

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

DEBORAH HEART AND LUNG CENTER,

Plaintiff,

v.

OUR LADY OF LOURDES HEALTH CARE
SERVICES, INC. d/b/a LOURDES HEALTH
SYSTEM, VIRTUA HEALTH, INC., AND
JOHN DOES 1-10,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BURLINGTON
COUNTY

CIVIL ACTION
CBLP ACTION
DOCKET NO. BUR-L-001235-19

OPINION

Argued: February 18, 2022

Decided: March 04, 2022

Epstein Becker & Green, P.C., attorneys for Plaintiff, Deborah Heart and Lung Center

Kutak Rock LLP, attorneys for Defendants, Our Lady of Lourdes Health Care Services, Inc.

d/b/a Lourdes Health System and Virtua Health, Inc.

Seyfarth Shaw LLP, attorneys for Third Party Kaufman, Hall & Associates, LLC

HONORABLE AIMEE R. BELGARD, P.J. Cv.

OVERVIEW

Deborah Heart and Lung Center (“Deborah” or “Plaintiff”) served third-party subpoenas on health care consultant Kaufman, Hall & Associates, LLC (“Kaufman Hall”) and independent auditing firm Grant Thornton, LLP (“Grant Thornton”). The Kaufman Hall subpoena seeks:

1. All documents and communications between Kaufman Hall and Virtua or Lourdes regarding Deborah or Deborah’s contracts with Lourdes.
2. All documents and communications between Kaufman Hall and any person other than Virtua and Lourdes regarding Deborah.
3. All documents and communications between Kaufman Hall and Virtua or Lourdes

regarding Lourdes' Cardiac CN.

4. All documents and communications between Kaufman Hall and Virtua or Lourdes concerning the failed Cooper and Maxis transaction.
5. All documents and communications between Kaufman Hall and any other person besides Virtua or Lourdes regarding the failed Cooper and Maxis transaction.
6. All documents and communications between Kaufman Hall and Virtua or Lourdes regarding Project Goldfinch.
7. All documents and communications between Kaufman Hall and any other person besides Virtua or Lourdes regarding Project Goldfinch or Project Lightbulb.
8. All documents and communications between Kaufman Hall and Virtua or Lourdes concerning Virtua obtaining a Cardiac CN.
9. All documents and communications between Kaufman Hall and any other person besides Virtua or Lourdes regarding Virtua obtaining a Cardiac CN.
10. All documents and communications between Kaufman Hall and Virtua or Lourdes regarding Lourdes "poor financial health" preceding the MTA.
11. All documents and communications between Kaufman Hall and any other person besides Virtua or Lourdes regarding Lourdes "poor financial health" preceding the MTA.
12. All documents and communications concerning the Lawsuit that are not responsive to the preceding requests.

The Grant Thornton subpoena seeks:

1. All documents in Grant Thornton's possession regarding the preparation of the audit of Virtua's 2019/2020 Consolidated Financial Statements.
2. All communications between Grant Thornton and Virtua regarding the preparation of the Consolidated Financial Statements.
3. All communications between Grant Thornton and Virtua concerning Deborah.
4. All communications between Grant Thornton and Virtua concerning Lourdes Cardiac CN.
5. All communications between Grant Thornton and Virtua concerning Virtua obtaining a Cardiac CN.
6. All documents in Grant Thornton's possession concerning the valuation of a Cardiac CN.

Defendants, Our Lady of Lourdes Health Care Services, Inc., d/b/a Lourdes Health System (“Lourdes”), and Virtua Health, Inc., (“Virtua”) (collectively “Defendants”) have moved to quash the aforementioned subpoenas. In addition, Kaufman Hall, Grant Thornton, and the Cooper Health System, a New Jersey Non-Profit Corporation (“Cooper”), have all joined in the Motion and have separately requested the Court quash the subpoenas. Deborah filed Cross Motions to Compel, seeking to enforce the subpoenas.

The Motion is **GRANTED** as follows:

- To the extent the subpoena seeks information related solely to a cardiac surgery CN license. The allegations in the Amended Complaint (i.e. Plaintiff’s Counts I through VIII) do not reference a cardiac surgery CN license, but instead refer to the Agreements which only refer to “cardiology services in Burlington County”; and
- To the extent the subpoena seeks due diligence information related to the failed Cooper-Maxis transaction. Plaintiff is entitled to any documents related to Virtua’s knowledge that the transaction failed.

The Motion is **DENIED** as follows:

- With regard to privilege, and consistent with any Stipulation that has been entered between the Plaintiff and each third-party, the third-party should review the relevant documents and produce any non-privileged responsive document. Any document the third-party believes is privileged should be included on a privilege log or provided to the Special Discovery Master for an *in camera* review; and
- With regard to confidentiality, the parties should enter into a Confidentiality Order and the Confidential documents should be limited to counsel for the litigation and *not* provided to Plaintiff itself unless and until the Party agrees or the Court or Special Discovery Master specifically permits the release.

Consistent with the above, and if they have not done so already, Kauffman Hall and Plaintiff should agree on search terms related to Request Nos. 1, 3, 6, 8, and 10. Plaintiff must limit Request Nos. 2 and 9 as the request itself is overly broad as it relates to “any other person.”

Consistent with the above, and if they have not done so already, Grant Thornton and Plaintiff should agree on search terms related to Request Nos. 3, 4, 5, and 6.

FACTS

Deborah commenced this lawsuit seeking to enjoin Lourdes from breaching three (3) agreements with Deborah: (i) the November 21, 2008 Letter of Intent (“LOI”); (ii) the Master Partnering Agreement (the “MPA”); and (iii) the Satellite Emergency Department (“SED”) Lease Agreement (the “SED Lease”) (the LOI, MPA, and SED Lease may be collectively referred to as the “Agreements”). The Parties agree that the Agreements formed the basis for Lourdes’ operation of the SED on Deborah’s campus in Browns Mills, New Jersey. The Parties further agree that the specific language in the Agreements prohibited Lourdes from forming a relationship with Virtua to provide cardiology services in Burlington County.

After initial motion practice, Plaintiff was permitted to file an Amended Complaint and proceed with its claims against Defendants related to Deborah’s claims for tortious interference and unfair competition. However, this Court denied the Plaintiff’s request to include unjust enrichment and equitable disgorgement. Further, this Court issued a written decision around the Motion to Amend the Complaint stating that it would not permit a re-litigation of Plaintiff’s claims in the Mercer Litigation related to Deborah’s White Knight Strategy.

Previously, this Court and the Special Discovery Master (“SDM”) weighed in on the scope of discovery in this case. The Motion to Amend the Complaint resulted in a written opinion from this Court which provided that Deborah may reference the White Knight Strategy, so long as it relates to Virtua’s alleged efforts to induce Lourdes into breaching the Agreements with Deborah. The Court further noted that the type of evidence that Deborah would need to introduce would be related to “Lourdes’ agreement with Virtua in June of 2018, discussions between Virtua and Lourdes between 2012 and 2018 that relate to the formation of the aforementioned agreement, the

economic advantage lost and damages incurred as a result of Virtua and Lourdes' agreement, and other evidence of Virtua's intent during its negotiations with Lourdes."

The prior decision from the SDM stated:

...Plaintiff is entitled to pursue a *revised* White Knight Strategy so long as it is related to the facts that give rise to the causes of action raised in the Amended Complaint. Plaintiff is not, however, entitled to a fishing expedition on facts that cannot and would not support the Amended Complaint.

It is against this background that the Parties moved to Quash the Subpoenas.

LEGAL STANDARD & DISCUSSION

New Jersey Court Rules regarding third-party subpoenas provide that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." R. 4:10-2(a). Furthermore, where a party serves a third-party subpoena in litigation, the court may, on a motion, quash the subpoena if compliance would be unreasonable or oppressive. R. 1:9-2. While the discovery process and rules in New Jersey are broad, they are not infinite.

The mere filing of a Complaint does not permit either party to go on a fishing expedition related to general or unsupported allegations. *Cain v. Merck & Co., Inc.*, 415 N.J. Super. 319, 331-32 (App. Div. 2010). That said, the Court recognizes that parties are entitled to seek discovery in a matter that is not privileged. Simply because a discovery request may include privileged or confidential information does not in-and-of-itself provide a basis to quash. *Marrero v. Feintuch*, 418 N.J. Super. 48, 59 (App. Div. 2011). Discovery in New Jersey is not limited just to admissible evidence, but anything that could lead to discovery of admissible evidence. *Pfenninger v. Hunterdon Central Reg. High School*, 167 N.J. 230, 237 (2001).

The Court will consider each of the Defendants' argument in turn.

a. Scope of Discovery

It is Defendants' position that the claims in this case relate only to:

- The Virtua/Maxis Transaction in Burlington County; and
- The Agreements between Deborah and Lourdes.

Thus, Defendants argue that the Kaufman Hall and Grant Thornton subpoenas should be limited to their respective engagements with Virtua and/or Lourdes in connection with the Virtua/Maxis Transaction only as it relates to cardiology services located in Burlington County and the Agreements.¹

Plaintiff believes the scope of discovery to be broader. It argues that it is seeking discovery related to Deborah's contracts with Lourdes and Lourdes' cardiac CN, Virtua obtaining a cardiac CN, the valuation of Virtua's cardiac CN, and Lourdes' poor financial health before the merger and Virtua's knowledge thereof. In short, the position is that Virtua's performance of cardiac surgery in only Camden County is of no moment because the issue warranting discovery is Virtua's intent to acquire a cardiac CN and the alleged unlawful means through which it attempted to do so. (See, p. 8, Plaintiff's Opposition to Motion to Quash).

In the case at bar, discovery should be related to the causes of action raised in the Amended Complaint or by Defendants in their Answer or Affirmative Defenses. While the background facts reference cardiac surgery, the causes of action in the Amended Complaint (i.e. breach of contract and tortious interference with the contracts) relate to "cardiology services in Burlington County." Although Plaintiff claims that the geographic restriction is of no moment, the reality is that the

¹ In the interest of brevity, the Court has not parsed out the separate arguments from Cooper, Kaufman Hall, Grant Thornton, or Trinity Health Corporation ("Trinity") as the majority of the arguments set forth in their briefs are substantially similar to those proffered by Defendants.

Agreements relate to “cardiology services in Burlington County” and the causes of action raised in the Amended Complaint relate to those Agreements that provide only for “cardiology services in Burlington County.” Based on the arguments before the Court, there is a distinction between “cardiology services” and “cardiac surgery.” Therefore, the language of the Agreement is of paramount importance. Whether Virtua attempted, though whatever means, to obtain a cardiac CN has no bearing on this case. Therefore, discovery on that subject would be beyond the scope of the Amended Complaint and would be tantamount to a fishing expedition. As previously noted by this Court and in the SDM decision in March, 2021, the type of evidence that Deborah will need to introduce in this case will be related to “Lourdes’ agreement with Virtua in June of 2018, discussions between Virtua and Lourdes between 2012 and 2018 that relate to the formation of the Agreement, the economic advantage lost and damages incurred as a result of Virtua and Lourdes’ Agreement, and other evidence of Virtua’s intent during its negotiations with Lourdes.” (See, p. 17 Statement of Reasons citing Am. Compl., ¶¶ 125, 133, 136, 141, 146).

Whether Defendants wanted to obtain a cardiac CN license is in no way related to the Agreements at issue. At best, it shows that Virtua wanted to expand cardiac services, but there is nothing improper about that fact. This case is about the Agreements and whether Virtua improperly or illegally interfered with those Agreements. As such, the Motion to Quash is **GRANTED in part**, limiting the Subpoenas to the third-parties’ engagement with either Virtua and/or Lourdes regarding the Virtua/Maxis transaction, communications regarding the Agreements or the SED, or the intent of Virtua to interfere with the Agreements.

b. Defendants’ Revenues or Projected Revenues

Defendants argue that Plaintiff is not entitled to revenues or projected revenues of either Virtua or Lourdes as the Plaintiff’s request to include a claim for equitable disgorgement in the

Amended Complaint was denied. In addition, Defendants claim this is just an attempt on the part of Plaintiff to pry into the books and records of its competitor. At this juncture, it does not appear that any records related to Virtua's financial condition (i.e., Requests Nos. 1 and 2 to Grant Thornton) are relevant. Depending on how the rest of fact discovery plays out, this does not mean they would not potentially become relevant. However, the Parties are still in early fact discovery. The revenue issues, at best, may relate to damages and expert discovery. The question in this case relates to the relationship between Deborah and Lourdes and the Agreements between them. Accordingly, the Motion to Quash is **GRANTED in part**, and the subpoena shall be limited, at this point, to information as to the relationship only and shall not include Virtua's consolidated financial records.

c. Confidentiality, Attorney-Client Privilege, and Attorney Work Product

The objection to the Subpoenas based on confidentiality, attorney-client privilege, and the attorney work product doctrine are, at this juncture, premature. Neither Kauffman Hall nor Grant Thornton are law firms. While privileges are not exclusive to only law firms, assumptions are being made as to what documents would be potentially relevant and then potentially privileged without running search terms and actually reviewing documents. Thus, the Motion to Quash as it relates to attorney-client privilege or the attorney work product doctrine is **DENIED**. The Parties shall provide privilege logs or submit any questionable documents to the SDM for consideration.

As for confidentiality, the third-parties and the Parties should work together, to the extent that a Confidentiality Order entered by this Court on February 8, 2021 is not sufficient, to enter into a Confidentiality Agreement that addresses the concerns raised by Defendants. It is possible to envision that documents produced by Grant Thornton may be under an attorney-eyes only designation with only counsel from Plaintiff's current law firm who are attorneys of record in this

case being able to review those documents. It is also possible that any issue related to confidentiality or privilege issues should be presented to the SDM for an *in camera* review and determination. Confidentiality alone does not prevent documents from being produced if they are discoverable under the New Jersey Court Rules, particularly as presented here, with the Parties already aware of the potential confidentiality issues that can be addressed prospectively. Accordingly, the Motions are **DENIED** in this regard.

d. The Subpoenas should be Quashed or Limited Because of the Burden to Non-Parties

While the third-parties have argued that the Motions should be granted or limited due to the burden on them to comply with the document requests, it appears that this is of no moment now that Plaintiff and the third-parties have entered into Stipulations. Kaufman Hall has also requested that the Court consider fee shifting; however, such an argument is premature as the costs associated with this review remain to be seen. As such, the Motions are **DENIED**.

CONCLUSION

For the foregoing reasons, the Motions to Quash are **GRANTED in part** and **DENIED in part** as set forth above and the Subpoenas shall be limited to issues that relate to the causes of action raised in the Amended Complaint. The Cross Motions to Compel are likewise **GRANTED in part** and **DENIED in part**, consistent with this ruling.