

1998 WL 2016508

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United States District Court, W.D. Michigan,
Southern Division.

KALAMAZOO RIVER STUDY GROUP, Plaintiff,
v.
ROCKWELL INTERNATIONAL, et al.,
Defendants.

No. 1:95-CV-838.

|
July 31, 1998.

*MEMORANDUM OPINION AND ORDER AFFIRMING
MAGISTRATE JUDGE'S ORDER OF JUNE 25, 1998*

BELL, J.

***1** Plaintiff Kalamazoo River Study Group ("KRSG") appeals Magistrate Judge Joseph G. Scoville's June 25, 1998, order denying Plaintiff's motion to compel the production of Dragun Corporation's environmental audit report and all underlying drafts and data associated therewith.

A magistrate judge's resolution of a nondispositive pretrial matter should be modified or set aside on appeal only if it is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a). The "clearly erroneous" standard applies only to the Magistrate Judge's findings of fact. His legal conclusions are reviewed under the "contrary to law" standard. *Gandee v. Glaser*, 785 F.Supp. 684, 686 (S.D. Ohio 1992), *aff'd*, 19 F.3d 1432 (6th Cir. 1994). "A finding is clearly erroneous where it is against the clear weight of the evidence or where the court is of the definite and firm conviction that a mistake has been made." *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 281 (6th Cir. 1991), *cert. denied*, 503 U.S. 945 (1992).

Plaintiff seeks discovery of Dragun's environmental audit of Rock-Tenn's Otsego facility. Dragun is a non-testifying consultant. Judge Scoville denied Plaintiff's motion to compel production of the Dragun

documents on the basis that they were immune from discovery as work product under FED. R. CIV. P. 26(b) and Plaintiff had not borne its burden of overcoming the work-product immunity.

Plaintiff contends that Judge Scoville's finding that the Dragun documents were prepared in anticipation of litigation was erroneous.

Judge Scoville's work-product finding was based upon an affidavit provided by Rock-Tenn that it engaged Dragun to perform an environmental audit and to provide assistance to Rock-Tenn and its counsel in connection with this litigation and the anticipated litigation with the MDEQ. Plaintiff admitted that it did not have any better evidence as to Rock-Tenn's motivation for hiring Dragun. On this record, Judge Scoville's determination that Dragun's reports were prepared for litigation is not clearly erroneous.

Plaintiff also contends on appeal that Judge Scoville erred in his finding that KRSG had not shown "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." FED. R. CIV. P. 26(b)(4)(B).

Plaintiff contends it satisfied the exceptional circumstances test by showing that Rock-Tenn denied Plaintiff's Rule 34 inspection request and Plaintiff's request that Rock-Tenn split samples taken by its experts.

Judge Scoville's determination that these are not exceptional circumstances is not contrary to law. Courts have identified two situations where the exceptional circumstances standard has been met. One is where the object or condition observed by the non-testifying expert is no longer "observable by an expert of the party seeking discovery," and the other is where it is possible to replicate expert discovery on a contested issue, but the costs would be judicially prohibitive. *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, 175 F.R.D. 34, 44 (S.D.N.Y. 1997).

***2** The case before this Court is not one where the evidence has been destroyed and is no longer available for testing by Plaintiff. *Cf. Braun v. Lorillard Inc.*, 84 F.3d 230, 236 (7th Cir. 1996) (destruction of lung tissues precluded defendants' experts from conducting tests); *Bank Brussels*, 175 F.R.D. at 44-45 (documents likely rearranged and possibly lost or altered during year that numerous parties had unlimited, unmonitored access to the files); *Sanford Const. Co. v. Kaiser Aluminum & Chemical Sales, Inc.*, 45 F.R.D. 465, 466 (E.D. Ky. 1968)

(defendant's agents not present at excavation of pipe and backfill, and conditions subsequently changed, so information contained in plaintiff's experts' reports cannot be obtained by defendant's independent investigation). Neither has there been any showing in this case that the cost to Plaintiff of doing its own testing would have been prohibitive. *Cf. Bank Brussels*, 175 F.R.D. (costs of hiring expert to reconstruct financial condition judicially prohibitive).

Plaintiff's only showing in support of its claim of "exceptional circumstances" is Rock-Tenn's refusal to cooperate in Plaintiff's discovery requests. Plaintiff, however, did not seek a Court order to enforce either its inspection request or its split sample request. Because Plaintiff never brought a motion for entry on land or to

compel discovery, Judge Scoville properly determined that Plaintiff failed to meet its burden of showing that it was impracticable for it to obtain the facts it now seeks from Rock-Tenn's non-testifying expert.

Accordingly, IT IS HEREBY ORDERED that Magistrate Judge Scoville's June 25, 1998, order denying motion to compel (Docket # 754) is AFFIRMED.

All Citations

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