

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1981

AMITECH, U.S.A., LTD.

VERSUS

NOTTINGHAM CONSTRUCTION COMPANY

Judgment Rendered: FEB 14 2007

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On Appeal from the Nineteenth Judicial District Court  
In and For the Parish of East Baton Rouge  
State of Louisiana  
Docket No. 510,269

Honorable Timothy E. Kelley, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

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**McCLENDON, J.**

A third party to this litigation appeals the judgment of the trial court denying its motion to quash certain discovery requests. For the reasons that follow, we amend and affirm.

**FACTS AND PROCEDURAL HISTORY**

This matter arises out of a dispute between Amitech U.S.A., Ltd. (Amitech) and Nottingham Construction Company (Nottingham). Briefly, the facts leading up to the dispute, as set forth in Amitech's petition against Nottingham, are as follows. Amitech was established to operate a pipe-manufacturing facility in the United States employing technology used by Amitech's corporate affiliates overseas. Starting in early 2001, Nottingham provided services to Amitech and served as Amitech's agent in connection with the possible location of Amitech's United States manufacturing facility in East Baton Rouge Parish, Louisiana. Nottingham's services included advising Amitech of a suitable site location, construction options, and regulatory requirements. By two acts of sale on February 26, 2002, Nottingham, and then Amitech, obtained immovable property near Zachary for the construction of the Amitech facility. Also on February 26, 2002, Amitech and Nottingham entered into a design/build contract in the amount of \$13,301,380.00 for the construction of the Amitech manufacturing facility. Sometime during construction, problems arose between Nottingham and Amitech. Subsequently, Amitech filed suit against Nottingham, alleging in part that Nottingham had breached its fiduciary duty to Amitech, overstated its costs, and derived unreasonable profit for its work.

On January 21, 2002, Rockwood Corporation (Rockwood), the appellant in this matter, had entered into a Contract For Providing Technical

Consultation with Nottingham, in connection with Nottingham's efforts to procure the contract with Amitech for the construction of the pipe manufacturing facility. According to the contract, Rockwood was to receive five percent of the total price of the contract between Amitech and Nottingham.

In connection with its lawsuit against Nottingham, Amitech sought to discover the actual costs and profits to Nottingham under the design/build contract. When the requested information was not forthcoming, Amitech filed two motions to compel discovery from Nottingham, which were granted. Through this discovery, Amitech learned of the existence of Rockwood and that Rockwood had been paid \$782,500.00 by Nottingham. Amitech then caused a subpoena and subpoena duces tecum (the subpoena) to issue to Rockwood, pursuant to LSA-C.C.P. arts. 1354 and 1463B.<sup>1</sup> Therein, Amitech sought various records and documents from Rockwood, including job cost accounting documents regarding Nottingham's payments to Rockwood; financial, banking, and tax records of Rockwood; and records of all communications between Nottingham and Rockwood. Specifically, the subpoena sought production of the following:

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<sup>1</sup> Louisiana Code of Civil Procedure article 1354 provides, in pertinent part:

A subpoena may order a person to appear and/or produce at the trial or hearing, books, papers, documents, or any other tangible things in his possession or under his control, if a reasonably accurate description thereof is given; but the court in which the action is pending in its discretion may vacate or modify the subpoena if it is unreasonable or oppressive.

Louisiana Code of Civil Procedure article 1463B provides, in pertinent part:

In addition, a party may have a subpoena duces tecum served on a person not a party directing that person to produce documents and things for inspection and copying or to permit entry onto and inspection of land, provided that a reasonably accurate description of the things to be produced, inspected, or copied is given.

1) All documents, including electronic documents and e-mails, related to or referencing any communication between any agent, employee, representative, officer, director, attorney, or accountant of Rockwood Corporation, and any agent, employee, representative, officer, director, attorney, or accountant of Nottingham Construction Company, from January 1, 2000 to the present day.

2) All records reflecting, concerning, or referring to any payment from Nottingham Construction Company, or any of its agents, employees, representatives, officers, directors, attorneys or accountants, to Rockwood Corporation, from January 1, 2000 to the present day. This request specifically includes, although without limitation, all such records relative to the following transactions:

- payment of \$43,202.14, made on or about May 28, 2002;
- payment of \$21,601.07, made on or about June 20, 2002;
- payment of \$76,202.14, made on or about August 12, 2002;
- payment of \$32,601.07, made on or about October 14, 2002;
- payment of \$96,606.42, made on or about October 23, 2002;
- payment of \$79,787.16, made on or about November 27, 2002;
- payment of 382,500.00, made on or about December 13, 2002;
- payment of \$50,000.00, made on or about January 22, 2003.

3) All financial, banking, investment, or other records concerning any of the payments discussed in the preceding paragraph, numbered 2) herein, including without limitation all records of any deposit, transfer, investment, negotiation, wire transfer, disbursement, or other disposition or treatment of such payments. The records produced should be sufficient to identify both the particular institution and particular account (by number or other identifying characteristic) into or out of which such payments were deposited, transferred, invested, negotiated, disbursed, or otherwise disposed.

4) All accounting, bookkeeping, or other such records concerning any of the payments discussed in the preceding paragraph, numbered 2) herein.

5) All tax returns, tax filings, internal or external audits, corporate filings, financial filings, and regulatory filings of Rockwood Corporation from January 1, 2000 to the present day.

6) Documents sufficient to identify and explain the regular business practice of Rockwood Corporation.

7) All documents concerning the identity, role, and remuneration of all agents or employees of Rockwood Corporation who participated in the confection, execution, or

performance of the “Contract for Providing Technical Consultation” between Nottingham Construction Company, Inc., and Rockwood Corporation, and purportedly executed by these parties on January 21, 2002. The documents include, but are not limited to, tax forms (including W-2’s, W-4’s, and 1099’s), paychecks, withholding forms, insurance lists or documents, and personnel records.

In response to these discovery requests, Rockwood filed the present motion to quash on December 1, 2004, asserting that the information sought was irrelevant and overly broad. Following a hearing in the matter on February 11, 2005, the trial court determined that Amitech had shown that the discovery requests were relevant and that there was not a less intrusive way in which to gain the information. Thus, finding relevancy and cause for the information sought, the trial court denied the motion to quash.

Thereafter, on March 10, 2005, Amitech filed an ex parte motion to supplement the record of the February 11, 2005 hearing, asserting that although the exhibits attached to the briefs and filed into the record were relied on by counsel and the trial court, neither party had moved for their admission into evidence or objected to their consideration. The trial court set the matter for hearing on May 16, 2005, after which it ordered that the record be supplemented. On May 26, 2005, the trial court signed its judgment ordering the record supplemented with all exhibits attached to the briefs filed into the record by Amitech and Rockwood that were submitted in support of or in opposition to the motion to quash. On May 26, 2005, the trial court also signed its judgment denying Rockwood’s motion to quash. It is from this judgment that Rockwood suspensively appeals.<sup>2</sup>

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<sup>2</sup> We note that the judgment is a final appealable judgment. The determination of discovery questions as to one who is not a party to the case is a final judgment. **R. J. Gallagher Co. v. Lent, Inc.**, 361 So.2d 1231 (La.App. 1 Cir. 1978).

## DISCUSSION

Rockwood initially asserts that the trial court erred in allowing the record to be supplemented. Rockwood contends that because the documents were not offered into evidence at the hearing on the motion to quash, it had no opportunity to object to their introduction. Amitech argues, however, that since the documents were already filed into the record, as they were attached to the briefs in support of and in opposition to the motion to quash, and were discussed without objection by counsel and the court at the hearing on the motion, the record was properly enlarged. In articulating its reasons for admitting the documents into evidence, the trial court stated that the documents in question were filed in the record, were utilized in making the court's decision, and needed to be made a part of the record.

A trial court has great discretion in the manner in which proceedings are conducted, and a trial court's decision to hold open or reopen a case for additional evidence will not be disturbed absent a clear abuse of discretion. LSA-C.C.P. art. 1631; **Fly v. Allstar Ford Lincoln Mercury, Inc.**, 95-1216, p. 9 (La.App. 1 Cir. 8/21/96), 690 So.2d 759, 764. In this matter, Rockwood acknowledged that the documents were already filed in the record. Counsel for both parties referred to the documents during the argument on the motion to quash. Further, Amitech moved to have the documents made part of the hearing record before final judgment on the motion to quash was signed.<sup>3</sup> We do not find an abuse of discretion by the trial court in enlarging the record under the facts and circumstances of this case.

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<sup>3</sup> The fact that these documents were already filed in the record and that the order to supplement the record was signed before entry of final judgment, distinguishes this case from **Williams Law Firm v. Board of Supervisors of Louisiana State University**, 03-0079 (La.App. 1 Cir. 4/2/04), 878 So.2d 557.

Rockwood's remaining assignments of error pertain to whether the information requested by Amitech in its subpoena is discoverable. Rockwood contends that the information sought to be produced is not relevant and is overly broad. Particularly, Rockwood objects to the production of its financial, banking, and tax records and objects to the production of all communications between Nottingham and Rockwood from 2000 to the present.

The basic objectives of the Louisiana discovery process are (1) to afford all parties a fair opportunity to obtain facts pertinent to the litigation, (2) to discover the true facts and compel disclosure of these facts wherever they may be found, (3) to assist litigants in preparing their cases for trial, (4) to narrow and clarify the basic issues between the parties, and (5) to facilitate and expedite the legal process by encouraging settlement or abandonment of less than meritorious claims. **Hodges v. Southern Farm Bureau Cas. Ins. Co.**, 433 So.2d 125, 129 (La. 1983). The discovery statutes are to be liberally and broadly construed to achieve their intended objectives. **Stolze v. Safety & Systems Assur. Consultants, Inc.**, 02-1197, p. 2 (La. 5/24/02), 819 So.2d 287, 289.

Louisiana Code of Civil Procedure articles 1422 through 1425 define the scope of permissible discovery and are applicable to all discovery devices. Generally, these articles permit discovery regarding any matter, not privileged, which is relevant to the subject matter of the action. LSA-C.C.P. art. 1422;<sup>4</sup> **Hodges**, 433 So.2d at 129. The test of discoverability is not the

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<sup>4</sup> Article 1422 provides, in pertinent part:

Parties 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, including the existence, description, nature, custody, condition, and location of any books,

admissibility of the particular information sought, but whether the information appears reasonably calculated to lead to the discovery of admissible evidence. Moreover, the criteria of this rule are whether it is practicable and feasible to answer the inquiry and, if so, whether an answer might expedite the litigation by either narrowing the area of controversy or avoiding unnecessary testimony or providing a lead to admissible evidence. **Lehmann v. American Southern Home Ins. Co.**, 615 So.2d 923, 925 (La.App. 1 Cir.), writ denied, 617 So.2d 913 (La. 1993). However, a showing of relevancy and good cause for production has been required in cases where a party seeks production of records from a non-party. **Stolze**, 02-1197 at p. 3, 819 So.2d at 289; **Ouachita National Bank in Monroe v. Palowsky**, 554 So.2d 108 (La.App. 2 Cir. 1989).

A trial court has broad discretion in ruling on discovery matters. **Stolze**, 02-1197 at p. 4, 819 So.2d at 289. In determining whether the trial court erred, this Court must balance the information sought in light of the factual issues involved and the hardships that would be caused by the court's order. **Lehmann**, 615 So.2d at 925-26.

In responding to Rockwood's motion to quash, Amitech argues that the information requested is relevant, because Nottingham has not produced any documents or other information indicating what Rockwood did to earn the \$782,500.00 paid to it. Specifically, Amitech asserts that the Rockwood subcontract was executed just over a month before the design/build contract between Amitech and Nottingham was signed, and therefore does not justify such a large payment amount. Amitech contends that, because of the timing

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documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.



and circumstances of the Rockwood subcontract, together with Nottingham's questionable cost accounting, it is trying to discover whether Nottingham inflated its accounting by "booking" payments for services not performed on the Amitech job.<sup>5</sup> Amitech further asserts that it is seeking to discover if any monies under the design/build contract were diverted to any of its agents or fiduciaries. Additionally, Amitech makes the argument that Rockwood is not an unrelated third party to this litigation as it is a corporation whose principal was Nottingham's attorney and agent in its dealings with Amitech.<sup>6</sup> Amitech contends that the information supplied to it by Nottingham shows that the Rockwood subcontract appears to have no reasonable purpose other than to be a vehicle for the diversion of funds. Further, Amitech asserts that it has exhausted its attempts to get discovery from Nottingham regarding job costs and, therefore, there is no less intrusive way to obtain further information about the true nature of the Rockwood subcontract.

In its oral reasons, the trial court stated that Amitech had shown that the information requested was relevant and that there was not a less intrusive way in which to obtain the information. The court further recognized that a protective order was in place and that the information requested would be subject to the order protecting it from dissemination to any other parties outside the litigation.

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<sup>5</sup> Amitech asserts that through discovery it has discovered at least one "mistake" where payments to Nottingham under the design/build contract were used to build the personal hunting camp of Nottingham's president.

<sup>6</sup> As an example, Amitech notes the sale of the immovable property for the pipe manufacturing facility. Nottingham purchased the property for \$448,300.00 and on the same day transferred it to Amitech for \$911,000.00. Amitech asserts that Nottingham's attorney, John Olin Brown, prepared a fraudulent corporate resolution for the sale, which was executed by Amitech's then president, Ron Cormier, without the knowledge of the other managers of Amitech.

We find no abuse in the trial court's discretion in allowing the discovery requested in paragraphs numbered 2 through 7. Amitech's amending petition asserts claims based on the indefinite scope of the building contract, overbilling of Amitech by Nottingham, breach of contractual and fiduciary duties by Nottingham, and unfair trade practices. Based on the allegations of its petition, Amitech is seeking to determine the purpose of the payments to Rockwood, as well as the business purpose of Rockwood and the true nature of the relationship between Nottingham and Rockwood, including the relationship of the parties who have interests in both entities. The information requested in these paragraphs is relevant and may reasonably lead to the discovery of admissible evidence. Further, review of the information sought is the only means by which Amitech can effectively discover the purpose of the payments to Rockwood.

Further, with regard to the request for Rockwood's tax returns and filings in paragraph number 5, we specifically find no abuse of the trial court's discretion in permitting such discovery. Amitech has alleged that Rockwood was simply a conduit between Nottingham and the ultimate recipient of the contract funds, and the information requested is relevant to the subject matter. We recognize that in cases involving discovery of income tax returns, because of their confidential nature and the highly personal character of their content, courts have required a significant showing of relevancy and good cause before permitting discovery. See **Ouachita National Bank**, 554 So.2d at 112. Nevertheless, we agree with the trial court that in the present case, the need for this discovery has been sufficiently demonstrated to overcome any opposing considerations that disclosure of this information to Amitech might produce.

However, with regard to Amitech's request in paragraph number 1, for all communications between Rockwood and Nottingham, we find that the request is overly broad. This request seeks all documents related to or referencing any communication between any agent, employee, representative, officer, director, attorney, or accountant of Rockwood and any agent, employee, representative, officer, director, attorney, or accountant of Nottingham from January 1, 2000, to the present. The request, therefore, includes unrelated communications, such as personal e-mails, which are not relevant or necessary to this case. Thus, we find that the trial court abused its discretion in failing to quash the subpoena insofar as it seeks communications that are not related to the confection, execution, or performance of the consulting contract between Nottingham and Rockwood, and are not related to Amitech or the design/build contract between Amitech and Nottingham.

### **CONCLUSION**

Based on the foregoing reasons, we amend the judgment of the trial court and grant Rockwood's motion to quash Amitech's subpoena and subpoena duces tecum, issued on October 21, 2004, to the extent that the request in paragraph number 1 is overly broad. Accordingly, we limit the documents sought in paragraph number 1 to those communications that are in any way related to or reference the confection, execution, or performance of the Contract For Providing Technical Consultation between Nottingham and Rockwood, or that are in any way related to or reference Amitech or the design/build contract between Amitech and Nottingham. In all other respects, the trial court's judgment is affirmed. Costs of this appeal shall be shared between Amitech and Rockwood.

**AMENDED, AND AS AMENDED, AFFIRMED.**