

STATE OF NORTH CAROLINA
GRAHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 7

PHILLIPS AND JORDAN, INC.,

Plaintiff,

v.

JOSEPH E. BOSTIC, JR., JEFFREY L.
BOSTIC, MELVIN MORRIS, JAMES
BOWMAN, TYLER MORRIS, BOSTIC
DEVELOPMENT, LLC, AND BOSTIC
DEVELOPMENT AT ASHEVILLE, LLC.

Defendants.

ORDER

Before the Court is Plaintiff's Motion to Compel and for Sanctions (the "Motion") with respect to written discovery (the "Discovery Requests") served by Plaintiff on Defendants Joseph E. Bostic, Jr., and Jeffrey L. Bostic (the "Bostic Defendants").

The Court has considered the Court file, the exhibits attached to the Motion, the Bostic Defendants' original, first supplemental, and second supplemental responses to the Discovery Requests, the briefs of the parties, and the views of counsel on the Motion expressed during a telephone conference on 30 September 2009 and at a discovery status conference in chambers on 4 December 2009. Pursuant to Business Court Rule 15.4, the Court **DENIES** the parties' request for a formal hearing on the Motion, as well as the request of counsel for the Bostic Defendants to file a further affidavit. For the reasons set forth below, the Court **GRANTS** the Motion in part.

BACKGROUND

On or about 10 November 2008, Plaintiff served the Discovery Requests, which included twenty-nine interrogatories served on each Bostic Defendant, as well 105 requests for production

of documents served on Defendant Jeffrey L. Bostic and 106 such requests served on Defendant Joseph E. Bostic, Jr.

Plaintiff filed the Motion on 23 October 2009. After the Motion was fully briefed, the Court ordered all counsel to appear at a discovery status conference on 4 December 2009 in an attempt to resolve the matter. Following that conference, the Bostic Defendants served Plaintiff with supplemental responses to the Discovery Requests.

On 2 February 2010, Plaintiff informed the Court that the Bostic Defendants' supplemental responses did not resolve the Motion. The Court thereafter ordered Plaintiff to file a supplemental brief stating with particularity how the Bostic Defendants' discovery responses remained deficient and how an order would remedy those deficiencies. The Bostic Defendants filed a response to Plaintiff's supplemental brief on 17 February 2010, and Plaintiff filed a reply on 25 February 2010.

Plaintiff's supplemental briefs, however, identified only a small sub-group of interrogatory responses as representative of the purported deficiencies, and Plaintiff failed in its briefs to identify any specific response to a request for production as deficient. Nevertheless, to avoid further motions practice in a case where counsel cannot agree on the time of day, the Court enters the following:

ORDER

1. The Court **DENIES** the Motion in so far as it seeks an order compelling the Bostic Defendants to further supplement their written responses to the Discovery Requests.
2. The Court, however, **GRANTS** the Motion such that where the Bostic Defendants have directed Plaintiff to look to the books and records of Bostic Construction, Inc., Bostic Development, LLC, or Bostic Development at Asheville, LLC (collectively, the "Bostic

entities”), for information responsive to the Discovery Requests, the Bostic Defendants shall not be allowed, whether pursuant to Rule 33(c) of the North Carolina Rules of Civil Procedure or otherwise, to foist upon Plaintiff the obligation to comb through the records for materials responsive to the Discovery Requests.

3. As to this issue, the Court finds that (a) the universe of potentially relevant corporate books and records amounts to over 200 banker boxes stored in a warehouse¹ as well as electronic records, (b) the records have been in the care, custody, or control of the Bostic Defendants since at least 2008,² and (c) the records are in total disarray.³

4. As a result, the Court holds that the burden to derive or ascertain the relevant information from the records is not the same for Plaintiff as for the Bostic Defendants. Accordingly, the Court shall require the Bostic Defendants to cull the books and records of the Bostic entities for documents responsive to Plaintiff’s Discovery Requests. *See e.g., Capacchione v. Charlotte-Mecklenburg Sch.*, 182 F.R.D. 486, 490 (W.D.N.C. 1998) (interpreting the federal version of Rule 33(c) and holding that a party fails to comply with its discovery obligations when it “simply directs the interrogating party to a mass of business records or offers to make all of their records generally available.”) (citations omitted).

5. Within **(30) thirty days** of the entry of this Order, the Bostic Defendants shall serve Plaintiff with copies of all documents contained in the corporate books and records of the Bostic entities (whether stored electronically or in paper form) that are under the care, custody, or control of the Bostic Defendants and that are responsive to Interrogatories Nos. 2–3, 11, 13–

¹ *See* James Russell Aff. ¶ 4, dated 4 September 2009 (Bostic Defs.’ Reply Brf. on R. 11 Sanctions Ex. 1).

² *See* Bostic Defendants’ Supplemental Brief filed on 17 February 2010 at 6 (stating the relevant records “were abandoned to the Bostics and Mel Morris in late 2007”).

³ *See* Pl.’s Mot. Exs. 9–29, 33, 35–72, 74–75 (which contain representative photographs of the records as found by Plaintiff in the warehouse).

15, and Requests for Production Nos. 1–64, 70, 72, 74–75, 77–78, 80–81, 94, 97, 99, 105, and (in the case of Joseph E. Bostic, Jr.) Request for Production No. 106.

6. **The Bostic Defendants shall produce documents in a manner such that Plaintiff (and, if necessary, the Court) can readily identify the set of documents that are responsive to each interrogatory or request for production.**

7. Within **(10) ten days** of producing the documents described in paragraph 5 above, each Bostic Defendant shall file an affidavit with the Court that explains with particularity how he has complied with the Court’s directive.

8. Under the circumstances, the Court finds it appropriate to tax the Bostic Defendants with the full cost of the document production ordered by the Court in paragraph 5 above. Additionally, pursuant to Rule 37(a)(4) of the North Carolina Rules of Civil Procedure, the Court shall consider whether to award Plaintiff its reasonable expenses in bringing this Motion. The Court, however, shall **DEFER** ruling on that issue pending the Bostic Defendants’ compliance with this Order.

9. Plaintiff’s request that the Bostic Defendants’ Answer be stricken and the case proceed to a trial on damages is **DENIED**.

10. Finally, Plaintiff’s request that the discovery and other deadlines in the Case Management Order be extended is **GRANTED**, such that all such deadlines in this case are hereby **STAYED**, pending the Bostic Defendants’ compliance with this Order. The Court will thereafter adjust these deadlines as necessary.

SO ORDERED, this the 30th day of March, 2010.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge