

STATE OF NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 2717

CARMAYER, LLC,
Plaintiff,

v.

KOURY AVIATION, INC.;
BRADFORD A. KOURY; and
THOMAS HURLOCKER,
Defendants.

ORDER ON MOTION TO COMPEL

1. THIS MATTER is before the Court on Plaintiff Carmayer, LLC’s (“Carmayer”) second motion to compel (the “Motion”) filed on March 24, 2017. The Motion seeks an order compelling Defendant Koury Aviation, Inc. (“Koury Aviation”) to provide additional responses to Carmayer’s first set of interrogatories and requests for production of documents and subsequent demands regarding information related to aircrafts rented out by Koury Aviation under a Part 135 Certificate or Part 91 Certificate (the “Rented Aircrafts’ Financials”). For the following reasons, the Court hereby DENIES the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

2. The Court sets forth here only those portions of the factual and procedural background necessary to its determination of the Motion.

3. On March 14, 2016, Carmayer served its first set of interrogatories and requests for production on Koury Aviation, which included requests for the Rented Aircrafts’ Financials. (Pl.’s Second Mot. Compel Ex. A, at 10–11.) On May 27, 2016,

Koury Aviation served its responses to Carmayer's initial discovery requests. Koury Aviation objected to Carmayer's requests for the Rented Aircrafts' Financials. (Pl.'s Mot. Ex. B, at 4.)

4. On May 19, 2016, the Court held a case management conference and adopted the parties' proposed discovery deadline of October 11, 2016. On September 29, 2016, the Court entered an Order Amending Case Management Order that extended the deadline for completing all discovery to February 15, 2017 and the deadline for filing post-discovery dispositive motions to March 17, 2017.

5. On September 27, 2016, Carmayer served a notice of deposition and requests for production of documents on Koury Aviation, which again sought the Rented Aircrafts' Financials. (Pl.'s Mot. Ex. C, at 4.) Again, Koury Aviation did not provide the Rented Aircrafts' Financials.

6. On October 12, 2016, Carmayer informed Koury Aviation, by letter, that Koury Aviation's production was inadequate regarding the Rented Aircrafts' Financials. (Pl.'s Mot. Ex. D, at 2.) On December 9, 2016, Carmayer sent a second letter summarizing Carmayer's position regarding outstanding discovery, including Koury Aviation's failure to produce the Rented Aircrafts' Financials. (Pl.'s Mot. Ex. E, at 2.)

7. On December 28, 2016, Carmayer filed a motion seeking an order compelling Koury Aviation to provide the Rented Aircrafts' Financials and all named defendants' net worth, which the Court denied on procedural grounds.

8. On January 20, 2017, Carmayer’s counsel e-mailed a summary of the above discovery dispute to the Court and opposing counsel pursuant to Rule 10.9(b) of the General Rules of Practice and Procedure for the North Carolina Business Court (“BCR”). Koury Aviation’s counsel replied on January 27, 2017.

9. On February 8, 2017, the Court held a hearing to address, in relevant part, the discovery dispute. The Court did not issue a formal ruling under BCR 10.9(b), but indicated that information related to the Rented Aircrafts’ Financials appeared to be relevant and within the scope of discovery. The Court stated that if a motion to compel were filed, the Court would likely order Koury Aviation to produce the Rented Aircrafts’ Financials.

10. On February 15, 2017, the deadline for all discovery lapsed with neither side seeking an extension of the discovery period. After the close of discovery, the parties continued to engage in discovery, and Carmayer continued to seek the Rented Aircrafts’ Financials. (Mem. Law Supp. Pl.’s Second Mot. Compel 3–4.) On February 27, 2017, Carmayer’s counsel e-mailed Koury Aviation’s counsel seeking additional information related to the Rented Aircrafts’ Financials. (Pl.’s Mot. Ex. H.) On March 3, 2017, Koury Aviation responded, in writing, stating unequivocally that it would not produce the documents sought by Carmayer. (Pl.’s Mot. Ex. I.)

11. On March 17, 2017, Defendants Koury Aviation, Bradford Koury, and Thomas Hurlocker (collectively, “Defendants”) filed a motion for summary judgment on all of Carmayer’s claims.

12. On March 24, 2017, Carmayer filed the Motion. At that time, three weeks had passed since Koury Aviation last responded that it would not produce the requested documents, five weeks had passed since the close of discovery, and six weeks had passed since the BCR 10.9(b) hearing.

13. The Motion implicitly requests that the Court reopen discovery.

II. ANALYSIS

14. “Whether or not [a] party’s motion to compel discovery should be granted or denied is within the trial court’s sound discretion and will not be reversed absent an abuse of discretion.” *Wagoner v. Elkin City Sch.’ Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (1994).

15. Pursuant to BCR 10.4(a), a party must show extraordinary cause to reopen discovery after the discovery deadline. Additionally, BCR 10.4(d) states that if the parties agree to continue discovery outside the deadlines established by the case management order, “the Court will not entertain a motion to compel or a motion for sanctions in connection with that discovery.”

16. Rule 37 of the North Carolina Rules of Civil Procedure (“Rule(s)”) does not include a deadline for filing a motion to compel. N.C. Gen. Stat. § 1A-1, Rule 37. The North Carolina appellate courts have not have not established a bright-line rule governing the propriety of motions to compel filed after the close of discovery. *See Lindsey v. Boddie-Noell Enters.*, 147 N.C. App. 166, 171–72, 555 S.E.2d 369, 373 (2001) (holding that, under Rule 26(b)(1), trial court did not commit an abuse of discretion in denying a motion to compel that was filed on the day trial was scheduled

to begin and that sought an order compelling information that was first requested roughly twenty months after filing the complaint and one month prior to trial), *rev'd on other grounds*, 355 N.C. 487, 562 S.E.2d 420 (2002).

17. In the absence of an interpretation of Rule 37 by the North Carolina appellate courts on this particular point, “[d]ecisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules.” *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (citation omitted). North Carolina federal district courts have addressed the timeliness of motions to compel under Rule 37 of the Federal Rules of Civil Procedure, analogous to Rule 37. Generally, in order for a motion to compel to be timely, it must be filed before the close of discovery. *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 238 F.R.D. 555, 558 (E.D.N.C. 2006) (questioning the timeliness of a motion to compel filed seven months after opposing party’s objections and one day before the close of discovery) (citing *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 647 (7th Cir. 2001)); *see Greene v. Swain Cty. P’ship for Health*, 342 F. Supp. 2d 442, 449 (W.D.N.C. 2004) (denying as untimely a motion to compel filed twenty-one days after the discovery deadline); *see also McCollum v. Puckett Mach. Co.*, 628 Fed. App’x. 225, 228 (5th Cir. 2015) (“[A] district court is within its discretion to deny a motion to compel filed on or after the court-ordered discovery deadline—regardless of the requested discovery’s value to the party’s case.”).

18. Federal courts have looked to a variety of factors when determining whether to address motions to compel filed after the close of discovery. These factors

include: (1) the amount of time that has elapsed since the discovery deadline, (2) the amount of time that has elapsed since the party learned of the discovery issue, (3) whether the discovery period had been extended, (4) the explanation for the tardiness, (5) whether dispositive motions had been scheduled or filed, (6) the age of the case, (7) prejudice to the opposing party, and (8) the potential disruption of the court's schedule. *Days Inn Worldwide, Inc. v. Sonia Invs.*, 237 F.R.D. 395, 397–98 (N.D. Tex. 2006) (collecting cases).

19. Initially, the Court notes that Carmayer's brief submitted with the Motion fails to comply with BCR 7.8 as it does not include a certificate stating that it complies with the length requirements set out in BCR 10.9(c).

20. The Court, in its discretion, denies the Motion pursuant to BCR 10.4(a) and 10.4(d). As the Court did not rule on the dispute at the 10.9(b) hearing, pursuant to BCR 10.9(c), Carmayer was authorized to file the Motion after February 8, 2017. However, the Motion was filed after the close of discovery and does not satisfy Carmayer's burden to establish the extraordinary cause that is necessary under BCR 10.4(a) to reopen discovery. Although Carmayer does not provide an express explanation for the delay in filing the Motion, the Court infers that the delay is attributable to Carmayer continuing to try to resolve the dispute consensually with Koury Aviation's counsel. Carmayer' potential prejudice in not receiving the Rental Aircrafts' Financials does not demonstrate extraordinary cause required to reopen discovery in light of Carmayer's knowledge of Koury Aviation's continued objections,

the lack of any indication by Koury Aviation that it would turn over the information, and Carmayer's opportunity to timely file the Motion prior to the close of discovery.

21. Even though Carmayer notified the Court of the outstanding discovery issues prior to the close of discovery, Carmayer continued to pursue discovery outside of the discovery period established by the case management order, including discovery regarding the Rented Aircrafts' Financials. As a result, pursuant to BCR 10.4(d), the Court declines to entertain the Motion on this additional ground.

22. Finally, the Court, with the guidance of federal decisions, finds that the Motion is untimely under Rule 37. Here, the Motion was filed five weeks after the close of discovery. Additionally, it was filed roughly ten months after Koury Aviation's initial objections, over five months after Carmayer contacted Koury Aviation about the perceived deficiencies, and three weeks after Koury Aviation stated unequivocally that it would not provide the Rental Aircrafts' Financials. By March 3, 2017, Carmayer was aware of the Court's position regarding the requested information, had an unequivocal statement from Koury Aviation stating its objection, and had already drafted at least one motion to compel on this exact issue, but did not file immediately. Instead, the Motion was filed after Defendants' motion for summary judgment. As such, the Court finds that hearing the motion at this point would both prejudice Defendants and would disrupt the schedule of this litigation, as established in the case management order, because it would delay the pending dispositive motion and a timely resolution of this case. Based on the procedural posture of this case and under the guidance of federal decisions interpreting the

timeliness of a motion to compel, the Court finds, in its discretion, that the Motion is untimely.

23. Therefore, the Court finds good cause exists to deny the Motion because (1) the Motion is untimely under Rule 37; (2) the Motion does not include an adequate explanation for why the Motion was not filed earlier, either prior to the close of discovery or prior to the motion for summary judgment; (3) the Motion seeks to reopen discovery without establishing extraordinary cause under BCR 10.4(a); and (4) Defendants will be prejudiced by the reopening of discovery and delaying the pending motion for summary judgment.

III. CONCLUSION

24. THEREFORE, in its discretion, the Court DENIES the Motion.

SO ORDERED, this the 5th day of April, 2017.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases