

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

HAMMERHEAD CONSTRUCTION LLC,

Plaintiff,

v.

**HARVEY HOFFMAN,
and JANICE HOFFMAN,**

Defendants.

3:23-cv-00014-RAM-EAH

**HARVEY HOFFMAN and
JANICE HOFFMAN,**

Counterclaim Plaintiffs,

v.

**HAMMERHEAD CONSTRUCTION, LLC,
STEPHEN RIVERA and
JENNIFER FIRESTONE,**

Counterclaim Defendants.

**TO: Ryan C. Meade, Esq.
A. Jeffrey Weiss, Esq.**

ORDER

THIS MATTER comes before the Court on the “Motion to Compel and for Order to Show Cause Against Artic Services & Repair, LLC for Failure to Comply with Subpoena,” filed on April 11, 2024 by A. Jeffrey Weiss, Esq., counsel for Defendants/Counterclaim Plaintiffs Harvey Hoffman and Janice Hoffman. Dkt. No. 75. In the motion, Attorney Weiss moves under

Hammerhead Construction LLC v. Hoffman
3:23-cv-00014-RAM-EAH
Order
Page 2

Fed. R. Civ. P. 45 for an Order directing Luis Manuel Amaro, Jr. of Artic Services & Repair, LLC (“Artic”) to appear on a date certain to show cause why he and Artic should not be held in contempt for failure to comply with a duly-issued subpoena served on March 20, 2024. *Id.* The Hoffmans also request an Order compelling Artic to produce all documents and records requested in the subpoena within five business days of the date of the Order, and that Artic be ordered to pay the Hoffmans’ reasonable attorney’s fees incurred as a result of its refusal to comply with the subpoena and in bringing the motion. *Id.*

As background for the motion, Attorney Weiss states that Mr. Amaro, as the registered agent and, on information and belief, the sole member of Artic, was served on March 20, 2024 with a subpoena, attached to the motion as Dkt. No. 75-1, which sought copies of bills and invoices provided to Hammerhead or Rivera for the purchase and installation of any air conditioning units at the Hoffman’s St. Thomas residence between September 2017 and January 30, 2021. *Id.* at 1-2. Attorney Weiss also attached the affidavit of service, Dkt. No. 75-2, and the return of service, Dkt. No. 75-3. Artic failed to produce the documents and an Artic representative failed to appear on the date commanded by the subpoena (April 1, 2024). Dkt. No. 7 at 2.

Consequently, Artic’s “continued refusal to comply with the subpoena” requires the Court’s attention via an Order to Show Cause requiring Mr. Amaro and Artic to explain why they should not be held in contempt and sanctioned for their refusal to comply with the

Hammerhead Construction LLC v. Hoffman
3:23-cv-00014-RAM-EAH
Order
Page 3

subpoena. *Id.* at 2. Attorney Weiss adds that Artic has not objected or moved to quash the subpoena, and has not moved for a protective order. *Id.*

DISCUSSION

I. Legal Standards

A. Fed. R. Civ. P. 45

Federal Rule of Civil Procedure 45 authorizes parties to serve subpoenas on parties or non-parties commanding the production of books, documents, electronically stored information, or tangible items in that person's possession, custody, or control. Under Rule 45(a)(1)(A), an attorney, as an officer of the court, may issue a subpoena on behalf of the court in which the attorney is authorized to practice. The recipient of such a subpoena is required to produce documents "kept in the ordinary course of business." Rule 45(e)(1)(A). The recipient may serve a written objection; if an objection is made, "the serving party may move the court for the district where compliance is required for an order compelling production[.]" Rule 45(d)(2)(B)(i).

The procedure for complying with a Rule 45 subpoena directed to a nonparty to produce documents is virtually identical to the procedure set forth in Rule 34, governing requests to produce documents directed to the parties in an action. *Riemensnyder v. Barr*, No. 20-cv-109, 2021 WL 1320826, at *2 (M.D. Pa. Apr. 8, 2021). Thus, a Rule 45 subpoena "must fall within the scope of proper discovery under Fed. R. Civ. P. 26(b)(1)," *id.* (internal quotation marks omitted), and such subpoenas are subject to the same discovery deadlines

Hammerhead Construction LLC v. Hoffman
3:23-cv-00014-RAM-EAH
Order
Page 4

that apply to the parties in a case, *Galloway v. Islands Mech. Contractor, Inc.*, No. 08-cv-0171, 2013 WL 163985, at *5 (D.V.I. Jan. 14, 2013) (citing cases); *see also Beltz v. Univ. of Pittsburgh*, No. 2:19-CV-1572, 2022 WL 17851003, at *1 n.1 (W.D. Pa. Dec. 22, 2022) (“all fact discovery, including third-party discovery, must be completed within the discovery deadline set by the Court. 9 Moore's Federal Practice - Civil § 45.02 (2022) (“A Rule 45 subpoena may not be used to circumvent discovery rules or to make an untimely request for documents or tangible things that should have been requested during the discovery period.”)); *Cregghan v. Procura Mgmt., Inc.*, No. 14-cv-1847, 2015 WL 12819210, at *2 (E.D. Pa. June 22, 2015) (“Although Rule 45 allows a party to seek documents from a third party for the purposes of trial or a hearing, federal courts have by and large concluded such a subpoena is a discovery device subject to the Court's scheduling Order and have held that parties may not issue such subpoenas ‘as a means to engage in discovery after the discovery deadline has passed,’ *Puritan Inv. Corp. v. ASLL Corp.*, 1997 WL 793569 at *1 (E.D. Pa. Dec. 9, 1997) (Waldman, J.) (collecting cases)”); *Nicholas v. Wyndham Int’l, Inc.*, No. 01-cv-0147, 2003 WL 23198847, at *2 (D.V.I. Oct. 1, 2003) (Rule 45 subpoenas are discovery devices and are governed by the temporal restraints of a case’s scheduling order); LRCi 26.5 (“Discovery requests that call for responses. . . after the discovery deadline will not be enforceable except by order of the Court for good cause shown. Unless otherwise ordered by the Court, motions to compel discovery must be filed within the discovery period.”).

Hammerhead Construction LLC v. Hoffman
3:23-cv-00014-RAM-EAH
Order
Page 5

It is “well settled that decisions on matters pertaining to subpoena compliance rest in the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion.” *R.J. Reynolds Tobacco v. Philip Morris Inc.*, 29 F. App'x 880, 881 (3d Cir. 2002).

B. Contempt

A court may hold a person in contempt for failing to comply with a properly served subpoena and who “fails without adequate excuse to obey the subpoena or an order related to it.” Rule 45(g). Once a party establishes by clear and convincing evidence that the non-party has violated a subpoena, the burden shifts to the subpoenaed party to offer proof beyond “a mere assertion of inability” to comply. *Harris v. City of Philadelphia*, 47 F.3d 1311, 1324 (3d Cir. 1995) (quoting *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991)). Generally, however, a non-party cannot be held in contempt “as long as it took all reasonable steps to comply.” *Id.* But if the non-party fails to introduce any evidence to prove the reasonable steps made towards compliance, then the Court may grant a motion for contempt. *Id.* A court may impose sanctions, including attorney’s fees incurred as a result of the failure to comply with Court Orders. *Cupolex Building Sys USA, LLC v. Varsity Slab Solutions*, Civ. No. 16-3200, 2018 WL 4922362, at *1 (D.N.J. July 6, 2018). The decision to hold a non-party in contempt under Rule 45 is within the sound discretion of the trial court. *Harris*, 47 F.3d at 1349.

Hammerhead Construction LLC v. Hoffman
3:23-cv-00014-RAM-EAH
Order
Page 6

The contempt power of a magistrate judge is set forth in 28 U.S.C. § 636(e). In a case in which the parties have not consented to the jurisdiction of the magistrate judge (such as in this case), the magistrate judge “shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified.” 28 U.S.C. § 636(e)(6). When the facts have been certified, the “district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.” *Id.*; see *Cupolex Bldg. Sys., USA, LLC*, 2018 WL 4922362, at *1.

II. Application

As indicated above, ample case law buttressed by LRCi 26.5, require that Rule 45 subpoenas comply with the discovery deadlines set forth in a case, and must be served before the discovery deadline has elapsed. *Galloway*, 2013 WL 163985, at *5. Thus, Rule 45 subpoenas served after the discovery deadline has passed are improper and, pursuant to LRCi 26.5, will not be enforced except for good cause shown.

Here, the discovery period ended on January 8, 2024. Dkt. No. 47. Consequently, the Hoffmans’ Rule 45 subpoena dated March 20, 2024 and requiring production from Artic on April 1, 2024, months after the discovery deadline, is untimely, falling outside the discovery

Hammerhead Construction LLC v. Hoffman
3:23-cv-00014-RAM-EAH
Order
Page 7

period Attorney Weiss has not mentioned, much less argued, that good cause supports enforcing the subpoena.

In a case where the parties, and particularly the Hoffmans, have sought to extend Scheduling Order deadlines to the extent that the operative Scheduling Order provided that “[t]he Court will not entertain any motions for extensions, changes, and/or modification of any dates or deadlines contained herein,” Dkt. No. 47, the Hoffmans may not circumvent that deadline by serving Rule 45 subpoenas out of time and seeking the authority of the Court to enforce them.

Accordingly, for the reasons set forth above, it is hereby **ORDERED** that the Hoffmans’ “Motion to Compel and for Order to Show Cause Against Artic Services & Repair, LLC for Failure to Comply with Subpoena,” Dkt. No. 75, is **DENIED**.

ENTER:

Dated: April 15, 2024

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE