

STATE OF NORTH CAROLINA
CLEVELAND COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 608

DOUGLAS BROWN,

Plaintiff,

v.

ARTHUR D. SECOR; SECOR
GROUP, LLC; JOSEPH
CHRISTOPHER ROSSO; and
SOUTHGROUP REAL ESTATE
MARKETING, LLC,

Defendants.

**ORDER ON
DISCOVERY DISPUTE**

1. Plaintiff Douglas Brown's motion to compel and Defendants' cross-motion for a protective order are before the Court. (ECF Nos. 112, 117.) Both sides have submitted briefs in support of their positions, and the window for briefing has closed. The Court elects to decide the motions without a hearing. *See* BCR 7.4.

2. Brown filed this suit in April 2016, alleging that Defendants fraudulently induced him to invest in three real estate projects in 2013. Brown alleges that his investment of more than \$2 million has since vanished, and he asserts claims for breach of contract, fraud, securities fraud, and related causes of action. Brown also asserts that he is entitled to a constructive trust. Additional background appears in previous orders and opinions. *See Brown v. Secor*, 2017 NCBC LEXIS 65 (N.C. Super. Ct. July 28, 2017) ["2017 Opinion"].

3. This discovery dispute follows from past, related disputes. Just over a year ago, Brown moved to compel the production of all banking records for each Defendant from 2012 to present. The Court granted the motion as to the banking records of

Defendant Secor Group because it was undisputed “that funds and expenses for the real estate transactions flowed through Secor Group.” 2017 Opinion at *36–37. The Court denied the motion as to the records of the individual defendants, Arthur Secor and Joseph Rosso, noting that they were “highly likely to contain vast amounts of irrelevant, personal information.” *Id.* at *38. Although Brown sought full access in the “belief that funds deposited with Secor Group were ultimately distributed to Secor and Rosso,” the Court concluded that “[t]he banking records of Secor Group and the tax records of the individuals provide[d] adequate, targeted discovery for this purpose.” *Id.*

4. According to Brown, the financial records received from Secor Group confirmed his suspicions. He contends that over \$1 million in proceeds were deposited into Secor Group’s account after the sale of the New River property (one of the three deals in which Brown invested). Shortly afterward, a significant sum was transferred out of Secor Group’s account and into the personal bank accounts of Secor and Rosso.

5. Brown now seeks discovery into the disposition of these funds. In an interrogatory, Brown asked Defendants to “[i]dentify the present disposition of the funds” along with “whether any assets were purchased with said funds, the identity and location of said assets, the account location of any funds, and in whose name the resulting assets or funds are currently in or who has possession or control over the same.” (Pl.’s Br. in Supp. of Mot. Compel 3 [“Pl.’s Br. to Compel”], ECF No. 113.) He also requested that Defendants produce “[a]ny and all documents showing the current

disposition of the assets or funds referenced in” the interrogatory. (Pl.’s Br. to Compel 3.) These requests, Brown contends, are “relevant to Plaintiff’s constructive trust remedy, his claim of unjust enrichment, and to the allegations of intent to defraud.” (Pl.’s Br. to Compel 1.)

6. Defendants refused to respond to the discovery and cross-moved for a protective order. They argue that the Court has already decided the issue when it denied access to Secor and Rosso’s personal banking records in the 2017 Opinion. Defendants further contend that the request is a premature attempt to seek postjudgment discovery and that a balancing test favors protecting their personal banking records. (Defs.’ Br. in Supp. of Mot. Protective Order and in Opp’n to Mot. Compel 7–11 [“Defs.’ Br.”], ECF No. 117.)

7. In general, “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” N.C. R. Civ. P. 26(b)(1). “The test of relevancy under Rule 26 is not, of course, the stringent test required at trial. The rule is designed to allow discovery of any information ‘reasonably calculated to lead to the discovery of admissible evidence.’” *Willis v. Duke Power Co.*, 291 N.C. 19, 32, 229 S.E.2d 191, 200 (1976) (quoting N.C. R. Civ. P. 26(b)); accord *Wachovia Capital Partners, LLC v. Frank Harvey Inv. Family L.P.*, 2007 NCBC LEXIS 7, at *31–32 (N.C. Super. Ct. Mar. 5, 2007). Nevertheless, a court may enter a discretionary protective order “even as to relevant material” after balancing “[o]ne party’s need for information . . . against the likelihood of an undue burden [being] imposed upon the other.” *Willis*, 291 N.C. at 34, 229 S.E.2d at 200.

8. First, the Court's 2017 Opinion does not bar Brown's discovery requests, as Defendants contend. Brown's current requests do not seek all of Secor and Rosso's banking records. Rather, he seeks discovery targeted to the disposition of funds known to have been transferred from Secor Group to Secor and Rosso. The current requests are far more narrow and limited than the discovery requests addressed in the 2017 Opinion, and they are based on information that came to light after the Court issued its Opinion.

9. Second, the discovery Brown seeks is relevant to his request for a constructive trust. "[I]t is a cardinal rule of trust pursuit that the proceeds or the product of the initial property must be traced and identified through any and all intermediate transfers into the property sought to be reached." *Edgecomb Bank & Trust Co. v. Barrett*, 238 N.C. 579, 586, 78 S.E.2d 730, 736 (1953). Defendants have produced records showing some \$1.6 million in New River proceeds were deposited into the Secor Group account and that Secor and Rosso then transferred a substantial sum to themselves as "loans," the terms and status of which are unclear. (See Pl.'s Br. to Compel Ex. 2 at 13–14, Ex. 3.) Whether Secor and Rosso have moved the funds into other accounts or converted the funds into other assets is relevant to the trust pursuit.

10. The Court further concludes that it is not premature to conduct this discovery now. North Carolina case law is unclear on this point, but federal courts appear to permit discovery related to the present disposition of funds when a constructive trust is at issue. See, e.g., *Regions Bank v. Lynch*, No. 2:08-cv-31-FtM-

99SPC, 2008 U.S. Dist. LEXIS 126670, at *6 (M.D. Fla. Dec. 9, 2008) (granting motion to compel and holding that discovery of financial records related to constructive trust was not “a premature attempt to seek post judgment discovery”); *Morningstar v. Jianping*, No. 2:13-cv-00427-JCM-GWF, 2013 U.S. Dist. LEXIS 54750, at *4 (D. Nev. Apr. 17, 2013) (permitting expedited discovery “to identify and locate funds” over which plaintiffs intended to seek constructive trust); *see also Metzgar v. U.A. Plumbers & Steamfitters Local No. 22 Pension Fund*, No. 13-CV-85V(F), 2016 U.S. Dist. LEXIS 51320, at *3 (W.D.N.Y. Apr. 15, 2016) (noting that alleged dissipation of funds “is a matter upon which the defendants are entitled to discovery”); *Stanton v. Couturier*, 2007 U.S. Dist. LEXIS 95515, at *12 (E.D. Cal. Dec. 26, 2007) (stating that discovery of information relevant to constructive trust “is normally part of the discovery process”).

11. The burden that would be imposed on Defendants in responding to these requests is not so great that it outweighs the relevance of the requested information. Brown’s interrogatory seeks a targeted response regarding specific fund transfers, all of which is uniquely within the knowledge of Defendants. Responding would pose no serious burden on Secor and Rosso; they can and should provide a response. The corresponding request for production is also limited and not overly burdensome. Defendants must provide only those documents that are sufficient to support their answer to the interrogatory—that is, documents sufficient to show the current disposition of the disputed funds.

12. The nature of Defendants' production depends on their answer to the interrogatory. If the funds were used to purchase assets, it should be relatively straightforward to provide documentation identifying the assets and how they were purchased. If the funds remain in each individual's account or were transferred to another account, the current account status and any transfers should be simple to identify. This may require the production of a limited number of banking records. To be clear, though, by compelling the production of responses to these discovery requests, the Court does not hold that Brown is entitled to receive all of Secor and Rosso's personal banking records. The Court's previous protective order remains in place, and Defendants are required to produce only those documents that are sufficient to show the current disposition of the disputed funds.

13. For these reasons, and in its discretion, the Court **GRANTS** Plaintiff's motion and **ORDERS** that Defendants shall provide a full and complete response to Interrogatory No. 15 in Brown's Second Set of Interrogatories within seven days of this Order. Defendants shall also respond to Brown's Request for Production No. 5 by providing documents sufficient to show the current disposition of the disputed funds within fourteen days of this Order.

14. The Court **DENIES** Defendants' motion.

15. The Court determines, in its discretion, that the parties shall bear their own costs.

This the 11th day of May, 2018.

/s/ Adam M. Conrad

Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases