STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOHN F. THORNTON,)
)
Plaintiff,)
vs.)
)
MARY E. PANDREA, a single woman individually and as Trustee of the Kari A. Clark and Mary E. Pandrea Revocable Trust u/a April 9, 2002, and KARI A. CLARK, a single woman individually and as Trustee of the Kari A. Clark and Mary E. Pandrea Revocable Trust u/a April 9, 2002, and as Trustee of the Kari A. Clark Trust u/a June 21, 2010,)
)
Defendants.)

Case No. **BON CV 2013 1334**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion to Compel filed November 19, 2013, by plaintiff John F. Thornton (Thornton).

On August 14, 2013, Thornton filed a Complaint to quiet title to real property he owns and upon which defendant Mary Pandrea (Pandrea) may have an interest. Complaint to Quiet Title and for Damages, pp. 3-5, ¶¶ 2.7-2.22. Pandrea, pro se, filed an answer on September 3, 2013, and admits there is a dispute over the interest. Defendant Pandrea's Answer to Complaint to Quiet Title and Damages, pp. 2-4, ¶¶ 2.7-2.22.

On October 22, 2013, counsel for Thornton served Plaintiff's First Set of Interrogatories and Requests for Production of Documents upon Pandrea. In response,

Pandrea filed a Motion to Dismiss the Complaint on November 7, 2013, and on November 27, 2013, Pandrea filed an "Opposition to Plaintiff's Motion to Compel and Defendant Pandrea's Request for Protective Order or Stay Pending Dismissal and Request to Reassign Case to Proper Jurisdiction" (Opposition). In the "Opposition" Pandrea objected to answering the interrogatories served upon her.[1] According to Pandrea, Thornton's attorney of record subsequently sent her an e-mail requesting responses to the interrogatories on November 15, 2013. Opposition to Plaintiff's Motion to Compel and Defendant Pandrea's Request for Protective Order or Stay Pending Dismissal and Request to Reassign Case to Proper Jurisdiction, p. 3. The contents to the e-mail and any response have not been provided to this Court.

Thornton then filed the instant Motion to Compel Discovery on November 19, 2013. That motion was accompanied by a certification that provides in pertinent part, "Counsel for Plaintiff has attempted to obtain responses without the need for recourse to the courts, however, Defendant has failed to respond to the inquiry of undersigned counsel." Certification of Counsel In Support of Motion to Compel Discovery, p. 1, ¶ 3. Pandrea then filed the "Opposition" described above. Pandrea's "Opposition" is not supported by an affidavit.

Oral argument on Thornton's Motion to Compel Discovery was held December 5, 2013, in a courtroom in Kootenai County. Counsel for Thornton appeared at court as did counsel for Kari A. Clark (Clark). Pandrea, *pro se*, appeared telephonically.

[1] The specific response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents has not been provided to this Court by either party. However, both parties have stated that Pandrea objected to responding to Thornton's request on November 7, 2013. Motion to Compel Discovery, p. 2, ¶ 2; Opposition to Plaintiff's Motion to Compel and Defendant Pandrea's Request for Protective Order or Stay Pending Dismissal and Request to Assign Case to Proper Judge, p. 3. According to Thornton, Pandrea objected on the grounds that "she is not the proper party defendant in the above entitled action, and that her motion to dismiss the lawsuit is scheduled to be heard the 6th day of January 20[14]." Plaintiff's Motion to Compel Discovery and Notice of Hearing, p. 2, ¶ 2.

Counsel for Clark stated Clark took no position on Thronton's Motion to Compel. Pandrea failed to notice up her request for protective order or stay pending the outcome of her Motion to Dismiss the Complaint, but instead, she included these issues as part of her oral argument in response to Thornton's Motion to Compel.

At the conclusion of that hearing the Court granted Thronton's Motion to Compel, awarded costs and fees against Pandrea in favor of Thornton pertaining to bringing the Motion to Compel, and scheduled the matter for trial beginning June 24, 2014. The Court indicated it would issue a memorandum decision explaining its decision on the Motion to Compel. Hearing on Pandrea's motion to dismiss is scheduled for January 6, 2014.

II. STANDARD OF REVIEW.

"Control of discovery is within the discretion of the trial court." *Jen-Rath Co. v. Kit Mfg. Co.,* 137 Idaho 330, 336, 48 P.3d 659, 665 (2002). As such, the decision to grant or deny a motion to compel rests in the discretion of the trial court. *Sirius LC v. Erickson,*144 Idaho 38, 43, 156 P.3d 539, 544 (2007); *Kirk v. Ford Motor Co.,* 141 Idaho 697, 700–01, 116 P.3d 27, 30–31 (2005).

III. ANALYSIS OF THORNTON'S MOTION TO COMPEL.

Idaho Rule of Civil Procedure 37(a)(1) requires that the moving party in a discovery dispute between the parties file with the Court a certification that the movant has made a good faith attempt to confer with the opposing party to obtain the disclosure without court action. I.R.C.P. 37(a)(1). This Court, in its standard Pretrial Order (which has not yet been issued in this case) further instructs the movant that "[t]he motion shall not refer the Court to other documents in the file. For example, if the sufficiency of an answer to an interrogatory is in issue, the motion shall contain, verbatim, both the

interrogatory and the allegedly insufficient answer, followed by each party's contentions, separately stated." (standard Scheduling Order, Notice of Trial Setting, ¶ 3.)

Thornton's attorney of record submitted with her motion a certification that provides "Counsel for Plaintiff has attempted to obtain responses without the need for recourse to the courts, however, Defendant has failed to respond to the inquiry of undersigned counsel." Certification of Counsel In Support of Motion to Compel Discovery, p. 1, ¶ 3. As noted in Pandrea's "Opposition", after she objected to answering the interrogatories, Thornton's counsel sent her an e-mail requesting responses to the interrogatories on November 15, 2013. "Opposition", p. 3. Pandrea claims she was unavailable at the time Thornton's counsel e-mailed her and that her unavailability was made known to Thornton's counsel. However, it is unclear from her "Opposition" how and when Thornton's counsel was made aware of her unavailability. No additional responses have been forthcoming.

While the certification filed in support of the Motion to Compel complies with Idaho Rule or Civil Procedure 37(a)(1), it fails to comply with this Court's (not-yet issued) Pre-Trial Order. Neither the Motion to Compel Discovery nor the Certification filed in support list verbatim each request for admission and response thereto. While the Certification filed in support of the Motion to Compel has attached the requests for admission, Pandrea's response or responses were not provided to this Court. Rather, the Motion provides the general response provided by Pandrea. This fails to comply with the Court's (not-yet-issued) Pre-Trial Order. However, since the Pre-Trial Order has not yet been issued in this case, such failure to use what is obviously best practice may not be held against Thornton.

In her "Opposition", Pandrea contends she should not have to respond to Thornton's interrogatories for a variety of reasons, none of which have any merit.

Pandrea claims she should not have to answer discovery because the questions asked are "procedurally improper". Opposition, pp. 6-8. Pandrea contends that by answering the interrogatories she will forfeit her rights to the disputed property. *Id.,* p. 7. Pandrea bases her contention on I.C. § 9-407, which provides: "Where, however, evidence is given that the party against whom the writing is offered, has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one produced from the custody of the adverse party, and has been acted upon by him as genuine." I.C. § 9-407. Pandrea's claim is misguided. Idaho Code § 9-407 governs the admission of the execution of a writing. This lawsuit is not about the sufficiency or contents of a document written or not written by Pandrea, and the interrogatories requested by Thornton do not ask that she admit to executing any document.

Pandrea also objects to the interrogatories on the basis that they call for an opinion based on a hypothetical fact. Opposition, p. 7. In support of this contention, she relies on cases from New York and Pennsylvania. Idaho law is clear on this issue. Idaho Rule of Civil Procedure 33(b)(1) provides in pertinent part: "An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact..." I.R.C.P. 33(b)(1).

Pandrea further contends that she cannot respond to Thornton's interrogatories because the exhibits referred to in the definition section of the interrogatories are based on "improper foundation because the documents are not authentic; they fail to meet the requirement of the original document rules and even fail to meet the hearsay exception rule" contained in Idaho Rule of Evidence 803(14). Opposition, p. 7. Again, this contention is misguided. Idaho Rule of Civil Procedure 26(b) allows for the discovery of all relevant subject matter:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) 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, 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.*

I.R.C.P. 26(b) (emphasis added).

Finally, Pandrea asserts that she "cannot logically respond to requests for production as Thornton's interrogatories call for admissions from Pandrea based on fictitious, self-defined and nonsensical descriptions of property that purport to slander of title in her own property." Opposition, p. 7. Pandrea claims that if she were to produce a copy of her title then "…Pandrea's title would be the prima facia evidence under *Idaho Code* 9-322." Id., p. 8. That statute, entitled ENTRIES IN PUBLIC AND OFFICIAL BOOKS – EFFECT AS PRIMA FACIA EVIDENCE, states: "Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein." I.C. § 9-322. This code section does not permit Pandrea to fail to serve answers to the interrogatories submitted by Thornton.

Pandrea's primary argument as to why she should not have to respond to discovery, at least oral argument on December 5, 2013, is because she has filed a Motion to Dismiss, and subsequently filed a "request for protective order or stay pending dismissal." Pandrea's argument in briefing is as follows:

> In addition, Pandrea has moved to dismiss plaintiff's complaint pursuant to Idaho Rule of Civil Procedure 12(b)(6), for failure to state a claim against Pandrea. The law is undisputed: "Facial challenges to the

> legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should be resolved before discovery begins." *Chudosama v. Mazda Motor Corp.,* 123 F.3d 1353, 1367 (11th Cir. 1997)(emphasis added). Clearly Eleventh Circuit precedent requires a stay pending resolution of Pandrea's dispositive motion to dismiss.

Opposition, pp. 5-6. There are a plethora of problems with Pandrea's reliance on *Chudosama*. First, a decision from the Eleventh Circuit United States Court of Appeals is not binding in any way upon this Court which is situated in the Ninth Circuit. Second, *Chudosama* interpreted the Federal Civil Rules of Procedure, and while Idaho's Rules of Civil Procedure take in large part from the Federal Rules, Idaho does not have the Civil Justice Reform Act, which was specifically discussed in *Chudosama*. 123 F.3d 1353, 1368, n. 38. Even the portion of *Chudosema* from which Pandrea quotes directly contradicts her own proposition. This is because the Eleventh Circuit wrote, "Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, *should* be resolved before discovery begins" (italics added), it did so after extensively recognizing these are matters soundly committed to a court's *discretion*. 123 F.3d 1353, 1367. Thus, when Pandrea then writes; "*Clearly* Eleventh Circuit precedent *requires* a stay pending resolution of Pandrea's dispositive motion to dismiss" (italics added), Pandrea is misleading the Court, which is sanctionable conduct under I.R.C.P. 11. Even though Pandrea is *pro se*, the Court must hold her as accountable as an attorney, and this Court made Pandrea aware of that fact at oral argument on December 5, 2013. As stated by the Idaho Supreme Court in *Golay v. Loomis,* 118 Idaho 387, 392, 797 P.2d 95, 100 (1990), citing *State v. Sima,* 98 Idaho 643, 570 P.2d 1333 (1977): "*Pro se* litigants are held to the same standards and rules as those represented by an attorney.

Idaho Rule of Civil Procedure 26(c) governs protective orders and provides:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . *may* make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the discovery not be had . . . .

I.R.C.P. 26(c) (emphasis added). The Idaho Supreme Court has held that the use of the word "may" indicates the exercise of discretion. *See Walborn v. Walborn,* 120 Idaho 494, 501, 817 P.2d 160, 167 (1991). As such, the decision to grant or deny a motion for protective order rests in the discretion of the trial court.

But Pandrea has not filed a "motion" for a protective order. As part of her written memorandum, her "Opposition", Pandrea merely filed a "request" for a protective order.

Pandrea alleges that there is good cause to stay discovery in this case because she filed a Motion to Dismiss Complaint for Quiet Title and for Damages November 7, 2013. Hearing on that motion is set for January 6, 2014. Pandrea believes that she is likely to prevail on her motion and, as such, she claims that conducting discovery prior to addressing her motion will diminish her rights, unfairly prejudice her by wasting her resources, time and expense, and will tax the resources of this Court. Opposition, p. 2.

As a general rule, staying discovery is not favored by courts and should not occur unless the entire action would be disposed of by a pending motion. *Taylor v. AAI Service Corp.,* 151 Idaho 552, 261 P.3d 829, 847 (2011).

> A [trial court] has broad discretion to stay discovery pending the decision on a dispositive motion. It is an abuse of that discretion, however, to stay general discovery if plaintiff [has] been denied discovery which relates to the summary judgment motion. In addition, motions to stay discovery are not favored and are rarely appropriate where resolution of the dispositive motion may not dispose of the entire case.

Id., citing *Hovermale v. School Board of Hillsborough County, Florida,* 128 F.R.D. 287, 289 (M.D. Fla.1989) (citations and quotations omitted).

In this case, while Pandrea has filed a motion to dismiss under I.R.C.P. 12(b), she also filed an affidavit in support of her motion. In considering a motion to dismiss under Idaho Rule of Civil Procedure 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990). Where matters outside the pleadings are submitted in support of a party's motion to dismiss, a court must treat the motion to dismiss as a motion for summary judgment. *Masi v. Seale*, 106 Idaho 561, 562, 682 P.2d 102, 103 (1984); *Hellickson*, 118 Idaho 273, 276, 796 P.2d, 150, 153. As such, this Court will in all likelihood ultimately treat her motion as a motion for summary judgment. Issuing a protective order or staying discovery until after Pandrea's motion is heard would prohibit Thornton from conducting inquiry into information that is reasonably calculated to lead to the discovery of admissible evidence in aid of responding to the motion to dismiss, which Pandrea through her own actions has turned into a motion for summary judgment. The discovery propounded by Thornton asks Pandrea questions about actions taken in 1992 regarding the property, to which both Thornton and Pandrea claim an interest.

Pandrea also requests that this case be consolidated with Bonner County Case CV-2011-835 pursuant to Idaho Rule of Civil Procedure 42(a) and heard in front of the Honorable John P. Luster. Opposition, pp. 3-4. However, Pandrea has not filed a **motion** to consolidate. Filing a brief and in it making a "request" is not a "motion." Idaho Rule of Civil Procedure 7(b)(1) requires "An application to the court for an order ***shall be by motion***, which, unless made during a trial, shall be made in writing, shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought." I.R.C.P. 7(b)(1). (emphasis added).

Moreover, Idaho Rule of Civil Procedure 42(a) provides: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary cost or delay." I.R.C.P. 42(a). Pandrea has failed to submit an affidavit with her opposition briefing and has further failed to provide any specific information that would assist this Court in making a determination whether there is a common question of law or fact between the instant action and Bonner County Case CV-2011-835; nor has Pandrea given this Court any information by which it could evaluate whether consolidation would expedite the court's business and further the interests of the litigants, at the same time minimizing the expense upon the public and the litigants. *Branum v. Smith Frozen Foods, Inc.,* 83 Idaho 502, 508-09, 365 P.2d 958, 961 (1961).

Moreover, Rule 2 of the Rules of the District Court and Magistrate Division for the First Judicial District provides: "Each District Judge shall control and set his own schedule for civil and criminal trials and for law and motion matters, subject to the authority of the Administrative District Judge pursuant to §1-907." Rules of the District Court and Magistrate Division for the First Judicial District, Rule 2. This Court cannot merely reassign this case to Judge Luster (who is now retired) without discussing the matter with the Administrative District Judge.

IV. CONCLUSION AND ORDER.

For the above stated reasons, this Court must grant plaintiff Thornton's Motion to Compel Discovery, and deny any "requests" made by Pandrea.

IT IS HEREBY ORDERED plaintiff Thornton's Motion to Compel is GRANTED.

IT IS FURTHER ORDERED defendant Pandrea must answer the discovery

propounded upon her by no later than December 20, 2013.

IT IS FURTHER ORDERED plaintiff Thronton is awarded the costs and fees associated with bringing the Motion to Compel against defendant Pandrea.

Entered this 9th day of December, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Val Thornton Mary E. Pandrea, Pro Se	208-255-2327	Joel P. Hazel	208-667-8470

_____
Jeanne Clausen, Deputy Clerk