

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

WESLEY MCFARLAND, *et al.*

PLAINTIFFS

VERSUS

CIVIL ACTION NO. 1:06cv466-LTS-RHW

**STATE FARM FIRE AND CASUALTY
COMPANY, *et al.***

DEFENDANTS

ORDER

This case is before the Court on [10] the emergency motion to quash or for protective order filed June 5, 2006, by State Farm Fire and Casualty Company (State Farm); [13] State Farm’s motion for protective order filed June 6, 2006; and [15] and [16] the June 6, 2006 motions filed by non-party Rimkus Consulting Group, Inc., seeking to quash subpoenas for production of documents and things served on Gary Hemphill and Norwood Shelton, Jr., respectively. The motions are considered together because they all concern subpoenas which Plaintiffs’ attorney issued and served upon Hemphill and Shelton on May 25, 2006. Counsel for Plaintiffs electronically filed notices of service of the subpoenas May 26, 2006 [5 and 6], and mailed copies of the notices to counsel for State Farm. For the following reasons, the Court finds the subpoenas were improperly issued and void when served.

State Farm’s motions [10 and 13] urge that the subpoenas be quashed and a protective order entered because the subpoenas seek “confidential claims information regarding more than 200 State Farm policyholders” who are not parties in this action, and have no known relationship to the Plaintiffs or their counsel. State Farm further objects on grounds that the subpoenas are a nullity due to this Court’s lack of authority to issue a subpoena compelling a non-party to

produce documents in Texas, and that the documents sought do not relate to the claims or defenses of the parties in this action.

The motions filed by non-party Rimkus [15 and 16], contend the subpoenas should be quashed and protective orders granted on grounds that (1) the subpoenas are void under Rule 45(a)(2)(C), Fed. R. Civ. P., as they were issued from the District Court of Mississippi but commanded production of documents in Texas; (2) the subpoenas require disclosure of confidential and proprietary material which belongs to Rimkus; (3) the documents bear no relevance to the instant litigation; and (4) the information sought is overbroad, unrelated to the litigation, not reasonably calculated to lead to discovery of admissible evidence and is unduly burdensome.

This Hurricane Katrina lawsuit was filed May 9, 2006, on behalf of some 662 named plaintiffs insured by State Farm at the time the Hurricane struck on August 29, 2005. Process was also issued May 9, 2006, and was served on State Farm May 18, 2006. The subpoenas in question were issued and served sixteen (16) days after the lawsuit was filed, and only one week following service of process – prior to the filing of the answer, which was due June 7, 2006; prior to the attorney conference required by Rule 26(f), Fed. R. Civ. P.;¹ and prior to the case management conference or entry of a case management plan by the Court. The subpoenas were issued and served by Plaintiff's attorney Derek A. Wyatt, out of the United States District Court for the Southern District of Mississippi, and required production of documents by Shelton and Hemphill in Dallas, Texas. The return date on the subpoenas was June 8, 2006. Both State Farm and Rimkus timely filed their motions to quash and for protective orders before the return date.

¹Rule 26(d) prohibits “discovery from any source before the parties have conferred as required by Rule 26(f).”

On June 6, 2006, the Court entered [12] an order suspending production of the documents sought by the subpoenas until the Court could rule on the motions filed by the objecting parties. The order stated, “**The responding parties shall not produce documents pursuant to the subpoenas pending further order of the Court. Counsel for the Plaintiffs shall provide copies of this Order to the responding parties or their counsel.**” (emphasis added)

In a June 6, 2006, *ex parte* communication to the undersigned, a copy of which is being provided to Defendant,² Plaintiffs’ counsel advised that the two engineers, Hemphill and Shelton, had “refused to speak with Plaintiffs’ attorneys, citing a confidentiality letter each had been required to sign. Each, however, said they probably would respond to a subpoena.” The letter goes on to say that attorneys from counsel’s office met with Hemphill and Shelton the previous Saturday, and “served each with a subpoena, which they honored by giving to us many of their own files, including draft reports they had written, and e-mail messages to and from their co-workers at Rimkus. ...” The Court notes that June 3 was the Saturday previous to June 6, 2006, however the subpoenas reflect that they were served May 25, 2006. Therefore, if Hemphill and Shelton responded to the subpoenas contemporaneously with the service of the subpoenas, they produced the documents on May 25, 2006 – before the notice of service was filed with the Court on May 26, 2006, thereby foreclosing any opportunity for objection to the subpoenas prior to the production. In this correspondence, Plaintiffs’ counsel further stated, with reference to the Court’s June 6, 2006 order, that the idea of “staying the return date is meaningless” because Hemphill and Shelton had already responded to the subpoenas...”

²The Court finds the *ex parte* communication improper and offensive in that it appears to seek the Court’s complicity in the acts leading to the production of the documents by Hemphill and Shelton. The Court is therefore providing it to defense counsel.

Plaintiffs responded to State Farm's motions on June 22, 2006, stating that Plaintiff served subpoenas on Hemphill and Shelton on May 25, 2006, pursuant to which Hemphill and Shelton produced documents "including drafts of engineering reports they had prepared ... while working for ... Rimkus ..." based on their inspections of Hurricane Katrina damaged properties on the Gulf Coast. Plaintiffs' response also gives information relating to an investigation by the office of the Mississippi Attorney General, which is essentially unresponsive and irrelevant to the issue before the Court on the present motions.

Law and Analysis

The U.S. District Court for the Southern District of Mississippi is not authorized to issue subpoenas for production and inspection of documents in Texas. Rule 45(a)(2)(C).³ Therefore the subpoenas served on Hemphill and Shelton were and are a nullity, void *ab initio*. This is a fact which was or should have been known to Plaintiffs' attorney when he issued the subpoenas. Furthermore, Rule 45 contemplates that one opposing production under such a subpoena will be afforded an opportunity to be heard on his objection. Indeed, the 1991 amendment to the Rule extended the former 10-day period for response to such a subpoena to 14 days "to allow a bit more time for ... objections to be made." *Advisory Committee Notes, 1991 Amendment, subdivision (c)*. In this case, all on the same day, Plaintiffs' attorney issued void subpoenas to compel production of documents Hemphill and Shelton had otherwise declined to produce, traveled to Texas, served the void subpoenas and gained possession of the documents, thereby depriving Defendant and Rimkus of any notice or opportunity to object thereto.

Finally, Rule 26 still governs discovery in civil actions, including Rule 45 production of

³"A subpoena must issue as follows: ... (C) for production and inspection, if separate from a subpoena commanding a person's attendance, *from the court for the district where the production or inspection is to be made.*"

documents from non-parties. Local Rule 26.1(A)(4) states that discovery prior to the case management conference is governed by Fed. R. Civ. P. 26(d), which provides, with certain exceptions which do not apply here, that “a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).” Thus, even proper efforts by Plaintiffs to obtain the documents from Hemphill and Shelton would have been premature. The Court is deeply troubled by the conduct of Plaintiffs’ counsel in this case. It is therefore,

ORDERED AND ADJUDGED, that the motions to quash [10], [15], and [16] are granted, as the subpoenas issued and served upon Hemphill and Shelton were void. It is further,

ORDERED AND ADJUDGED, that State Farm’s motion for protective order [13] requesting alternative relief in the event the subpoenas were not quashed, is held moot.

SO ORDERED, this the 30th day of August, 2006.

/s/ Robert H. Walker

ROBERT H. WALKER
UNITED STATES MAGISTRATE JUDGE