



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
December 15, 2022

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 18-12734-MKN
)	Chapter 11
SCHULTE PROPERTIES LLC,)	
)	
Debtor.)	Date: November 2, 2022
)	Time: 9:30 a.m.
)	

**ORDER ON NEWREZ LLC DBA SHELLPOINT MORTGAGE SERVICING'S
MOTION TO ALTER OR AMEND ORDER GRANTING SCHULTE PROPERTIES,
LLC'S MOTION TO COMPEL¹**

On November 2, 2022, the court heard NewRez LLC dba Shellpoint Mortgage Servicing's Motion to Alter or Amend Order Granting Schulte Properties, LLC's Motion to Compel ("Reconsideration Motion"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On August 19, 2022, the court entered an Order on Motion to Compel Shellpoint to Respond to Discovery Requests ("August Discovery Order").² (ECF No. 1106). The background information contained in that order is incorporated by reference, including the terms defining the parties to the underlying motion to compel ("Compel Motion"). (ECF No. 1008).

¹ In this Order, all references to "ECF No." are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRCP" are to the Federal Rules of Civil Procedure.

² The August Discovery Order granted the Debtor's related request to extend the deadline to file a new plan of reorganization and disclosure statement.

1 On September 28, 2022, Shellpoint filed the instant Reconsideration Motion supported by
2 the Declaration of Nicholas E. Belay, Esq. (“Belay Declaration”).³ (ECF Nos. 1116 and 1117).⁴

3 On October 19, 2022, Debtor filed an opposition to the Reconsideration Motion
4 (“Opposition”) that includes a declaration from its counsel, Matthew L. Johnson (“Johnson
5 Declaration”).⁵ (ECF No. 1136).

6 On or about October 26, 2022, Shellpoint filed a reply to the Opposition as well as
7 another Declaration of Nicholas E. Belay (“Supplemental Belay Declaration”). (ECF Nos. 1140,
8 1141, and 1143).

9 DISCUSSION

10 The August Discovery Order was the result of previous discovery disputes between the
11 same litigants. The disputes focus on Shellpoint’s production of documents related to its various

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13 ³ The Reconsideration Motion does not seek relief from the portion of the August
14 Discovery Order that granted Debtor an extension of the deadline to file a proposed plan and
disclosure statement.

15 ⁴ Six lettered exhibits are attached to the Reconsideration Motion. Exhibit “A” consists
16 of email messages among Debtor’s prior special counsel and Shellpoint’s prior counsel in June
17 2019 referencing a specific “dropbox” folder in which Shellpoint could deposit copies of various
18 documents regarding four specific properties. Counsel expressly agreed to use a dropbox folder
19 because of the size of the data files related to the subject properties. Exhibit “B” is a copy of an
20 email from Debtor’s prior special counsel acknowledging receipt of documents regarding three
21 properties. Exhibit “C” is a copy of a pleading reflecting production by Shellpoint’s prior
22 counsel on May 27, 2020, of specific documents regarding the same four properties, including
23 one located at 1392 Echo Falls Avenue, Las Vegas, Nevada. For each property, the document
24 describes specific items by Bate stamp number. The certificate of service attests that the
25 documents were sent by electronic dropbox to current counsel for the Debtor. Exhibit “D”
26 includes a copy of an email from Debtor’s current counsel to Shellpoint’s prior counsel dated
27 May 29, 2020, acknowledging that Debtor’s current counsel was able to access the dropbox of
28 materials transmitted by Shellpoint’s prior counsel on May 27, 2020. Exhibit “E” are copies of
email messages indicating that substantial drop box files were transmitted in several batches to
Debtor’s current counsel by Shellpoint’s prior counsel on May 29, 2020, and October 21, 2021.
The May 29, 2020 emails appear to correspond to the production date reflected in Exhibit “C.”
Exhibit “F” consists of copies of photographs taken by Shellpoint’s current counsel of the stacks
of documents in possession of Debtor’s current counsel.

⁵ Debtor’s counsel attests that the facts stated in the Opposition are true and correct. See
Johnson Declaration at ¶ 2.

1 claims against the Debtor. The genesis and rulings on those disputes were reflected in the
2 Protective Order entered on January 28, 2022⁶ as well as an Interim Order entered on May 3,
3 2022. That Interim Order was entered on the Compel Motion that the Debtor filed on April 12,
4 2022.⁷ The August Discovery Order required a number of things. First, Shellpoint was required
5 to produce the documents that were agreed at a “meet and confer” that was held at the office of
6 Debtor’s counsel on May 23, 2022. Second, Shellpoint was required to continue to supplement
7 its discovery responses under FRCP 26 until otherwise ordered by the court. Finally, Shellpoint
8 was required to pay the reasonable expenses of Debtor’s counsel, including attorney’s fees, for
9 preparing and presenting the Compel Motion.

10 Shellpoint seeks relief from the August Discovery Order under FRCP 60(b)(1, 2, and 3).
11 It argues that the August Discovery Order relies on “two critical incorrect factual findings”
12 warranting relief under FRCP 60(b)(1) based on “mistake, inadvertence, surprise, or excusable
13 neglect.” See Reconsideration Motion at 10:12 to 11:8; Reply at 5:7-18. Shellpoint further
14

15 ⁶ The Protective Order was entered in connection with a document Subpoena issued by
16 the Debtor on or about May 28, 2021. Shellpoint sought relief from compliance and the Debtor
17 opposed. Shellpoint’s request was heard on November 17, 2021, and the Protective Order was
18 entered on January 28, 2022. The motion was granted as to certain requested documents and
19 denied as to other requests. Shellpoint’s response to the production required by the Protective
20 Order led the Debtor to file the Compel Motion. The latter motion led to the Interim Order.
21 Shellpoint’s response to the Interim Order led to the August Discovery Order that granted the
22 Compel Motion. In response to the document Subpoena on May 28, 2021, that triggered the
23 instant dispute, Shellpoint consistently has maintained that it previously produced “thousands of
24 pages of documents” in response to discovery requested by the Debtor’s former special counsel.
25 See Protective Order at 9:20 to 11:6.

26 ⁷ At a status hearing held on June 15, 2022, Shellpoint was ordered to produce additional
27 responsive documents to Debtor’s counsel no later than July 6, 2022. See August Discovery
28 Order at 4:27 to 5:4. At the continued status hearing on July 13, 2022, counsel for both the
Debtor and Shellpoint reported that the deadline had not been met. Id. In support of the instant
Reconsideration Motion, Shellpoint’s counsel now explains that the reason the July 6 deadline
could not be met was due to his severe affliction with COVID-19 and the passing of his father.
See Belay Declaration at ¶ 10. Both circumstances are unfortunate and tragic. Either might have
warranted requests for an extension of the July 6 deadline or a continuance of the July 13 status
hearing, but such requests were never made to the court and apparently a stipulation was never
sought from Debtor’s counsel.

1 maintains that, unbeknownst to its current counsel, Shellpoint's prior counsel had produced
2 most, if not all, of the documents now sought to be produced, thereby warranting relief from the
3 August Discovery Order under FRCP 60(b)(2) based on "newly discovered evidence." See
4 Reconsideration Motion at 8:25 to 10:6; Reply at 4:14 to 5:5.⁸ Finally, Shellpoint argues that the
5 Debtor did not disclose the documents previously produced to the Debtor's prior counsel⁹
6 thereby warranting relief under FRCP 60(b)(3) based on "fraud..., misrepresentation, or
7 misconduct of an opposing party" under FRCP 60(b)(3). See Reconsideration Motion at 7:6 to
8 8:23; Reply at 2:5 to 3:24.

9 Debtor maintains that documents required by the Protective Order, the Interim Order, and
10 the August Discovery Order remain outstanding. Both parties agree that some, or perhaps even
11 most, of the documents required have been produced but continue to disagree on whether all
12 have been produced. As previously emphasized, nothing prevents Shellpoint from verifying that
13 it does not have current possession or access to additional documents, and identifying the person
14 or entity previously having possession or access. See Protective Order at 13 n.21; Interim Order
15 at 2 n.2; August Discovery Order at 2 n.2.¹⁰ Both parties concede that a variety of documents

16 ⁸ On January 18, 2022, current counsel for Shellpoint filed separate notices of association
17 of counsel. (ECF Nos. 935, 936, and 937). On January 24, 2022, substitutions of attorney were
18 filed for current counsel to replace prior counsel. (ECF No. 946 and 947). On January 26, 2022,
19 an order was entered approving the substitution of Shellpoint's counsel. (ECF No. 949). On
20 January 28, 2022, the Protective Order was entered. (ECF No. 952).

21 ⁹ On November 29, 2018, Debtor filed an application to employ special counsel to
22 investigate and pursue claims against third parties, including lenders and servicers. (ECF No.
23 135). On January 4, 2019, an order was entered authoring Debtor to employ special counsel.
24 (ECF No. 154). On September 10, 2019, an order was entered granting special counsel's motion
25 to withdraw as counsel for the Debtor. (ECF No. 583).

26 ¹⁰ Shellpoint's apparent position is that it is not certain about the documents that are
27 encompassed by the Debtor's requests, or perhaps that the requests continue to evolve: hence the
28 inability or reluctance to verify that all documents have been produced. The purpose of the meet
and confer requirement, of course, is to resolve such uncertainties. Unfortunately, counsel that
actually participated in the meet and confer that occurred on May 23, 2022, apparently cannot
even agree on the scope of the documents that were actually present during the meeting.
Moreover, given the potential volume of materials that may have been provided electronically by
prior counsel for Shellpoint and the Debtor, some or all of which may or may not be familiar to
current counsel, it is not clear whether a meet and confer requirement is doomed to failure.

1 were electronically transmitted by Shellpoint to the Debtor. Both parties acknowledge that
2 Shellpoint is under a continuing duty to supplement its discovery responses. Both parties make
3 contrasting factual assertions: (1) Shellpoint's current counsel attests that it only recently learned
4 that predecessor counsel had electronically transmitted a substantial number of documents even
5 though current counsel substituted into the case many months prior to the last hearing on the
6 Compel Motion¹¹; and (2) Debtor's counsel attests that all of the documents obtained by former
7 special counsel as well as current counsel were printed and displayed at the meet and confer.¹²

8 The court previously granted the Compel Motion based on the record presented.
9 Shellpoint bears the burden of proving that relief from the August Discovery Order is warranted
10 under FRCP 60(b). See generally 3 MOORE'S MANUAL: FEDERAL PRACTICE & PROCEDURE, §
11 26.40 (Matthew Bender 3d ed. 2021). See, e.g., In re M/V Peacock on Complaint of Edwards,
12 809 F.2d 1403, 1405 (9th Cir. 1987) (FRCP 60(b)(1); Umeda v. Tesla Inc., 2021 WL 148360, at
13 *4 (N.D. Cal. Jan. 15, 2021) (FRCP 60(b)(2)); Hilliard v. Twin Falls County Sheriff's Office,
14 2022 WL 4235136, at *3 (D. Idaho. Sep. 14, 2022) (FRCP 60(b)(3). Having considered the
15 evidence provided in support of the Reconsideration Motion, together with the written and oral
16 arguments and representations of counsel, the court concludes that the request should be denied
17 in part and granted in part for several reasons.

18 First, Shellpoint's argument that the August Discovery Order included "two critical
19 incorrect factual findings," see Reconsideration Motion at 10:12, is immaterial inasmuch as it
20 does not dispute that it did not produce any additional documents by the agreed July 6 deadline.
21 If an alleged mistake by a court actually may be a basis for relief under FRCP 60(b)(1), see

22 ¹¹ The last hearing on the Compel Motion occurred on July 13, 2022.
23

24 ¹² Debtor's counsel attests that any documents transmitted by Shellpoint's prior counsel
25 through an electronic link were not, in fact, ever received. See Johnson Declaration at ¶ 14.
26 Debtor's counsel has requested that the dropbox files transmitted on May 29, 2020, and
27 apparently on October 21, 2021, be re-transmitted to Debtor's counsel to confirm what was
28 actually transmitted. While Debtor's counsel previously acknowledged on May 29, 2020 that the
dropbox files received from Shellpoint were accessible, see note 4, supra, the actual content of
the files was not acknowledged. Because counsel for the Debtor who accessed the files is no
longer with the law firm and Shellpoint's current counsel apparently did not create the dropbox
files, there appears to be no witness with personal knowledge of the contents of those files.

1 generally 11 Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL, §2858.1 (3rd Ed.
2 2022), that mistake did not excuse Shellpoint from the deadline ordered by the court.

3 Second, Shellpoint's reliance on materials that might have been provided by prior
4 counsel on May 29, 2020, prior to the issuance of the subject Subpoena, on October 21, 2021,
5 after the issuance of the subject Subpoena, is insufficient. In either instance, Shellpoint's
6 evidence of its alleged compliance was in possession of its own legal counsel rather than a third
7 party. Given that these materials were available to Shellpoint, and current counsel had actively
8 participated in this Chapter 11 proceeding for nearly seven months before the final hearing on
9 the Compel Motion, the evidence now presented was not "newly discovered" to warrant relief
10 under FRCP 60(b)(2).

11 Third, Shellpoint's allegation that its prior counsel produced all of the materials sought
12 by the Debtor is simply an allegation. Copies of the actual documents contained in the dropbox
13 files are not before the court, and Debtor's counsel attests that the files could not be opened or
14 that they did not contain the requested documents. See Opposition at 7:2-9 & n.2. Debtor's
15 counsel even attests that photographs of the documents covered at the meet and confer held on
16 May 23, 2022, are misleading: only four stacks of documents are shown even though ten stacks
17 were present. See Opposition at 7:13-18. Under these circumstances, Shellpoint has failed to
18 demonstrate the presence of fraud, misrepresentation, or misconduct justifying relief under
19 CRCP 60(b)(3).

20 Fourth, the sufficiency of the documents produced by Shellpoint's prior counsel
21 electronically through the dropbox links apparently is unknown to current counsel for both the
22 Debtor and Shellpoint. Neither party suggests that the electronic copies of the documents
23 previously produced by Shellpoint's prior counsel are no longer available or would require
24 additional assembly. Shellpoint does not suggest that those documents were not reviewed for
25 privilege before transmission by its prior counsel or that additional attorney's fees would be
26 incurred in re-sending the same dropbox files to Debtor's counsel.

27 Fifth, the court has no idea why Debtor has not successfully accessed all of the dropbox
28 files transmitted by Shellpoint's prior counsel or taken other steps to gain access short of filing

1 the Compel Motion. The court has no idea why Shellpoint has not already re-transmitted the
2 dropbox files previously provided by prior counsel along with any access keys necessary to open
3 the files. The court has no idea why Shellpoint's current counsel cannot provide similar indexes
4 of the documents produced by prior counsel to corroborate the contents of the dropbox files.

5 Finally, the court considers whether appointment of a discovery master is appropriate to
6 complete this Chapter 11 proceeding, including the instant dispute between the Debtors and
7 Shellpoint. As the current parties are aware, this Chapter 11 proceeding encompasses a
8 multitude of properties, loans, lenders, servicing agents, and related parties, as well as past and
9 present legal counsel. When discovery disputes have arisen, as in the current instance, the
10 inflection points almost always involve whether documents or records exist and who has them.
11 Disputes are made worse when, as in the current instance, the passage of time has required the
12 involvement of different parties, different representatives, and different counsel. Moreover, the
13 potential volume of the relevant documents presents challenges of the most basic kind, e.g.,
14 whether the same parties have access or possession of the same document.

15 Under these circumstances, the court concludes that a modification of the August
16 Discovery Order is warranted. The court already has concluded that the information sought by
17 the Debtor from Shellpoint is relevant. The Compel Motion is appropriate, but the remedy set
18 forth in the August Discovery Order will be modified.

19 **IT IS THEREFORE ORDERED** that NewRez LLC dba Shellpoint Mortgage
20 Servicing's Motion to Alter or Amend Order Granting Schulte Properties, LLC's Motion to
21 Compel, Docket No. 1116, is **GRANTED IN PART** and **DENIED IN PART**.

22 **IT IS FURTHER ORDERED** as follows:

- 23 1. No later than **December 30, 2022**, Shellpoint Mortgage Servicing shall re-transmit to
24 Debtor's current counsel the dropbox files referenced in this Order.
- 25 2. Shellpoint Mortgage Servicing shall remain under a continuing duty to supplement its
26 responses to discovery, including the above-referenced subpoena, unless otherwise
27 ordered by the court.
- 28 3. The award of attorney's fees and costs to the Debtor in connection with the Compel

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Motion is vacated without prejudice. No attorney's fees or costs are awarded to Shellpoint Mortgage Servicing in connection with this instant motion.

IT IS SO ORDERED.

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:
SCHULTE PROPERTIES LLC
ATTN: OFFICER OR MANAGING AGENT
9811 W. CHARLESTON BLVD STE 2-351
LAS VEGAS, NV 89117

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