

COMERICA BANK, a Texas
banking corporation,

Plaintiff,

vs.

TROPIC RANCH INC., et. al.,

Defendants.

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: CACE12013597 (18)

**DEFENDANTS' MOTION TO
COMPEL BETTER PRODUCTION**

Defendants, H.K. HOTEL MANAGEMENT, LLC, TROPIC RANCH, INC., and HANNA KARCHO-POLSELLI, by and through their undersigned attorneys and pursuant to Florida Rule of Civil Procedure 1.380, hereby file their Motion to Compel Better Production, and in support state as follows:

1. Plaintiff filed the above-styled lawsuit to foreclose commercial real property and personal property, enforce loan documents, and for damages.
2. The instant case is a "companion" case to an earlier-filed action filed by Plaintiff, as to a neighboring parcel, under Case Number CACE11028447 (03). Both cases involve the same parties in interest, and the same counsel, and the respective loans are cross-collateralized.
3. Accordingly, on July 24, 2012, Defendants sought Plaintiff's agreement to consolidate the two cases. On July 26, 2012, Plaintiff replied by stating that it "oppose[s] any effort to consolidate the two cases." October 24, 2012, Defendants again sought Plaintiff's agreement to consolidate the two cases. That same day, Plaintiff replied that it "remain[s] adverse to consolidating the two cases." Copies of the emails to this effect are attached hereto as Exhibit "A."
4. Defendants' response to Plaintiff's Complaint raises numerous affirmative defenses. In order to obtain documentary evidence in support of, and critical to these defenses, July 26, 2012, Defendants propounded their First Request for Production to Plaintiff (the "RFP"), requesting that Plaintiff produce certain documents, "...at the law offices of ROTHMAN & TOBIN, P.A., 11900 Biscayne Boulevard, Suite 740, North Miami, Florida 33181, within thirty (30) days of service of this request." Plaintiff's response was due August 30, 2012. Plaintiff did not object to any portion of the RFP.
5. However, Plaintiff did request numerous extensions of time, all of which were agreed-to by Defendants, with an ultimate agreed-upon final deadline of October 15, 2012 – more than 6 weeks from the original due date. Copies of the emails to this effect are attached hereto as Exhibit "B."
6. After that deadline had already passed, Plaintiff sent a letter to Defendants: (i) enclosing a compact disc, containing numerous batches of PDF files with documents bates-stamped number 000001 to

014209; and, (ii) inviting Defendants to first contact Plaintiff's counsel to coordinate a document inspection. A genuine copy of that letter is attached hereto as Exhibit "C."

7. Presumably, since the documents were bates-stamped, Plaintiff has catalogued which documents correspond to which bates-stamp; however, Defendants were not furnished with this information.

8. In addition, as demonstrated by the letter which accompanied the production (*See* Exhibit "C"), the single compact disc contained documents for both the above-styled case, and for CACE11028447 (03), notwithstanding Plaintiff's repeated refusal to consolidate the two cases upon Defendants' request. Moreover, documents for both cases were intermingled, in random order, with numerous duplications, and with no indication as to which documents were directed at which case, or which documents were responsive to which request.

9. After over six-weeks of agreed-to extensions, Defendants reasonably expected the electronic production to be in some semblance of order and/or organization, and Defendants submit that it is outright bad faith for Plaintiff to produce a disorganized mess of documents, with an invitation to first "coordinate" a document inspection (*See* Exhibit "C"), after the aforesaid extensions and professional courtesies.

10. The civil rule governing production of documents requires that documents be produced as they were kept in the usual course of business or identified to correspond with the categories in the request. Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd., 924 So. 2d 887 (Fla. 4th DCA 2006).

11. Additionally, with regard to electronically stored information, Rule 1.350 (b), Fla.R.Civ.P. provides, in relevant part:

If a request for electronically stored information does not specify the form of production, **the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The party submitting the request may move for an order under rule 1.380 concerning any objection, failure to respond to the request, or any part of it, or failure to permit the inspection as requested.**

12. Plaintiff, a major banking institution, cannot maintain the position that it is their usual business practice to haphazardly comeingle files on separate commercial loans, with no categorization, labels or other meaningful method of organization, and the documents produced by Plaintiff were clearly not identified to correspond with the categories in Defendants' RFP, and were not in a reasonable usable form.

13. As such, Plaintiff's production is incomplete pursuant to Fla.R.Civ.P 1.380, and Defendants are entitled to an order compelling better production, and awarding them reasonable attorneys' fees incurred in connection with the instant motion.

14. The undersigned endeavored to resolve this issue prior to filing the instant Motion, to no avail, as evidenced by the emails attached hereto as Exhibit "D."

WHEREFORE, Defendants, H.K. HOTEL MANAGEMEBT, LLC, TROPIC RANCH, INC., and HANNA KARCHO-POLSELLI, respectfully request the entry of an order the entry of an Order granting the

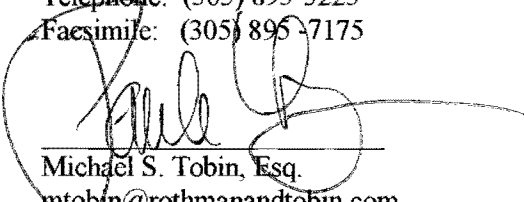
instant Motion, awarding Defendants' reasonable attorney's fees and costs pursuant to 1.380(a)(4), and granting any other relief deemed just and proper under the circumstances.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically served this 9th day of November, 2012 to: Brian K. Hole, Esq., Holland & Knight LLP, 515 E. Las Olas Blvd., Suite 1200, Fort Lauderdale, FL 33301-4249; E-Mail: brian.hole@hklaw.com.

ROTHMAN & TOBIN, P.A.
11900 Biscayne Blvd., Suite 740
North Miami, Florida 33181
Telephone: (305) 895-3225
Facsimile: (305) 895-7175

By:



Michael S. Tobin, Esq.
mtobin@rothmanandtobin.com
Florida Bar No. 958931
Paula Levy, Esq.
plevy@rothmanandtobin.com
Florida Bar No. 0117031

From: Brian.Hole@hklaw.com [Brian.Hole@hklaw.com]
Sent: Wednesday, October 24, 2012 12:24 PM
To: Paula Levy
Cc: Michael Tobin; Bibi Fortun
Subject: RE: Comerica Bank v. Tropic Ranch / Ocean 4660

Hello Paula,

I just realized that I intended to address your question concerning consolidation. Yes, we remain adverse to consolidating the two cases.

Best regards.

Brian.

Brian Hole | Holland & Knight
Partner
515 East Las Olas Boulevard, Suite 1200 | Fort Lauderdale FL 33301
Phone 954.468.7910 | Fax 954.463.2030
brian.hole@hklaw.com | www.hklaw.com

-----Original Message-----

From: Paula Levy [mailto:plevy@rothmanandtobin.com]
Sent: Wednesday, October 24, 2012 8:20 AM
To: Hole, Brian (FTL - X27910)
Cc: Michael Tobin; Bibi Fortun
Subject: Re: Comerica Bank v. Tropic Ranch / Ocean 4660

Hello, Brian. I will look into this.

In the meantime, can you please get us some dates for Mr. Blankstein's deposition, toward the end of November? We may have to take other Comerica employee depositions as well, but would like to start with him.

Are you still adverse to consolidating the two cases? It might be a good time to reconsider this, before depositions commence...

Thank you, Brian. Have a great day.

Paula Levy, Esq.
Rothman & Tobin, P.A.
12514 W. Atlantic Boulevard
Coral Springs, FL 33071
Telephone (954) 510-0500
Facsimile (954) 510-0440
<http://www.rothmanandtobin.com>

Exhibit "A"

From: Brian.Hole@hklaw.com [mailto:Brian.Hole@hklaw.com]
Sent: Thursday, July 26, 2012 6:27 PM
To: Paula Levy
Cc: Michael Tobin; Orlando Cicilia; Bibi Fortun
Subject: RE: COMERICA BANK v. TROPIC RANCH, et al - CASE NO.: CACE12-013597 (18)

Hello Paula,

This is response to your question below. We intend to oppose any effort to consolidate the two cases.

Best regards.

Brian.

Brian Hole | Holland & Knight

Partner

515 East Las Olas Boulevard, Suite 1200 | Fort Lauderdale FL 33301

Phone 954.468.7910 | Fax 954.463.2030

brian.hole@hklaw.com | www.hklaw.com

[Add to address book](#) | [View professional biography](#)

From: Paula Levy [mailto:plevy@rothmanandtobin.com]
Sent: Tuesday, July 24, 2012 11:17 AM
To: Hole, Brian (FTL - X27910)
Cc: Michael Tobin; Orlando Cicilia; Bibi Fortun
Subject: RE: COMERICA BANK v. TROPIC RANCH, et al - CASE NO.: CACE12-013597 (18)

Hello, Brian.

While working with Michael on our clients' response in the above-referenced case, it occurred to us that, particularly because of the cross-collateralization issue, consolidation of this case with the Ocean 4660 matter (CACE11028447 (03)) might best serve judicial economy as well as the interests of all parties. Please let me know if you would oppose a Motion for Consolidation to this effect. Thank you.

Very Truly Yours,

Paula Levy, Esq.

Rothman & Tobin, P.A.

12514 W. Atlantic Boulevard

Coral Springs, FL 33071

Telephone (954) 510-0500

Facsimile (954) 510-0440

<http://www.rothmanandtobin.com>

From: Paula Levy
Sent: Monday, September 24, 2012 2:58 PM
To: Brian.Hole@hklaw.com
Cc: Michael Tobin; Bibi Fortun
Subject: RE: Comerica/Tropic & Ocean 4660

Hello, Brian. In follow-up to our telephone conversation, please be advised that we are amenable to a final extension on your past-due discovery to 10/15. Although I mentioned Plaintiff's recently-propounded discovery in Tropic Ranch on the phone, in reviewing the file, I now see that it is premature to discuss that discovery deadline.

Thank you.

Very Truly Yours,
Paula Levy, Esq.
Rothman & Tobin, P.A.
12514 W. Atlantic Boulevard
Coral Springs, FL 33071
Telephone (954) 510-0500
Facsimile (954) 510-0440
<http://www.rothmanandtobin.com>

From: Paula Levy
Sent: Wednesday, September 12, 2012 4:51 PM
To: Brian.Hole@hklaw.com
Subject: Re: Ocean 4660 & Tropic Ranch
Hello, Brian. Michael had agreed to your requested extension.
Paula Levy, Esq.
Rothman & Tobin, P.A.
12514 W. Atlantic Boulevard
Coral Springs, FL 33071
Telephone (954) 510-0500
Facsimile (954) 510-0440
<http://www.rothmanandtobin.com>

On Sep 12, 2012, at 1:43 PM, "Brian.Hole@hklaw.com" <Brian.Hole@hklaw.com> wrote:
Hello Michael,

I show on my calendar that the present deadline for Comerica Bank to respond to the written discovery you served is September 14, 2012. I have yet to receive the documents Comerica Bank's transactional counsel has in its possession that are responsive to your discovery requests. I am expecting them by the end of the week but I will need to review the documents before producing them to you. May I please have an additional two weeks to respond to the written discovery in each of the two cases -- giving Comerica Bank through September 28, 2012 to respond?

Best regards.

Brian.

Exhibit "B"

Brian Hole | Holland & Knight

Partner

515 East Las Olas Boulevard, Suite 1200 | Fort Lauderdale FL 33301

Phone 954.468.7910 | Fax 954.463.2030

brian.hole@hklaw.com | www.hklaw.com

From: Bibi Fortun

Sent: Thursday, July 26, 2012 3:27 PM

To: brian.hole@hklaw.com; patty.casey@hklaw.com

Cc: Michael Tobin; Orlando Cicilia; Paula Levy

Subject: COMERICA BANK v. TROPIC RANCH, et al - CASE NO.: CACE12013597 (18)

Dear Brian & Patty:

Attached please find copies of Defendants' Answer & Affirmative Defenses and Defendants' First Request for Production. Hard copies have been mailed to your office. Should you have any questions, please advise. Thanks.

Bibi Fortun, Legal Assistant

Rothman & Tobin, P.A.

11900 Biscayne Boulevard, Suite 740

Miami, Florida 33181

Phone: (305) 895-3225

Fax: (305) 895-7175

Email: bfortun@rothmanandtobin.com

Holland & Knight

515 East Las Olas Boulevard, Suite 1200 | Fort Lauderdale, FL 33301 | T 954.525.1000 | F 954.463.2030
Holland & Knight LLP | www.hklaw.com

Brian K. Hole
(954) 468-7910
brian.hole@hklaw.com

October 16, 2012

Via FedEx

Michael S. Tobin, Esq.
Rothman & Tobin, P.A.
11900 Biscayne Boulevard, Suite 740
Miami, FL 33181

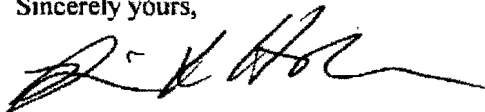
Re: *Comerica Bank v. Tropic Ranch, Inc., et al., Broward County Circuit Court Case No. 12-013597 (18) and Comerica Bank v. Ocean 4660, LLC, et al., Broward County Circuit Court Case No. 11-028447 (03)*

Dear Michael:

Enclosed is a CD containing Comerica Bank's electronic document production in response to Defendants' Request for Production in the above referenced matters. The CD contains PDF images. The documents are Bates numbered BODMAN000001 - BODMAN014209. In reference to the electronic document production, also enclosed is a privilege log identifying privileged documents responsive to Defendants' Request for Production in the above referenced matters.

Please coordinate with my office to schedule a date and time for your inspection of hard copy documents as they are kept in the usual course of business.

Sincerely yours,



Brian K. Hole
For the Firm

MRS
Enclosure

cc: All parties on the attached service list (via regular mail w/o enclosure).

Atlanta | Bethesda | Boston | Chicago | Fort Lauderdale | Jacksonville | Lakeland | Los Angeles | Miami | New York
Northern Virginia | Orlando | Portland | San Francisco | Tallahassee | Tampa | Washington, D.C. | West Palm Beach

Exhibit "C"

From: Paula Levy
Sent: Tuesday, November 06, 2012 12:49 PM
To: Brian.Hole@hklaw.com
Cc: Michael Tobin; Bibi Fortun
Subject: Re: COMERICA DEPOSITION AND DISCOVERY

Not a problem, Brian. If you feel that your production was adequate, we can agree to disagree, and let the judge decide. My motion will be forthcoming. Have a good day.

Paula Levy, Esq.
Rothman & Tobin, P.A.
12514 W. Atlantic Boulevard
Coral Springs, FL 33071
Telephone (954) 510-0500
Facsimile (954) 510-0440
<http://www.rothmanandtobin.com>

On Nov 6, 2012, at 11:48 AM, "Brian.Hole@hklaw.com" <Brian.Hole@hklaw.com> wrote:

> Hello Paula,
>
> I don't understand why you are complaining about the "VOLUMINOUS" documents we produced. We produced exactly what you asked for. Maybe you should have narrowed your request a little more. And, it is not like you did not have some forewarning that there would be a lot of documents when I asked for repeated enlargements of time explaining that I needed the time to review the large volume of documents in the client's possession.
>
> Additionally, several weeks ago we informed you that we have hard documents in our possession for you to review that are also responsive to your document request. You have yet to coordinate with us to review the documents. If you would rather just take a copy of the entire set that is fine with us as well -- just coordinate with me for the copying service to use so that they may bill you directly. As I recall, there are approximately four boxes of documents.
>
> As for the manner in which they were produced, we produced them in the manner in which they were maintained by the client. If you feel that you need to file a motion to compel, please proceed in doing so. Please let me know when you want to proceed with the deposition of Comerica Bank's representative. I can only wait so long before I am going to proceed with a motion for summary judgment.
>
> Please do not hesitate to call me if you want to discuss this further.
>
> Best regards.
>
> Brian.
>
> Brian Hole | Holland & Knight
> Partner
> 515 East Las Olas Boulevard, Suite 1200 | Fort Lauderdale FL 33301
> Phone 954.468.7910 | Fax 954.463.2030
> brian.hole@hklaw.com | www.hklaw.com
>

Exhibit "D"

>
> -----Original Message-----
> From: Paula Levy [mailto:plevy@rothmanandtobin.com]
> Sent: Wednesday, October 31, 2012 4:41 PM
> To: Hole, Brian (FTL - X27910)
> Cc: Michael Tobin; Bibi Fortun
> Subject: COMERICA DEPOSITION AND DISCOVERY
> Importance: High
>
> Hello, Brian:
>
> Upon your return to the office, I need to speak with you regarding discovery issues.
>
> I will likely need to ask you for new dates for your client's deposition. I anticipated being finished reviewing your production by now; however, the VOLUMINOUS documents you produced have taken much longer than expected to review; and frankly, I am exasperated at the manner in which you have produced them. Specifically, you have not given me any indication as to which documents correspond to which requests, and, to make matters worse, you have thrown together all of the documents for both the Tropic Ranch and the Ocean 4660 cases, despite your repeated refusal to consolidate the two cases - even just for discovery purposes. Accordingly, I am contemplating filing a motion to compel better answers, but I wanted to discuss this with you first, to see what we can work out. The outcome of our discussion and/or my motion will dictate when I depose your client, and whether or not I need to do so duces tecum.
>
> Rest up, feel better, then please give me a call.
>
> Very Truly Yours,
> Paula Levy, Esq.
> Rothman & Tobin, P.A.
> 12514 W. Atlantic Boulevard
> Coral Springs, FL 33071
> Telephone (954) 510-0500
> Facsimile (954) 510-0440
> <http://www.rothmanandtobin.com>