

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WESTERN SURETY COMPANY, a South Dakota  
corporation, individually and as assignee of  
WESTRA CONSTRUCTION, INC.,

Plaintiff,

v.

ALLIANCE STEEL CONSTRUCTION, INC.,  
a Wisconsin corporation,

Defendant and Third-Party Plaintiff,

v.

WESTRA CONSTRUCTION, INC.,  
a Wisconsin corporation,

Third-Party Defendant.

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ORDER

06-C-326-C

Defendant/third party plaintiff Alliance Steel Construction, Inc., has moved to compel plaintiff Western Surety Company to produce its entire underwriting file regarding third-party defendant Westra Construction, Inc. For the reasons stated below I am granting Alliance's motion.

This lawsuit arises out of an ill-fated construction project on which Alliance was the primary contractor, Westra was one of Alliance's subcontractors, and Western Surety issued a performance bond for Westra. Westra went out business before finishing its work for Alliance. As a result, Western Surety performed on its bond and became Westra's assignee. After Western Surety crunched the numbers, it claimed that Alliance still owed Westra about \$260,000 out of \$2.9 million billed. Alliance countered that Westra's untimely and inadequate work had

damaged Alliance; therefore Alliance was entitled to withhold the \$260,000. As far as Alliance was concerned, all accounts were even. Western Surety did not accept that response and filed this lawsuit. Alliance pulled in Westra as a third-party defendant and counterclaimed against Western Surety, contending that Western Surety had breached its duty to Alliance by failing adequately to investigate Alliance's complaints about Westra's performance, and by failing to stay apprised of Westra's performance of its subcontract.

During discovery, Alliance requested production of Western Surety's underwriting file, believing that it would contain information showing the extent and timing of what Western Surety knew about Westra's inadequate performance and Westra's precarious financial situation. Western Surety refused to turn over the file, claiming that Alliance was on a fishing expedition, but Western Surety performed its own review of the file and disclosed the documents it deemed relevant to Alliance's allegations.

Alliance, in its brief supporting the motion to compel, cites to other evidence adduced in this case that leads Alliance to surmise that Western Surety's underwriting file has more relevant information than has been revealed. *See* dkt. 32 at 3-5.

Western Surety responds that it has turned over its entire claim file (which governed its relationship with Westra), it has performed its own review of its underwriting file to cull and disclose documents it deems relevant, and that other references during depositions to what might be in the underwriting file are speculative. According to Western Surety, "Alliance's motion was moot before it was filed." Dkt. 35 at 4.

Perhaps Western Surety's approach to Alliance's discovery demand would be acceptable in a Panglossian world, but in modern American civil litigation, one tenet of pretrial discovery is "trust your mother but cut the cards." Western Surety, as the party who filed this lawsuit and who is seeking about a quarter million dollars from Alliance, does not occupy the ideal perch from which objectively to determine which of its own records Alliance is entitled to review to prepare its defense and its counterclaims. There are enough indicia of relevance from enough separate sources for this court to deem Western Surety's underwriting file in play. Perhaps Western Surety already has disclosed every document from its underwriting file that Alliance possibly could consider relevant. But Alliance is entitled to verify this for itself, subject to the confidentiality stipulation between the parties.

It is ORDERED that Alliance's motion to compel discovery is GRANTED. Western Surety forthwith shall disclose the contents of its underwriting file to Alliance.

Pursuant to Rule 37(a)(4), costs are shifted in favor of Alliance on its motion. Alliance may have until May 30, 2007 within which to file and serve an itemized lists of expenses reasonably incurred in pursuing its motion. Western Surety may have until June 4, 2007 within which to contest the reasonableness of the amount claimed.

Entered this 23<sup>rd</sup> day of May, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge