

**In The Missouri Court of Appeals
Western District**

STATE OF MISSOURI EX REL.,)	
SAMUEL K. LIPARI,)	
<i>Relator,</i>)	
)	
v.)	
)	No. _____
THE HONORABLE)	
JUDGE MICHAEL W. MANNERS,)	
CIRCUIT COURT OF)	
JACKSON COUNTY,)	
MISSOURI,)	
<i>Respondent.</i>)	

WRIT SUMMARY

(Form No. 16. Summary For Original Remedial Writs)

Identity of parties and their attorneys in the underlying action, if any: _
Samuel K. Lipari, relator appearing pro se
Honorable Judge Michael W. Manners, respondent

Nature of underlying action, if any:
Seeking enforcement of discovery in real estate contract action.

Action of Respondent being challenged, including date thereof:
Denials of motions to enforce discovery that led to defendants producing no
discovery documents and failing to identify witnesses.

Relief sought by Relator or Petitioner:
Order requiring respondent to perform his ministerial duty of fostering
discovery production, rescheduling of trial.

Date case set for trial, if set, and date of any other event bearing upon relief sought (e.g.,
date of deposition or motion hearing):
10/29/2007 , 09:00:00 - Jury Trial

Date, court and disposition of any previous or pending writ proceeding concerning the
action or related matter:
10/12/2006 U.S. Court of Appeals for the Eight Circuit, *In re Samuel Lipari* 8th
Cir. Case No. 06-3546 Writ of Mandamus seeking remand of action to state court.
11/20/2006 Denied
11/29/2006 Action remanded to state court by trial judge.

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ORIGINAL PROCEEDING IN MANDAMUS

Comes now the relator Samuel K. Lipari appearing pro se and makes this application for a writ of mandamus to order respondent The Honorable Judge Michael W. Manners of the Circuit Court Of Jackson County, Missouri to afford relator discovery rights in the underlying action, *Lipari v. General Electric, et al*; 16th Cir. Case No. 0616-cv07421 under Supreme Court rule 94.

(A) Relief relator seeks from appellate court;

1. The relator respectfully seeks to have the Honorable Judge Michael W. Manners ordered to perform his ministerial duty of fostering discovery production and to postpone the scheduled jury trial until after the General Electric defendants have satisfied the relator’s discovery requests and until after the General Electric defendants have produced discovery substantiating any nonfrivolous affirmative defense.

(B) The action that the relator challenges;

2. On 03/14/2007, the respondent denied relator's first motion to compel production of discoverable documents from the defendants, including the defendant's lease of the building that is the subject of the contract action and the sales contract, ruling that the plaintiff had failed to conform to specific discovery rules, but not finding a duty of the defendant to produce relevant documents or witnesses.

3. On 05/11/2007, the respondent denied the relator's second request to compel production of documents which corrected the previous identified deficiencies. Again the respondent did not find a duty of the defendant to produce relevant documents or witnesses.

4. On 08/06/2007, the defendants served upon the relator a set of interrogatories to be answered by the respondent and a request for production of documents (which the relator had dutifully produced previously on 01/19/2007).

5. As of 08/10/2007, the defendants have not produced a single evidentiary document or information about witnesses related to the relator's claims or the General Electric defendants' affirmative defenses.

(C) The legal reasons for the challenge to respondent's action;

Mandamus under Missouri Supreme Court Rule 94 is the relator's appropriate remedy for the trial court's denial of discovery. See *St. Louis Little Rock Hosp., Inc. v. Gaertner*, 682 S.W.2d 146, 148[1, 2] (Mo.App.1984); *State ex*

rel. Chandra v. Sprinkle, 678 S.W.2d 804 (Mo. banc 1984); *State ex rel. J.E. Dunn Const. v. Sprinkle*, 650 S.W.2d 707, 712 (Mo.App.1983).

Mandamus will lie to review the action of the trial court in sustaining an objection to discovery of a matter which is properly discoverable. *St. Louis Little Rock Hosp., Inc. v. Gaertner, supra*, 682 S.W.2d at 148.

The relator has a clear unequivocal right to discovery from the General Electric defendants upon which to prosecute his real estate contract related claims. Mandamus will lie only when there is a clear, unequivocal, and specific right. See *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982).

The relator's right to discovery is clearly established and presently existing. See *State ex rel. Commissioners of the State Tax Comm'n v. Schneider*, 609 S.W.2d 149, 151 (Mo. banc 1980).

Mandamus lies to require the disclosure of information during discovery when the information is relevant to the lawsuit or reasonably calculated to lead to the discovery of admissible evidence. *State ex rel. Rowland v. O'Toole*, 884 S.W.2d 100, 102 (Mo. App. 1994).

Mandamus will lie to review a trial court's sustention of objections to discovery because the refusal to permit discovery of matters which are relevant to the lawsuit and reasonably calculated to lead to admissible evidence and which are neither work product nor privileged is an abuse of discretion. *State ex rel. Hudson v. Ginn*, 374 S.W.2d 34 (Mo. banc 1964).

(D) Relator’s suggestions in support of the challenge.

The relator has a right guaranteed at law under Rule 56.01(b)(1) to obtain discovery related to the prosecution of his civil action:

“Rule 56.01(b)(1) plainly says that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" (emphasis added)

State ex rel Svejda v. Roldan, 2002 MO 1420 at ¶21 (MOCA, 2002).

The Missouri Supreme Court in *State ex rel. Collins v. Edwards*, 652 S.W.2d 98 at 102 (Mo., 1983) has established that the respondent the Honorable Judge Michael W. Manners has the ministerial duty of fostering discovery as provided by the rules.

The Missouri Supreme Court in *State ex rel. Collins v. Edwards* also established that the factual substance behind claims of privilege should be reviewed by the trial judge for good faith. *State ex rel. Collins v. Edwards*, 652 S.W.2d 98 at 102 (Mo., 1983).

Missouri courts prohibit assertion of a blanket privilege upheld by the respondent:

“*Health Midwest Development v. Daugherty*, 965 S.W.2d 841 (Mo.banc 1998), the Supreme Court of Missouri equated the statutory peer review privilege to other privileges when, in analyzing section 537.035, it characterized all privileges as impediments to the truth and declared that, as such, they are to be strictly construed. *Id.* at 843[32]. In a similar vein, the *Daugherty* court held that "the general principles that govern [other] privileges[]" are to be used in interpreting section 537.035. *Id.* at 843. *Dixon v. Darnold*, 939 S.W.2d 66, 70-71 (Mo.App. 1997) (holding rule against blanket assertion of work product privilege sufficiently analogous to be applied when hospital attempts to make blanket assertion of peer review privilege).”

State ex rel St. John's Regional Medical Center v. Dally, 2002 MO 1367 at ¶31 (MOCA, 2002) The Supreme Court of Missouri held in *Friedman*, 668 S.W.2d at 80, that "blanket assertions of privilege" will not suffice to invoke its protection."

The defendants have not identified any of the documents requested by the plaintiff that are privileged, nor have they described the circumstances leading to the documents being protected:

"Where the party opposing a discovery is in control of facts peculiarly within that party's knowledge, as was the case in the instant proceedings, and it is asserting a privilege or immunity from the discovery request, the burden of proof must necessarily shift from the proponent of discovery to the opponent of discovery. See 1 MO. CIVIL TRIAL PRACTICE, § 5.61 (MOBAR 2D ED.1988) ; see also discussion of blanket assertion of privilege *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 80 (Mo. banc 1984), *infra*.

State ex rel. Dixon v. Darnold, 939 S.W.2d 66 at pg. 70 (Mo. App. S.D., 1997).

The remedy by appeal is not adequate. Like in *State ex rel. Collins v. Edwards* the problems of the defense's lack of good faith have appeared at the inception of the discovery process. The defendants are seeking to frustrate the discovery process intentionally, to force the relator to go to trial without the benefit of discovery as to the subject matter of his action. The relator would face an impossible burden in establishing that the denial of this information could have affected the result of the trial. This court is justified in intervening at the writ

stage, for otherwise the defendants would benefit from their inappropriate attempts. *State ex rel. Collins v. Edwards*, 652 S.W.2d 98 at 102 (Mo., 1983).

CONCLUSION

Whereas because the defendants have produced no discovery and have not identified specific records protected from discovery by privilege or witnesses to the relator's claims or their affirmative defenses as a result of the respondent's orders denying discovery, the relator respectfully requests that the court order the respondent to perform his ministerial duty of fostering discovery. Additionally the relator respectfully requests that this court order the jury trial postponed until the General Electric defendants have satisfied their discovery production requirements under Missouri State law.

Respectively submitted,

S/Samuel K. Lipari
Samuel K. Lipari
Relator
Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 10th day of August, 2007, by first class mail postage prepaid to:

Leonard L. Wagner and John K. Power, Esq., Husch & Eppenberger, LLC 1700
One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

and by personal delivery to the office of Hon. Judge Michael W. Manners in the Circuit Court Of Jackson County, Missouri.

S/Samuel K. Lipari
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