

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR ADA COUNTY

STRIDER CONSTRUCTION CO. INC.,
Plaintiff,

vs.

IDAHO WATER RESOURCE BOARD,
Defendant.

Case No. CV01-22-10932

ORDER DENYING DEFENDANT'S
MOTION TO ORDER RETURN OF STATE
PROPERTY

THIS MATTER comes before the Court on Defendant's Motion to Order Return of State Property, filed May 8, 2023, and Plaintiff's Motion to Strike, filed through counsel on June 8, 2023. For the reasons set forth on the record and herein, both motions are DENIED.

BACKGROUND

This is a breach of a contract action related to a construction contract entered between Plaintiff Strider Construction Co., Inc. ("Strider") and Defendant Idaho Water Resource Board ("IWRB") for certain improvements to the Priest Lake Water Management Project Outlet Dam located in Priest Lake, Idaho. Strider filed its Complaint on July 29, 2022, alleging breach of contract, violation of Idaho Prompt Payment Act, I.C. § 67-2302, and declaratory judgment. Strider seeks over \$1.5 million in damages and a declaratory judgment that its termination of the contract was proper.

On August 23, 2022, IWRB filed an Answer and Counterclaim. The Counterclaim alleges breach of contract against Strider, including for installing defective Tainter gates that leak water and

failing to repair them. Countercl. ¶ 65(f), (g). Strider filed a Reply to the Counterclaim on September 14, 2022.

On May 8, 2023, IWRB filed the instant motion for an order requesting that certain property be returned. Under the parties' contract, Strider was allegedly responsible for replacing J-Seals¹ on the State dam Tainter gates. IWRB maintains that Strider provided deficient Tainter gate repairs, and that the failure to install J-seals with a proper seal resulted in nearly all of the gates leaking water. Countercl. ¶¶ 53—57.

The facts pertinent to the instant motion arose on March 29, 2023, when IWRB's attorney Jennifer Reinhardt-Tessmer ("Reinhardt-Tessmer") had a meet and confer conference with Strider's attorney Kristina Southwell ("Southwell"). Reinhardt-Tessmer asked Southwell whether Strider had in its possession any of the J-seals that Strider was tasked with replacing. Reinhardt-Tessmer Decl. ¶ 2. Southwell responded that Strider did have some J-seals and that they were "probably in Strider's office." *Id.*

Following the meeting, Reinhardt-Tessmer emailed Southwell requesting that the J-seals be returned, along with documentation showing the chain of custody. *Id.* at Ex. A. Southwell responded that the "specs call for removal and disposal of the old J-seals . . . [and that] Nothing indicates that IWRB intended to retain ownership of items it directed to be removed and disposed of." *Id.* at Ex. C. Southwell confirmed that Strider had one original J-seal and one of the new J-seals. The original J-seal is at issue in the instant motion.

¹ J-seal in this case refers to a side seal on Tainter gates of a dam.

Timothy Yedinak (“Yedinak”) was Strider’s project manager on the Priest Lake project at issue. Yedinak Decl. ¶ 2. One of Strider’s contractual responsibilities included “removal and disposal of existing J-Seals” and the installation of new J-seals on 11 Tainter gates. *Id.* at ¶ 3, Ex. A, p. 7, § 1.03(B)(13). During construction, after roughly half of the Tainter gates had J-seals removed and replaced, concerns were raised that a couple of gates were leaking and the new seals were not completely water tight. *Id.* at ¶ 4. The issues were raised and discussed during regular project meetings between IWRB and Strider. *Id.* Yedinak specifically recalled discussing this issue with IWRB representatives Michelle Richman and Mike Morrison in late 2021 or early 2022 when they were onsite. *Id.* at ¶ 5. Yedinak stated that there was a dumpster filled with old J-seals that had been removed from the Tainter gates, and he cut a “small sample piece of old J-seal (approximately two feet long) from the material in the dumpster” and showed it to Richman and Morrison. *Id.* In March 2022, Yedinak again showed the sample to other various IWRB representatives and compared it to the new J-seal.² *Id.* at ¶ 6. Yedinak stated it was “no secret” that he had a sample of the old J-seal in his office and no one from IWRB ever indicated this was a problem or that the old J-seal was IWRB property. *Id.* at ¶ 7. Yedinak testified that after the parties’ contract was terminated, Strider “demobilized and the sample of old J-seal was taken to Strider's office in Wenatchee where it has remained since.” *Id.* at ¶ 9. Attached as Exhibit C to Yedinak’s declaration is a photograph he took on March 28, 2023, showing the sample of old J-seal and the sample of new J-seal in Strider's office. *Id.*

² Attached to Yedinak’s declaration is an email chain between IWRB representatives that Strider obtained in discovery. Yedinak Decl. ¶ 7, Ex. B. The emails noted that Yedinak met with IWRB representatives, summarized the problems and challenges encountered during the installation, and showed them samples of the old and new J-seal material that Yedinak had on hand. *Id.* Bates stamp IWRB020238. Richman responded on March 25, 2022, that she thought it “would be valuable for [IWRB] to have the samples of the old J seal material and the new J seal material for comparison.” *Id.* Richman asked whether Yedinak could provide those samples; however, neither Yedinak, nor Strider personnel, were included on the email. Yedinak testified that “[n]o one associated with [IWRB] ever asked me to provide them with their own samples. Had they asked, I would have gone to the dumpster and cut another sample piece of the old J-seal for them. Had anyone associated with [IWRB] gone into the dumpster to cut a sample, I would not have stopped them. It was trash.” Yedinak Decl. ¶ 8.

ANALYSIS & CONCLUSION

(1) Strider's Motion to Strike

Strider moves to strike the following statements made in IWRB's memorandum and reply briefs arguing they are unsupported by any factual evidence:

- "At a time unknown, and without IWRB's knowledge or consent, Plaintiff determined examining the J-seals would be valuable in the litigation." Memo at p. 2.
- "Rather than follow the proper channels and seek an examination through formal discovery, Strider selected one of the J-seals, stole it from the worksite and apparently took it to his business." Memo at p. 2.
- "Plaintiff did not provide IWRB with advance notice of the removal, nor did Plaintiff or Plaintiff's counsel notify IWRB that such key evidence and State property was taken." Memo at p. 2.
- Strider used "surreptitious means to procure the J-seal." Memo at p. 7.
- Strider "wrongfully took" property from the worksite "just 48 hours before filing the instant litigation." Reply at p. 2, 5.
- Strider decided to remove the J-seal from the project site "knowing it would be initiating litigation in the following days." Reply at p. 2.
- Strider specifically took the J-seal sample "for purposes of the instant lawsuit." Reply at p. 5.

IWRB argues Strider impermissibly used its motion to strike to raise untimely arguments pertinent to the motion to order the return of property. It argues the above statements are supported by declaration and exhibits and/or reasonable argument and inference.

If the statements at issue were made in affidavits or declarations, then the Court would likely grant some of the motion to strike; however, the above statements are made as argument in IWRB's briefs. The Court can determine for itself which arguments are supported or unsupported by the evidence and record. Therefore, the motion to strike is DENIED.

(2) IWRB's Motion for Order of Return of State Property

IWRB contends that Strider has wrongfully retained the J-seal and used "surreptitious means" to

obtain it. Mem. in Supp. of Mot. p. 7. IWRB argues that such “gamesmanship and misconduct should not be rewarded.” *Id.* IWRB argues Strider should be ordered to return the J-seal—which it contends is IWRB’s property—because the Court has inherent powers to control discovery and regulate evidence improperly obtained outside formal discovery. IWRB acknowledges that while there is no Idaho case on point, out-of-state authority is persuasive that the Court can order the rerun of the J-seal in this case. It argues that the property is evidence that is central to this case. It claims that Strider’s conduct to obtain the J-seal was improper³ and it should have utilized formal discovery procedures for the collection or inspection of the evidence.

Strider argues the motion is unwarranted and should be denied, because the parties’ contract provides the J-Seal material is waste to be removed and disposed of by Strider, the sample retained by Strider was discarded in a dumpster and used for demonstrative purposes during site-visits, IWRB was well-aware and did not object to Strider retaining the sample, and IWRB never requested the sample be returned or for its own sample. Strider argues that the serious misrepresentations by IWRB regarding Strider’s conduct should be sanctioned under IRCP 11 if Strider does not promptly retract or correct its allegations. Strider argues there is no legal basis for the motion because the old J-seal was discarded trash (i.e., not IWRB property) and IWRB failed to request the production of or access to the old sample by way of proper discovery means. Strider argues that IWRB is improperly attempting to thwart discovery procedures.

³ IWRB argues Strider’s conduct in retaining the sample J-seal was improper because it took it to its Washington office and filed the instant litigation “just 48 hours later.” It cites to Strider’s brief at page 5. (In Yedinak’s declaration at Section 9, Yedinak states that “After strider terminated the contract due to the stop work order and nonpayment, we demobilized and the sample of old J-seal was taken to Strider’s office in Wenatchee where it has remained since.”). IWRB argues that it “appears” the J-seal was “specifically taken for the purpose of the instant lawsuit, as Strider asserts it has since been preserved and maintained.” IWRB acknowledges that Strider “was permitted” under the parties’ contract to remove and dispose of the J-seals; however, it argues the particular J-seal at issue had not been discarded when the obligations to preserve evidence in anticipation of litigation began. IWRB does not materially address Strider’s argument that the J-seal was abandoned trash. Rather, it maintains that Strider did not inform IWRB that it had the J-seal and improperly took it back to Washington.

At the outset, the Court finds that no evidence was presented that Strider improperly obtained the old J-seal. IWRB made arguments that Strider stole the J-seal or improperly obtained it to gain an advantage in this litigation. However, Yedinak's declaration detailing the opposite is uncontradicted. The undisputed evidence is that Yedinak obtained the sample (which was discarded trash) during construction for demonstrative purposes, i.e., to show the differences between the old and new J-seals and the issues that were occurring with installation. IWRB representatives knew Yedinak had a sample and never requested it back or asked for their own. Had they done so, Yedinak would have complied.

Strider's argument that the J-seal is no longer IWRB property is well taken. The exact contract language at issue provides: "Work under this item shall include all materials, supplies, equipment, and labor required for removal and disposal of existing J-Seals and fabricating, installing, and installation of new J-Seals in all 11 bays as described in these Technical Specifications and as indicated in the Contract Drawings." Yedinak Decl. ¶ 3, Ex. A, p. 7, § 1.03(B)(13). There is no evidence Strider was required to dispose of the old J-seals in any particular manner.

As noted by Strider, "waste is abandoned property that any taker can claim possession and ownership over." Strider Mem. in Opp. p. 10, citing 25 Am. Jur. Proof of Facts 2d 685 ("[A]bandoned property becomes subject to appropriation by the first taker or finder who reduces it to possession. That person thereupon acquires all right, title, and interest in the property as against both the former owner and the person on whose land it was left."); *see also Galvin v. City of Middleton*, 164 Idaho 642, 646, 434 P.3d 817, 821 (2019) (defining

“abandonment” as “the relinquishment of a right by the owner thereof without any regard to future possession by himself or any other person, but with the intention to forsake or desert the right”).

IWRB has failed to show that it has an ownership interest in the J-seal. Strider was contracted to remove and dispose of the old J-seals. With IWRB’s knowledge, Yedinak took one out of the trash and retained it for demonstrative purposes. IWRB knew that Strider retained a sample that was discarded and made no objection to that retention. Had Yedinak not retained the old J-seal, it would have been discarded and there would likely be no evidence for the parties to inspect in this litigation. There is no evidence the J-seal was retained by Strider for any improper purpose, and Strider represents that it has been properly maintained and preserved for litigation.

Because IWRB lacks an ownership interest in the old J-seal and Strider did not have any duty to voluntarily give the J-seal back to IWRB, there is no basis upon which Strider should be ordered to return it. IWRB can certainly request inspection of the J-seal by way of a proper discovery request, or deal with the matter informally.⁴ However, there is no indication that Strider wrongfully obtained and retained the sample of J-seal, and IWRB is not entitled to its return. Therefore, IWRB’s motion to order its return is DENIED.

IT IS SO ORDERED



SAMUEL A. HOAGLAND
District Judge

8/2/2023 8:56:04 AM

Date

⁴ As indicated at the hearing, on a party’s motion, the Court would entertain entering a proper order to preserve the property and to allow for its inspection and testing under appropriate conditions. However, the parties are welcome to resolve the matter informally.

CERTIFICATE OF MAILING

I hereby certify that on 8/3/2023 1:54:33 PM, I served a true and correct copy of the within instrument to:

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Trent Tripple
Clerk of the District Court

By  _____
Deputy Court Clerk