UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WENDY KUBIK, et. al.,

Plaintiff,

vs.

WILLIE GARY, et al.,

Defendants.
_____/

CIVIL ACTION NO. 03-CV-73350-DT

DISTRICT JUDGE PAUL D. BORMAN

MAGISTRATE JUDGE MONA K. MAJZOUB

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR ORDER COMPELLING DISCOVERY (DOCKET # 64)

On December 15, 2004, Plaintiffs in the instant action filed a Motion For Order Compelling Discovery which was referred to the undersigned for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A). The parties, through counsel, presented oral arguments on the matter on January 12, 2005.

The Defendants to this action formerly represented the Plaintiffs in several sexual harassment lawsuits filed against Company A and Company B. Ultimately, Defendants purportedly settled Plaintiffs' claims for $16 million of which Defendants allegedly took $6 million off the top as a separate fee owed them by Company A and/or Company B and retained 1/3 of the remaining $10 million on contingency. The remaining $6.7 million was divided among the 42 Plaintiffs in a structured settlement to be paid out in annuities over several years . Following the settlement, Plaintiff Harsen discovered, mixed in with other documents, a spreadsheet that references Defendants' $3,309,771.55 contingency fee, Defendants' $6 million fee for programs, and a $51.5 million line item for "programmatic relief." (Plaintiff's Brief in Support of Motion, pg. 11). The spreadsheet was prepared by Sofia McGuire, "an outside consultant used by Defendant Attorneys to

purchase the annuities for the structured settlements." Based on these allegations, Plaintiff filed the instant complaint alleging legal malpractice, common law conversion, breach of fiduciary duty, and contract in contravention of public policy, fraud and statutory conversion.

Plaintiffs filed the instant Motion for Order Compelling Discovery on December 15, 2004 seeking an Order compelling: (1) Defendants Willie Gary, Tricia Hoffler and Sekou Gary to produce their W-2 and/or 1099 from the Gary Law Firm for 2002 and/or their 2002 routine salary and bonus checks; (2) Defendants Robert Parenti, Willie Gary, Tricia Hoffler and/or Sekou Gary to provide testimony regarding programmatic initiatives negotiated between Defendants and each company from whom any of the Defendants ever received any fee, compensation or remuneration; (3) Defendants Robert Parenti, Willie Gary, Tricia Hoffler and/or Sekou Gary to provide testimony regarding the prototype settlement agreement including use of Exhibit 74. On January 3, 2005, Defendants' filed an Answer to Plaintiff's Motion to Compel and a Request For Sanctions to be Imposed on Plaintiffs Pursuant to Court's Opinion.

GENERAL DISCOVERY STANDARDS

The Federal Rules of Civil Procedure provide for broad, liberal discovery of any information which may be relevant to a suit. The discovery rules, like all of the Rules of Civil Procedure, must "be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1; *accord North River Ins. Co. v. Greater N.Y. Mut. Ins. Co.*, 872 F. Supp. 1411, 1412 (E.D. Pa. 1995) (courts should apply discovery rules in accordance with "the important but often neglected Rule 1 of the Federal Rules of Civil Procedure[.]"). Under FED. R. CIV. P. 26(b)(1), discovery may be had "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to the discovery of admissible evidence." The determination of "relevance" is within the court's sound

discretion. *See, e.g.*, *Watson v. Lowcountry Red Cross*, 974 F.2d 482 (4th Cir. 1992); *Todd v. Merrell Dow Pharm.*, 942 F.2d 1173 (7th Cir. 1991); *McGowan v. General Dynamics Corp.*, 794 F.2d 361 (8th Cir. 1986). In applying the discovery rules, "relevance" should be broadly and liberally construed. *Herbert v. Lando*, 441 U.S. 153 (1979); *Hickman v. Taylor*, 329 U.S. 495 (1947); *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991). "The requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms." *Miller v. Pancucci*, 141 F.R.D. 292, 294 (C.D. Cal. 1992).

Generally, the party objecting to the discovery has the burden of showing irrelevancy. *McCleod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990); *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982); *Schaap v. Executive Indus., Inc.*, 130 F.R.D. 384 (N.D. Ill. 1990). Further, "[i]n ruling on a discovery motion, a court will not determine whether the theory of the complaint is sound, or whether, if proven, would support the relief requested." 4 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 26.07[1] (2d ed. 1995); *see also*, *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958). *But see*, *Todd v. Merrell Dow Pharm., Inc.*, 942 F.2d 1173 (7th Cir. 1991) (court may deny discovery when the claim or defense appears baseless or speculative).

1. Plaintiff's request to compel Defendants to produce bonus and salary checks

Here, Plaintiffs have requested Defendants to produce documents regarding Parenti's, Gary's, Sekou's, and Hoffler's share of the distribution of attorney fees received by the Gary Firm for the representation of Plaintiffs. Because Plaintiffs complaint contains allegations of conversion, breach of fiduciary duty, fraud, and breach of contract, these documents are relevant and should be produced. Therefore, Plaintiffs' Motion to Compel is GRANTED. Within fourteen days of the entry of this order, Defendants will produce those documents evidencing the money received by Parenti, Gary, Sekou, and Hoffler as a result of the settlements in Plaintiffs' case.

2. Plaintiff's request to compel testimony regarding programmatic initiatives

Next, the Court considers Plaintiffs' request to compel Defendants' testimony regarding programmatic initiatives. Plaintiffs want the Court to order Defendants to disclose settlement agreements Defendants entered while representing other individuals with claims against other corporations.

Defendants initially responded to Plaintiffs' motion by noting that Defendants were prevented from voluntarily disclosing the agreements by confidentiality and non-disclosure provisions in the agreements themselves. At the hearing on this matter, the parties appeared to resolve this issue when Defendants agreed that an order compelling production from this Court would be sufficient to protect Defendants' interests and that Defendant would not object to such an order. Defendants' Supplemental Brief in Opposition to Motion to Compel Discovery attempted to withdraw from this agreement, arguing that the settlement agreements should be produced *in camera*, at which time Plaintiffs ask the Court for any information in the agreements other than the identity of any of the third parties.

Evidence of a settlement agreement is not admissible to prove the validity or invalidity of the claim settled, but is admissible for other purposes, such as proving bias or prejudice of a witness, or proving an effort to obstruct a criminal investigation. Fed. R. Evid. 408. Defendants conduct in settling cases similar to the cases underlying this action is relevant to the present lawsuit because it may help demonstrate that certain conduct was intentional. The identity of the parties to these other settlements is reasonably calculated to lead to the discovery of admissible evidence regarding Defendants conduct in negotiating and settling cases.

Defendants' objection and alternative proposal are without serious merit. Defendants consented on the record to a Court order compelling disclosure of the settlement agreements. The

protective order in this case gives adequate assurance that the identity of third parties to settlement agreements will not become public knowledge. Defendants argue that the third parties to these settlement agreements cannot appear in the Eastern District because their lawyers are so eminent that their mere presence in the provincial backwater of Detroit, Michigan will inevitably disclose the identity of the parties and, presumably, set the entire town a-talking. This argument is without merit where the parties would be made to appear in a town with a number of persons capable of serving as local counsel. Therefore, Plaintiff's Motion to Compel is GRANTED.

IT IS ORDERED that, within fourteen days of the entry of this order, Defendants shall produce: (1) a complete copy of one of the settlement agreements with each company with the names of the individual claimants represented by the Gary firm redacted,[1] and (2) an affidavit signed by Willie Gary or Tricia Hoffler that lists (a) the name of the company, (b) the amount of the programmatic initiative fee paid by that company, (c) the amount of any other fees or payments received by Defendants from that company separate from the programmatic initiative fee, (d) the number of claimants Defendants represented against the company, (e) the month and year the company paid the programmatic initiative fee, (e) the name and address of opposing counsel, (e) if a lawsuit was involved, the identity of the court, case number and judge and (f) if a lawsuit was not involved, the counties and state where the company and claimants reside. Defendants must notify third-parties with whom they believe they have an obligation to do so about this order. All produced information shall be considered "Confidential Information" and shall be subject to this Court's March 31, 2004 Stipulated Protective Order.

[1]Defendants may redact the names of the individuals corporate third parties.

IT IS FURTHER ORDERED that at Plaintiffs' request, Defendants shall make available via telephone one of the Defendants for more detailed deposition questioning regarding this information.

3. Plaintiff's request to compel testimony regarding prototype settlement agreement as contained in Exhibit 74

Finally, Plaintiffs request this Court to compel redeposition of several Defendants on the subject of a prototype settlement agreement and a document described in the proceedings as Exhibit 74. Plaintiff alleges that Defendants have a "'prototype" settlement agreement used for "settling their multiple plaintiff employment discrimination claims where [Defendants] intend on taking a separate legal fee for determining programmatic relief." (Plaintiff's Brief in Support of Motion, pg. 18).

At deposition, Plaintiff asked several witnesses questions about the prototype agreement as contained in Exhibit 74. Defendants did not allow the witnesses to answer on the ground that the questions sought testimony about communications protected by the attorney-client privilege. Plaintiffs' motion does not ask the Court to compel production of Exhibit 74. Rather, Plaintiffs seek to have this Court order redeposition of the witnesses on the ground that communications about the prototype agreement are not privileged.

Defendants assert that Exhibit 74 and other communications concerning the prototype settlement agreement are protected by attorney-client privilege. Plaintiff contends these communications are not privileged because they are subject to the crime/fraud exception. Both parties appear to realize that an *in camera* inspection of Exhibit 74 is likely, and that the outcome of that inspection will likely determine the outcome of the instant motion.[2]

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[2]The following colloquy took place at the deposition of Mary Diaz after Plaintiffs' attorney attempted to ask about Exbihit 74.

Questions of privilege arising in the federal courts are "governed by principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. The attorney-client privilege covers "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403 (1976).

The attorney client privilege, however, does not extend to communications made for the purpose of getting advice for the commission of a crime or fraud. *United States v. Zolin*, 491 U.S. 554, 563 (1989). The crime-fraud exception to the attorney-client privilege "is predicated on the recognition that where the attorney-client relationship advances the criminal enterprise or fraud, the reasons supporting the privilege fail." *People v. Paasche*, 207 Mich. App. 698 (1994). To establish that

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> Mr. Wittlinger: Number one, we have established a foundation that Exhibit 74 is attorney-client privileged. And since it's attorney client privileged it was inadvertently produced.
>
> Here's my suggestion as to how we proceed. That I get back all of the copies you have of Exhibit 74. I will immediately then provide to you a privilege log on which probably the only thing will be Exhibit 74.
>
> Mr. Falzon: Okay.
>
> Mr. Wittlinger: Then you can file your motion and I can then argue to the magistrate that the magistrate should look at the document in camera and make a decision as to whether you get it or not.
>
> Mr. Falzon: Okay.
>
> Mr. Wittlinger: And at that point if you get it, we can discuss whether or not the witness needs to be redeposed. So that's my suggestion of how we're proceeding.
>
> Mr. Falzon: And I agree with that.

(Defendants' Answer to Plaintiffs' Motion to Compel, pg. 7-8, citing Diaz Deposition transcript at 49-51).

an otherwise privileged communication falls within the crime fraud exception, the proponent of the exception has the burden of proving (1) that there is probable cause to believe that a crime or fraud has been attempted or committed; and (2) probable cause to believe that the communication at issue was made in furtherance of it. *Zolin*, 491 U.S. at 563, *Sackman v. Ligget Group, Inc.*, 920 F. Supp. 357 (E.D.N.Y. 1996).

Either party may request that the communication be subject to review *in camera* to determine whether the crime-fraud exception applies. *Zolin*, at 574. A district court may not conduct review *in camera* at the behest of the proponent of the exception unless the proponent presents evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability. *Id.* Once this threshold showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court in light of the circumstances. *Id.* Before a court determines whether to do an *in camera* inspection of attorney-client documents to see if those documents contain evidence that the crime-fraud exception applies, the party seeking the disclosure must use "information extraneous to the attorney-client documents to demonstrate that it was reasonably possible that an in camera examination may show that the crime-fraud exception is applicable." *KW Muth Co. v. Bing-Lear Mfg.,* 219 F.R.D. 554 (E.D. Mich. 2003)(citing *United States v. Zolin*, 491 U.S. 554, 572 (1989).

Here, Plaintiffs' entire case rests on the notion that Defendants' settlement agreements were fraudulent. Plaintiff's brief points to several conversations and other documents extrinsic to Exhibit 74 tending to show that Defendants may have used a common fraudulent settlement agreement scheme in a variety of cases, and that discussions about the prospective structure of this scheme may have involved advice in furtherance of fraud. The parties seemed to agree during the deposition of Mary Diaz that Exhibit 74 would be presented for *in camera* review before this Court. More

importantly, the document has already been disclosed to opposing counsel. This Court can no longer protect Exhibit 74 from mere disclosure to Plaintiffs, since Plaintiffs have already seen it. While inadvertent disclosure does not always vitiate the privilege, reviewing an already disclosed document does less to damage the privilege than reviewing a document that has never been disclosed.

After reviewing Exhibit 74 *in camera*, the Court is convinced that there is probable cause to believe that a fraud has been attempted or committed and that there is probable cause to believe that the communications at issue were made in furtherance of it. Thus, any privilege that may have attached to Exhibit 74 and surrounding communications is waived under the crime-fraud exception.

Communications surrounding the production of the prototype settlement agreement are not privileged. Therefore, Plaintiff's Motion to Compel is GRANTED. Plaintiff may redepose any witness who, on the ground of attorney-client privilege, has either refused to testify or been prevented from testifying in response to questions concerning the prototype settlement agreement or Exhibit 74. Defendants will make the witnesses available within fourteen days of the entry of this order, unless Plaintiffs agree to hold the redepositions at a later date.

IT IS SO ORDERED.

Pursuant to Fed. R. Civ. P. 72(a), the parties have a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. 636(b)(1).

Dated: 2/17/05

s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

Certificate of Service

I hereby certify that a copy of this order was served upon Jay A. Schwartz, Lawrence C. Falzon, Eric E. Reed, Mark J. Zausmer, Reginald M. Turner, Jr., Timothy Wittlinger and Tricia Hoffler on this date February 17, 2005.

Dated: 2/17/05

s/ Lisa C. Bartlett
Courtroom Deputy