

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS,)	CASE NO. CV-2016-09-3928
)	
Plaintiff,)	JUDGE TODD MCKENNEY
)	
v.)	
)	<u>DEFENDANTS' BRIEF IN OPPOSITION</u>
KISLING, NESTICO & REDICK, LLC,)	<u>TO PLAINTIFF'S MOTION FOR</u>
et al.,)	<u>PROTECTIVE ORDER AND REPLY</u>
)	<u>BRIEF IN SUPPORT OF THEIR MOTION</u>
Defendants.)	<u>TO COMPEL DISCOVERY</u>

I. INTRODUCTION

Because Plaintiff wants to choose when she produces her documents rather than follow the Civil Rules, Plaintiff filed a Motion for Protective Order requesting that the Court require the parties to produce their documents simultaneously. Plaintiff has offered, and there is, no reason for this production schedule. She should be ordered to produce her documents immediately.

In combination with that Motion, Plaintiff also filed an Opposition to Defendants' Motion to Compel Discovery. In response, Defendants incorporate their Motion to Compel Discovery and file this Reply Brief to address three baseless arguments in Plaintiff's Opposition: (1) Plaintiff's misrepresentation of the record of the discovery dispute; (2) Plaintiff's misunderstanding that the attorney-client privilege protects her communications with Mr. Horton; and (3) Plaintiff's argument that just because reporters can communicate with attorneys regarding litigation and report on lawsuits does not equate to a privilege that protects Plaintiff from having to produce communications with the reporter, John Harper, and the media outlets. All three assertions are meritless, and Plaintiff should be compelled to produce the discovery sought in Defendants' Motion to Compel Discovery.

II. LAW AND ARGUMENT

A. Plaintiff's Motion for Protective Order should be denied.

Once again, this time through her Motion for Protective Order, Plaintiff believes that she can set the deadlines on when she responds to discovery and produces her documents. Nothing in the law allows her to do that. Defendants Kisling, Nestico & Redick, LLC, Alberto R. Nestico, and Kisling Legal Group, LLC ("Defendants") oppose Plaintiff's Motion for Protective Order by incorporating, as if fully rewritten herein, their reasons and arguments set forth in Defendants' Motion to Compel Discovery and their Supplemental Brief.

Plaintiff contends that fairness requires a mutual exchange of documents because Defendants have not produced their documents. (Opposition, p. 3.) Defendants, however, have more than a justifiable basis for not producing their documents – Plaintiff refuses to agree to a protective order that adequately protects Defendants' proprietary information (to which Plaintiff has agreed is at issue in this case) and that allows Plaintiff to select any number of experts without hindering her case. Until a protective order is entered, Defendants cannot produce their documents. Plaintiff has no such argument for her refusal to produce. Accordingly, Plaintiff's Motion for Protective Order should be denied.

B. Plaintiff's Opposition does nothing to undermine Defendants' Motion to Compel Discovery.

Plaintiff's Opposition to Defendants' Motion to Compel Discovery confirms that Plaintiff should be compelled to produce the requested discovery. Defendants, however, need to correct Plaintiff's errors on three issues outlined below.

1. Plaintiff mischaracterizes the record of the discovery dispute.

As an initial matter, Plaintiff misstates the facts of the discovery dispute. She contends that Defendants did not attempt to resolve the discovery dispute and that further discussion

would have addressed the remaining issues. (Opposition, p. 2.) Nothing could be further from the truth.

Plaintiff's continued failure to produce documents, including, without limitation, communications with Mr. Horton and communications with Cleveland.com and The Plain Dealer establishes that further discussions would not have resulted in Plaintiff complying with her discovery obligations. In addition, her agreement to provide certain additional discovery (e.g., dates of communications with Mr. Horton and to produce Plaintiff's tax and employment records), as outlined in her Opposition, occurred only because Defendants filed the Motion to Compel Discovery. If that is not the case, then Plaintiff should have provided this information and agreed to produce the documents initially in response to the discovery requests, or at the latest, in response to Defendants' November 8, 2016 discovery dispute correspondence. It should not take a series of communications for Plaintiff to understand her obligations under the Civil Rules. Plaintiff is merely playing games with discovery.

The other critical misstatement of the record concerns the issue of the verification page. Plaintiff contends that she never has refused to sign a verification page. (Opposition, p. 5.) She then argues that the dispute concerned whether Defendants provided Plaintiff with a verification page to sign, with Plaintiff allegedly merely responding by informing Defendants that they did not provide her with the verification page. (*Id.*, p. 5-6.) That is not an accurate summary of the discovery dispute.

Defendants' discovery dispute letter requested that Plaintiff sign a verification verifying the interrogatory responses: "Plaintiff has not verified the interrogatory responses. Defendants request that Plaintiff immediately provide the signed verification page." (Ex. F to Defendants' Mot. to Compel.) Plaintiff responded that, because Defendants did not provide a verification

page, she did not sign one. (Ex. I to Defendants' Mot. to Compel.) Plaintiff then demanded that Defendants provide her with a verification page. (*Id.*) Despite professing in her Opposition that she will provide a signed verification page before December 16, Plaintiff still has not (nearly two months after discovery was due). (Opposition, pg. 5.) Again, Plaintiff believes she can dictate how and when she responds to discovery.

2. Plaintiff's communications with Mr. Horton are not protected by the attorney-client privilege.

Regarding the issue of whether Mr. Horton is counsel to Plaintiff in this lawsuit and communications between them are privileged, Plaintiff merely concludes that Mr. Horton is her counsel. (Opposition, p. 6.) She does not provide any affidavit or declaration from either herself or Mr. Horton to support this self-serving conclusion. Plaintiff has offered no facts to establish an attorney-client relationship between Plaintiff and Mr. Horton.

Furthermore, Plaintiff ignores the ethical issues with Mr. Horton serving as Plaintiff's counsel in this lawsuit (e.g., Mr. Horton is also a witness in this case, has a conflict of interest, and is in breach of his confidentiality agreement). (Mot. to Compel, p. 5-8.) She also disregards the fact that Plaintiff waived the privilege based on her discovery responses. (*Id.*) By omission, Plaintiff concedes these arguments. In fact, she reiterates her waiver by stating: "Plaintiff has disclosed the source of her knowledge of these facts as former KNR attorney Robert Horton." (Opposition, p. 4.) The attorney-client privilege simply does not apply to the communications between Plaintiff and Mr. Horton and those documents should be produced.

3. Plaintiff should produce the communications with the media.

Finally, Plaintiff continues to refuse to produce the communications among Plaintiff, her counsel, John Harper, Cleveland.com, and The Plain Dealer. (Opposition, p. 10-11.) She contends that they are irrelevant to this case because of Plaintiff's pending Motion to Dismiss

Defendants' Counterclaim. (*Id.*) As outlined in Defendants' Brief in Opposition to Plaintiff's Motion to Dismiss, Plaintiff's motion should be denied. Furthermore, as pointed out in the Supplemental Brief, these communications are also relevant to Defendants' overall defense to this case and specific defenses (e.g., violation of R.C. 2323.51 and Rule 11) asserted in their Answers. (Suppl. Brief, p. 8.) Plaintiff simply ignores the documents' relevancy to the defense.

In further support of her futile position, Plaintiff argues that the article does not contain anything that is not in the pleadings in this case and that such communications between counsel and the reporter are permitted under the law. (Opposition, p. 10-11.) This somehow allows her not to produce the communications. The problem with this argument is twofold. First, Defendants are not seeking the production of the article, as it was already published. The focus is on the communications, the substance of which is not in the pleadings.

Second, it is irrelevant that attorneys and the press can communicate and that the press can report on lawsuits. Other than the Ohio Shield Law, which protects only the reporter from disclosing only the identity of the source (and not the communications with the source), there is nothing precluding those communications from discovery. Indeed, knowing that the law is not applicable, Plaintiff has abandoned the Ohio Shield Law protection argument by not raising it in her Opposition.

Similarly, Plaintiff offers no argument in response to Defendants' position that the work product doctrine does not apply to these communications and, even assuming *arguendo* that they do, Defendants are still entitled to them. (Suppl. Brief, p. 9-12.) Because these communications

are not protected by any privilege and are relevant to this case (Counterclaim, defenses asserted in Answers, and overall defense strategy), they are discoverable. They should be produced.¹

III. CONCLUSION

For the foregoing reasons and those outlined in Defendants' Motion to Compel Discovery and Supplemental Brief, Plaintiff should be ordered to immediately produce the requested and required discovery and Plaintiff's Motion for Protective Order should be denied. Defendants are also entitled to their legal fees and expenses in filing these discovery briefs.

Respectfully submitted,

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¹ Again, thinking she is above the Civil Rules and Local Rules, Plaintiff asks for the opportunity to submit additional briefing if this Court to entertain Defendants' position. (Opposition, p. 11.) Plaintiff is not entitled to any more briefing, and Plaintiff's repeated conduct should not be condoned.

CERTIFICATE OF SERVICE

A copy of Defendants' Brief in Opposition to Plaintiff's Motion for Protective Order and Reply Brief in Support of Their Motion to Compel Discovery was filed electronically with the Court on this 12th day of December, 2016. The parties may access this document through the Court's electronic docket system.

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