STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Chris Gregerson,

Plaintiff,

v.

Morgan Smith, Boris Parker, and Vladimir Kazaryan; Smith & Raver, LLP, Saliterman & Siefferman, PC, and Bassford Remele, PA, Minnesota Law Firms,

Defendants.

Case Type: OTHER CIVIL
Court File No.: 27-CV-09-13489
Judge: John Q. McShane

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SANCTIONS UNDER MINN. R. CIV. P. 45.01(e) AND FOR VIOLATION OF RULE 45.04(b)(2)

Introduction

Counsel for Boris Parker, Bassford Remele, and Saliterman & Siefferman (the Parker Defendants) used a subpoena to learn the exact settlement amount between Gregerson and former defendants [OCP][1] and [owner of OCP]. This private financial information is unrelated to the claims or defenses in this action, and it's disclosure has permanently damaged Gregerson's bargaining position. Gregerson served a timely motion to quash, but opposing counsel had obtained the information before Gregerson received a copy of the subpoena.

Gregerson's motion to quash made a claim of privilege under Minn. R. Civ. P. 45.03(c)(1)(C). The Parker Defendants were obligated to “return, sequester, or destroy the specified information until the claim [of privilege] is resolved.” Minn. R. Civ. P. 45.04(b)(2). Instead, they sent an un-redacted copy of the settlement agreement to the remaining defendants the following

1 Due to settlement with the original malicious prosecution Plaintiff, the public version of pleadings (which this is) have been redacted to remove the name of the Original Corporate Plaintiff [OCP] and the person who owned the corporation [owner of OCP]. This document is otherwise identical to the document filed with the court.

day, compounding the dissemination of the settlement figure (and other terms). They did so despite having been informed this sanctions hearing was scheduled.

The Parker Defendants misuse of subpoena power has damaged Gregerson's bargaining position while enhancing their own. More than one rule was violated, in letter and intent, and it was not the result of a mistake or accident. Gregerson has been prejudiced in a way that cannot be undone. Gregerson now moves for an appropriate sanction to deter this conduct in the future.

Background

The Settlement Agreement

On July 14th, 2009, Plaintiff entered into a settlement agreement with [owner of OCP] and [OCP], resulting in Gregerson signing a stipulation to dismiss those two parties, and those two parties only, from this case. The agreement was initiated by a phone call from [owner of OCP] to Chris Gregerson personally, and arrived at verbally. Both parties agreed to keep the agreement confidential, reflected in the attached July 14th email between the parties just before the agreement was signed (attached exhibit A). For reasons unclear, Robert Smith ([OCP]'s attorney and the drafter of the settlement agreement) did not include a confidentiality clause in the document. That clause was not to require liquidated damages, but reflect a good-faith agreement, and [owner of OCP] has honored that confidentiality[2].

Subpoena of the Settlement Agreement

On Friday, July 24th, Gregerson received a copy of a subpoena from Paul Peterson by regular mail (see attached exhibit B, Gregerson's motion to quash and memorandum of law in support of motion to quash, at attached subpoena). The subpoena was to Robert Smith, and sought production of the settlement agreement between Gregerson and [OCP], giving a date and time for compliance of Monday, July 27th, at 10:00am.

---

2 For reasons also unclear, [OCP]'s lawyer, Robert Smith, ignored this understanding and produced the subpoenaed document without informing either Gregerson or [owner of OCP] in advance.

The Parker Defendants could reasonably anticipate Gregerson might object to an unredacted copy of his settlement agreement being produced. This would reveal the exact figure Gregerson accepted from [OCP], prejudicial information not related to the claims or defenses in this case. Yet the Parker Defendants only allowed Gregerson one business hour, between 9:00am and 10:00am on Monday, to bring a timely motion to quash the subpoena (which is what Gregerson did, see below). However, the unreasonable narrowness of the opportunity to object resulted in the subpoenaed document having already been produced by the time Gregerson received the subpoena -- Robert Smith produced it by email at 10:44am on Friday, July 24th, one day after the July 23rd signature date on the subpoena.

It's worth noting that the agreement does not indemnify [OCP], nor is it a "Mary Carter" or high-low agreement (which requires disclosure). Arguments about the privacy of the agreement appear below, and Gregerson is entitled to be heard on his objections. There is a fall-back provision under rule 45.04(b)(2), requiring a party to sequester documents already produced once a claim of privilege is raised. The Parker Defendants ignored this rule, too (see below).

Gregerson's Motion to Quash

On Sunday, July 26th, Gregerson emailed Robert Smith:

> "[owner of OCP] and I both want and intended for that agreement to remain confidential. I plan to serve a motion to quash on Monday, July 27th...Therefore, please do not produce the agreement until the motion to quash has been heard and ruled on."

See attached exhibit C, email to Robert Smith. Gregerson prepared a Motion and Notice of Motion to Quash Subpoena of a Settlement Agreement, citing Minn. R. Civ. P. 45.03(c)(1)(C), "privileged or other protected matter". He prepared a Memorandum of Law in support of the motion, and an affidavit of service (see attached exhibit B, motion papers to quash).

On the morning of Monday, July 29th, Gregerson called Bob Smith at 8:30am and left a

voice mail message asking he not produce the subpoenaed document. He served Robert Smith with a copy of his motion papers to quash the subpoena by fax at 9:09am (see exhibit D, fax confirmation). Gregerson emailed Paul Peterson at 9:16am informing him of his motion to quash, attached his motion papers, and offered the possibility of providing a redacted version of the settlement agreement (see exhibit E, email to Paul Peterson). Gregerson served his motion papers to quash the subpoena to Paul Peterson by fax at 9:31am (see exhibit F, fax confirmation).

Gregerson thus served a timely motion to quash first thing next business morning after receipt of the subpoena, before the return date and time on the subpoena. Paul Peterson did not responded to Gregerson's email, so at 2:30pm Gregerson contacted this Court's judicial clerk and an informal phone conference was scheduled for Tuesday, August 4th, at 1:15pm.

Production to Third Parties Following a Claim of Privileged

On Tuesday, July 28th, William Davidson (co-counsel with Paul Peterson) informed Gregerson by email they were already in possession of the settlement agreement, and they considered Gregerson's motion to quash to now be moot. He said they intended to file a copy of the agreement with the settlement amount redacted with their client's motion to dismiss (see exhibit G, letter from Mr. Davidson).

Gregerson replied by demanding they destroy the document and not incorporate it into motion papers. Gregerson also informed Mr. Davidson he had scheduled this motion for sanctions under 45.01(e) (see attached exhibit I, email reply to William Davidson). The next day, counsel for the Parker Defendants served their memorandum of law supporting their motion to dismiss, including an *unredacted* version of Gregerson's settlement agreement – thus sharing the settlement amount with the remaining defendants, Morgan Smith and Vladimir Kazaryan.

Argument

Rule 45.01(e), Prior Notice of Use of a Subpoena

The Parker Defendant's subpoena allowed 1.5 business days for return of the document. They only notified Gregerson by regular mail. This circumvented any reasonable chance for Gregerson to object prior to production, despite his immediate motion to quash. This violates the Minnesota Rules of Civil Procedure's requirement that prior notice be given to other parties before use of a subpoena under 45.01(e):

> "Notice to Parties. Any use of a subpoena, other than to compel attendance at a trial, without prior notice to all parties to the action, is improper and may subject the party or attorney issuing it, or on whose behalf it was issued, to sanctions."

The requirement for prior notice is repeated in Minn. R. Civ. P. 45.02(a):

> Prior notice of any commanded production of documents and things or inspection of premises, copying, testing, or sampling before trial shall be served on each party in the manner prescribed by Rule 5.02.

Rule 45.03(c), which allows for a subpoena to be modified or quashed by the court "upon timely motion", is meaningless if the rules are not interpreted to require other parties are given notice sufficiently in advance of the production of the subpoenaed material. Historically, Minn. R. Civ. P. 45.02 (effective Jan. 1, 1997) provided that:

> "the court, upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena..." (emphasis added)

Gregerson's motion was timely by this definition. The state rules of civil procedure in Kentucky, Colorado, Mississippi, Arkansas, and Hawaii (for example) also utilize the 1997 Minnesota language in describing a timely motion to quash as occurring "promptly, or in any event, at or before the time specified in the subpoena for compliance".

There is little Minnesota case law on this point, but the U.S. 10th circuit concluded that

the "prior notice" requirement to other parties of a subpoena logically must mean "well in advance of the production date":

> The district court...based its reasoning on its observation that "the purpose behind the notice requirement is to provide opposing counsel an opportunity to object to the subpoena."...A contrary interpretation of Rule 45(b)(1), as noted by the district court, "would allow a party to mail notice to opposing counsel one day prior to the date of compliance, effectively prohibiting counsel from responding[3]."...Further, the 1991 Advisory Committee Notes to Rule 45 indicate that the purpose of the notice requirement is to provide opposing parties an opportunity to object to the subpoena. For an objection to be reasonably possible, notice must be given well in advance of the production date.

Butler v. Biocore Medical Technologies, Inc. 348 F.3d 1163, 1173 (10th Cir. 2003)
(internal citations omitted, emphasis added)

Gregerson received notice less than one business day before the production date, which turned out to be too late. The Parker Defendants unnecessarily created a situation where it was not be possible for Gregerson to object prior to production. They could have emailed or called Gregerson on the day they served the subpoena, or provided a later production date, but did not.

Rule 45.04(b), Claims of Privilege

Once Gregerson asserted a claim of privilege in his motion to quash (and attached memorandum) on July 27th, 2009. The Parker Defendants were required, under rule 45.04(b)(2), to destroy or sequester the document until the claim was resolved. They did not. That rule reads:

> If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving

3 This is essentially what happened in this case, give or take a few hours.

> party may promptly present the information to the court under seal for a determination of the claim. <u>If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.</u> The person who produced the information must preserve the information until the claim is resolved.

Minn. R. Civ. P. 45.04(b)(2), emphasis added.

The Parker Defendants ignored Gregerson's claim of privilege, and instead shared the settlement agreement, unredacted, with the other defendants. They have not presented the information to the court under seal, or taken reasonable steps to retrieve the information (requesting the return of all copies of their Memorandum of Law in support of motion to dismiss). Even then, this will not un-ring the bell of having shared the settlement amount with the other defendants. Gregerson requests an appropriate sanction against the Parker Defendants for violation of this rule, under the court's inherent powers.

Privacy of Financial Information

Gregerson's attempts to keep his settlement figure with [OCP], at a minimum, from discovery is within his rights under the rules. Financial information is afforded privacy, and that exact figure is not reasonably calculated to lead to the discovery of admissible evidence. Minnesota has no case law on the privacy of settlement agreements, but California does:

> Private financial information is worthy of protection in discovery...The need for such discovery is balanced against the need for privacy protection in resolving such disputes. When seeking to discover such material, the proponent must make a higher showing of relevance and materiality than would be necessary for less sensitive material.
>
> ...We find <u>a private settlement agreement is entitled to at least as much privacy protection as a bank account or tax information</u>, and analyze the situation on that basis.

Hinshaw Winkler, DRAA, Marsh & Still v. Superior Court (1996) 51 Cal. App. 4th 233, 239 et seq. (internal quotation omitted, emphasis added)

The Parker Defendant's conduct in this case is comparable to the tort of "intrusion upon seclusion" in the Restatement (Second) of Torts, § 652B (1977)[4]. The Restatement offers the example, at illus. 4, "use of forged court order to obtain opposing party's bank records would constitute invasion of privacy". The conduct that has occurred here would satisfy the test of making a reasonable person highly offended.

Court's Policy of Encouraging Settlement

This ordeal has served as an argument *against* settlement. Gregerson now regrets the decision to settle with [OCP], not because of the terms, but because the Parker Defendant's intrusion upon that settlement and dissemination of it to the other defendants. See attached affidavit of Gregerson. Future settlement has been made less likely, especially with the knowledge that privacy rights under the law will no be respected by opposing council. The Court can, by granting an appropriate sanction, re-affirm the policy of encouraging settlement.

Summary

The court would never order the Parker Defendants to divulge to Gregerson the most recent settlement amounts they paid for professional misconduct claims, because that is private, sensitive, and prejudicial financial information unrelated to the claims or defenses in this case. This is what the Parker defendants have done to Gregerson, showing a deliberate disregard for Gregerson's rights under the rules. They did not provide prior notice of use of a subpoena, did not sequester the document once a claim was raised, but disseminated it and have not attempted to retrieve it.

As officers of the court, attorneys have a duty *not* to use subpoena power to learn private financial information of their opponents, unrelated to the claims or defenses in the case, which is prejudicial to their opponents. The Parker Defendants have enhanced their own bargaining position at Gregerson's expense, and their conduct warrants an appropriate sanction.

4 Recognized in Minnesota law. Lake v. Wal-Mart Stores, Inc. 582 N. W. 2d 231 (Minn. 1998)

Sanctions

When there is an honest mistake and the harm can be undone, a remedy other than a sanction should be used. Sanctions motions risk the appearance (or reality) of being shrill and vexatious. Gregerson believes that is not the case here. There was absolutely no reason for the settlement amount Gregerson negotiated with [OCP] to be shared with either the Parker Defendants or the other defendants, over his immediate, timely, and forceful objections. In this case, the conduct was willful and the harm to Gregerson's bargaining position can't be undone. The Parker Defendants deliberate disregard for Gregerson's rights is evidence by their sharing the settlement amount with the remaining defendants, even after Gregerson's claim of privilege was raised and they were informed of this motion for sanctions. They have, as of this writing, not attempted to retrieve the information Gregerson raised a claim of privileged over.

Gregerson defers to the Court in determining an appropriate sanction. As the moving party, he makes the specific requests below, but is receptive to the court's exercise of discretion.

1. The Court order counsel for the Parker Defendants to destroy all copies of the settlement agreement and not incorporate or reference it in any proceedings in this case (this would include their pending motion to dismiss);
2. The court orders the Parker Defendants to, in the future, insure Gregerson receives notice three business days in advance of the return date on any subpoenas, and honor any claims of privilege Gregerson makes in accordance with Minn. R. Civ. P. 45.04(b)(2).
3. A financial sanction of $500 (or an amount deemed appropriate by the court).

Attempts to Confer

Gregerson has made attempts to confer with counsel for the Parker Defendant about this matter since Monday, July 27th, and will continue to try to resolve this matter party-to-party so

this motion can be withdraw before the scheduled hearing. Gregerson will cooperate with discovery going forward and regrets this motion was necessary so early in the case.

Respectfully submitted,

Dated: ______________________ ____________________________________

Chris Gregerson
Plaintiff, *pro se*
150 N Green Ave.
New Richmond, WI 54017
Telephone: 612-245-4306