IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Safety Today, Inc.,	:	
Plaintiff,	:	
v.	:	Case No. 2:12-cv-510
Susan Roy, et al.,	:	JUDGE MICHAEL H. WATSON Magistrate Judge Kemp
Defendants.	:	

OPINION AND ORDER

Plaintiff Safety Today, Inc., the former employer of defendants Susan Roy and Jeanne Brady, filed suit against them claiming they took confidential information away with them when they stopped working for Safety Today and that they used it while working for a competitor, defendant Safeware. On August 2, 2013, defendants filed a motion to compel production of certain documents which, according to Safety Today, are protected from disclosure by the attorney-client privilege. The motion is fully briefed. For the following reasons, the Court will grant the motion by ordering production of the documents for an *in camera* review.

I.

The facts leading up to the motion to compel are not really disputed. From the Court's perspective, the relevant facts are these.

After alleging in its complaint that Ms. Roy and Ms. Brady misappropriated its trade secrets, breached duties of good faith and loyalty, and committed various other torts, Safety Today obtained a temporary restraining order from Judge Watson. As the factual basis for that order, Judge Watson found that shortly before she left the company, Ms. Roy emailed some Safety Today

files to her personal account, accessed some confidential customer information, and took some documents relating to private label gloves manufactured by another company, Superior Gloves. After she left, she forwarded a confidential document obtained by Ms. Brady to two Safeware employees. Judge Watson also concluded that the information which Ms. Roy took was "likely trade secrets" under Ohio law and that irreparable harm would result if she or Safeware were allowed to use it. He consequently enjoined both defendants from "soliciting the business of Safety Today customers to whom they provided services as employees of Safety Today in 2012" and from disclosing or using any of the information at issue. Order of June 29, 2012, Doc. 15. The TRO was extended several times to permit the Court to conduct a hearing on Safety Today's motion for a preliminary injunction.

The Court held a preliminary injunction hearing on September 21, 2012. Following the hearing, and after considering the parties' briefs, Judge Watson issued a preliminary injunction order on October 12, 2012. That order (Doc. 67) specifically recited that Safety Today failed to prove that either Ms. Roy or Ms. Brady still had any of its proprietary information in their possession or that other Safeware employees did so. Based on defendants' agreement, however, Judge Watson enjoined them from using any such information to solicit any customers or to order work from vendors. The balance of the TRO, including that part which prohibited Ms. Roy and Ms. Brady from soliciting business from certain Safety Today customers, was dissolved.

Almost immediately after this order was filed, Safety Today prepared and sent a letter to its customers and vendors about the litigation. Copies of this letter are attached to defendants' motion to compel (Doc. 144) as Exhibit A. After describing the actions taken by Ms. Roy and Ms. Brady as they left Safety Today's employ, the letter stated, in bold typeface, that "**the**

Federal Court acknowledged that Sue Roy and Joanne Brady not only took Safety Today's confidential information and trade secrets but used such information to solicit the business of Safety Today's customers." It then explained that this Court prohibited Ms. Roy and Ms. Brady, as well as Safeware, from using any of that information to solicit customers or to order work from vendors and to "return all original Safety Today confidential information and trade secrets that Sue Roy and Joanne Brady took from Safety Today."

Believing this letter to be a substantial misrepresentation of the Court's order, defendants served a document request on Safety Today asking for any drafts of that letter and any email correspondence relating either to the letter or to the Court's order. There are apparently a large number of such documents. Most of them were either sent by or to Kimberly Duttlinger, one of Safety Today's attorneys. Ms. Duttlinger testified in her deposition that she "drafted this letter with folks at Safety Today" including Ed Gustafson and possibly others. (Duttlinger Deposition, Doc. 117, at 18). She also testified that outside counsel, Gary Batke, reviewed the letter before it was mailed and that there were changes made to it after his review. Id. at 21. She agreed that "the intent of the letter was to give ... customers a fair understanding of what was going on in the litigation." Id. at 23.

Ms. Duttlinger was also questioned extensively about whether the information which Ms. Roy and Ms. Brady took from Safety Today was, in fact, confidential. She acknowledged that the parties to this case took different positions on that issue. Id. at 47. She also stated that this Court has not yet resolved that issue although she felt, based on the language in the preliminary injunction order, that Judge Watson must have considered "some of the information to be trade secret." Id. at 53.

Defendants have counterclaimed based on the mailing of these letters to customers and vendors. The counterclaim (Doc. 105) alleges that despite the fact that "Judge Watson's Decision [the ruling on the motion for preliminary injunction] is absolutely clear that the Court never acknowledged that confidential information or trade secrets had been used by either Ms. Roy or Ms. Brady," the letter "falsely asserted that Defendants took and used Plaintiff's confidential information and trade secrets." *Id*. at ¶s 9 & 11. Claiming that this misstatement was made "with actual knowledge ... that the assertions in it were both false and directly contrary to Judge Watson's actual ruling," defendants have brought claims for tortious interference with contract or prospective business relations and for defamation. Subsequently, they provided the Court with evidence from Safety Today's own documents that various vendors who received the letter expressed some measure of support for Safety Today's actions against Safeware and the two individual defendants based on the letter's contents.

II.

The document requests at issue are reprinted in the motion to compel at page 8. They asked for:

> 1. All drafts and versions of the October 17, 2012 letter sent by Plaintiff Safety Today regarding the October 12, 2012 order, as referenced in pages 18-20 and 59 of Kimberly Duttlinger's deposition transcript.
>
> 2. All email correspondence concerning or referencing the October 17, 2012 letter sent by Plaintiff Safety Today regarding the Court's October 12, 2012 order, as referenced on page 20 of Kimberly Duttlinger's deposition transcript.

Safety Today produced "a few responsive documents" but withheld 76 separate documents on the ground of attorney-client privilege. The privilege log showing the withheld documents is Exhibit E to

the motion to compel.

Defendants dispute the designation of these documents as privileged for one basic reason. They say that the "crime-fraud exception" to the attorney-client privilege applies to the documents because the documents all related to a future unlawful action - namely, the sending out of a false letter with the intent to injure the defendants' business relationships. Defendants do not argue that sending out the letter violated any criminal laws, but they do contend that it was the type of unlawful act which comes under the crime-fraud exception. They also assert that it is fairly evident from the privilege log's description of the documents that they all relate to the process by which the letter came to be drafted and sent out. Relying on the formulation of the elements of the crime-fraud exception as set forth in Ohio decisions like Moskovitz v. Mt. Sinai Med. Ctr., 69 Ohio St. 3d 638 (1994), defendants conclude that their evidence satisfies that standard and that, at the very least, they have made out a case for *in camera* review of the documents.

In its opposing memorandum, Safety Today takes issue with a fundamental premise of defendants' argument. It asserts that the crime-fraud exception to the attorney-client privilege is limited to situations where the conduct in question is either a crime or an actual fraud; that is, the exception does not apply more generally to "unlawful conduct" which is neither criminal nor fraudulent. Safety Today cites, *inter alia*, Squire, Sanders & Dempsey LLP v. Givaudan Flavors Corp., 127 Ohio St. 3d 161 (2010)(which, in turn, cited State ex rel. Nix v. Cleveland, 98 Ohio St. 3d 379 (1998)) for the proposition that the party invoking the crime-fraud privilege must show that either a crime or a fraud was committed, and that mere wrongful (but not criminal or fraudulent) conduct will not suffice. Safety Today argues, in the alternative, that even if some type of conduct

which is neither criminal nor fraudulent could satisfy the crime-fraud exception, the type of conduct alleged here - which Safety Today describes as "the underlying torts at issue in the case" - does not qualify. Lastly, it argues that defendants have failed to show that any type of wrongful conduct occurred. It seeks not only denial of the motion to compel, but sanctions, asserting that the motion has no legal foundation.

III.

Safety Today's arguments raise this threshold issue: If one assumes that all of the withheld documents relate to the drafting of the letter in question, and further assumes that the letter intentionally misrepresented the Court's order so that Safety Today could gain some competitive advantage in the marketplace or cast unwarranted aspersions on Ms. Roy, Ms. Brady and Safeware, does the attorney-client privilege still protect those documents from disclosure? Or, as the court in Koch v. Specialized Care Services, Inc., 437 F.Supp. 2d 362, 371 (D. Md. 2005) put it, "[t]he principal question at issue here is what type of alleged conduct falls within the ambit of the crime-fraud exception." As it turns out, the answer to that question is not quite so straightforward as Safety Today has suggested.

The parties agree that Ohio law governs this issue, and that is correct. See Fed.R.Evid. 501. The Court therefore begins its analysis with a discussion of Ohio law.

Unquestionably, Ohio recognizes both the attorney-client privilege and the crime-fraud exception to that privilege. Although Safety Today suggests that the Ohio legislature has defined the scope of the crime-fraud exception in R.C. §2317.02(A)(2), as defendants note, that statutory provision applies only to insurance bad faith claims, and it is only a testimonial privilege. Ohio still retains a substantial body of common law in the area of attorney-client privilege, and even

after the enactment of §2317.02(A)(2) Ohio courts continue to analyze the crime-fraud exception under the common law as it has developed through the courts. See, e.g., Sutton v. Stevens Painton Corp., 193 Ohio App.3d 68 (Cuyahoga Co. 2011). The elements of the exception are still defined by Nix, supra. Id. at 75. And although the language of Nix refers to the commission of either a crime or a fraud, it is instructive to note that in Nix itself, the wrongdoing which underlay the crime-fraud exception argument was the forming of a conspiracy to bring false criminal charges against the plaintiff - something which seems to be neither a crime nor a fraud.

Nix is not the only Ohio decision which analyzes a species of wrongful conduct other than crime or fraud as potentially satisfying the crime-fraud exception. For example, Euclid Retirement Village, Ltd. Partnership v. Giffin, 2002 WL 1265570 (Cuyahoga Co. App. June 6, 2002) was a breach of fiduciary duty case in which limited partners sued the general partner for breach of fiduciary duty. They claimed, among other things, that an attorney had assisted the general partner in carrying out the challenged transactions. The appeals court held that the attorney's billing records, which the plaintiff had requested through discovery, were not privileged, but it also held, in the alternative, that the crime-fraud exception applied to the records even if the information in them was privileged. The court reached that conclusion despite characterizing the wrongful conduct as simply a breach of fiduciary duty, noting that "the unlawful activity was self-dealing and the unlawful transfer of partnership debt" and upholding the trial court's determination that "the documents were not privileged under the crime-fraud exception to the attorney-client privilege." Id. at *5. This Court reached a similar result in Horizon of Hope Ministry v. Clark County, Ohio, 115 F.R.D. 1, 5 (S.D. Ohio 1986), a case

involving a claim of civil rights conspiracy, where Judge Rice observed that "[a]ttorney/client communications which are in perpetuation of a tort are not privileged."

The most persuasive argument for this somewhat fluid approach to the crime-fraud exception is found in Koch v. Specialized Care Services, Inc., supra. That was a case, like this one, in which tortious interference with contract was alleged. Specifically, the plaintiffs, shareholders in a privately-held corporation who had sold 90% of their shares to a second corporation and who had negotiated terms for the sale of the remaining 10%, alleged that the defendant acted intentionally to deprive them of the benefit of their bargain for that latter sale. Part of the interference they identified was a letter written by the defendant's counsel stating (falsely, in their view) that one of the plaintiffs had resigned his employment with the second corporation. Again, as here, communications between the defendant and its attorney leading up to the letter's being sent were designated as privileged, and, as here, the party alleging tortious interference claimed that the defendant acted with actual malice and with the intent to deprive the plaintiff of the economic benefit of his contract.

That is not a fraud claim. Yet the Koch court applied the crime-fraud exception, noting that although the Maryland courts had not "ruled on the applicability of the exception to torts," it was true that "an intentional tort involving misrepresentation, deception, and deceit, ... would appear to constitute fraud" as defined in both Maryland law and the Restatement of Torts. Id. at 372-73. In so holding, the court said that when determining whether to apply the crime-fraud exception, "courts increasingly focus on the conduct alleged. The determinant of the exception's applicability is the wrongfulness of the conduct before the Court, not the form of its

pleading." Id. at 373. The court also commented that "[i]t is not necessary to a finding of the exception that a party plead a specific crime or cause of action in fraud" because "courts have moved to expand the conduct undeserving of the attorney-client privilege." Id. The Koch court then surveyed the trend in the law up to the date of its decision (2005) and, after citing numerous treatises which support the expansion of the exception to any intentionally tortious conduct undeserving of protection, concluded that "[a] survey of case law demonstrates judicial willingness to expand the exception to the kind of conduct alleged here." Id. at 376. Finally, the court determined that the tortious interference alleged by the plaintiff, which involved "injurious falsehood," fell close enough to the type of fraudulent conduct covered by the crime-fraud exception to justify applying that exception to the privileged documents in question. Id. at 376-77.

The Koch decision, especially in its treatment of the Restatement (Third) Law Governing Law §82 cmt. d., candidly acknowledged that there is a split of authority on whether the exception should be expanded beyond actual crimes or frauds to other intentional tortious conduct, and that the Restatement points out that formulating a broad rule about what additional types of conduct should be included is a difficult task. At the same time, however, the Restatement recognizes that "[l]egislatures and courts classify illegal acts as crimes and frauds for purposes and policies different from those defining the scope of the privilege. Thus, limiting the exception to crimes and frauds produces an exception narrower than principle and policy would otherwise indicate." Id., quoted in Koch at 375. That led the Koch court to opt for a case-by-case analysis when actions which are not strictly crimes or frauds are involved. See also In re Heraeus Kulzer GmbH for an Order

Pursuant to 28 U.S.C. Section 1782 to Take Discovery Pursuant to Federal Rules of Civil Procedure for Use in Foreign Proceedings, 2012 WL 1493883 (N.D. Ind. April 26, 2012)(applying the exception in a case of misappropriation of trade secrets).

For essentially the same reasons set forth in Koch, this Court concludes that Ohio courts have, and will continue to, analyze wrongful conduct not strictly falling into the category of either crimes or frauds on a case-by-case basis to determine if the conduct involves similar elements of malicious or injurious intent and deliberate falsehood. If it does, there is no reason why the law should prevent disclosure of the role an attorney may have played in assisting his or her client to commit that type of act, which itself has no social value.

Deciding that something other than a crime or fraud can trigger the application of the crime-fraud exception does not, of course, resolve the motion to compel. The Court must still decide if the facts which defendants allege qualify as the intentional and injurious conduct which is similar to fraud; and, if so, whether the traditional two-prong test for invoking the crime-fraud exception has been satisfied. The Court begins with the first question.

Here, defendants have alleged tortious interference with contract or business relations, which is a species of intentional tort under Ohio law. Two elements of that claim are "the wrongdoer's intentional procurement" of an interference and "lack of justification." See, e.g., Reali, Giampetro & Scott v. Soc. Nat'l Bank, 133 Ohio App.3d 844, 849 (Mahoning Co. 1999). As in Koch, these are matters which require the specific intent to commit a wrongful act. Further, under the facts of this case, the alleged wrongful act is a misrepresentation designed to mislead others, and may be seen as especially egregious because the misrepresentation relates to a court order. The Court has

little difficulty in concluding that the conduct alleged (which, of course, Safety Today disputes) is sufficiently akin to fraud to permit the Court to explore further the applicability of the crime-fraud exception.

Once such an act has been identified, the Court must proceed as outlined in United States v. Zolin, 491 U.S. 554 (1989). As Zolin explains:

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982), that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Id. at 572. Following that standard, "courts have required the privilege challenger to present evidence: '(1) that the client was engag[ed] in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.'" In re Grand Jury Proceedings, 417 U.S. 18, 22 (1st Cir. 2005), quoting In re Grand Jury Proceedings (Violette), 183 F.3d 71, 75 (1st Cir. 1999). Proof by even a preponderance of the evidence is not needed; rather, the requesting party's burden is satisfied by showing that there is a "reasonable basis" for the privilege challenger's claim. Id. at 23; see also In re Antitrust Grand Jury, 805 F.2d 155, 166 (6th Cir. 1986)(party seeking to avoid the privilege "must present evidence to give 'colour to the charge' that a wrongful act was committed and that the communications at issue show the attorney's involvement in it").

Here, there is little doubt that Safety Today was planning to send the letter in question during the time that the

communications occurred. Ms. Duttlinger and the other participants in the letter's drafting all testified to that fact. The real issue is whether defendants have made at least a *prima facie* showing that sending the letter constituted the tort of intentional interference with business relationships, committed by means of an intentionally misleading misrepresentation of Judge Watson's order.

Safety Today's memorandum does not directly address this issue. Rather, its argument, consistent with its position that this type of tortious interference claim is not strictly a crime or fraud and that Ohio requires proof of such acts, is that "Defendants have not established or even identified any crime or fraud ...." Memorandum in Opposition, Doc. 158, at 12. Perhaps so, but they have identified a wrongful act. Further, there is at least *prima facie* evidence to support their claim. The wording used in the letter can be read as a misstatement of Judge Watson's order, and the identity of the recipients, the letter's strong suggestion that the defendants were engaged in either illegal or unethical conduct, and Safety Today's tracking of the responses permits an inference that it was Safety Today's intent to make it harder for defendants to compete with Safety Today. That is a sufficient showing to justify at least an *in camera* review of the withheld documents.

It is important to stress, at this point, what the Court is *not* deciding. The Court has not determined, as a matter of law, if the letter represents an intentional misrepresentation of Judge Watson's order - only that its language can be read to support that inference, among others. Further, the Court has not determined that defendants have proved either the intent element, or any other element, of their tortious interference claim. That will ultimately be a decision for the trier of fact. The Court is also not deciding, without the benefit of an *in camera* review,

if any of the withheld documents show that Safety Today's attorneys may have wittingly or unwittingly furthered the alleged intentional and malicious misrepresentation; that is the very purpose of the review. Finally, it is helpful to recall that this is only a discovery issue, and while the attorney-client privilege is an important consideration in the discovery stages of the case, if an exception applies which allows disclosure of attorney-client communications, the ultimate significance of those communications is again a matter for the trier of fact. At this point, all the Court has decided is that a species of intentional tortious conduct involving intentional misrepresentations has been identified; that there is some credible evidence to support the claim; and that the communications at issue were made at a time and in such a manner as to permit an inference that they had the effect of furthering the conduct at issue. That is enough to allow for an *in camera* review of the documents, and that is what the Court orders.

It should be apparent that the Court has rejected Safety Today's claim that the motion to compel lacked even an arguable basis in law. That being so, an award of sanctions in its favor is clearly unwarranted.

IV.

Based on the discussion contained in this Opinion and Order, the motion to compel (Doc. 144) is granted. Within seven days, Safety Today shall deliver the withheld documents to the Court for an *in camera* inspection. After that is completed, the Court will issue a further order concerning whether any of the documents in question must be disclosed to the defendants.

V.

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A),

Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.3.

/s/ Terence P. Kemp
United States Magistrate Judge