Cite as 2023 Ark. App. 539

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-22-338

PROTECH SOLUTIONS, INC. APPELLANT V. CHASE GLOBAL SERVICES APPELLEE	Opinion Delivered November 29, 2023 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, TWELFTH DIVISION [NO. 60CV-19-739] HONORABLE ALICE S. GRAY, JUDGE AFFIRMED

BART F. VIRDEN, Judge

This case is about a potential waiver of attorney-client privilege. Protech Solutions, Inc. ("Protech"), and Chase Global Services ("Chase") are involved in litigation regarding a bid to replace the State of Nevada's computer-based child-support-enforcement system. Protech was ordered by the circuit court to produce documents it claims are protected by the attorney-client privilege and work-product doctrine. Protech then filed this interlocutory appeal.

I. *Factual and Procedural Background*

While the facts in the underlying lawsuit are not relevant to the issue on appeal, a brief overview provides context. On July 20, 2016, Nevada issued "Request for Proposals 2017" ("RFP 2017") to solicit bids on replacing its computer-based child-support-enforcement system. In early September 2016, Protech and Chase entered into a

nondisclosure agreement and a teaming agreement, both in relation to their joint response to RFP 2017. Protech was to be the prime contractor with Chase as a subcontractor. Protech submitted the response to RFP 2017. However, after the bids were submitted, Nevada withdrew RFP 2017 and returned all proposals to the bidders without awarding a contract.

Approximately one year later, Nevada issued "Request for Proposals 3462" ("RFP 3462") to again solicit bids on replacing its computer-based child-support-enforcement system. Before the bids were due, Chase's and Protech's counsel exchanged letters about whether Protech could respond to RFP 3462 without including Chase in the bid.

Protech later submitted a bid on RFP 3462 that did not include Chase. Nevada awarded the contract to Protech on April 10, 2018. On May 17, 2018, Chase's counsel sent another letter to Protech accusing it of wrongdoing.

In February 2019, Chase filed its complaint against Protech. The complaint was later amended and sets forth claims for breach of the teaming agreement, breach of the nondisclosure agreement, unjust enrichment, intentional interference with business expectancy, violation of the Arkansas Trade Secrets Act, fraud, and a request for declaratory relief. Chase served its first set of interrogatories and requests for production on Protech on March 13, 2019. Those requests are not involved in this appeal.

We now turn to the timeline regarding the documents at issue in this appeal. On July 1, 2019, Chase propounded on Protech its second set of requests for production, which included Request for Production No. 20: "Please produce all of the Defendant's internal correspondence (including emails) regarding RFP 2107, RFP 3462, or the Plaintiff since

January 1, 2014." There were five requests for production in total and one interrogatory in the second set of requests for production. The deadline to respond to these requests was August 5, 2019. *See* Ark. R. Civ. P. 6(d) and 34.

Protech responded on August 5, 2019; however, it produced no documents at that time. Its response contained a preliminary statement, which said, "Each response and any documents produced subject to all objections as to . . . privilege, privacy, and any and all other objections on grounds that would require the exclusion of any response or document." The preliminary statement further says, "Defendant's responses to all or any part of the Requests are not intended to be, and shall not be, a waiver of any objection(s) to such Request(s)." Protech also stated in the preliminary statement that it reserved the right to "modify and/or supplement" its responses.

Specifically in response to Request for Production No. 20, Protech stated:

> Defendant objects to the Request to the extent it seeks documents that are not relevant to any claim or defense and/or insofar as it is unduly burdensome or seeks documents whose collection is more burdensome and expensive than beneficial under the circumstances and is not proportional to the needs of the case or is unreasonably cumulative. Defendant objects to this Request insofar as it is duplicative of other Requests. Subject to and without waiving Defendant's objections, Defendant will conduct a search of reasonable scope and produce copies of Defendant's internal correspondence (including emails) regarding RFP 2107, RFP 3462, or the Plaintiff since January 1, 2014.

Again, Protech did not produce any documents on August 5. Protech had not requested additional time to respond to the discovery requests from Chase nor did it state why it had not yet conducted a search of its internal documents in order to fully respond to Request for Production No. 20.

A month later, on September 6, Protech produced a batch of documents it simply titled "Protech Production 003." The record contains no indication that Protech's written responses and objections were amended, and no party argues they were. The documents produced on September 6 included emails with Bates numbers PT 10191–10235 (the "Contested Documents"). The documents are completely redacted, except a few short phrases, and they appear to be emails with everything except the to, from, date, and time fields redacted. Protech produced a privilege log at the same time, asserting attorney-client privilege and work-product doctrine to most of the Contested Documents. The privilege log does not use Bates numbers to identify the Contested Documents but instead uses "Privilege IDs," and Protech did not provide any key for matching the Bates numbers on the Contested Documents to the Privilege IDs. Documents in Bates ranges PT0010194–96 and PT0010212–14 are not included in the privilege log at all. Although Protech represented to the circuit court that it was not asserting privilege for PT0010194–96 and PT0010212–14, the record does not reflect those documents have been produced in unredacted form.[1]

On January 2, 2020, Chase filed a motion to compel discovery ("First Motion to Compel"). In that motion, Chase argued that the Contested Documents were "full of redactions that appear on their face to not be privileged documents" because legal counsel is not listed in any of the email addresses that are visible. In its response to the First Motion to Compel, Protech noted that Chase was seeking production of "15 redacted documents

[1]The record before this court does not include unredacted copies of any of the Contested Documents.

which are included in Defendant's privilege log. The 15 documents each contain one or more of the following: references to and discussion of attorney work-product and legal advice; attorney-client privileged communications; and, attorney work-product attachments." At this point, Protech still did not state which request for production the documents were related to. Protech further stated in its response to the First Motion to Compel, "Defendant is reviewing redactions."

Before the circuit court ruled on the First Motion to Compel, Chase filed its second motion to compel discovery on April 27, 2020 ("Second Motion to Compel"). The Second Motion to Compel does not raise any arguments regarding Request for Production No. 20.

On July 7, 2020, the circuit court held a thirty-minute hearing on various discovery matters, but Request for Production No. 20 was not discussed during that hearing. Chase represented to the circuit court at a later hearing that it thought the parties had an agreement about the Contested Documents before the July 7 hearing, but there is no evidence in the record of any agreement. At the July 7 hearing, the parties presented arguments regarding Chase's entitlement to information relevant to a punitive-damages claim, Chase's entitlement to teaming agreements related to other lawsuits, and other discovery disputes. The circuit court then instructed the parties to submit an order memorializing the rulings from the hearing as well as the dispositions of two motions the parties resolved without court intervention. Neither of the resolved motions were the First Motion to Compel relevant to this appeal.

On July 24, 2020, Chase wrote a letter to the circuit court explaining that the parties could not come to an agreement on an order regarding the July 7 hearing. Chase included in its draft some language addressing the Contested Documents. Protech would not agree to that language. It is unclear why language about the Contested Documents was included in Chase's proposed order, even though that issue was not addressed during the July 7 hearing, and that was not the subject of the motions the parties had resolved before the July 7 hearing. On October 22, 2020, Chase wrote another letter to the circuit court requesting an order compelling the production of the Contested Documents. The circuit court did not enter an order regarding the Contested Documents at this time.

On October 26, 2020, Protech filed a motion for protective order regarding the Contested Documents. On December 1, 2020, Chase filed a countermotion for the production of unredacted copies of the Contested Documents.

On March 31, 2022, the circuit court held a hearing regarding the competing orders from the July 7, 2020 hearing and Protech's motion for protective order. Chase's counsel stated that he did not argue the First Motion to Compel and bring up Request for Production No. 20 because "we believed it had been resolved by agreement. And, after the hearing, we find out that they want to make these elaborate claims for it . . . that they had waived. Waived in their responses to the request for production of documents . . . . Waived for not raising it in response to the motion to compel the first time around." Chase's attorney presented the privilege log to the circuit court, noting that it did not use the same Bates numbers as the redacted documents that were produced.

After argument by the parties, the circuit court ruled from the bench:

> The Court's ruling is just going to be that you provide the unredacted to the other side because I believe, based on what I can see, that the privilege was waived. I don't think that the response that was made in conjunction with the privilege log was sufficient to apprise the other side that you were claiming privilege as to that particular request. I think it should have been clearer.

On April 15, 2022, the circuit court entered an order directing Protech to fully respond to Chase's discovery requests and remove its blanket confidentiality designations. However, the order specifically states, "The Court's ruling that Defendant shall remove the redactions on documents marked PT0010191 to PT0010235, and that the privilege Defendant attempted to assert regarding these documents was insufficient and waived *will be addressed*, as appropriate, by further order." (Emphasis added.)

On May 3, 2022, the circuit court held a hearing regarding Arkansas Rule of Civil Procedure 26(f), which requires a court to include factual findings in an order for production when a party has asserted a privilege or work-product objection.

On May 13, 2022, the circuit court entered an order denying Protech's motion for protective order and ordered the production of unredacted versions of the Contested Documents. The circuit court held, "Any privilege that Defendant attempted to assert regarding these documents was insufficient and waived." The order also contained some findings relating to the factors set forth in Arkansas Rule of Civil Procedure 26(f). The sufficiency of those findings is not at issue on appeal.

The circuit court never reviewed unredacted copies of the Contested Documents in camera. The circuit court did not make a determination on whether the Contested

Documents are actually privileged—it ruled only that the attorney-client-privilege and work-product objections to production were insufficient and waived.

Protech filed a timely petition for permission to appeal under Arkansas Rule of Appellate Procedure–Civil 2(f). That petition was granted, and Protech filed a timely notice of appeal.

II. *Standard of Review*

The circuit court has "broad discretion in matters pertaining to discovery[.]" *Gerber Prods. Co. v. CECO Concrete Constr., LLC*, 2017 Ark. App. 568, at 6, 533 S.W.3d 139, 143 (citing *Hardesty v. Baptist Health*, 2013 Ark. App. 731, 431 S.W.3d 327; *Nat'l Enters., Inc. v. Lake Hamilton Resort, Inc.*, 355 Ark. 578, 142 S.W.3d 608 (2004)). This court will not reverse a circuit court's ruling on a protective order absent an abuse of discretion that is prejudicial to the appealing party. *Id.* "To have abused its discretion, the circuit court must have not only made an error in its decision, but also must have acted improvidently, thoughtlessly, or without due consideration." *Id.*

III. *Analysis*

Although this is an interlocutory appeal, jurisdiction is proper in this court under Arkansas Rule of Appellate Procedure–Civil 2(f)(1). That rule allows a party to petition the supreme court for permission to appeal an interlocutory order compelling the production of discovery of information that the party claims is privileged or protected by the work-product doctrine. *See Gerber*, 2017 Ark. App. 568, at 2, 533 S.W.3d at 140–41. Protech filed such a petition, and it was granted by the supreme court.

A. Preliminary Statement

Protech first relies on its general objections. Those are the only objections based on attorney-client privilege that were unquestionably timely because they were asserted within the time period allowed by Rule 34. In the preliminary statement in its response to the second set of requests for production, Protech states, "Each response and any documents produced are subject to all objections as to . . . privilege . . . and any and all other objections on grounds that would require the exclusion of any response or document if such were offered pursuant to the Arkansas Rules of Evidence[.]" Protech also states that its responses "are not intended to be, and shall not be, a waiver of all objection(s) to such Request(s)." Further, the preliminary statement says, "[Protech] reserves all rights to modify and/or supplement these responses."

These preliminary statements are not specific to any request, document, or response. The supreme court has held that general objections do not protect privileged information from disclosure. *See Dunkin v. Citizens Bank of Jonesboro*, 291 Ark. 588, 592, 727 S.W.2d 138, 140–41 (1987); *see also Bomar v. Moser*, 369 Ark. 123, 130, 251 S.W.3d 234, 240 (2007). A "blanket refusal" to answer discovery is not sufficient to establish a privilege. *Dunkin*, 291 Ark. at 592, 727 S.W.2d at 141. Further, for a privilege to be properly asserted, the party asserting it must make a "particularized showing of the potentially incriminating nature of each question[.]" *Id.*; *see also* Ark. R. Civ. P. 34(b)(2).

Protech's preliminary statement is a blanket refusal to answer discovery. Such general objections are not a "particularized showing of the potentially incriminating nature" of

Chase's request. Therefore, the language in the preliminary statement does not serve as a proper privilege or work-product objection.

B. Specific Response to Request for Production No. 20

Because this court does not consider the preliminary statement to be a sufficient attorney-client-privilege or work-product-doctrine objection, we turn to an analysis of the specific objection that Protech purported to make to Request for Production No. 20.

Arkansas Rule of Civil Procedure 34(b)(2) clearly outlines the procedure for objecting to a request for the production of documents. That rule states that the party upon whom the request has been served must respond within the prescribed time period and

> shall state, *with respect to each item or category*, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts.

Ark. R. Civ. P. 34(b)(2) (emphasis added). The same rule further provides that the producing party

> shall (A) organize and label [the documents] to correspond with the categories in the production request or (B) produce them as kept in the usual course of business if the party seeking discovery can locate and identify the relevant records as readily as can the party who produces the documents.

Ark. R. Civ. P. 34(b)(3).

An attorney-client-privilege objection "is only safeguarded if the proper procedures are followed in a timely fashion." *Gerber*, 2017 Ark. App. 568, at 8, 533 S.W.3d at 144; *see also Calandro v. Parkerson*, 333 Ark. 603, 610–11, 970 S.W.2d 796, 800–01 (1998).

In its timely response to the second set of requests for production, Protech objected specifically to Request for Production No. 20 by stating,

> Defendant objects to the Request to the extent it seeks documents that are not relevant to any claim or defense and/or insofar as it is unduly burdensome or seeks documents whose collection is more burdensome and expensive than beneficial under the circumstances and is not proportional to the needs of the case or is unreasonably cumulative. Defendant objects to this Request insofar as it is duplicative of other Requests. Subject to and without waiving Defendant's objections, Defendant will conduct a search of reasonable scope and produce copies of Defendant's internal correspondence (including emails) regarding RFP 2107, RFP 3462, or the Plaintiff since January 1, 2014.

In these timely responses, Protech did not make any attorney-client-privilege or work-product-doctrine objections within its specific response to Request for Production No. 20. Further, Protech did not provide a privilege log or produce any documents at that time. Additionally, Protech did not request any additional time to search for responsive documents before serving the response above and its general objections, nor did it file for a protective order. Instead, Protech simply stated that it "will conduct a search" of its internal documents without any explanation why it could not comply with Rule 34.

Protech argues that the objections in its privilege log protect the Contested Documents from disclosure. However, the privilege log and Contested Documents were not produced within the time period specified by Rule 34. If Protech needed more time to search its internal documents, the parties may agree in writing to extend the time under Rule 34, the producing party may move the circuit court for additional time, or the producing party may move the court for protective order within the time period stated in Rule 34. *See* Ark. R. Civ. P. 34, 37. None of those steps were taken here.

Not only must the objection be timely, but an attorney-client or work-product objection must also follow the proper procedures. *See Gerber*, 2017 Ark. App. 568, at 8, 533 S.W.3d at 144; *see also Camelot Grp., Ltd. v. W.A. Krueger Co.*, 486 F. Supp. 1221, 1224–25 (S.D.N.Y. 1980).

As discussed above, Protech did not make the attorney-client objections specifically to Request for Production No. 20. Further, Protech did not update its responses to assert the privilege objection. Rule 34 requires the objection to be made to a specific request. Also in violation of Rule 34, the privilege log does not show which documents are responsive to which requests. Further, the privilege log does not identify the allegedly protected documents by Bates number, only by Privilege ID, which was not printed on the documents produced to Chase.

This is not to suggest a bright-line rule with regard to the timing and precise form of attorney-client-privilege or work-product objections. A party has a continuing duty to amend its discovery responses under Arkansas Rule of Civil Procedure 26(e), and this court understands that certain privileged documents may not be unearthed before the Rule 34 deadline for one reason or another. However, analyzing the facts in this specific case, we hold that the privilege log in this case was insufficient.

In order to reverse, this court must find that the circuit court acted improvidently, thoughtlessly, or without consideration. Given all the factors discussed above, the circuit court did not abuse its discretion in denying Protech's motion for protection order and compelling Protech to produce unredacted copies of the Contested Documents.

Affirmed.

GRUBER and BROWN, JJ., agree.

McDaniel & Wolff, PLLC, by: *Scott P. Richardson*; and *Hyden, Miron & Foster, PLLC*, by: *James L. Phillips*, for appellant.

Kutak Rock LLP, by: *Andrew King* and *Harper L. Kiefer*, for appellee.