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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SIMPLEXGRINNELL LP,

Petitioner,

v.

THE SUPERIOR COURT OF SOLANO
COUNTY,

Respondent;

JULES ARTHUR et al.,

Real Parties in Interest.

A130663

(Solano County Super. Ct. Nos.
FCR277095 & FCR 277097)

SimplexGrinnell petitions for a writ of mandate directing the Solano County Superior Court to vacate its order directing SimplexGrinnell to produce certain documents for in camera review. It also requests that we direct the trial court to grant SimplexGrinnell's motion to quash a subpoena issued on behalf of the real parties in interest who are defending criminal charges. We vacate the order to produce documents for in camera review, but decline to quash the subpoena. Instead, we return this case to the superior court for further proceedings on the motion to quash consistent with our decision.

FACTUAL AND PROCEDURAL BACKGROUND

Real parties in interest Jules Arthur and Michael Hagigeorgiou are facing criminal charges arising from an August 2008 fire at Casa de Vallejo, an apartment complex for

senior citizens. SimplexGrinnell provided, repaired, and maintained a fire alarm system at Casa de Vallejo. SimplexGrinnell is also a defendant in a related civil action in Sacramento County Superior Court, stemming from its alleged negligence in maintaining Casa de Vallejo's fire alarm system. Arthur is a party to the Sacramento litigation, but Hagigeorgiou is not.

As part of their criminal defense efforts, real parties subpoenaed "any incident report or other internal report prepared by SimplexGrinnell personnel that discusses the fire" at Casa de Vallejo. SimplexGrinnell has only one responsive document. It is an incident report that SimplexGrinnell claims is protected by the attorney-client privilege. Accordingly, SimplexGrinnell moved to quash the subpoena.

Based upon the deposition testimony of its district general manager that was provided in the Sacramento civil case, SimplexGrinnell asserts that the incident report is not discoverable because it was prepared at the request of its legal department and has only been reviewed by SimplexGrinnell and its counsel. It also claims as part of its prima facie showing in support of the issuance of this writ that the Sacramento County Superior Court has determined that the document is privileged and suggests that the Solano County Superior Court should reach the same conclusion.

Real parties dispute the significance of the district general manager's deposition testimony and point out other parts of his deposition they say directly conflict with the testimony cited by SimplexGrinnell. According to the testimony cited by real parties, SimplexGrinnell's district general manager directed that the report be prepared for general corporate purposes such as verification that proper policies and procedures were in place, and that the employees properly performed their duties at Casa de Vallejo. Based on this disputed testimony, real parties argue that the general manager was internally inconsistent and, thus, SimplexGrinnell failed to carry its burden to establish that the report was protected by the attorney-client privilege.

At the hearing on the motion to quash, real party Hagigeorgiou's attorney pointed out that SimplexGrinnell's reply brief invited the court to conduct an in camera review of

the incident report. SimplexGrinnell's attorney disavowed that position and retracted any such invitation for the court to conduct an in camera review.

The respondent superior court has not yet decided whether the incident report must be produced. Rather, at a December 10, 2010, hearing the court stated: "I think under the criminal subpoena duces tecum process that I've got to apply, SimplexGrinnell's refusal to produce this is inappropriate. I think the defense, at the very least, is entitled to an in camera review of the material. [¶] And, therefore, I'm going to order that the third party, SimplexGrinnell, produce the document under seal to this Court. I will review it and determine whether or not there's any privilege. Well, first of all, I'll try to determine whether or not there's any relevant information in there, and then if there is, I'll determine whether or not there's any privilege to not disclose it based on the privilege that you're asserting. And on the other hand, I'll release all or part of it, if I feel that it's relevant and not privileged to the defendants."

SimplexGrinnell filed its petition for a peremptory writ of mandate seeking to compel the superior court to vacate its order requiring production of the report, and to enter a new order granting the motion to quash. SimplexGrinnell also requested an immediate stay of the court's order for an in camera review.

On December 22, 2010, we stayed the court's order compelling the production of the incident report, gave notice pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, that if circumstances warranted, we might issue a peremptory writ in the first instance, and requested informal briefing. Real parties opposed the petition and petitioner did not file a reply brief by the deadline. For the reasons stated below, we now direct respondent to vacate its order compelling the production of the incident report and we remand the matter to the superior court for it to decide the merits of the motion to quash without conducting an in camera review of the report.

DISCUSSION

While discovery orders are generally not reviewable by writ, we will review this one because it involves a claim of privilege, and if the privilege is improperly invaded, it

is destroyed. (*Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 5; *Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516.)

I. Evidence Code Section 915 Prohibits the Court from Compelling Disclosure of the Document Even for an In Camera Review

Evidence Code section 915 provides that a court considering a claim of privilege may not require production of the requested information in order to determine the validity of the claim. (§ 915, subd. (a).) Section 915 applies to claims based upon the attorney-client privilege. (*Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 744.)

It also applies in criminal cases. (See *People v. Galland* (2008) 45 Cal.4th 354, 364; *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 873.) While in certain circumstances specified in section 915, subdivision (b), a court may conduct an in camera review of documents to determine a claim of privilege, none of those circumstances is present here. (§ 915, subsd. (a), (b) [claims concerning attorney work product, trade secrets, official information and identity of confidential informants].)

Moreover, there is no statutory provision that permits the in camera disclosure of material protected by the attorney-client privilege. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 736; see also *Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 45, fn. 19 [“There is no statutory or other provision that allows for . . . an inspection of documents allegedly protected by the attorney-client privilege [in order to rule on a claim of privilege.”]) “[T]he attorney-client privilege is a legislative creation, which courts have no power to limit by recognizing implied exceptions.” (*Costco Wholesale Corp. v. Superior Court, supra*, at p. 739.) Thus, the superior court had no authority to conduct an in camera review of the incident report in order to determine whether it is protected by the attorney-client privilege.

Instead, the court may determine the claim by “reviewing the facts asserted as the basis for the privilege to determine, for example, whether the attorney-client relationship existed at the time the communication was made, whether the client intended the communication to be confidential, or whether the communication emanated from the

client.” (*Costco Wholesale Corp. v. Superior Court, supra*, 47 Cal.4th at p. 737.) “[I]t is neither customary nor necessary to review the contents of the communication . . . as the court’s factual determination does not involve the nature of the communications or the effect of disclosure.” (*Cornish v. Superior Court* (1989) 209 Cal.App.3d 467, 480.)

II. *In Camera* Review of the Incident Report was not Authorized by Penal Code Section 1326

When the superior court ordered SimplexGrinnell to produce the incident report for in camera review, it stated it was doing so “under the criminal subpoena duces tecum process that I’ve got to apply.” It appears that the court was of the impression that it was authorized, and perhaps obligated, to review the documents in camera by the provisions of Penal Code section 1326, subdivision (c).¹ Section 1326, subdivision (c) provides that when a defendant issues a subpoena duces tecum to a person or entity not a party to the proceeding, “the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents.” (§ 1326, subd. (c).)

But the fact that Penal Code section 1326 authorizes an in camera hearing does not mean that a court in a criminal matter may disregard the requirements of Evidence Code section 915 or imply an exception to the attorney-client privilege and order production of an arguably privileged document. An in camera hearing may be necessary to determine foundational issues such as whether the privilege attaches to the requested document, or whether the privilege was waived because in a criminal case it may be important to avoid prematurely disclosing defense strategies and theories or protect the privacy of third party witnesses. In apparent recognition of such concerns, Penal Code section 1326 specifies that disclosure to the prosecution is not authorized, other than via the procedures outlined in Penal Code section 1054.3. Nothing in Penal Code section 1326 authorizes a court to

¹ There is a special statutory scheme for criminal discovery directed by one party of the case to another party to the case. (See Pen. Code, § 1054 et seq.) Those sections, however, are inapplicable to discovery directed towards uninvolved third parties such as SimplexGrinnell. (See *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1077.)

order the in camera production of a potentially privileged document to determine if it is protected by the attorney-client privilege.

III. SimplexGrinnell Effectively Rescinded Any Consent it Provided for the In Camera Review

In its reply brief in support of the motion to quash, SimplexGrinnell invited the court to conduct an in camera review of the incident report. In context, it appears it did so as a stopgap measure to prevent disclosure of the report to the real parties. But, by the time of the hearing on the motion to quash and before any disclosure, SimplexGrinnell changed its mind. At the hearing, its counsel clearly communicated its opposition to in camera review to the court and to real parties. Thus, it is not bound by its statement in the reply brief.

Accordingly, neither legal authority nor SimplexGrinnell's consent permits the court to review the incident report in order to determine whether it is protected from disclosure by the attorney-client privilege. Because the superior court has not yet determined whether the document is privileged, we do not reach the issue of its ultimate production, and decline to issue an order quashing the subpoena deuces tecum.

DISPOSITION

The accelerated *Palma* procedure is appropriate “when petitioner’s entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue . . . or when there is an unusual urgency requiring acceleration of the normal process.” (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241.)

The superior court’s in camera review of the incident report is precluded by Evidence Code section 915 that prohibits the production of an arguably privileged document to determine the validity of the claimed privilege. Although Penal Code section 1326 authorizes an in camera hearing to determine whether a document subpoenaed from a third party can be disclosed to the defense, it does not authorize the compelled disclosure of a document arguably protected by the attorney-client privilege in

order to determine whether the privilege applies. Thus, further briefing and argument in this court would not be useful.

Let a peremptory writ of mandate issue commanding respondent superior court to vacate its order of December 10, 2010, directing SimplexGrinnell to produce its incident report pertaining to the Casa de Vallejo fire for the court's in camera inspection. On remand, the superior court shall determine whether the incident report is privileged without reviewing the incident report. Nothing in this opinion should be construed to suggest this court has reached any conclusion regarding the validity of SimplexGrinnell's claim of privilege. That is for the superior court to decide.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.