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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JEFFREY COX,

Plaintiff,

v.

ROADRUNNER INTERMODAL SERVICES, LLC, a Delaware limited liability company, CENTRAL CAL TRANSPORTATION, LLC, a Delaware limited liability company, and DOES 1 through 50,

Defendants.

Case No. 1:17-cv-01056-DAD-BAM

ORDER GRANTING *EX PARTE* APPLICATION TO QUASH BRUCE W. HONEYMAN, PH.D.'S SUBPOENA TO TESTIFY AT DEPOSITION AND PRODUCE PRIVILEGED RECORDS

(DOC. No. 211)

ROADRUNNER INTERMODAL SERVICES, LLC, a Delaware limited liability company,

Defendant/Counter-Plaintiff,

v.

JEFFREY COX,

Plaintiff/Counter-Defendant.

ROADRUNNER INTERMODAL SERVICES, LLC, a Delaware limited liability company,

Plaintiff,

v.

T.G.S. TRANSPORTATION, INC., a California corporation, and DOES 1-10,

Defendants.

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1 On May 16, 2019, non-party Bruce W. Honeyman, Ph.D. (“Dr. Honeyman”) filed an *ex parte*
2 application pursuant to Federal Rule of Civil Procedure 45 for an order to quash a subpoena issued by
3 Roadrunner Intermodal Services, LLC (“Roadrunner”) requiring Dr. Honeyman to appear at a
4 deposition on May 17, 2019, and to produce confidential records and testimony. (Doc. No. 211.)
5 Following a review of the application, the Court permitted Roadrunner and Mr. Jeffrey Cox to file
6 responses to the *ex parte* application to quash. The Court also set the matter for hearing on May 31,
7 2019, and stayed the deposition of Dr. Honeyman pending resolution of the motion. (Doc. No. 212.)

8 On May 24, 2019, Roadrunner filed an opposition to the *ex parte* application. (Doc. No. 214.)
9 Mr. Jeffrey Cox also filed a response indicating that he does not oppose the application for an order to
10 quash. (Doc. No. 215.)

11 The Court found the application suitable for resolution without oral argument, vacated the
12 hearing and the matter was deemed submitted. (Doc. No. 216.)

13 Having considered the moving and response papers, and for the reasons that follow, Dr.
14 Honeyman’s *ex parte* application for an order to quash the subpoena will be granted.

15 **I. Background**

16 On March 11, 2019, Mr. Cox served his expert disclosures, which included information
17 regarding Dr. Honeyman as a non-retained expert. (Doc. No. 215-1, Declaration of Christopher Rusca
18 (“Rusca Decl.”) at ¶ 5 and Ex. B.) Dr. Honeyman is a licensed psychologist and is the treating
19 therapist for Mr. Cox and Mr. Cox’s wife. (*Id.*) Mr. Cox also identified a retained expert, Stephanie
20 Rizzardi, Ph.D., who reportedly opined, among other things, that based on the “best available
21 information,” Mr. Cox has and would incur over \$14,000 in damages as a result of seeking marital
22 counseling due to the alleged wrongful termination. (Doc. 214-3, Declaration of Todd Pickles
23 (“Pickles Decl.”) at ¶¶ 2, 3 and Ex. 2.)

24 On March 22, 2019, Roadrunner emailed counsel for Mr. Cox a copy of the deposition
25 subpoena for Dr. Honeyman. (*Id.* at ¶ 5.) Dr. Honeyman was never personally served with the
26 subpoena and document demand. (Doc. No. 211-2, Declaration of Kathleen A. Humphrey
27 (“Humphrey Decl.”) at ¶ 8.) Nevertheless, counsel for Dr. Honeyman timely objected to the subpoena
28 on March 29, 2019, and notified all counsel that there were no authorizations for release of the therapy

1 records. (Id. at ¶ 9; Rusca Decl. at ¶ 10.) Mrs. Cox reportedly refused to provide a waiver. (Doc.
2 215-1, Rusca Decl. at ¶ 9; Humphrey Decl. at ¶ 10 (“[A]ll counsel have been repeatedly notified that
3 Mrs. Cox has specifically instructed that she does not want her private therapy records released.”)).

4 Based on Dr. Honeyman’s objections and issues regarding Mrs. Cox’s refusal to waive any
5 privilege, on April 2, 2019, Mr. Cox served all parties with a notice of the de-designation of Dr.
6 Honeyman as a non-retained expert. (Doc. 215-1, Ex. A to Rusca Decl.)

7 On May 2, 2019, counsel for Roadrunner contacted counsel for Dr. Honeyman by email to
8 advise that Roadrunner intended to proceed with the deposition of Dr. Honeyman despite Mrs. Cox’s
9 lack of consent. (Doc. 211-2, Humphrey Decl. at ¶ 12.)

10 On May 8, 2019, Roadrunner reportedly inquired whether the other parties would be willing to
11 allow the deposition of Dr. Honeyman after the non-expert discovery deadline, which expired on
12 February 22, 2019. (Id. at ¶ 14; Doc. No. 111.) On the same date, Roadrunner served Dr. Honeyman
13 with an amended subpoena and noticed the deposition for May 17, 2019. (Doc. 211-2, Ex. C to
14 Humphrey Decl.) May 17, 2019 was the last day to complete expert discovery. (Doc. No. 195.)

15 Dr. Honeyman filed the instant application to quash on May 16, 2019. (Doc. 211-1.) As noted
16 above, the Court permitted both Roadrunner and Mr. Cox to file responses to the application and
17 stayed the deposition of Dr. Honeyman and the related document production pending resolution of the
18 application. (Doc. 212.)

19 **II. Legal Standard**

20 Federal Rule of Civil Procedure 45 governs the deposition and records subpoena at issue here.
21 Rule 45 provides that a party or attorney responsible for issuing and serving a subpoena “must take
22 reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.”
23 Fed. R. Civ. P. 45(d)(1). The court must enforce this duty and impose an appropriate sanction on a
24 party or attorney who fails to comply. Id. Pursuant to Rule 45(d)(3)(A), the court must quash or
25 modify a subpoena that:

- 26 (i) fails to allow a reasonable time to comply;
- 27 (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- 28 (iii) requires disclosure of privileged or other protected matter, if no exception or waiver
applies, or
- (iv) subjects a person to undue burden.

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2 Fed. R. Civ. P. 45(d)(3)(A). Further, pursuant to Rule 45(d)(3)(B)(ii), the court may quash or modify
3 a subpoena if it requires “disclosing an unretained expert’s opinion....” Fed. R. Civ. P.
4 45(d)(3)(B)(ii).

5 **III. Discussion**

6 A. Summary of Dr. Honeyman’s Position

7 Dr. Honeyman reports that he is not a party to this lawsuit and is not a retained expert. Instead,
8 he is the marital therapist for Mr. Cox and his wife, Mrs. Cox. Dr. Honeyman contends that he would
9 be in breach of his ethical duties as a California psychologist and could lose his license if forced to
10 testify and provide documents without written authorizations from both Mr. Cox and Mrs. Cox. It is
11 Dr. Honeyman’s understanding that Mrs. Cox does not intend to provide authorization permitting him
12 to testify or produce records. (Doc. No. 211-1 at 3.)

13 Dr. Honeyman reportedly notified Roadrunner that as a result of Mrs. Cox’ refusal to waive the
14 psychotherapist-patient privilege, he “cannot disclose anything that was said in confidence to him
15 during or for treatment notwithstanding Mr. Cox’s willingness to waive said privilege.” (Id. at 4.)
16 According to Dr. Honeyman, Roadrunner has insisted the deposition proceed despite the fact that he
17 “cannot offer any testimony without breaching his ethical duties as a psychologist in California and
18 placing his license in jeopardy.” (Id.) Dr. Honeyman contends that if he were forced to provide
19 testimony and documents without authorizations for release, he would be in violation of HIPAA and
20 the Medical Information Act concerning patient confidentiality. Dr. Honeyman argues that he should
21 not be unduly burdened and forced to breach his ethical duties and threaten his medical license based
22 on Roadrunner’s untimely and improper subpoena.

23 Dr. Honeyman therefore seeks to quash the subpoena as required under the provisions of Rule
24 45(d)(3)(a)(iii) and (iv) because it requires disclosure of privileged or other protected mater where no
25 exception or waiver applies, and it subjects him to undue burden. Additionally, Dr. Honeyman asserts
26 that the Court may quash the subpoena pursuant to Rule 45(d)(3)(B)(ii) because it would require
27 disclosure of an unretained expert’s opinion.

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1 B. Summary of Roadrunner’s Position

2 Roadrunner first argues that Mr. Cox has waived the privilege as to evidence relating to
3 counseling because he has placed his mental and emotional state directly at issue and because he is
4 seeking as actual damages regarding the medical costs associated with treatment by Dr. Honeyman.
5 (Doc. No. 214 at 7-8.) Roadrunner argues that it would be inequitable for Mr. Cox to place his
6 treatment with Dr. Honeyman at issue and seek damages for the counseling costs, but bar Roadrunner
7 from obtaining evidence from Dr. Honeyman because Mrs. Cox has not given consent to the
8 deposition. Roadrunner also argues that it has not seen any declaration or admissible evidence stating
9 Mrs. Cox position.

10 Nevertheless, Roadrunner explains that it is not arguing that Mr. Cox’ waiver also serves to
11 waive Mrs. Cox’ privilege, nor is it seeking to obtain discovery of Mrs. Cox’ statements, Dr.
12 Honeyman’s observations of her demeanor, or any other confidences of Mrs. Cox. Rather,
13 Roadrunner seeks the following discovery, reportedly narrowly tailored to the issues Mr. Cox has
14 placed at issue:

- 15 (1) Dr. Honeyman’s testimony and notes concerning Cox’s statements;
16 (2) Dr. Honeyman’s testimony and notes observations of Cox’s demeanor and other
17 such matters;
18 (3) Any opinions or conclusions that Dr. Honeyman formed concerning whether Cox
19 was seeking counseling related to Cox’s allegations of wrongful termination or due to
20 “alternate stressors,”
21 (4) Information relating to the frequency and expected duration of the counseling, and
22 (5) The costs of the counseling.

23 (Doc. No. 214 at 9.)

24 Roadrunner alternatively suggests that if the Court finds it impossible for Dr. Honeyman to
25 separate the confidences of Mr. Cox from those of his wife, then Mr. Cox should be precluded from
26 offering evidence relating to Dr. Honeyman’s treatment and counseling, including the costs associated
27 with that treatment. (Id.) Roadrunner contends that fundamental fairness compels either narrow
28 discovery of Dr. Honeyman on the subjects that Mr. Cox has placed at issue or Mr. Cox must be
precluded from offering evidence shielded from discovery by the privilege, particularly evidence
regarding damages. (Id. at 11-12.)

1 C. Summary of Mr. Cox' Position

2 Mr. Cox reports that while his is willing to waive the psychotherapist-privilege, Mrs. Cox is
3 not. Although he initially designated Dr. Honeyman as an unretained expert, when it became clear
4 that non-party Mrs. Cox was unwilling to waive the privilege, Mr. Cox immediately sought to
5 withdraw the designation even though it would prejudice his case and he may be precluded from
6 calling Dr. Honeyman as a witness.

7 Mr. Cox now argues that because Dr. Honeyman is no longer a retained or non-retained expert
8 and the deadline for non-expert discovery is closed, Roadrunner should be precluded from deposing
9 Dr. Honeyman. Even if that were not the case, Mr. Cox contends that the law is clear that Dr.
10 Honeyman cannot testify because Mrs. Cox is unwilling to waive the psychotherapist-client privilege.
11 Mr. Cox explains that in diversity cases such as this one, the psychotherapist-patient privilege is
12 governed by state law and under California state law, a waiver by one spouse in marital therapy does
13 not act as a waiver for the other. Mr. Cox therefore contends that all communications within a marital
14 therapy session are encompassed by the privilege and in order to discuss Dr. Honeyman would require
15 a waiver from both Mr. Cox and Mrs. Cox. Mr. Cox asserts that this is true even if he had conditional
16 communications with Dr. Honeyman outside the presence of Mrs. Cox those communications also
17 would be privileged because they were made for the benefit of Mrs. Cox' treatment. (Doc. No. 215 at
18 5.)

19 D. Analysis

20 As a preliminary matter, the Court finds that the deposition of Dr. Honeyman should not be
21 permitted because the deadline to complete non-expert discovery expired more than three months ago,
22 and Dr. Honeyman is no longer designated as a retained or non-retained expert. However, even if he
23 remained a non-retained expert, any request to order compliance with the amended subpoena is
24 untimely. Roadrunner did not serve the amended subpoena sufficiently in advance of the expert
25 discovery cutoff so that the Court could effectively address this dispute before expiration of the
26 allotted time for discovery. See Doc. No. 195 at 4 (discussion of discovery cutoffs and limits).

27 Setting aside the untimely nature of the subpoena and discovery at issue, the motion to quash
28 should be granted. First, the subpoena must be quashed because it requires disclosure of privileged

1 matter to which no exception or waiver applies. Fed. R. Civ. P. 45(d)(3)(a)(iii.) In diversity cases
2 such as this one, the psychotherapist-patient privilege is governed by the state law of California. Fed.
3 R. Evid. 501. California law recognizes the psychotherapist-patient privilege. Cal. Evid. Code §
4 1014. Communications disclosed in group therapy, such as marital therapy, are privileged and
5 protected. Id.; see also Farrell L. v. Superior Court 203 Cal.App.3d 521, 527 (1988). Further,
6 disclosures from family members to assist in treatment also are privileged. Grosslight v. Superior
7 Court 72 Cal.App.3d 502, 508 (1977). Thus, all communications (and related documents) during the
8 therapy sessions involving Dr. Honeyman are encompassed by the privilege, whether made by Mr.
9 Cox or Mrs. Cox in the course of treatment. In the absence of Mrs. Cox' authorization or waiver of
10 the privilege, the subpoena would require disclosure of privileged or other protected matter. It is
11 evident to the Court that Mrs. Cox has not waived the psychotherapist-privilege and has not authorized
12 Dr. Honeyman to provide testimony or documents concerning the marital counseling provided to Mr.
13 and Mrs. Cox. Even if Mr. Cox is willing to waive the privilege, his waiver alone is not sufficient.
14 Cal. Evid. Code § 912(b).

15 Second, the subpoena must be quashed because enforcement would place an undue burden on
16 Dr. Honeyman and subject him to possible professional repercussions. Fed. R. Civ. P. 45(b)(3)(a)(iv).
17 Dr. Honeyman has represented that it is impossible to separate his testimony and the records without
18 breaching Mrs. Cox' confidentiality. In the absence of Mrs. Cox' authorization, Dr. Honeyman would
19 be unduly burdened and forced to breach his ethical duties by responding to the subpoena.

20 For these reasons, the Court finds that the subpoena requiring Dr. Honeyman to testify and
21 produce records in this action should be quashed. Mr. Cox is cautioned, however, that in the absence
22 of Dr. Honeyman's testimony, he may be precluded from introducing evidence concerning Dr.
23 Honeyman's treatment or the costs associated with that treatment. Motion in limine practice is the
24 appropriate vehicle to address evidence preclusion.

25 **IV. Conclusion and Order**

26 For the reasons stated, IT IS HEREBY ORDERED as follows:

- 27 1. The *ex parte* application to quash Bruce W. Honeyman, Ph.D.'s subpoena to testify at
28 deposition and produce privileged records is HEREBY GRANTED; and

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2. The Subpoena to Testify at a Deposition in a Civil Action and the Requests for Documents, 1-30 attached thereto and served on non-party Bruce W. Honeyman, Ph.D., is HEREBY QUASHED IN ITS ENTIRETY.

IT IS SO ORDERED.

Dated: May 30, 2019

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE