IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MICHAEL E. SPREADBURY, CV 11-64-M-DWM-JCL

Plaintiff,

vs.

ORDER

BITTERROOT PUBLIC LIBRARY, CITY OF HAMILTON, LEE ENTERPRISES, INC., BOONE KARLBERG, P.C., DR. ROBERT BROPHY, TRISTA SMITH, NANSU RODDY, JERRY STEELE, STEVE SNAVELY, STEVEN BRUNER-MURPHY, RYAN OSTER, KENNETH S. BELL, and JENNIFER LINT,

Defendants.

I. Introduction

Before the Court are the following three motions filed by Plaintiff Michael Spreadbury:

(1) Motion to quash subpoenas for the production of documents issued to non-parties pursuant to Fed. R. Civ. P. 45(a)(1)(D) (Dkt. 176);

(2) Motion to "suppress" information obtained by way of subpoenas issued to non-parties pursuant to Fed. R. Civ. P. 45(a)(1)(D) (Dkt. 177); and

(3) Motion to hold the law firm of Boone Karlberg P.C., counsel for Defendants City of Hamilton, Bitterroot Public Library and the individually named Defendants, in contempt (Dkt. 178).

II. Discussion

A. Background

The facts and procedural history of this case are well known to the parties and are only repeated here as necessary to clarify the discussion.

By way of his complaint, Spreadbury advances a raft of claims against a multitude of defendants, including the City of Hamilton, the Bitterroot Public Library, and numerous individuals employed by, or associated with, these two entities (collectively the "City Defendants"). Spreadbury asserts claims under 42 U.S.C. § 1983 for alleged violations of the rights secured him by the United States Constitution and claims under Montana law for negligence, abuse of process, defamation, malicious prosecution, tortious interference with prospective economic advantage and negligent and intentional infliction of emotional distress.

Spreadbury alleges the City Defendants' conduct caused him to suffer "severe and grievous mental and emotional suffering, fright, anguish, shock, nervousness, and anxiety" resulting in "permanent damage to [his] lifestyle and professional life" and the destruction of his established course of life. Dkt. 90, at 17. He seeks compensatory damages for, among other things, lost earnings in the amount of $2.2 million, and pain, suffering, and emotional distress in the amount of $3 million. Dkt. 90, at 44.

Faced with Spreadbury's allegations and claims for damages, the City Defendants – through Boone Karlberg – served Fed. R. Civ. P. 45 subpoenas on the following non-parties with which Spreadbury was believed to have some relationship, commanding those entities to produce documents in their possession pertaining to Spreadbury: (1) Riverfront Mental Health Center; (2) the Montana Office of Public Instruction – Montana Education Licensure Program; (3) RLK Hydro, Inc.; (4) Lehigh University; (5) the University of Montana; (6) the Federal Emergency Management Agency ("FEMA"), and (7) the Social Security Administration.[1] The first three entities produced responsive documents they possessed. The latter four entities, according to the Defendants, have stated they

[1] A subpoena was also served upon an entity identified as Geotechnics, Inc., which apparently responded that it had no records pertaining to Spreadbury.

will not comply with the subpoenas absent Spreadbury's consent.[2]

Construed liberally, all three of Spreadbury's motions are grounded in the assertion that the documents sought – and in three cases actually produced – by the disputed subpoenas are privileged. In this regard, Spreadbury generally asserts that the documents contain confidential information protected from compelled disclosure by his right to privacy. Spreadbury also asserts, in conclusory fashion, that the documents are variously protected from disclosure by the Health Insurance Portability and Accountability Act ("HIPPA"), P.L. No. 104-191,110 stat. 1936 (1996); (1996), the Family Education Privacy Rights Act , 20 U.S.C. § 1232(g)(b)(1), and the Privacy Act, 5 U.S.C. §§ 552. He asks the Court to quash the subpoenas, preclude the use of all information received by any of the subpoenas and hold Boone Karlberg in contempt for issuing the subpoenas.

The City Defendants retort that Spreadbury has waived any privilege that might otherwise protect the subpoenaed documents from disclosure by placing his mental and physical health and employability at issue in this litigation.

B. Analysis

Fed. R. Civ. P. 26(b) provides that a party "may obtain discovery regarding

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[2] Spreadbury does not dispute he was provided timely notice of the subpoenas as required by Rule 45(b)(1).

any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 45, in turn, provides as a general rule that "the common law – as interpreted by United States courts in light of reason and experience – governs a claim of privilege" unless the United States Constitution, a federal statute, or rules prescribed by the Supreme Court provide otherwise. Fed. R. Evid. 501 (effective Dec. 1, 2011). "But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." *Id.* What is privileged is defined by the Federal Rules of Evidence. *Campbell v. Gerrans*, 592 F.2d 1054, 1057 (9th Cir. 1979).

Rule 501, however, is silent as to which privilege law should be applied where, as here, the Court is exercising federal question jurisdiction over a claim for which federal law supplies the rule of decision, supplemental jurisdiction over a claim for which state law supplies the rule of decision and the evidence sought is relevant to both claims. Courts, including the Ninth Circuit, that have confronted this issue in the context of the discoverability of evidence have held that the federal law of privilege governs even where the evidence sought might be relevant to a pendent state law claim. *Agster v. Maricopa County*, 422 F.3d 836, 839-40 (9th Cir. 2005); *Virmani v. Novant Health Inc.*, 259 F.3d 284, 286 n. 3 (4th Cir. 2001); *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992); *Wm. T. Thompson Co. v.*

General Nutrition Corp., 671 F.2d 100, 104 (3rd Cir. 1982).

Federal Courts recognize a constitutional right to privacy. *See Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996)*; Caesar v. Mountanos* , 542 F.2d 1064, 1066-70 (9th Cir. 1976). And specifically, they recognize the existence of a psychotherapist privilege under federal common law. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1923). These privileges, like other privileges, are not absolute and may be waived. *Jaffee*, 518 U.S. at 15 n. 14. A party in litigation implicitly waives a privilege by "asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials." *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003).

The subpoenas under scrutiny seek information falling into the following three categories:

(1) health and psychotherapy information (Riverfront Mental Health Center, Social Security Administration);

(2) employment history (RLK Hydro Inc., FEMA, Montana Office of Public Instruction), and

(3) education (Lehigh University, University of Montana).

Under the circumstances of this case, Spreadbury has implicitly waived any privilege – based upon his right to privacy – that would otherwise protect these

categories of information from compelled disclosure pursuant to Fed. R. Civ. P. 26. In reaching this conclusion, the Court remains cognizant that a litigant's implicit waiver of privacy rights by placing private matters at issue in a lawsuit is limited to private information that is relevant to the lawsuit. *See e.g. Doe v. City of Chula Vista*, 196 F.R.D. 562, 569-70 (S.D. Cal. 1999). Spreadbury's Complaint alleges the City Defendants' conduct caused him to suffer severe emotional distress resulting in permanent damage to his earnings ability and his established course of life. He has thus placed his health and employability in issue. The City Defendants' subpoenas seeking information pertaining to Spreadbury's health, education, and past employment appear "reasonably calculated to lead to the discovery of admissible evidence" that is relevant to both Spreadbury's claims and the City Defendants defenses. They are appropriate under Fed. R. Civ. P. 26(b).

The federal statutes cited by Spreadbury do not operate to preclude the City Defendants from obtaining legitimate discovery. Regulations promulgated by the U.S. Department of Health and Human Services pursuant to the mandate of HIPPA do require health care providers to protect an individual's "protected health information" and "individual identifiable health information," as defined by 45 C.F.R. § 160.103. The protection HIPPA affords private medical information, however, is not absolute. Rather, this private medical information may be released

in those situations delineated in 45 C.F.R. § 164.500 et seq. Pertinent to the present discussion is 45 C.F.R. § 164.512(e)(ii)(A) which allows a covered entity to disclose protected health information "[i]n response to a subpoena, discovery request, or other lawful process that is not accompanied by an order of a court...." If the covered entity receives "satisfactory assurance" that the party seeking the information has provided sufficient notice to the individuals whose protected health information is being requested. The notice must include sufficient information about the litigation in which the protected health information is requested that will permit the individual to raise an objection to the court. 45 C.F.R. § 164.512(e)(iii)(B). The City Defendants' subpoena to the Riverfront Mental Health Center requesting private medical information satisfied the requirements of 45 C.F.R. § 164.512(e) – and Spreadbury does not argue otherwise.

Spreadbury's invocation of the Privacy Act is also of no avail. Although the Privacy Act prohibits federal agencies from disclosing certain items of personal information, it does not protect information from disclosure in litigation pursuant to a valid discovery request. *Seem Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987).

Finally, the Family Education Privacy Rights Act allows the release of

personally identifiable information in education records in response to a lawfully issued subpoena "upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency." 20 U.S.C. § 1232g(b)(2)(B). Thus, Spreadbury's reliance upon this Act to preclude the City Defendants from gaining access to his educational records is misplaced.

A final point bears comment. As noted, Spreadbury asks in one of his motions that the Court "suppress the use, [or] disclosure of confidential information." Reading this motion broadly, the Court views it as requesting the entry of a protective order under Fed. R. Civ. 26(c) precluding the City Defendants from disclosing Spreadbury's personal information outside the bounds of this litigation. The Court also considers the motion as a request that any documents filed by the City Defendants in this case that contain Spreadbury's personal information be filed under seal. The Court finds it appropriate to grant this aspect of Spreadbury's motion to "suppress." Therefore, for the reasons set forth,

IT IS HEREBY ORDERED that Spreadbury's Motion to Quash Subpoenas (Dkt. 176) and Motion for Order of Contempt (Dkt. 178) are DENIED.

IT IS FURTHER ORDERED that Spreadbury's Motion to "suppress" information is GRANTED to the extent that: (1) the City Defendants shall not

disclose outside the bounds of their litigation any of Spreadbury's personal information obtained via the disputed subpoenas; and (2) the City Defendants shall move the Court to file under seal any document containing any of Spreadbury's personal information obtained via the disputed subpoenas. The motion is, however, DENIED in all other respects.

DATED this 13th day of December, 2011

/s/ Jeremiah C. Lynch
Jeremiah C. Lynch
United States Magistrate Judge