UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 212 et al.	:	No. 1:07-cv-324
Plaintiffs	:	
vs.	:	**OPINION AND ORDER**
AMERICAN LAUNDRY MACHINERY, INC. et al.	:	
Defendants	:	

This matter is before the Court on Defendants' Objection to the Magistrate Judge's September 30, 2008 Order (doc. 76), Plaintiffs' Response in Opposition (doc. 79), and Defendants' Reply in Support (doc. 82), as well as Plaintiffs' Objections to the Magistrate Judge's September 30, 2008 Order (doc. 77), Defendants' Response in Opposition (doc. 81), and Plaintiffs' Reply in Support (doc. 83). Also before the Court is Plaintiffs' Objections to the Magistrate Judge's November 4, 2008 Order (doc. 84), Defendants' Response in Opposition (doc. 87), and Plaintiffs' Reply in Support (doc. 89). For the reasons stated herein, the Court AFFIRMS the Magistrate Judge's September 30, 2008 Order (doc. 75), and November 4, 2008 Order (doc. 80) in all respects.

I. Standard of Review

Under Federal Rule of Civil Procedure 72, the standard of review to be applied by district courts for nondispositive matters

decided by magistrate judges is "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). This standard provides " 'considerable deference to the determinations of magistrates. [...]" ' In re Search Warrants Issued August 29, 1994, 889 F.Supp. 296, 298 (S.D.Ohio 1995). The "clearly erroneous" standard applies only to factual findings made by the magistrate judge, while the legal conclusions are reviewed under the more lenient "contrary to law" standard. See Gandee v. Glaser, 785 F.Supp. 684, 686 (S.D.Ohio 1992), aff'd, 19 F.3d 1432 (6th Cir.1994).

A finding is "clearly erroneous" when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Heights Community Congress v. Hilltop Realty Corp., 774 F.2d 135, 140 (6th Cir.1985). When examining legal conclusions under the "contrary to law" standard, this Court's review is plenary. The Court may overturn "'any conclusions of law which contradict or ignore applicable precepts of law, as found in the Constitution, statutes, or case precedent."' Gandee, 785 F.Supp. at 686 (quoting Adolph Coors Co. v. Wallace, 570 F.Supp. 202, 205 (N.D.Cal.1983)).

II. Objections to September 30, 2008 Order (doc. 75)

In the September 30, 2008 Order the Magistrate Judge first

considered Plaintiffs' Motion to Strike a copy of the complaint filed by Plaintiffs against the law firm of Manley Burke LPA in the Hamilton County Court of Common Pleas (doc. 75). The Magistrate Judge denied the motion, finding Defendants' argument that the complaint was lawfully acquired before an order sealing it was issued well-taken (Id.).

Next, the Magistrate Judge granted in part and denied in part Plaintiffs' motion to compel Defendants to produce documents and to compel the Payne Firm to comply with subpoenas (Id.). In regards to fifty-one documents listed in Defendants' privilege log, the Magistrate Judge found that they were not work product, but may be protected by attorney/client privilege, stating specifically that "testing and sampling information, assuming it to be part of the 51 documents, must be disclosed, but...requests for advice by American Laundry as well as options and legal advice so provided by Thompson Hine are attorney/client privileged" (Id.). The Magistrate Judge further instructed Defendants to produce a Rule 30(b)(6) witness and to disclose a list of persons with knowledge of Defendants' defenses as requested in Plaintiffs' motion (Id.). The Magistrate also declined to rule on Plaintiffs' request for a spoilation instruction, stating that such an instruction was "exclusively the business of the trial judge whose job it is to prepare jury instructions" (Id.).

Finally, the Magistrate Judge granted in part and denied in

part Plaintiffs' supplemental Motion to Compel (doc. 42), in which Plaintiffs sought to have Defendants disclose (1) employee lists, (2) documents relating to pollution generating equipment, (3) corporate and financial records and (4) insurance policies (doc. 75). In regards to the employee lists, the Magistrate Judge concluded that unless and until those who Defendants previously identified as likely to have responsive information were deposed, Plaintiffs' request was overly broad and burdensome. The Magistrate Judge next ordered Defendants to produce any records regarding waste disposal at Tartar Farm site near Somerset, Kentucky (Id.). Last, the Magistrate Judge denied both Plaintiffs' request for the financial records of Martin Franchises, stating that those records were relevant only to the issue of punitive damages, and Plaintiffs' request for discovery of all insurance policies, finding that Defendants had supplied the policies that satisfied the relevance standards (Id.).

A. Defendants' Objection

Defendants object to the Magistrate Judge's ruling that the fifty-one documents identified on the Payne Firm's privilege log were not protected work product (doc. 76). Specifically, Defendants first argue that the Magistrate Judge incorrectly determined that none of the documents were prepared in response to any objectively reasonable belief that litigation was likely (Id.). Defendants contend that the Magistrate Judge's reasoning that these

documents were not work product because there was no regulative investigation under way is contrary to law, citing the Sixth Circuit's ruling in U.S. v. Roxworthy, 457 F.3d 590, 599-600 (6th Cir. 2006) (Id.). Defendants argue that here, as in Roxworthy, even though no government investigation had occurred, litigation was objectively possible because they were engaged in the type of events that "reasonably could result in litigation" (Id.).

Second, Defendants contend that the Magistrate Judge erroneously concluded that none of the documents created by the Payne Firm could be protected by attorney-client privilege (Id.). Defendants state that the Payne Firm was hired to help counsel render legal opinions to Defendants, and therefore work performed by the consulting firm is properly protected by the attorney-client privilege (Id., citing Olson v. Accessory Controls & Equip. Corp., 254 Conn. 145, 757 A.2s 14 (Conn. 2000)).

In response, Plaintiffs argue that the Magistrate Judge's ruling is correct, first, because Defendants' subjective anticipation of litigation was not reasonable under the Sixth Circuit's test from Roxworthy (doc. 79). Plaintiffs argue that the Affidavit of Attorney Kolesar emphasizes the speculative nature of Defendants' belief in litigation and contend that such speculation does not meet the "objectively reasonable" requirement in Roxworthy (Id., also citing Bituminous Casualty Corp. v. Tonka Corp., 140 F.R.D. 381 (D. Minn 1992)). Second, Plaintiffs argue that because

the Payne firm provided environmental and technical, not legal advice to Defendants, and Defendants are contractually obligated to provide testing and sampling information to Plaintiffs, the Court should uphold the Magistrate Judge's ruling (Id.). Plaintiffs argue that the Magistrate Judge's conclusion complies with the holdings in In re Grand Jury Matter, 147 F.R.D. 82 (E.D. Pa. 1992) and United States Postal Service v. Phelps Dodge Refining Corp., 852 F.Supp. 156 (E.D.N.Y. 1994), in that the attorney-client privilege does not apply to communications made to secure or provide environmental advice from an environmental consulting firm (Id.).

The Court finds the Magistrate Judge's ruling on this issue to be well-reasoned and correct. The Magistrate Judge applied the correct legal standard in determining that there was no objective anticipation of litigation which would qualify the fifty-one documents as work product and the Court does not find the Sixth Circuit's holding in Roxworthy to be contrary to the Magistrate Judge's conclusion. Further, the Magistrate Judge's finding that the attorney-client privilege does not apply to communications made to secure or provide environmental advice from the Payne Firm is neither clearly erroneous nor contrary to law, and is supported by In re Grand Jury Matter, 147 F.R.D. 82 (E.D. Pa. 1992) and United States Postal Service v. Phelps Dodge Refining Corp., 852 F.Supp. 156 (E.D.N.Y. 1994). Defendants cite no precedential case law to

refute this finding. Therefore, the Court upholds the Magistrate Judge's conclusion regarding discovery of the fifty-one documents in question.

B. Plaintiffs' Objections

Plaintiffs object to the parts of the September 30, 2008 Order that denied several of Plaintiffs' discovery requests (doc. 77).

1. Employee and Officer Identification Records

Plaintiffs first object to the Magistrate Judge's denial of discovery of employee and officer identification records (Id.). Plaintiffs claim that under Rule 26(b)(1), they are entitled to know the "identity and location of persons who know of any discoverable matter," and that the Magistrate Judge's ruling that their discovery request was burdensome is clearly erroneous (Id.). Plaintiffs argue that the information they seek exists in both paper and electronic format at Defendants' current business location, and therefore would not be a burden on Defendants to produce (Id.). In response, Defendants contend that Plaintiffs' demand of both employee personnel files and a list of all employees who ever worked at American Laundry is overly burdensome, particularly in light of Defendants' disclosure of employees likely to have discoverable information, only one of whom Plaintiffs have disposed (doc. 81).

The Court agrees. The Magistrate Judge's conclusion that Plaintiffs' request is overly broad and burdensome is not clearly

erroneous. As Plaintiffs have failed to depose the "employees likely to have discoverable information" provided by Defendants, they cannot show that their request for all employee records is not overly broad or burdensome. Therefore, the Court affirms the Magistrate Judge's denial of this request.

2. Corporate Records

Plaintiffs next object that Magistrate Judge's ruling that Martin Franchises' records are only relevant to punitive damages is contrary to law (Id.). Plaintiffs cite U.S. v. Township of Brighton, 153 F.3d 307, 316 (6th Cir. 1998), for the proposition that financial records are routinely subject to discovery in environmental cases to determine which person or entity is an operator of a facility for liability purposes (Id., also citing LeClercq v. Lockformer Co., 2002 WL 908037, *3 (N.D. Ill. May 6, 2002); U.S. v. Kayser-Roth Corp., 272 F.3d 89, 102-103 (1st Cir. 2001)). Defendants argue that they have clearly established that Martin Franchises had nothing to do with the property involved in this case, and therefore the only purpose behind Plaintiffs' request is to conduct a judgment-debtor exam, which is prohibited under Ohio law (Id., citing among others, Ranney-Brown Distributors, Inc. v. E.T. Barwick Industries, Inc., 75 F.R.D. 3 (S.D. Ohio 1977)).

In reviewing this issue, the Court finds that Plaintiffs have not proved that the Magistrate Judge's ruling was contrary to law

or clearly erroneous. Although Plaintiffs cite cases where the Court allowed discovery of financial records in environmental matters, Plaintiffs have not shown why, in this case, the records of Martin Franchises are relevant beyond the subject of punitive damages as the Magistrate Judge determined.

In regards to Plaintiffs' complaint that the Magistrate Judge failed to address several categories of requested financial and business records, the Court finds that this is not the case. This matter was fully briefed and argued before the Magistrate Judge, who clearly held that the requested records, including those from Martin Franchises, were only relevant to punitive damages and therefore not discoverable at this time (doc. 75). The Court does not find Plaintiffs' argument well-taken and affirms the Magistrate Judge's ruling on this issue.

3. Insurance Documents

In regards to the requested insurance documents, Plaintiffs object to the Magistrate Judge's finding that "[r]elevance is restricted to those policies in effect at the time and for which coverage is afforded. Defendants have represented that they have supplied the policies which satisfied the relevance standards" (docs. 77, 75). Plaintiffs argue that despite the pollution exclusions in the undisclosed policies, the policies "may" still provide coverage, are therefore discoverable under Fed. R. Civ. P. 26 (Id.). Further, Plaintiffs contend that the documents are

relevant to the ownership status of Martin Franchises, and that any insurance inspection documents are relevant to the condition of the property during inspection (Id.).

In response, Defendants contend that they have complied with the requirements of Rule 26(a)(1)(A)(iv), which only applies to insurance agreements that may satisfy part or all of the judgment and does not contemplate insurance inspections (doc. 81). The Court agrees. As the Magistrate Judge found, Defendants have provided Plaintiffs with the insurance documents required. The Court finds the ruling of the Magistrate Judge neither clearly erroneous nor contrary to law. Under Rule 26, Plaintiffs are not entitled to the broad range of insurance documents they have requested, only those which may satisfy all or part of the judgment. Fed. R. Civ. P. 26. The Magistrate Judge's ruling on this issue is upheld.

4. Issues not addressed in September 8, 2008 Order

Finally, Plaintiffs argue that the September 8, 2008 Order should be modified because it fails to address several issues, specifically requested pollution generating documents and Defendants' request for an index of categories of documents (doc. 77). Defendants contend that discovery has established that the requested documents either do not exist or are not in Defendants possession, and therefore cannot be provided to Plaintiffs (doc. 81). The Court finds Defendants' argument well-taken and will not

modify the Magistrate Judge's Order to compel Defendants to produce documents or an index of documents which are either non-existent or not in Defendants possession. This finding, however, does not relieve Defendants of the obligation to produce, as ordered by the Magistrate Judge, records that "may exist on Defendants' back up computer system" and any "[r]ecords regarding waste disposal at Tartar Farm site" (doc. 75).

III. Objections to November 4, 2008 Order (doc. 80)

The Magistrate Judge's November 4, 2008 Order considered Defendants' motion to compel information relating to the Manley Burke law firm (doc. 80). Plaintiffs objected on the basis of relevance and attorney-client and work product privilege, arguing that their law suit against Manley Burke was not a waiver of the privilege as to Defendants(Id.). The Magistrate Judge stated that Plaintiffs "make an unconvincing pass at arguing irrelevance" and did not find their privilege argument persuasive. Citing In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289 (6th Cir. 2002), the Magistrate Judge found that the attorney-client privilege is waived by conduct that implies a waiver, such as raising issues concerning counsel's performance, which Plaintiffs did in their state case against Manley Burke (Id.). Finding that the standard for waiver of work product privilege is the same, the Magistrate Judge ordered Plaintiffs to

disclose the requested documents (Id.).

Plaintiffs object to the November 4, 2008 Order, arguing again that the information sought is both not relevant and protected by attorney-client and work product privilege (doc. 84). Plaintiffs reiterate the arguments rejected by the Magistrate Judge, contending that the Manley Burke litigation is distinct from the issues here and so not relevant, and that waiver only applies if the advice of the attorney is put at issue in the instant litigation, not separate litigation (Id., citing among others, In re Lott, 424 F.3d 446, 452 (6th Cir. 2005). The Court is not persuaded by Plaintiffs' arguments. As the Magistrate Judge found, the information sought by Defendants regarding what the Manley Burke law firm knew about the contamination of the property at issue is clearly relevant to this matter. The Sixth Circuit's holding in In re Columbia/HCA Healthcare Corp. is not, as Plaintiffs contend, contrary to the opinion in In re Lott, and therefore, the Magistrate Judge applied the correct legal standard in finding that the Plaintiffs waived attorney-client and work product privilege by raising issues concerning counsel's performance. The Court does not find the Magistrate Judge's ruling either clearly erroneous or contrary to law, and so affirms the November 4, 2008 Order (doc. 80).

IV. Conclusion

For the foregoing reasons, the Court AFFIRMS the Magistrate Judge's September 30, 2008 Order (doc. 75), and November 4, 2008 Order (doc. 80) in all respects.

SO ORDERED.

Dated: January 8, 2009

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge