SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,

Plaintiffs,

-against-

KESHA ROSE SEBERT p/k/a KESHA,

Defendants.

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KESHA ROSE SEBERT p/k/a KESHA,

Counterclaim-Plaintiff,

-against-

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC, KEMOSABE ENTERTAINMENT, LLC, KEMOSABE RECORDS, LLC, SONY MUSIC ENTERTAINMENT, LLC and DOES 1 – 25, inclusive,

Counterclaim-Defendants.

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Index No.: 653118/2014

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

I. Introduction

Motion sequence numbers 031 and 032 are consolidated for disposition.[1]

Plaintiffs move to compel non-party SS KS LLC, d/b/a, Sunshine Sachs to comply with a document and deposition subpoena (Dkt. 858 & 859).[2] Seq. 031.[3] Sunshine Sachs is a public relations firm "that Kesha employed both before and during the course of this litigation, and which [has] been involved in Kesha's communications with the press regarding her allegations

[1] Familiarity with this action is assumed. *See Gottwald v Sebert*, 2016 WL 1365969 (Sup Ct, NY County, Apr. 6, 2016).

[2] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[3] The portions of this motion that have been resolved by stipulation are not addressed.

against Plaintiffs and [with] this litigation generally." Dkt. 850 at 6. Sunshine Sachs did not move to quash the subpoenas, nor did it file opposition to the instant motion. Defendants filed opposition to the motion, arguing: (1) the subpoena was served after the June 30, 2017 deadline; (2) the discovery sought is not relevant; and (3) the discovery sought is privileged.

Plaintiffs separately move to hold Geragos & Geragos, A.P.C. and Mark Geragos (Mr. Geragos) (collectively, the Geragos Parties) in civil contempt due to Mr. Geragos' conduct at his deposition, and for an order compelling Mr. Geragos to appear for a second deposition to answer questions he refused to answer at his first deposition. Seq. 032. The Geragos Parties oppose and seek an order compelling plaintiffs to reimburse them for the expenses they allegedly incurred in responding to plaintiffs' subpoena. For the reasons that follow, plaintiffs' motions are granted.

II. Sunshine Sachs

Plaintiffs are entitled to the discovery they seek from Sunshine Sachs.

Defendants' timeliness argument is without merit. Plaintiffs originally served Sunshine Sachs prior to the June 30 deadline by service on the incorrect legal entity, and subsequently served the correct entity on July 3. As the court already ruled in a discovery conference, the court excuses plaintiffs' mistake and deems the subpoenas timely served.

Next, the court has already ruled [*see* Dkt. 850 at 11-12] that the discovery sought from Sunshine Sachs is relevant because it is material and necessary to plaintiffs' prosecution of their breach of contract and defamation claims (bearing on motive and malice). *See Kapon v Koch*, 23 NY3d 32, 38 (2014) ("The words 'material and necessary' as used in [CPLR] 3101 must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'") (citation omitted). "An application to quash a subpoena should be granted '[o]nly

where the futility of the process to uncover anything legitimate is inevitable or obvious' ... or where the information sought is '**utterly irrelevant** to any proper inquiry.'" *Id.* (emphasis added; citations omitted); *see Harold Levinson Assocs., Inc. v Wong*, 128 AD3d 566, 567 (1st Dept 2015) ("Defendants failed to establish that the records sought were 'utterly irrelevant' to the instant action and they had sufficient notice of 'the circumstances or reasons' underlying the subpoena request.") (internal citations omitted).

The court rejects defendants' contention that Sunshine Sachs – Kesha's public relations firm – only has documents that are either utterly irrelevant to this case or entirely duplicative of the discovery produced by defendants.[4] The court has reviewed the categories of requested documents [*see* Dkt. 858 at 11-12] and finds that, when properly interpreted in accordance with the subpoena's definitions [*see id.* at 8], they concern matters relevant to plaintiffs' claims. Regarding duplication, plaintiffs have raised seemingly valid concerns that possible spoliation by Mr. Geragos necessitates seeking discovery of his communications with Sunshine Sachs directly from Sunshine Sachs.[5] Moreover, burden objections are more properly addressed in the context of crafting an ESI protocol, where, for instance, hit count caps can be used to keep costs reasonable. To the extent Sunshine Sachs was not involved prior to 2014, the hit count for that time period should be minimal or nonexistent.

Likewise, defendants' assertion of privilege is premature. The proper course is for the parties to craft an ESI protocol, review documents for responsiveness to the subpoena, and log

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[4] The court explained during the August 22, 2017 oral argument why the same is not true of the documents defendants sought from plaintiffs' public relations firm.

[5] *See* Dkt. 868 at 9 n.2 ("Mr. Geragos admitted at his deposition that his firm automatically deletes its emails every sixty to ninety days, and, as a result of this 'automatic delete', his firm no longer has copies of documents created in his capacity as Kesha's attorney that would have been responsive to Plaintiffs' subpoena duces tecum, including but not limited to Mr. Geragos's communications with the media and with Kesha's press agent.").

those that are purportedly privileged. Plaintiffs must reimburse Sunshine Sachs (but not defendants) for the reasonable costs of doing so. *See* CPLR 3111 & 3122(d); 22 NYCRR 202.70, Rule 11-c, Appendix A ("Fees charged by outside counsel and e-discovery consultants ... include "[t]he costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production."). That said, if the court eventually determines defendants' privilege assertions to be utterly without merit (e.g., based on privilege arguments raised by Mr. Geragos and rejected herein), or if documents sought from Sunshine Sachs should have been produced in party discovery, but were, for instance, deleted or spoliated, the court may take such factors into account when making a final cost-shifting ruling. Disputes over any of these matters shall be raised in the first instance in a discovery conference.

A production schedule is set forth in the ordering language below.

III. The Geragos Parties

Mr. Geragos was deposed on April 25, 2017. *See* Dkt. 875.[6] After reviewing the nearly 150 pages of deposition transcript that were submitted, the court is dismayed at the conduct of a licensed attorney.[7] As plaintiffs accurately explain:

> At his deposition, Mr. Geragos initially refused to answer questions regarding his communications with the press and his statements on Twitter pertaining to Gottwald and the parties' dispute. As a result, counsel called Chambers during

[6] "On February 2, 2017, Geragos & Geragos, A.P.C. moved to quash the subpoenas", and "[o]n March 13, 2017, this Court granted [the] motion to quash in part and ordered that Mr. Geragos appear for a deposition in this action and testify as to certain topics listed in the subpoena." *See* Dkt. 868 at 4.

[7] For instance, "[d]espite the fact that Mr. Geragos is a licensed attorney who has been practicing law for decades, he walked out of the deposition room on more than one occasion while a question was pending." *See* Dkt. 868 at 9 n.3.

> the middle of the deposition, at which time [after argument was put forth by both Mr. Geragos and his counsel,] Mr. Geragos was instructed that the questions he refused to answer were relevant and that he was required to answer them. Nonetheless, following the call with Chambers, Mr. Geragos still failed and refused to provide crucial information ...
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> *First*, based upon a meritless assertion of the work product doctrine, Mr. Geragos refused to provide the basis, if any, for his assertion on the Access Hollywood television program that a drug which Kesha claims to have received from Gottwald "turned out to be [the illegal drug] GHB." ... The information which Mr. Geragos refuses to provide is not work product, given that Plaintiffs do not seek any materials reflecting Mr. Geragos's legal strategy but rather Plaintiffs simply seek to know what facts (if any) support an assertion that Mr. Geragos made on television ...
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> *Second*, at his deposition, Mr. Geragos, by his own admission, was utterly unprepared to testify regarding his communications regarding the litigation and Gottwald on the Twitter social network—even though these communications were the express subjects of Plaintiffs' subpoena ad tesificandum, and the Court had already denied Respondents' motion to quash the subpoena with respect to those subjects.

Dkt. 868 at 4-5 (italics in original). Simply put, Mr. Geragos refused to abide by a court ruling that he answer certain questions. *See id.* at 9-10; *see also id.* at 15-16.

"Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate." *McCain v Dinkins*, 84 NY2d 216, 226 (1994), citing *McCormick v Axelrod*, 59 NY2d 574, 583 (1983). A defendant may be held in civil contempt when there is "clear and convincing evidence that defendant knowingly disobeyed clear and unequivocal orders of the court." *Simens v Darwish*, 104 AD3d 465, 466 (1st Dept 2013), citing *McCormick*, 59 NY2d at 582-83. A hearing is not required to hold a party in civil contempt when there is no question of fact that a court order was knowingly violated. *See Yonamine v New York City Police Dep't*, 121 AD3d 598 (1st Dept 2014), citing *Cashman v Rosenthal*, 261 AD2d 287 (1st Dept 1999) ("Supreme Court properly held defendant in civil

contempt without holding a hearing, since it was clear from the papers submitted to the court that there was no issue of fact to be resolved"); *see also Gryphon Domestic VI, LLC v APP Int'l Fin. Co.*, 58 AD3d 498, 499 (1st Dept 2009) ("To sustain a finding of civil contempt based on alleged violation of a court order, it is necessary to establish that a lawful order of the court was in effect, clearly expressing an unequivocal mandate. It must also appear with reasonable certainty that the order has been disobeyed and that the party had knowledge of its mandate"). Judiciary Law § 773 provides that the contemnor may be obligated to pay damages or a fine "sufficient to indemnify the aggrieved party" or, if actual losses are not established, "a fine may be imposed, not exceeding the amount of the complainant's costs and expenses, and [$250]." *See Gottlieb v Gottlieb*, 137 AD3d 614 (1st Dept 2016) ("Legal fees that constitute actual loss or injury as a result of a contempt are routinely awarded as part of the fine. These may include the legal fees incurred in bringing the contempt motion.") (internal citations omitted).

As an initial matter, the court will refrain from addressing the question of whether serious contempt sanctions against Mr. Geragos are warranted as the court struck the contempt notice from the Order to Show Cause application. The court, therefore, will not consider the contempt request, although its basis is fully set forth in the papers and supported by documentation. Further, since Mr. Geragos is an attorney who presumably will promptly cease flouting this court's orders given the clear and unequivocal written mandate issued herein, the question of whether a substantial monetary sanction (including the costs of plaintiffs' motion) is tabled and will hopefully be mooted by Mr. Geragos's future compliance with this court's orders, the requirements of the CPLR and common courtesy to his colleagues in the Bar.

That said, Mr. Geragos must make himself available to be deposed for another seven hours and answer all questions he refused to answer at his first deposition. He was woefully

unprepared for his first deposition, failed to provide clear answers to many questions, and baselessly objected to many others. His first deposition, simply put, was insufficient.

Prior to his second deposition, Mr. Geragos must review the transcript from his first day of testimony and identify ***each and every instance*** where he claimed not to know or remember the answer to a question. He must do whatever is necessary to refresh his recollection and learn the answers to those questions and be prepared to provide complete and accurate answers when his deposition continues. He will be sanctioned if he does not follow this directive.

Mr. Geragos' privilege objections are utterly without merit. Also, his reliance on California law was misplaced. New York law applies. *JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 AD3d 18, 25 (1st Dept 2012) ("The law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding, is applied when deciding privilege issues"). New York law mandates "full disclosure of all evidence material and necessary in the prosecution or defense of an action." *Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 376 (1991), quoting CPLR 3101(a). "By the same token, the CPLR establishes three categories of protected materials ...: privileged matter...; attorney's work product ... and trial preparation materials." *Id.* at 376-77 (internal citations omitted). "[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." *Id.* at 377, citing *Priest v Hennessy*, 51 NY2d 62, 69 (1980); *see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 (2016) ("Despite the social utility of the privilege, it is in obvious tension with the policy of this State favoring liberal discovery. Because the privilege shields from disclosure pertinent information and therefore constitutes an

obstacle to the truth-finding process, it must be narrowly construed.") (citations and quotation marks omitted").

None of the questions Mr. Geragos refused to answer are protected by the work product or trial preparation privileges. "Not every manifestation of a lawyer's labors enjoys the absolute immunity of work product." *Cioffi v S.M. Foods, Inc.*, 142 AD3d 520, 522 (2d Dept 2016) (emphasis added), quoting *Hoffman v Ro-San Manor*, 73 AD2d 207, 211 (1st Dept 1980). Rather, "[a]ttorney work product ... is limited to 'documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as **those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy.**" *In re New York City Asbestos Lit.*, 109 AD3d 7, 12 (1st Dept 2013) (emphasis added), quoting *Brooklyn Union Gas Co. v Am. Home Assur. Co.*, 23 AD3d 190, 190-91 (1st Dept 2005) (emphasis added). Likewise, trial preparation materials are limited to "[d]ocuments generated for litigation." *Id.*, citing *People v Kozlowski*, 11 NY3d 223, 244 (2008).

Plaintiffs correctly contend that "Mr. Geragos' assertion that the alleged pill 'turned out to be GBH' is an assertion of purported fact—and not a reflection of [his] **legal** research, **legal** theory, **legal** conclusions, or **legal** strategy—and thus it does not constitute work product." Dkt. 868 at 13 (emphasis in original); *see also id.* at n.6 ("Plaintiffs are not seeking to learn about any requests for legal advice by Defendant to [the Geragos Parties]; nor are they seeking the disclosure of advice that [the Geragos Parties] provided to Defendant. Rather they are merely seeking to learn the basis, if any, for a factual assertion that Mr. Geragos made on national television that an alleged pill Gottwald purportedly gave Kesha 'turned out to be GHB.'"). Plaintiffs' questioning on this topic does not implicate any form of privilege. "Plaintiffs are not asking [the Geragos Parties] to produce any **materials** prepared for any litigation. Rather,

Plaintiffs are seeking for [the Geragos Parties] to verbally disclose at deposition the claimed factual basis (if any) for an assertion of purported fact that Mr. Geragos made about Mr. Gottwald **outside the courtroom and on national television**." Dkt. 868 at 13-14 (emphasis in original). Plaintiffs aver that "[i]t is clear that Mr. Geragos and his former client Kesha are attempting to use their highly specific GHB accusation—reputed by Mr. Geragos to be an absolutely certain fact—as a sword to spread highly damaging allegations about Gottwald in the national media, while simultaneously using a claim of privilege as a shield to conceal the fact that there is no evidence to support it." *Id.* at 14; *see Farrow v Allen*, 194 AD2d 40, 45 (1st Dept 1993) ("it is unfair for the opposing party in a litigated controversy to have [a party] 'use this privilege both as a sword and a shield, to waive when it inures to her advantage, and wield when it does not.'") (citation omitted). All of the questions asked by plaintiffs' counsel merely seek factual information on which Mr. Geragos based his public, non-confidential statements.

Likewise, an attorney's communications with a public relations firm are discoverable if, as here, such communications do not evidence legal advice. *See Pecile v Titan Capital Group, LLC*, 119 AD3d 446, 446-47 (1st Dept 2014). The only reasonable inference that may be drawn from the record on this motion is that Mr. Geragos' communications were made purely for public relations purposes – and not for the purpose of providing legal advice in connection with this action. While he may have attempted to try this case in the press, that is not the same as actually trying the case. Communications in furtherance of the former are ***not*** made "solely and exclusively for litigation purposes" [*see Madison Mut. Ins. Co. v Expert Chimney Servs., Inc.*, 103 AD3d 995, 996 (3d Dept 2013), citing *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 (1st Dept 2009)] and, therefore, are not privileged.

Indeed, Mr. Geragos admitted the extra-judicial nature of his press statements. For instance, Mr. Geragos admitted at his deposition that when he spoke to TMZ and compared Gottwald to Bill Cosby, he made that statement – not on behalf of Kesha – but on his own behalf. *See* Dkt. 970 at 14-15. Remarkably, the Geragos Parties highlight this portion of Mr. Geragos' deposition transcript in their own brief. *See id.* at 15 ("Mr. Geragos's testimony establishes that any so-called defamatory statements he made about Gottwald **were made on his own personal behalf, and not as an agent of Kesha.**") (emphasis added).[8]

While sanctions are not being issued, nonetheless, due to Mr. Geragos' behavior at his deposition, the court holds that the Geragos Parties' have forfeited their cost-shifting claims. Most of the deposition was an utter waste due to Mr. Geragos being woefully unprepared and his refusal to provide straightforward answers. The instant motion practice has resulted in more delay and expense. Mr. Geragos cannot come to this court seeking cost-shifting with such unclean hands. He is cautioned that if he does not timely appear for a deposition and comply with the directives provided herein, the court will entertain a contempt application. The court also may order him to appear for additional days of deposition if his second deposition mirrors the first. Accordingly, it is

ORDERED that plaintiffs' motion to compel Sunshine Sachs to comply with its subpoenas is granted; and it is further

ORDERED that an ESI protocol governing the documents to be reviewed in connection with Sunshine Sachs' document subpoena shall be executed by August 31, 2017, all responsive documents shall be produced or itemized on a privilege log by September 12, 2017, and any

[8] This self-serving admission is obviously not dipositive of the merits of plaintiffs' defamation claim, but nonetheless defeats any assertion of privilege.

privilege disputes shall be raised with the court – after a proper meet and confer between counsel – no later than September 19, 2017; and it is further

ORDERED that Sunshine Sachs shall make corporate representatives available for deposition after plaintiffs have had a reasonable opportunity to review their production, but no later than the week of October 2, 2017; and it is further

ORDERED that plaintiffs' motion against the Geragos Parties is granted to the following extent: (1) Mr. Geragos shall appear for another seven hours of deposition, either in New York or California (at his election), on or before September 20, 2017, and Mr. Geragos shall commit to the date and location of the deposition on or before September 1, 2017; (2) prior to his deposition, Mr. Geragos shall review the transcript from his first deposition and identify each and every instance where he claimed not to know or remember the answer to a question and do whatever is necessary to learn the answers to those questions and be prepared to provide complete and accurate answers at his second deposition; (3) Mr. Geragos shall answer all questions that he refused to answer on the ground of privilege; and (4) plaintiffs need not provide compensation to the Geragos Parties for their first deposition appearance other than a $15 per day attendance fee pursuant to CPLR 8001(a).

Dated: August 25, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C