At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of February, 2019.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

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JEHDY VARGAS, CAMILLA YOSHIMOTO, MAGALY VEGA-LOPEZ and SARAH NOVIO

Plaintiff,

Index No.: 505001/2016

-against-

Decision and Order

THE NEW YORK ACADEMY OF ART, NYAA HOLDINGS, LLC and WADE SCHUMAN,

Defendants.

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The following *papers* numbered 76 to 128 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	76-117
Opposing Affidavits (Affirmations)	124-127
Reply Affidavits (Affirmations)	
Memorandum of Law	118, 123, 128

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant, WADE SCHUMAN, move this court pursuant to CPLR 4503(a)(1) for an order (1) deeming the attorney client privilege between plaintiff's and their counsel waived with respect to a) plaintiff's alleged emotional distress damages; b) plaintiff's

medical psychological, psychiatric or any other treatment for those alleged emotional distress damages; (2) pursuant to CPLR 3124 compelling the plaintiff to produce all documents for which the privilege has been deemed waived; (3) pursuant to CPLR 3124 compelling production of social media accounts; (4) for the plaintiff to cure any and all outstanding discovery; (5) for sanctions; and (6) pursuant to 1:03-1.1 granting sanctions and/or attorney's fees and costs, based on plaintiff's willful failure to comply with discovery requests. Plaintiff opposes the same.

ARGUMENTS

Defendant contends that plaintiffs' have failed to comply with discovery deficiencies and discovery since October 19, 2017. Defendant's contend that they informed the plaintiff at least on four separate occasions by letter that the plaintiffs' in response to discovery request turned over three (3) emails that were between plaintiffs' and their counsel which they assume was knowing and intentional and if they were not knowing and intentional that they need to advise the defendants immediately. Defendant's further contend that plaintiff's counsel's failure to respond until 43 days later on May 31, 2018 effectively waived the attorney-client privilege in regard to any claims arising from or out of these email discussions between plaintiffs' and their attorney.

Plaintiffs' in opposition contends the three (3) email communications that defendants are referring to were inadvertently handed over, after plaintiffs' counsel did put discovery through a system that did not catch these three (3) emails, after notice by the defendants of the disclosure counsel for plaintiffs' advised defendants' by letter that the disclosure was inadvertent and the emails should be destroyed by the defendant's

counsel. Plaintiffs' contend the inadvertent disclosure of these three emails did not waive the attorney-client privilege. Plaintiff further contends the motion to compel is without merit. Plaintiffs have provided all non-privileged, responsive documents which were in their possession. Defendant seeks unfettered access to plaintiff's social media accounts and such access is not warranted, they have been provided everything that is responsive to their discovery demands. Plaintiffs further contend they have produced all responsive documents in their possession with regard to communication between then significant others, family members etc. Plaintiffs have given defendants over 800 pages of responsive documents. A Privilege log is inapplicable because nothing that is to be provided is subject to any privilege. Plaintiffs further contend that they provided discovery on July 11, 2018 and the he Final Conference Part Order fixes the discovery deadline as July 31, 2018. Therefore sanctions are not appropriate.

ANALYSIS

"The attorney-client privilege applies to confidential communications between clients and their attorneys made "in the course of professional employment" (CPLR 4503[a]), "and **such privileged communications are absolutely immune from discovery"** (CPLR 3101[b]; see *also Spectrum Systems International Corp. v. Chemical Bank*, 78 NY2d 371, 377, 575 NYS2d 809, 581 NE2d 1055). "The privilege applies to communications from the client to the attorney when the communication is " 'made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose' " (*Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588, 593, 542 N.Y.S.2d 508, 540 N.E.2d 703); *citing New York Times Newspaper Div. of New*

York Times Co. v. Lehrer McGovern Bovis, Inc., 300 AD2d 169, 171, 752 NYS2d 642, 644–45 (2002).

Disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that the client intended to maintain the confidentiality of the document, reasonable steps were taken to prevent disclosure, the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued (*see New York Times Newspaper Div. of N.Y. Times Co. v. Lehrer McGovern Bovis*, 300 AD2d 169, 752 NYS2d 642; *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 AD2d 392, 398–400, 522 NYS2d 999; *John Blair Communications v. Reliance Capital Group*, 182 AD2d 578, 579, 582 NYS2d 720). The burden is on the proponent of the privilege to prove that the privilege was not waived (*see John Blair Communications v. Reliance Capital Group*, 182 AD2d at 579, 582 NYS2d 720); *citing Oakwood Realty Corp. v. HRH Const. Corp.*, 51 AD3d 747, 749–50, 858 NYS2d 677, 679–80 (2008).

In the present case, on April 18, 2018 defendants counsel by letter to plaintiffs' counsel informed them that they disclosed in their response to discovery requests three (3) emails that were between plaintiff and their counsel which "they assume was knowing and intentional and if they were not knowing and intentional that they need to advise the defendants immediately."[1] Defendant again wrote another letter advising of the same on April 20, 2018, and again on April 26, 2018; and again, on May 29, 2018. Plaintiff's

[1] It is noted and undisputed that the defendant has not attach the emails in question to any of their motion papers. Therefore, the court has not reviewed the disclosed documents.

counsel responded to the alleged disclosure forty-three (43) days later on May 31, 2018 wherein they state the documents were produced inadvertently and requested that defendant counsel destroy the documents immediately. In response to the present motion plaintiff's counsel contends the documents in question are subject to the attorney client privilege and such privilege has not been waived by inadvertent disclosure.

Defendant's rely on *AFA Protective Sys. v. City of N.Y.*, 13 AD3d 564 (2 dept. 2004), in arguing that the plaintiff's failed to exercise due diligence to revoke the document it claimed was privileged. However, in the *AFA Protective Sys.*, case they did not attempt to revoke the inadvertently disclosed documents for four (4) years. In the present case, no such length of time had passed before revocation, revocation was done in 43 days. There is clearly no intent by the plaintiff to waive the attorney-client privilege. Counsel for the plaintiff asserts they utilized a screening process for the production of documents for privileged information, but these emails were produced in error. It is also undisputed that a disclaimer as to the confidentiality of the document was included at the bottom of each of the emails in question. Moreover, depositions have not been conducted and there is no prejudice to the defendant by remedying the accidental disclosure. Additionally, plaintiff has admitted that they do not intend to use the information in the inadvertently disclosed emails to establish any of plaintiff's damages. Therefore, it is the determination of this court that the plaintiff did not waive the attorney-client privilege and the discovery disclosure regarding the emails in question was inadvertent. As such, the defendants shall immediately destroy said documents and shall be prohibited from using said documents.

Next, the court shall address the defendants request for seemingly unfettered production of the plaintiffs' social media accounts and sanctions for outstanding discovery. Plaintiffs contend that they have produced all documents that are responsive to the defendant's discovery requests, this contention is undisputed. It has been held by courts that unfettered access to social media accounts is too broad. Such access should be carefully limited to only messages and posts relevant to the claim before the court, *see Patterson v. Turner Constr. Co.*, 88 AD3d 617 (1st Dept, 2011). It is important to note that "the fact that a party is dissatisfied with the answers proffered by another party is an insufficient basis upon which to conclude that the party willfully and contumaciously failed to comply with a court order compelling disclosure" see, *Miller v Duffy*, 126 AD2d 527, 528; *E.K. Const. Co. v. Town of N. Hempstead*, 144 AD2d 427, 427, 534 NYS2d 206 (2 Dept, 1988). In the present case, the defendant fails to point out any discovery that has not been provided or is not responsive of their requests. In almost every instance the defendant's consented to time extensions for the exchanges and all discovery that was ordered to be exchanged has been exchanged within the court ordered deadline of July 31, 2018. Therefore, defendants request to compel production is deemed moot as everything requested has been produced. Moreover, defendants request to sanction the plaintiff for failure to produce is likewise denied as all requests have been responded to within the court ordered deadline.

Accordingly, defendant's request pursuant to CPLR 4503(a)(1) for an order deeming the attorney client privilege between plaintiff's and their counsel waived with respect to a) plaintiff's alleged emotional distress damages; b) plaintiff's medical

psychological, psychiatric or any other treatment for those alleged emotional distress damages is hereby Denied. Defendants' request pursuant to CPLR 3124 compelling production of social media accounts is denied as plaintiff's have produced all social media documents which are responsive to the defendant's requests and relate to the allegations in the plaintiff's complaint. Defendants request for the plaintiff to cure any and all outstanding discovery is deemed Moot as the defendant has provided all outstanding discovery. Defendants request for sanctions pursuant to 1:03-1.1 and/or attorney's fees and costs, is hereby Denied.

This constitutes the Decision/Order of the Court.

Date: February 1, 2019

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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KINGS COUNTY CLERK
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