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United States District Court, N.D. Illinois, Eastern Division.

Peso CHAVEZ, Plaintiff,
v.
ILLINOIS STATE POLICE, Gregory Lee, Anthony W. Thomas, Linda Thomas, Terrance W. Gainer, individually, and in his official capacity as Director of the Illinois State Police, Larry Thomas, Daniel Gillette, Robert P. Cesna, Trooper Butler, Robert Lauterbach, Dale Fraher, Craig Graham, and other presently unknown officers of the Illinois State Police, in their individual capacities, et al.

No. 94CV5307. | Feb. 12, 1996.

MEMORANDUM AND ORDER

MANNING, District Judge.

***1** Defendants have moved for a protective order to prevent further disclosure of a document that was inadvertently produced in a deposition of Kevin Eack, legal advisor to Illinois State Police Deputy Director Neumann. This memo was also carbon copied to James Redlich, chief legal counsel of the Illinois State Police. The actual memo is not attached to either the motion or the response. We have reviewed Eacks deposition testimony to become familiar with its contents.

Upon review of the respective motions of both parties, it is hereby ordered that defendants' motion for a protective order for the Kevin Eack memo at issue in their motion is hereby granted. Further, plaintiffs' motion to order Kevin Eack to fully answer plaintiffs' deposition questions about the content of conversations relating to the memo is denied and plaintiffs' motion to order defendants to produce documents, even if formerly privileged, which address the same subject as the Eack memorandum to plaintiffs within ten days of their motion is also denied.

Facts leading to the disclosure of the document

Assistant Attorney General Ian D. Johnston is directly responsible for this case. On the date of Kevin Eack's deposition, Johnston was out of the state on vacation. Attorney Cara L. Smith was the assigned attorney for the deposition who was unable to cover the deposition because of emergency medical issues with her newborn son. As a result, Attorney Andrew N. Levine became the person responsible for attending the deposition of Kevin Eack. It appears that Levine had less than 24 hours to prepare for this deposition.

At that deposition, plaintiff produced a memo which was prepared by Eack which apparently provided Neumann with information from an article addressing the legal activity in another state. Eacks reported directly to Neumann -- it appears that part of his job description required him to update Neumann on various developments in criminal law across the country. Attached to the memo was a summary of a case involving the activities of the New Jersey Police. It appears that this case found the statistics of a police departments' enforcement activity may display a disproportionate effect on persons in the minority community. Eack recalls that he obtained the information from the Criminal Law Reporter.

Defendants assert that the attorney-client privilege attaches to this document. An argument can be made that Eack provided legal advice on developments throughout the country to advise his client, the Illinois State Police Department.

However, the argument that this document is protected by the work product privilege is less tenable. It is not certain that this memo was prepared in anticipation of litigation for the Chavez case, or any other case for that matter.

Analysis

Generally, in the seventh circuit, protection from disclosure is only available when the party asserting the privilege has maintained confidentiality. *Matter of Continental Illinois Securities Litigation,* 732 F.2d 1302, 1315 (7th Cir. 1984), *citing Permian Corp. v. United States,* 665 F.2d 1214, 1222 (D.C. Cir. 1981); *United States v. A.T. & T.,* 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Maryville Academy v. Loeb Rhoades & Co.,* 559 F. Supp. 7, 9 (N.D. Ill. 1982). Further, a party waives the attorney - client privilege when the contents of the privileged communication are put in issue by the party asserting the privilege. *Matter of Continental Illinois,* 732 F.2d at 1315,

n. 20.

***2** It appears that this circuit employs a balancing test on a case-by-case to determine whether the privilege is waived. Under the balancing test, the court weighs: (1) the reasonableness of the precautions taken to prevent the disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery (4) the extent of the disclosure and (5) the overriding issue of fairness. *Central Die Casting v. Tokheim,*1994 U.S. Dist. LEXIS 11411 (1994).

Both sides rely on *Central Die Casting v. Tokheim,*1994 U.S. Dist. LEXIS 11411 (1994), a case of Judge Williams' that finds that a defendants' disclosure of a document, albeit inadvertent, still did not grant them recovery on their motion for a protective order. The significant factor that distinguishes Tokheim from this case is the time period that defendants took to rectify their inadvertent disclosure -- it was much longer. Additionally, plaintiffs in Tokheim relied on the inadvertently produced document in their motion for summary judgment.

Here, employing the balancing test enumerated in *Tokheim,* it appears that the defendants employed reasonable attempts to preclude this document from being disclosed. In April 1995, attorneys and plaintiff's agents marked documents that they wished to have copied out of "tens of thousands of documents" available. After the documents were marked by the plaintiffs' attorneys and agents, the defendants copied them. Next, Kevin Eack, attorney for the defendants reviewed those documents. The documents were then sent from Springfield to the Assistant Attorney General, who was directly responsible for the case in Chicago, Illinois, who reviewed the documents again. In other words, defendants did not leave plaintiffs to wander in a room of documents and then attempt to assert the attorney-client privilege when something they didn't want to be found was discovered. Instead, defendants engaged in a lengthy process to separate privileged documents from those actually transmitted to the plaintiffs.

The second requirement, time taken to rectify the error, also seems to be satisfied by the defendants. Assistant Attorney General Johnston called plaintiff's attorney as soon as he was aware of the error -- the evening he arrived from his vacation. Johnston called plaintiffs' attorney again the next day, and finally spoke to him the following day. Further, this motion is before us less than one month after the deposition of Eacks took place.

With regard to the third requirement, the scope of discovery does not excuse the inadvertent production of this document and does not aid defendant's position. The memorandum was fully disclosed because it was copied, produced to the plaintiff and arguably used by the plaintiff in their pre-deposition preparation.

The fourth requirement examines the extent of disclosure. When Eacks deposition transcript is reviewed, it appears that Attorney Levine continued to object to mental impressions, discussions or any concerns that Eack may have had, as it related to the memo. Therefore, it appears that the only thing that is conclusively established for the record is that Eacks wrote the memo, that the memo was written to Neumann, and copied to Redlich. Eaks' sketchy testimony also addresses the substance of the memo -- to the extent that he can remember.

***3** It appears, when all is said and done, that the real issue underlying all of the analysis rests on the fifth prong -- that is, what is really fair ? Defendants had an unfortunate chain of events which caused them to leave this deposition in the hands of an attorney who appeared to be wholly unfamiliar with the case. Under these circumstances, it is arguable that he would have missed making the same objections with regard to this document even if it had been placed in his hands minutes before the deposition began. Further, review of the deposition record shows that Attorney Levine took a break fairly early in the deposition to learn more about the case in an attempt to preserve any requisite privileges. The record also reveals he instructed his client not to answer any questions relating to mental impressions, discussions or any other communications relating to the memo. Taking all of this under consideration, a strong argument can be made that Levine did everything he could to protect the applicable privileges at issue in this deposition. Plaintiffs should not be able to profit from the unfortunate turn of events that befell defendants.

Plaintiffs' arguments with regard to fairness do not seem to be as strong -- especially because the testimony potentially favorable to the plaintiff, which is arguably essential because it is related to the document, has effectively been excluded from the deposition by Levine's objections. If plaintiffs' could articulate reliance on this document, that would be their strongest argument to prevent defendants' protective order from being granted. Plaintiffs' raise this argument in their motion, yet fail to articulate *specifically* how they have relied on this document.

Therefore, we find that defendant's motion for a protective order is granted in that little prejudice befalls either party at this point. Further, plaintiffs' motion to order Kevin Eack to fully answer plaintiffs' deposition

questions about the content of conversations relating to the memo is denied and plaintiffs' motion to order defendants to produce documents, even if formerly privileged, which address the same subject as the Eack memorandum to plaintiffs within ten days of their motion is also denied.

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