

NO.: NNH-CV-14-6050848-S : SUPERIOR COURT
ZHAOYIN WANG : JUDICIAL DISTRICT OF NEW
HAVEN
VS. : AT NEW HAVEN
BETA PHARMA, INC.,
DON ZHANG, and ZHEJIANG
BETA PHARMA CO., LTD. : APRIL 18, 2016

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Defendants have moved for the entry of a protective order to authorize them to make a limited and temporary waiver of otherwise attorney-client privileged documents allegedly authored by one Attorney Lance Liu during his work for Beta Pharma between July, 2011 and November or December, 2012, the period during which defendants claim that Liu represented them as general counsel. They move for permission to reveal these documents to the Court and counsel only for use during the litigation of their pending Motion to Disqualify, so that, after that motion is determined, the documents will regain their former privileged character, and not be available to adverse counsel or the Court for any other use in this litigation. They describe their proposed order as follows:

In support of their Motion to Disqualify, Defendants intend to submit for the Court's consideration, as exhibits supporting that Motion, certain documents showing that Liu counseled Defendants on the subject matter of this case, but which contain Defendants' confidential, work product, and privileged information. The Proposed Order will prevent any waiver of their privileges with respect to such information, and prevent Defendants' privileged information from being used against them in the litigation of this case's merits.

Defendants' Motion for Protective Order at page 2.

Defendants' Motion for Protective Order should be denied. The order they seek is contrary to established Connecticut case law governing assertion and waiver of the attorney-client privilege. Although these legal infirmities exist in a protective order entered in another case pending in the United States District Court for the District of Connecticut between defendants and different plaintiffs, namely Shao v. Beta Pharma, Inc., et al., docket number 3:14cv01177-CSH, the court in that case was not called upon to address these infirmities. Thus, the entry of defendants requested order in that case does not provide persuasive authority here. See discussion, infra. Further, the order proposed by defendants, if entered, prejudices plaintiff and creates a significant burden on the truth finding process in this case. For these reasons, it should be denied.

I. BACKGROUND

As will be demonstrated in plaintiff's forthcoming opposition memorandum, defendants' Motion to Disqualify plaintiff's counsel lacks merit. An attorney should only be disqualified if he or she "has accepted employment adverse to the interests of the former client on a matter **substantially related** to the prior representation." Bergeron v. Mackler, 225 Conn. 391, 399 (1993) (emphasis added). The Connecticut Supreme Court has explained that "[t]his test 'has been honed in its practical application to grant disqualification only upon a showing that the relationship between the issues in the prior and present cases is "patently clear" or when the issues are "identical" or "essentially the same.'" Id. (quoting Government of India v. Cook Industries, Inc., 569 F.2d 737, 739-40 (2d Cir. 1978)).

Defendants seek a protective order to use the attorney-client privilege as a sword, for a second time in this case, in support of their second tardy and tactical Motion to Disqualify.¹ The previous motion was filed in Federal court five months after suit was filed. This case was returned to court on November 10, 2014. On December 1, 2014, Defendants removed it to Federal court. On December 5, 2014, they moved to transfer it to the United States District Court in New Jersey. Plaintiff fully briefed his opposition to transfer. On January 7, 2015 defendants filed a Motion to Dismiss, which plaintiff also fully opposed. On March 20, 2015 defendants filed an “emergency” motion for protective order similar to that they seek here, which was also fully opposed. Finally, on April 21, 2015, they filed their first Motion to Disqualify. The Motion to Disqualify was fully briefed. Plaintiff’s Opposition to Motion to Disqualify (running to some 99 pages including exhibits, and indexed erroneously as a defendant’s “Memorandum”), was filed on May 11, 2015. That document is part of the Superior Court file in this case, as docket entry 166. On June 16, 2015, the Federal Court issued an Order to Show Cause as to why the case should not be remanded for improper removal. That issue was fully briefed, and Judge Bryant remanded the case to this Court on August 24, 2015.

After remand, defendants did not renew their Motion to Disqualify. Instead, they filed a Motion to Strike. Plaintiff fully briefed his opposition. The motion was argued, and decided by Judge Fischer, who issued a detailed, eight-page page ruling denying the

¹ Defendants have previously lost a Motion to Disqualify undersigned counsel from representing plaintiffs in Shao et al. v. Beta Pharma, Inc., et al.; United States District Court, District of Connecticut Civil Action No., 3:14CV01177 (CSH)(sealed ruling). Defendants have also moved to disqualify undersigned counsel from representing plaintiff in Xie v. Beta Pharma, Inc., X06-UWY-CV13-6025526-S, Complex Litigation at Waterbury. That motion was filed October 9, 2014, nearly a year after the undersigned entered his appearance for Guojian Xie. It has not yet been decided, in part because defendants have to date successfully obstructed the discovery of the deposition transcripts of defendant Don Zhang and Attorney Lance Liu, taken in defendants’ civil action against Liu pending in the Superior Court for Mercer County, New Jersey as docket no. MER-L-2040-14. Litigation concerning discovery of those transcripts is pending in Waterbury.

Motion to Strike in its entirety on March 9, 2016. Only now, after causing plaintiff and the Court to expend enormous amounts of time and effort, and after having taken nearly a year to study plaintiff's opposition to the first Motion to Disqualify, do defendants re-raise their claim that undersigned counsel is precluded from representing Zhaoyin Wang due to the alleged wrongful conduct of Attorney Lance Liu. This is obviously a tactical filing by a defense team committed to making this litigation as protracted and expensive as possible for all concerned. Indeed, the reasonable inference from this record is that, if defendants legitimately believed they were being subject to an injustice, their Motion to Disqualify would and should have been the first motion they filed in this case.

In any event, the prior record in this case clearly shows that disqualification is inappropriate. It establishes that Attorney Lance Liu was not involved in substantially the same matter as this litigation. As set forth at Page 2 of defendants' Motion for Protective Order (Docket Entry 186), Liu represented Beta Pharma only from July, 2011 through November or December 2012—long after the "Partnership Offering Agreement" that is Exhibit A to the Complaint had been executed, and long before the relationship between Zhaoyin Wang and Beta Pharma finally broke down. On May 11, 2015, plaintiff Zhaoyin Wang filed a sworn Declaration in Federal Court, setting forth the relevant facts. This Declaration is "Exhibit A" to plaintiff's "Memorandum in Opposition to Defendants' Motion to Disqualify Opposing Counsel," Superior Court docket entry 166, and bears a Federal indexing header, as Document 76-1, pages 1 through 36. The Declaration establishes that Liu had no involvement in the transaction in March, 2010 whereby plaintiff and defendants went into business together, as that transaction long predated Liu's involvement with Beta Pharma. Likewise, Liu had no involvement in the 2014 discussions between plaintiff and

defendant Don Zhang leading up to this lawsuit—as he was long gone from Beta Pharma by then and was not a party to the lengthy email discussion between Wang and Zhang attached to Dr. Wang's Declaration. Liu did have some brief contact with Zhaoyin Wang in connection with a shareholder's agreement drafted by Dr. Wang, which Wang thought was necessary to obtain research and development tax credits under Canadian law. See Declaration of Zhaoyin Wang, Paragraphs 6 through 11. Liu's minor involvement in this matter consisted of telephone calls, and was clearly routine general counsel work pertaining to a tax matter and did not involve "substantially the same matter" as this litigation.

If defendants believe that they must offer evidence of this work in order to support their Motion to Disqualify, they may waive their attorney-client privilege and do so. But, as set forth below, they are not entitled to a temporary and selective waiver of the privilege to use as a sword to further their tactical objectives, and then to re-cloak their submissions with artificial secrecy.²

II. ARGUMENT

1. The Proposed Protective Order violates Established Connecticut Law Governing the Assertion and Deliberate Waiver of the Attorney Client Privilege.

Defendants' proposed protective order is contrary to precepts of Connecticut law regarding privilege. In particular, defendants seek to waive their privilege as to purportedly attorney-client protected documents for purposes of pressing their motion to disqualify plaintiff's attorney, while at the same time preventing the use of those documents for any

² Defendants used this tactic in the Shao litigation, producing relevant documents pursuant to the protective order, such that they cannot be used in the case in chief without further litigation.

other purpose in this litigation – no matter the relevance of those waived documents to the central issues presented by plaintiff’s complaint. However, this kind of strategic use of selective disclosure has been rejected by our courts.

In Rosado v. Bridgeport Roman Catholic Diocesan Corp., 292 Conn. 1 (2009), the Connecticut Supreme Court made clear that “the voluntary disclosure of confidential or privileged information to a third party, such as an adversary, generally constitutes a waiver of privileges with respect to that material.” Id. at 58. That court also rejected the defendants’ attempt to assert a selective waiver of their attorney-client privilege -- as defendants attempt to do in this case -- holding, “[f]urthermore, we reject the defendants’ contention that any waiver of privileges operated selectively, allowing the defendants to maintain the privilege with respect to parties other than those to whom disclosure was made. We agree with the trial court’s conclusion to the contrary and approve of the reasoning employed by the Court of Appeals for the District of Columbia in rejecting the selective waiver doctrine: ‘[T]he [party] cannot be permitted to pick and choose among [its] opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, **or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.**’” Id. at 60-61 (emphasis added).

As the court observed in Kowalonek v. Bryant Lane, Inc., No. CV 960324942S, 2000 WL 486961 (Conn.Super. April 11, 2000), “A client cannot waive that privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial.” (quoting In re Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984)). “[T]he attorney-client privilege

should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.” Id. (quoting Permian Corp. v. United States, 665 F.2d 1214, 1219-22 (D.C.Cir. 1981)). Cf. In re von Bulow, 828 F.2d 94, 101 (2d Cir. 1987) (recognizing that fairness prevents the “prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder’s selective disclosure during litigation of otherwise privileged information”).

“Connecticut courts have consistently refused to give credence to the concept of selective waiver of the attorney-client privilege. ‘This result [waiver of the privilege] is reached because once the confidence privilege has been breached, the privilege has no valid “continuing office to perform.”’” Feinstein v. Keenan, No. FSTCV106007235S, 2012 WL 2548331 (Conn.Super. June 6, 2012) (quoting Gebbie v. Cadle Co., 49 Conn.App. 265, 274 (1998)).

Here, the record is quite clear that defendants are attempting to use their purportedly privileged communications as both sword and shield in this litigation. Specifically, defendants are prepared to voluntarily disclose claimed attorney-client privileged and/or work product protected information in an effort to disqualify plaintiffs’ counsel – an effort which is severely prejudicial to plaintiffs because it deprives them of their chosen counsel, including that counsel’s extensive knowledge and experience in the case, and it exposes plaintiffs’ to substantial litigation expense should defendants’ motion to disqualify succeed.

In short, defendants are more than willing to disclose protected information as a sword to disadvantage plaintiffs in this litigation. However, defendants also seek to shield that same information from use during any other facet of this same litigation, claiming that

such information should then remain privileged. Defendants make this claim notwithstanding that the privileged materials at issue are highly relevant to the central issues in this case—whether defendants breached the 2010 Partnership Offering Agreement and their commitments to Beta Pharma Canada, and the damages plaintiff suffered thereby. Defendants have already asserted that the allegedly privileged documents pertain to “. . . tax issues associated with BPC [Beta Pharma Canada] and the 2010 Agreement,” and to defendants’ investigation of the possible dissolution and redrafting of that Agreement. See Defendants’ Motion for Protective Order at page 3.

Under these circumstances, the documents may constitute defendants’ admissions that they breached their contract with plaintiff. Essentially, defendants’ proposed protective order seeks to allow plaintiff’s counsel and the Court to review defendants’ purported attorney-client privileged documents for purposes of defendants’ motion to disqualify him, but then requires them to ignore those documents and their contents for the balance of the litigation, no matter their relevance. “Fairness concerns underlie courts’ holdings that voluntary disclosure of once-privileged communications constitutes waiver of the attorney-client privilege as to the disclosed communications. ‘Because the attorney-client privilege inhibits the truth-finding process, it has been narrowly construed . . . and courts have been vigilant to preserve litigants from converting the privilege into a tool for selective disclosure.’” Kowalonek v. Bryant Lane, Inc., No. CV 960324942S, 2000 WL 486961 (Conn.Super. April 11, 2000) (quoting Permian Corp., 665 F.2d at 1221).

The strategic and manipulative use of the attorney-client privilege, defendants’ tactic here, has been explicitly rejected when “merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.” In Re Steinhardt

Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993)). Plaintiff respectfully submits that the Court should reject defendants' attempt to use the attorney-client privilege in such a selective and strategic manner, and that the Court should deny entry of defendants' proposed protective order.

2. The Entry of Defendant's Proposed Protective Order in Shao v. Beta Pharma does not Justify its Entry Here.

Defendants argue that this Court should grant their protective order because another judge granted it in a different case. They assert that the protective order they seek here has already been entered in Shao, et al., v., Beta Pharma, Inc., et al., No. 3:14-cv-01177 (CSH) (D. Conn.), which is currently pending before the Hon. Charles S. Haight. At the outset, Dr. Wang, plaintiff here, is not a party to the Shao case. The claims he makes for breach of partnership agreement against Beta Pharma and Dr. Zhang are very different from those made by Shao and her four fellow purchasers of unregistered private shares in Zhejiang Beta Pharma. Importantly, the procedural history of the protective order in the Shao case did not provide plaintiffs there with an opportunity to brief the issue of whether applicable law prohibited defendants from making a selective and temporary waiver of the attorney-client privilege.

Plaintiff is not a party to the Shao case. The fact that undersigned counsel represents the Shao plaintiffs does not compel this court to prejudice plaintiff here by entering the Shao protective order, as the two cases are entirely different. Plaintiff here alleges that he entered into a partnership agreement with defendants whereby he rendered services and established Beta Pharma Canada, half-owned by Don Zhang. In exchange, defendants transferred to him a 1% interest in Zhejiang Beta Pharma, but failed

to register the shares in China. Defendants also promised him an increasing ownership interest in U.S. Beta Pharma.

The Shao plaintiffs make very different claims. Those plaintiffs allege they purchased shares of the Chinese company Zhejiang Beta Pharma from Beta Pharma and Don Zhang, for cash, in 2010 and 2011 while defendants were doing business in Branford, Connecticut. In the summer of 2013, defendants offered to repurchase these shares from the Shao plaintiffs for cash, based on the assumption that Zhejiang Beta Pharma was then worth \$600 million. Defendants then breached the repurchase agreements by reducing their offer by approximately 50%, ostensibly because defendants had to fund the purchase with after-tax dollars. Litigation ensued.

The Shao litigation has proceeded differently from the instant case. Defendants in Shao moved to disqualify undersigned counsel on October 14, 2014. See Shao Docket Entry 20. On November 18, 2014, plaintiffs filed their opposition to the Motion to Disqualify in the Shao case. See Shao Docket Entry 32. After reviewing the opposition, defendants determined that they needed to allege a nexus between the allegations in the Shao complaint and the work Lance Liu had previously performed for Beta Pharma. They decided to supplement the record in their Motion to Disqualify by submitting attorney-client privileged documents to the Court.

Defendants filed a "Motion for Scheduling of Conference" in the Shao case, (Shao Docket Entry 35). In their motion, defendants stated that the documents they sought to offer contained "confidential and privileged information" and that "service of the Documents on Plaintiffs' counsel" would waive the privilege. (Shao Docket Entry 35 at 2). At the resulting telephone conference, plaintiff's counsel objected to defendants making any ex

parte submission to the court. Judge Haight then ordered the parties to develop a joint protective order. The parties could not agree on a joint order. Each side submitted a draft, as ordered, and the Court issued its Opinion and Order, each dated January 16, 2015. Notably, defendants were never required to submit legal authority in support of the order they obtained, and plaintiffs in Shao never had an opportunity to oppose it. Thus, the important consequences of the waiver of the attorney client privilege were never briefed by the parties, or discussed with the Court.

Judge Haight's Opinion on Proposed Protective Orders adopted defendants' interpretation of the Rule without citing any authority. Notably, it sharply criticized defendants for tendering to the Court a draft Protective Order which omitted key provisions of Federal Local Rule 5 (e)(4) (d). The Court wrote:

One of Plaintiffs' principle concerns raised at the telephone conference was an assurance that their counsel be given an opportunity to view the documents filed under seal so that he might fairly address Defendants' disqualification arguments based upon those documents. In spite of the Court's direction to the parties to work together to address each other's respective concerns, Defendants' proposed protective order does not even attempt to fashion a mechanism by which Plaintiffs' counsel may view and respond to documents filed under seal.

Shao Opinion, Docket Entry 49-6, at pages 8 – 9. Had the Court adopted defendants' proposed order without change, it would have inadvertently provided for unlawful ex-parte communication between the defense and the Court and deprived plaintiffs' counsel of the right to see sealed submissions. See Shao Opinion, Document 49-6 at pp. 8 to 10.

On July 2, 2015, Judge Haight denied defendants' Motion to Disqualify plaintiffs' counsel in the Shao case. The decision was filed under seal.

Although defendants rely heavily on Judge Haight's entry of the Shao protective order, defendants do not contend that this Court is bound by the discovery order that

entered in the Shao court. Indeed, the two cases are separate. One does not control the other. This Court is free to make an independent determination. Because defendants' proposed order blatantly disregards established precedent in opposition to temporary and selective waivers, defendants' motion should be denied.

3. Defendant's Motion, if Granted, May Permanently Contaminate the Truth-Finding Process in this Case.

Defendants' proposed mechanism for obtaining a limited and temporary waiver of the attorney-client privilege threatens to contaminate the truth-finding process in this case on an ongoing basis by permitting defendants to proffer, and then to retract, potentially incriminating documents. What if the privileged documents establish that defendants knowingly breached their contract with plaintiff? Is plaintiff to be permanently precluded from using these documents to oppose a Motion for Summary Judgment? Is the Court to be permanently precluded from considering the documents in ruling on a Motion for Summary Judgment? How are plaintiff and the Court to litigate a case in which they have seen potentially inculpatory documents during litigation of the Motion to Disqualify, but must essentially "unsee" and forget about these documents for substantive purposes in the future?³ This unfair dilemma is precisely why limited temporary waivers of the attorney client privilege are not permitted under law.

For the foregoing reasons, plaintiff respectfully requests that this Court deny defendants' Motion for Protective Order.

³ Indeed, plaintiffs in the Shao action now face precisely this problem, since documents relevant to Beta Pharma's decision to repurchase plaintiffs' shares of Zhejiang Beta Pharma were produced as "Attorney's Eyes Only" material for the purpose of the Motion to Disqualify only. Plaintiffs are seeking to lift the veil of secrecy from those documents, which the Court has seen but plaintiffs cannot now offer into evidence.

PLAINTIFF ZHAOYIN WANG,

By: _____


Jonathan Katz, Esq.
Jacobs & Dow, LLC
350 Orange Street
New Haven, Connecticut 06511
Telephone: (203) 772-3100
Facsimile: (203) 772-1691
Email jkatz@jacobsllaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was, or immediately will be, either mailed or electronically delivered on this 18th day of April, 2016, to all counsel and self-represented parties of record (and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were electronically served) in accordance with Practice Book §10-13 and §10-14 (as amended 1/1/2015).

Michael G. Caldwell, Esq.
LeClair Ryan, P.C.
545 Long Wharf Drive, 9th Floor
New Haven, CT 06511
Michael.caldwell@leclairryan.com

Jack L. Kolpen, Esq.
Benjamin R. Kurtis, Esq.
Fox Rothschild LLP
Princeton Pike Corporation Center
997 Lenox Drive, Building 3
Lawrenceville, NJ 08648-2311
jkolpen@foxrothschild.com
bkurtis@foxrothschild.com

Glenn A. Duhl, Esq.
Siegel, O'Connor, O'Donnell & Beck, P.C.
150 Trumbull Street
Hartford, CT 06103
gduhl@siegelconnor.com



Jonathan Katz, Esq.