

NO.: NNH-CV-14-6050848-S

ZHAOYIN WANG,	:	SUPERIOR COURT
Plaintiff,	:	
	:	
v.	:	J.D. OF NEW HAVEN
	:	AT NEW HAVEN
BETA PHARMA, INC., DON ZHANG AND	:	
ZHEJIANG BETA PHARMA CO., LTD.,	:	
Defendants.	:	APRIL 28, 2016

**DEFENDANTS' REPLY BRIEF IN FURTHER
SUPPORT OF MOTION FOR PROTECTIVE ORDER**

Pursuant to Practice Book § 11-10(b), Defendants¹ hereby file this Reply to respond to arguments made in the Opposition to Defendants' Motion for Protective Order (the "Opposition" or "Opp. Br.") [D.E. #190.00], which Plaintiff filed on April 18, 2016. This Reply is also filed in further support of Defendants' Motion for Protective Order (the "Motion" or "Mot. Pr. Or.") [D.E. #186.00], which requests entry of a Proposed Order to govern litigation of the pending Motion to Disqualify [D.E. #183.00].

PRELIMINARY STATEMENT

Defendants moved to disqualify Jonathan Katz from representing Plaintiff because Defendants' former lawyer, Lance Liu, counseled Beta Pharma on issues in this action and then teamed up with Katz in this case. Defendants have additional evidence proving that Liu's representation involved the same matter as this action, including Liu's draft revision to the agreement at issue in this breach of contract case. Because the evidence is covered by the attorney-client privilege and/or work product

¹ All defined terms that are not defined herein have the same meanings as in the Motion for Protective Order.

doctrine, Defendants seek a Protective Order (the “Proposed Order”) to disclose the evidence solely to litigate the Motion to Disqualify without waiving any privilege.

In response to this Motion, Plaintiff makes the misguided arguments that Defendants cannot partially waive privileges, and that a privilege cannot be invoked as “a sword and a shield.” As to the former argument, Defendants do not seek to partially waive any privilege, but instead seek to avoid any waiver at all. And Courts possess ample authority to authorize disclosure of privileged information for the limited purpose of litigating a disqualification motion without effecting a waiver. Regarding the latter point, neither the Proposed Order nor a privilege will “shield” otherwise non-privileged documents from Plaintiff’s use in litigating the merits of this case. The documents to be designated under the Proposed Order are privileged and/or work product, so Plaintiff could never have used them in litigating this case. Thus, none of Plaintiff’s arguments against the Proposed Order have merit.

Disqualification protects litigants from having their confidential and privileged information used against them. See, e.g., Bergeron v. Mackler, 225 Conn. 391, 397 (1993); Memo. in Supp. of Motion to Disqualify at 15. The Motion for Protective Order should be granted so Defendants can further demonstrate the conflict without their privileged information being used against them – which is exactly what the Motion to Disqualify seeks to prevent.

LEGAL ARGUMENT

I. It is Undisputed that the Court Has the Authority to Issue an Order Preventing Waiver of the Attorney-Client and Work-Product Privileges

In the Motion for Protective Order, Defendants explained that this Court has the authority to issue an Order under which Defendants could file privileged documents in

support of the Motion to Disqualify without waiving their privileges. Mot. Pr. Or. at 6-9. As Defendants observed, the Order they request is essentially the one entered by the Superior Court under similar circumstances (a motion to disqualify) in Franco v. Toyota Motor Sales, USA, Inc., 1995 WL 780944 (Conn. Super. Ct. Dec. 11, 1995). Plaintiff does not deny that the Court has this authority. The question therefore is not whether the Court has authority to issue the Proposed Order but whether it should do so. It should, so that Defendants can offer additional evidence of the conflict without waiving their privileges or having their privileged information used against them.

II. The Proposed Order Does Not Violate Connecticut Law

Plaintiff argues that the Proposed Order violates Connecticut law concerning the assertion and waiver of the attorney-client privilege,² citing the Rosado, Kowalonek, and Feinstein decisions. Opp. Br. at 5-9. However, none of those cases suggests that the Court cannot, or should not, issue the Proposed Order. Were those decisions addressed “selective waivers,” they were concerned with issues not present here. Importantly, none of the cases concerned a motion for a protective order, made in advance of the disclosure of privileged material, asking the court to permit such material to be disclosed for purposes of a disqualification motion (or any other specific purposes) without waiving the privilege.

A. Rosado is Inapplicable

The Court’s decision in Rosado v. Bridgeport Roman Catholic Diocesan Corp., 292 Conn. 1, 55-61 (2009), concerned the clergyman’s privilege and First Amendment privilege rather than attorney-client privilege, and addressed entirely different issues.

² Plaintiff does not present equivalent arguments about attorney work product protection.

First, the Court found that the defendants in that case had waived those privileges with respect to certain documents because they failed to claim the privileges at the time of disclosure. Id. at 60. The defendants had produced the documents in discovery without asserting the privileges, and first asserted them in response to a motion filed by an intervenor. That issue is not relevant here because Defendants are asserting the privilege in advance of any disclosure.

Second, the Court held that when the defendants waived those privileges as to the plaintiffs, they also waived them as to the intervenor. Id. The Court held that a party cannot pick and choose among its opponents, waiving the privilege for some and resurrecting it to obstruct others. Id. at 60. That holding was the context for the sentence that Plaintiff emphasizes: a party may not “invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.” Id. at 60-61; Opp. Br. at 6.

Here, Defendants are not seeking to pick and choose which opponents will see the privileged documents. Indeed, no opponent other than Plaintiff is at issue. Furthermore, Defendants have not compromised the confidentiality of these documents and have no plan to make them public in the future. Plaintiff states that the Proposed Order enables Defendants to effect a “limited and temporary waiver” of the attorney-client privilege, Opp. Br. at 1, 5, when in fact, the Proposed Order would permit Defendants to use the documents in a very specific way without waiving the privilege at all. Defendants intend to submit the documents as exhibits to the Motion to Disqualify only after entry of the Proposed Order, and only under seal. Mot. Pr. Or. at 15-16.

B. Kowalonek is Inapplicable

Likewise, the Superior Court's decision in Kowalonek v. Bryant Lane, Inc., 2000 WL 486961 (Conn. Super. Ct. Apr. 11, 2000), is inapplicable. The Court noted that a party's waiver as to one document may extend to other documents in related areas if the disclosing party would use incompleteness of disclosure against its opponent. Id. at *9. Here, there is no such issue. Defendants do not ask permission to disclose some documents while withholding other documents on the same subject matter. They ask permission to use these documents without waiving their privileges with respect to the same documents.³

Plaintiff quotes Kowalonek for the principle that "a litigant who wishes to assert attorney-client confidentiality must maintain genuine confidentiality." Opp. Br. at 6-7; Kowalonek at *5. But, as noted above, Defendants are not failing to maintain confidentiality; they are doing everything possible to preserve the confidentiality of the documents in question through the Proposed Order.

The Court's holding in Kowalonek concerned a retrospective effort to withdraw a waiver of the attorney-client privilege. The plaintiff filed grievance proceedings against the attorney who previously represented her in the same action, Farrell. In those proceedings, the plaintiff testified about her communications with Farrell, including "the preparation of discovery response[s], analysis of liability and damage issues, settlement positions, and the eventual breakup of their attorney-client relationship." Id. at *1. The testimony was published in three volumes of publicly available transcripts. Later, the

³ Kowalonek, like Rosado, also rejected the idea that a party can disclose privileged communications to one opponent and later assert it against a different opponent. Id. at *5. As noted above, multiple opponents are not at issue here.

defendant sought to depose Farrell. At that point, the plaintiff sought to resurrect her privileges to prevent the deposition from taking place, and the Court found that the privileges had been waived.

Defendants here have not placed privileged information before the public, and they are not seeking to resurrect a privilege as to information already disclosed. They are seeking a protective order in advance to govern use of privileged or work product evidence. Stated differently, this Motion does not concern whether a waiver has already occurred, but only whether the Court should issue the Proposed Order.

C. Feinstein is Inapplicable

In the third decision that Plaintiff cites, Feinstein v. Keenan, 2012 WL 2548331 (Conn. Super. Ct. June 6, 2012), the Superior Court found that the plaintiffs had made both express and implied waivers of the attorney-client privilege. The plaintiffs simultaneously brought two actions: (1) an action for breach of contract and torts against the people from whom they bought their home, the Keenans; and (2) an action for malpractice against the attorney who represented them in that sale, Kimberly Rizza. In connection with their action against Rizza, the plaintiffs signed express waivers of any privilege they might have “with Kimberly Rizza.” Id. at *3. In the action against the Keenans, one of the plaintiffs provided extensive deposition testimony about his discussions with Rizza and her legal advice. The other plaintiff’s attorney did not object or assert the privilege. Id. at *4.

The defendants sought to depose Rizza, and the plaintiffs did not object to that deposition. Id. at *1-3 and *3 n. 3. However, Rizza moved for a protective order on the grounds that the deposition would violate the attorney-client privilege and Rule 1.6 of

the Rules of Professional Conduct. The Court held that the plaintiffs had waived those privileges. First, it found that the signed waivers were not limited to the action against Rizza, but also applied to the action against the Keenans. Id. at *3. Here, Defendants have signed no waivers.

Second, the Court found that the plaintiffs had waived the privileges when one of them testified about his communications with Rizza. Id. at *3-4. As Plaintiff observes in his Opposition, the Court held that the privileges were waived because “once the confidence privilege has been breached, the privilege has no valid ‘continuing office to perform.’” Id. at *3, quoting Gebbie v. Cadle Co., 49 Conn. App. 265, 274 (1998).

Here, the privilege will have a continuing office to perform if the Court grants the Proposed Order. Defendants will not place these documents on the public record and thus destroy their confidentiality. Under the Proposed Order, if any party files one of the privileged documents with the Court, it must do so under seal. Mot. Pr. Or. at 15. The privilege will have a continuing role in maintaining the confidentiality of Defendants’ communications with their attorney and preventing the use of such communications against them.

In these decisions, the courts never addressed the issuance of an Order with the provisions that are at issue here – that is, provisions to protect privileges during litigation of a disqualification motion. As Defendants explained in the Motion for Protective Order, many courts have fashioned Orders to handle situations like the present one. Mot. Pr. Or. at 6-13.

III. Issuance of the Same Protective Order in the Shao Action Supports Its Issuance in Identical Circumstances Here

Judge Haight's issuance of the identical order under identical circumstances in the Shao Action strongly supports its issuance here. Facing exactly the same situation, Judge Haight entered a protective order containing the non-waiver provision. See Mot. Pr. Or. at 14-16. Plaintiff argues that the Court should ignore Judge Haight's Order because "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 waiver⁴ of the attorney-client privilege." Opp. Br. at 9.⁵ But that argument is both irrelevant and factually inaccurate.

First, that account of the procedural history of the Shao Order is inaccurate. The Shao plaintiffs did have an opportunity to make the arguments that Plaintiff now advances, and in fact filed a document presenting their own version of the proposed order and arguing against Defendants' version. See Proposed Protective Order Concerning Motion to Disqualify, Shao Action [D.E. #42].⁶

Second, the Shao plaintiffs' failure to make Plaintiff's current arguments does not render Judge Haight's decision unpersuasive. Judge Haight's Order was issued after briefing by the Shao plaintiffs and Beta Pharma, and after due consideration by the Court, as shown by Judge Haight's written decision supporting it. Mot. Pr. Or. at 14-16;

⁴ As noted above, Defendants do not advocate a "temporary and limited waiver" of their privileges, but rather an Order that would prevent any waiver, which is exactly what was issued in the Shao Action.

⁵ As Plaintiff noted, the Shao plaintiffs were represented by the same attorney who represents Plaintiff in this action. Id.

⁶ The briefing schedule in the Shao case provided the Shao plaintiffs with over one month during which to make Plaintiff's current arguments, but they elected not to do so.

see also Opinion on Proposed Protective Orders, Shao v. Beta Pharma, Inc., No. 3:14CV1177 (D. Conn. Jan. 16, 2015) [D.E. #48].

Plaintiff also argues that his underlying claims differ from the underlying claims of the Shao plaintiffs. Opp. Br. at 9-10. That argument misses the mark. The underlying claims are not relevant to the Motion for Protective Order. The protective-order and disqualification motions in the two cases raise exactly the same issues: did Katz associate with a conflicted lawyer? And should Defendants be permitted to submit evidence of the egregious conflict without waiving any privileges?

Plaintiff raises a red herring when he states that Judge Haight's opinion criticized Defendants because their proposed protective order did not mention the sealing procedure under Federal Local Rule 5. Opp. Br. at 11. That was an entirely different issue. Judge Haight was under the misimpression that Defendants' order would prevent the plaintiffs' counsel from seeing documents filed under seal, which was not the case in Shao or here. The Proposed Order specifically provides for the service on Plaintiff of any documents submitted to the Court. Proposed Order (Exh. A to Motion for Protective Order), ¶ 10.

IV. Plaintiff's "Sword and a Shield" Argument is Factually and Legally Meritless

Plaintiff also makes the specious argument that Defendants seek to use the privileged communications as both a "sword" and a "shield." Opp. Br. at 7. Misapplying the facts and law, Plaintiff incorrectly assumes that, in the absence of the Proposed Order, he could access and obtain the documents at issue. He incorrectly asserts that Defendants seek to cloak the documents with "artificial secrecy." Opp. Br. at 5.

However, Defendants are not seeking to use either the documents or the Proposed Order as a “shield” in any sense. The Proposed Order would not prevent Plaintiff from obtaining or using documents that he would otherwise be entitled to obtain or use because the documents at issue are privileged or work product, and therefore are inherently cloaked with actual secrecy. For example, in the absence of the Proposed Order, if Plaintiff served a request for production to which the privileged documents were responsive, Defendants would provide a privilege log as required by Practice Book § 13-3(d), but would not produce the privileged documents themselves. Because they would be privileged, Plaintiff would not be entitled to obtain or use them. Exactly the same is true under the Proposed Order. See, e.g., Proposed Order ¶ 6.

Plaintiff suggests that he should be permitted to see and use the privileged documents because they are “highly relevant to the central issues in this case.” Opp. Br. at 8. Of course, whether the privileged documents are relevant is of no moment. Because the documents are privileged, Plaintiff has no right to see or use the documents in litigating the merits of the case.

For these reasons, the Proposed Order is not a “shield.” If the Court enters it, Plaintiff will not be prevented from using any documents that he is currently entitled to use.

V. The Proposed Order will Not Contaminate the Truth-Finding Process

Finally, Plaintiff contends that the Proposed Order would contaminate the truth-finding process in this action, arguing that Plaintiff and the Court cannot see certain documents during litigation of the Motion to Disqualify and then “unsee” the documents for substantive purposes. Opp. Br. at 12. Plaintiff’s argument on this point gives the

impression that Defendants' proposal is unprecedented, and that a prohibition on a party's or the court's use of a document they have seen is impossible or unworkable. In fact, such a prohibition is far from unprecedented.

For example, the Superior Court sometimes issues a protective order containing a provision that if a party inadvertently produces a privileged document, the receiving party must return it and make no use of it in the litigation. See, e.g., Steadfast Ins. Co. v. Purdue Frederick Co., 2005 WL 3511085, at *1 (Conn. Super. Ct. Nov. 30, 2005). Thus, it is not unprecedented or impossible for a party to litigate an action without making use of a privileged document that its counsel has seen. The Motion for Protective Order cites cases in which courts ordered that production of a document to an opposing party would not waive the privilege even outside the context of inadvertent production. Mot. Pr. Or. at 11; see, e.g., Ellis v. Toshiba Am. Info. Sys., Inc., 218 Cal. App. 4th 853, 878 (2013). Because the privilege was not waived in those cases, the receiving party had to proceed without using the privileged documents even though its counsel had received and reviewed them.

With respect to the Court "unseeing" privileged documents, Defendants note that there is no reason to believe that the judge who will rule on the Motion to Disqualify will be the same judge who will rule on any subsequent motions or preside at trial. If necessary, steps could be taken to ensure that it is a different judge. Furthermore, a blanket assumption that it is impossible for a court to avoid using a privileged document that it has seen is unwarranted. Of course, courts routinely strike, and avoid considering, evidence they have already seen.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record by email this 28th day of April, 2016.

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/s/
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