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AF Holdings v. Rajesh Patel; 2:12-cv-00262 (N.D.Ga.) (Judge William C. O'Kelley)

1. Introduction

This case escalated when AF (through Nazaire) reneged on its agreement to set aside the clerk's entry of default forcing Patel to file a motion to set aside the default. While this motion was pending, AF offered to dismiss the case *with prejudice* if Patel agreed to waive any right to seek attorneys' fees. Mr. Patel declined and AF dismissed the case *with prejudice* anyways.

On **April 6, 2013**, Patel moved **(ECF #16)** for attorneys' fees and sanctions under the Court's inherent powers due to, *inter alia*, the case being filed in bad faith. A hearing was held on July 2, 2013 and the Court ordered two months of discovery with no restrictions on the scope other than the normal strictures of the FRCP. The Court subsequently extended the discovery period up to and including **September 5, 2013**. **(ECF #50)**.

2. AF's First Motion for a Protective Order – ECF #46

Filed on **July 30, 2013**, this motion failed to contain a meet and confer certificate as required by FRCP 26(c)(1), thus the Court denied the motion on **August 1, 2013 (ECF #50)**.

3. AF's Second Motion for a Protective Order, Motion to Quash and Seal – ECF #60

Filed on **August 13, 2013**, this motion asks the Court to strike all discovery requests after the first set,[1] quash all subpoenas, and order that "all" documents to be filed under seal. Besides being ridiculously overbroad, the motion cites incorrect case law for the standard governing protective orders and completely fails to mention FRCP 45 governing when a subpoena should be quashed as well as the standards for sealing court filings.[2] The subpoena served on Hansmeier was attached to this motion **(ECF #60-10)** as were subpoenas served on Lutz and Biz Xpress, LLC.[3]

Patel's response **(ECF #61)** argues that the motion should be denied because:

- The meet and confer certification is faulty – a sufficient meet and confer never took place as required by FRCP 26(c) (and FRCP 45) because the *entirety* of AF's meet and confer efforts consist of a single e-mail demanding withdrawal of all discovery devices after the first set and all subpoenas.
- AF lacks standing to assert that the discovery is "harassing" third parties. *Auto-Owners, Ins. Co. v. Southeast Floating Docks*, 231 F.R.D. 426, 429 (M.D. Fla. 2005).
- The motion includes the discovery requests but omits the attachments, making it impossible for Patel to respond and for the Court to decide. For example, Patel's requests for admissions ask AF to authenticate multiple documents that are attached, but the motion for a protective order doesn't include those attachments.

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[1] I.e. any interrogatories, requests for production, requests for admission after the first set.

[2] This is undoubtedly why AF subsequently filed a second motion titled exclusively "Motion to Quash" and briefly (but ineptly) discussed FRCP 45. *See* ECF #68.

[3] Biz Xpress, LLC is a Nevada company that is renting the post office box that the copyright assignor (Heartbreaker Digital, LLC) lists (in violation of Nevada law) as the office address for its registered agent. The subpoena seeks to uncover the person behind renting the box.

- It is an abuse of discretion to grant a protective order based on conclusory statements such as, the discovery requests are unnecessary, too long, too broad, require too much time, too expensive to complete, irrelevant, etc. *Panola land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985).
- Similar to other subpoenas, the subpoenas seek information reasonably calculated to lead to admissible evidence – e.g. the GoDaddy audio recordings and records.
- Most importantly, a motion to quash must be filed in the issuing court.

AF's Reply **(ECF #62)** argues that a sufficient meet and confer *has* occurred given the "environment that has been created" (referring to the recording of phone calls and the public's interest in the case). There is also a nonsensical argument that the First Amendment doesn't guarantee the press access to materials obtained during discovery.

4. AF's Redundant and Frivolous Motion to Quash – ECF #68

Filed on **August 26, 2013**, this motion seeks to quash subpoenas issued from Courts in California, Florida, Arizona, and Nevada (in addition to the subpoena served on Hansmeier that was already attached to ECF #60). This motion was obviously an attempt to correct the complete failure to even mention FRCP 45 in ECF #60.

The Minnesota motion to compel compliance with the subpoena served on Hansmeier was filed four days later on **August 30, 2013**.

5. The Court Prohibits Further Motions and Reponses

On **September 11, 2013** (one day before a response was due to **ECF #68**), the Court entered an order prohibiting the parties from filing "further motions or responses." **(ECF # 82)**. The Court gave three reasons for its order: (1) it is "otherwise engaged and is unable to immediately schedule a hearing on the motions;" (2) "the current motion on the table are sufficient to articulate both sides' alleged grievances;" and (3) "the court does not believe that further motions or responses would serve to meaningfully advance the litigation at hand."

The Court's order is silent as to whether it prohibits filing motions to compel subpoenas issued in other jurisdictions. Patel subsequently asked clarification (but has not yet received an answer), thus PPatel has negotiated compliance with one or more subpoenas and is in the process of filing similar motions to compel in one or more jurisdictions.

6. Hansmeier's Response to the Motion to Compel

Hansmeier did not object to the subpoena within the fourteen day time period prescribed by FRCP 45 but he did file a response to a motion to compel on **September 24, 2013** arguing:

- Service was improper because attorneys and litigants are immune from service of process. *Lamb v. Schmitt*, 285 U.S. 222, 225 (1932).
- The information sought is the subject of a motion for a protective order pending in Georgia and *Hepperle v. Johnston*, 590 F.2d 609 (5th Cir. 1979) doesn't apply. That case held that a pending motion for a protective order does not suspend one's duty to attend a deposition – it said nothing about subpoenas or other written discovery.

- The Georgia Court prohibited the filing of any motions including motions to compel compliance with subpoenas issued in other jurisdictions.
- Before a person can be held in contempt a Minnesota court must order compliance with its subpoena.
    - *NXIVM Corp. v. Bouchy*, 2011 WL 5080322, *2 (N.D.N.Y. 2011).
    - *Cruz v. Meachum*, 159 F.R.D. 366, 368 (D.Conn. 1994).
    - *Kant v. Seton Hall Univ.*, 2009 WL 5033 927, *1 (D.N.J. 2009).
    - *Daval Steel Prods., Div. of Francosteel Corp. v. M/V Fakredline*, 951 F.2d 1357, 1364-65 (2d Cir. 1991).
- The discovery order in Georgia didn't explicitly authorize discovery aimed at Hansmeier.
    - [This argument is completely irrelevant because no restrictions were placed on discovery.]
- A motion to quash was timely filed in Georgia.
    - *COA Inc. v. Ximei Houseware Group Co., Inc.*, 2013 WL 2332347, *2 (W.D.Wash. 2013).
- Failing to object within fourteen days may be excused for "good cause."
    - *Motorola Credit Corp. v. Uzan*, _ F.Supp.2d_, 2013 WL 4125053, *6 (S.D.N.Y. 2013).
    - *Accord Powell v. Time Warner Cable, Inc.*, 2010 WL 5464895, *4 (S.D. Ohio 2010).
    - *Century 21 Real Estate, LLC v.* All Prof. Realty, Inc., 2012 WL 2090434 *4-5 (E.D.Ca. 2012).

7. Law Relevant to Hansmeier's Response

(a) The Subpoena was Properly Served

The rule that parties or witnesses are immune from service of process *only* applies when they are attending proceedings outside the jurisdiction of their residence.

- *Stewart v. Ramsay*, 242 U.S. 128, 130 (1916)
    - ". . . suitors, as well as witnesses, ***coming from another state or jurisdiction***, are exempt from the service of civil process while attendance upon court, and during a reasonable time in coming and going." (emphasis added).
- *I.C.C. v. St. Paul Transp. Co.*, 39 F.R.D. 309 (D.MN. 1966) (non-resident was immune from service while attending court in response to a criminal summons).

(b) The Underlying Motion was Properly Served

A civil action is commenced with the filing of a "complaint," FRCP 3, which is served pursuant to FRCP 4.

- "Complaint"
    - *Evans v. McConnell*, 2009 WL 1560192, *2 (W.D.Pa. 2009) (a "Petition for Mandamus")
    - *Jones v. U.S. Dept. of Justice*, 2003 WL 24303731, *2 (D.Colo. 2003) (a "Petition for Writs of Injunction")

- Not a "Complaint"
  - *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 (1984) (a right-to-sue letter)
  - *Sawicki v. Pennsylvania State University*, 2010 WL 419419, *1 (M.D.Pa. 2010) (a "Motion for Order to Produce Documents")
  - *Bernadin v. I.N.S.*, 2002 WL 1267992, *2 (E.D.N.Y. 2002) (construing a "Notice of Motion" as *not* a complaint where it did not allege jurisdiction nor contain numbered averments setting forth a claim).

The purpose of service under FRCP 4 is to establish a court's "authority" over a person.

- *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987)
- *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.,* 526 U.S. 344 (1999)
  - it is the "*sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.")

A subpoena is not a "complaint" subject to service under FRCP 4. Rather, service is governed by FRCP 45. *Lehman v. Kornblau*, 206 F.R.D. 345, 346-47 (E.D.K.Y. 2001). As a result, the Court established its "authority" over Hansmeier when the subpoena was properly served pursuant to FRCP 45. Consequently, the motion was properly served pursuant to FRCP 5. FRCP(a)(1)(D) ("must be served . . . a written motion").

- *See also Rogers v. Webster*, 776 F.2d 607 (6th Cir. 1985) (contempt proceedings characterized as a "continuation" of the civil action from which the disobeyed order issued)

(c) Civil Contempt is the Proper Course to Seek Compliance

Hansmeier misleads the Court by omitting binding precedent.

- *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1342 (8th Cir. 1975)
  - "In this case the subpoena duces tecum was issued by the district court under Rule 45(b) and it directed the appellant to produce the designated documents . . . If the non-party appellant was in fact errant without "adequate excuse," the proper course was to find him in contempt under Rule 45(f).
  - A district court has inherent power to enforce compliance with its lawful orders and mandates by awarding civil contempt damages, including attorneys fees." *Id* at 1340.
- *Compare In re Digital Equipment Corp.*, 949 F.2d 228, 231 (8th Cir. 1991)
  - "Upon service of the written objection, the deposing party shall not be entitled to inspect and copy the materials identified in the subpoena, except pursuant to an order of the court from which the subpoena was issued."

(d) The Pending Motion for a Protective Order in Georgia Does not Matter

Under Georgia law, a pending motion for a protective order does not suspend one's duty to attend a deposition.

- *Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979)

- "The Court's inaction on appellant's motion did not relieve him of the duty to appear for his deposition."
- Binding precedent via *Bonner v. Prichard*.

There is no distinguishing reason to hold that a pending motion for a protective order relieves Hansmeier "of the duty" to comply with the subpoena. In fact, a motion to compel subject to a protective order should not be stayed absent a showing of "imminent harm" regarding the disclosure of privileged documents.

- *Chamber of Commerce of U.S. v. Legal Aid Soc. Of Alameda County*, 423 U.S. 1309 (1975).

(e) A Pending Motion to Quash in Georgia Notwithstanding

Hansmeier omits binding precedent yet again.

- FRCP 45(c)(3)(A) – plain text.
- *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1342 (8th Cir. 1975)
  - "Failure by any person without adequate excuse to obey a subpoena served upon them may be deemed a contempt of the court **from which the subpoena issued.**" *Id* at footnote #2. (emphasis added).
- *In re Digital Equipment Corp.*, 949 F.2d 228, 231 (8th Cir. 1991)
  - "While the Oregon district court initially has exclusive jurisdiction to rule on the objections, it may in its discretion remit the matter to the court in which the action is pending. . . . Absent such transfer . . . the District Court . . . **lacks jurisdiction** . . ." (emphasis added)

Georgia law appears to hold the same.

- *GFI Computer Indus., Inc. v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973)
  - "the court had no power to force a civil defendant outside **its subpoena jurisdiction** to appear personally at the trial and there submit to examination." (emphasis added)
  - Binding precedent via *Bonner v. Prichard*.
- *Ariel v. Jones*, 693 F.2d 1058 (11th Cir. 1982)
  - When documents are located in Colorado and not "controlled" by a local registered, they are outside the jurisdiction of a Georgia subpoena.
- *Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (11th Cir. 1973)
  - When documents under the government's "custody" in the District of Columbia, they are outside the jurisdiction of a Georgia subpoena.

(f) Hansmeier's Failure to Object is not Excusable Due to "Adequate Excuse"

"Adequate excuse" does not exist because…[your familiar with the facts].

(g) The Georgia Court Did not Impose Any Restrictions on Discovery

Discovery is favored and a "greater showing" is required to prohibit discovery. *Southern Ry. Co. v. Lanham*, 403 F.3d 119 (5th Cir. 1968). Only a "strong public policy" weighs against disclosure. *U.S. v. Proctor & Gamble Co.*, 356 U.S. 677 (1958).

Discovery of a document that would reference other potential documents is discoverable as "reasonably calculated" to lead to discoverable evidence.

- *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978)
  - Binding via *Bonner v. Prichard*.
- *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973)
  - Finding discoverable a list of employees identified by name, age, sex, educational background, employment history of all white employees
- *Compare Borden, Inc. v. Florida Ease Coast Ry. Co.*, 772 F.2d 750 (11th Cir. 1985)
  - It is not an abuse of discretion to deny a discovery request seeking "every document which could conceivably be relevant to the issues in this case."

8. Other Possible Counter Arguments

The attorney-client privilege is can only be asserted by AF Holdings.

- *Swanson v. Domning*, 251 Minn. 110 (1957)
  - Holding that the attorney-client privilege is personal to the client and can be waived.
    - **[Despite the fact that Hansmeier represents AF Holdings in other matters, including the consolidated action, AF Holdings has waived the privilege. First, it filed a motion to quash in Georgia – a clearly improper jurisdiction – rather than file its motion in Minnesota. Second, nowhere in the Georgia motion is the privilege asserted.]**
- *Sprader v. Mueller*, 265 Minn. 111 (1963)
  - Existence of attorney-client privilege must be proved by the one asserting it.
- *State v. Madden*, 161 Minn. 132 (1924)
  - The state cannot assert the privilege when a client was called as a witness.
- *Driscoll v. Standard Hardware, Inc.*, 785 N.W.2d 805 (Minnesota Court of Appeals 2010)
  - Privilege was waived when documents were referred to in a client's deposition and motion papers.

Even if asserted, the privilege does not extend to most or all of the documents sought.

- *City Pages v. State*, 655 N.W.2d 839 (Minnesota Court of Appeals 2003)
  - Attorney-client privilege exists where: (1) legal advice of any kind is sought; (2) from a professional legal advisor in his capacity as such; (3) the communications relate to that purpose; (4) made in confidence; (5) by the client; (6) are permanently protected; (7) from disclosure by himself of the legal advisor; (8) except the privilege may be waived.
- *Kobluk v. University of Minnesota*, 574 N.W.2d 436 (Supreme Court of Minnesota 1998)

  - No attorney-client privilege attaches when a lawyer has acted as a mere scrivener in drafting a document as opposed to an instance in which the lawyer's legal advice is sought.
  - Preexisting documents do not become subject to the attorney client privilege upon delivery to an attorney.
- *City Pages v. State*, 655 N.W.2d 839 (Minnesota Court of Appeals 2003)
  - Documents are only subject to the attorney-client privilege if they embody a communication in which legal advice is sought.
  - Attorney billing records are not protected.
- *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374 (Supreme Court of Minnesota 1978)
  - A notice of representation letter is not protected.
- *Baskerville v. Baskerville*, 246 Minn. 496 (1956)
  - Retainer agreements are not protected.

The privilege does not extend to documents obtained from sources other than the client.

- *Davis v. New York, O & W.R. Co.*, 70 Minn. 37 (1897)
- *Leininger v. Swadner*, 379 Minn. 251 (1968)
  - An independent expert is not an employee of a defense attorney and may be treated like any third party for purposes of the attorney-client privilege.

The crime-fraud exception to the privilege applies.

- *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676 (Minnesota Court of Appeals 2000)
  - There is a crime-fraud exception to the attorney-client privilege when a communications was (1) made in furtherance of a crime or fraud; and (2) was closely related to the fraud.

Miscellaneous.

- *Kobluk v. University of Minnesota*, 556 N.W.2d 573 (Minnesota Court of Appeals 1996) (overruled on other grounds)
  - Attorney-client privilege is strictly construed.