

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

THOMAS MACKLEY,
an individual,

Plaintiff,

vs.

Case No. 2017-2250-CB

AMERICO VALENTE, an individual and
as trustee for the AMERICO VALENTE
REVOCABLE LIVING TRUST, and D-M
TOOL & FAB, a Michigan Corporation,

Defendant.

OPINION AND ORDER

Defendant D-M Tool & Fab (“Defendant DMF”) has filed a motion for order determining that Plaintiff’s email communications on its server are not protected by the attorney-client privilege. Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

On June 21, 2017, Plaintiff filed his complaint in this matter (“Complaint”). Plaintiff is a minority shareholder of Defendant DMF. Defendant Americo Valente Living Trust is the majority shareholder of Defendant DMF (“Defendant Trust”).

In 1986 Plaintiff was allegedly the sole owner of Defendant DMF. In November 1989, Plaintiff sold a majority interest in Defendant DMF to Defendant Americo Valente (“Defendant Valente”). However, the sale allegedly included an agreement that Defendant Valente would “eventually” sell the interest back to Plaintiff.

In 1999 Defendant Valente, through Defendant Trust, Plaintiff, and Defendant DMF entered into a "Stockholders' Agreement" ("Agreement"). The Agreement provides that on January 1, 2013 Defendant Valente would offer to sell all of his shares in Defendant DMF to Defendant DMF, and that Defendant DMF would redeem the shares pursuant to a specific formula. The result was allegedly to have the effect of once again making Plaintiff the sole owner of Defendant DMF.

In addition, the Agreement provides that Plaintiff's employment with Defendant DMF could not be terminated except by Plaintiff himself.

In the Complaint, Plaintiff alleges that Defendants have, *inter alia*, breached the Agreement (Count I) and oppressed his shareholder interest in Defendant DMF (Count VII). On December 8, 2017, Defendant DMF filed its instant motion for an order determining that certain emails Plaintiff sent utilizing its server are not protected by the attorney-client privilege. Plaintiff has filed a response and requests that the motion be denied. The documents in question have been submitted to the Court for in-camera review and the Court is now prepared to make its determination as to whether any/all of the documents are privileged.

II. Standard of Review

Generally, parties may obtain discovery regarding any matter not privileged that is relevant to the subject matter involved in the pending action. *Id.*; MCR 2.302(B)(1). MCR 2.313(A)(2)(a) permits the Court to enter an order compelling discovery if a deponent fails to answer a question made during a deposition. Although broad discovery is encouraged, a party opposing discovery must not be subject to "excessive, abusive, irrelevant or unduly burdensome discovery requests." *Hamed v Wayne*

County, 271 Mich App 106, 110; 719 NW2d 612 (2006) (internal citation omitted). As such, a court may issue “any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” MCR 2.302(C). Furthermore, discovery should not be extended merely to allow a “fishing expedition.” *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004).

III. Arguments and Analysis

A party resisting discovery based on the attorney-client privilege has the burden of showing that the privilege applies. *In re Columbia/HCA Healthcare Corp Billing Practices Litigation*, 293 F3d 289, 294 (6th Cir 2002). The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents.” *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998). “The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice.” *Id.* at 618–619.

In its motion, Defendant DMF argues that none of the documents in question are protected by the attorney-client privilege because they were transmitted and received utilizing its email system, which pursuant to its Handbook is its property. The Handbook provision in question provides:

The E-mail system is the property of [Defendant DMF]. [Defendant DMF] has provided in for use in conducting company business. All communications and information transmitted by, received from, or stored in this system are company records and property of [Defendant DMF]. The E-mail system is to be used for company purposes only. Use of the E-mail system for personal purposes is prohibited.

Employees have no right of personal privacy in any matter stored in, created, received, or sent over the [Defendant DMF] mail system.

[Defendant DMF], in its discretion as owner of the E-mail system, reserves and may exercise the right to monitor, access, retrieve, and delete any matter stored in, created, received, or sent over the E-mail system, for any reason and without the permission of any employee.

Even if employees use a password to access the E-mail system, the confidentiality of any message stored in, created, received, or sent from the [Defendant DMF] E-mail system still cannot be assured. Use of passwords or other security measure does not in any way diminish [Defendant DMF's] rights to access materials on its system, or create any privacy rights of employees in the messages and files on the system. Any password used by employees must be revealed to [Defendant DMF] as E-mail files may need to be accessed by the company in an employee's absence.

(See Defendant DMF's Exhibit 1, at 18.)

In response, Plaintiff has testified that he, to the best of his knowledge, had never seen the Handbook. (See Plaintiff's Exhibit 1.) Further, Plaintiff testified that he never signed the Handbook or acknowledged that he read or understood its provisions. (Id. at ¶4.) Moreover, Plaintiff testified that he oversaw Defendant DMF's operations and that employees were not required to read or sign an employee handbook (Id. at ¶5.)

Defendant DMF has not provided any evidence establishing when the Handbook was prepared, that it was ever adopted or distributed, or that its employees, including Plaintiff, in any way had knowledge that they were bound by its terms or had acknowledged the same. As a result, the Court is convinced that Defendant DMF has failed to establish that any potentially privileged documents at issue are rendered unprivileged by operation of the above-referenced Handbook provision.

The Court will now turn to whether any of the documents at issue are protected by the attorney-client privilege. The first set of documents are identified by bates numbers DM 4563-4577. Documents 4563-4572 and 4574-4577 do not seem to involve communications made for the purpose of obtaining legal advice. Moreover,

Plaintiff has not offered any evidence providing any context to the emails in question. As a result, the Court is satisfied that Plaintiff has not met his burden in establishing that the emails in question are privileged.

As to document 4573, the emails requests guidance on a particular issue and Plaintiff and his attorney are the only two parties to the statement. Consequently, the Court is persuaded that document 4573 is privileged.

The next bundles of documents are identified as BM 4630-4633, 4686-4688, and 4741-4743. Those documents are largely duplicative and do not appear to be made in connection with seeking or receiving legal advice. As a result, Plaintiff has failed to establish that the documents are privileged.

Next, the Court reviewed documents BM 4746-4779. The Court is convinced that documents 4746-4757, 4761-4762, and 4773-4774 involve communications made for the purposes of obtaining/delivering legal advice. As a result, those documents are privileged. Documents 4758-4760 are random documents that do not appear to be attachments to any privileged emails. As a result, those documents are not privileged. Documents 4763-4772 and 4778-4779 do not appear to involve obtaining/delivering legal advice. As a result, those documents are not privileged.

The parties also dispute whether documents BM 4781-4797 are privileged. Document 4781 involves requesting a specific legal service. As a result, it is privileged. Documents 4782-4797 involves a largely repetitive email chain in which Plaintiff counsel is assisting Plaintiff with a legal matter. Accordingly, the Court is convinced that those documents are privileged.

As to Documents BM 4808-4813, 4831-4834, and 4859-4860, 4885-4888 and 4894. Upon examining those emails, the Court is satisfied that they contain privileged material.

IV. Conclusion

For the reasons discussed above, Defendant DMF's motion for order determining Plaintiff's email communications on its server are not privileged is GRANTED, IN PART and DENIED, IN PART. Specifically, Documents DM 4573, 4746-4757, 4761-4762, and 4773-4774, 4781-4797 4808-4313, 4831-4834, 4859-4860, 4885-4888, and 4894 are protected by the attorney-client privilege. Documents 4563-4572, 4574-4577, 4630-4633, 4686-4688, 4741-4743, 4758-4760, 4763-4772, and 4778-4779 do not contain material protected by the attorney-client privilege. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: JAN 03 2018

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge