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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4994-15T4

OSCAR SANCHEZ,

Plaintiff-Appellant,

v.

MAQUET GETINGE GROUP,

Defendant-Respondent.

Argued March 15, 2017 – Decided May 23, 2018

Before Judges Fuentes, Carroll, and Gooden
Brown.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-4643-
15.

Cindy N. Vogelmann argued the cause for
appellant (Chasan Lamparello Mallon &
Cappuzzo, PC, and Niedweske Barber Hager, LLC,
attorneys; Ralph J. Lamparello and Cindy N.
Vogelmann, on the brief).

Ashley D. Brightwell (Alston & Bird LLP) of
the Georgia bar, admitted pro hac vice, argued
the cause for respondent (McElroy, Deutsch,
Mulvaney & Carpenter, LLP, and Ashley
Brightwell, attorneys; William A. Cambria,
John F. Cambria of the Georgia bar, admitted
pro hac vice, and Ashley D. Brightwell, of
counsel and on the brief).

The opinion of the court was delivered by
FUENTES, P.J.A.D.

Plaintiff Oscar Sanchez worked as the Chief Quality Regulatory and Compliance Officer for defendant MAQUET GETINGE GROUP¹ (MAQUET), a German pharmaceutical company. Sanchez worked in this capacity for eighteen months, until MAQUET terminated his employment in April 2015. On July 2, 2015, plaintiff filed a civil action against MAQUET in which he alleged his former employer wrongfully terminated him for engaging in whistleblowing activities, in violation of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14.

In October 2015, defendant served plaintiff with its First Request for Production of Documents. Defendant's request focused on retrieving purported confidential or proprietary documents that plaintiff had taken from MAQUET during the time he worked at the company. On January 27, 2016, the trial court entered a Consent Order for Protection of Confidential Material, that authorized the parties to designate as "Confidential" any information or

¹ Defendant notes in the brief filed in this appeal that the correct legal name of plaintiff's former employer is "MAQUET Cardiovascular, LLC." Defendant claims that it informed plaintiff of this error in its responsive pleading and throughout the discovery process. Despite these efforts, plaintiff did not correct this error. We express no opinion as to the legal significance, if any, of this alleged error.

documents which they believed "in good faith" was entitled to be protected from disclosure under Rule 1:38-1.² The Consent Order also provided a dispute resolution procedure if a party "objects to such designation." Finally, if a confidential document or confidential information was released inadvertently, the recipient of such unintended disclosure was required to return it or dispose of it as instructed by the producing party.

On February 1, 2016, plaintiff responded to defendant's request for documents. Defendant claimed that the documents plaintiff's counsel produced were owned by MAQUET and had been improperly taken by plaintiff from MAQUET's premises while he was employed by the company, without the company's knowledge or consent. More importantly, defendant claimed that many of these documents contained privileged attorney-client communications between MAQUET's staff and its attorneys, including "correspondence between MAQUET employees . . . regarding, among other subjects, [Food and Drug Administration (FDA)] compliance issues, results of third-party audits, budgeting issues, research and development, quality processes and procedures, and FDA findings."

² Although the Consent Order states Rule 1:38, effective September 1, 2009, the new caption is Rule 1:38-1.

In a letter dated February 1, 2016, plaintiff's counsel, Kevin Barber, and Niedweske Barber Hager, LLC, conceded that they had produced "communications between [plaintiff] and, among others, [in-house counsel] Abraham Ronai" They argued, however, that MAQUET had waived the attorney-client privilege between plaintiff and Ronai during the latter's deposition testimony in an unrelated arbitration hearing. Defendant moved to preclude plaintiff from using these documents as evidence in the prosecution of his CEPA action against defendant, and to remove Kevin Barber and Niedweske Barber Hager, LLC, from continuing to represent plaintiff in this case.

Defendant's motion was argued on June 2, 2016, before a different judge than the one who entered the January 27, 2016 Protective Order. After considering the arguments of counsel, the judge found MAQUET, as a legal entity, had not waived the attorney-client privilege. Relying on a long line of decisions that have recognized the right of corporations to invoke the attorney-client privilege to protect communications expressed through its agents, the judge rejected plaintiff's argument based on waiver.

With respect to the disqualification of plaintiff's counsel, the judge found Barber and Niedweske Barber Hager, LLC "knew or should have known the material was privileged." The judge particularly noted counsel's failure "to promptly notify the

opposing side that they had received its privileged information."

The judge made the following specific findings:

They did not notify their adversary that privileged communications were in their possession until February, 2016. Nine (9) months passed before Mr. Barber or [Niedweske Barber Hager, LLC] notified the Defendants.

. . . .

R.P.C. 4.4(b), which states, "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." . . . [T]here is no denying that there was "reasonable cause to believe" that the documents were privileged. The documents were quite clearly labeled as attorney-client privileged communications and expressly involved MAQUET's General Counsel.

On the issue of prejudice to plaintiff if his counsel was disqualified, the judge did not find any facts that plaintiff would be harmed in the prosecution of this case nor that he would be unable to secure competent substitute counsel. The judge especially noted that the parties were still at the beginning of the discovery phase. In an order dated June 9, 2016, the judge disqualified Barber and Niedweske Barber Hager, LLC from serving as counsel for plaintiff in this matter. The order also reflected "that plaintiff and plaintiff's counsel agree by consent to be precluded from further divulging . . . defendant's attorney-client

privileged communications" Finally, the judge ordered plaintiff to return all of defendant's property in plaintiff's or his counsel's possession "within 10 days from the entry of this Order" The judge explained the reasons supporting her decision in a letter-opinion.

In an order entered on July 21, 2016, this court granted plaintiff's motion for leave to appeal the Law Division's June 9, 2016 order. In this appeal, plaintiff argues the motion judge erred in reaching her decision to disqualify his chosen counsel without conducting an evidentiary hearing. Plaintiff also argues the judge misapplied the multi-factor analysis the Supreme Court established in Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 269-71 (2010). We reject these arguments and affirm.

I

Before we address the relevant legal issues, we will briefly summarize the following uncontested facts. As a pharmaceutical company, defendant designs, develops, manufactures, and distributes medical devices. The medical and related technological focus of defendant's business requires it to amass and maintain confidential information and documentation which is primarily stored on computer systems located on its various business sites. This information includes sensitive research and

development data, new products, quality processes and procedures, and protocols for the preparation of inspections by the FDA.

Defendant has developed comprehensive policies designed to protect this vital proprietary information. Any unwarranted or unauthorized disclosure of confidential information would cause severe irreparable harm to defendant's business activities. Defendant thus maintains a "Standards of Conduct" policy that requires employees to "[m]aintain a commitment to protect the trade secrets and all other proprietary information of MAQUET[.]" Employees are prohibited from mishandling, or improperly possessing or using MAQUET property or employee property or financial assets. An employee who violates these policies or fails to uphold these standards may be terminated.

MAQUET's "End User Acceptable Use Policy," among other things, forbids employees from: (1) "[a]ccess[ing] confidential or secret information outside the scope of [their] work responsibilities[;]" and (2) "[m]isus[ing] or disclos[ing] company information assets and personal information belonging to employees, customers[,] or suppliers" MAQUET also has strict standards governing the use of its computer system by employees. This standard specifically and strictly prohibits an employee from accessing confidential or secret information that is kept "outside the scope of one's work responsibilities."

As the Chief Quality Regulatory and Compliance Officer, plaintiff had high-level clearance and routinely encountered and accessed sensitive proprietary and otherwise confidential information. Consequently, defendant required plaintiff and other similarly situated employees to sign a contract agreeing to return documents and other work-related data after he or she separated from the company. Here, plaintiff signed a "Confidential Information, Invention Assignment, and Non-Compete Agreement" in August 2013. MAQUET's offer of employment to plaintiff was expressly conditioned upon him agreeing to enter into this confidentiality/non-compete agreement.

This agreement also contained the following two provisions: "Covenant Not to Disclose" and "Return of Company Documents." The "Covenant Not to Disclose" provision states:

I agree that I will not, at any time during my employment or after the termination of my employment, with the Company communicate, disclose, or otherwise make available to any person or entity (other than the Company . . .), or use for my account (except in the course of my employment with the Company but only when such disclosure is necessary and appropriate to perform my responsibilities) or for the benefit of any other person or entity, any information or materials proprietary to the Company that relates to the Company's business or affairs which is of a confidential nature ("Proprietary Information"). . . . I further agree that I will retain such knowledge and information which I acquire and develop during my employment respecting such

Proprietary Information in trust for the sole and exclusive benefit of the Company and its successors and assigns.

[(Emphasis added).]

Under the second provision, plaintiff made the following promise:

I will promptly communicate and disclose to the Company all observations made and data obtained by me in the course of my employment by the Company. Upon termination of my employment (or at such earlier time as the Company may request me to do so), I will promptly deliver the same to the Company or to any party designated by it, without retaining any copies, notes, or excerpts thereof.

[(Emphasis added).]

Two months before his termination, plaintiff received a written disciplinary warning as a result of an investigation into numerous complaints about his conduct and deportment involving employees who reported to him, as well as his colleagues. Both of these type of employees complained that plaintiff made threatening and/or discriminatory comments, mistreated employees, and was overall incompetent. After plaintiff received these complaints, he informed Senior Vice President of Marketing Philip Freed that "he had personally retained copies of all kinds of MAQUET-owned documentation – which he referred to as his 'burn files' and which included copies of . . . two executives' hard drives and a binder full of emails and documents." According to

Freed, plaintiff told him that he "would use the 'burn files' to 'fuck' MAQUET 'when they try to get [him].'"

II

Against this factual backdrop, we will now address the legal issues raised by plaintiff in this appeal. Because the motion judge's decision was based entirely on her assessment of the law applicable in this case, our review is de novo. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We will review de novo whether the attorney-client privilege applies here, whether the documents involved here fall under the purview of the attorney-client privilege, and whether defendant may have waived its attorney-client privilege. Hedden v. Kean Univ., 434 N.J. Super. 1, 10 (App. Div. 2013); see also Paff v. Div. of Law, 412 N.J. Super. 140, 149 (App. Div. 2010).

New Jersey law generally permits parties involved in a civil dispute to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party" R. 4:10-2(a). Our rules of discovery also provide for the protection of information subject to certain established privileges:

If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable efforts to retrieve it. The producing party must preserve the information until the claim is resolved.

[R. 4:10-2(e)(2) (emphasis added).]

Furthermore, the Rules of Professional Conduct established by our Supreme Court impose an ethical obligation on attorneys to safeguard confidential information of third persons:

A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the sender (2) return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible.

[RPC 4.4(b) (emphasis added).]

N.J.R.E. 504 codifies the attorney-client privilege. Subject to certain exemptions not applicable here, see N.J.R.E. 504(2),

the privilege protects "communications between lawyer and his [or her] client in the course of that relationship and in professional confidence" N.J.R.E. 504(1). Thus, a client has the right:

(a) to refuse to disclose any such communication, and (b) to prevent his [or her] lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness.

[Ibid.]

The attorney has the commensurate obligation to invoke the privilege "unless otherwise instructed by the client or his [or her] representative" Ibid. The privilege may also be claimed by a corporation or association. Ibid. The privilege even survives the dissolution of the corporate entity and "may be claimed by its successors, assigns or trustees in dissolution." Ibid.; see also Hedden, 434 N.J. Super. at 11.

Plaintiff argues the privilege does not apply here because the documents in question do not contain any advice, input, or opinion by defendant's house counsel Ronai. Plaintiff claims that merely including Ronai's name as a "cc" on these communications

do not bring them within the purview of the attorney-client privilege. Plaintiff argues the motion judge erred when she swathed these documents with the attorney-client privilege without a proper evidential foundation. We disagree.

The motion judge particularly noted that the documents "in dispute contain [electronic] communications between the [p]laintiff, MAQUET's Global Chief Quality Assurance & Regulatory Officer, and MAQUET's General Counsel, [Gail Christie]" The appellate record also includes emails labeled "ATTORNEY CLIENT PRIVILEGE" by plaintiff, copied to counsel, discussing whether defendant is complying with federal regulations. Christie also certified that the emails contained discussions between her and plaintiff concerning whether FDA regulations demand second-shift workers to obtain Product Performance Qualification validation before starting work. Although defendant's in-house counsel did not respond to these emails, the motion judge reasonably inferred that plaintiff and Christie included counsel in these discussions to make him "aware of the dispute, effectively work with MAQUET's regulatory and compliance personnel, and position himself to offer legal advice and guidance on the subject." We discern no legal basis to question the soundness of the judge's conclusion.

III

The motion judge applied the multi-factor test established by the Court in Quinlan, 204 N.J. at 269-71, to conclude plaintiff was required to return to defendant the documents plaintiff removed from his employer's custody through self-help, pre-litigation measures. For the first time on appeal, plaintiff argues the motion judge should have conducted an evidentiary hearing to properly apply the Quinlan factors. We reject this argument as both untimely and legally unnecessary.

The approach endorsed by the Court in Quinlan to determine when an employee may take or use documents belonging to his or her employer required the judge to complete the following seven tasks:

First, the court should evaluate how the employee came to have possession of, or access to, the document . . . [T]he employee who finds a document by rummaging through files or by snooping around in offices of supervisors or other employees will not be entitled to claim the benefit of this factor.

Second, the court should evaluate what the employee did with the document. If the employee looked at it, copied it and shared it with an attorney for the purpose of evaluating whether the employee had a viable cause of action or of assisting in the prosecution of a claim, the factor will favor the employee.

. . . .

Third, the court should evaluate the nature and content of the particular document

in order to weigh the strength of the employer's interest in keeping the document confidential. If the document is protected by privilege, in whole or in part, . . . or . . . [reveals] proprietary business information . . . the employer's interest will be strong.

Fourth, the court should also consider whether there is a clearly identified company policy on privacy or confidentiality that the employee's disclosure has violated.

. . . .

Fifth, the court should evaluate the circumstances relating to the disclosure of the document to balance its relevance against considerations about whether its use or disclosure was unduly disruptive to the employer's ordinary business.

. . . .

Sixth, the court should evaluate the strength of the employee's expressed reason for copying the document rather than, for example, simply describing it or identifying its existence to counsel so that it might be requested in discovery . . . [In other words,] whether the document would be critical to the case, like the true "smoking gun," such that the employee's perceived need to preserve it would be entitled to greater weight in light of the significance of the risk of its loss.

Last, but of the utmost importance, the court should evaluate how its decision in the particular case bears . . . the broad remedial purposes the Legislature has advanced through our laws against discrimination, including the LAD . . . [and] the balance of legitimate rights of both employers and employees.

[Quinlan, 204 N.J. at 269-71 (emphasis added).]

The record shows plaintiff's unauthorized removal of these documents was in direct violation of defendant's policies related to confidential documents containing proprietary information. The judge correctly found that "[p]laintiff's removal of the documents amounted to an intentional act outside of his ordinary duties" as compliance officer because "he admittedly took a 'binder full of emails and documents' from MAQUET to 'fuck the company when they try to get [him].'"

The record also supports the judge's finding that plaintiff copied these documents to share them with his attorneys for the purpose of evaluating whether plaintiff had "a viable cause of action" against defendant. See Quinlan, 204 N.J. at 269. Conversely, the judge found defendant "has a very strong interest in keeping the material confidential as they undeniably contain highly confidential and sensitive information" We agree and add that there are also strong public policy considerations at stake here. The rules governing the management of civil disputes are carefully supervised by the judiciary to prevent the discovery process from degenerating into a chaotic self-help battle that ultimately undermines the confidentiality of privileged communications.

Equally important, the motion judge expressly addressed one of the Court's preoccupations in Quinlan by noting that plaintiff did not present "any evidence of a likelihood that [defendant] would not have maintained [the documents], or would have discarded them in the ordinary course of business, that they would have been destroyed, or that their authenticity would be called into question" The last Quinlan factor also weighs in favor of defendant. The motion judge did not preclude plaintiff from seeking to admit these documents into evidence, provided that: (1) they are produced in the regular course of discovery; and (2) a judge determines their admissibility under the rules of evidence.

IV

Finally, we hold the judge did not commit plain error when she disqualified plaintiff's counsel from representing plaintiff in this litigation without sua sponte conducting an evidentiary hearing. We recognize that the "[d]isqualification of counsel is a harsh discretionary remedy which must be used sparingly." Cavallaro v. Jamco Prop. Mgmt., 334 N.J. Super. 557, 572 (App. Div. 2000). As noted by our Supreme Court:

In evaluating motions for the disqualification of counsel . . . we have long recognized that "a motion for disqualification calls for us to balance competing interests, weighing the need to maintain the highest standards of the

profession against a client's right freely to choose his counsel."

[Twenty-First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 273-74 (2012), (quoting Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988)).]

In striking a proper balance between these policy interests, we must underscore that a party's possession of its opponent's privileged material weighs in favor of disqualification because "[l]ess severe remedies such as assessments of expenses or counsel fees fail to adequately address both the [RPC 4.4(b)] violation and the attendant harm of access and exposure to privileged documents." Cavallaro, 334 N.J. Super. at 572. Thus, the record must show that the content of the privileged emails that would not have been divulged in discovery absent a judicial determination can be adequately preserved by redaction or through a carefully crafted and enforceable protective order. R. 4:10-2(e).

Plaintiff's extra-judicial self-help measures deprived defendant of the opportunity to prevent the disclosure of this privileged information. Plaintiff's counsel's unreasonable delay in disclosing this information rendered futile any attempt to mitigate this harm. As the motion judge noted, this case is still in its early stages. The only way left to salvage this cause of action is to permit plaintiff a reasonable time to obtain substitute counsel.

Affirmed and remanded for such further proceedings as may be warranted. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION