

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-01665-RM-NYW

KENNETH OLSEN,

Plaintiff,

v.

OWNERS INSURANCE COMPANY, an Ohio corporation,

Defendant.

**DEFENDANT OWNERS INSURANCE COMPANY'S MOTION TO STAY THE
COURT'S ORDER (ECF NO. 100) GRANTING PLAINTIFF'S MOTION TO COMPEL
PENDING OWNERS' OBJECTION PURSUANT TO RULE 72(a)**

Defendant Owners Insurance Company ("Owners") moves this Court to stay its order compelling Owners to produce documents withheld as privileged (ECF No. 100) pending resolution of Owners' forthcoming objection pursuant to Fed. R. Civ. P. 72(a).

CERTIFICATE OF CONFERRAL

Pursuant to D.C.Colo. L.CivR 7.1(a), Counsel for Owners has conferred with opposing counsel. Plaintiff opposes the relief requested in this motion.

BACKGROUND

Plaintiff filed its Motion to Compel Disclosure of Communications with Attorney Mr. Torrey (ECF No. 70) on April 26, 2019 and requested the Court compel Owners to disclose confidential communications between Owners in-house counsel, Mr. Andrew Torrey, and Owners claims representative, Mr. Nicholas Zeman., which Owners had withheld as privileged. Plaintiff argued that communications between Mr. Torrey and Mr. Zeman were not privileged

because Mr. Torrey was acting as a claims representative, and not as legal counsel, at the time those communications occurred. (*Id.*)

Owners filed a response explaining that Mr. Torrey was not acting as a claims representative simply because he offered legal advice to a claims representative during the claims handling process; rather, Mr. Torrey was advising Mr. Zeman on how to proceed with Plaintiff's claim consistent with Owners' obligations under Colorado law. (ECF No. 80.) Pursuant to the Court's order (ECF No. 85), Owners filed the documents under restriction for *in camera* review (ECF No. 91), along with a supplemental privilege log (ECF No. 94) and request for oral argument (ECF No. 95).

The following day, the Court stayed the remaining discovery in the case (ECF No. 082) until resolution of Owners' pending Motion to Disqualify Levy Law P.C. and Marc R. Levy, Esq. as Plaintiff's Counsel (ECF No. 98.). The Court indicated that discovery remained open for the sole purpose of adjudicating the then-pending motions to compel. (*Id.*)

On June 17, 2019, the Court granted Plaintiff's motion to compel in part. (ECF No. 100.) After reviewing the documents *in camera*, the Court concluded the communications "do not necessarily implicate legal advice" and compelled Owners to produce them by June 19, 2019—giving Owners just two days to comply.

ARGUMENT

The Federal Rules of Civil Procedure provide that a party may object to a magistrate's order and seek review by the presiding district judge within fourteen days. F.R.C.P. 37(a). Staying an order pending resolution of an objection to a magistrate's discovery order is expressly permitted by this Court's local rules. *See* D.C.Colo. LCivR. 30.2(b) ("Objection under Fed. R.

Civ. P. 72(a) to an order by a magistrate judge concerning discovery does not stay the discovery to which the order is directed. A stay of the order shall be obtained by motion filed with the magistrate judge, and if denied, then with the assigned district judge.”).

The Court’s order on Plaintiff’s motion to compel is significant to Owners. It requires Owners to produce communications between its employees and in-house counsel that Owners considers privileged and confidential. Not only does the Court’s order implicate this case, it also jeopardizes Owners’ general ability to make legal advice available to its claims representatives regarding Owners’ obligations under Colorado law. Given the importance to Owners of protecting its privileged and confidential communications and the far-reaching implications of the Court’s order, Owners will object to the order and seek review by the presiding district judge within fourteen days pursuant to Rule 72(a).

But the order compels Owners to produce the documents within just two days. Compliance would render an objection for review by the presiding district judge futile. Thus, Owners will be significantly prejudiced if forced to produce the documents before having an opportunity to file an objection. Forcing Owners to produce the documents before it has an opportunity for review by the presiding district judge would not only deny Owners that review, but may also waive Owners’ ability to appeal the issue to the Court of Appeals. *See Moore v. U.S.*, 950 F.2d 656, 659 (10th Cir. 1991) (“Our waiver rule provides that the failure to make timely objection to the magistrate’s findings or recommendations waives appellate review of both factual and legal questions.”). Thus, unless the order is stayed, Owners will be forced to forfeit both judicial and appellate review for the sake of complying with the Court’s order.

Staying the order until resolution of Owners' objection will not delay the case or prejudice Plaintiff. The Court has already stayed discovery pending resolution of Owners' motion to disqualify. Thus, staying the order compelling Owners to produce documents withheld as privileged pending resolution of Owners' objection will not delay the case. Accordingly, while granting the relief sought would not prejudice any party, denying it would significantly prejudice Owners by precluding judicial and appellate review of a critical issue.

CONCLUSION

For these reasons, Owners respectfully requests the Court stay its order compelling disclosure of documents withheld as privileged until resolution of Owners' Rule 72(a) objection.

Dated: June 18, 2019

Respectfully submitted,

s/ Kristen L. Ferries

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on June 18, 2019, I electronically filed the foregoing **DEFENDANT OWNERS INSURANCE COMPANY'S MOTION TO STAY THE COURT'S ORDER (ECF NO. 100) GRANTING PLAINTIFF'S MOTION TO COMPEL PENDING OWNERS' OBJECTION PURSUANT TO RULE 72(a)** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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s/Kim Creasey for Kristen Ferries
