UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No.: CV 20-3146-JFW (PLAx) **Date: September 25, 2020**

Title: Curtis Conyers, et al. v. Marisa Cano, et al.

PRESENT: THE HONORABLE PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

Christianna Howard	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

ATTORNEYS PRESENT FOR PLAINTIFF(S):	ATTORNEYS PRESENT FOR DEFENDANT(S):
NONE	NONE

PROCEEDINGS: (IN CHAMBERS) Cross-Plaintiff's Motion to Quash Service of Subpoena

On August 28, 2020, defendant and cross-plaintiff Sandra Maloney ("cross-plaintiff" or "Maloney") filed a Motion to Quash, seeking to quash a subpoena served on her former marriage counselor, Dr. John D. Deyo, M.A., LMFT, LPCC. (ECF No. 74). On September 9, 2020, cross-defendants filed an Opposition. (ECF No. 78). On September 16, 2020, cross-plaintiff filed a Reply. (ECF No. 82). The Court previously concluded that oral argument would not be of material assistance in determining the Motion, and ordered the hearing, originally set for September 30, 2020, off calendar. (ECF No. 84).

The Complaint in this matter alleges that in March 2020, Maloney was terminated from her employment at Southwest Carpenters Trusts because she breached her fiduciary duties under ERISA and engaged in prohibited transactions involving unauthorized paid time off for herself and her staff. (See ECF No. 1).

In the operative Third Amended Counterclaim, cross-plaintiff alleges that she was subjected to sexual harassment in her workplace from 2011 to 2020, and that the reasons cross-defendants gave for her termination were a pretext for retaliation. She asserts numerous causes of action under California law, including harassment, retaliation, discrimination, intentional infliction of emotional distress ("IIED"), and wrongful termination. (See ECF No. 72). Of relevance here, cross-plaintiff in her IIED cause of action alleges "extreme" and "severe" emotional distress as a result of cross-defendants' misconduct involving sexual harassment, retaliation, and discrimination. She also alleges she suffered and continues to suffer "mental and physical pain and anguish." (Id. at 23-24).

Discovery in Dispute

On July 31, 2020, cross-defendants served a subpoena on Dr. Deyo seeking the production of:

> All documents, including but not limited to records of treatments, intakes, consultations and communications, including by not limited to electronic mail, voicemails, and texts, concerning, related to, or referring to [cross-plaintiff] . . . , for the period bet[]ween Jan. 2017 to June 2020.

(ECF No. 74-1 at 6).

The Parties' Positions

According to cross-plaintiff, during a ten-month period, from July 2017 to May 2018, she and her husband attended marriage counseling sessions with Dr. Deyo that were "entirely unrelated to the sexual harassment she suffered at the hands of her boss, . . . or her termination in 2020." (ECF No. 74 at 10). Cross-plaintiff accuses cross-defendants of serving the challenged subpoena for an improper purpose -- "to wage a campaign of harassment" -- as the highly personal documents have no relevance to this action. (Id. at 9, 15). Additionally, cross-plaintiff argues that, although federal privilege law should control in this federal question case, her marriage counseling records are protected from disclosure pursuant to the psychotherapist-patient privilege under both federal law and California law. Furthermore, her counterclaim for emotional distress damages does not result in any waiver of the privilege because: she is "seeking damages for the garden variety emotional distress anyone would suffer as a result of losing her employment" and she "has not received any formal diagnosis of a specific, diagnosable injury" (id. at 7); she "has not relied and does not intend to rely upon records maintained by" Dr. Deyo (id. at 14); she has not identified Dr. Deyo as a witness in this action (id. at 7); and, as she stated in other discovery responses, she did not seek treatment for the harassment, retaliation, and discrimination she experienced until *after* she was terminated, and even then she was not treated by Dr. Deyo (id. at 15). She further contends that the production of the subpoenaed documents would violate both her and her husband's right to privacy, the Healthcare Insurance Portability and Accountability Act ("HIPAA"), and federal and California law protecting confidential marital communications. (Id. at 8, 17-19). The Court notes that in a declaration attached to the Reply, cross-plaintiff states: "I will dismiss my claim against Counterclaim Defendants for intentional infliction of emotional distress to ensure that all of my private and privileged medical and psychotherapy records remain private and privileged[, and] . . . because I am fearful of [what] Counterclaim Defendants and their counsel will do with my records outside of this legal proceeding." (ECF No. 82 at 5; ECF No. 82-1 at 2).

In the Opposition, cross-defendants assert that Dr. Deyo's records are relevant to cross-plaintiff's IIED claim, as the alleged sexual harassment during 2011 to 2020 overlaps with her marriage counseling sessions. Thus, records regarding her emotional/mental condition during that nine-year period should be discoverable, as cross-defendants seek to "determine whether the entirety of her emotional distress damages was caused by [cross-defendants], or if the damages were caused by separate events and circumstances unrelated to her termination and alleged sexual harassment, such as the circumstances that caused [her] to seek counseling with Mr. Deyo." (ECF No. 78 at 14). As to the psychotherapist-patient privilege, cross-defendants assert that California privilege law applies because the challenged discovery is only relevant to cross-plaintiff's state law counterclaims, but that cross-plaintiff waived the privilege by requesting damages for severe emotional distress. Alternatively, even if federal privilege law applies, the privilege is waived because cross-plaintiff has alleged more than "garden-variety" emotional distress by raising a claim of IIED. (Id. at 9, 16-17, 20-21). Cross-defendants further contend that any privacy objection is meritless because an appropriate protective order would prohibit the use or disclosure of the sensitive information. Cross-defendants have submitted a proposed protective order to address the subpoenaed records.[1] (Id. at 9, 19; See ECF No. 79-7 at 2-5).

[1] Cross-defendants also argue that the Motion is procedurally defective and should be dismissed because cross-plaintiff failed to prepare a Joint Stipulation in violation of Local Rule 37-2. (ECF No. 78 at 11-12). In response, cross-plaintiff asserts that cross-defendants "stonewalled" her attempts to meet and confer, and that in any event she "did indeed file a Joint Statement." (ECF No. 82 at 5). It appears that cross-plaintiff is referring to the L.R. 7-3 Joint Statement Re: Motion to Quash Subpoena to Dr. John D. Deyo she filed on August (continued...)

Legal Standard

Rule 26 of the Federal Rules of Civil Procedure provides that a party may obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). Factors to consider include "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Id. Discovery need not be admissible in evidence to be discoverable. Id. However, a court "must limit the frequency or extent of discovery otherwise allowed by [the Federal] rules" if "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C).

Relevance is broadly construed "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on," any party's claim or defense. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978) (citing Hickman v. Taylor, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451 (1947)); Kennicott v. Sandia Corp., 327 F.R.D. 454, 469 (D. N.M. 2018) (definition of relevance set forth in Oppenheimer Fund still applies after 2015 amendment to Rule 26).

Under Rule 45, a party to an action may seek discovery from a third party through a subpoena. The scope of discovery allowed under a Rule 45 subpoena is the same as the scope of discovery allowed under Rule 26. Miller v. Ghirardelli Chocolate Co., 2013 WL 6774072, at *2 (N.D. Cal. Dec. 20, 2013). Rule 45 provides that a subpoena must be modified or quashed if it "requires disclosure of privileged or other protected matter, if no exception or waiver applies," or if the subpoena "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iii), (iv).

Analysis

The Court first addresses the question of whether federal or state privilege law applies. The instant matter is a federal question case that includes pendent state law counterclaims. Under Rule 501 of the Federal Rules of Evidence, federal privilege law generally applies in federal question cases. See Fed. R. Evid. 501, Advisory Committee Notes to the 1974 Enactment. Rule 501 also states, however, that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. "The interplay of these two principles has created somewhat inconsistent case law regarding the application of federal privilege doctrine to pendent state law claims in federal question cases." See, e.g., Love v. Permanente Med. Grp., 2013 WL 4428806, at *2 (N.D. Cal. Aug. 15, 2013). Nevertheless, the Ninth Circuit has held that "[w]here there are federal question claims and pendent state law claims present, the federal law of privilege applies." Agster v. Maricopa Cty., 422 F.3d 836, 839 (9th Cir. 2005); see also Fed. R. Evid. 501, Advisory Committee Notes to 1974 Enactment (adopting the guideline that in "Federal question civil cases, federally

[1](...continued)
28, 2020, in which she set forth a summary of the parties' "meet and confer" discussion about the discovery dispute. (See ECF No. 73). This Joint Statement is not a substitute for the Joint Stipulation. While cross-plaintiff's failure to comply with the Local Rules subjects the instant Motion to dismissal, the Court has determined that, in the interests of moving this litigation forward, the Court will address the merits of the Motion. Going forward, the Court expects that cross-plaintiff's counsel will fully comply with the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Central District of California.

evolved rules on privilege should apply since it is Federal policy which is being enforced," and noting that "[i]t is also intended that the Federal law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case"). Accordingly, the Court applies federal privilege law to this discovery dispute. The Court notes, however, that the subpoenaed documents only concern counter-plaintiff's state law causes of action, and have no bearing on the federal law causes of action asserted in the Complaint. As explained below, even if California privilege law controlled, the outcome would remain the same.

The psychotherapist-patient privilege is recognized under federal law. See Jaffee v. Redmond, 518 U.S. 1, 15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (holding that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence").[2] The privilege is subject to waiver when a party seeks certain emotional distress damages. District courts have adopted different approaches -- falling into three categories: broad, middle ground, or narrow -- to determine whether the psychotherapist-patient privilege is waived. Here, the Court finds the middle ground approach to be the appropriate standard, as under the middle ground analysis, waiver is found only when the party asserts more than a "garden variety" claim for emotional distress damages. See Garedakis v. Brentwood Union Sch. Dist., 2016 WL 1133715, at *2 (N.D. Cal. Mar. 23, 2016).[3]

After considering the scope of the challenged subpoena along with the claims at issue in this case, the Court concludes that the subpoena seeks documents that are relevant to cross-plaintiff's claim for emotional distress damages. As mentioned above, cross-plaintiff asserts IIED against cross-defendants -- a claim that requires proof of intentional outrageous conduct that causes "severe emotional suffering."[4] Fisher v. San Pedro Peninsula Hospital, 214 Cal.App.3d 590, 617, 262 Cal.Rptr. 842 (Cal.App. 2 Dist. 1989). In accordance, she alleges "extreme" and "severe" emotional distress as well as "mental and physical pain and anguish" that she attributes in part to the sexual harassment she experienced. (ECF No. 72 at 23-24). Cross-plaintiff also alleges that, following her termination, she sought mental health treatment as a result of the alleged sexual harassment, discrimination, and retaliation. (ECF No. 74 at 15). Based on the foregoing, cross-plaintiff has presented more than an ordinary or "garden variety" claim of emotional distress. By asserting the IIED cause of action and alleging "extreme" and "severe" emotional suffering, she has placed her emotional/mental state at issue not only around the time of her termination, but during the time of the sexual harassment as well. As the marriage counseling sessions took place within the nine-year span of harassment, the subpoenaed records have bearing on the IIED claim. Thus, to the extent the records show that cross-plaintiff's emotional distress may have been caused by something unrelated to the alleged harassment, fairness dictates that cross-defendants be permitted to review that evidence. For these reasons, the Court concludes that cross-plaintiff has waived the psychotherapist-patient privilege with respect to her marriage counseling records.[5]

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[2] The parties do not dispute that the privilege extends to Dr. Deyo, a licensed professional clinical counselor and licensed marriage and family therapist.

[3] "Under the broad approach, an allegation of emotional distress in the complaint constitutes waiver," while "[u]nder the narrow approach, the privilege is waived only if there is affirmative reliance on psychotherapist-patient communications." Garedakis, 2016 WL 1133715 at *2 (citations omitted).

[4] Although cross-plaintiff in her declaration attached to the Reply states that she "will dismiss [her] claim . . . for intentional infliction of emotional distress" to avoid the disclosure of her private records (ECF No. 82-1 at 2), there is no indication in the docket that plaintiff has made any attempt to do so.

[5] To the extent cross-plaintiff contends that the marital communications privilege protects the records (continued...)

The Court notes that under California law, the privilege protecting confidential communications between patients and psychotherapists from disclosure is waived if the patient has "tendered" the issue of his or her mental condition. See Cal. Evid. Code § 1016; see also Cal. Evid. Code §§ 1010, 1012, 1014. This exception allows "a limited inquiry into the confidences of the psychotherapist-patient relationship, compelling disclosure of only those matters directly relevant to the nature of the specific 'emotional or mental' condition which the patient has voluntarily disclosed and tendered in [the] pleadings or in answer to discovery inquiries." In re Lifschutz, 2 Cal. 3d 415, 431 (1970). As set forth above, because cross-plaintiff has asserted a claim of IIED based on "extreme" and "severe" emotional distress attributable at least in part to the sexual harassment that she alleges was ongoing from 2011 to 2020, the Court finds she has waived the state law psychotherapist-patient privilege with respect to mental health treatment she may have received during that span of time.

The Court recognizes that production of the subpoenaed records implicates the privacy interests of not just cross-plaintiff, but her husband as well. The Court finds, however, that cross-defendants' discovery needs outweigh such privacy interests, and that the privacy concerns can be addressed in an appropriately drafted protective order. See Soto v. City of Concord, 162 F.R.D. 603, 616 (N.D. Cal. 1995) ("Federal Courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests," and the "[r]esolution of a privacy objection . . . requires a balancing of the need for the information sought against the privacy right asserted."). To date, no protective order has been issued in this action. Additionally, although cross-defendants submitted a proposed protective order with their Opposition (see ECF No. 79 at 4; ECF No. 79-7), it does not appear that cross-plaintiff has provided any response or indication as to whether she is amenable to its use in this matter. Accordingly, as set forth below, the parties must submit to the Court a proposed Stipulated Protective Order that addresses the subpoenaed records.

Based on the foregoing, the Court **denies** the Motion to Quash. Additionally, **no later than October 5, 2020**, the parties must submit to the Court a proposed Stipulated Protective Order for the Court's consideration. A sample Stipulated Protective Order may be found on the Court's website, under Judge's Procedures and Schedules, at the following URL: http://www.cacd.uscourts.gov/honorable-paul-l-abrams.

IT IS SO ORDERED.

cc: Counsel of Record

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[5](...continued)
from disclosure, the Court finds her argument unavailing. Under federal law, the marital communications privilege "(1) extends to words and acts intended to be a communication; (2) requires a valid marriage; and (3) applies only to confidential communications, i.e., those not made in the presence of, or likely to be overheard by, third parties." United States v. Vo, 413 F.3d 1010, 1016 (9th Cir. 2005) (citations and quotations omitted). Here, to the extent the records reflect communications between cross-plaintiff and her husband, such communications were made in the presence of Dr. Deyo. Accordingly, cross-plaintiff has not demonstrated that the marital communications privilege applies.