SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IAN JACK MILLER,

PLAINTIFF,

-- against --

ZARA USA, INC,
DILIP PATEL, AND
MOISES COSTAS RODRIGUEZ

DEFENDANTS.

Index No. 155512/2015

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER REGARDING PRIVILEGED AND CONFIDENTIAL DOCUMENTS

I. INTRODUCTION

Plaintiff Ian Jack Miller seeks a protective order under CPLR 3103 to prevent Defendant Zara USA, Inc. ("Zara" or the "Company") from obtaining attorney-client communications and work product *concerning this action*. The documents at issue are detailed notes of Plaintiff's conversations with his counsel, drafts of Plaintiff's demand letter to Zara, and notes Plaintiff prepared for counsel concerning this action. Zara wants to obtain all of these documents.[1]

Zara claims that it is entitled to those privileged and confidential documents based on the mere fact that Plaintiff saved them on his work laptop. **But Zara has never seen or had possession of these privileged documents.** That is because the Company does not routinely access or monitor its employees' use of electronic devices. In fact, in his more than seven years with the Company, Plaintiff never had his laptop monitored or reviewed and never heard of the Company monitoring any other employee's laptop. (Affidavit of Ian Jack Miller in Support of Plaintiff's Motion for Protective Order Regarding Privileged and Confidential Documents ("Miller aff"), ¶ 6.)

Shortly after commencing this action, Plaintiff reached an agreement with Zara to enable him to identify and remove privileged files from the laptop. Plaintiff followed this agreement and, in essence, prepared a privilege log. Yet, despite being apprised of the clearly privileged nature of the documents at issue—and despite never having had possession of those privileged files—Zara now claims that the files are theirs.

Zara's motives are clear. It wants to see Plaintiff's communications with his counsel; it wants to see Plaintiff's counsel's work product. Presumably, it believes that doing so will yield

[1] Throughout this motion, Plaintiff uses the term "privileged" or "privileged documents" to refer to documents subject to both the attorney-client privilege and work product doctrine.

some litigation advantage. Evidentiary privileges protect against such mischief. The Court should put a stop to this transparent attempt to pry into Plaintiff's relationship with counsel.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is Zara's former General Counsel. In this action, he brings claims under the New York City Human Rights Law and New York State Human Rights Law against Zara and two of Zara's top executives, Defendant Dilip Patel and Defendant Moises Costas Rodriguez. Plaintiff alleges, *inter alia*, that Defendants discriminated against him, subjected him to a hostile work environment, and wrongfully terminated him because he is Jewish, gay, and American.

During the course of Plaintiff's employment, Zara provide him with a laptop (Miller aff, ¶ 4). Like many high ranking employees at the company, Plaintiff stored some personal documents on company-issued electronic devices, such as family photos. (*Id*.) Plaintiff also frequently kept his laptop at home. (*Id.*) Throughout his more than seven-year career at Zara, the Company never monitored or requested access to Plaintiff's laptop. (*Id.*, ¶ 6.) In fact, Plaintiff never heard of Zara monitoring any other employee's laptop. Accordingly, he expected that documents stored on the laptop would remain private. (*Id*.)

Just prior to the commencement of this action, Plaintiff and Zara agreed to place his laptop in an evidence locker (Affidavit of David Tracey ("Tracey aff"), exhibit A). They also agreed to work cooperatively on a protocol for removing Plaintiff's personal documents and data from this device (*id*). Those personal documents included certain communications with Plaintiff's counsel in this action. (Miller aff, ¶ 10.) On August 19, 2015, the parties agreed to a

protocol for copying and/or removing personal and privileged files from the laptop.[2] (Tracey aff, exhibit B.)

Pursuant to parties' review agreement, a third-party vendor ("Altep") imaged the computer's hard drive, created a list of all user-generated files on the laptop, and delivered that list to Plaintiff. (*See Id.*) The list contained over 350,000 discrete file names. (Miller aff, ¶ 8). Plaintiff reviewed this list carefully, and pursuant to the protocol, specifically identified his personal files. (*Id.*)

Pursuant to the parties' review agreement, Plaintiff specifically identified files that were subject to the attorney-client privilege and the work product doctrine. (*Id.*, ¶¶ 8-9; Tracey aff, exhibit C.) These privileged files include detailed notes from at least three meetings between Plaintiff and his counsel concerning his claims against Zara. (*Id.*,¶ 9.). The files also include drafts of a demand letter that Plaintiff sent to Zara prior to initiating this action. (*Id.*). Several of these drafts are entitled "Jack's Redline," indicating that Plaintiff made comments on the drafts for his counsel. (*Id.*) The computer also contains notes that Plaintiff prepared for undersigned counsel, at the instruction of undersigned counsel, concerning his employment with Zara. (*Id.*) **These documents are highly privileged communications between Plaintiff and counsel and contain counsel's impression and strategy for *this action*.**

Under the parties' review agreement, Zara's counsel promised "to review Plaintiff's log of purportedly privileged files to identify which, if any, Zara will allow to be removed from the applicable device(s)" (Tracey aff, exhibit B). However, rather than engage in the individualized review of Plaintiff's privilege log contemplated by the parties' review agreement, Zara set forth a blanket assertion that Plaintiff had waived any applicable privilege. (*Id.*, exhibit D.)

[2] The parties' review agreement also concerned two other electronic devices, a cell phone and a tablet, which are not the subject of this motion.

Accordingly, Plaintiff had no choice but to file this motion for a protective order.

III. LEGAL STANDARD

Under CPLR 3103, "The court may . . . on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Courts regularly issue such orders to prevent a party from seeking the opposing party's attorney-client communications or attorney work-product. (*See e.g. Kraus v Brandstetter*, 185 AD2d 300, 301 [2d Dept 1992] [reversing denial of protective order where opposing party had obtained information subject to attorney-client privilege].)

IV. ARGUMENT

a. Plaintiff Never Waived Attorney-Client or Work Product Protections Because He Never Disclosed Privileged Information to Defendants

Mr. Miller never disclosed any privileged information to Zara. Thus, Mr. Miller never waived the attorney-client privilege or work product protection.

"CPLR 4503 (a) states that a privilege exists for confidential communications made between attorney and client in the course of professional employment, and CPLR 3101 (b) vests privileged matter with absolute immunity." (*Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 377 [NY Ct App 1991].) As the Court of Appeals has explained, this privilege is "the oldest among common law evidentiary privileges [and] fosters the open dialogue between lawyer and client that is deemed essential to effective representation."(*Id.*, [citations omitted].) Moreover, attorney-work product is also statutorily protected by the CPLR (CPLR 3101[c] ["[t]he work product of an attorney shall not be obtainable."].) Zara has claimed in its letters to Plaintiff's counsel that the communications at issue lost their privileged character simply because they were

saved on a Zara laptop – even though Zara has never seen or had access to those communications. (*See* Tracey aff, exhibit D.)

The Court of Appeals has explicitly rejected Zara's position. As the Court has explained, "there must be *actual disclosure*" for the attorney-client privilege to be waived. (*In re the Bronx Cty. Grand Jury Investigation*, 57 NY2d 66, 77 [NY Ct App 1982] [emphasis added].) "Otherwise the confidence arising from the attorney-client relationship has not been breached." (*Id.*)

In *Bronx Cty. Grand Jury*, an attorney asserted that a cassette tape of his client's impressions was subject to the attorney-client privilege. However, prior to reaching the attorney's custody, the cassette tape had been in the custody of the client's wife, a friend, and the attorney's son. The Court found that the cassette retained its privilege character because no person other than the attorney had actually listened to the cassette. (*Id.* ["[N]one of these persons ever heard his words."].) There had been no "actual disclosure." (*Id.*)

Here, the communications saved on the laptop meet each element of CPLR 4503. (*See generally Spectrum Sys. Int'l Corp.*, 78 NY2d at 377.) Each document is a communication or a memorialization of a communication between Plaintiff and his counsel. They were made in the course of Plaintiff's relationship with counsel – specifically, they relate to the prosecution of this action. Furthermore, and crucially, they were made in confidence and they remain confidential. (*See Bronx Cty. Grand Jury*, 57 NY2d at 77.) The materials also contains the "statements . . . mental impressions, [and] personal beliefs" of Plaintiff's counsel, and therefore qualify for the work product protection. (*Hickman v. Taylor*, 329 US 495, 511 [1947]; CPLR 3101[c].)

Zara has never seen or had access to these documents. In fact, it was precisely to avoid revealing confidential information that Plaintiff entered into the review agreement with Zara: he

could retrieve the privileged documents *prior to* disclosure. As there has been no "actual disclosure," the communications remain privileged. *Bronx Cty. Grand Jury*, 57 NY2d at 77.

b. Additionally, Plaintiff Had a Reasonable Expectation of Privacy in the Documents on the Laptop

Several state and federal trial courts in New York have addressed the applicability of the attorney-client privilege and work product doctrine where an employee saves privileged communications on an employer's email servers or computer. These courts have found that the employee does not waive privilege so long as the employee had a "reasonable expectation of privacy" in the employer-issued email or computer. (*See In re Asia Global Crossing, Ltd.*, 322 BR 247, 257 [SD NY 2005]; *Falcon Envtl. Servs., Inc. v American Falconry Servs., LLC*, 2013 Misc LEXIS 5995, *44 [Sup Ct, NY County 2013] ["The analysis suggested by the *Asia Global Crossing* case has been followed not only by the federal courts in New York, but its state courts as well."].)

This inquiry, which is fact dependent, calls for evaluation of at least four factors:

> (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

(*Asia Global Crossing*, 322 BR at 257.)

"Whether or not there was enforcement of any computer usage policy" remains an important consideration in this analysis. (*Curto v Medical World Communs., Inc.*, 2006 US Dist LEXIS 29387, *7 [ED NY 2006]; *see also id.* at 23 [noting, "the court in *Asia Global* . . . did recognize enforcement as a factor to be considered" in the privilege analysis].)

In *Curto*, for example, the Plaintiff saved certain privileged files on her work computer. The Defendant-employer's electronic usage policy explicitly provided "employees expressly

waive any right of privacy in anything they create, [or] store . . . on the computer." (*Curto*, 2006 US Dist LEXIS 29387, *2.)

Yet the Court found that the Plaintiff had a reasonable expectation of privacy in her computer. (*Id.*, *17.) This expectation, the Court reasoned, derived from the fact that the employer lacked the ability to monitor the contents of her computer, since Plaintiff worked remotely from her home. (*Id.*) Moreover, when "she did have to return her laptop, she deleted all personal files. Thus it was reasonable for her to believe that the e-mails she sent and the personal documents she stored on her laptops were confidential." (*Id.* * 17; *Accord Brown-Criscuolo v. Wolfe*, 601 F Supp 2d 441, 450 [D Conn 2009] [finding that a policy that allowed for "routine maintenance and monitoring" of email system and Plaintiff's "aware[ness] of this policy" did not destroy Plaintiff's reasonable expectation of privacy, "because the record does not indicate that it was actually the practice of the [employer] to routinely monitor system users' email accounts."].)

Here, similarly, the balance of the *Asia Global* (322 BR at 257) factors favor Plaintiff's position that he has not waived any privilege. Zara lacked the capacity to remotely access the laptop and monitor Plaintiff's use. (Miller aff, ¶ 6.) In Plaintiff's more than seven years at the Company, Zara never monitored or reviewed Plaintiff's laptop or, as far as Plaintiff knows, the laptop of any other employee. (*Id.*) Moreover, to Plaintiff's knowledge, no third party could have accessed the laptop without Plaintiff's express permission. (*Id.*)

As in *Curto*, Plaintiff frequently used his laptop while working remotely (2006 US Dist LEXIS 29387, *17; Miller aff, ¶ 4). He also often stored the computer at home. (Miller aff, ¶ 4.) Moreover, while Zara claims to have had a policy concerning the use of electronic devices, that policy did not per se ban personal use. (*See* Tracey aff, Exhibit E). Indeed, Plaintiff understands

that Defendant Moises Costas Rodriguez engaged in personal use of his work-issued electronic devices. (Miller aff, ¶ 5.)

Crucially, Zara has never seen the documents at issue. Just after the commencement of this action, Plaintiff entered into a protocol with Zara to identify and remove all privileged files on the laptop *prior to returning it to Zara*. (Tracey aff, exhibit B.) This makes Plaintiff's position even stronger than that of the plaintiff in *Curto*, where the employer had seen certain of the plaintiff's privileged files. (2006 US Dist LEXIS 29387, * 4.)

Accordingly, Plaintiff had a reasonable expectation of privacy in his computer. Under *Asia Global* and *Curto*, his documents are protected by the attorney-client privilege and work product doctrine.

c. Zara Did Not Engage in the Review Agreement in Good Faith

The parties entered into a review agreement that specifically contemplated for the removal of documents subject to attorney-client privilege and work product protections. Zara did not engage in the review agreement in good faith. Zara's bad faith refusal to cooperate is, by itself, a reason to issue a protective order. (CPLR 3103.)

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." *Dalton v Educ. Testing Serv.*, 87 NY 2d 384, 389 (NY 1995). "Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included." (*Id.* (citation omitted).) "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." *Id.*

Zara's response to Plaintiff's privilege designations evinces an arbitrary and irrational exercise of discretion. Pursuant to the parties' protocol, Plaintiff reviewed a list of over 350,000

files from the laptop. (Miller aff, ¶ 8.) He specifically identified 106 privileged files and created a privilege log. (*Id.* ¶ 9; *see* Tracey aff, exhibit C.) Pursuant to the agreement, Zara promised "to review Plaintiff's log of purportedly privileged files to identify which, if any, Zara will allow to be removed from the applicable device(s)." (Tracey aff, exhibit B.) However, rather follow through with this promise, Zara claimed that the protocol was "void ab initio," and asserted a blanket refusal to respect Plaintiff's privilege designations. (*Id.*, exhibit D.) Plaintiff's counsel then sent Defendant's counsel a letter debunking the basis for its "void ab initio" position. (*Id.*, exhibit F.) In response, Zara retracted. (*Id.*, exhibit G.) Nonetheless, Zara refused to back down from its blanket rejection of Plaintiff's privilege designations. (*Id*.)

Plaintiff did all the work necessary to establish that the documents in question are, in fact, privileged and confidential. Plaintiff pored over 350,000 files and identified those that were privileged. Once identified, Zara attempted to claim that the protocol was void and refused to consider any of Plaintiff's privilege designations on an individual basis. Zara, in essence, seeks to profit from Plaintiff's diligent review efforts – which point Zara to the most sensitive documents contained on the laptop. Such bad faith warrants a protective order preventing Zara from viewing Plaintiff's privileged files.

V. Conclusion

Zara has never seen the privileged files at issue on this motion. Zara has never had possession of these files. That is because Zara never monitored Plaintiff's use of the laptop and never reviewed the files on the laptop. At bottom, the privileged nature of the files at issue remains intact. Furthermore, the parties entered into a review agreement that provided a detailed protocol for the removal of privileged and confidential files, yet Zara refused to perform its obligations under the review agreement in good faith.

The Court should not countenance Zara's attempt to obtain these files and meddle in Plaintiff's relationship with counsel. Under CPLR 3103, the Court should issue a protective order preventing Zara from obtaining these highly privileged documents.