UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

NXIVM Corp. v. O'Hara

241 F.R.D. 109 (N.D.N.Y. 2007) · No. 05-CV-1546 · Decided February 9, 2007

SUMMARY

The court resolves motions concerning a protective order, a third-party subpoena, and the disclosure and return of materials claimed to be protected by the attorney-client privilege and work-product doctrine. The decision addresses privilege, the crime-fraud exception, waiver, related litigation in New Jersey, and discovery sought to support counterclaims.

CASE DETAILS

COURT	United States District Court for the Northern District of New York
WRITING FOR THE COURT	Randolph F. Treece
JURISDICTION	New York
DECIDED	February 9, 2007
DOCKET	05-CV-1546
DISPOSITION	other
PROCEDURAL POSTURE	The court addressed NXIVM's omnibus motion for a protective order, to quash Rick Ross's subpoena to O'Hara, and to compel the return or production of files and communications. Ross intervened in the discovery dispute and sought a stay or deferral in favor of related proceedings in the District of New Jersey.
STANDARD OF REVIEW	The party asserting attorney-client privilege bears the burden of establishing each element by competent and specific evidence. The party asserting work-product protection bears the burden of showing that the materials were prepared in anticipation of litigation. A claimed crime-fraud exception requires reasonable cause to believe that a crime or fraud was committed or intended and that the communication itself was intended to facilitate or conceal it. Discovery and protective-order issues were determined under the Federal Rules of Civil Procedure and the court's inherent discretion.
PRECEDENTIAL VALUE	published district court memorandum decision; persuasive authority within the jurisdiction but not binding appellate precedent

PARTIES	NXIVM Corp., Plaintiffs v. Joseph O'Hara, Defendants

TOPICS

discovery dispute · attorney client privilege · work product doctrine · civil procedure

PRACTICE AREAS

civil procedure · evidence · commercial litigation · intellectual property

QUESTIONS PRESENTED

1. Whether the court should stay or defer its ruling in favor of the District of New Jersey.
2. Whether NXIVM established attorney-client privilege or work-product protection for communications and documents associated with O'Hara.
3. Whether the Interior Report was protected attorney work product.
4. Whether the crime-fraud exception applied to the Interior Report or to communications concerning the sting operation.
5. Whether disclosure of privileged or work-product material to Raniere, Loperfido, Sitrick, Ross, or the press waived applicable protection.
6. Whether NXIVM was entitled to a further protective order, and whether Ross's subpoena to O'Hara should be quashed.
7. Whether Ross was entitled to discovery concerning the sting operation to support his proposed counterclaims in the New Jersey action.

HOLDINGS

1. The court declined to stay or defer its decision because the New Jersey court lacked jurisdiction to decide issues arising from the New York litigation, and rulings by the other court would be persuasive rather than controlling.
2. NXIVM failed to establish blanket attorney-client protection. The privilege applies only to communications whose predominant purpose was obtaining or providing legal advice, not to communications concerning business, media, lobbying, public-relations, or other nonlegal services.
3. The Interior Report was prepared in anticipation of litigation and initially qualified as work product because NXIVM had already sued Ross when Interior investigated him. The Report was not protected by attorney-client privilege.
4. The crime-fraud exception did not defeat work-product protection for the Interior Report because Ross and O'Hara showed possible unlawful collection of information but failed to show that the Report itself was used or intended to be used to facilitate or conceal a crime or fraud.
5. Communications concerning the planning and execution of the sting operation were not protected by attorney-client privilege or work-product doctrine and were subject to disclosure.

6. NXIVM waived work-product protection in the Interior Report by deliberately sharing it with Sitrick for public-relations purposes unrelated to assisting counsel in conducting litigation.
7. Ross was entitled to pursue discovery from O'Hara concerning the sting operation because the information was germane to his proposed counterclaims in the New Jersey action, and NXIVM's motion to quash the subpoena was denied.

KEY QUOTATIONS

> *"When determining if there is in fact an attorney-client privilege present to cloak both the client's communication and the corresponding legal advice, a court needs to ascertain that this safety net attaches to only those communications (1) where legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication relates to that purpose, (4) made in confidence, (5) by the client, and (6) are at his or her insistence permanently protected, (7) from disclosure by the client or the legal advisor, (8) except if the protection is waived."* (125)

> *"The Second Circuit has pellucidly stated that this exception does not apply "simply because the privileged communication would provide an adversary with evidence of a crime or fraud, [and], if it did the [attorney-client] privilege would be virtually worthless.""* (134)

> *"A party cannot selectively share a work product and then expect it to remain as a shield."* (142)

> *"Neither the attorney-client privilege nor the work product doctrine protects factual information."* (144)

FACTUAL BACKGROUND

NXIVM retained Joseph O'Hara under a professional-services arrangement involving strategic planning, lobbying, public relations, business consulting, and coordination with attorneys. Although O'Hara later reconstituted a law practice and had an attorney-client relationship with NXIVM for at least part of the relationship, the court found that many communications concerned nonlegal services and were not privileged. NXIVM retained Interior to investigate matters involving Rick Ross while litigation between NXIVM and Ross was pending; Interior produced a report containing sensitive banking and telephone information and participated in a deceptive sting operation designed to obtain information from Ross. The Interior Report was later shared with the public-relations firm Sitrick, and O'Hara disclosed the Report and related information to Ross and the press.

PROCEDURAL HISTORY

NXIVM originally brought related claims against O'Hara in federal court, voluntarily dismissed that action without prejudice, and refiled substantially identical claims in New York state court; the refiled action was removed and transferred to the Northern District of New York. During discovery, O'Hara disclosed the Interior Report, and NXIVM sought protection based on attorney-client privilege and work-product protection. Ross intervened because the Report and related alleged sting operation were relevant to his subpoena and proposed counterclaims in the New Jersey litigation. After briefing and oral argument, the court denied Ross's request to defer to New Jersey, determined the status of various documents and communications, and permitted discovery concerning the sting operation subject to remaining privilege limits.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand was ordered. The court denied Ross's motion to stay or defer, denied NXIVM's motion to quash Ross's subpoena to O'Hara, permitted discovery concerning the sting operation, and limited disclosure by preserving genuinely privileged attorney-client communications and protected factual boundaries.

CASES CITED

- Bank of Am., N.A. v. Terra Nova Ins. Co. Ltd., 211 F. Supp. 2d 493 (S.D.N.Y. 2002)
- Swidler Berlin v. United States, 524 U.S. 399, 403 (1998)
- Upjohn Co. v. United States, 449 U.S. 383, 389, 401 (1981)
- United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997)
- In re County of Erie, 473 F.3d 413, 417-22 (2d Cir. 2007)
- Fisher v. United States, 425 U.S. 391, 403 (1976)
- Hickman v. Taylor, 329 U.S. 495, 510-16 (1947)
- United States v. Adlman, 68 F.3d 1495, 1500-02 (2d Cir. 1995)
- United States v. Adlman, 134 F.3d 1194, 1196, 1202 (2d Cir. 1998)
- Clark v. United States, 289 U.S. 1, 15-16 (1933)
- In re Richard Roe, 68 F.3d 38, 39-41 (2d Cir. 1995)
- United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997)
- United States v. Zolin, 491 U.S. 554, 563, 572 (1989)
- United States v. Kovel, 296 F.2d 918, 921-24 (2d Cir. 1961)
- United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999)
- United States v. Nobles, 422 U.S. 225, 239-42 (1975)
- In re Steinhardt Partners, L.P., 9 F.3d 230, 233-37 (2d Cir. 1993)
- Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54-55 (S.D.N.Y. 2000)
- In re Subpoenas Dated March 21, 2003, 265 F. Supp. 2d 321, 326, 330-31 (S.D.N.Y. 2003)
- Maloney v. Sisters of Charity Hosp. of Buffalo, New York, 165 F.R.D. 26, 29 (W.D.N.Y. 1995)
- In re Pfohl Bros. Landfill Litig., 175 F.R.D. 13, 22-28 (W.D.N.Y. 1997)
- Export-Import Bank of United States v. Asia Pulp & Paper Co., Ltd., 232 F.R.D. 103, 111 (S.D.N.Y. 2005)