2012 IL App (1st) 103739-U

No. 1-10-3739

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SIXTH DIVISION
May 17, 2012

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VANITY MACK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 L 8861
	)	
ALLSTATE INSURANCE COMPANY,	)	
	)	
Defendant-Appellant,	)	
	)	
(Kyndon Fuller,	)	The Honorable
	)	Kathy Flanagan,
Defendant).	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court did not abuse its discretion in ordering defendant to submit a claim file for an *in camera* inspection to determine whether privilege prevented disclosure of any of the documents. Defendant was properly found in civil contempt and imposed a nominal sanction for

repeatedly violating the trial court's orders.

¶ 2 Defendant, Allstate Insurance Company, appeals the trial court's order requiring it to produce a claim file for *in camera* inspection and the court's order holding defendant in civil contempt when the company refused to comply with that order. Defendant contends the trial court abused its discretion in ordering an *in camera* inspection of documents that were privileged. Defendant further contends the trial court abused its discretion in holding it in civil contempt for failing to comply with the erroneous order. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 On July 28, 2009, plaintiff, Vanity Mack, filed a complaint against Kyndon Fuller for personal injuries plaintiff suffered in a car accident in which she was the passenger. Mack's mother, Barbara Carter-Wilson, retained insurance through defendant and had a policy for medical payments coverage under which plaintiff was an "insured" for no fault, first party medical payment coverage up to $10,000. Plaintiff's attorney submitted a claim to defendant for nearly $18,000 in medical special damages. Defendant issued a check to the ambulance provider. According to plaintiff, the ambulance provider had already been paid by plaintiff's insurance company, Aetna Insurance Company. Defendant then refused to pay plaintiff's hospital bill. The record reflects, however, that defendant paid $1,735 to satisfy a portion of the doctors' bill related to the hospital visit.

¶ 5 On October 28, 2009, plaintiff filed an amended complaint, adding defendant as a party and alleging a breach of contract claim because defendant "failed to pay or improperly directed payment of $10,000 representing its policy limits under [a medical payments] coverage" and a

claim for statutory damages pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2008)). Defendant filed an answer to plaintiff's breach of contract count and an affirmative defense, arguing that the medical bills lacked the required diagnosis codes or adequate descriptions to enable defendant to determine whether the procedures performed were "reasonable and necessary." Defendant also filed a motion to dismiss plaintiff's section 155 claim. The motion was denied and defendant filed an answer denying the applicability of the statute.

¶ 6 On February 24, 2010, plaintiff served defendant with written discovery requests, specifically requesting defendant's "entire claim file." Defendant filed objections to plaintiff's Supreme Court Rule 214 (eff. Jan. 1, 1996) request for production and to plaintiff's interrogatories. Notably, defendant did not object to plaintiff's request for the "entire claim file." The trial court ordered defendant to answer discovery by May 13, 2010. On May 20, 2010, Fuller was dismissed from the case as a result of a settlement agreement. On May 25, 2010, defendant responded to plaintiff's written discovery requests and produced a "claim diary." According to defendant's brief, it produced "all documentation and communications from April 27, 2009, when [d]efendant was first notified of the loss to January 5, 2010, four months after [p]laintiff filed suit and days after [d]efendant filed its [a]ppearance in this case." One entry, from December 29, 2009, was redacted pursuant to attorney-client privilege, as provided by defendant.

¶ 7 On June 25, 2010, plaintiff filed a motion to compel defendant to answer written discovery, arguing that the "claim diary" failed to include any information after January 5, 2010,

failed to contain any intra-company communications, and "does not even reference the name of Allstate's counsel, much less contain any communications between counsel and the adjuster, all in violation of 50 Ill. Adm. Code. 919.30(c)." Plaintiff argued that defendant erroneously asserted privilege without submitting a privilege log in violation of Supreme Court Rule 201(n) (eff. July 1, 2002). Plaintiff further argued that defendant's objections had no basis in law. On September 1, 2010, the trial court granted plaintiff's motion to compel "in its entirety." Defendant was ordered to present the claim file for *in camera* inspection and to answer any outstanding written discovery by September 15, 2010. On September 15, 2010, defendant filed supplemental answers to plaintiff's interrogatories and requests for production. Defendant, however, did not produce any materials for *in camera* inspection.

¶ 8 On December 1, 2010, the trial court ordered the "entire claim file up to the present date Dec. 1, 2010 shall be produced for an *in camera* inspection" by defendant and "the deposition of Mr. Robert Lamb (who will be questioned on interrogatory questions) will be noticed by December 8, 2010–the deposition is not to proceed by 12/8/10." On December 7, 2010, defendant filed a motion for partial reconsideration, arguing that any additional documents "are prepared in anticipation of trial and include correspondence between [d]efendant and its counsel as well as internal discussions of litigation strategy." In support of the motion for partial reconsideration, defendant attached the affidavit of Robert Lamb, defendant's litigation specialist. The affidavit averred that "[a]ll information related to the medical payments claim that is the subject of this litigation was tendered to [p]laintiff's counsel on May 25, 2010" and that information added to the claim file since January 5, 2010, was privileged. The affidavit included

a privilege log.

¶ 9 On December 8, 2010, the trial court denied defendant's motion for partial reconsideration. In so doing, the trial court reasoned:

> "*Youle* stands for the proposition that –just like any other issue or privilege. Anybody can argue privilege. Anybody again, unless and until a court does an in-camera inspection to determine if the privilege applies or not, a trial court who makes a decision concerning privilege without the in-camera inspection abuses its discretion and has no first-hand information or examination in making the decision."

The court imposed a sanction of $150 pursuant to Supreme Court Rule 219(c) (eff. July 1, 2002) against defendant for refusing to produce the claim file. The court again ordered defendant "to produce the entire claim file up to the present date (December 1, 2010) for an *in camera* inspection." Defendant filed a notice of appeal on December 21, 2010. On January 4, 2011, the trial court entered a *nunc pro tunc* order, effective December 8, 2010, clarifying that defendant was "held in civil contempt and fined $150 pursuant to Supreme Court Rule 219(c) for its ongoing refusal to produce the entire claim [file] for an *in camera* inspection pursuant to the Court's September 1, 2010 Order and December 1, 2010 Order." We have jurisdiction, pursuant to Supreme Court Rule 304(b)(5) (eff. Jan. 1, 2006), to consider defendant's appeals of the trial court's September 1, 2010, December 1, 2010, and December 8, 2010, orders.

¶ 10 DECISION

¶ 11 At the outset, we address a motion that was taken with this case. Defendant filed a

motion to strike the supplemental record containing Robert Lamb's deposition testimony. As stated, defendant filed his notice of appeal on December 21, 2010. On January 27, 2011, plaintiff conducted Lamb's deposition. On September 9, 2011, the trial court granted plaintiff's motion to instruct the circuit clerk to certify Lamb's deposition transcript. Plaintiff then filed, in this court, a motion for leave to supplement the record and defendant filed a motion to strike the supplemental record. On October 13, 2011, we granted plaintiff's motion for leave to supplement the record with Lamb's deposition transcript. On January 4, 2012, defendant again filed a motion to strike the supplemental record containing Lamb's deposition. Plaintiff filed a response. Because the deposition was taken after the trial court's order appealed from, the deposition may not be considered by this court. *County of Lake ex rel. Lake County Stormwater Management Comm'n v. Fox Waterway Agency*, 326 Ill. App. 3d 100, 104-03, 759 N.E.2d 970 (2001) ("evidence not in existence at the time of the lower court proceeding is outside the record on appeal"). Defendant's motion to strike the supplemental record is, therefore, granted. We may only consider the record that was present before the trial court when it made its rulings on September 1, 2010, and December 1, 2010, as defendant appeals directly from those orders and from the trial court's December 8, 2010, order denying defendant's motion to reconsider the prior orders.

¶ 12 Turning to the substance of the appeal, the questions before us are whether the trial court abused its discretion in ordering defendant to produce its claim file for an *in camera* inspection and whether the trial court abused its discretion in issuing a civil contempt order and sanction for defendant's repeated refusal to comply with the trial court's order?

¶ 13 Discovery orders are reviewed for an abuse of discretion. *MDA City Apartments v. DLA Piper LLP*, 2012 IL App (1st) 111047, ¶13. We recognize that a trial court's determination regarding privilege is reviewed *de novo* (*id*.); however, no such determination was made in this case. The abuse of discretion standard, therefore, applies for purposes of our review.

¶ 14 Where a contempt citation based on a discovery violation is appealed, the discovery order is also subject to review. Youle v. Ryan, 349 Ill. App. 3d 377, 380, 811 N.E.2d 1281 (2004). "[T]he right to discovery is limited to disclosure of matters that will be relevant to the case at hand in order to protect against abuses and unfairness, and a court should deny a discovery request where there is insufficient evidence that the requested discovery is relevant or will lead to such evidence." Id. at 380-81 (quoting Leeson v. State Farm Mutual Automobile Insurance Co., 190 Ill. App. 3d 359, 366, 546 N.E.2d 782 (1989).

¶ 15 Defendant essentially argues that it satisfied plaintiff's discovery requests where everything prior to January 5, 2010, was produced, and anything after that date is necessarily privileged where the documents were generated during litigation. Defendant relies on cases where privilege did not attach to the requested documents because they were created prior to litigation and attempts to extend those holdings such that documents created after litigation must be protected by privilege. Cf. Rounds v. Jackson Park Hospital, 319 Ill. App. 3d 280, 745 N.E.2d 561 (2001); Menoski v. Shih, 242 Ill. App. 3d 117, 612 N.E.2d 834 (1993); Johnson v. Frontier Ford, Inc., 68 Ill. App. 3d 315, 386 N.E.2d 112 (1979). Defendant's logic is unconvincing.

¶ 16 The application of the attorney-client privilege is an *exception* to the duty to disclose and must be established by the party asserting the privilege. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 117-18, 432 N.E.2d 20 (1982). "The only communications that are ordinarily held privileged under this test are those made by top management who have the ability to make a final decision [citation] rather than those made by employees whose positions are merely advisory [citation]. ***. Thus, if an employee of the status described is consulted for the purpose of determining what legal action the corporation will pursue, his communication is protected from disclosure." *Id.* at 120. Defendant's repeated responsive argument that "the only information added to the 'claim file' since January 5, 2010 regarding this medical payments claim is generated by counsel or Allstate employees based on consultation with counsel" does not establish an absolute privilege to all documents generated after January 5, 2010. Rather, to establish attorney-client privilege, a claimant must demonstrate: (1) the statement originated in confidence that it would not be disclosed; (2) the statement was made to an attorney acting in his legal capacity for purposes of securing legal advice or services; and (3) the statement remained confidential. Rounds, 319 Ill. App. 3d at 285-86. Moreover, the work-product privilege protects the "theories, mental impressions, or litigations plans of the party's attorney" from disclosure. Ill. S. Ct. R. 201(b)(2) (eff. July 1, 2002); *Consolidation Coal Co.*, 89 Ill. 2d at 109.

¶ 17 Pursuant to Rule 201(n), when a party withholds documents on a claim of privilege, “any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed.” Ill. S. Ct. R. 201(n) (eff. July 1, 2002). In other words, “[a] party claiming that

discovery material is privileged may not merely assert that the matter is confidential and privileged; rather, he should support such a claim 'either by producing the materials for an in camera inspection or by submitting affidavits setting forth facts sufficient to establish the applicability of the privilege to the particular documents.' " Youle, 349 Ill. App. 3d at 382 (quoting *Menoski*, 242 Ill. App. 3d at 121. Defendant did not attempt to support its privilege claims until December 7, 2010, when it submitted Lamb's affidavit. Accordingly, there was no way for the trial court to assess the privilege claims prior to December 7, 2010. *People v. Anderson*, 101 Ill. App. 3d 596, 599, 428 N.E.2d 528 (1981). Our review of plaintiff's June 25, 2010, motion to compel demonstrates that plaintiff requested discovery that could possibly be relevant or that could lead to relevant evidence. We, therefore, find that the trial court's September 1, 2010, and December 1, 2010, orders requiring defendant to produce the claim file for an *in camera* inspection were appropriate.

¶ 18 It is important to highlight that defendant's affidavit and privilege log were submitted in conjunction with a motion to reconsider. The motion asked the trial court to reconsider its orders instructing defendant to provide the entire claim file for *in camera* inspection. The information in the affidavit was not newly discovered and, therefore, did not support defendant's motion to reconsider where defendant did not claim the trial court erred in applying the law or that there was a change in law. *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 65, 747 N.E.2d 391 (2001) (the purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available prior to entry of the judgment, changes in the law, or errors in the court's previous application of existing law). As a result, the affidavit and

privilege log were not properly before the trial court.

¶ 19 Moreover, even assuming, *arguendo*, that the trial court could consider the affidavit, defendant has not cited any authority *requiring* a trial court to base its privilege assessment on an affidavit when one is submitted, especially where the claimant violated Rule 201(n) by failing to support the privilege claim when first asserted and then repeatedly violated the trial court's order to provide support for the privilege claim. The cases cited by defendant instead provide that a claim of privilege should be supported by affidavit *or* by providing materials for an *in camera* inspection. See *Menoski*, 242 Ill. App. 3d at 121. "Where there is a genuine dispute as to the nature or content of the document sought to be discovered, an attorney must ordinarily comply with the trial court's order for an in camera inspection of the document or be subject to sanctions for contempt." *Anderson*, 101 Ill. App. 3d at 600. In addition, defendant's argument that an affidavit was not required until the trial court ordered its *in camera* inspection is belied by Rule 201(n), which requires "a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed." Furthermore, Rule 201(c)(2) (eff. July 1, 2002) provides that "[u]pon the motion of any party or witness, on notice to all parties, or on its own initiative without notice, the court may supervise all or any part of any discovery procedure." The language of the rule provides the trial court with broad power to control the discovery of its cases. We, therefore, find the trial court did not abuse its discretion in denying defendant's motion to reconsider and in entering its December 8, 2010, order instructing defendant to submit its entire claim file for *in camera* inspection. We, however, caution that our ruling applies narrowly to the case before us and should not be construed to give

courts the right to require insurance companies to produce their entire claim files for discovery in all cases.

¶ 20 To the extent defendant argues that submission of the challenged documents could compromise the objectivity of the trial judge and "impugn the integrity of the judicial process," defendant fails to cite to any supporting authority in violation of Supreme Court Rule 341(h)(7) (eff. Sep. 1, 2006) ("[a]rguement, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"). Defendant has forfeited review of this argument. *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶29.

¶ 21 We further uphold the trial court's contempt finding and the nominal sanction imposed. "[T]he sanction to be imposed for failure to comply with a discovery order is within the trial court's discretion; nominal fines, such as the one imposed here, have been upheld as an appropriate sanction for failure to comply with a court order." Anderson, 101 Ill. App. 3d at 598. Moreover, defense counsel's refusal to comply was contemptuous where he not only refused to comply, but failed to provide any support for his privilege claim. The trial court did not abuse its discretion.

¶ 22 CONCLUSION

¶ 23 We conclude that the trial court did not abuse its discretion in ordering defendant to submit documents for an *in camera* inspection to determine whether privilege prevented disclosure of any of the documents. We further conclude the trial court did not abuse its discretion in finding defendant in contempt for repeatedly violating the trial court's orders and

imposing a nominal sanction.

¶ 24 Affirmed.