

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC aka GAWKER MEDIA; *et al.*,

Defendants.

_____ /

**GAWKER MEDIA, LLC’S MOTION TO RECONSIDER RULING
REGARDING PRODUCTION OF “CEASE AND DESIST” COMMUNICATIONS
OR, IN THE ALTERNATIVE, FOR A STAY PENDING APPELLATE REVIEW**

Defendant Gawker Media, LLC (“Gawker”) respectfully moves this Court for reconsideration of its oral ruling compelling Gawker to produce four years worth of documents that relate to “cease and desist” communications involving alleged copyright, trademark and/or other intellectual property violations. In particular, Gawker seeks reconsideration to provide additional information to the Court concerning (a) the burden of producing documents that are entirely irrelevant to any issue in this case (and unlikely to lead to the discovery of admissible evidence), and (b) the fact that they are being sought for an improper purpose. In the alternative, Gawker seeks a stay of the order to permit Gawker to seek appellate review before being required to produce documents that involve confidential and irrelevant matters and, in many instances, reflect attorney-client communications and attorney-work product.

BACKGROUND

1. As the Court is aware, in this lawsuit, plaintiff has asserted claims for invasion of privacy, violation of his publicity rights, negligent and intentional infliction of emotional

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distress, and violation of Florida's wiretap statute. Notably, plaintiff has alleged *no* claim for copyright infringement, trademark infringement, or any other intellectual property violation.

2. Despite having alleged no claims for intellectual property violations, plaintiff nevertheless propounded a document request to Gawker seeking "all documents that constitute, refer or relate to all cease and desist communications that [Gawker] received from January 1, 2005, through the present that refer to alleged copyright, trademark and/or other intellectual property violations, including [Gawker's] response to such cease and desist communications, and [Gawker's] internal communications regarding same." Pl.'s Req. for Prod. ("RFP") No. 28. Gawker objected to this Request for more than eight years' worth of "cease and desist" communications, including on the grounds that it sought documents "that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." Gawker's Resp. to RFP No. 28. Not only were the documents sought irrelevant because they involved (a) news stories not at issue in this action and (b) claims not asserted in this action, but also because most involved claims whose validity was never tested. Plaintiff then moved to compel documents responsive to this request (as well as to compel other documents, not at issue on this motion for reconsideration).

3. On November 25, 2013, the Court held a hearing on Plaintiff's motion to compel. No court reporter was present to record counsel's arguments or this Court's rulings.

4. In addressing Gawker's objections to the request for information concerning "cease and desist" letters asserting intellectual property claims, the Court inquired whether Gawker had in-house counsel. Based on the belief that the "cease and desist" communications at issue would likely be contained within an easy-to-review file maintained by in-house counsel, and thus that the burden on Gawker to produce such communications would be minimal, the

Court overruled Gawker's objection. The Court nevertheless limited the relevant time period to documents related to "cease and desist" communications received since October 1, 2009.¹

5. In response to the Court's directive, Gawker began to search for and assemble the responsive documents. Upon doing so, it has become clear that the order places a significant and unjustified burden on Gawker. As detailed in the affidavit of Gawker's in-house counsel, Heather L. Dietrick, Esq. ("Dietrick Aff."), dated December 20, 2013 (filed herewith), a thorough investigation of Gawker's files reveals that Gawker, as the publisher of over 8,000 posts per month, has received a significant number of "cease and desist communications," the overwhelming majority of which led to no further action on the part of the sender. *See* Dietrick Aff. ¶ 5. Moreover, the documents are not centrally located in files maintained by Ms. Dietrick, who just began as counsel in June 2012, or her predecessor. *Id.* ¶¶ 2, 6. They reside in files and email accounts belonging to a number of different individuals, which would be burdensome and costly to search, and there is no single paper file in which the correspondence is collected, as the Court seemed to believe at the November 25, 2013 hearing. *Id.* ¶ 6.

6. As Ms. Dietrick's affidavit explains, of further concern is the portion of plaintiff's request seeking all internal communications regarding the "cease and desist" letters. Gawker's in-house legal department is comprised of only two attorneys. It would take at least several days of each of their time – and likely more – together with substantial assistance from an outside litigation support vendor to collect and review all the internal communications, as well as to address privilege issues. *See* Dietrick Aff. ¶¶ 3, 7.

¹ The Court's decision – announced orally at the hearing – has not yet been reduced to a written order. The time to seek appellate review therefore has not yet started to run. Gawker nevertheless reserves its right to seek review of this aspect of the Court's written order if the Court declines to reconsider its order, and therefore also seeks in the alternative a stay pending appellate review.

7. Finally, it appears that this request for information having nothing to do with the merits of *this* case is being used for an improper purpose. During the life of this case, plaintiff's lead counsel, Charles Harder, Esq., has on at least two occasions sent to Gawker his own "cease and desist" letters asserting claims on behalf of other clients, at least one of which asserted a violation of the Copyright Act. *See* Dietrick Aff. ¶ 8. As has been the case with the overwhelming majority of cease and desist communications, neither led to litigation where the merits of the claims were actually tested. *Id.* To the extent that Mr. Harder, who represents a number of celebrities, is using this request to build a dossier about Gawker in connection with other intellectual property claims, that is a demonstrably improper use of the discovery process in this action and should be rejected by this Court.

8. In light of the additional factual showing set forth herein and in the Dietrick Affidavit, Gawker now asks this Court to reconsider its conclusion and to deny plaintiff's motion to compel with regard to RFP No. 28.

9. Alternatively, if the Court denies Gawker's motion for reconsideration and issues a written order directing production of the cease and desist communications, Gawker respectfully requests that the Court stay that portion of the order directing Gawker to produce documents responsive to RFP No. 28 pending appellate review.

ARGUMENT

I. THE COURT SHOULD RECONSIDER ITS RULING COMPELLING GAWKER TO PRODUCE "CEASE AND DESIST" COMMUNICATIONS FROM UNRELATED INTELLECTUAL PROPERTY CLAIMS.

Under governing law, "a trial court has inherent authority to reconsider . . . any of its interlocutory rulings prior to the entry of a final judgment or final order in the cause." *Bettez v. City of Miami*, 510 So. 2d 1242, 1243 (Fla. 3d DCA 1987); *AC Holdings 2006, Inc. v. McCarty*,

985 So. 2d 1123, 1125 (Fla. 3d DCA 2008) (“[A] trial court has inherent authority to reconsider and modify its interlocutory orders.”); *Ala. Hotel Co. v. J.L. Mott Iron Works*, 98 So. 825, 826 (Fla. 1924) (deeming it “well settled that interlocutory judgments or decrees made in the progress of a cause are always under the control of the court until final disposition of the suit, and they may be modified or rescinded upon sufficient grounds, shown any time before final judgment”), *superseded by statute on other grounds, as recognized in Ramagli Realty Co. v. Craver*, 121 So. 2d 648 (Fla. 1996).

Reconsideration is warranted here for three reasons: (1) producing the documents imposes a substantial burden on Gawker; (2) this burden is unwarranted given that communications concerning “cease and desist” communications are totally irrelevant to the facts at issue in *this* case; and, (3) particularly given the patent irrelevance of the documents, it appears they are being sought for an improper purpose.

First, requiring Gawker to produce all cease and desist communications it received over more than four years, let alone all of its internal communications about such letters, will impose a significant and unjustified burden on Gawker. *See* Fla. R. Civ. P. 1.280(c) (permitting courts to limit discovery to protect parties from “undue burden”); *Caterpillar Indus., Inc. v. Keskes*, 639 So. 2d 1129 (Fla. 5th DCA 1994) (denying, on grounds of burden and irrelevance, discovery of unrelated incident reports in products liability litigation where there was no substantial similarity between the instant litigation and the prior reports), *disapproved on other grounds by Bd. of Trs. of Internal Improvement Trust Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450 (Fla. 2012). Gawker posts more than 8,000 items per month across its eight websites. Like most news organizations, particularly those that publish a large amount of content, Gawker receives a significant number of communications demanding that it alter, revise, or remove certain content.

See Dietrick Aff. ¶ 5. The overwhelming majority of these communications do not lead to any further action on the part of the sender, or to litigation, but the communications, together with Gawker’s internal communications and/or external response, if any, nevertheless, comprise a very large number of documents. *Id.*

Moreover, the “cease and desist” letters, and the internal communications related to them, are not automatically directed to any particular email address or recipient or stored in any central location. *See* Dietrick Aff. ¶ 6. Nor are they held as hard copies in any specific paper file. *Id.* To be produced, they would have to be collected from various Gawker employees (and the emailboxes of former employees). *Id.* In and of itself, this charge is onerous. When added to the work of collecting, reviewing, and logging every single internal communication about any “cease and desist” letter or email (regardless of merit), the task will require a significant amount of work for Gawker’s in-house legal staff.² *Id.* ¶ 7. And imposing such a task is particularly unwarranted given that plaintiff already had the opportunity to, and did, depose Gawker’s President, its Vice President of Operations, and the former editor of *gawker.com*, about various other claims that have been asserted against Gawker.

Second, requiring Gawker to undertake this heavy burden is especially unreasonable in light of the patent irrelevance of the documents to be collected. Although the applicable rules permit discovery of “any matter, not privileged, that is relevant to the subject matter of the pending action,” Fla. R. Civ. P. 1.280(b)(1), the discovery “must be relevant to issues properly framed by the pleadings in the litigation,” *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.

² At the hearing, the Court may have been under the misimpression that Gawker has a large in-house legal department who will share the burden of reviewing every piece of internal correspondence referencing “cease and desist” demands. In fact, Gawker’s legal department is comprised of only two attorneys (to add to the burden, one of the two is leaving the company at the end of December, and his replacement just started within the last couple of weeks, but is not yet up to speed on where to search for all such communications). *See* Dietrick Aff. ¶ 3. It would place an undue burden on Gawker’s lead in-house counsel, who has substantial other responsibilities in that role, including day-to-day operations of the company’s legal affairs, to have to devote literally days to searching for, reviewing, and logging such communications. *Id.* ¶ 7.

2d 936, 946 (Fla. 2002). Indeed, a party may not use the discovery process as “a fishing expedition,” particularly where it would cause undue burden. *Sugarmill Woods Civic Ass’n, Inc. v. S. States Utilities*, 687 So. 2d 1346, 1351 (Fla. 1st DCA 1997); *see also Am. Med. Sys., Inc. v. Osborne*, 651 So. 2d 209, 211 (Fla. 2d DCA 1995) (“[T]here must be a connection between the discovery sought and the injury claimed. Otherwise, it is an improper fishing expedition.”).

Here, communications regarding years-old “cease and desist” demands over alleged copyright and trademark infringements have nothing to do with anything at issue in *this* case. *See Nationwide Mut. Fire Ins. Co. v. Hess*, 814 So. 2d 1240, 1242 (Fla. 5th DCA 2002) (interrogatory seeking information about party’s handling of prior, unrelated claims was improper and not relevant to question of its good- or bad-faith in its consideration of the claim at issue in the case); *see also, e.g., Vives v. City of N.Y.*, 2003 WL 282191, at *1 (S.D.N.Y. Feb. 10, 2003) (denying discovery related to defendant’s handling of distinct but purportedly similar matter). Plaintiff is not asserting any intellectual property claims against Gawker, and, even if he were, “cease and desist” demands regarding *other, unrelated* alleged intellectual property violations (whose validity has not been tested) would neither be admissible nor likely to lead to the discovery of admissible evidence in *this* case. Even if the Court were prepared to direct the production of information that is neither relevant nor likely to lead to the discovery of admissible evidence on the assumption that it involved a minimal burden, here that burden is substantial and clearly changes any such calculus.

Third, given the plain irrelevance of the documents plaintiff seeks, there is only one possible motivation for plaintiff’s request: that plaintiff, and especially his counsel, is attempting to use the discovery process in this case to obtain information for use in other matters. Since the filing of this lawsuit, plaintiff’s counsel has represented at least two *other* individuals on whose

behalf he has sent “cease and desist” letters to Gawker, including one who asserted an intellectual property-related claim. *See* Dietrick Aff. ¶ 8. To date, neither of these claims has resulted in litigation. *Id.* Counsel should not be permitted to abuse the discovery process in this case to gather information for use representing other clients who may assert claims against Gawker, especially given the irrelevance of the documents sought to *this* litigation.

II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT A STAY OF ITS RULING PENDING APPELLATE REVIEW.

In the alternative, if this Court denies Gawker’s motion for reconsideration and enters a written order requiring production, Gawker hereby moves the Court for an order staying that portion of the order directing Gawker to produce “cease and desist” communications and related internal communications in response to Plaintiff’s RFP No. 28. Trial courts have broad discretion to grant a stay pending appellate review. *See, e.g., Air Comfort Mech., Inc. v. Simmons*, 252 So. 2d 285, 285 (Fla. 2d DCA 1971). Here, the Court should do so for three reasons: (1) the order presents potential for irreparable harm by ordering release of privileged documents; (2) a stay pending appellate review will not prejudice plaintiff; and (3) a stay on this narrow issue is warranted to avoid the need for Gawker to request an emergency stay from the Second District Court of Appeal.

First, Gawker faces irreparable harm if directed to produce privileged documents, including internal communications about other claims. A discovery order compelling release of privileged materials necessarily causes irreparable harm. *See HCA Health Servs. of Fla., Inc. v. Hillman*, 870 So. 2d 104, 107-08 (Fla. 2d DCA 2003) (quashing order compelling discovery of privileged documents); *Coyne v. Schwartz, Gold, Cohen, Zakarin & Kotler, P.A.*, 715 So. 2d 1021, 1022 (Fla. 4th DCA 1998) (stating that an order compelling production of attorney-client privileged materials presents potential for irreparable harm). Such an order also departs from the

essential requirements of the law. *See Nussbaumer v. State*, 882 So. 2d 1067, 1072 (Fla. 2d DCA 2004). Here, RFP No. 28 extends not only to the “cease and desist” letters received by Gawker, but to internal Gawker communications about the letters. Internal corporate communications about legal matters go to the heart of attorney-client and work product privileges. *See* § 90.502, Fla. Stat. (2013); *Shell Oil Co. v. Par Four P’ship*, 638 So. 2d 1050 (Fla. 5th DCA 1994) (stating “[t]his privilege covers communications on legal matters between corporate counsel and corporate employees.”). Release of these privileged documents in response to RFP No. 28 will cause Gawker irreparable harm. The “likelihood of irreparable harm if the stay is not granted” is a key factor in determining the propriety of a stay. *Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005). Because this Court’s order will cause irreparable harm, this motion for stay should be granted. *See Perez v. Perez*, 769 So. 2d 389, 391 n. 4 (Fla. 3d DCA 1999) (stating that court may consider potential harm to the moving party if the motion is denied).

Second, where a narrowly tailored motion for stay poses no threat of material harm to the plaintiff, it is proper. *Carrow v. Fla. Bar*, 848 So. 2d 1283, 1285 (Fla. 2d DCA 2003) (narrow stay of discovery permissible because it presented no threat of material harm to plaintiff). Here, Gawker requests a narrow stay to prevent imminent and irreparable harm of being compelled to undertake a substantial burden and to disclose documents that are both sensitive and protected by privilege. In contrast to the threat to Gawker, the likelihood of harm to plaintiff is minimal, if any. Plaintiff has already deposed Gawker’s witnesses and questioned them about other claims against Gawker. Information collected through RFP No. 28 will merely supplement that testimony, and thus, a temporary stay will not result in significant, if any, impact on plaintiff’s ability to prepare for and proceed with his case. Because a temporary stay will not prejudice

plaintiff, but will protect Gawker from imminent harm, this Court should grant a stay pending appellate review with respect to RFP No. 28.

Third, this Court should grant a stay to prevent the need for an emergency motion for stay in the appellate court. Rule 9.130 of the Florida Rules of Appellate Procedure directs litigants to first request stay from the trial court before proceeding with appellate review. This allows the trial court the opportunity to stay an order and avoid the filing of an emergency motion for stay in the Second District Court of Appeal, which should be avoided wherever possible. “Pleadings filed as emergencies disrupt court procedures and interrupt work on cases that were already pending.” *USAA Cas. Ins. Co. v. Pembroke Pines MRI, Inc.*, 24 So. 3d 588, 589 (Fla. 4th DCA 2009). Rather than burden the Second District Court of Appeal with the need for immediate resolution of a discovery dispute related to just one request for production, this Court should grant a stay of its order on RFP No. 28 to allow for orderly appellate review without requiring emergency action by the appeals court.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that the Court reconsider its prior oral ruling and deny plaintiff’s motion to compel insofar as it seeks documents responsive to Request for Production Number 28, and for such further relief as the Court deems appropriate. In the alternative, if that relief is denied and a written order is entered, Gawker respectfully requests that the Court stay that portion of the order directing Gawker to produce “cease and desist” communications, and related internal communications, pending review by the Second District Court of Appeal.

Dated: December 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December 2013, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal upon the following counsel of record:

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