

Superior Court of Arizona.
Maricopa County
Morton H FLEISCHER, et al.,
v.
SPIRIT FINANCE CAPITAL MANAGEMENT L L C, et al.
No. CV 2010-004091.
November 1, 2010.

Minute Entry

Hon. Edward O. Burke.

The court has had defendants' Emergency Motion to Overrule Privilege Objection and to Compel Production of Documents under advisement and issues the following ruling.

Defendants' Emergency Motion to Overrule Privilege Objection is GRANTED; and Defendants' Motion to Compel Production of Documents is DENIED.

Procedural Background

Defendants' prior Motion to Overrule Plaintiffs' Privilege Objections Regarding Spirit Finance Capital Management E-Mails argued generally that plaintiffs could not assert a privilege for non-confidential SFCM emails, but it was more specifically directed toward those emails plaintiffs had *sent* from their SFCM email accounts. This court's August 25, 2010 minute entry granted defendants' motion, finding that emails sent by plaintiffs over SFCM's corporate email system were not confidential under *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (S.D.N. Y. 2005). This court found persuasive that some of the plaintiffs had actually drafted SFCM's email policy, and that there was nothing "inadvertent" about plaintiffs sending 1300 emails to their attorneys.

Subsequent to that ruling, defendants apparently produced the documents they had previously segregated, including the documents at issue.^[FN1] Plaintiffs again asserted privilege. Defendants filed this emergency two-part motion: (1) to overrule plaintiffs' privilege objection, and, (2) in connection therewith, to compel plaintiffs to produce all communications between them and the law firm of Coppersmith Schermer & Brockelman PLC ("CSB") prior to February 4, 2010.

FN1. Defendants categorize these as emails and memoranda saved by plaintiffs Bennett and Volk to their work computers or Spirit network and hard copy documents left by plaintiff M. Fleischer in his office.

I. Attorney-Client Privilege and Work Product Doctrine.

A. Emails and Documents on SFCM Computers.

Defendants argue that these documents are encompassed by the court's August 25, 2010 ruling. Plaintiffs contend that, to fall within that ruling, the document must be (a) an email, (b) sent by plaintiffs, (c) over SFCM's email system. According to plaintiffs, none of the electronic documents at issue fall within these parameters.^[FN2]

FN2. Absent a denial of the Motion, plaintiffs request this court order an *in camera* inspection of the documents at issue. See *Samaritan Health Servs., Inc. v. Superior Court*, 142 Ariz. 435, 438, 690 P.2d 154, 157 (App. 1984). The court finds no basis to grant such a request under the facts presented.

As an initial matter, the court finds that these documents are outside the literal wording of its prior ruling. Expanding on the argument defendants made in their first motion, however, defendants contend that plaintiffs had no expecta-

tion of privacy as to *any* document stored on SFCM's computers.^[FN3] The court agrees. Between Spirit's Employee Handbook and its IT Policies, which this court has previously found plaintiffs were aware of, plaintiffs cannot claim inadvertence and ignorance. Plaintiffs were clearly on notice that they were "prohibited from using Spirit computers, e-mail and voice mail systems, and Internet access accounts for personal reasons..." (Handbook at 21.) Particularly persuasive, plaintiffs were explicitly warned:

FN3. Both sides reference Spirit and SFCM somewhat interchangeably, without argument that the corporate form impacts analysis of this issue.

Monitoring

Employees should expect that all information created, transmitted, downloaded, received or stored in Spirit computers may be accessed by Spirit at any time without prior notice. Employees should not assume that they have an expectation of privacy or confidentiality in such messages or information (whether or not any such message or information is password protected), or that deleted messages are necessarily removed from the system.

(Handbook at 22; *see also* Handbook at 21, Spirit Property), and further at § 4.8 of Spirit's IT Policies:

Privacy

All electronic documents created or stored, and all communications using the Company's computers are the property of the Company. The Company may access documents or communications stored on its property or in its systems whenever warranted by business needs or legal requirements; and it will periodically monitor its systems for accounting purposes, to assure proper use, and to prevent security violations. Employees should not expect that their communications using the Company's systems are private or confidential.

Plaintiffs contend that courts routinely find documents inadvertently saved onto a company computer via a personal email account to be confidential and therefore privileged, citing *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 655 (N.J. 2010) as being directly on point.^[FN4] The court agrees with defendants that *Stengart* is distinguishable because that company's policy did not address personal email accounts, permitted occasional personal use of e-mail, and did not warn employees that the contents of such emails were not private. *Id.* at 322.

FN4. Plaintiffs argue this is the very argument defendants made in their first motion to obtain the emails sent using the SFCM email accounts - that, when plaintiffs *wanted* to keep an email confidential, they knew to use their personal email accounts. The court acknowledges the inherent inconsistency in defendants' positions, but the court does not find it rises to the level of a waiver of defendants' argument in this second motion or a concession of the issue.

Privilege issues arising from an employee's use of a company computer are decided on a case-by-case basis. *United States v. Hatfield*, 2009 WL 3806300, *8 (E.D.N. Y. 2009). The court finds other cases cited by plaintiffs to be distinguishable on their facts. *See Nat ' Econ. Research Assocs., Inc. v. Evans*, 2006 WL 2440008, *3 (Mass. Super. 2006) (company manual did not declare it would monitor content of internet communications or email communications made from employee's personal email account, or that content of email communications would be stored on hard drive capable of being read by company); *Hatfield*, 2009 WL 3806300 at *8 (policy did not prohibit company computers from being used for personal matters); *Curto v. Medical World Communications, Inc.*, 2006 WL 1318387, *5 (E.D.N. Y. 2006) (employee worked from home office).

Applying the four factor analysis in *In re Asia Global Crossing*, the court finds the electronic documents stored on SFCM's computers were not confidential. 322 B.R. at 257; *see Thygeson v. U.S. Bancorp*, 2004 WL 2066746, *19-20 (D. Or. 2004). In so finding, the court places great weight on plaintiffs' prior positions as directors and officers with both Spirit and SFCM and their intimate familiarity with company policy.

As to those electronic documents plaintiffs categorize as work product, *see* Rule 26(b)(3); *Brown v. Superior Court*,

137 Ariz. 327, 334-35, 670 P.2d 725, 732-33 (1983), defendants argue that any such work product protection was waived because SFCM could monitor, access, or retrieve any documents or files downloaded onto its computers. See *In re Steinhard Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (waiver as a limitation on work product protection); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 329-30 (N.D. Cal. 1985) (case by case determination of waiver; degree of care used to protect documents major focus). The court agrees. To the extent that plaintiffs argue defendants must show waiver by both them and their counsel, the court finds that the cases cited by plaintiffs do not support their position. Cf. *Emergency Care Dynamics, Ltd. v. Superior Court*, 188 Ariz. 32, 33, 932 P.2d 297, 298 (App. 1997); *Waitkus v. Mauet*, 157 Ariz. 339, 340, 757 P.2d 615, 616 (App. 1988).

B. Hard Copy Paper Documents in Plaintiffs' Offices.

As to documents found in hard copy files and in offices, defendants contend the same analysis applies because employees do not have a privacy interest in their offices. See *Peitsmeyer v. Jackson Township Bd. of Trustees*, 2003 WL 21940713, *6 (Ohio App. 2003); *Johnson v. C&L, Inc.*, 1996 WL 308282, *5 (N.D. Ill. 1996); *Lathwell v. Lorain County Jobs for Ohio's Graduates*, 2000 WL 563331, *4 (Ohio App. 2000).

In response, plaintiffs argue that, until they were fired, they were senior management with the use of private offices and whose privacy was respected. Because they had no expectation of being fired or forbidden to return to their offices to retrieve their personal effects, they argue they could not be found to have abandoned these documents or relinquished any privilege to them. *In re Asia Global Crossing*, 322 B.R. at 261. Plaintiffs distinguish cases cited by defendants on the basis that those plaintiffs knew their offices could be opened by master keys and thus could have anticipated the search; contrarily, according to plaintiffs, nothing in Spirit's Handbook or Spirit/SFCM's practices warned them this was the case with their offices.

Spirit/SFCM clearly and unequivocally informed its employees, including senior management such as plaintiffs, that the company's computers were company property and its employees had no privacy rights therein. The court finds that plaintiffs had opportunity over the course of their employment with SFCM to otherwise safeguard the confidentiality of the documents at issue, and their failure to do so relinquished any privilege in their contents. *In re Asia Global Crossing*, 322 B.R. at 261.

II. Plaintiffs' Communications with CSB Prior to February 4, 2010.

Defendants argue that, in May 2009, CSB agreed to represent "Spirit Finance and related entities," in connection with litigation pending in Florida. Plaintiff Bennett entered into this retention agreement on behalf of Spirit. According to defendants, a few months later Bennett approached CSB about representing plaintiffs in anticipation of the present action. Defendants assert CSB continued this dual representation until February 4, 2010, when the Florida court entered an order granting CSB's motion to withdraw. Because plaintiffs retained CSB knowing of this "obvious" conflict of interest, defendants posit, plaintiffs could not have an expectation of privacy in their communications with CSB, and thus any communications between plaintiffs and CSB prior to February 4, 2010 are not only not privileged, but must be produced.

Plaintiffs respond that CSB did not "represent" Spirit prior to February 4, 2010, contending instead that CSB represented only Spirit Master Funding III, LLC ("SMF"), an affiliate of Spirit involved in the Florida action, despite "boilerplate" "Spirit Finance and related entities" language to the contrary.^[FN5] Regardless, plaintiffs argue that CSB had informed SMF it intended to withdraw on November 30, 2009 and that CSB had "stopped acting as counsel to SMF" as of December 1, 2009, so there was no concurrent representation of SMF and plaintiffs. Moreover, plaintiffs contend that CSB represented only plaintiffs Volk and M. Fleischer starting in December 2009 and those plaintiffs did not believe they were retaining Spirit's counsel, and that the other four plaintiffs, including Bennett, did not retain CSB until April 2010.

FN5. The retention letter references the Florida caption in the "Re:" line as "Spirit Finance Master Funding III, LLC."

Most importantly, even if a conflict did exist, plaintiffs argue the remedy is not to strip plaintiffs of their attorney-

client privilege. The court agrees. In so ruling, the court specifically does not reach the issue whether CSB had a conflict of interest under the facts of this case. The court does find that, even if one did exist, compelling plaintiffs to produce all communications to or from CSB prior to February 4, 2010 would not be an appropriate remedy.

Defendants rely on *Mueller Industries, Inc. v. Berkman*, 927 N.E.2d 794 (Ill. App. 2010), which this court agrees is instructive. The key issue in *Mueller* was whether the corporate officer could “reasonably believe under the circumstances” that his communications with the corporation's attorneys would be confidential. *Id.* at 804. In that case, however, the officer was “well aware” of when the dual representation began, and thus the court found he could reasonably expect the same duty of loyalty would be owed to him and the corporation after that time. *Id.* Thus, *Mueller* upheld the order granting the motion to compel on the basis that the dual representation destroyed any claim of attorney-client privilege. *Id.*

The court does not find the facts in this case establish that plaintiffs prior to February 4, 2010 were “well aware” of any such “dual representation” by CSB. Importantly, defendants do not contest that only Volk and M. Fleischer retained CSB prior to that date, and even in their reply defendants argue that it was Bennett and Zieg who were responsible for dealing with outside counsel. Moreover, defendants do not contend and the court does not find that the Florida matter was so significant that Volk and M. Fleischer at SFCM could reasonably be found to have been aware of either that litigation or CSB's involvement in it. The court finds that plaintiffs could not have reasonably expected prior to February 4, 2010 that CSB may have owed a duty of loyalty to both them and Spirit.

Based on the foregoing, defendants motion is granted to the extent it seeks to overrule plaintiffs' privilege objections and denied to the extent it seeks to compel production of the pre-2/4/10 CSB communications.