

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE VARGAS and, : CIVIL ACTION
JENNIFER BRENNAN, :
Plaintiffs, :
 :
v. :
 :
PALM MANAGEMENT CORPORATION :
d/b/a THE PALM RESTAURANT, :
Defendant. : No. 03-4280

MEMORANDUM AND ORDER

J. M. KELLY, J.

MARCH , 2004

Presently before the Court is a Motion to Compel Discovery filed by Plaintiffs Jose Vargas ("Vargas") and Jennifer Brennan ("Brennan") (collectively, "Plaintiffs") seeking discovery of the contents of an investigative file created and maintained by Defendant Palm Management Corporation d/b/a The Palm Restaurant ("Defendant") in its internal investigation of Plaintiffs' complaints of unlawful workplace discrimination. Defendant refuses to produce the contents of the investigative file on the basis that its contents were prepared in anticipation of litigation and, thus, protected from discovery by the work-product doctrine. Plaintiffs, however, contend that they, in accordance with Federal Rule of Civil Procedure 26(b)(3) which provides for discovery of materials prepared in anticipation of litigation, have made a showing of substantial need and are otherwise unable to obtain the substantial equivalent of those materials without undue hardship. For the following reasons, Plaintiffs' Motion to Compel is **GRANTED IN PART** and **DENIED IN**

PART.

I. BACKGROUND

After having filed a charge of discrimination with the Pennsylvania Human Relations Commission and the United States Equal Employment Opportunity Commission, Plaintiffs initiated suit in this Court on July 22, 2003 asserting claims for hostile work environment racial discrimination and retaliation.

Plaintiffs, both employed as servers for Defendant's restaurant in Philadelphia, allege that they began a romantic relationship in October 2001, and that the manager of the restaurant, Alex Plotkin ("Plotkin") engaged in a pattern of discrimination against them because he disapproved of their inter-racial relationship. Approximately three months later, on or about January 4, 2002, Plotkin both terminated Vargas from employment and suspended Brennan for a period of two weeks.

Contemporaneously with his termination, Vargas complained to company management that his termination was the result of unlawful discrimination by Plotkin. Brennan similarly complained to company management about her suspension. From Defendant's responses to Plaintiffs' discovery requests, it appears that Defendant conducted an internal investigation, creating an investigative file, after Plaintiffs' January 4, 2002 complaints of unlawful managerial conduct.

In the matter before this Court, Plaintiffs propounded Interrogatories and Requests for Production of Documents seeking the contents of that investigation's file from Defendant. Defendant refused to provide the file's contents, responding that the materials requested were prepared in anticipation of litigation and that Plaintiffs have failed to make the requisite showing of substantial need as required by Rule 26(b)(3).¹

¹ Separate sets of interrogatories and requests for documents for each of the Plaintiffs were served upon Defendant. Defendant's answers to each of the Plaintiffs' discovery requests were substantially the same. At issue in this Motion is Defendant's response to Plaintiffs' Interrogatory No. 5 and Document Request No. 14.

Plaintiffs' Interrogatory No. 5 asked: "Did the Defendant conduct any investigation regarding the complaints of discrimination registered by the Plaintiff? If so, identify and produce all documents pertaining or related to that investigation." (Pls.' Ex. A ¶ 5.) Defendant's response was: "The answering defendant objects to producing any documents related to its investigation regarding the complaints of discrimination made by Ms. Brennan [and Mr. Vargas] on the grounds that said materials were prepared in anticipation of litigation and plaintiff has not made the showing of substantial need as required by Rule 26(b)(3)." (Pls.' Ex. B ¶ 5.)

Plaintiffs' Document Request No. 14 sought: "All documents pertaining to any investigation by the Defendant regarding complaints of discrimination made by Plaintiff." (Pls.' Ex. B. ¶ 14.) Defendant's response was: "The answering defendant objects to this request to the extent that it requires the production of materials protected by the attorney-client privilege. In addition, the answering defendant objects to producing any such documents since they constitute materials prepared in anticipation of litigation, as defined by Rule 26(b)(3), and plaintiff has not made the showing of substantial need as required by said Rule." (Pls.' Ex. B. ¶ 14.)

Since the parties, in their memoranda of law, do not address the applicability of the attorney-client privilege here,

II. DISCUSSION

The work-product doctrine protects the materials prepared by an attorney or his or her agent in anticipation of litigation or for use in trial. See Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). Its purpose is to encourage careful and thorough preparation for litigation by a party's attorney. See United States v. Nobles, 422 U.S. 225, 238 (1975). The work-product doctrine has been codified in Federal Rule of Civil Procedure 26(b)(3), which provides in pertinent part that:

a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3). Thus, the work-product privilege provides a qualified immunity that depends on the information being sought and the adversary's need for the information, see Hickman, 329 U.S. at 512; Nobles, 422 U.S. at 238, and which qualified immunity can be overcome only by a showing of extraordinary circumstance. See Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985). Even if the party seeking discovery of information otherwise protected by the work-product doctrine has

we discuss only whether the work-product doctrine applies to the facts of this case.

made the requisite showing of need and undue hardship, courts must still protect against the disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney and his or her agents. Fed. R. Civ. P. 26(b)(3); In re Cendant Corp. Sec. Lit., 343 F.3d 658, 663 (3d Cir. 2003).

The burden of establishing that the work-product doctrine applies rests with the party asserting the objection. Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, P.A., 144 F.R.D. 258, 267-68 (E.D. Pa. 1992). A general, unspecified objection to discovery requests on the ground of work-product is insufficient and improper. Id. at 268. In determining whether the work-product doctrine applies, the appropriate inquiry is "whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1258 (3d Cir. 1993). It is well-settled that a determination on whether a privilege applies is made on a case-by-case basis and not on the basis of a blanket assertion. Stabilus, 144 F.R.D. at 268.

Here, Defendant fails to identify the specific documents, or even the nature of the documents, alleged to be protected by the work-product doctrine. Defendant also fails to provide any factual support for its assertion of the privilege such that the

Court is able to analyze whether indeed the contents of the investigative file were "prepared or obtained because of the prospect of litigation." See id. (quoting In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 803 (3d Cir. 1979)).

Instead, Defendant argues that Plaintiffs have failed to make a proper showing pursuant to Rule 26(b)(3), for example, that witnesses knowledgeable about the internal investigation are unavailable for interview by Plaintiffs. To attack a claim of privilege, a party must establish a substantial need for the documents and that they will suffer an undue hardship attempting to obtain the documents by other means. Fed. R. Civ. P. 26(b)(3); Runyan v. Sybase, Inc., Civ. A. No. 93-0368, 1993 U.S. Dist. LEXIS 13425, at *23-24 (E.D. Pa. Sept. 16, 1993). While Plaintiffs have also not provided any factual support for their conclusory assertion that they would be unable to secure the information they seek without undue hardship, it is nevertheless the party objecting to the production of documents that has the burden of establishing the existence of the privilege in the first instance. See Runyan, 1993 U.S. Dist. LEXIS 13425, at *24; Stabilus, 144 F.R.D. at 267.

IV. CONCLUSION

For these foregoing reasons, Plaintiff's Motion to Compel is **GRANTED IN PART** and **DENIED IN PART** in that Defendant **SHALL**,

within ten days of the date of this Order, answer Plaintiffs' Interrogatory No. 5 and Document Request No. 14 to the extent that the contents of the investigative file were not prepared or obtained because of the prospect of litigation and, if applicable, state with specificity its reasons for asserting the work-product doctrine.

In the unlikely event that the parties are unable to agree on this discovery matter and require additional relief from this Court, appropriate papers consistent with this Memorandum and Order shall be promptly filed with the Clerk of Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE VARGAS and,	:	CIVIL ACTION
JENNIFER BRENNAN,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
PALM MANAGEMENT CORPORATION	:	
d/b/a THE PALM RESTAURANT,	:	
Defendant.	:	No. 03-4280

O R D E R

AND NOW, this day of March, 2004, in consideration of the Motion to Compel Discovery filed by Plaintiffs Jose Vargas and Jennifer Brennan (collectively, "Plaintiffs") (Doc. No. 7) and the Answer thereto filed by Defendant Palm Management Corporation, d/b/a The Palm Restaurant ("Defendant") (Doc. No. 9), **IT IS ORDERED** that Plaintiffs' Motion to Compel is **GRANTED IN PART** and **DENIED IN PART** in that Defendant **SHALL**, within ten days of the date of this Order, answer Plaintiffs' Interrogatory No. 5 and Document Request No. 14 to the extent that the contents of the investigative file were not prepared or obtained because of the prospect of litigation and, if applicable, state with specificity its reasons for asserting the work-product doctrine.

In the unlikely event that the parties are unable to agree on this discovery matter and require additional relief from this Court, appropriate papers consistent with this Memorandum and Order shall be promptly filed with the Clerk of Court.

BY THE COURT:

JAMES MCGIRR KELLY, J.