

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

BRENT STRAMARA, Administrator : CIVIL ACTION
of the Estate of :
CHRISTOPHER V. STRAMARA, :
deceased :
 :
v. :
 :
DORSEY TRAILERS, INC. : NO. 96-CV-7361
_____ :

FRED M. ELLMAKER, JR. : CIVIL ACTION
Administrator of the Estate :
of RAYMOND ELLMAKER, deceased :
and MELISSA RISSER, Mother :
and Natural Guardian of :
RAYMOND MICHAEL ELLMAKER :
and ROCHELLE LYNN ELLMAKER, :
Minor Children of the Deceased: :
RAYMOND ELLMAKER :
 :
v. :
 :
DORSEY TRAILERS, INC. : NO. 96-CV-7362

MEMORANDUM AND ORDER

J.M. KELLY, J.

OCTOBER 15, 1998

Presently before the Court is the Joint Motion of Plaintiffs for Sanctions or, in the alternative, to Compel the Re-deposition of Paul Morrow (Document No. 47). For the reasons that follow, Plaintiffs' motion for sanctions or to compel is denied. Plaintiffs, however, have been denied an opportunity to discover information that potentially would serve their case, and therefore may serve interrogatories on Defendant, but only in a manner in strict accordance with this Memorandum and Order.

The circumstances underlying this motion relate to Mr. Morrow's assertion of attorney-client privilege in response to

questions posed to him at his deposition. During the deposition, plaintiffs' counsel asked Mr. Morrow with whom at Dorsey he discussed a memorandum written by Charles Mudd, a former Dorsey vice president for sales, that was distributed to Dorsey Trailers dealers. (Morrow Dep. at 57-58.) Before Mr. Morrow answered, defense counsel raised the issue of attorney-client privilege, which Mr. Morrow then asserted. (Id. at 59-61.) Mr. Morrow subsequently answered, in response to questions following up his claim of privilege, that he couldn't recall whether any discussions regarding the memorandum ever took place. (Id. at 65-66.)

Plaintiffs argue that there are no factual or legal bases on which to claim the privilege. Plaintiffs claim they have been severely prejudiced, and that they have been prevented "from obtaining relevant and potentially very meaningful discovery from this corporate Defendant." (Pls.' Mem. Supp. Joint Mot. at 4.) Accordingly, plaintiffs allege, Mr. Morrow's and defense counsel's conduct at the deposition is sanctionable under Federal Rule of Civil Procedure 37(b)(2).

Plaintiffs correctly have concluded the privilege does not apply in this situation. The attorney-client privilege prevents attorneys from testifying about confidential communications made to the attorney for the purpose of obtaining legal advice. In re Ford Motor Co., 110 F.3d 954, 965 (3d Cir. 1997) (discussing 42 Pa. Cons. Stat. Ann. § 5928 (West 1982)). Based upon Mr.

Morrow's deposition transcript, it appears he did not receive the memorandum as part of a request for legal advice. First, fellow vice-presidents at Dorsey Trailers did not know Mr. Morrow was an attorney (Kemp Dep. at 34), and so the possibility that other members of Dorsey management sought Mr. Morrow out for legal advice is, at best, remote. Second, it also appears from the transcript that the memorandum came across Mr. Morrow's desk as part of the memorandum's distribution to other members of management.¹ In this case, Mr. Morrow would have been acting as Dorsey Trailers' vice president, and not its attorney, when he received the memorandum, and this role was never converted to that of an attorney rendering legal advice during any subsequent conversation. Dorsey Trailers has utterly failed to allege any facts that would challenge this conclusion.

Plaintiffs, however, overstate the prejudice they have suffered through the assertion of the privilege. The conduct at the deposition denied Plaintiffs only an opportunity to discover how widely known the memorandum's contents were to Dorsey Trailer's management; Plaintiffs are in possession of the

¹Nothing in Mr. Morrow's description of his duties indicates he would have received the memorandum for any purpose other than his input as a member of management. At his deposition, Mr. Morrow said his obligations as vice president of administration included administering benefits plans and being contact at Dorsey for outside attorneys. (Morrow Dep. at 10-11.) Not included in this list was responsibility for reviewing corporate policy or evaluating those policies' legal ramifications.

memorandum, which will speak for itself at trial. The Court therefore finds Plaintiffs are not sufficiently prejudiced to warrant sanctions, and will deny their motion.

Whatever prejudice Plaintiffs have suffered is easily remedied, although not in the fashion requested by Plaintiffs. Plaintiffs seek leave to re-depose Mr. Morrow, but that avenue exposes this litigation to further delays potentially arising either from scheduling conflicts or more contentious behavior by the parties. The Court, therefore, will deny Plaintiffs' request to re-depose Mr. Morrow, but because the assertion of privilege during the deposition was erroneous and may have prevented Plaintiffs from discovering the extent of the knowledge of Dorsey Trailers' management, the Court will permit Plaintiffs to serve interrogatories on Defendant. These interrogatories, however, will be exceedingly limited in scope, and will seek information relating only to with whom Mr. Morrow discussed the memorandum and when those conversations took place. This narrow scope of inquiry will be matched by the number of interrogatories permitted under the following Order: Plaintiffs' may serve only two (2) interrogatories, including sub-parts, on Defendant. Defendant will have ten (10) days to respond.

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O R D E R

AND NOW, this 15th day of October, 1998, in consideration of Plaintiffs' Joint Motion for Sanctions or, in the Alternative, to Re-Depose Paul Morrow (Doc. No. 47), and Defendant's Response, it is hereby **ORDERED**:

1. Plaintiffs' motion is **DENIED**;
2. Plaintiffs may serve two interrogatories, including sub-parts, in accordance with the accompanying Memorandum; and

3. Defendant will have ten days in which to respond to Plaintiffs' interrogatories.

BY THE COURT:

JAMES MCGIRR KELLY, J.