UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DUKE UNIVERSITY

CIVIL ACTION
No. 2:12-mc-00196-JHR

v.

JOHNSON

DUKE'S RESPONSE TO DR. JOHNSON'S OBJECTIONS TO MEMORANDUM DECISION AND ORDER ON MOTION TO COMPEL AND TO QUASH SUBPOENA

This dispute is about whether communications between plaintiffs in a civil lawsuit and an author concerning facts relevant to that lawsuit should be shielded from discovery. Magistrate Judge Rich concluded that "people who bring suit must expect that their prior statements that are relevant to their claims cannot be hidden from those they are suing." (Dkt. 18 at 7.)

Judge Rich ordered Dr. Johnson to produce communications between him and the plaintiffs or their attorneys, limited to four narrow topics that are central to the claims in the underlying litigation: (a) events occurring between March 13, 2006, and March 28, 2006; (b) the subpoena for DukeCard information by Durham Police; (c) Duke's prior release of DukeCard information to Durham Police; and (d) any disciplinary action taken against one of the three plaintiffs in the McFadyen case. (Id. at 8-9; see Dkt.1 at 10 n.4.)

Dr. Johnson raises three objections to Judge Rich's order. First, he argues that Duke failed to show relevance and need. The discovery is relevant. It is limited by subject matter to the claims in the underlying litigation. Duke demonstrated its need for the discovery by showing that it exhausted all other avenues for obtaining it. Second, Dr. Johnson claims that compliance with Judge Rich's order will chill his ability to continue reporting. The people involved in the

communications at issue, however, have no expectation that those communications will be kept in confidence. To the contrary, they produced what they had in their possession and did not intervene here to prevent Dr. Johnson's compliance with Duke's subpoenas. Third, Dr. Johnson claims that any deposition would be harassing and that he has been singled out by Duke. Judge Rich concluded otherwise and ruled that these were not sufficient grounds to grant the extraordinary relief of quashing a deposition subpoena.

STATEMENT OF FACTS

On March 13, 2006, members of the Duke men's lacrosse team hired two exotic dancers to perform at a party. One of those dancers claimed she was raped at the party, and three lacrosse players were indicted. These three players were exonerated and declared innocent by the North Carolina Attorney General on April 11, 2007. Nevertheless, forty-one other members of the team (none of whom were indicted) filed two separate lawsuits against Duke, Duke employees, the City of Durham, and others for money damages arising out of their treatment following the rape allegations. Carrington v. Duke Univ., No. 1:08-cv-00119-JAB-JEP (M.D.N.C.); McFadyen v. Duke Univ., No. 1:07-cv-00953-JAB-JEP (M.D.N.C.). The relevant pending claims in Carrington and McFadyen involve communications of certain lacrosse players with Duke administrators in March 2006, communications from Duke to the players in advance of some players' motions to quash a subpoena for their DukeCard data in July 2006, and disciplinary action that Duke took against the three McFadyen plaintiffs in 2005 and 2006.

Dr. Johnson is a Maine resident and professor at Brooklyn College who began blogging about the rape allegations in April 2006, about a month after the team's party. See K.C. Johnson, Duke News, Durham-in-Wonderland, http://durhamwonderland.blogspot.com/2006/04/duke-news.html (last visited Nov. 1, 2012). Dr. Johnson co-authored a book about the allegations,

Until Proven Innocent, which was published in August 2007. The book describes events that give rise to the claims in Carrington and McFadyen and discloses some players and their attorneys as sources of information used to write about those events. (See Dkt. 1, Ex. 11.)

For their part, the players and their attorneys had an interest in providing Dr. Johnson with that information. Prior to filing suit against Duke, the players' attorneys spent time reviewing book manuscripts (including Dr. Johnson's). One of those attorneys justified that time as "particularly important as [it] allowed us an opportunity to correct factual errors about events and to ensure that the permanent, written memorialization of the events of the night, the investigation, the case, and especially the character of the boys were all portrayed in a positive light." (Dkt. 1, Ex. L at 3.)

Duke requested communications with Dr. Johnson from the players and their attorneys. (Dkt. 1 at 7 & Exs. P, Q, R, & S; Dkt. 5, Ex. 5.) The players themselves did not resist production on relevance or "confidentiality" grounds; they collectively produced about 70 such documents without such an objection. (Dkt. 5, Exs. 4, 5.) In depositions, many players testified (without objection) that they corresponded with Dr. Johnson about these events, but had difficulty remembering the details of those interactions. (E.g., Dkt. 1 at 7-8 & Exs. T, U, V, W.) The players' attorneys have since certified that the players produced all such documents in their possession or the time for such certification has passed. (Dkt. 1 at 8 n.3; Dkt. 5, Exs. 4, 5.)

Having exhausted other sources of this information, on July 9, 2012, Duke issued subpoenas to Dr. Johnson. (Dkt. 1, Exs. E, F.) Counsel for Duke and Dr. Johnson negotiated the scope of the subpoenas but were unable to reach agreement. (See Dkt. 1, Exs. G, H, I, J.)[1] On

[1] Dr. Johnson claims that Duke offered to narrow its subpoenas "for the first time" in a footnote in its motion to compel. (See Dkt. 20 at 6.) As the correspondence of counsel reveals, however, these offers were made and rejected by Dr. Johnson long before Duke filed its motion to compel. (See Dkt. 1, Exs. H at 11, J at 1.)

September 17, 2012, Duke moved to compel Dr. Johnson's compliance with the subpoenas. (Dkt. 1.) After briefing and an in-person hearing, Judge Rich granted in part and denied in part Duke's motion to compel and denied Dr. Johnson's motion to quash on October 12, 2012. (Dkt. 18.) On October 26, 2012, Dr. Johnson objected to Judge Rich's decision. (Dkt. 20.)

STANDARD OF REVIEW

United States magistrate judges may hear and determine any pretrial matter, except for eight specifically enumerated "dispositive" motions. See 28 U.S.C. § 636(b)(1)(A). Judge Rich issued a Memorandum Decision on Duke's motion to compel and Dr. Johnson's cross-motion to quash. Neither motion is one of the eight enumerated motions in section 636(b)(1)(A). This Court may overrule Judge Rich's decision only if Dr. Johnson has shown that the decision is "clearly erroneous or contrary to law." See id.

ARGUMENT

The First Circuit's decision in Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998), governs this dispute. Under Cusumano, Duke (as the moving party) bears an initial burden to "make a prima facie showing that [its] claim of need and relevance is not frivolous." Id. at 716.[2] Judge Rich concluded that Duke met this burden. (Dkt. 18 at 6.) Upon that showing, the burden shifts to Dr. Johnson to demonstrate a basis for withholding the information. Cusumano, 162 F.3d at 716. Judge Rich concluded that Dr. Johnson had carried that burden. (Dkt. 18 at 6.) The court must then balance Duke's need for the discovery with Dr. Johnson's

[2] Duke bears no "heavy burden," nor must it show that the discovery is relevant "in an important sense," as Dr. Johnson repeatedly claims. (See Dkt. 20 at 9, 11, 13.) The "important sense" language comes from Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 598 (1st Cir. 1980), but is taken from a discussion of what the district court in that case did. It is not part of the First Circuit standard. When Bruno & Stillman articulates that standard, it holds that the party seeking discovery must show that its case for discovery is "not frivolous" and that the information is "more than remotely relevant." This is consistent with the Cusumano standard articulated 18 years later. 162 F.3d at 717 (citing that precise holding in Bruno & Stillman, 633 F.2d at 597).

interest in confidentiality and any potential injury to the free flow of information that such disclosure would cause. Cusumano, 162 F.3d at 716. Judge Rich correctly concluded that the Cusumano balance tipped in Duke's favor in the circumstances presented here. (Dkt. 18 at 7.)

I. DUKE HAS SHOWN THAT THE DISCOVERY IS RELEVANT AND NEEDED.

A. The Documents Sought Are Relevant.

The documents that Judge Rich ordered Dr. Johnson to produce are limited by subject matter to the claims pending in the underlying litigation. (Dkt. 18 at 8; Dkt. 1 at 10 n.4.) Therefore, they are relevant. In fact, they may be admissible evidence in their own right as statements of a party opponent. See Fed. R. Evid. 801(d)(2)(A).

Duke explained the relevance of these documents to Judge Rich (Dkt. 1 at 6-10), and Duke incorporates those arguments by reference here. The Carrington and McFadyen plaintiffs do not dispute that the documents are relevant. They produced documents similar to what Duke seeks without a relevance objection, and they have not intervened to challenge relevance here.

Dr. Johnson's primary arguments in opposition to relevance are (1) that Duke has not shown relevance in a sufficiently "important sense," and (2) that Duke overstates the contemporaneous nature of the documents. The first argument fails because it relies on a misstatement of the applicable law. See supra n. 2. The second fails because it relies on a misstatement of fact. Dr. Johnson claims he did not begin blogging about the case until August 2006, "months after the meetings and events in question." (Dkt. 20 at 12.) But Dr. Johnson's first blog post about the matter was published on April 16, 2006, within weeks of the events in question. K.C. Johnson, Duke News, Durham-in-Wonderland, http://durhamwonderland.blogspot.com/2006/04/duke-news.html (last visited Nov. 1, 2012). In any case, because the underlying events occurred over six and a half years ago, statements made in the weeks or even

months that followed are sufficiently contemporaneous to be critical. This is especially true where the point of the statements was to "ensure . . . the permanent, written memorialization of the events … in a positive light," as the lawyer for some players explained. (Dkt. 1, Ex. L at 3.)

Communications between the players, their attorneys, and Dr. Johnson are relevant, highly probative, and likely admissible at trial. Duke has made out a prima facie case for relevance far stronger than required by Cusumano.

B. Dr. Johnson Is The Only Source Of These Documents.

Contrary to Dr. Johnson's assertions, Duke has exhausted its efforts to obtain these documents elsewhere. Some players indicated they corresponded with Dr. Johnson but did not produce any such emails in response to Duke's document requests. (E.g., Dkt. 1, Ex. W; Dkt. 13 at 3 n.2.) Counsel for the McFadyen and Carrington plaintiffs certified that they produced relevant documents. Neither suggested they were withholding documents on relevance or any other ground. (Dkt. 5, Exs. 4, 5.) Thus, Dr. Johnson is the only participant from whom Duke can obtain these communications. If there were no such responsive documents, presumably Dr. Johnson would have said that, as he did with respect to his notes. (See Dkt. 1, Ex. G at 3) ("Dr. Johnson has not retained any copies of notes from any of the interviews he conducted.").)[3]

Dr. Johnson first claims that there is no evidence that the players lost or destroyed any communications. (Dkt. 20 at 14.) Judge Rich concluded otherwise, stating that Duke had shown

[3] Unfortunately, Duke cannot confirm even this presumption because Dr. Johnson refuses to log the documents he is withholding. (See 11/08/2012 letter from Mr. Strawbridge to Mr. Segars (attached as Exhibit A).) Rule 45(d)(2)(A)(ii) requires any party withholding documents on a claim of privilege to provide a log. In re Grand Jury Subpoena, 274 F.3d 563, 576 (1st Cir. 2001). This requirement is not restricted to claims of attorney-client privilege, as Dr. Johnson suggests. E.g., Bailey v. Me. Comm. on Governmental Ethics & Election Practices, 277 F.R.D. 48, 51 (D. Me. 2011) (requiring log of documents withheld from response to subpoena on marital privilege grounds). Nor would a log "defeat the very purpose of" the privilege here, since the facts of communication and the participants' identities are already known. Judge Rich, having ordered Dr. Johnson to produce the documents, denied Duke's request for a log as moot. Duke hereby renews its request for such a log.

its efforts to obtain the documents from other sources. (Dkt. 18 at 6.) Dr. Johnson claims that "alternative sources" like depositions eliminate the need for the subpoenas and criticizes Duke for providing four sample deposition excerpts with its motion rather than full transcripts of all forty-one player depositions. (Dkt. 20 at 14-16.)[4] Duke pursued this information in depositions, but often was thwarted by faulty memories of six-year-old events. (See Dkt. 1 at 8-10.)

Contemporaneous correspondence could fill in those memory gaps. Duke has made out a prima facie case for need far stronger than the non-frivolous case required under Cusumano.

II. DISCLOSURE OF COMMUNICATIONS BETWEEN PLAINTIFFS AND DR. JOHNSON WILL NOT CHILL DR. JOHNSON'S REPORTING ON THE CASE.

If the Court adopts Dr. Johnson's position, communications between a plaintiff in a civil lawsuit and a blogger publicizing the subject matter of that suit would be entitled to even greater protection than communications between that plaintiff and his attorney or spiritual confessor. This is not the law. Plaintiffs who file federal lawsuits should expect that their relevant communications about the subject matter of the litigation will be subject to discovery. The McFadyen and Carrington plaintiffs confirmed this expectation by producing similar documents.

None of the cases Dr. Johnson cites holds that a journalist's communications with civil litigants – especially plaintiffs, who are in court by choice – are entitled to any heightened protection under the First Amendment. Instead, the cases demonstrate that production of the type of documents Duke seeks is not controversial at all.

The factually similar case of In re Subpoena to Witzel, 531 F.3d 113 (1st Cir. 2008), which Dr. Johnson cited (see Dkt. 5 at 5), further confirms this expectation. In Witzel, the target

[4] Dr. Johnson did not raise these arguments to Judge Rich, and therefore cannot make them here. Paterson-Leitch Co., Inc. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988); Vining v. Astrue, 720 F. Supp. 2d 126, 128 (D. Me. 2010). To the extent the Court would consider these arguments, Duke respectfully requests the opportunity to present additional evidence, as permitted by 28 U.S.C. § 636(b).

of the subpoena voluntarily produced documents akin to what Duke seeks from Dr. Johnson – direct communications with the parties to the underlying litigation; he withheld communications with third parties not involved in the underlying case. Id. at 116-17.[5] This result is consistent with Judge Rich's conclusion: communications between an author and plaintiffs in a pending civil case regarding the facts of that case are not entitled to the same level of protection as communications between an author and non-parties to the litigation. (Dkt. 18 at 6-7.)

Dr. Johnson criticizes Judge Rich's focus on the players' "expectation of privacy" and argues that it is not relevant to the analysis. (Dkt. 20 at 16, 18 n.12.) To the contrary, an individual's expectation of confidentiality when communicating with a writer bears directly on the First Amendment concerns that Dr. Johnson raises. Disclosing communications in which there is no expectation of confidentiality cannot plausibly chill the free flow of information; it has no bearing on future communicants who do expect confidentiality.

Applicable authority confirms that expectations of confidentiality are among the "myriad of factors" to be considered. See Cusumano, 162 F.3d at 716. Holding that courts must "assess the . . . need for confidentiality," Bruno & Stillman even discussed the issue in terms of "reasonable expectations of confidentiality." 633 F.2d at 597. Similarly, Cusumano described a "continuum of confidentiality" that requires an examination of the totality of the circumstances. 162 F.3d at 715. In that context, Cusumano considered whether the interviewers or their subjects knew at the time that litigation could ensue and result in a subpoena for their communications.

[5] In this regard, the remaining cases that Dr. Johnson cites are factually distinguishable. See Cusumano, 162 F.3d at 711 (involving communications among researchers and Netscape employees, none of whom was involved in underlying litigation); Bruno & Stillman, 633 F.2d at 596 (considering whether a newspaper had to reveal confidential sources); In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liability Litig., 249 F.R.D. 8, 10 (D. Mass. 2008) (involving documents from medical journals relating to the defendant's products – not correspondence between subpoena targets and parties in underlying case).

Id. In Cusumano, the fact that no one anticipated litigation weighed in favor of an expectation of confidentiality. Id. Here, by contrast, the players and their attorneys expected to file suit and were collaborating with Dr. Johnson in advance of "potential civil actions." (Dkt. 1, Ex. L at 4.)

Finally, Dr. Johnson's First Amendment arguments do not seek to protect a type of information from disclosure. They seek to protect a type of person from whom information is sought. There can be no argument that Duke's discovery of the same type of information from the players and their attorneys chilled speech. (Moreover, if the very documents being sought from Dr. Johnson were still in the possession of the McFadyen and Carrington plaintiffs, it stands to reason that they would have been produced to Duke already.) While the courts do afford journalists and other types of information gatherers "a measure of protection from discovery," Cusumano, 162 F.3d at 714, that measure is not absolute. E.g., United States v. LaRouche Campaign, 841 F.2d 1176, 1181-83 (1st Cir. 1988). Considering the circumstances, the limited disclosure compelled by Judge Rich is a far cry from the "routine and casual[]" discovery initiatives against which the First Circuit has warned. Id. at 1181.

Dr. Johnson's claim that production of his communications with the McFadyen and Carrington plaintiffs or their attorneys will chill his ability to blog about the case is implausible. Judge Rich's order simply reinforces the uncontroversial point that a plaintiff's prior statements – even if given "confidentially" to a third-party blogger – may be subject to discovery.

III. DUKE IS NOT SEEKING DISCOVERY FOR ANY IMPROPER PURPOSE, AND DR. JOHNSON'S SUGGESTION OTHERWISE IS UNFOUNDED HYPERBOLE.

Dr. Johnson argues that Duke's deposition subpoena should be quashed because Duke asked him improper questions at a deposition in an unrelated case, and because Duke singled him out for third-party discovery. (Dkt. 5 at 10.) These arguments have no support in the record.

Nevertheless, because Dr. Johnson repeatedly impugns counsel by suggesting that Duke's earlier deposition was "abusive and irrelevant," Duke provides a brief response.

Duke is currently defending an unrelated lawsuit containing unsubstantiated allegations that one of its senior administrators made specific comments to a reporter concerning a Duke student who was sexually assaulted in 2007. Rouse v. Duke Univ., No. 1:11-cv-00549-CCE-JEP (M.D.N.C.). The student produced two blog posts that discussed these statements (including one from Dr. Johnson's blog), but no admissible evidence of the statements. Duke subpoenaed Dr. Johnson to discover what evidence he used as a source for the post. Instead of being "abusive," questions regarding how "well sourced" his blog was, (see Dkt. 20 at 5), were vital to determining whether any evidence existed to support the allegations.

Dr. Johnson also questions Duke's motivation for subpoenaing him, arguing that Duke has unfairly singled him out. (Dkt. 5 at 10.) He invites the Court to "draw the inference" that Duke subpoenaed him because he has been critical of Duke. (Dkt. 20 at 20.) Dr. Johnson's speculation is unfounded. Duke's reasons for issuing subpoenas to him are obvious. The players testified that they communicated with him. (Dkt. 1, Exs. T, U, V, W.) Dr. Johnson holds himself out as one of the preeminent national sources of information about the case, noting that he consulted with those "at the heart of the controversy." (Dkt. 20 at 3.) Whether Duke subpoenaed other authors is of no import – Dr. Johnson possesses relevant discovery that Duke cannot obtain from any other source. Judge Rich was correct to compel him to produce it.

CONCLUSION

For the foregoing reasons, Duke respectfully requests that this Court affirm Judge Rich's order granting in part Duke's motion to compel compliance with its subpoenas to Dr. Johnson and denying Dr. Johnson's motion to quash those subpoenas.

This the 13th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November 2012, I filed the foregoing **DUKE'S RESPONSE TO DR. JOHNSON'S OBJECTIONS TO MEMORANDUM DECISION AND ORDER ON MOTION TO COMPEL AND TO QUASH SUBPOENA** upon the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record in the above-captioned action, including counsel for the witness, Patrick Strawbridge of Bingham McCutchen LLP, One Federal Street, Boston, MA 02110.

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