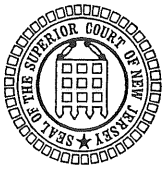
SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
PHILLIP LEWIS PALEY
JUDGE



MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903 - 0964

October 13, 2009

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Re: Roy v. Safety-Kleen Systems, Inc., et als.
Docket No. MID-L-4915-08

Dear Counsel:

Background: On June 17, 2008, Diane Roy filed a complaint against Safety-Kleen Systems, et als. The complaint alleged that her late husband, William Roy, had been exposed to chemicals within Safety-Kleen's products (and the products of others) which caused his death. At all times, Ms. Roy has been represented by Stephen Wodka, Esquire.

This court has addressed several discovery motions. First, approximately one year ago, Mr. Wodka issued a discovery subpoena for the files of Ronald Grayzel, Esquire, of Levinson Axelrod, a New Jersey law firm, in a settled case called "Silbernagel". Mr. Wodka asserted that that file contained material regarding Safety-Kleen products relevant here. Safety-Kleen moved to quash the subpoena; Mr. Wodka moved to enforce it. Consequently, a ten-page discovery order was entered on November 25, 2008. That order does not preclude the use of any document in the prosecution of this case; its thrust is to prohibit publication outside this lawsuit. The form of order was determined after receipt of a letter from Mr. Wodka dated November 25, 2008.

Thereafter, Safety-Kleen sought an order providing for additional protection of material it considered confidential. The proposed order permitted such material to be used in this lawsuit but not disseminated further. Safety-Kleen relied on an affidavit

submitted by one Bradley A. Carl, Assistant General Counsel of Safety-Kleen, in Plano, Texas. In response, Mr. Wodka served a Notice in Lieu of Subpoena[1], requiring the presence of Mr. Carl at a testimonial hearing. On May 15, 2009, following oral argument and without hearing testimony, this court granted Safety-Kleen's application for a permanent protective order, whereby "confidential" documents were to be "... permanently protected from disclosure or dissemination to any party outside of the confines of this litigation." But for a provision for service of that order, there is no other decretal paragraph.

Thereafter, Mr. Wodka filed a timely motion to the Appellate Division, seeking leave to appeal interlocutorily. That application was denied on July 24, 2009.

While the above application was pending, Mr. Wodka deposed James Breece on June 9, 2009. Certain documents used at that deposition were classified as "confidential" by Safety-Kleen in accordance with the November 25, 2008 order. Mr. Wodka disputed that classification. Safety-Kleen then moved before this court to include the Breece materials within that order. Its motion was supported by an affidavit from Mr. Carl. Mr. Wodka opposed that motion and served a Notice in Lieu of Subpoena to compel testimony from Mr. Carl. This generated a motion by Safety-Kleen to quash the Notice in Lieu of Subpoena, filed in mid-August, 2009. On the return date, August 28, 2009, this court ordered that the Breece materials were within the scope of the November 25, 2008, protective order, and quashed the Notice in Lieu of Subpoena.

Thereafter, Mr. Wodka served a notice to depose Mr. Carl on the subject of the confidentiality of the Breece materials. Safety-Kleen responded by moving to quash the Notice for Deposition. Contemporaneously, Mr. Wodka moved for reconsideration of the August 28, 2009, protective order as to the Breece materials. This letter will address both applications.

Plaintiff's Argument: Ms. Roy contends that the entry of the August 28, 2009, order was arbitrary, capricious, and unreasonable. She argues that she should be permitted to conduct cross-examination of Mr. Carl at an evidentiary hearing, at which she could review each confidentiality designation individually and raise challenges to Safety-

[1] Paragraph 9 of the November 25, 2008, order calls for an in camera review of any materials where the parties dispute whether such materials are confidential.

Kleen's claims of confidentiality. She contends that the failure to hold such a hearing places an unconstitutional prior restraint on her.

Mr. Wodka argues on her behalf that Mr. Carl's affidavits in support of Safety-Kleen's motions for permanent protective orders are conclusory, not specific, and unsound. He contradicts several of the allegations of Mr. Carl's affidavits by his own certification and suggests that the resolution of contested issues based on conflicting affidavits without a plenary hearing is an abuse of discretion. Tancredi v. Tancredi, 101 N.J. Super. 259, 262 (App. Div. 1968). He argues that Trump's Castle Assoc. v. Tallone, 275 N.J. Super. 159 (App. Div. 1994) mandates an in camera evidentiary hearing when the affidavits and certifications submitted before the Court dispute the existence of trade secrets or proprietary or confidential information.

Lastly, Ms. Roy contends that denying oral argument violates her due process rights. The order of August 28, 2009 "permanently" bars Ms. Roy and Mr. Wodka from disclosing or disseminating certain documents to any party outside of this litigation. Moreover, the order directs such documents to be destroyed or returned to Safety-Kleen. In Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), the Supreme Court held that a protective order addressing discovered but not yet admitted information is not a restriction on a traditionally public source of information and is not the type of classic prior restraint which requires exacting First Amendment scrutiny. The argument is that this court's protective order violates that ruling whereby, a party may "disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's process." 467 U.S. at 33-34.

Defendant's Opposition: Safety-Kleen argues that Ms. Roy has failed to state with specificity the basis for reconsideration and include a statement of the matters or controlling decisions which she believes the court overlooked or mistakenly interpreted. See R. 4:49-2. Reconsideration is a remedy only where either the court's decision is based on a palpably incorrect or irrational basis or the court failed to consider or failed to appreciate the significance of probative, competent evidence. Fusco v. Board. of Education of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002). Ms. Roy has failed to address any data not available to this court during its prior review.

R. 4:10-3 specifically allows protective orders to be issued for matters involving private, unfiled discovery materials, including trade secrets and proprietary information. Regardless of how such material was obtained, a party does not have an unrestrained right to disseminate information obtained through pretrial discovery. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31 (1984).

Safety-Kleen argues that the Greece materials are not public documents. Discovery materials from another case are neither "public" nor "widely disseminated." Estate of Frankle v. Goodyear Tire & Rubber Co., 181 N.J. 1, 5 (2004). There was never any intent that the Breece materials relating to another case be injected into this matter.

Safety-Kleen argues that no testimony is required before the entry of a protective order. Trump's Castle Assoc. v. Tallone, supra, cited by Plaintiff, addressed the disclosure of trade secrets but did not determine that a deponent who attests to the need for the protection of trade secrets and other proprietary information must present testimony.

The November 25, 2008, protective order provides a framework to address confidentiality vel non of discovery materials. Mr. Wodka has failed to comply with that framework.

Motion for Reconsideration: The court heard oral argument from counsel [Mr. Wodka for plaintiff, Mr. Alost for Safety-Kleen] on Friday, October 9, 2009. The argument began by Mr. Wodka's noting that, through the on-line posting of motions decided by trial courts throughout New Jersey, he had learned that trial courts have large numbers of motions to address at each motion cycle. Because of this volume, he suggested that the court had not fairly considered the motions leading up to the August 28, 2009, order, because of its busy calendar; it must have "fallen through the cracks".

It did not. It will not. Mr. Wodka's positions both in his papers and at oral argument have been given the same careful attention as any other attorney's. Indeed, because many of his arguments are clever and original, his papers are considered with great attention and reviewed with eagerness by this court.

The application for reconsideration of the August 28, 2009, orders which quashed the Notice in Lieu of Subpoena for Mr. Carl and which granted Safety-Kleen's motion

for a permanent protective order for the "Breece Materials" is denied. The standard for granting such an application is found in R. 4:49-2:

> ... a motion for ... reconsideration seeking to alter or amend a[n] order ... shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

Such motions should be used only for cases in which: (1) the court has expressed its decision based upon a palpably incorrect or irrational basis; or (2) it is obvious that the court either did not consider, or failed to appreciate the significance, of probative and competent evidence. Fusco v. Board. of Education of Newark, supra. Each such motion must focus on what was before the court in the first instance. Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App. Div. 1993), quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401, (Ch. Div.1990).

A litigant must initially demonstrate that the court acted in an arbitrary, capricious, or unreasonable manner before it should engage in the actual reconsideration process. The arbitrary or capricious standard calls for a less searching inquiry than other formulas relating to the scope of review. Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review.

Alternatively, if a litigant wishes to bring new or additional information to the court's attention which it could not have provided on the first application, the court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration. D'Atria v. D'Atria, 242 N.J. Super. 392, 401-402 (Ch. Div. 1990).

Reconsideration cannot be used to expand the record and reargue a motion. A motion for reconsideration is designed to seek review of an order based on the evidence before the court on the initial motion, R. 1:7-4, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record. Capital Fin. Co. of Del.

Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008), quoting Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

This court is satisfied that, in consideration of the August 28, 2009, motion, it fairly determined that Safety-Kleen had shown good cause to protect its confidential and proprietary documents from widespread dissemination. Therefore, it properly entered a protective order limiting the dissemination of the Breece materials and restricting their use to this litigation. There has been no showing that that restriction affects any constitutional rights of Ms. Roy, plaintiff; even defendants are entitled to due process.

Tancredi v. Tancredi, supra, on which Mr. Wodka relies, is not dispositive. That case dealt only with the procedure used in family court where dueling spouses submit conflicting affidavits about support previously paid. It is simply not practical that, in every case involving exposure to a product, a plenary hearing is required to determine confidentiality.

Mr. Wodka may freely challenge the "confidential" designation by following the procedure set forth in the earlier orders in this case. His motion for reconsideration is denied.

Motion to Quash: As noted, on May 15, 2009, this court ordered that certain discovery materials be protected from disclosure outside this case. The motion for such relief was supported by an affidavit of Mr. Carl, Safety-Kleen's counsel. Then, on August 28, 2009, this court granted a second permanent protective order, simultaneously quashing a notice to depose Mr. Carl. Three days later, Mr. Wodka served another notice for the deposition of Mr. Carl, relating to documents produced at the June 9, 2009, deposition of Dr. James Breece but deemed confidential.

Safety-Kleen now moves under R. 4:10-3 for a protective order relieving Safety-Kleen from having to produce Mr. Carl for deposition. This application is appropriate, procedurally. N.J. Turnpike Authority v. Sisselman, 106 N.J. Super. 358, 367 (App. Div. 1969).

The deposition notice directs Mr. Carl to produce "all confidentiality orders or agreements entered in any jurisdiction which concern any aspect of the Breece materials for which a protective order was entered in this matter on August 28, 2009." Safety-Kleen now contends that, as this court has already determined that the Breece materials

are worthy of permanent protection, honoring the notice of deposition would be to revisit an issue previously briefed, submitted and decided, and would subject Safety-Kleen and Mr. Carl to annoyance, embarrassment, oppression, and undue burden or expense prohibited by R. 4:10-3

Safety-Kleen further argues that the document request contained in the deposition notice is overly broad, unduly burdensome, and vague, in that it seeks to produce potentially confidential discovery materials from other cases as discovery here, which will generate additional motions practice.

Mr. Wodka, in opposition, contends that Mr. Carl's affidavits are conclusory because they outline no adverse effect upon Safety-Kleen's business interests or competitive position in the marketplace if the protective orders were not entered. Mr. Carl's testimony is clearly relevant, justifying an evidentiary hearing. Further, as an affiant before the court, Mr. Carl is subject to cross-examination, either at an in camera evidentiary hearing or at a deposition. R. 1:6-6.

Mr. Wodka argues that the court has unfairly restricted counsel's ability to share information from this case with other attorneys in other jurisdictions; consequently, Mr. Wodka's ability to prepare his case for trial is being compromised. His claim is that he is losing a valuable resource: the ability to compare this case with similar cases elsewhere.

Consistent with its earlier ruling, the court grants Safety-Kleen's motion for a protective order under R. 4:10-3. Safety-Kleen, in this court's view, has demonstrated good cause to protect those materials already designated as confidential and proprietary.

R. 4:10-3 allows a court, if good cause is shown, to order that confidential information either not be disclosed or disclosed in a limited manner only. R. 4:10-3(d) ("That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters."). This Rule limits the discovery of matters deemed confidential. See Dixon v. Rutgers, The State University of New Jersey, 110 N.J. 432 (1988) (protective orders appropriate to protect college peer review materials); Snyder v. Mehhjian, 244 N.J. Super. 281 (App. Div. 1990) (allowing a protective order to prevent disclosure of the donor of HIV contaminated blood).

As Mr. Wodka argues, R. 1:6-6 does permit the court, at its discretion, to direct an affiant to submit to cross-examination, either through oral testimony or deposition. The

only case which has addressed the scope of cross-examination under the Rule is Davis v. Davis, 184 N.J. Super. 430 (App. Div. 1982), a matrimonial proceeding involving a request to modify alimony. It is not conceivable that this rule mandates oral testimony from every affiant. If that is so, why has the rule been cited so seldom?

The order of November 25, 2008, provides a fair method to deal with issues of confidentiality. The court encourages compliance with the procedures established in that order.

The application for a protective order relieving Safety-Kleen from having to produce Mr. Carl in response to plaintiff's deposition notice is granted.

Forms of order conforming to the rulings made above are enclosed herewith. The court is most appreciative of the high quality of oral argument.

Very truly yours,

PHILLIP LEWIS PALEY

plp:hs