Received 3/22/2019 3:41:45 PM Commonwealth Court of Pennsylvania

Filed 3/22/2019 3:41:00 PM Commonwealth Court of Pennsylvania
334 MD 2014

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, By JOSH SHAPIRO, Attorney General, et al.,	:	
Petitioners,	:	
v.	:	No. 334 M.D. 2014
UPMC, A Nonprofit Corp., et al.,	:	
Respondents.	:	

THE COMMONWEALTH OF PENNSYLVANIA'S REPLY IN SUPPORT OF ITS APPLICATION TO QUASH UPMC'S SUBPOENA TO DEPOSE ITS LEAD COUNSEL AND FOR A PROTECTIVE ORDER

The Commonwealth of Pennsylvania, acting by Attorney General Josh Shapiro and through the Office of Attorney General (the "Commonwealth"), files this short Reply in Support of its Application to Quash UPMC's Subpoena to Depose Its Lead Counsel and for a Protective Order. *See Application to Quash,* 03/06/2019. In so doing, the Commonwealth reincorporates its Application by reference and will not burden the Court by repeating it here. Rather, it files this Reply solely to address several errant claims made by Respondent UPMC, A Nonprofit Corp., et al. ("UPMC") in its Response.

First, contrary to UPMC's claim, the Commonwealth is not trying to "flip" the burden regarding Pennsylvania Rules of Civil Procedure 4007.2 and 4012. The Commonwealth properly moved under Pa. R. Civ. P. 4012, and demonstrated good

cause for a protective order. On March 7, 2019, this Court granted a temporary Protective Order pending briefing. *See* Order re Protective Order, 03/07/2019. For the reasons set forth in its Application and this Reply, the Commonwealth respectfully requests that this Court make its existing Protective Order permanent.

Second, over and over in its Response, UPMC insists that it "needs" to depose Mr. Donahue "now" solely as a witness "concerning the factual basis for the allegations in the [Commonwealth's] Petition," Response at 10, 14. It promises repeatedly that it is not seeking information that is attorney-client privileged, work product protected, or the subject of internal deliberations or investigative processes.[1] Response at 11-14. But UPMC's own arguments betray this conceit.[2]

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[1] UPMC argues, based on a D.C. Circuit case, *Black v. Sheraton Corp of America*, 564 F2.d 531, 543 (D.C. Cir. 1977), that in order to properly invoke the deliberative process or investigative privileges in the Commonwealth Court of Pennsylvania, Attorney General Josh Shapiro must – *himself* – review every such claim and submit an "affidavit … identifying the materials as to which privilege is claimed, stating that he has *personally considered them*, and that after his personal consideration, [the Attorney General, himself, believes] they are protected by the deliberative process and/or investigative privileges." Response at 13 (emphasis added). This is both absurd, and a particularly obvious example of UPMC's strategy of litigation by harassment. It is also a plain misreading of *Black*, which only suggests such consideration by the "responsible department head." *Black*, 564 F2.d at 543. Here, the Commonwealth's Application was signed and submitted to this Court by, among others, the Executive Deputy Attorneys General for the Civil Law and Public Protection Divisions, who represent the Attorney General. Importantly, under the scenario UPMC suggests to the Court, it would be literally *impossible* for the Commonwealth to ever raise any objection under the deliberative process or investigative privileges in response to questions raised at Mr. Donahue's deposition unless Attorney General Josh Shapiro – *himself* – was in

In admitting that it wishes to depose Mr. Donahue as "the lead investigator," UPMC is admitting that it wishes to depose Mr. Donahue about materials implicated by the investigative, attorney client, work product, and deliberative process privileges. The gathering of facts in a civil investigation is generally protected by these legal privileges and protections insofar as those facts were gathered by attorneys and those working for them in their course of their professional duties and those facts indicate sources and methods, legal decision-making, internal processes, negotiations and strategy. *Pennsylvania Dep't of Educ. v. Bagwell*, 131 A.3d 638, 657 (Pa. Cmwlth. Ct. 2015). In admitting that it wishes to depose Mr. Donahue as the "principal participant in the meetings, conversations and negotiations with UPMC, Highmark, and others from 2011 onward," UPMC is admitting that it wishes to depose Mr. Donahue in violation of these same

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the room, defending it. The Commonwealth invoked the deliberative process and investigative privileges properly.

[2] Demonstrating both its hyper-aggressive tactics and that it is, in fact, seeking privileged and protected information, UPMC attaches to its Response a four-page "Rule 1023 letter" that it sent to Mr. Donahue, demanding that the Commonwealth "withdraw or correct" a laundry list of allegations in its Petition. Response at 10 and Ex. 3. However, UPMC's letter, which was sent on February 21, 2019, did not require a response from the Commonwealth until March 21, 2019. *See* PA. R. CIV. P. 1023.1-1023.4. The Commonwealth responded to that letter on March 20, 2019. Thus, the Commonwealth responded to UPMC's letter after UPMC filed its response, and within the time limits contemplated by the Rules. Furthermore, the Commonwealth has support for each of the listed allegations, their inclusion in the Petition is warranted, and they are not included for an improper purpose. There is nothing for the Commonwealth to correct, and its Petition will not be withdrawn.

privileges and protections and, in addition, to elicit information relating to confidential settlement negotiations that is inadmissible pursuant to Pennsylvania Rule of Evidence 408(a).

Under Pennsylvania Law, the Consent Decree is a contract. *See Com. ex rel. Kane v. UPMC,* 129 A.3d 441, 463-64 (Pa. 2015) (citation omitted). And, more than an ordinary contract, it is a contract that has been approved by this Court as a Court Order. *Id.* In this case, all of the parties to that contract – and especially UPMC – were represented by highly sophisticated counsel. It is blackletter law that once a contract is formed, litigation over the contract is confined to the four corners of that contract. *See, e.g., Seven Springs Farm, Inc. v. Croker*, 748 A.2d 740, 744 (Pa. Super. 2000), *aff'd,* 801 A.2d 1212 (Pa. 2002). Whatever negotiations may have occurred before vanish with only the completed agreement remaining. "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly." *Steuart v. McChesney*, 444 A.2d 659, 662 (Pa. 1982) (citations and quotation marks omitted).

The Pennsylvania Supreme Court recently restated these bedrock principles of law in a related matter, *Commonwealth by Shapiro v. UPMC*, 188 A.3d 1122, 1131–32 (Pa. 2018). "[I]n the absence of fraud, accident or mistake, [courts have]

neither the power nor the authority to modify or vary the terms set forth [in a contract]." *Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 405 Pa. 259, 265, 175 A.2d 58, 61 (1961) (*citing Buffington v. Buffington*, 378 Pa. 149, 106 A.2d 229 (1954)). Extrinsic evidence may be employed to ascertain the meaning of contractual terms ***only*** when they *truly are ambiguous* or *subject to more than one reasonable interpretation. Murphy v. Duquesne Univ. of the Holy Ghost*, 565 Pa. 571, 591, 777 A.2d 418, 429-30 (2001) (citation omitted) (emphasis added). Here, there is no ambiguity in the Consent Decree, and no allegation that the contract is ambiguous.[3] *See generally* UPMC's Answer to Commonwealth's Petition to Modify Consent Decrees, 02/21/2019; UPMC's Reply in Support of Motion to Dismiss the Petition to Modify Consent Decrees, 03/18/2019.

Where, as here, the terms of the contract are unambiguous, they are deemed to reflect the intent of the parties. *See Kane, supra,* at 134, 129 A.3d at 463 (*citing Kripp v. Kripp*, 578 Pa. 82, 90, 849 A.2d 1159, 1163 (2004)). And, in determining intent, courts must examine "the entire contract ..., taking into consideration the surrounding circumstances, the situation of the parties when the contract was made and the objects they apparently had in view and the nature of the subject matter."

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[3] UPMC's representation that the Commonwealth initiated a legal action against it in this Court "challenging the meaning of the Consent Decree, including particularly the modification provision" Response at 2 and 5, is false. No one is *challenging the meaning* of the Consent Decree. Rather, the Commonwealth is simply petitioning this Court to apply the modification provision of the Consent Decree to UPMC's conduct.

Lower Frederick Twp. v. Clemmer, 518 Pa. 313, 329, 543 A.2d 502, 510 (1988) (*quoting Mather's Estate*, 410 Pa. 361, 366-67, 189 A.2d 586, 589 (1963)). Therefore, even if the deposition of Mr. Donahue was not protected by the various legal privileges and protections the Commonwealth has cited – and it is – all of the information that UPMC seeks is inadmissible pursuant to Pennsylvania Rule of Evidence 408(a) and falls outside the scope of discovery.

Third, to the extent there are any legitimate, non-privileged, relevant "facts" in the soup UPMC seeks to serve, UPMC's Response shows that it already has them: They are publically available or available to UPMC without seeking to depose the Commonwealth's lead counsel. UPMC quotes liberally to Mr. Donahue's October 10, 2014 public testimony; it cites to an OAG brief in another matter; and it offers its own detailed, self-serving recollection of a January 17, 2018 off-the-record judicial conference with another then-Commonwealth Court Judge in his chambers.[4] Response at 7-9. UPMC alludes specific to "meetings, conversations, and communications back-and-forth with UPMC [*itself*], Highmark, and other Commonwealth executive departments" and alleges specific "meetings and discussions with UPMC [*itself*], Highmark, and … other third parties".

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[4] It is not surprising that the Commonwealth would not stipulate to UPMC's recollection. Response at 2, Exs. 1 and 2. It is perplexing, however, why UPMC would think that any such off-the-record statements would even be relevant to the plain legal task before this Court: applying the law to the Commonwealth's Petition to modify the consent decree. *See* Commonwealth's Petition to Modify Consent Decrees.

Response at 7. How or why UPMC seems to think such statements are relevant to this Court's application of basic contract and charitable non-profit law to the Commonwealth's Petition to Modify Consent Decree is another question, entirely.[5]

Fourth, UPMC's insistence that the Commonwealth can simply assert its objections "at the time of the deposition" shows its real purpose. Response at 11. UPMC insists that the Commonwealth "will have the opportunity at the time of the deposition to object to specific questions … and those objections *can be dealt with in due course*." *Id.* But such sacred legal ground cannot be protected from planned and pervasive encroachments with piecemeal "objections as to form" that can be "dealt with" at some later time, presumably in further motion practice before this Court designed to further string out this Court's time sensitive decision on the Commonwealth's Petition.

Last, the cases UPMC cites (all trial matters, none appellate) are easily distinguishable. *See Adeniyi-Jones v. State Farm Mutual Automobile Company,* 2015 WL 6180965 (E.D. Pa. Oct. 21, 2015) (allowing deposition of car accident victims' counsel in bad faith litigation regarding existence of *oral contract* entered into between that attorney and accident victims' insurer prior to litigation where *no written settlement agreement had been entered into*); *Frazier v. Southeastern*

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[5] In applying the law to the Petition before it, extraneous statements by the Attorney General during the course of negotiation are not relevant and should have no bearing. *See* Pennsylvania Rule of Evidence 408(a).

Pennsylvania Trans. Authority, 161 F.R.D. 309 (E.D. Pa. 1995) (allowing deposition of losing personal injury plaintiff's attorney where, in later lawsuit, plaintiff alleged prior-defendant SEPTA had improperly surveilled her during initial lawsuit in violation of her constitutional rights and her attorney had specific knowledge of those facts); and *Premium Payment Plan v. Shannon Cab Co.,* 268 F.R.D. 203 (E.D. Pa. 2010) (allowing deposition of business owner's attorney *who handled day-to-day transactions of his business* where business owner testified that counsel had directly received payments and records in dispute).

In rare cases, like those above, an attorney can be deposed – but that is only where the actual actions of the attorney are at the heart of a typically separate legal dispute. The most obvious example is in a claim of malpractice. That is not what we have here. Executive Deputy Attorney General James A. Donahue, III, has no duty to UPMC. His only legal duty is to the Commonwealth, his role as lead counsel is not the basis for the matter before the Court, and the information UPMC seeks from Mr. Donahue is legally privileged and protected from disclosure. If this Court allows Mr. Donahue to be deposed, no attorney representing a client in contract or settlement negotiations can any longer be shielded from the subpoena of opposing counsel in later litigation seeking to enforce that agreement.[6]

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[6] In the private sector, such subpoenas could quickly become weaponized by aggressive opposing counsel seeking to conflict an adverse party's counsel out of litigation. For example, if a party to this litigation was to issue a similar subpoena

For all of these reasons and those set forth in its Application, this Court should grant the Commonwealth's Application to Quash UPMC's Subpoena to Depose Its Lead Counsel and for a Protective Order and make permanent its existing temporary Protective Order prohibiting UPMC from taking the deposition of the lead counsel to the Commonwealth.

Respectfully submitted,

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to UPMC's own lead counsel – who, based on UPMC's Response, has parallel "factual" knowledge to Mr. Donahue and was party to the same negotiations, meetings and correspondence as Mr. Donahue was – UPMC's counsel would become a fact witness to the case. UPMC, then might have to or choose to hire alternative, less "conflicted" (and less knowledgeable) counsel to represent it in the underlying litigation. Or UPMC's counsel might then conclude that it is conflicted and has to withdrawal from the representation entirely, thereby leaving its client at a strategic disadvantage.

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

s/ Jonathan Scott Goldman
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CERTIFICATE OF SERVICE

I hereby certify that this document was served on all counsel via PACFile.

s/ Jonathan Scott Goldman
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ORDER

AND NOW this _____ day of _____, 2019, upon consideration of the Commonwealth of Pennsylvania's Application to Quash UPMC's Subpoena to Depose its Lead Counsel and Application for a Protective Order (the "Application"), UPMC's Response thereto and the Commonwealth's Reply, and for good cause shown, it is hereby ORDERED that the Application is GRANTED. Respondent UPMC's notice and subpoena for the deposition of Executive Deputy Attorney General James A. Donahue, III, is hereby QUASHED and a Protective Order is entered prohibiting the deposition.

BY THE COURT:

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, J.