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NELSON C. JOHNSON, J.S.C.



SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

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RE: In Re: New Jersey Consolidated Olmesartan Litigation (Rahman v. Daiichi Sankyo, Inc., et al.) ET. AL. **DOCKET NO.** ATL-L-504-14

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

NATURE OF MOTION AND PROCEDURAL HISTORY

Defendants, Daiichi Sankyo, Inc., Daiichi Sankyo U.S. Holdings, Inc., Forest Laboratories, Inc., Forest Pharmaceuticals, Inc. and Forest Research Institute, Inc. (“Defendants”), bring this Motion to Compel Discovery pursuant to R. 4:23-1. Plaintiffs oppose this Motion and bring a Cross-Motion for a Protective Order. This Memorandum of Decision addresses only the issue of the Protective Order sought by Plaintiffs regarding certain documents obtained prior to filing litigation. The remaining issues entailed with the other Motions pertaining to discovery were discussed by the court with counsel, and ruled upon by the court, at oral argument on May 8, 2015. Two separate Orders have been entered.

ARGUMENTS OF COUNSEL

Defendants: In support of their Motion to Compel documents received by Plaintiffs' counsel through their request under the Freedom of Information Act ("FOIA") to the Food and Drug Administration ("FDA"), and for which Plaintiffs seek a Protective Order, Defendants aver as follows:

First, despite Plaintiffs' claims of work-product privilege, Defendants are entitled to know what documents were received from the FDA. Plaintiffs have obtained certain documents through a FOIA request regarding Benicar, Benicar HCT and Azor NDAs and various Adverse Event Reports. Defendants state that this court directed Plaintiffs at the January 9, 2015 conference call to produce a list showing for each document: the identity of the party who sent the document, the date of the document, and the identity of the person who received it.

Defendants argue that the list provided by Plaintiffs does not communicate sufficient detail to allow Defendants to identify any documents received by Plaintiffs through their FOIA request. According to Defendants, there are no senders or recipients identified, several of the documents listed have no dates, while others list dates from November 2008 to November 2014. Additionally, in eleven months since they first asserted the privilege in their discovery responses, Plaintiffs have refused to produce a privilege log.

Second, the documents received by Plaintiffs through their FOIA request were not created in anticipation of litigation and, therefore, are not subject to the work-product doctrine. Defendants argue that Plaintiffs' reliance on the unpublished decision in *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 1991 U.S. Dist. LEXIS 14791 (E.D. Pa. Oct. 9, 1991) is misplaced. In *Rhone-Poulenc*, the court held that the grouping of documents requested via a FOIA request was attorney work-product. For Defendants, this case is inapposite because Plaintiffs' counsel has already provided the information as to what "grouping" of documents were sought from the FDA in her October 6, 2014 Reply Brief in support of Plaintiffs' previous motion to compel, wherein counsel provided the correspondence sent to the FDA and FDA's response.

Plaintiffs: In support of their petition for a Protective Order, Plaintiffs aver as follows:

First, As an initial matter, Plaintiffs emphasize that Defendants Motions are untimely because under R. 4:17-5 a notice of motion to compel should have been served within twenty days of receiving Plaintiffs' objections. Since Defendants waited longer, their objections should

be considered invalid and prohibit compelling responses, whether the answers are deemed inadequate or not. Furthermore, Plaintiffs argue that Defendants' document requests make little effort to specify or limit the information sought from Plaintiffs and, therefore, do not comply with R. 4:18-1(b)(1). [NOTE: Any delay in Defendants' filing was occasioned by the court's encouragement to resolve this dispute amicably.]

Second, Defendants improperly request Plaintiffs' attorney work-product and other privileged documents. Citing *Rhone-Poulenc, Supra*, Plaintiffs argue that the documents obtained through their FOIA request are protected by the work-product privilege and Defendants have no legitimate need to discover Plaintiffs' counsel's thought process and decisions as to what categories and types of documents were needed from the FDA. Nevertheless, Plaintiffs assert that Defendants cannot show that they are unable to obtain the substantial equivalent of the materials by other means without undue hardship because Defendants: (1) have all of the documents submitted to the FDA in their own files; and/or (2) can submit their own FOIA request to the FDA.

Defendants: In further opposition to a Protective Order, Defendants aver as follows:

First, the documents obtained by Plaintiffs through their FOIA request to the FDA are not privileged. For Defendants, the work-product doctrine does not apply to documents received and prepared by others in anticipation of litigation and, therefore, does not apply to the documents obtained by Plaintiffs. Defendants again argue that they already have the "grouping" of documents requested by Plaintiffs.

Second, Plaintiffs have failed to meet the requirements of a Protective Order under R. 4:10-3. Defendants argue that Plaintiffs have failed to establish good cause for the issuance of a protective order as Defendants have not annoyed, embarrassed, oppressed or unduly burdened Plaintiffs during discovery. Furthermore, Defendants argue that they have made a permissible request for non-privileged and relevant documents.

PLAINTIFFS' CROSS-MOTION FOR A PROTECTIVE ORDER

R. 4:10-2(a) provides,

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition

and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

Moreover, it is the policy of our courts that the rules of discovery are to “be construed liberally in favor of broad pretrial discovery,” *Payton v. New Jersey Turnpike*, 148 N.J. 524, 550 (1997). This policy is based upon the principle that “[o]ur court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts.” *Jenkins v. Rainner*, 69 N.J. 50, 56-57 (1976).

Additionally, R. 4:10-3 provides,

On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following: [sub-paragraphs (a) thru (h) recite the circumstances contemplated by the Rule – none apply here]

A party “who seeks to overcome the strong presumption of access must establish by a preponderance of the evidence that the interest in secrecy outweighs the presumption. The need for secrecy must be demonstrated with specificity as to each document. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient.” *Hammock v. Hoffmann-La Roche*, 142 N.J. 356, 381-382 (1995). The same is required to satisfy the “good cause” and “justice” requirements of R. 4:10-3. *Id.* at 382. However, “there is nothing in the rule that defines ‘good cause,’ or an ‘order which justice requires to protect a party.’” *Id.* at 369.

Furthermore, the work-product doctrine is codified in R. 4:10-2(c) which provides that,

[a] party may obtain discovery of documents, electronically stored information, and tangible things otherwise discoverable...and *prepared in anticipation of litigation* or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, *the court shall protect against disclosure of the mental impressions, conclusions,*

opinions, or legal theories of an attorney or other representative of a party concerning litigation. (emphasis added)

In Judge Pressler's comment to the Rule at Note 4.1, she advises that, "The fundamental test of applicability of the work-product privilege is whether the materials sought to be discovered were prepared in anticipation of litigation rather than in the ordinary course of business." She likewise references Note 6 to the Rule and advises "The rule protects from disclosure 'an attorney's mental impressions, conclusions, opinions or legal theories.'" Further, as noted by the court in *Miller v. J.B. Hunt Transport*, 339 N.J. Super, 144, 150 (App. Div. 2001), "a statement or other document will be considered to have been prepared in anticipation of litigation if the 'dominant purpose' in preparing the document was concern about potential litigation and the anticipation of litigation was 'objectively reasonable.'" (quoting *Martin v. Bally's Park Place Hotel & Casino, Inc.* 983 F. 2d. 1252, 1260 (1993)).

At oral argument, Plaintiffs' counsel acknowledged that she had the burden of proof on her request for a Protective Order and asserted that the "work product" she relied upon was the grouping of her inquiries, plus, her extensive negotiations and/or diligent efforts in securing documents from the FDA. In making her assertion as to the grouping of her FOIA inquiries to the FDA, Plaintiffs' counsel relies upon the decision in *Rhone-Poulenc, Supra*. There the court held that FOIA documents are protected by the work-product privilege since counsel selected only certain documents that would best aid in the preparation and proving of their case, the grouping of which was found to represent the thoughts and opinions of counsel as to the case. The court analogized compelling production of FOIA documents to receiving copies of all cases used by opposing counsel in preparation of their case, as both would be publically available. *Id.* at 27.

From this court's perspective, the most persuasive portion of the ruling in *Rhone-Poulenc* reads as follows: "While the documents themselves are not privileged, information regarding which documents defendant used in analyzing and preparing its case certainly would reveal information about the attorneys' mental processes in preparing the case." *Id.* at 25.

Although the court respects the holding of *Rhone-Poulenc*, it is not bound by it and is unable to embrace its reasoning. The reason for that is three-fold: *first*, counsel asks the court to ignore the express language of R. 4:10-2(c); *second*, the court believes the analogy of case law to

public records is flawed. A court ruling contains the author's reasoning within the body of the document and *a fortiori*, there is nothing to extrapolate or deduce from it. Court rulings speak for themselves; *third*, this court will not assume that the records will "certainly" reveal anyone's thought but the person(s) who prepared them.

Here, Plaintiff's counsel assumes that something *can, and will be* extrapolated from the documents regarding *her* thought processes, despite the fact that these public records were prepared by others. This court is hesitant to speculate or assume what can be learned from these public records, they will speak for themselves and for the people who prepared them, who we know was not anyone representing the Plaintiffs in this litigation.

On all applications for a Protective Order, it is the party seeking protection who has the burden of proof. See *Seacoast Builders Corp. v. Rutgers*, 358 N.J. Super. 524, 551 (App. Div. 2003). The court is satisfied that Plaintiffs have not met their burden. The court concludes that the mere identification of public records obtained from the FDA under the FOIA in preparation for a matter in litigation does not convey meaningful information of the type entitled to protection under New Jersey's work-product doctrine. The court so concludes based upon the reasons stated hereinafter.

- 1) Plaintiff's petition asks this trial court to interpret – essentially to re-write – Rule 4:10-2(c) in a manner in which no other court has to date.
- 2) The contents of these public records were not created in anticipation of litigation, nor were they prepared by Plaintiffs' counsel.
- 3) Any facts contained within these public records are neither the conclusions nor mental impressions of an attorney representing the Plaintiffs.
- 4) Plaintiffs' argument that the mere identification of these public records would reveal their lawyers' litigation strategy – because defense counsel's examination of the records would "certainly" reveal conclusions as to why each document was chosen - *assumes* that that one can extrapolate backwards from the results of a selection process to determine the reason a record was obtained, or how it will be used.
- 5) Every act by an attorney gives rise to vague inferences. In order to claim the shield of opinion work-product, it must be established that it is the attorney's thought processes that are revealed by the contents of the documents. These public records were not created

in anticipation of litigation and contain neither the conclusions nor the mental impressions of an attorney representing the Plaintiffs. They express the thoughts of others unknown to the court.

- 6) There are multiple reasons a public record might be useful in the preparation of a claim. This court will not speculate as to what they may be.

Accordingly, Plaintiffs' Motion for a Protective order is DENIED and counsel is ordered to produce the documents obtained from the FDA through their FOIA request within fifteen (15) business days of the date of this decision. An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision.



NELSON C. JOHNSON, J.S.C.

Date of Decision: May 12, 2015