IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAUL BARROWS,

Plaintiff,

v.

DAUBERT LAW FIRM LLC, *et al.*,

Defendants.

ORDER

06-C-409-C

In this FDCPA case filed against a law firm, its attorneys and its staff, plaintiff has filed a motion to compel discovery (dkt. 26) and a motion to strike defendants' summary judgment motion and supporting documents (dkt. 40). Defendants oppose both motions. For the reasons stated below, I am granting plaintiff's motion to compel and denying his motion to strike. For what it's worth, I also will address the parties' dueling letters outlining recent discovery disputes.

I. Plaintiff's motion to compel discovery

Plaintiff's motion to compel seeks complete answers to Interrogatories 3 and 7, seeking the identity of people who can describe accurately defendants' use of the "Hubbard" computer system and who can describe the attempted garnishment proceedings against plaintiff. Plaintiff claims to need more information because, after he deposed four people who might have this knowledge, salient questions remained unanswered and relevant documents remained unproduced, particularly the Hubbard notes (essentially a typed chron file prepared by attorneys working on the underlying collection action against plaintiff). *See* Pagel Aff., dkt. 27, at 2-4.

Defendants respond that they have provided plaintiff with an updated list of persons with knowledge of the topics at issue, but they have no intention of disclosing their Hubbard notes because the notes are protected by the attorney-client privilege as well as the attorney work product privilege. Further, the withheld notes were used by defendant Espinoza merely to refresh his recollection of events in anticipation of his deposition in this case. Defendants have provided for *in camera* review a marked copy of the contested Hubbard notes used at Espinoza's deposition.

Having reviewed and considered all the submissions, I conclude that plaintiff is entitled to disclosure of an unmarked copy of these notes. Preliminarily, the notes do not qualify for protection under the tightly defined and strictly construed attorney-client privilege. *See, Rehling v. City of Chicago*, 207 F.3d 1009, 1019 (7th Cir. 2000).; *In re Sulfuric Acid Antitrust Lit.*, 235 F.R.D. 407, 414-15 (N.D. Ill. 2006).

The Hubbard notes *might* qualify as attorney work product under F.R. Civ. Pro. 26(b)(3), *See, e.g., Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006), but there is room to disagree. Although litigation was a possible outcome of defendants' work on behalf of its client creditor, the clear focus of defendants' collection activities recorded in the Hubbard notes was getting plaintiff voluntarily to pay the debt. Further, whatever litigation that might have been anticipated as a last resort was a different potential lawsuit (creditor client *v.* debtor) than the one that got filed (debtor *v.* collecting law firm). So, this court could justify disclosure of the Hubbard notes because they are not attorney work product.

Even assuming, *arguendo*, that the notes technically qualify as attorney work product, disclosure still is appropriate. Rule 26(b)(3) distinguishes between materials prepared in anticipation of litigation that contain the mental impressions, opinions or legal theories of an attorney concerning the litigation, and those that do not. The former are off limits, but the latter are discoverable upon a showing that the party seeking disclosure has substantial need of the materials to prepare his case and cannot obtain the substantial equivalent from other sources without undue hardship. *See Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 768-69 (7th Cir. 2006).

The reason for fencing off an attorney's mental impressions and legal theories is obvious in the ordinary case: attorneys are entitled to a zone of privacy in which to analyze and prepare their client's case free from scrutiny or interference by an adversary. *Hobley*, 433 F.3d at 949. But our scenario is very different: at most, the attorneys' opinions and impressions recorded in defendants' Hubbard notes were made in possible anticipation of their collection action against plaintiff in their capacity as the creditor's attorneys.[1] Plaintiff wants to review these opinions and impressions because they are the statements of party opponents in his lawsuit against the defendants in their capacity as debt collectors who allegedly violated federal statutes while attempting to collect a debt. The fact that defendants happen to be lawyers is irrelevant in this case. Nothing in these notes reveals information that Rule 26(b)(3) was intended to protect from disclosure. *See Yancey v. Hooten*, 180 F.R.D. 203, 212-13 (D. Conn. 1998). Therefore, plaintiff is entitled to disclosure.

[1] Many of the withheld notes are prosaic action entries into a chron file that are not protected by the mental processes exception.

II. Plaintiff's motion to strike defendants' summary judgment motion

Plaintiff moved to strike defendants' motion for summary judgement because they did not timely or properly serve it on him. Defendants confess inadvertent error but suggest that plaintiff suffered no prejudice. Unmollified, plaintiff seeks strict application of the rules.

This court sometimes grants motions of this ilk, so I understand why plaintiff took a stab at it. But in the absence of a history of obdurate resistence to the applicable rules and procedures, this court is not keen on quashing a summary judgment motion as punishment for a negligent service failure. So it is here. The court will decide defendants' motion on its merits.

III. The dueling discovery letters

On January 26, 2006, this court received a January 25, 2007 letter from defendants' attorney outlining perceived discovery misconduct by opposing counsel and announcing defendant's reaction and intended response. Later that same day plaintiff's attorney submitted a letter (dated January 18, 2007, but clearly in response to defendants' letter) providing his side of the story.

Neither side asked for any relief from the court, so none will be given. Since I had to address the pending nondispositive motions anyway, I am taking this opportunity to clean the slate: because the parties have such conflicting views of what has happened and why, the letters cancel each other out. The court will not assess equitable demerits against either side based on discovery behavior occurring prior to submission of these letters.

Hereafter the court expects discovery to continue according to the applicable federal rules and the announced procedures of this court. If the parties encounter a discovery dispute that evades prompt resolution, then someone needs to file a discovery motion in the manner outlined in the preliminary pretrial conference order.

ORDER

For the reasons stated above, it is ORDERED that:

(1) Plaintiff's motion to compel discovery is GRANTED. Defendant must produce the requested notes not later than February 15, 2007.

(2) Plaintiff's motion to strike the summary judgment motion is DENIED.

Entered this 8th day of February, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge