

9/22/15
Dept. 73
Rafael Ongkeko, Judge presiding

StemExpress, LLC, et al. v. The Center for Medical Progress, et al. (BC589145)

Counsel for plaintiffs: Charles Weir; Gregory Jones; Kate Hammond (McDermott, etc.)
Counsel for defendants: Catherine Short (Life, etc.); Charles LiMandri; Paul Jonna; Teresa Mendoza;
Jeffrey Trissell (Freedom, etc.)

Plaintiffs' motion to conduct specified discovery on shortened time under CCP § 425.16(g) (filed 8/26/15)

TENTATIVE RULING:

The court finds good cause for the specified discovery sought, as noted in the discussion below.

DISCUSSION

(Please note: Unfortunately, the court's tentative ruling website, which is the source of this version, is not able to show certain formatting contained in the original, such as the court's use of footnotes, boldface, italics, or the underscoring of case citations. A hard copy will be available for review in court before the hearing.)

On August 4, 2015, Defendants filed their Special Motion to Strike, halting all discovery efforts. Plaintiff now moves to conduct specified discovery on shortened time under CCP §425.16(g).

The specified discovery sought by plaintiffs [BRIEF TENTATIVE RULING IN BRACKETS]

Document production sought:

1. By October 2, 2015, 5 pm:
 - a. Electronic, unedited copy of every recording made at the May 22, 2015 meeting [GRANT, EXCEPT TO THE EXTENT ALREADY PRODUCED].
 - b. All documents identifying every version of every recording of the meeting. [GRANT, EXCEPT TO THE EXTENT ALREADY PRODUCED]
 - c. All documents supporting Defendants' assertion that they recorded the meeting to obtain evidence they reasonably believed is related to "the commission of crimes of partial birth abortion and/or homicide," including but not limited to
 - i. The "investigation" conducted by Defendants that they claim supports their "belief,"
 - ii. The communications between Daleiden and O'Donnell, and
 - iii. An electronic copy of the entire unedited version of every recording of O'Donnell.

[GRANT IN FULL]
2. The ability to serve O'Donnell with a subpoena seeking documents related to her communications with defendants. [GRANT]

Depositions sought:

3. By October 6, 2015, produce for deposition in 3 areas (the May meeting; versions of the recordings; and item 1c. above)
 - a. CMP's corporate representative;
 - b. David Daleiden;
 - c. "Susan Tennenbaum"
 4. The ability to serve O'Donnell with a subpoena seeking her deposition.
- [GRANT AS TO ALL OF THE ABOVE SPECIFIED DEPOSITIONS]

Plaintiffs' alleged 'good cause' for discovery under CCP §425.16(g)

In this invasion of privacy case (and 7 other causes of action), Plaintiffs assert good cause exists because:

1. They need to respond to three issues Defendants themselves have raised in their motion- namely, that the May 22nd meeting was not confidential; the meeting was recorded lawfully based on collection of evidence of "any felony involving violence against the person," an exception under Penal Code § 633.5; and plaintiffs' need to evaluate defendants' communications with its former employee, O'Donnell, defendants' source for a number of purportedly proprietary confidential documents, of which defendants contend they had no such knowledge;
2. The information sought is uniquely within defendants' possession or within a third party's possession.
3. As to shortened time, plaintiffs' opposition is due on October 13, 2015, and the usual discovery periods would fall beyond that date.

ANALYSIS

"All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision." CCP § 425.16(g).

A request for discovery in opposition to an anti-SLAPP motion should be determined with reference to the issues raised in the motion. The Garment Workers Center v. Superior Court (2004) 117 Cal.App.4th 1156, 1162. "...[G]ood cause to lift the SLAPP statute's discovery ban exists "[i]f the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case[.]" Id., at 1161 (internal citation omitted.)

Entire video recording of May 22 Meeting

While good cause is easily found as to these recordings (defendants claim the videos are proof of the absence of confidentiality), it appears that this issue may be moot as defendants have provided plaintiffs (and attached as exhibits for the court) copies of both videos made at the meeting, although follow-up discovery may be needed to determine if the exhibits themselves are full unedited versions. Such discovery is expected to be brief and is therefore permitted. Having had an opportunity to skim through portions of the video/audio recording, the court does find that there is sufficient evidence for purposes of this motion to support plaintiffs' reasonable expectation that their conversation would not be overheard.

The motion is GRANTED as to all unedited, complete recordings of the May 22nd meeting.

Evidence Regarding Commission of a Violent Felony against the Person

Penal Code § 633.5 provides: “Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m. Nothing in Section 631, 632, 632.5, 632.6, or 632.7 renders any evidence so obtained inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, a violation of Section 653m, or any crime in connection therewith.”

The court finds that good cause exists to seek specified discovery regarding Defendants’ investigations. Defendants are claiming that their investigations are the grounds for their reasonable belief that the May 22 meeting would produce evidence of partial-birth abortions in violation of 18 U.S.C. §1531 and 42 U.S.C. §289g-1. Plaintiffs are entitled to establish evidence that addresses their own burden in defending against the antiSLAPP motion under the second prong by negating Defendants’ reasonable belief defense. This discoverable evidence is in the hands of Defendants and Plaintiffs should be afforded the opportunity to argue against such an affirmative defense based on factual evidence to which it currently does not have access, save for conclusory statements in defendant Daleiden’s declaration (see, e.g., ¶¶3, 4 Daleiden declaration).

Defendants argue that the only concern for the court is whether the recorded communication was for the purpose of obtaining evidence reasonably believed to relate to the commission of a violent crime and that no discoverable evidence will defeat that reasonable belief because Defendants have already produced significant evidence to show that the belief was reasonable. However, at this stage, it is not for the court to determine whether the evidence provided is sufficient to establish a reasonable belief. That is an issue for the anti-SLAPP hearing. The only issue before the court at this time is to determine whether there is good cause to permit Plaintiffs the discovery they seek. In this instance, given Defendants’ reliance on investigative materials which purportedly establish defendants’ “reasonable belief” not yet in plaintiffs’ possession, such good cause exists.

The motion is GRANTED as to the investigations leading up to the video recording of the May 22nd meeting.

Holly O’Donnell Communications

Although these may already be part of the previous category of investigations made, the same reasons establishing good cause apply and are even more directly relevant to the other causes of action involving the allegedly proprietary and confidential StemExpress documents.

Depositions

As the court found regarding the document production, good cause exists for the depositions requested. The depositions should be held within a reasonable time following the production of documents.

Shortened Time for Discovery

The court, on motion of any party and for good cause shown, may shorten the time for the serving of discovery responses or the scheduling of a deposition. CCP §2025.270(d); CCP §2041.030(c)(2).

Given that the hearing on the anti-SLAPP motion is calendared for October 26, 2015, the court finds that good cause exists to shorten the time frame for the limited discovery sought.

Based on the foregoing, the motion to shorten time for discovery is GRANTED.

Order re actual production and deposition dates: TBD. Hear argument thereon.