

DIVISION OF ST. THOMAS AND ST. JOHN

Defendant.

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) **CASE NO. ST-15-CV-62**

Pending before the Court is Defendant's motion to quash and for a protective order. For the following reasons, Defendant's motion will be granted in part and denied in part.

On June 25, 2015, the parties submitted a proposed scheduling order requiring that written discovery be propounded by August 1, 2015.¹ Plaintiff filed a motion to extend all discovery deadlines on September 9, 2015, and, through an Order dated October 7, 2015, the Court extended the deadline for depositions but did not extend the deadline for written discovery because Plaintiff failed to demonstrate good cause. Then, on October 26, 2015, Plaintiff filed a notice of deposition under Fed. R. Civ. P. 30(b)(6) and a subpoena duces tecum, and Defendant filed the pending motion on November 5, 2015.

¹ The Court approved the discovery plan through an Order dated June 30, 2015.

Under Fed. R. Civ. P. 26(c)(1), a party may move for a protective order “for good cause ... to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”² “When a motion for protective order is related to an oral deposition, the parties are not required to confer or file a written certification prior to seeking court intervention.”³

“When considering a motion to quash a deposition subpoena where the private and confidential information of a company, though not privileged under law, is sought, the Court may weigh the need for the documents against the burden and invasion of corporate privacy.”⁴

ANALYSIS

A) Subpoena Duces Tecum

In Paragraph 5 of her subpoena duces tecum, Plaintiff requests “copies of any and all reports, opinions, notes, studies, photographs, video recordings, sketches, calculations, and all documentation regarding the incident on September 16, 2014.”⁵ In Paragraph 6, Plaintiff seeks “all correspondence, memoranda, articles, notes, reports, computer

² See Super. Ct. R. 39 (In the absence of a local statute, case law, or Superior Court rule addressing the issue adequately, the Federal Rules of Civil Procedure are applicable to the Superior Court); Fed. R. Civ. P. 26(c)(1); see *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 169 n.3 (2012) (Recognizing that “[t]he Superior Court Rules make the Federal Rules of Civil Procedure 26 through 37 applicable for the purposes of discovery in all civil cases.”).

³ See also *Barton v. V.I. Port Auth.*, 2015 V.I. LEXIS 59, *3-5 (V.I. Super. Ct. June 3, 2015). While Fed. R. Civ. P. 26(c)(1) requires the motion include “a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action,” LRCi 37.1 excludes motions related to depositions from the requirement for counsel to meet and confer.

⁴ *O’Neale’s Transp. v. Marshall & Sterling*, 29 V.I. 23, 24, 1994 V.I. LEXIS 3, *1-2, 1994 WL 90627 (V.I. Terr. Ct. 1994).

⁵ In the Complaint, Plaintiff alleges that she fell on Defendant’s property on September 16, 2014.

simulations, reports, studies, tests ... or other non-privileged documents that you have received from or sent to any person relating to this case and to any opinions rendered to the Defendant, his counsel, or other representatives in this case.” In Paragraph 7, Plaintiff demands “copies of any and all memorandum, notes, reports, civil pleadings, graphs or other non-privileged document or thing regarding any slip and fall or trip accidents or injuries occurring near the location complained of by Plaintiff on or before September 16, 2014. All correspondence, notes, memoranda, and working papers concerning this cause of action.”

Plaintiff asserts that she may compel Defendant to produce the specified documents and materials by virtue of the subpoena power established in Federal Rule of Civil Procedure 45, which provides that a “subpoena may command ... production of documents, electronically stored information, or tangible things.”⁶ However, Fed. R. Civ. P. 45 is a vehicle to compel documents from a nonparty, whereas Fed. R. Civ. P. 34 is the device to compel production from a litigant.⁷ As a result, the Court will treat Plaintiff’s subpoena as a request for the production of documents under Fed. R. Civ. P. 34.

By its terms, Fed. R. Civ. P. 34 is governed by Fed. R. Civ. P. 26,⁸ and the scope of discovery provided for in Fed. R. Civ. P. 26 is governed by the scheduling order

⁶ Fed. R. Civ. P. R. 45(c)(2)(A).

⁷ See Fed. R. Civ. P. 34(a) (“A party may serve on any other party a request within the scope of Rule 26(b): ... to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party’s possession, custody, or control: ... any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form”). See also Fed. R. Civ. P. 34(c) (“As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection”).

⁸ See Fed. R. Civ. P. R. 34(a).

established by the Court under Fed. R. Civ. P. 16(b).⁹ “When a party seeks to conduct discovery after [a] deadline has passed, that party must seek a modification of the scheduling order by demonstrating good cause under Rule 16.”¹⁰

Here, Plaintiff’s Fed. R. Civ. P. 34 request is untimely because it was submitted after the written discovery deadline established by this Court’s Scheduling Order.¹¹ In addition, Plaintiff has not demonstrated good cause for extending the written discovery deadline.

Notwithstanding, Plaintiff asserts that the material she seeks in her discovery request is required discovery that should have already been submitted by Defendant in compliance with Fed. R. Civ. P. 26(a)(1)(A), which establishes that, “[e]xcept as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties ... a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.”

⁹ “Scheduling Order ... Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order ... after receiving the parties’ report under Rule 26(f).”

¹⁰ *Fabery v. Mid-South Ob-Gyn, PLLC*, 2008 U.S. Dist. LEXIS 39679, *3-7, 2000 WL 35641544 (W.D. Tenn. May 15, 2008). See also Fed. R. Civ. P. 16(b)(4) (A scheduling order “may be modified only for good cause and with the judge’s consent”).

¹¹ “Written discovery” is commonly known to consist of “interrogatories, requests for production of materials, requests for admission and any other written discovery permitted by Rules 33, 34 and 36 of the Federal Rules of Civil Procedure.” *In re San Juan Dupont Plaza Hotel Fire Litig.*, 1988 U.S. Dist. LEXIS 17332, *64-65, 1989 WL 168401 (D.P.R. Dec. 2, 1988). See also *Chen v. Cayman Arts, Inc.*, 2011 U.S. Dist. LEXIS 66423, *4, 2011 WL 2491009 (S.D. Fla. June 22, 2011) (“[u]nder the Federal Rules of Civil Procedure, a party must respond to written discovery requests within 30 days after the requests are served. See Fed. R. Civ. P. 33(b)(2) (interrogatories), Fed. R. Civ. P. 34(b)(2)(A) (requests for production) and Fed. R. Civ. P. 36(a)(3) (requests for admissions)”).

The goal of the initial disclosure requirement in Rule 26(a)(1)(A) is to “accelerate the exchange of basic information about the case and to eliminate paper work involved in requesting such information.”¹² In addition, “[i]nitial disclosures ... serve the purpose of thwarting a party from improperly withholding relevant documents on the grounds that the opposing party has not specifically asked for them.”¹³

“Although producing a copy of a document or other tangible thing is one way to satisfy the duty to make initial disclosures under Rule 26(a)(1), a party may also simply make a list of such materials and that will satisfy the rule.”¹⁴ “The purpose of Rule 26(a)(1) is not to put the actual document in the opposing party's hands. Rather, ‘[t]he objective of such a listing is to enable the other parties to make informed decisions about which documents they should request be produced pursuant to [Federal] Rule [of Civil Procedure] 34, and to enable them to frame document requests that will avoid squabbles about wording.’”¹⁵

Defendant filed a notice of service of its initial disclosures on July 14, 2015, and filed notices on October 22, 2015, and on November 5, 2015, that the initial disclosures were amended. While it is unclear what Defendant actually disclosed, an email

¹² *Watts v. Two Plus Two, Inc.*, 54 V.I. 286, 305, 2010 V.I. Supreme LEXIS 32, *38-39, 2010 WL 4962902 (VI. 2010) (quoting *U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 223 F.R.D. 330, 333 (E.D. Pa. 2004)). See also Fed. R. Civ. P. 26 advisory committee's note; *Fitz, Inc. v. Ralph Wilson Plastics Co.*, 174 F.R.D. 587, 589 (D.N.J. 1997).

¹³ *Patel v. Havana Bar*, 2011 U.S. Dist. LEXIS 139180, *20 (E.D. Pa. Dec. 2, 2011) (quoting *Tarlton v. Cumberland Cnty. Corr. Facility*, 192 F.R.D. 165, 169 (D.N.J. 2000)).

¹⁴ *Schaffer v. Beringer*, 2014 U.S. Dist. LEXIS 175290, *7-8 (D.S.D. Dec. 16, 2014). See also 8 Wright & Miller § 2053; Fed. R. Civ. P. 26(a)(1)(A)(ii) (stating that a party may simply give “a description by category and location” of the documents or tangible things).

¹⁵ *Schaffer v. Beringer*, 2014 U.S. Dist. LEXIS 175290, *7-8 (D.S.D. Dec. 16, 2014) (quoting 8 Wright & Miller § 2053).

correspondence between opposing counsel on October 23, 2015, gives some indication of the content of these disclosures.¹⁶

Plaintiff's counsel initiated the email conversation by writing: "I understand from your response or failure to address my concern over the non-production of the video of the accident that you are refusing to produce the same." Defense counsel responded, stating: "Our client has already provided Plaintiff a full and complete copy of the insurance agreement related to Plaintiff's claim. In addition, our client has amended its initial disclosures by providing Plaintiff with the names and contact information of persons who may have discoverable information as well as the subjects of that information which they may know. The Defendant does not have any other materials, information or evidence which it may use to support its defense or which may ... not be used solely for impeachment." In reply, Plaintiff's counsel asked: "Are you stating that your client does not have and has never had the requested video recording of the accident?" Defendant's counsel answered, stating: "I am not understanding where the confusion is arising from given that Defendant is under no obligation to produce any materials, information or evidence which it will not use to support its defense or which it may use solely for impeachment. Since ... the Defendant has nothing that does not fit into either of the aforementioned categories [,] it has fully complied with its obligations under all applicable Rules governing this matter."

¹⁶ The email correspondence is attached to Defendant's motion to quash and for a protective order.

Then, Defendant filed a Privilege Log on November 5, 2015, outlining the material that it considered to be not discoverable, including a "Video of Plaintiff" that Defendant claims it intends to use only for impeachment purposes.¹⁷

Federal Rule of Civil Procedure 26(b)(5)(A)(ii) requires that a privilege log must "describe the nature of the documents, communications, or tangible things not produced or disclosed-and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." "A timely and adequate privilege log is required by the federal rules, and the failure to serve an adequate and timely privilege log may result in a waiver of any protection from discovery."¹⁸

This Court determines that "providing a privilege log with initial disclosures would be consistent with the purpose animating the initial disclosure requirement."¹⁹ By filing its Privilege Log several months after the deadline to propound written discovery had expired, Defendant put Plaintiff at a disadvantage, effectively foreclosing Plaintiff's ability to challenge the privilege claims and compel production of the privileged material.

In addition, courts have generally found that video depicting the circumstances of a plaintiff's injury is evidence that has both impeachment and substantive value. Surveillance video can serve an impeachment purpose in that it is evidence that may show the jury why it should not put faith in the plaintiff's testimony.²⁰ However, "the video would

¹⁷ See Defendant's Privilege Log, filed November 5, 2015.

¹⁸ *Miller v. City of Plymouth*, 2011 U.S. Dist. LEXIS 48481, *9-11 (N.D. Ind. May 5, 2011).

¹⁹ *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 2015 U.S. Dist. LEXIS 108381, *20 (E.D. Cal. Aug. 17, 2015). See also 8A Charles A. Wright, et al., *Federal Practice & Procedure* § 2053 (3d ed.) (noting one purpose of initial disclosures is to avoid "the cost of adversarial antics in discovery" (citing Fed. R. Civ. P. 26(a) advisory comm. notes to 1993 amendments)).

²⁰ *McDaid v. Stanley Fastening Sys., LP*, 2008 U.S. Dist. LEXIS 57844, *6-8 (E.D. Pa. July 28, 2008).

also constitute substantive evidence by helping to establish the truth of [the] plaintiff's description of the accident."²¹

"Where a party can use evidence for both impeachment and substantive purposes, it does not fall under the exception for evidence that is solely for impeachment."²² Similarly, when the "impeachment value [of evidence] is so closely linked to its substantive value, and the evidence ... cannot be realistically confined to use for impeachment purposes, [the evidence] must be produced."²³

Defendant's argument that the video can be withheld because it will be used only for impeachment purposes is without merit. Similarly, the other material Plaintiff seeks in Paragraphs 5 and 7 of the Rule 34 request could be used to establish the truth of Plaintiff's description of the accident. Moreover, Defendant has not made a cogent argument establishing that the burden of production and the invasion of Defendant's privacy outweighs Plaintiff's need for the requested documents and materials. Accordingly, Defendant must produce any documents and materials in its possession that have been requested by Plaintiff in Paragraphs 5 and 7 of the Rule 34 request.^{24 25}

²¹ *Id.*

²² *Davis v. Varlack Ventures, Inc.*, 59 V.I. 229, 234-235, 2013 V.I. Supreme LEXIS 36, *8-10, 2013 WL 3367302 (VI. 2013).

²³ *Kelley v. Smith's Food & Drug Ctrs., Inc.*, 2014 U.S. Dist. LEXIS 162850, *10-13 (D. Nev. Nov. 19, 2014).

²⁴ See, e.g., *Taylor v. San Mateo Police Dep't*, 2015 U.S. Dist. LEXIS 22285, *4-5 (N.D. Cal. Feb. 24, 2015) ("the initial disclosures were facially deficient ... the disclosures should have been supplemented to identify additional responsive information, including a contemporaneous video of the construction site where many of the events at issue in this case took place").

²⁵ The Court notes that, in Defendant's Privilege Log, Defendant asserts that the video of Plaintiff, photographs of Plaintiff, investigation materials, measurements, and photographs related to the area on Defendant's property where Plaintiff allegedly was injured is also privileged. However, Defendant did not raise these arguments in its briefing materials. In addition, the video, photographs, investigation materials, and measurements are not attorney-client communications, and Defendant has failed to demonstrate that these items are attorney work product materials.

On the other hand, Plaintiff's discovery request in Paragraph 6 for all documents and material that Defendant received or sent to any person relating to this case "does not relate to a specifically alleged factual dispute regarding an existing claim" and is "overbroad."²⁶ As a result, Defendant is not required to respond to Paragraph 6 of Plaintiff's Rule 34 request.

B) Notice of Deposition

Defendant also moves for a protective order concerning the information requested in Plaintiff's notice of Rule 30(b)(6) deposition.

In Paragraph 5 of the notice of deposition, Plaintiff demands that Defendant produce a representative who can be examined on: "Any and all persons who knew about the defect in the construction of [Defendant's] parking areas, how long these defects have existed and any information concerning efforts to fix or repair the defect." Defendant contends that Paragraph 5 is effectively a request for admissions under Fed. R. Civ. P. 36 that is barred by the Court's Scheduling Order, which established that written discovery was to be completed by August 1, 2015.

Fed. R. Civ. P. 36 provides that "[a] party may serve on any other party a written request to admit ... [and a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter ..."

While it is true that the deadline for written discovery has expired, which includes the deadline for requesting admissions under Fed. R. Civ. P. 36, Paragraph 5 of the notice

²⁶ *Wessinger v. Cain*, 2009 U.S. Dist. LEXIS 3729, *12, 2009 WL 161206 (M.D. La. Jan. 21, 2009).

is not a disguised Fed. R. Civ. P. 36 request for admissions. The notice of deposition clearly states that Defendant must produce a representative to respond to inquiries at a deposition, which does not constitute written discovery. As a result, Paragraph 5 of the notice does not violate the Court's Scheduling Order.

Defendant also moves for a protective order concerning Paragraphs 5, 6, and 7 of the notice for deposition on the grounds that the testimony that Plaintiff seeks to elicit is protected by the attorney-client privilege and the work product doctrine.

The attorney-client privilege protects confidential communications between an attorney and his or her client, encouraging "clients to make full and frank disclosures to their attorneys, who are then better able to provide candid advice and effective representation."²⁷ "In order for the attorney-client privilege to attach to a communication, it must be (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client."²⁸ Because the privilege "impedes full and free discovery of the truth, the attorney-client privilege is strictly construed."²⁹

The work product doctrine "shelters the mental processes of the attorney, providing a privileged area within which he [or she] can analyze and prepare his [or her] client's case."³⁰ The doctrine promotes "the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of

²⁷ *Browne v. People of the Virgin Islands*, 56 V.I. 207, 235, 2012 V.I. Supreme LEXIS 9, *44-45, 2012 WL 366964 (VI. 2012).

²⁸ *Id.* See also *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 359 (3d Cir. 2007) (quoting Restatement (Third) of the Law Governing Lawyers § 68 (2000)).

²⁹ *Id.* See also *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).

³⁰ *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 661-62 (3d Cir. 2003).

litigation.”³¹ The doctrine applies if a document or material was prepared “at a time when litigation was reasonably predictable or foreseeable” and was prepared “primarily for the purpose of litigation.”³² When materials are prepared “merely in the ordinary and regular course of a party’s business, they are outside the scope of work product protection.”³³ Because it is an evidentiary privilege, “the work product doctrine should be strictly construed.”³⁴

In Paragraph 6 of the deposition notice, Plaintiff indicates that she intends to depose Defendant’s representative concerning “any and all incident reports, facts, documents concerning Plaintiff’s accident.” In Paragraph 7, Plaintiff indicates that she intends to depose Defendant’s representative concerning “any and all incidents involving trips and/or falls in areas where Plaintiff’s fall took place.”

Plaintiff’s inquiries concerning “any and all incidents involving trips and/or falls in areas where Plaintiff’s fall took place,” “facts ... concerning Plaintiff’s accident,” and “any and all persons who knew about the defect in the construction of the parking areas, how long these defects have existed and any information concerning efforts to fix or repair the

³¹ *Jones v. Nationwide Mut. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 2307, *4, [WL] (M.D. Pa. 2010).

³² *Muse-Freeman v. Bhatti*, 2008 U.S. Dist. LEXIS 40899, *4, [WL] (D.N.J. 2008). See also *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252, 1258 (3d Cir. 1993.); *People of the V.I. v. Carty*, 2010 V.I. LEXIS 5, *2-4 (V.I. Super. Ct. Feb. 16, 2010). Material protected by the work product doctrine “must have been produced because of th[e] prospect of litigation and for no other purpose.” *U.S. v. Ernstoff*, 183 F.R.D. 148, 156 (D.N.J. 1998).

³³ *U.S. v. Ernstoff*, 183 F.R.D. 148, 156 (D.N.J. 1998)(citing *Diversified Industries, Inc. v. Meredith*, 572 F.2d at 604 (8th Cir. 1977)).

³⁴ *People of the V.I. v. Carty*, 2010 V.I. LEXIS 5, *2-4 (V.I. Super. Ct. Feb. 16, 2010).

defect” are not obvious attempts to elicit confidential communications³⁵ between Defendant and its counsel or disclose work product of defense counsel.

On the other hand, Plaintiff’s inquiries regarding “[i]ncident reports and documents concerning Plaintiff’s accident” could touch on communications or documents protected by the work product doctrine or the attorney-client privilege. However, Defendant can raise objections at the appropriate times during the deposition, and the Court will subsequently determine if the objections have merit.

As a result, Defendant’s motion will be denied concerning Plaintiff’s notice of deposition.

An Order consistent with this Opinion shall follow.

Dated: February 29, 2016

ATTEST: Estrella H. George
Acting Clerk of Court

by:

Lori Boynes-Tyson
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

³⁵ See *Upjohn Co. v. United States*, 449 U.S. 383, 395-396 (U.S. 1981) (“the [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. [The] protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney”(citations omitted)).