UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CABLEVIEW COMMUNICATIONS OF JACKSONVILLE, INC., a Florida Corporation,

Plaintiff,

vs. Case No. 3:13-cv-306-J-34JRK

TIME WARNER CABLE SOUTHEAST, LLC, a/k/a Time Warner Cable Enterprises, LLC, f/k/a Time Warner Entertainment Company, L.P., a/k/a Time Warner Entertainment-Advance/Newhouse Partnership, d/b/a Time Warner Cable,

Defendant.
_____/

O R D E R

This cause is before the Court on Plaintiff's Motion to Compel Production of Documents (Doc. No. 87; "Motion"), filed March 6, 2015, to which Defendant responded in opposition on March 27, 2015, see Defendant Time Warner Cable Southeast LLC's Opposition to Plaintiff's Motion to Compel Production of Documents (Doc. No. 96; "Response"). In short, Plaintiff seeks to compel production of Defendant's tax returns and other documents demonstrating Defendant's financial worth as well as documents and communications concerning Defendant's document retention policies.

I. Background

On March 21, 2013, Plaintiff Cableview Communications of Jacksonville, Inc. ("Cableview") initiated the instant action against Defendant Time Warner Cable Southeast LLC ("Time Warner"). Complaint (Doc. No. 1). The intricate factual details of this case are largely

extraneous to the instant motion, so only a brief summary of the relevant facts follows. On or about July 19, 2004, Cableview entered into an agreement with Time Warner to provide cable television installation services for Time Warner in the Greensboro, North Carolina area. Amended Complaint filed June 23, 2014 (Doc. No. 47; "Am. Compl.") at 2 ¶ 5; see Installation Agreement (Doc. No. 47-1). On September 23, 2010, Time Warner tendered a workplace injury claim to Cableview for indemnification allegedly pursuant to the Installation Agreement. Am. Compl. at 3 ¶ 12. Cableview forwarded the claim to its insurance agent, who then forwarded the claim to its insurance carrier; however, the insurance carrier denied defense and coverage, stating that the claim "did not fall within Cableview's contractual indemnification obligations to Time Warner under the Installation Agreement." Id. at 3-4 ¶¶ 13-14. The claim was left unpaid. See Defendant's Amended Answer and Affirmative Defenses to Amended Complaint and Amended Counterclaims (Doc. No. 74; "Am. Answer") at 6 ¶ 29.

In early 2012, Cableview and FTS USA, LLC ("FTS") jointly informed Time Warner of the possibility that FTS would acquire Cableview. Id. at 5 ¶ 20. Although the Installation Agreement provided that written consent was required for any assignment of the duties or obligations thereunder, Time Warner allegedly gave its verbal consent to the Cableview-FTS transaction, which Cableview interpreted as "Time Warner's clear expression of support for the [assignment]." Id. at 5 ¶¶ 20-21. On March 2, 2012, then, Cableview and FTS entered into an Asset Purchase Agreement through which FTS acquired substantially all of Cableview's assets, including the Installation Agreement with Time Warner. Id. at 5 ¶ 22. On or about March 1, 2012, one day before the closing of the Cableview-FTS transaction, however, FTS received a letter from Time Warner in which Time Warner made repayment for the workplace

injury claim "a condition to assent to assignment" of the Installation Agreement from Cableview to FTS. Id. at 6-7 ¶¶ 29-30. Cableview alleges that Time Warner "ultimately extracted $560,000.00 of Cableview's proceeds from the Cableview-FTS transaction" as reimbursement for the workplace injury claim. Id. at 9 ¶ 39.

There are two critical factual issues in the case that are relevant to the instant Motion, the first being whether Time Warner verbally consented to the Cableview-FTS transaction. See Am. Compl. at 47 ¶ 20; see also Am. Answer at 4 ¶ 20. The second issue is whether Time Warner improperly elicited $560,000.00 of Cableview's proceeds from the Cableview-FTS transaction, as Cableview alleges, see Am. Compl. at 9 ¶ 39, or alternatively, as Time Warner contends, Cableview actually agreed to a settlement of Time Warner's claim against Cableview for Cableview's breach of the Installation Agreement, which included payments to Time Warner from the proceeds of the Cableview-FTS transaction, see Am. Answer at 7 ¶ 39. While the undersigned does not attempt to resolve these issues in the instant motion, the issues form the bases of the parties' respective positions here.

II. Motion to Compel

In the Motion, Cableview seeks an Order compelling Time Warner to produce documents responsive to Request Numbers 1, 2, and 3 of Plaintiff's Third Request for Production of Documents, served on December 18, 2014. Motion at 3. Plaintiff also seeks attorneys' fees in bringing the Motion. Id. at 7-8.

Request Number 1 and its Response state:

> **Document Request #1**
> Your tax returns for the years 2012-present, and other documents sufficient to demonstrate Time Warner's ability to pay for purposes of Cableview's punitive damages claim.

Time Warner's Response

Defendant objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is irrelevant and immaterial to the subject matter of the pending litigation and not reasonably calculated to lead to the discovery of admissible evidence. This Request is particularly objectionable in that Plaintiff has not and cannot establish any basis for recovering punitive damages in this action. Defendant objects to this Request on the ground that it is vague and ambiguous to the extent it uses the terms "ability to pay for purposes of Cableview's punitive damages claim."

Defendant objects to this Request to the extent it seeks information that is a trade secret or other confidential and proprietary research, development, or commercial information.

Defendant objects to this Request to the extent it seeks information protected from discovery under the attorney-client privilege or the work-product doctrine. Defendant will not produce such information.

Motion at 4. In the Motion, Cableview argues that its request is not overly broad, unduly burdensome, or irrelevant. Id. at 5. To the extent that any information produced is confidential or privileged, Cableview suggests the Protective Order (Doc. No. 55) and the logging of privileged information in a privilege log pursuant to Rule 26, respectively, will provide adequate safeguards. Id. Finally, Cableview posits that Time Warner should direct its argument that punitive damages are not appropriate to the jury (rather than the Court in the discovery stage of litigation). Id.

Request Numbers 2 and 3, and their joint Response, state:

Document Request #2

All documents and communications concerning Time Warner's retention and purging policies for electronically stored information–including electronic mail and calendar files–in place from June 18, 2008 to present. This includes, without limitation, documents and communications concerning back-up servers and logs concerning the purging of electronically stored information for all Time Warner employees identified in Cableview's Second Amended Rule 26(a)(1) Initial Disclosures (served on December 18, 2014).

Document Request #3

> All documents and communications–limited to the period of June 18, 2008 to present–sent to any Time Warner employee identified in Cableview's Second Amended Rule 26(a)(1) Initial Disclosures (served on December 18, 2014), concerning litigation holds, preservation notices, preservation orders, or providing instructions to retain documents or communications in anticipation of litigation.
>
> **Defendant's Response**
> Defendant objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is irrelevant and immaterial to the subject matter of the pending litigation and not reasonably calculated to lead to the discovery of admissible evidence. This request is particularly objectionable to the extent it is overbroad as to the time frame indicated for responsive documents. Moreover, there is no credible issue or dispute concerning TWC's preservation of relevant documents in this case.
>
> Defendant objects to this request to the extent it seeks information that is a trade secret or other confidential or proprietary research, development, or commercial litigation. Defendant will only produce such information pursuant to a protective order entered in this case.
>
> Defendant objects to this Request to the extent it seeks information protected from discovery under the attorney-client privilege or the work product doctrine. Defendant will not produce such information.

Motion at 5-6. According to Cableview, these requests are not overly broad, unduly burdensome, or irrelevant because the testimony and representations made surrounding the searches and retention of the documents of Anthony Sieiro ("Mr. Sieiro"), Director of Technical Operations for Time Warner and the individual Cableview alleges verbally consented to the Cableview-FTS transaction, raises the issue of spoliation. Id. at 6. Furthermore, according to Cableview, the time frame of the requests is not overly broad, as "it only covers the pendency of the indemnification dispute." Id. Lastly, Cableview reiterates the argument it advanced with respect to Request Number 1, suggesting that the Protective Order (Doc. No. 55) and the use of a privilege log would provide adequate safeguards against the unintentional disclosure of confidential and privileged documents. Id. at 7.

III. Discussion

Generally, a party is entitled to discovery that is "relevant to any party's claim or defense" so long as it "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). The language of Rule 26(b)(1), Federal Rules of Civil Procedure ("Rule(s)") has been construed liberally by courts "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (citing Hickman v. Taylor, 329 U.S. 495, 501 (1947)).

Under Rule 34, a party may serve on any other party a request for production of documents. See Fed. R. Civ. P. 34. If the party served refuses to produce the documents or objects, the party seeking the documents may move the court to compel their production in accordance with Rule 37.[1] The burden is on the party seeking discovery to demonstrate that its production "is relevant, i.e., calculated to lead to admissible evidence." Shearson Lehman Hutton, Inc. v. Lambros, 135 F.R.D. 195, 198 (M.D. Fla. 1990) (citing Fed. R. Civ. P. 26(b)(1)). Motions to compel discovery pursuant to Rule 37 are left to the sound discretion of the trial court. See Commercial Union Ins. Co. v. Westrope, 730 F.2d 729, 731 (11th Cir. 1984).

"A court must impose attorneys' fees and expenses when compelling discovery unless the party was substantially justified in resisting discovery." Maddow v. Proctor & Gamble Co., 107 F.3d 846, 853 (11th Cir. 1997); see also Fed. R. Civ. P. 37(a)(5)(A) (stating the exceptions to the requirement of imposing fees and costs). "Substantially justified means that reasonable

[1] Fed. R. Civ. P. 37 deals with failure to make disclosures or to cooperate in discovery as well as discovery sanctions.

people could differ as to the appropriateness of the contested action." Maddow, 107 F.3d at 853 (citation omitted).

A. Request for Tax Returns and Financial Discovery

Financial records are relevant and therefore discoverable when punitive damages may be awarded. See Lane v. Capital Acquisitions, 242 F.R.D. 667, 669 (S.D. Fla. 2005). Because "'the purpose of punitive damages is . . . to punish [a] defendant for [his] wrongful conduct,'" and "'a jury may properly punish [a] wrongdoer by extracting from his pocketbook a sum of money which, according to his financial ability, will hurt,'" financial records can assist a jury in determining the wealth of a defendant and how much money is necessary to properly punish a defendant. Soliday v. 7-Eleven, Inc., 2010 WL 4537903, at *2 (M.D. Fla. Nov. 3, 2010) (unpublished) (quoting Myers v. Cent. Fla. Invs., Inc., 592 F.3d 1201, 1216 (11th Cir. 2010)). When a plaintiff seeks financial discovery in connection with a demand for punitive damages, Fla. Stat. § 768.72(1) is pertinent. § 768.72(1) states that:

> [i]n any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the [plaintiff] which would provide a reasonable basis for recovery of such damages. The [plaintiff] may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. . . . No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

§ 768.72(1) contains two separate parts. The first three sentences form the pleading component, which requires that a plaintiff make an evidentiary showing or proffer before punitive damages may be claimed. Neill v. Gulf Stream Coach, Inc., 966 F.Supp. 1149, 1153 (M.D. Fla. 1997). The last sentence forms the discovery component, which involves the court making a determination that there is "a reasonable basis in the evidence for an award of

punitive damages before a party is entitled to financial worth information." Haaf v. Flagler Constr. Equip., LLC, No. 10-62421-CIV, 2011 WL 1871159, at *1 (S.D. Fla. May 16, 2011) (unpublished).

In Cohen v. Office Depot, Inc., the Eleventh Circuit held that the pleading component of § 768.72(1) requiring a plaintiff to obtain leave of court before pleading a request for punitive damages directly conflicted with Rule 8(a)(2)'s requirement of only a "short and plain statement" for establishing a claim for punitive damages. 184 F.3d 1292, 1299 (11th Cir. 1999). As this pleading component of § 768.72(1) is procedural, the Cohen court held it is preempted by Rule 8(a)(2) and (3). Id. "Nevertheless, as noted in Porter v. Ogden, Newell & Welch, 241 F.3d 1334, 1340-41 (11th Cir. 2001), the Eleventh Circuit in Cohen did not decide whether the statute's discovery component (requiring a showing of a reasonable basis in the evidence for an award of punitive damages before a party is entitled to discover financial worth information) applies in federal litigation." Haaf, 2011 WL 1871159, at *1. "Although it did not expressly rule on the applicability of the discovery component of the Florida statute, the Eleventh Circuit did . . . note in Porter that the discovery component of the statute requires a party seeking punitive damages to offer at least some evidence supporting its claim." Id. "A formal evidentiary hearing is not mandated by the statute . . . [but] merely setting forth conclusory allegations in the complaint is insufficient to entitle a [plaintiff] to recover punitive damages." Porter, 241 F.3d at 1341.

In the Middle District of Florida, Courts have consistently viewed the discovery component of § 768.72(1) (requiring a showing of a reasonable basis in the evidence for an award of punitive damages before a party is entitled to discover financial worth information)

as substantive and therefore applicable in diversity actions. See, e.g. Neill, 966 F. Supp. at 1156 (noting that failure to follow the state statute would "pose [an] unacceptable risk of forum shopping"); Domke v. McNeil-P.P.C., Inc., 939 F. Supp. 849, 852 (M.D. Fla. 1996) (stating that "a demand for punitive damages is premature without a showing of an evidentiary basis in the record," in line with § 768.72(1)).

When financial worth discovery involves requests for the production of tax returns, district courts in the Eleventh Circuit have held that at least some level of heightened protection from disclosure applies. See, e.g., Pendlebury v. Starbucks Coffee Co., No. 04-80521-CIV, 2005 WL 2105024, at *2 (S.D. Fla. Aug. 29, 2005) (unpublished); Dunkin Donuts, Inc. v. Mary's Donuts, Inc., No. 01-0392-CIV-GOLD, 2001 WL 34079319, at *2 (S.D. Fla. Nov. 1, 2001) (unpublished). This is because "'[i]ncome tax returns are highly sensitive documents' that courts should be reluctant to order disclosed during discovery." Pendlebury, 2005 WL 2105024 at *2 (quoting Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1411 (5th Cir. 1993)).[2]

Applying these principles to the instant case, the key issue becomes whether Cableview has shown a reasonable basis for punitive damages and therefore is entitled to financial discovery in the form of income tax returns. Cableview's demand for punitive damages is based on its allegations of Time Warner's tortious interference. Am. Compl. at 9-10 ¶¶ 42-47. To establish a claim for tortious interference, Cableview must prove: (1) the existence of a business relationship between Cableview and FTS; (2) Time Warner's knowledge of the

[2] The undersigned acknowledges that Pendlebury and Dunkin Donuts, Inc. deal with the discoverability of personal tax returns as opposed to the tax returns of a corporation.

business relationship between Cableview and FTS; (3) Time Warner's intentional and unjustified interference with Cableview's relationship with FTS; and (4) consequent damage to Cableview. See KMS Rest. Corp. v. Wendy's Intern., Inc., 361 F.3d 1321, 1325 (11th Cir. 2004) (setting out the elements of a tortious interference claim under Florida law) (citation omitted). Tortious interference could support a claim for punitive damages since its third element, intentional and unjustified interference with a business relationship, constitutes "intentional misconduct" under § 768.72(2)(a), Florida Statutes. See G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526, 1537 (11th Cir. 1985) (overturning a jury's award of punitive damages for a tortious interference claim only because the tortious conduct had not risen to the requisite level of recklessness, maliciousness, or offensiveness).[3]

In its Amended Complaint, Cableview alleges that it "had developed a business relationship with FTS, with the expectation that the relationship would ultimately result in the sale of Cableview's assets to FTS." Am. Compl. at 9 ¶ 43. Cableview states that "Time Warner was aware of this relationship between Cableview and FTS through the joint notification of Time Warner." Id. at 9 ¶ 44. According to Cableview, Time Warner "intentionally and unjustifiably interfered with this relationship by blocking the close of the Cableview-FTS transaction by unreasonably withholding consent to assignment of the Installation Agreement to FTS until Cableview was forced to pay money to Time Warner." Id.

[3] Because the standard of proof necessary to sustain an award of punitive damages constitutes a substantive rule under Erie, federal courts sitting in diversity apply the state punitive damages standard. See Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). In Florida, a defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. See Mee Indus. v. Dow Chem. Co., 608 F.3d 1202, 1220 (11th Cir. 2010) (applying the Florida standard for punitive damages found in § 768.72(2) in a federal case based on diversity).

at 9-10 ¶ 45. Cableview further alleges that Time Warner "had actual knowledge of the wrongfulness of its conduct, actively and knowingly participated in the conduct, and was well aware of the severe economic damage it was inflicting on Cableview." Id. at 10 ¶ 46. Nevertheless, according to Cableview, Time Warner "intentionally and maliciously interfered with Cableview's business relationship with FTS simply because Time Warner possessed the market dominance and economic power in the cable television industry that enabled it to act with unrestrained impunity." Id. Finally, Cableview alleges that it has been damaged by Time Warner's tortious interference, and therefore "demands judgment for damages, both compensatory and punitive." Id. at 10 ¶ 47.

In Time Warner's response to Plaintiff's Motion, it argues that Cableview has failed to offer sufficient evidence to the Court in support of its claim for punitive damages; moreover, according to Time Warner, Cableview has not demonstrated a reasonable basis for punitive damages. Response at 8. The undersigned agrees in part with Time Warner. While Plaintiff has made a reasonable showing that there existed a business relationship between Cableview and FTS, and that Time Warner knew of this relationship, see generally Am. Compl. at 4-5 ¶¶ 17-20, Cableview has not made a reasonable showing by evidence in the record or by proffer that Time Warner intentionally and unjustifiably interfered with this relationship. Rather, Cableview's allegations in the Amended Complaint that Time Warner intentionally and unjustifiably interfered with Cableview's business relationship are conclusory. For instance, Cableview states that Time Warner "*intentionally* and *unjustifiably* interfered . . . by *unreasonably* withholding consent," id. at 9 ¶ 45, and that Time Warner "*intentionally* and *maliciously* interfered with [the] business relationship . . . ." Id. at 10 ¶ 46 (emphasis added).

Cableview has not provided the Court with a sufficient factual basis to support its allegations that Time Warner acted "unreasonably" or "maliciously." Moreover, given that the Installation Agreement required written consent for any assignment, see Installation Agreement at ¶ 21, and Cableview only alleges having obtained verbal consent from Time Warner, despite being aware of the requirement for written consent, see Am. Compl. at 5 ¶ 20, Cableview's allegations that Time Warner acted "unjustifably" are suspect. Because Cableview at this point has not made a reasonable showing by proffer or evidence in the record that Time Warner intentionally and unjustifiedly interfered with Cableview's relationship with FTS, the request for punitive damages cannot form the basis for financial worth discovery. The Motion as it relates to Request Number 1 is **DENIED**.

B. Request for Documents and Communications Relevant to Plaintiff's Allegation of Potential Spoliation

In its Motion, Cableview also requests discovery of documents and communications concerning Time Warner's document retention policies, suggesting this material is relevant since "potential spoliation is at issue." Motion at 6. "Rule 26(b)(1) may be construed to allow for discovery of document production policies and procedures in allowing parties to obtain discovery regarding any matter, . . . including the existence, nature, custody, condition, and location of any . . . documents," see Doe v. D.C.., 230 F.R.D. 47, 55 (D.D.C. 2005) (internal quotation omitted), and spoliation implicates the existence, condition, and location of documents. It follows that when spoliation is at issue, document production policies and procedures would be discoverable.

The discoverability of document retention policies hinges upon whether spoliation is actually at issue. In the Motion, Cableview states that "in light of the testimony and

representations made surrounding the searches and retention of the documents of Mr. Sieiro, potential spoliation is at issue." Motion at 6. The "testimony and representations" Cableview is referring to include the deposition testimony of Mr. Sieiro, see Deposition of Anthony Sieiro (Doc. No. 87-1; "depo."), and correspondence between Cableview's attorney and Time Warner's attorney, see Dec. 12, 2014 Letter from John D. Webb to Mark L. Block (Doc. No. 87-2; "Dec. 12, 2014 Letter"); Dec. 17, 2014 Letter from Mark. L. Block to John D. Webb (Doc. No. 87-3; "Dec. 17, 2014 Letter"), each attached to the Motion. According to Cableview, Mr. Sieiro is the individual who verbally consented to the assignment of the Cableview-FTS transaction. Motion at 2; see also Am. Compl. at 5 ¶ 20. In his deposition, Mr. Sieiro testified that he kept his calendar on his Time Warner Microsoft Outlook account, and that his Outlook account was never searched for documents responsive to Cableview's discovery requests. Depo. at 4-5; see also Motion at 2. The next day, Cableview requested that Time Warner conduct a reasonable search of Mr. Sieiro's email and calendar for documents responsive to Cableview's requests. Dec. 12, 2014 Letter at 2-3; see also Motion at 2. Time Warner responded that "any emails that Mr. Sieiro may have had were deleted pursuant to [Time Warner's] document retention policies and any calendar entries were also deleted long before this lawsuit was commenced." Dec. 17, 2014 Letter at 3; see also Motion at 3. Thus Cableview suggests there are "missing" emails which would show that Time Warner had notice of Mr. Sieiro's verbal consent to the assignment of the Installation Agreement, and that these emails are "missing" due to the intentional acts of Time Warner.

Time Warner, for its part, contends that there is no spoliation issue; therefore, its document retention policies are not relevant to any issue in the case. Response at 14.

Specifically, Time Warner points to the fact that sometime after the deposition of Mr. Sieiro, it located all of Mr. Sieiro's emails from the relevant time period, explaining that they had been separately archived in connection with other unrelated matters. Id.; see also Block Declaration (Doc. No. 96-1) at 2 ¶ 9. Time Warner produced all relevant and non-privileged emails sent to or received by Mr. Sieiro. Response at 14; see Block Declaration at 2 ¶ 9; Emails (Doc. No. 96-10, 11). Because there are no missing emails, says Time Warner, Cableview cannot make out a prima facie case of spoliation. According to Time Warner, its document retention policies, therefore, are not relevant to any issue in the case. Response at 14-15.

Had Time Warner not located Mr. Sieiro's emails from the relevant time period, provided an explanation as to where the emails had been retained, and produced the relevant and nonprivileged emails, Cableview may be in a better place to raise the issue of spoliation. The undersigned also notes that Cableview has not suggested that Time Warner has only produced *some* of Mr. Sieiro's emails. Absent evidence that there remain "missing" emails, there is no spoliation issue. For this reason, Defendant's document retention policies are not relevant to any issue in this case. Therefore, discovery of documents and communications relevant to Plaintiff's allegation of potential spoliation is inappropriate here, and the Motion as it relates to Request Nos. 2 and 3 is **DENIED.**

C. Request for Attorney's Fees

Because the Court is not compelling discovery, Plaintiff's request for attorney's fees is also **DENIED**.

IV. Conclusion

After due consideration, it is

ORDERED:

Plaintiff's Motion to Compel Production of Documents (Doc. No. 87) is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida, on May 4, 2015.

James R. Klindt

JAMES R. KLINDT
United States Magistrate Judge

efh
Copies to:
Counsel of Record