

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 C 5893	DATE	4/12/2007
CASE TITLE	Jaffe vs. Household Int'l, Inc. et al.		

DOCKET ENTRY TEXT

For the reasons stated in this Minute Order, the Court overrules the class' objection to Magistrate Judge Nan R. Nolan's March 5, 2007 Order that denied the class' motion for reconsideration of her January 24, 2007 Order finding waiver of KPMG documents, but precluding their disclosure [doc. no. 947], and the Court adopts the ruling in full.

■ [For further details see text below.]

Docketing to mail notices.
*Copy to judge/magistrate judge.

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Under Federal Rule of Civil Procedure 72(a), a magistrate judge "to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written Order setting forth the disposition of the matter." Fed. R. Civ. P. 72(a). Routine discovery motions are not dispositive. *Adkins v. Mid-Am. Growers, Inc.*, 143 F.R.D. 171, 175 n.3 (N.D. Ill. 1992). The Federal Rules of Civil Procedure grant magistrate judges broad discretion in resolving discovery disputes. *Heyman v. Beatrice Co.*, No. 89 C 7381, 1992 WL 245682, at *2 (N.D. Ill. Sept. 23, 1992). A magistrate judge's ruling on a nondispositive matter may only be reversed on a finding that the ruling is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see* 28 U.S.C. § 636(b)(1).

Because the class sought reconsideration of an interlocutory order, its motion was governed by the court's inherent power to modify orders in a pending case before final judgment. *See Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985). Final or not, however, the court's orders are not "first drafts, subject to revision and reconsideration at a litigant's pleasure." *See Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1985). In the context of final judgments, our court of appeals has said that motions to reconsider should be presented only when the law or facts change significantly after the issue is presented to the Court, the Court has "patently misunderstood a party," has "made a decision outside the adversarial issues presented" to it, or has "made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales*, 906 F.2d 1185, 1191 (7th Cir. 1990) (quotation omitted).

First, the class argues that Magistrate Judge Nolan made an error of apprehension because she purportedly did not have sufficient information before her at the time of her January 24, 2007 ruling to determine whether Household had waived its attorney work product privilege as to the inadvertently produced KPMG Opinion Letters. Second, the class opines that Magistrate Judge Nolan misapprehended the

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applicable law in determining that Household had not waived the privilege. The Court disagrees with both assertions.

Magistrate Judge Nolan has been overseeing discovery in this case for three and a half years, during which waiver of privilege with regard to inadvertently produced documents has been the subject of approximately thirty docket entries. Over the course of discovery, she has become thoroughly aware of the class' theories of the case and, prior to ruling on January 24, 2007, she conducted an *in camera* review of the KPMG Opinion Letters. Because her January 24, 2007 ruling was based on her intimate knowledge of the issues, the prior briefing and rulings, and the letters at issue, the Court holds that Magistrate Judge Nolan had sufficient information from which to make her ruling and did not commit clear error in denying the class' motion to reconsider that ruling without further briefing.

Next, the class argues that Magistrate Judge Nolan misapprehended the test with regard to waiver of privilege as stated in *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, No. 99 C 1174, 2001 WL 1286727, at *6-9 (N.D. Ill. Oct. 24, 2001). To determine whether a privilege has been waived by inadvertent disclosure, a court balances the: (1) reasonableness of precautions taken to prevent disclosure; (2) time taken to correct the error; (3) magnitude of discovery; (4) extent of disclosure; and (5) overarching issue of fairness. *Id.* at *6.

Magistrate Judge Nolan cited *R.J. Reynolds* and applied its balancing test correctly. In essence, she found that the balance of the factors weighed against waiver. Thus, what it boils down to is that the class disagrees with Magistrate Judge Nolan's reasoning, which is neither an appropriate ground for a motion for reconsideration nor a proper showing of clear error. Accordingly, the Court adopts Magistrate Judge Nolan's denial of the motion and rejects the class's objections.

Two of the factors weigh in favor of waiver. With regard to the second factor, *i.e.*, the time taken to correct the error, Magistrate Judge Nolan held that Household failed to bring the KPMG documents to the Court's attention in a timely manner because defendants knew that KPMG was its auditor, knew of her ruling on July 6, 2006 stating that similar documents were privileged and did not seek the return of the KPMG documents until January 2007. With regard to fourth factor, *i.e.*, the extent of disclosure, inherent in Magistrate Judge's ruling is the finding that due to defendants' delay in seeking the return of the KPMG Opinion Letters, the documents were fully disclosed.

However, the rest of the factors weigh against waiver. As to the first, third and fifth factors, *i.e.*, reasonableness of precautions, scope of discovery and overriding issue of fairness, Magistrate Judge Nolan intimated that given the sheer magnitude of discovery in this case (over four million documents have been produced), the Court could not conclude that the precautions taken to prevent thirty-six KPMG Opinion Letters from slipping through the cracks were unreasonable. She previously had noted that the parties' agreed protective order outlines a procedure for returning inadvertently produced, privileged materials. (Mem. Op. & Order of 7/6/07, at 11.) The Court agrees that Household's mistake was minuscule compared to the grand scale of discovery and finds no error in her conclusion. The Court has found no other case in which a court found waiver that involved anything close to the amount of discovery in this case.

Moreover, given the immense sweep of discovery in this case, it was not error for Magistrate Judge Nolan to conclude that fairness did not dictate a harsh punishment for Household's mistake. After all, fairness is the dominant issue in the balancing test, *R.J. Reynolds*, 2001 WL 1286727, at *8, and "the punishment should be proportionate to the seriousness of the mistake." *CCC Info. Servs., Inc. v. Mitchell Int'l, Inc.*, No. 03 C 2695, 2006 WL 3486810, at *2 (N.D. Ill. Dec. 1, 2006).

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In addition, the fairness inquiry may take into account the importance of the documents to the case. *R.J. Reynolds*, 2001 WL 1286727, at *8-9. To this end, Magistrate Judge Nolan, who, as discussed above, is fully aware of the plaintiffs' theories of the case, was not persuaded by the class' averment that the Opinion Letters are highly probative of falsity, scienter and materiality. After reviewing the Opinion Letters, she concluded that "fairness requires that the KPMG Opinion Letters remain confidential." (Minute Order of 3/5/07, at 2 (quoting Minute Order of 1/24/07).) The class has not established that Magistrate Judge Nolan misapprehended any binding authority or misunderstood the facts of the case.

In sum, the Court finds no fault with Magistrate Judge Nolan's denial of the class' motion for reconsideration. The Court adopts the ruling in full.

