

IN THE CIRCUIT COURT FOR MANATEE COUNTY, FLORIDA

MARY LOU SMITH,
An individual, and
SHARON DENSON,
An individual

Plaintiffs,

v.

CASE NO.: 2008 CA 11315

TRAILER ESTATES PARK
AND RECREATION DISTRICT,
An independent special
taxing district, and others,

FILED FOR RECORD
R.B. SHORE
2009 AUG 18 PM 4:12
CLERK OF CIRCUIT COURT
MANATEE CO. FLORIDA

DEFENDANT, JOHN VANDER MOLEN'S OBJECTION TO PRODUCTION,
MOTION FOR PROTECTIVE ORDER AND MEMORANDUM

Defendant, JOHN VANDER MOLEN (VANDER MOLEN), objects to the Plaintiff's Second Request for Production to copy and image the computer of the defendant VANDER MOLEN in order to obtain all emails from January 1, 2006 to the present, and moves for a protective order because:

1. On December 12, 2008, plaintiffs requested defendant VANDER MOLEN to produce all emails relating to District business. See Exhibit A attached hereto.

2. On January 9, 2009, defendant VANDER MOLEN produced all emails in his possession, custody or control responsive to the request, see Exhibit B attached hereto. Plaintiff did not thereafter indicate that Mr. Vander Molen's response was deficient until filing a Motion to Compel on May 29, 2009.

3. Since that time defendant, VANDER MOLEN has not sent nor received any emails that are responsive to plaintiffs' request.



4. On August 6, 2009, plaintiffs served counsel for Mr. VANDER MOLEN with a Plaintiffs Second Request for Production which seeks to inspect, copy and image VANDER MOLEN'S personal computer.

5. VANDER MOLEN objects to this request on the basis that is overboard; not reasonably calculated to lead to admissible evidence; fails to identify any perquisite showing of discovery misconduct; invades VANDER MOLEN'S privacy guaranteed by article I, section 23, Florida Constitution; potentially violated her First, Fourth and Fifth Amendment right to the U.S. Constitution; and potentially could invade attorney-client, doctor-patient, and clergy privileges. VANDER MOLEN objects to Plaintiffs' demand that this response be made in less than 30 days.

6. On April 16, 2009, plaintiffs deposed defendant VANDER MOLEN and in the course of the deposition plaintiff asked defendant VANDER MOLEN about emails in general (Page 159 line 16 attached hereto as Exhibit C). In his response to plaintiffs' inquiry defendant VANDER MOLEN testified that prior to April 16, 2009, he routinely deleted his emails sent and received. However, plaintiff did not ask defendant VANDER MOLEN if he had deleted emails that are responsive to the request for production.

7. Defendant VANDER MOLEN has fully complied with the plaintiffs' request for production and plaintiff has shown no evidence of thwarting of discovery by defendant VANDER MOLEN which is a requirement for plaintiff to obtain discovery from

defendant VANDER MOLEN's personal computer. This request is overboard and intrusive and no foundation has been laid by plaintiffs to justify the request at this time.

8. VANDER MOLEN like all citizens of Florida, has a constitutionally guaranteed right of privacy. See art. I & 23, Fla. Const. As the Florida Supreme Court has explained, "there can be no doubt that the Florida [privacy] amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others." See Rasmussen v. South Florida Blood Service, Inc., 500 So. 2d 533, 536 (Fla. 1987). This privacy right includes and individual's financial information. See Mogul v. Mogul, 730 So. 2d 1287, 1290 (Fla. 5th DCA 1999). The privacy right includes medical information. 730 So. 2d 1287, 1290 (Fla. 5th DCA 1999). The privacy right includes medical information. See Universal City Development v. Williams. 963 So. 2d 351, 355 (Fla. DCA 2007). The privacy right includes "family privacy". See Tallahassee Memorial Regional Medical Center v. Petersen, 920 So. 2d 75, 80 (Fla. 1st DCA 2009).

Plaintiff's Second Request for Production implicates VANDER MOLEN'S First, Fourth and Fifth Amendments. This request potentially implicates VANDER MOLEN'S attorney-client, doctor-patient, and clergy privileges.

The Fourth District's decision in Menke v. Broward County School Board, 916 So. 2d 8 (Fla. 4th DCA 2005), is instructive

here. In Menke, the school board sought access to the home computer belonging to the teacher the school board was attempting to fire, alleging that there would be sexually-explicit emails or instant messages and other derogatory emails. See id. at 9. The administrative law judge permitted the inspection by the school board and imposed certain restrictions on the expert, such as creating a process filter potentially privileged communications. (These restrictions are very similar to the restrictions Plaintiffs are suggesting in their request.) Menke objected to the inspection on privacy, Fifth Amendment, and attorney client, spousal, accountant, patient, and clergy privilege grounds. See id.

The court quashed the inspection, explaining the impropriety of permitting this privacy invasion. See id. at 10. The Court noted that the examination permitted the school board's agent to comb through "every byte, every word, every sentence, every date fragment, and every document, including those that are privileges or that may be part of privileged communications, looking for 'any date' that may evidence communication[.]" Id. In rejecting the safe guards put in place, the court noted the "those communications are still revealed to a paid representative of the opposing party, as will everything else on the computer, substantially invading the privacy of Menke and his family members." Id. (emphasis asses). The court went further, explaining that "[I]n civil litigation, we have never heard of a

discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if the contain any information useful to the litigate." Id. (emphasis added).

Florida law is clear that, should a search be necessary in the future, the party being asked to produce records should be the one to conduct the computer search, not the requesting party. See Strasser v. Yalamachi, 669 So. 2d 1142 (Fla. 4th DCA 1996). In Strasser, the court concluded that giving the requesting party access to someone else's computer was legally erroneous and granted the aggrieved party's certiorari petition. That case involved a discovery request that the requesting party said the other party was thwarting. Here, VANDER MOLEN has fully complied with every discovery request propounded upon him, so there is no basis for Plaintiffs to argue the VANDER MOLEN somehow has not complied with the discovery rules.

The Second Request for Production in this case seeks to operate the same as the discover orders in Menke and Strasser. Florida Law does not permit Plaintiffs to invade VANDER MOLEN'S personal computer, especially at this juncture, where there is no allegation of public record violations against VANDER MOLEN and there has been no discovery violations. The procedural safe guards suggested in the motion have been found by the Fourth District to be inadequate. The Fourth District's decisions in

decisions in these cases are binding on this Court. See Pardo v. State, 596 So. 2d 665, 666-67 (Fla. 1992).

Other jurisdictions likewise do not permit this type of sweeping invasion of a person's personal computer. See In re Ford Motor Co., F.3d 1315 (11th Cir. 2003) (vacating discovery order requiring Ford to permit Plaintiff direct access to Ford's computer systems); Ferron v. Search Cactus, LLC, 2008 WL 1902499, *2 (S.D. Ohio April. 28, 2008) (discovery of electronically stored information stands on equal footing with discovery of paper documents and that opposing parties "are no more entitled to access to [a party's] electronic information storage systems than to [a party's] warehouses storing paper documents"); Diepenhort v. City of Battle Creek, 2006 WL 1851243 (W.D. Mich. June 30, 2006) (denying request to forensically image hard drive of opponent, explaining that this "court is loathe to sanction intrusive examination of an opponent's computer as a matter of course, or on the mere suspicion that the opponent may be withholding discoverable information."); Powers v. Thomas M. Cooler Law School, 2006 WL 2711512 (W.D. Mich. Sept. 21, 2006) (same); Melcher v. Apollo Medical Fund Management, LLC, 2008 WL 2277589, * (N.Y.A.D. June 5, 2008) (affirming trial court's refusal to require opponents hard drive be imaged); and Scotts Company, LLC v. Liberty Mutual Ins. Co., 2007 WL 1723509, *2-3 (S.D. Ohio June 12, 2007) (denying request to search opponent's computer, citing confidentiality and privacy grounds.

9. Defendant, VANDER MOLEN's computer contains private and privileged information and to allow plaintiff's request would violate defendant, VANDER MOLEN's right of privacy and will reveal private banking information, account numbers, passwords and communications with his wife, his attorney, accountants, clergy and doctors.

10. Regardless of any "safeguards" or "restrictions" the court may impose upon the inspection, the information will be revealed to a paid representative of the plaintiff substantially invading the privacy of VANDER MOLEN and his family members.

11. Should the court allow plaintiff to image defendant, VANDER MOLEN's computer the case law provides that strict guidelines and restrictions must be ordered as part of a protective order to protect the privacy and privilege information of defendant VANDER MOLEN.

12. In addition to the above, the plaintiff's request for expedited discovery (August 12, 2009) does not allow VANDER MOLEN time to secure his own computer expert to (1) search the computer for the requested data or (2) to be present during the inspection by the plaintiff's expert to limit the inspection to relevant data.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Kevin Hennessey, Robert E. Turffs, Thomas D. Shults, James D. Dye and Hunter Carroll, by facsimile, on August 13, 2009.

DANIEL E. SCOTT, P.A.

A handwritten signature in cursive script that reads "Daniel E. Scott". The signature is written in black ink and is positioned above a horizontal line.

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