

**IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA**

MARY LOU SMITH, et al,

Plaintiff

vs

Case No. 2008-CA-11315

TRAILER ESTATES PARK AND RECREATION
DISTRICT, et al

Defendants _____/

**DEFENDANT MARY LOU MCNULTY'S AMENDED OBJECTION TO
PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF HER COMPUTER,
RESPONSE TO PLAINTIFF'S SECOND REQUEST FOR PRODUCTION,
MOTION FOR PROTECTIVE ORDER, AND MEMORANDUM OF LAW**

DEFENDANT, **MARY LOU MCNULTY**, objects to the Plaintiffs' demand for a copy of her personal computer's hard drive and seeks a protective order prohibiting same. This Amended Objection is being refilled to reflect that it was originally efiled on Friday, August 28, 2009, but was refused by the Clerk of the Court's efile system because of a missing electronic signature. The signature problem has been corrected. This Amended Objection is unchanged from the Objection originally sent on August 28, 2009. Attached hereto and incorporated herein as Exhibit A is a copy of the Clerk's rejection notice received by email.

Background

Plaintiffs served Defendant McNulty with the first Request for Production on December 12, 2008. In the preceding months, Defendant McNulty has fully complied with this request and has turned over to Plaintiffs approximately 500 pages of documents. Many of these documents are emails and computer records relating to Trailer Estates. On August 5, 2009, Plaintiffs served, via facsimile, a Second Request for Production. In general, Plaintiffs' Second Request

for Production sought to inspect Defendant McNulty's personal computer. On August 6, 2009, Plaintiffs served, via facsimile, a Motion to Compel Defendant McNulty to turnover her personal computer for inspection by Plaintiffs' hired consultant.

Response to Plaintiff's Second Request for Production

Defendant McNulty responds to Plaintiffs' Second Request as follows:

1. Any and all computers you have used to send, receive, or store emails during January 1, 2006, to the present. The inspection and creation of a forensic image/copy of each of the hard drives of the foresaid will occur at the District's office on August 12, 2009, at 9 am unless a different time is mutually agreed to by the parties. Agile Risk Management, LLC, 2002 N. Westshore Blvd. Suite 200, Tampa FL 33607 will be the expert inspecting, copying and imaging the hard drives of each of the computers produced by the Defendants. Agile Risk Management and its employees agree to maintain in confidence all information and data that is not related to the District and is retrieved from the hard drives of each of the individual defendants. Furthermore, Agile Risk Management and its employees agree to maintain in confidence all information and data that is between Defendants and their respective counsels that is retrieved from the hard drives of each of the Defendants' computers.

Response: Defendant McNulty objects to this request on the bases that it is overbroad; not reasonably calculated to lead to admissible evidence; fails to identify any prerequisite showing of discovery misconduct; invades Defendant McNulty's privacy guaranteed by Article I, Section 23, Florida Constitution; potentially violates her First, Fourth, and Fifth Amendment rights to the U.S. Constitution; and potentially could invade attorney-client privilege, doctor-patient privilege, accountant-client privilege, husband-wife privilege, and clergy privilege. Defendant McNulty moves for an extension of time to create a privilege log. Moreover, Defendant McNulty objects to Plaintiffs' demand that this response be made in less than 30 days.

2. Any and all computers you have used to participate in blogs, chat rooms, chalkboards, bulletin boards, instant messages, groups, or other electronic mediums during January 1, 2006, to the present. The inspection and creation of a forensic image/copy of each of the hard drives of the foresaid will occur at the District's office on August 12, 2009, at 9 am unless a different time is mutually agreed to by the parties. Agile Risk Management, LLC, 2002 N. Westshore Blvd. Suite 200, Tampa FL 33607 will be the expert inspecting, copying and imaging the hard drives of each of the computers produced by the Defendants. Agile Risk Management and its employees agree to maintain in confidence all information and data that is not related to the District and is retrieved from the hard drives of each of the individual defendants. Furthermore, Agile Risk Management and its employees agree to maintain in confidence all information and data that is between Defendants and their respective counsels that is retrieved from the hard drives of each of the Defendants' computers.

Response: Defendant McNulty objects to this request on the bases that it is overbroad; not reasonably calculated to lead to admissible evidence; fails to identify any prerequisite showing of discovery misconduct; invades Defendant McNulty's privacy guaranteed by Article I, Section 23, Florida Constitution; potentially violates her First, Fourth, and Fifth Amendment rights to the U.S. Constitution; and potentially could invade attorney-client privilege, doctor-patient privilege, accountant-client privilege, husband-wife privilege and clergy privilege. Defendant McNulty moves for an extension of time to create a privilege log. Moreover, Defendant McNulty objects to Plaintiffs' demand that this response be made in less than 30 days.

Response to Plaintiffs' Motion to Compel

1. Rule 1.350(b), *Florida Rules of Civil Procedure*, permits a party submitting a request for production to move for an order compelling production under Rule 1.380 if there is a "failure to respond to the request, or any part of it, or failure to permit inspection as requested."
2. Plaintiffs have not shown good cause for a wholesale rummaging of Defendant McNulty's personal computer.
3. The First Request does not form a basis for Plaintiffs' Motion to Compel. The first request asked for documents and approximately 500 pages of documents have been provided. The Plaintiffs have not shown or alleged that this production is inadequate or unresponsive.
4. Plaintiffs' Motion to Compel lists no prerequisite reason for the search. It merely states that "Upon information and belief, the Defendants have emails contained in their computers' memory and other non-legible storage that were not produced." This obtuse allegation fails to provide any predicate to balance against Defendant McNulty's substantial privacy rights. (See Committee Notes to Rule 1.350, *Florida Rules of Civil*

Procedure. Likely results of discovery should be weighed against the privacy rights of the custodian)

5. Plaintiffs' email of August 6 only gave under-signed counsel a half-day to respond, and failed to meet local rules for consultation before bringing the Motion to Compel.
6. An examination of Defendant McNulty's personal computer would violate several of her constitutionally protected rights, including her right to privacy, which are more fully set forth in the memorandum of law contained herein. Defendant McNulty and her husband are entitled to protection from disclosure of their personal business. These vast privacy concerns must be weighed against the likely results of discovery. Plaintiffs have failed to allege anything that would make the results of a computer search likely to yield anything more than what Defendant McNulty has already produced.

Memorandum of Law

Right to Privacy

Defendant McNulty has a constitutionally guaranteed right to privacy. art. I, § 23, Fla. Const. The Florida Supreme Court has stated: "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." *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533, 536 (Fla. 1987). Included in this right to privacy is an individual's: financial information, *Mogul v. Mogul*, 730 So. 2d 1287, 1290 (Fla. 5th DCA 1999); family privacy, *Tallahassee Memorial Regional Medical Center v. Petersen*, 920 So. 2d 75, 80 (Fla. 1st DCA 2006); and medical information, *Universal City Development v. Williams*, 963 So. 2d 351, 355 (Fla. 5th DCA 2007).

Scope of Discovery

Rule 1.280(b)(1), *Florida Rules of Civil Procedure*, exempts privileged information from the scope of discovery. Plaintiffs' Second Request and Motion to Compel seek to examine Defendant McNulty's personal computer. Defendant McNulty's personal computer may contain various privileged communications with her attorney(s), husband, and medical information. 90.502-5055, Florida Statutes. In addition, it contains information completely irrelevant to this lawsuit, and therefore beyond the scope of discovery.

In *Menke v. Broward County School Board*, 916 So. 2d 8 (Fla. 4th DCA 2005), the Broward County School Board in a Chapter 120 proceeding sought access to the home computer of a teacher the board was attempting to fire, alleging that there would be sexually-explicit emails or instant messages and other derogatory emails. *Id.* at 9. The administrative law judge permitted the inspection with certain restrictions on the School Board's expert conducting the search (i.e. filtering process to protect privileged communications). Menke objected to the inspection on privacy, Fifth Amendment, and attorney-client, spousal, accountant, patient, and clergy privilege grounds.

The appellate court quashed the inspection stating that the examination would allow the school board's paid representative to sift through "every byte, every word, every sentence, every date fragment, and every document, including those that are privileged or that may be part of privileged communications, looking for 'any data' that may evidence communication." *Id.* The court noted that even with the purported safe guards privileged 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.* The court went on to analogize searching a personal computer with searching through an entire filing cabinet stating that "in 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 they contain any information useful to the litigation.” *Id.*

Application of Law

Both the Second Request and the Motion to Compel in the present case seek to operate the same as the discovery orders in *Menke*. Plaintiffs have made no allegation of misconduct in the current discovery process or provided the court with any information demonstrating the likelihood that the search would yield results different from a traditional request to produce documents. The Fourth District found safeguards identical to the ones offered by Plaintiffs to be insufficient, and the privacy concerns implicated by such a search to be too great. *Menke* at 12. Therefore, the Plaintiffs’ Second Request is outside the scope of discovery, and the Plaintiff’s Motion to Compel is not supported by the facts or the law.

WHEREFORE, Mary Lou McNulty respectfully requests that this Court sustain Mary Lou McNulty’s objection to Plaintiffs’ Second Request for Production and Motion to Compel. Mary Lou McNulty moves for a protective order denying the Plaintiffs access to her personal computer.

Date: August 31, 2009

s/James D. Dye
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August , 2009, a true and correct copy of the foregoing Defendant Marylou McNulty's Objection of Plaintiffs' Motion to Compel Production of her computer, Response to Plaintiff's Second Request for Production, Motion for Protective Order, and Memorandum of Law has been provided via hand delivery to:

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s/James D. Dye
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From: kris.gaffney@manateeclerk.com
Sent: Friday, August 28, 2009 12:22 PM
To: Warren Pies
Subject: Warren Pies - Status for Request # 101362 Case # 2008 CA 011315 1
Document Rejected

Dear Warren Pies :

Processing of request # 101362 Submitted by you to Manatee Clerk of Circuit Court at 08/28/2009 09:51:25 AM is completed. Details are as follows.

Document #	Document Type	Case #	Status	Docket #	Docket Date/Rejection
203752	OBJ	2008 CA 011315	Rejected		Signature Missing

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