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Our File No. 52215.0051

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Via eCourts

Honorable Peter F. Bariso, AJSC
Hudson County Administration Building
595 Newark Avenue, 9th Floor
Jersey City, New Jersey 07306

Honorable Kimberly Espinales-Maloney, JSC
Hudson County Administration Building
595 Newark Avenue, 9th Floor
Jersey City, New Jersey 07306

Re: Stacie Percella v. James Davis, et al.
Docket No. HUD-L-00177-18

Dear Judges Bariso and Espinales-Maloney:

Kindly accept this letter brief, in lieu of a more formal brief, in opposition to Plaintiff Stacie Percella's (hereinafter "Percella") Motion to Quash Defendant City of Bayonne's (hereinafter "City") subpoena for Percella's cell phone records (hereinafter "Subpoena").

I. STATEMENT OF FACTS

On October 18, 2019, the undersigned served a subpoena duces tecum on AT&T Wireless for the cell phone number associated with Percella. See, Certification of Teresa M. Lentini, Exhibit D. The Subpoena required the production of documents from AT&T Wireless to be returnable on October 31, 2019. Ibid. On October 30, 2019, counsel Elizabeth T. Foster, Esquire, on behalf of Percella, filed a Motion to Quash the Subpoena in this matter.

II. LEGAL STANDARD

Under New Jersey Rules of Court 1:9-2, a court may, on motion, quash or modify a subpoena if compliance would be "unreasonable or oppressive." R. 1:9-2; see also, State v. Cooper, 2 N.J. 540, 556-57 (1949) (determining that a subpoena duces tecum could be quashed if

it is unreasonable or oppressive). Similarly, R. 4:10-3 permits a target of discovery to seek a protective order shielding from discovery that which would result in "annoyance, embarrassment, oppression, or undue burden or expense." R. 4:10-3; see also, Kerr v. Able Sanitary & Env. Servs., Inc., 295 N.J. Super. 147, 155 fn.4 (App. Div. 1996) (motion to quash discovery subpoena is considered equivalent of motion for protective order).

Under either R.1:9-2 or R. 4:10-3, the determination of whether to quash or modify a subpoena is based upon reasonableness and oppression. In addition, there must be a substantial showing that the evidence sought by a subpoena is relevant and material to the case. R. 4:10-2.; Wasserstein v. Swern & Co., 84 N.J. Super. 1, 7 (App. Div.), cert. denied, 43 N.J. 125 (1964).

As set forth below, Percella's Motion to Quash should be denied.

III. LEGAL ARGUMENT

The perquisite for a demand of a subpoena duces tecum is "reasonableness" meaning that the subject of the subpoena duces tecum "must be specified with reasonable certainty, and there must be a substantial showing that they contain evidence relevant and material to the issue." Cooper, 2 N.J. at 556. Litigants may only obtain discovery "which is relevant to the subject matter involved in the pending action." R. 4:10-2.

A. The Subpoena Seeks Relevant Information Within the Broad Scope of Discovery

The discovery rules "were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel." Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 387 (App. Div. 1990). There is substantial liberality in the granting of discovery. See, Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 215-16 (App. Div. 1987). The relevance standard

does not only apply to matters which would necessarily be admissible as evidence in trial but includes information reasonably calculated to lead to admissible evidence in regards to the cause of action or a defense. See, Pfenninger v. Hunterdon Central, 167 N.J. 230, 237 (2001).

In her moving papers, Percella conflates the issue of relevancy with her privacy interests. See Percella's Brief in support of her motion to quash p.3. Percella has initiated this lawsuit and has made numerous allegations regarding the receiving of sexual text messages from Mayor Davis and the alleged aftermath of her denials of his alleged sexual advances. A phone call log and text message log stating to whom her calls and/or text messages were sent and received, dates and times, specifically communications with Mayor Davis, is clearly relevant to Plaintiff's allegations and the City's defense.

Percella has made numerous allegations regarding the alleged text messages sent by Mayor Davis. In fact, she has alleged that Mayor Davis began to send her "sexting" messages "prior to him being elected" to his position of mayor. See, Certification of Teresa M. Lentini, Exhibit A, Percella's Amended Complaint at ¶ 12. Percella alleges she "largely ignored the 'Sexting' when then Police Captain Davis was sending [her] these unwanted 'sexts.'" Ibid. Further, Percella alleges Defendant Davis continued to send her "sexting" messages after he became the Mayor of the City. Id. at ¶ 13. Moreover, she alleges she "made every effort to ignore and disregard" these messages from Mayor Davis. Id. at ¶ 14. She alleges she never entertained Mayor Davis' alleged sexual text messages. Ibid. Percella has alleged that due to her failure to respond and "succumb" to Mayor Davis' sexual text messages, she was subjected to a "pretextual charade to terminate her long-time employment." Id. at ¶ 18.

Additionally, Percella has produced a black and white version of dated and undated text messages, in no specific order, allegedly between herself and Mayor Davis. Id. at Exhibit 2. Percella has indicated that these attached text messages are all of the text messages in her possession in this matter. See, Certification of Teresa M. Lentini, Exhibit B, Percella's responses to City's request for production of documents at #31 (incorrectly numbered). However, based upon a legitimate and reasonable belief, the City believes Percella has failed to produce all relevant text messages. In her Certification in Support of her Motion to Quash, Percella claims she was sent "lewd text messages" from Mayor Davis from "June 18, 2013 to February 6, 2015." However, in her answers to interrogatories, Percella has claimed she was sent "sexual text messages" from Mayor Davis from "July 1, 2014 [the date he was sworn in as Mayor] to 110/17 (sic)." See, Certification of Teresa M. Lentini, Exhibit C, Percella's answers to Interrogatories #9. The production of her cell phone records is directly relevant to the City's defenses and is reasonably calculated to lead to admissible evidence regarding the frequency, dates, and amount of text message communications between Percella and Mayor Davis and her production of the same. Plaintiff and Davis knew each other for 35 years. Text messages and communications prior to Davis' election to mayor in July 2014 are clearly relevant to the defense to establish the relationship of Davis and Plaintiff prior to his election to mayor.

Therefore, such production of cell phone records is plainly relevant and necessary to determine all facts relevant to the City's defenses.

B. The Subpoena Does Not Subject Percella To An Undue Burden

A subpoena causes an undue burden if the request is "unreasonable or oppressive." Cooper, 2 N.J. at 557. Under R. 4:10-2(f)(2), electronically stored information need not be

produced in discovery if the electronically stored information is not reasonably accessible due to undue burden or cost.

Here, Percella does not argue in her moving papers that the Subpoena would be oppressive or cause her an undue burden. The Subpoena does not require Percella to perform any actions. See the Certification of Teresa M. Lentini, Exhibit D, City's Subpoena to AT&T Wireless. The Subpoena has been served on AT&T Wireless, the company providing services for Percella's cell phone. Ibid. Percella is not being asked to collect or produce any information. See Gaines v. Fusari, 2012 WL 12914691, at * 2 (D.N.J. May 29, 2012)[1].

Additionally, these records were requested in the City's supplemental document request in August 2019 to which Plaintiff has not responded.

Therefore, since Percella is not required to do perform any action pursuant to the Subpoena, the subpoena is not unduly burdensome or oppressive.

C. The Subpoena Does Not Seek Privileged or Protected Communications

Under R. 4:10-2(a), "privilege" means those privileges set out in N.J.R.E. 501 through N.J.R.E. 517. See, Prosser & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:10-2. "Asserted privileges having no statutory source are, therefore, no defense to a discovery demand." Ibid.; see also, Dixon v. Rutgers, 215 N.J. Super. 333 (App. Div. 1987), aff'd as mod 110 N.J. 432 (1988).

Contrary to the argument of Percella, this production of cell phone records is commonplace and the Subpoena in this matter does not invade her privacy based upon some vague claim of privilege. Specifically, the Subpoena seeks "all phone call logs and text message logs" from

[1] Pursuant to R. 1:36-3 a true and correct copy is attached as Exhibit E to the Certification of Teresa M. Lentini.

Percella's phone number. See, Exhibit D. Percella has provided a vague legal conclusion and speculates about a "legally protected privacy interest in [her] AT&T account." See, Percella's Brief in support of her motion to quash p.4. As such, she has failed to state any statutory privilege that would be allegedly violated by the production of her phone records pursuant to the Subpoena.

Therefore, the Subpoena does not violate any statutory privileges.

D. The Subpoena Does Not Unconstitutionally Violate Any Privacy Interest of Percella[2]

In her moving papers, Percella seems to argue that her cell phone records are private and do not need to be produced in discovery. See, Percella's Brief in support of her motion to quash p.3-4. In support of her privacy claims, Percella relies on criminal case law. Specifically, she relies on State v. Saunders, 75 N.J. 200, (1977); State v. Hunt, 91 N.J. 338 (1982); and State v. Mollica, 114 N.J. 329 (1989).

However, Percella's reliance on these criminal cases is misplaced. Specifically, in Hunt, the New Jersey Supreme Court held that there was a sufficient expectation of privacy in telephone toll billing records to require a warrant before such records could be seized. In Hunt, the police went to the offices of the New Jersey Bell Telephone Company and obtained a defendant's home toll billing records without a warrant. Hunt, 91 N.J. at 341. The Court held that "the police wrongfully obtained the toll billing records . . . in that they were procured without any judicial sanction or proceedings." Id. at 348.

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[2] As a note to the Court, under R. 1:36-3, Percella has improperly cited to an unpublished opinion without following the proper procedure. Percella has cited to Crabtree v. Angie's List Inc., No. 1:16-cv-00877-SEB-MJD, 2017 BL 28193 (S.D. Ind. Jan. 21, 2017), without serving a copy upon counsel and the Court. See, R. 1:36-3.

In this matter, the City has not made a warrantless seizure of the cell phone records of Percella. Instead, the City has issued a subpoena in this matter to AT&T Wireless. A subpoena is "simply a command to appear at a certain time and place to give testimony upon a certain matter." Silverman v. Berkson, 141 N.J. 412, 422 (1995). Subpoenas are a less intrusive means than a search and seizure. See Greer v. New Jersey Bureau of Securities, 288 N.J. Super. 69, 81 (1996). A subpoena does not require any physical search. Ibid. The standard of what is "unreasonable in the case of search and seizure is not the measure of what is unreasonable in the case of a subpoena duces tecum; that the probable cause required for a search or arrest warrant is very different from the probable cause required to support the subpoena." In re Addonizio, 53 N.J. 107, 118 (1968).

Here, the City has issued a subpoena duces tecum to AT&T Wireless for the cell phone records, phone call logs and text message logs, for Percella. Contrary to Percella's search and seizure arguments in her moving papers, as explained by the case law, a subpoena is less intrusive than a search and seizure under the Fourth Amendment. Percella's argument that the City needs a "compelling state interest" in order to serve a subpoena duces tecum is not supported by the case law. See, In re Addonizio, 53 N.J. at 118. Finally, the City has requested that Percella turn over all of her text message logs and phone logs and provided directions to assist Percella in accomplishing the download of her text messages and phone logs without the use of a subpoena but Percella has failed to comply with this request. See, Certification of Teresa M. Lentini, Exhibit F, August 15, 2019 letter to Elizabeth T. Foster, Esquire.

Therefore, the City has properly served a subpoena and has not violated Percella's Constitutional rights.

IV. CONCLUSION

For the reasons stated above, Percella's Motion to Quash the Subpoena should be denied.

Respectfully Submitted,

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Attorneys for Defendant, City of Bayonne

By: _____
Teresa M. Lentini, Esquire

TML/NAS/nlw
cc: Elizabeth T. Foster, Esquire (via eCourts)