

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: HARDIEPLANK FIBER CEMENT
SIDING LITIGATION

Case No. 12-md-2359
MDL No. 2359

THIS DOCUMENT RELATES TO
ALL ACTIONS

ORDER

I. INTRODUCTION

This matter is before the Court on Defendant James Hardie Building Products Inc.'s Objection to the Special Master's Order. [Docket No. 180]

In an Order filed August 21, 2015, Special Master Jonathan Lebedoff granted Plaintiffs' Motion to Compel. [Docket No. 179] The Special Master held that Defendant had waived the attorney-client privilege and the work product doctrine as to HARDIE-WARR254434 (the "Document"), a document inadvertently produced by Defendant in this litigation. The Document contains the notes of Defendant's former in house counsel's interview with Defendant's scientist David Melmeth. (Cooper Decl. ¶ 3.) It was prepared in connection with Defendant's defense in one of the cases contained within this MDL. (Id.) Defendant has now objected to the Special Master's Order.

II. STANDARD OF REVIEW

Pursuant to Pretrial Order No. 2 [Docket No. 22], the Court reviews the Special Master's orders under the standards set forth in Federal Rule of Civil Procedure 53(f). In relevant part, Rule 53(f) provides:

(3) Reviewing Factual Findings. The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) Reviewing Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Reviewing Procedural Matters. Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

The parties dispute whether the Special Master's Order finding waiver was a ruling on a procedural matter. Because the Court concludes that it would affirm the Special Master's Order regardless of the standard applied, out of an abundance of caution, the Court will apply the de novo standard.

III. DISCUSSION

A. Standard for Waiver

The parties agree that Defendant inadvertently disclosed a privileged document. Under the Stipulated Protective Order,

an inadvertent disclosure of information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, or immunity does not, standing alone, waive the privilege or protection over that information. Federal Rule of Evidence 502 shall govern all limitations on waiver of attorney-client privilege and work product. The parties shall act in accordance with Federal Rule of Civil Procedure 26(b)(5)(B) should a producing party assert that privileged or otherwise protected information has been inadvertently produced.

([Docket No. 19] Stipulated Protective Order at 4-5.)

Rule 502(b) provides:

When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Fed. R. Evid. 502(b).

“The party seeking the protection of Rule 502(b) bears the burden of proving that each of its elements have been met.” Maxtena, Inc. v. Marks, 289 F.R.D. 427, 444 (D. Md. 2012).

B. Whether Defendant Took Reasonable Steps to Prevent Disclosure

Defendant emphasizes that the Document bears no indication of its author, in either its text or metadata. It notes that an attorney reviewed each document before it was produced and that a privilege key word search was run on the documents, screening for words likely to appear in privileged documents, such as the names of attorneys. (Murphy Decl. ¶¶ 3-5.) It further used a different attorney to perform a quality control review over a selection of the documents to be produced. (Id. ¶ 6.) As evidence that its screening procedures were successful, Defendant points out that it logged 1,800 privileged documents. (Id. ¶ 7.)

The Court concludes that Defendant has failed to show that it took reasonable steps to prevent disclosure. First, the Document was created and saved on Defendant’s former general counsel’s work computer. (Cooper Decl. ¶ 4.) Defendant provides no indication that it took any precaution to flag or check the documents originating on its former general counsel’s computer before

producing them. Common sense would require there should be some procedure to attempt to flag such documents as likely to contain privileged information.

Second, the Document had no author indicated in its text or metadata. (Moriarty Decl. ¶ 2.) Defendant provides no indication that documents with no apparent authors were in any way flagged for further investigation before production.

Third, the Document was extensively discussed during the June 10, 2015 deposition of David Melmeth. (Moriarty Decl., Ex. 1.) General counsel for Defendant's parent company and Defendant's outside counsel were present for that deposition. (Id.; Moriarty Decl. ¶ 8.) Based on Plaintiffs' extended questioning of Melmeth regarding the contents of the Document, Defendant was alerted that the Document was a key document for Plaintiffs. Before that deposition, Defendant's attorneys discovered that neither Melmeth nor any other employee who was questioned could identify the author of the Document. (Murphy Decl. ¶¶ 9-10.) Defendant's attorneys also learned that the Document's metadata did not identify an author. (Id. ¶ 11.) Despite being alerted to the potential importance of the Document and to the lack of knowledge regarding authorship, Defendant does not indicate any further steps that it took to

investigate the authorship or potentially privileged nature of the Document until it received a June 25, 2015, interrogatory regarding the author of the Document. Defendant's attorneys did not contact Defendant's in house counsel to inquire regarding the authorship of the Document until after they received the interrogatory. (Murphy Decl. ¶ 14.) After the Document was extensively discussed in the deposition, it took Defendant more than six weeks to determine that the Document was privileged and to alert Plaintiffs to that fact. Defendant provides no indication of any procedure that was in place to investigate significant documents with unknown authors. It provides no indication of any procedure in place to communicate with key client contacts, such as in house counsel, regarding a potentially smoking gun document whose author is unknown.

The Document fell through the cracks in Defendant's production system. Mistakes are bound to happen when more than one million pages of documents are produced. The mere existence of an inadvertent disclosure does not establish that Defendant failed to take reasonable precautions. However, in this case, red flags abounded. Defendant had no reasonable procedure in place to screen for a smoking gun document originating from in house counsel's computer, discussed

extensively in a deposition, with no author apparent in the text or metadata, and with the subject of the document unable to remember the author. Defendant has failed to meet its burden as to the second factor. The Court concludes that the Special Master reached the correct conclusion: Defendant has waived attorney-client privilege and work product doctrine as to the Document.

C. Whether Defendant Promptly Took Reasonable Steps to Rectify the Error

Because the Court concludes that Defendant failed to prove that it took reasonable steps to prevent disclosure, the Court is not required to address the third element. However, the Court notes that this element does not weigh in Defendant's favor. While Defendant's outside counsel may not have known that former in house counsel authored the Document until July 16, 2015, Defendant should have known of the privileged nature of the Document weeks earlier. Defendant knew that the Document had been produced, that its contents were significant, and that the author was not clear, all before Melmeth's June 10, 2015 deposition. Counsel pursued a limited inquiry, but then dropped the matter. The significance of the Document was solidified during the extensive questioning during Melmeth's June 10 deposition, as was the fact that the author was unknown. Yet, after the deposition, Defendant took no further steps to

identify the Document until the interrogatory was served on June 25. Even then, former in house counsel was not contacted until July 16. By the time Defendant decided to fully investigate the authorship of the Document, Plaintiffs' experts had finished a report relying on the Document, and Melmeth had been extensively questioned regarding the Document. While there are important equities on both sides of this unfortunate occurrence, the delay in Defendant's actions to rectify its error and the interest of justice support the Court's finding of waiver.

Accordingly, based upon the files, records, and proceedings herein, **IT IS**

HEREBY ORDERED:

1. Defendant James Hardie Building Products Inc.'s Objection to the Special Master's Order [Docket No. 180] is **OVERRULED**.
2. The Special Master's Order [Docket No. 179] is **AFFIRMED**.

Dated: November 16, 2015

s/Michael J. Davis
Michael J. Davis
United States District Court