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April 18, 2011

U.S. District Judge Joseph F. Bianco
Long Island Federal Courthouse
814 Federal Plaza
Central Islip, New York 11722

RE: Zarda v. Altitude Express, Inc. & Ray Maynard, 10 Civ 4334 (JFB)

Dear Judge Bianco:

I represent plaintiff in this action and write in response to the defendants' most recent pre-conference letter on a proposed motion to quash a subpoena. For the reasons the follow, a motion would not be successful because it would be an excessive response to a *potential* assertion of the privilege as to particular marital communications. Joanne Maynard¹ may testify in a deposition subject to objection, as well as Mr. Maynard's showing that a marital confidence was intended and should be protected. Furthermore, plaintiff should have the right to show that marital communications are not at issue; the privilege is not applicable to a dead marriage; the privilege was waived; an adverse inference should be imposed for the assertion of the privilege; or that the privilege does not apply to the corporate defendant. Simply put, a privilege cannot bar in a blanket manner Mrs. Maynard's testimony in a deposition. I propose that she testify openly but under seal and subject to objection and the potential assertion of the privilege. Then, after her deposition, the Court can rule as to what testimony would be subject to the privilege and what would not if the parties cannot agree.

Background

Plaintiff vaguely knew of Joanne Maynard prior to this lawsuit, however, in the autumn of last year, Mrs. Maynard contacted him on Facebook and wrote as follows:

dear donald

as you know ray and i are divorcing. i will be willing to help you in any way possible to stop this monster. he made a lot of negative comments about you during our marriage. i plan on stopping him. contact me if i can help you in any way in your suit against him, believe me he hated your sexual preference

¹ She might be going by her maiden name at this time, but I will refer to her as Mrs. Maynard.

(As in original.)

Later, after my client and I tried contacting Mrs. Maynard, she backed away from the idea of testifying, stating that Mr. Maynard “was trying to destroy” her and that his lawyer had threatened to sue her if she spoke, and that her lawyer had advised her against testifying. I thereafter notified the Court about what I believed was witness intimidation and you indicated that any motion practice would be premature – a deposition would have to be taken first. Mr. Zabell raised the issue of spousal privilege in that conference, and you stated at that conference that the issue as to whether Mrs. Maynard was being intimidated, at a minimum, would not be privileged.

Discussion

Defense counsel is correct in pointing out that there are two types of marital privilege in federal courts. The one at issue here is the marital communications privilege for which the most significant case in the Second Circuit – a case uncited by defense counsel – is United States v. 281 Syosset Woodbury Rd., 71 F.3d 1067 (2d Cir. 1995). The privilege is not absolute. Applying “reason and experience,” federal courts construe evidentiary privileges, including the marital privileges narrowly. See e.g., Trammel v. United States, 445 U.S. 40, 50 (1980). Privileges obstruct the search for truth. Id.; United States v. Zolin, 809 F.2d 1411, 1415 (9th Cir. 1987), modified, 842 F.2d 1135 (9th Cir. 1988), (“... like the attorney-client privilege, the marital communications privilege is ‘an obstacle to the investigation of the truth . . . [that] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.’”) (quoting Wigmore, Evidence § 2291 (McNaughton rev. 1961)), aff’d United States v. Zolin, 491 U.S. 554, 556 (1989).

Where the privilege is asserted, an adverse inference may be drawn by the trier of fact. United States v. 281 Syosset Woodbury Rd., 862 F. Supp. 847 (E.D.N.Y. 1994), aff’d, 71 F.3d 1067 (2d Cir. 1995). The privilege applies only to *private* communications that are not waived to third parties. Id.; Thomsen v. County of Erie, 2006 U.S. Dist. LEXIS 5401 (W.D.N.Y. Jan. 26, 2006) (citing Pereira v. United States, 347 U.S. 1, 7 (1954); United States v. McConnell, 903 F.2d 566, 572 (8th Cir. 1990) (waived where uttered through third parties). Finally, the privilege does not extend to a marriage “so obviously destroyed as the one here.” See, e.g., United States v. Fisher, 518 F.2d 836, 841 (2d Cir. 1975), and it is the burden of the party asserting the privilege to make the showing that the privilege applies. United States v. Espino, 317 F.3d 788, 796 (8th Cir. 2003).

Because of all of these factors, blanket motions to quash a spouse’s testimony have never been granted so far as I can tell, and defendant shows no case where a court has awarded such draconian relief. In the two cases where the issue came up the court allowed the testimony subject to objection or pursuant to instructions. Engelmann v. National Broadcasting Co., 1995 U.S. Dist. LEXIS 4725 (S.D.N.Y. Apr. 6, 1995) See United States v. Davis, 714 F. Supp. 853, 870 (S.D. Ohio 1988). In this case, since Mr. Maynard has not been deposed and since plaintiff is considering dismissing him as a

defendant – i.e., proceeding after the corporate defendant only – I suggest that the deposition go forward and be kept confidential or under seal until such time as the Court can rule on whether the privilege can be asserted – and, indeed, whether the privilege can be asserted if plaintiff proceeds against only the corporation.

I note that I have learned that in 2009, Mr. and Mrs. Maynard participated in a reality TV show, “The Marriage Ref,” in which camera crews came into their home, and taped their interactions over a course of time with the intention of exposing them to a nationwide television audience. Although their squabbles never aired on TV, they had allowed this taping so that a panel of celebrities could decide which of them had the better argument. As such, we believe that there is a significant chance of waiver, and a showing that the marriage was dead at the time the communications were made. All told, a fully developed record must be developed wherein all of the fact and circumstances of a particular testimony can be explored to see whether it is a communication of the sort that the privilege protects, whether it was waived, whether the corporation can assert the privilege, and whether there should be an adverse inference. Again, whatever the method the Court suggests be employed to determine whether the privilege should be asserted, a motion to quash is not the way to go in the first instance.

Other Matters

Also pending before the Court are (1) plaintiff’s motion to compel; and (2) plaintiff’s motion to strike defendants’ motion to compel on the grounds of excessiveness; and (3) defendant’s motion to compel. The first is complete; the second is mostly complete, however, I would add that I apologize for filing the motion rather than requesting a pre-motion conference. However, the motion to strike requests simple relief. If the Court grants it, then the defendant’s motion to compel will be streamlined in accordance with the local rules, and I will respond in kind. If the Court allows the defendant’s submission as is, I will need time for a response to a 176-page motion. I agree with Mr. Zabell that the defendants have a right to defend themselves, but I think that a 176-page discovery motion with a memorandum that exceeds what you would allow on a judgment as a matter of law is totally out of proportion to what is reasonable in a case of this nature.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Antollino', with a long horizontal line extending to the right.

Gregory Antollino

Cc: Saul Zabell by ecf