UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SEAN McCLENDON Plaintiff, v. CITY OF CHICAGO, et al., Defendants,	Hon. Sharon Coleman No. 1:22-cv-05472

DEFENDANTS' RULE 72(a) OBJECTION TO THE MAGISTRATE JUDGE'S ORDER DATED JANUARY 19, 2024

Defendants hereby present the following Federal Rule of Civil Procedure 72(a) objection to the Magistrate Judge's January 19, 2024, order (the "Order"), granting in part and denying in part Plaintiff's motions to quash discovery. In support, Defendants states as follows:

BACKGROUND

Plaintiff alleges that he was framed for gun possession when officers lied about seeing him ditch a gun on the night of his October 10, 2014, arrest, and hearing him admit to possessing the gun shortly thereafter. (Pl.'s Compl., Dkt. 1, ¶ 8.) In discovery, Plaintiff was asked about phone calls that he made from Cook County Jail in the days after his arrest. Specifically:

- When asked about an October 11, 2014, call to his mother, Plaintiff stated: "I called my mom and told her that the police just put a gun on me….I didn't go into too much detail. *I just told her what happened*. Basically of them putting a gun on me…." (Ex. A, Pl.'s Dep., 155:14-156:18 (emphasis added).) Plaintiff then stated that he could not

remember if his mother asked him anything about his arrest, but surmised that "[s]he probably did. She probably did, I don't recall, though." (*Id.* at 157:7-10.)

- When asked about an October 12, 2014, call to his now ex-wife Moneka Curtis, Plaintiff stated that he told Ms. Curtis "[t]he same thing I told my mom," that the police "put a gun on me." (*Id.* at 158:10-159:14.) Plaintiff could not recall if Ms. Curtis asked him questions about his arrest. (*Id.* at 159:15-160:2.)
- When asked about an October 13, 2014, call to one of his friends, Diamond Glover, Plaintiff stated that he told her the same thing that he told his mother. (*Id.* at 162:17-163:14.)

After Plaintiff's deposition, Defendants informed Plaintiff's counsel that they intended to listen to these calls, which were already in Defendants' possession because they were inadvertently produced by the Cook County Sheriff. Plaintiff then filed a motion to quash (the "Motion").

In his Motion, Plaintiff argued that the above calls are not discoverable because even though Plaintiff "likely told these three women that he had been falsely arrested…he did not go into details about the facts of his arrest." (Ex. B (Pl.s' Mot.), p. 5.) Plaintiff called Defendants' desire to listen to the calls "nothing other than speculation." (*Id.*) Plaintiff made no showing of how these calls implicated any sensitive or private information. (*Id.*, *passim*.)

A hearing was held on Plaintiff's Motion on January 17, 2024.[1] At that hearing, the City's counsel explained to the Magistrate Judge that Plaintiff had admitted that he discussed his arrest

[1] The Magistrate Judge's standing order states that "[t]he Court most often will decide most discovery motions after oral argument at the motion call and without briefing. If after argument the Court believes that the motion requires briefing, the Court normally will set an expedited briefing schedule so that the matter can be resolved promptly." (*See* https://www.ilnd.uscourts.gov/judge-info.aspx?7yT+5xuai/U= ("Motion Requirements" tab – last visited Feb 1, 2024.) The Magistrate Judge did not set a briefing schedule before or after oral argument, so Defendants did not file a response brief to Plaintiff's Motion.

on these three calls. (Ex. C (hearing transcript), 14:3-15:6; 16:1-8.) In response to these statements, Plaintiff's counsel rested on Plaintiff's Motion and stated "[n]othing on these calls is directly relevant to the issues in the case." (*Id.* at 7-8.) [2]

The Magistrate Judge took the matter under advisement and issued her written ruling on January 19, 2024. As to the calls that are the subject of this objection, the Court stated:

> Defendants want to listen to five calls Plaintiff made to three individuals from October 11, 2014, the day after his arrest, to October 13, 2014. Plaintiff testified that in his initial calls to these three individuals – his mother, his now ex-wife, and a friend – he said he had been framed. Defendants want the calls to corroborate or contradict Plaintiff's testimony as well as to prepare for the anticipated depositions of Plaintiff's mother and his ex-wife.
>
> Defendants have not offered any specific reasons these calls may be relevant, only the general argument that because Plaintiff admits he told the three individuals about his arrest, he may have given them details about the underlying circumstances. Accordingly, the motion to quash is granted as to these calls, whose slight potential relevance is outweighed by Plaintiff's privacy interest.

(Ex. D (1/19/24 Order), pp. 6-7.)

ARGUMENT

Defendants' argument is simple: when a plaintiff alleges that his arrest was illegal because police framed him for gun possession, phone calls in which the plaintiff talked about what happened during his arrest are very relevant. With all due respect to the Magistrate Judge, the Magistrate committed clear error by ruling that the phone calls involving the gravamen of this case had only "slight potential relevance," and that Plaintiff's privacy interests outweighed the Defendants' right to discover these calls.

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[2] Plaintiff's counsel had more specific comments as to other discovery that was the subject of his Motion, but not the calls that are the subject of this objection. (*Id.* at 28:9-21.)

I. Legal Standard.

Federal Rule of Civil Procedure 72(a) states that a district judge may review a pretrial, non-dispositive ruling by a magistrate judge and "must…modify or set aside any part of the order that is clearly erroneous or is contrary to law." Under this standard, a district court must have a "definite and firm conviction that a mistake has been made." *Weeks v. Samsung Heavy Indus., Co., Ltd.*, 126 F.3d 926, 943 (7th Cir. 1997). Respectfully, Defendants submit that this standard is met here.

II. The Phone Calls At Issue Are Undeniably And Potentially Very Relevant.

Federal Rule of Civil Procedure 26(b)(1) permits a party to discover information "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional[3] to the needs of the case." Fed. R. Civ. Proc. 26(b)(1). Caselaw is saturated with the axiom that this standard should be applied broadly and liberally, and that the threshold for relevance is low. *See*, *e.g.*, *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 559 (7th Cir. 1984) ("Generally, the Federal Rules of Civil Procedure allow for broad discovery…."); *Murata Mfg. Co., Ltd., v. Bel Fuse, Inc.*, 422 F. Supp. 2d 934, 945 (N.D. Ill. 2006) ("The Federal Rules of Civil Procedure authorize the broadest scope of discovery…and relevance under Rule 26(b)(1) is construed more broadly for discovery than for trial.") (internal citations omitted); *Bouto v. Guevara*, No. 19-cv-2441, 2020 WL 4437669, *2 (N.D. Ill. Aug. 3, 2020) ("The relevance standard [under Rule 26] is extremely broad….") (Ex. E).[4]

[3] The Magistrate Judge did not prohibit discovery of these calls because of any proportionality concerns.

[4] Rule 26(b)(1) has been amended over the years, yet it is widely recognized that the scope of discovery remains as broad as it was under prior versions. *See*, *e.g.*, Christine L. Childers, *Keep on Pleading: The Co-existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 Val. U.L.Rev. 677, 691 (2002) ("Under the new Rule 26(b)(1), the scope of discovery remains as broad as it was prior to the amendment.").

In *U.S. v. Boros*, 668 F.3d 901, 908, (7th Cir. 2012), the Seventh Circuit discussed the standard for relevance under Federal Rule of Evidence 401, which has a higher threshold than relevance under Federal Rule of Civil Procedure 26(b)(1), *see*, *e.g.*, *Wendt v. Offshore Trust Service, Inc.*, 2010 WL 11712561, *1 (N.D. Ill. Aug. 3, 2010) (internal citation omitted) ("As expansive as the definition of relevancy is under Rule 401, the standard under Rule 26 of the Federal Rules of Civil Procedure is even broader.") (Ex. F.) Even under the more stringent standard of Rule 401, the Seventh Circuit – citing Supreme Court precedent – noted that "[a] party faces a significant obstacle in arguing that evidence should be barred because it is not relevant, given that the Supreme Court has stated that there is a 'low threshold' for establishing that evidence is relevant." *Boros*, 668 F.3d at 908 (7th Cir. 2012) (citing *Tennard v. Dretke*, 542 U.S. 274, 285 (2004)). Indeed, the Seventh Circuit has repeatedly indicated the breadth of relevance in discovery.

For instance, in *E.E.O.C. v. Konica Minolta Bus. Solutions U.S.A., Inc.*, 639 F.3d 366 (7th Cir. 2011), the EEOC sought court enforcement of a records subpoena. In explaining the standard for relevancy, the Seventh Circuit stated that the EEOC need only satisfy a "not particularly onerous" standard to obtain "*virtually any material that might cast light on the allegations against the employer*…." *Id.* at 369 (internal quotations and citation omitted) (emphasis added). The Court analogized this standard to "the standard found in Federal Rule of Civil Procedure 26...." *Id.*; *accord Nat'l Steel Corp. v. Nat'l Labor Relations Bd.*, 324 F.3d 928, 934 (7th Cir. 2003) (noting in the context of the National Labor Relations Act that the Court applies a "*broad 'discovery-type' standard* to determine relevance, and that under this standard, unions should receive a broad range of *potentially useful* information to fulfill these obligations.") (internal citations omitted) (emphasis added). With this clear legal guidance at every precedential level, it is undeniable that the three calls at issue are relevant for discovery purposes.

The Magistrate Judge's description of the calls as having "slight potential relevance," instead of being outright "irrelevant," does not make the Magistrate's ruling any more reasonable. The central disputed issue in this case is very discrete: was Plaintiff seen in possession of a gun the night of his arrest. Plaintiff says no, and claims he was framed. Statements about that issue – whether they refute or confirm Plaintiff's claim – are highly relevant. Fed. R. of Civ. Proc. 26(b)(1) (making no distinction for relevance purposes as to which party's claim or defense discoverable information may support); *see Jackson v. Parker*, No. 08 C 1958, 2008 WL 4844747, *2, n.1 (noting discovery was "obviously relevant" even if it ended up supporting the opposing party's theory) (Ex. O). Indeed, if relevance in this case were a target, phone calls regarding what happened during Plaintiff's arrest would be a bullseye.

It is apparent that the Magistrate Judge accepted Plaintiff's argument that because Plaintiff claimed he did not go into details on these calls, Defendants were speculating that more details might be learned if the calls were heard. (Ex. C, pp 6-7.) But there are several problems with that.

First, Plaintiff is Defendants' adversary. For obvious reasons, Defendants' discovery efforts should not be limited by Plaintiff's assurances that there is nothing more to know than what he chooses to share. *See*, *e.g.*, *accord*, *Marten v. Yellow Freight Sys., Inc.*, No. 96-2013-GTV, 1998 WL 13244, *1 (D. Kan. Jan. 6, 1998) ("A litigant need not accept the opinion of opposing parties [ ] as to the relevancy of a document. He may discover the contents of the document. He may then draw his own conclusion….") (Ex. G); *Sandy Dale Beasley v. Tractor Supply Co.*, No. 23-cv-14131, 2024 WL 319915, *2 (S.D. Fl. Jan. 11, 2024) ("[A]dversaries in litigation need not accept their opponent's view of the underlying facts showing relevance.") (Ex. H).

Second, these calls were a decade ago, and are three of only thousands of calls Plaintiff made while incarcerated. Even if Plaintiff is being forthcoming, it is unreasonable to think that he

would remember every detail of these conversations. Indeed, Plaintiff acknowledged in his deposition he could not recall portions of these calls. (Ex. A, Pl.'s Dep., 157:7-10; 159:15-160:2.)[5]

While it is true that Defendants do not know if Plaintiff said more on these calls than he offered at his deposition, that is exactly what makes discovery proper, not improper. As Magistrate Judge Cole aptly stated (ironically, in the context of recorded prison calls):

> Is it likely that some [calls] were proved to be of no consequence? As in every case that buffets through discovery, the answer is, "of course." Discovery is not a guarantee of success; it is not a matter of mathematics and equations in which certainty and exactness play central roles. It is, by its very nature, an enterprise with uncertain results and no assurance of ultimate success. Thus, because the information that is sought satisfies, in the abstract, the general requirement that the information sought be "relevant" – and proportional – does not ensure that the results of any given inquiry will yield usable information…. The inescapable fact is that litigants often come away "empty handed' from discovery."…But the indisputable reality as common sense dictates is that one can't know which specific items sought will turn out to be significant until they all are produced and reviewed.

Velez v. City of Chicago, No. 18 C 8144, 2021 WL 3231726, *2 (N.D. Ill. 2021) (internal citations omitted) (Ex. I); *accord Nw. Mem. Hosp. v. Ashcroft*, 362 F.3d 923, 931 (7th Cir. 2004) ("[o]ne can't know what one has caught until one fishes."). Because these conversations involve the main dispute in the case, their potential relevance is apparent, and is far from slight.

III. Plaintiff Made No Showing Of Any Privacy Interest That Could Outweigh The Relevance Of These Calls

Federal Rule of Civil Procedure 26(c)(1) allows a party to seek a protective order against discovery in order to guard against "annoyance, embarrassment, oppression, or undue burden or expense…." As the Supreme Court has explained, a party seeking such an order has the burden of presenting "a particular and specific demonstration of fact, as distinguished from stereotyped and

[5] For this reason, it is equally unreasonable to limit Defendants to the call recipients' memories about what was discussed ten years ago.

conclusory statements," as to why such an order should issue. *Gulf Oil v. Bernard*, 452 U.S. 89, 102, n.16 (1981). At most, Plaintiff only presented the latter.

Specifically, the Magistrate Judge ruled that Plaintiff's privacy interests outweigh any potential relevance in the pertinent calls. (Ex. D, pp.6-7.) But Plaintiff made no argument, gave no explanation, and submitted no support in the form of affidavits or otherwise as to how these few calls unduly burden his privacy interests. Indeed, when discussing these calls, Plaintiff did not even mention privacy as a concern. (Ex. B, p.5.) *See Velez*, 2021 WL 3231726 at *4 (denying protective order regarding prison calls when "plaintiff has made no specific showing whatsoever as to what he asserts is the 'intimacy' or 'sensitivity' of the phone calls at issue.") (Ex. I).

In an introductory paragraph, Plaintiff cited one case on the matter of privacy generally, quoting *DeLeon-Reyes v. Guevara*, No. 18-cv-01028, 2020 WL 7059444, *5 (N.D. Ill. Dec. 2, 2020) for the principle that "in order to overcome a prisoner's privacy interest in the recordings of her telephone calls, the subpoenaing party must offer more than mere speculation that the recordings could house relevant evidence." (Ex. B, p.3.) But even this sole authority offered by Plaintiff supports the narrow discovery sought here.

In *DeLeon*, the recorded calls at issue were those of a non-party, altering the privacy analysis from the beginning. *Id.* at *2 (Ex. N). Moreover, the defendants sought many calls because of an assumption that they might house relevant information, when prior discovery had not established that relevant topics were actually discussed. *Id.* at * 5-6. Here, only three calls are at issue, and Plaintiff himself has acknowledged that he talked about his arrest on these calls. Thus, the only unanswered question is not *whether* Plaintiff said anything relevant, but *how much* and *what* he said. This case presents exactly what the Court in *DeLeon* – and other courts that have prohibited such discovery – found lacking. *See Bishop v. White*, No. 16 C 6040, 2020 WL 6149567,

*6 (N.D. Ill. Oct. 20, 2020) (no evidence that relevant communications existed) (Ex. J); *Pursley v. City of Rockford*, No. 18-cv-50040, 2020 WL 1433827, *2-4 (N.D. Ill. Mar. 24, 2020) (quashing an "unlimited subpoena" for calls without indication that "material sought may contain relevant information") (Ex. K).

Defendants are aware of no case in which prison calls that – per the plaintiff's own admission – involved a relevant matter and were still not discoverable. To the contrary, courts have allowed such discovery on less specific bases than here. *See Coleman v. City of Peoria*, No. 15-cv-1100, 2016 WL 3974005 (N.D. Ill. Jul. 2, 2016) (allowing discovery of calls because plaintiff disclosed call recipients as potential witnesses) (Ex. L); *Rodriguez v. Chicago*, 18-cv-7951, 2021 WL 2206164 (N.D. Ill. Jun. 1, 2021) (allowing discovery of calls that were "*likely* to have relevant information," and rejecting plaintiff's effort to "narrow the scope of discovery") (Ex. M).

Defendants are also unaware of any case that has recognized a strong privacy interest in an inmate's recorded phone calls, which is not surprising because inmates know that they are being recorded. *See*, *e.g.*, *Bishop*, 2020 WL 6149567 at *4 (referring to plaintiff's privacy interest in jail calls as "minimal") (Ex. J); *Coleman*, 2016 WL 3974005 at *4 (noting plaintiff's "lessened privacy interests" in recorded calls were not enough to prohibit discovery) (Ex. L). Thus, Plaintiff's failure to establish any concrete privacy concerns cannot be supplemented by a generally recognized concern in case law, as the relevant law has only recognized a weakened privacy interest in jail calls. And even if that were not the case, there is a governing confidentiality order in this case that could have been used to address any privacy concerns while still honoring the discovery principles discussed above. (*See* Dkt. 36.)

Conclusion

Defendants appreciate the time and attention the Magistrate Judge has devoted to monitoring this case throughout discovery. But, respectfully, Defendants disagree with the Magistrate on this issue. Because the potential relevance of these calls is far more than slight, and because Plaintiff made no showing of any privacy interest that would alter the usual framework of broad discovery, Defendants asks this Court to overrule the Magistrate Judge's Order as it relates to the three calls discussed herein and permit Defendants to listen to those calls (whether under the contours of the governing confidentiality order, or otherwise).

Respectfully submitted,

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