

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 23, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: NATIONAL ASSOCIATION OF
FORENSIC COUNSELORS, INC.;
AMERICAN ACADEMY OF CERTIFIED
FORENSIC COUNSELORS, INC.,
d/b/a American College of Certified
Forensic Counselors,

Petitioners.

No. 16-7067
(D.C. No. 6:14-CV-00187-RAW)
(E.D. Okla.)

ORDER

Before **MATHESON, O'BRIEN**, and **BACHARACH**, Circuit Judges.

Petitioners, who are plaintiffs in the underlying litigation, have filed a petition for a writ of mandamus seeking relief from the district court's order entered on August 29, 2016. The August 29 order upheld a magistrate judge's order requiring the plaintiffs to produce to the defendants images contained on a laptop and server. Because petitioners have failed to establish their entitlement to mandamus relief, we deny the petition.

I. Background

The events leading to the filing of the mandamus petition began at the end of July when the magistrate judge overseeing discovery granted defendants' motion to compel production of documents that were located on plaintiffs' representative's laptop and plaintiffs' server. Plaintiffs filed an emergency motion for an extension, claiming their computers were hacked. In response, defendants recited plaintiffs' history of losing

documents due to mysterious causes and identified instances of document destruction. Defendants requested that the court allow them to take images of the hard drives of the laptop and the server, so that defendants could figure out what plaintiffs actually have.

The magistrate judge gave plaintiffs until August 26 to produce responsive documents. The magistrate judge also ordered plaintiffs to make the laptop and server available for imaging of the hard drives by defendants' consultant. Plaintiffs responded with a motion for clarification, asserting that the laptop contained numerous privileged attorney-client communications. They also asserted that the laptop was the witness's personal laptop, in contradiction to her recent affidavit that the laptop was her business laptop.

At argument on the motion for clarification on August 18, the magistrate judge inquired why plaintiffs had not submitted a privilege log for the allegedly privileged documents. Plaintiffs' counsel apparently represented to the magistrate judge that they could submit a privilege log in a week. The magistrate judge allowed the imaging to proceed and ordered plaintiffs to submit a privilege log by August 25. He set a hearing on privilege for August 26.

Plaintiffs filed their privilege log on August 25. At the hearing, however, the magistrate judge held that the privilege log was insufficient. He gave plaintiffs two weeks to submit an adequate privilege log and further ordered:

In the meantime, Defendant's consultant may disclose the contents of the imaged hard drives to Defendants' attorneys, who shall not disclose the contents thereof to any third persons until further order of the Court and who shall immediately return to the Plaintiffs' attorneys any documents the

Defendants' attorneys reasonably believe to be privileged in accordance with Fed. R. Civ. P. 26(b)(5)(B).

Pet., Ex. 2 at 1. The magistrate judge denied plaintiffs' oral motion for a stay, and the consultant transmitted the imaged hard drives to defendants' counsel that same day. Plaintiffs immediately appealed to the district court, requesting that the court vacate the magistrate judge's order.

On August 29, the district court entered an ordering denying the motion to vacate and upholding the magistrate judge's order. The district court found "the Magistrate Judge's ruling to be measured and restrained under the circumstances" because the magistrate judge did not find that plaintiffs forfeited their privilege by failing to produce an adequate privilege log. *Id.*, Ex. 1 at 2. The court was unpersuaded by plaintiffs' argument regarding the interpretation and application of Local Civil Rule 26.2. As the court explained, "[c]ontrary to Plaintiffs' assertions, Plaintiffs' privilege log is not in compliance with the rule; the Magistrate Judge's Order does not violate the rule; and Defendants' motions to compel document production set this discovery litigation in motion." *Id.* The district court further approved defendants' proposed protocol for handling potentially privileged documents. *See id.* That protocol included:

- (1) automatically segregating emails to or from petitioners' counsel;
- (2) attorneys reviewing the remaining material flagging for segregation any potentially privileged material;
- (3) attorneys not involved in the litigation reviewing the segregated potentially privileged material; and
- (4) those attorneys returning to petitioners any such privileged material on a weekly basis. *See id.*

After the district court issued its order, petitioners filed an emergency motion for stay and writ of mandamus. We denied the emergency motion for stay on August 30.

II. Discussion

Petitioners seek a writ of mandamus to: (1) direct the district court to vacate its August 29 order; (2) direct the district court to enter an order (a) requiring opposing counsel to return and/or destroy all documents and information received as a result of the August 29 order and (b) requiring counsel to provide a privilege log of all files on the hard drives that counsel opened or reviewed; (3) find that the August 29 order has irreparably harmed petitioners; and (4) direct the district court to take all reasonable steps to mitigate the damage caused by the disclosure of information and documents protected by the attorney-client privilege and work product doctrine.

“Mandamus is not a substitute for appeal after a final judgment and is a drastic remedy that is invoked only in extraordinary circumstances.” *United States v. Copar Pumice Co. Inc.*, 714 F.3d 1197, 1210 (10th Cir. 2013) (internal quotation marks omitted). “Generally, before a writ of mandamus may issue, the petitioner must satisfy three conditions: the party seeking [the] writ must have no other adequate means for relief sought, the party’s right to the writ must be clear and undisputable, and the issuing court must be satisfied that the writ is appropriate.” *Id.*

When a writ of mandamus implicates the discovery of privileged information, two factors must first be established: disclosure of the allegedly privileged or confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality; and the disclosure involves questions of substantial importance to the administration of justice.

Id. (internal quotation marks omitted).

Petitioners have failed to show that disclosure of any of the information on the hard drives involves a question of substantial importance to the administration of justice. See *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 655 (10th Cir. 1984) (“[T]he instant case involves a discovery dispute between private litigants. We cannot say that a question of substantial importance to the administration of justice is at issue.”).

Petitioners have further failed to establish that they have a “clear and undisputable” right to mandamus relief. Although they contend that the district court erred in interpreting and applying Local Rule 26 to permit disclosure of the documents, “[i]t is not appropriate to issue a writ when the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.” *Copar*, 714 F.3d at 1210 (internal quotation marks omitted); see also *Barclaysamerican Corp.*, 746 F.2d at 655 (“Although a simple showing of error may suffice to obtain reversal on direct appeal, a greater showing must be made to obtain a writ of mandamus.”).

Petitioners have failed to establish that they are entitled to the extraordinary remedy of a writ of mandamus. Accordingly, we deny the mandamus petition.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk