IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE 15-000072

BRADLEY J. EDWARDS and
PAUL G. CASSELL,

Plaintiffs/Counterclaim Defendants,

vs.

ALAN M. DERSHOWITZ,

Defendant/Counterclaim Plaintiff.

_____/

DEFENDANT / COUNTERCLAIM PLAINTIFF ALAN DERSHOWITZ'S OPPOSITION TO NON-PARTY ROBERTS'S MOTION TO STRIKE AND FOR SANCTIONS

Non-Party [redacted] ("Roberts") motion to strike the Affidavit of Alan M. Dershowitz ("Dershowitz") and for sanctions ("Roberts's Motion") has no support in the law or the facts. It is entirely meritless and should be denied.

INTRODUCTION AND EXECUTIVE SUMMARY

Roberts's counsel, David Boies ("Boies"), does not deny in his cursory declaration that he participated in discussions with Dershowitz about the allegations that Roberts has made against Dershowitz. Dershowitz has sworn that those communications were not part of any settlement discussions, which makes sense because Boies does not represent any party to this case. Boies apparently contends otherwise but has provided no details to support his contrary assertion. To the extent the Court determines it matters whether these were settlement discussions, Dershowitz requests an evidentiary hearing. There is no basis on which the Court

could decide the dispute without hearing sworn testimony from both participants, Dershowitz and Boies, as well as the witnesses to many of the conversations.

Even if the communications between Dershowitz and Boies were settlement discussions (which they were not), the current motion to strike and for sanctions would be patently meritless. Settlement communications are admissible at trial for some purposes but are not admissible for other purposes. But, whether settlement discussions are admissible or not, Roberts cites no authority (and there is none) for the extraordinary proposition that settlement discussions are subject to some privilege such that they are not discoverable and cannot be made part of the public record. In some circumstances, settlement discussions between two attorneys cannot come into evidence at trial, but they are not state secrets. There is no basis in Florida law for saying they cannot be part of the record in a case where a party contends they are relevant, as Dershowitz contends in this case, and correctly so as shown in his separate Motion in Limine to Overrule Objections as to Application of Settlement Rules. *See* Mot. in Lim. at 6-7. The Court either admits the settlement discussions into evidence at trial or it does not; the Court cannot properly strike the evidence from the record just because it concludes that the evidence may not be admissible. Court files are full of evidence that is ultimately determined not to be admissible for purposes of trial.

To be clear, Roberts does not contend and could not contend here that the discussions at issue took place at a mediation, and there is no colorable argument that any mediation privilege applies. Likewise, there can be no legitimate contention that disclosure of the communications violated some court order or statute; there is no such court order or statute. Roberts's lawyer objected to the disclosure of the communications at issue during Prof. Dershowitz's deposition. As a courtesy to Roberts and her counsel, the undersigned instructed Prof. Dershowitz not to

answer the questions at that time, in order to afford time to consider the issue and to afford time for Roberts to seek a judicial determination if she wanted to obtain one. As of fifty-seven days after the deposition, Roberts had not sought any such relief and Dershowitz therefore properly brought the evidence to the Court's attention to obtain a ruling. By doing so, Dershowitz did not violate any Court order or statute or otherwise act improperly.

Boies may be embarrassed that it has been made public that he does not believe that his client's allegations against Dershowitz are true. But that does not mean that his voluntary statements cannot be disclosed. And it surely does not mean that sanctions can be imposed for disclosing communications where the disclosure did not violate any rule, order or statute under any circumstances, let alone where the complaining party had ample opportunity to go to court to seek relief but did not do so.

ARGUMENT

I. THE COMMUNICATIONS WERE NOT FOR SETTLEMENT AND THE COURT CANNOT CONCLUDE OTHERWISE WITHOUT AN EVIDENTIARY HEARING

Dershowitz has provided a sworn affidavit attesting that his communications with Boies were not for the purpose of settling this defamation case. Roberts acknowledges that Boies and Dershowitz participated in communications and that others who are not parties or counsel in this action were present for the conversations. Indeed, Boies is not counsel to any party in this action. Although Roberts's motion states that "Mr. Boies had discussions with Dershowitz in an attempt to resolve the litigation" (Roberts's Mot. at 4), Roberts's motion and the declaration filed in support make no effort to explain how Boies supposedly could attempt to settle the defamation claims by Brad Edwards and Paul Cassell against Dershowitz, or Dershowitz's counterclaims, where Boies does not represent any party.

Notably, there is no pending legal dispute between Dershowitz and Boies or between Dershowitz and Boies's client, Roberts. Also, Boies does not assert that he had any authority to settle this defamation case. *See* Boies Decl., filed Dec. 11, 2015 in support of Emergency Motion to Seal. For these reasons as well, any characterization by Boies of the communications as "settlement communications" defies common sense. How could Boies settle a case in which he does not represent a party?

Certainly, this Court cannot find that the disputed communications are settlement communications on the current record. Dershowitz has asserted under oath that the communications were not settlement negotiations. *See* Aff. of A. Dershowitz, filed Dec. 11, 2015 in support of Motion in Limine, at ¶ 5. Boies asserts without explanation that the communications were somehow settlement negotiations relating to the claims in this action. Boies Decl., filed Dec. 11, 2015 in support of Emergency Motion to Seal, at ¶ 3. The Court cannot validly adjudicate this disputed issue of fact without a hearing. *See, e.g.*, *Teva Pharm. Indus. v. Ruiz*, No. 2D14-4462, 2015 Fla. App. LEXIS 15348, at *12 (Fla. 2d DCA Oct. 16, 2015) ("because there was a conflict in the evidence, the trial court was required to hold a limited evidentiary hearing to resolve the disputed issues of fact"). Likewise, the Court cannot find that the disclosure of these disputed communications merits sanctions without holding an evidentiary hearing. *Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002) (court cannot issue sanction without "an express finding of bad faith conduct" that "must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees"). Therefore, to the extent that the Court does not immediately reject Roberts's motion out of hand, the Court must hold an evidentiary hearing to determine the nature and purpose of the disputed communications between Boies and Dershowitz; the reasons

for the disclosure; and whether the disclosure resulted in the unnecessary incurrence of attorneys' fees.

II. EVEN IF THE COMMUNICATIONS WERE FOR SETTLEMENT PURPOSES, THEY ARE NOT PROPERLY STRICKEN OR THE SUBJECT OF SANCTIONS BECAUSE THEY ARE AT LEAST DISCOVERABLE AND POTENTIALLY ADMISSIBLE

A careful examination of Roberts's motion reveals that her misplaced objection is that the disputed communications are settlement communications that would be inadmissible at trial. That argument confuses the concepts of "discoverability" with "admissibility." The admissibility of a particular type of evidence at trial does not afford proper grounds to object to the discovery of that evidence under the Rules. Although Dershowitz disputes that the communications were settlement discussions, even if they were, they are properly the subject of discovery in this case so long as they are "relevant to the subject matter of the pending action." Fla. R. Civ. P. 1.280(b)(1). Rule 1.280 is explicit that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Boies's communications to Dershowitz about Roberts, who is a central figure in this case, appear reasonably calculated to lead to the discovery of admissible evidence, and are, therefore, discoverable.

Moreover, settlement discussions would be admissible at trial, so long as they are not offered to prove liability or value of the claim. *See, e.g.*, *Bankers Trust Co. v. Basciano*, 960 So. 2d 773, 780 (Fla. 5th DCA 2007) ("[i]f the evidence is offered for another purpose [other than to prove liability or value], the evidence is not barred by section 90.408 and will be admissible if it is relevant to prove a material fact or issue"); *Wolowitz v. Thoroughbred Motors, Inc.*, 765 So. 2d 920, 925 (Fla. 2d DCA 2000) (Section 90.408 does not ban all evidence of unsuccessful settlement negotiations, but only evidence of settlement negotiations when offered to prove

liability or value). An admission by one of Roberts's lawyers that, after considering Dershowitz's evidence, he himself does not believe Roberts's allegations to be true would be offered at trial to show that Edwards and Cassell did not do an adequate investigation before falsely accusing Dershowitz.

Roberts relies on *Rubrecht v. Cone Distributing, Inc.*, 95 So. 3d 950 (Fla. 5th DCA 2012) (*see* Roberts's Mot. at 5), but it does not support her motion. Instead, *Rubrecht* is consistent with Dershowitz's position that settlement discussions may be inadmissible at trial if they are submitted solely to prove liability in that case, but that there is no flat prohibition against admissibility; rather, the evidence must be evaluated in the initial instance to determine if admissible for other purposes. *Id.* at 953-56.

In any event, general principles of discoverability and admissibility are quite distinct from whether evidence can be stricken or grounds for sanctions. Even if Roberts's characterization of the disputed communications were correct—which it is not—Roberts does not provide a single authority to support the extraordinary relief that she seeks. Settlement discussions between two attorneys may or may not come into evidence at trial, but they are not the type of facts that can never be made part of a court record. There is no basis for saying the discussions between Boies and Dershowitz cannot be part of the record in a case where a party contends the discussions are relevant, as Dershowitz contends in this case, and correctly so as shown in his separate Motion in Limine to Overrule Objections as to Application of Settlement Rules. *See* Mot. in Lim. at 6-7.

III. THE RULES FOR MEDIATION CONFIDENTIALITY DO NOT APPLY TO THE DISPUTED COMMUNICATIONS AND THERE IS NO APPLICABLE COURT ORDER

There is no suggestion in Roberts's motion—nor could there be—that the disputed communications fall within the statutory definition of a "mediation communication" under the Mediation Confidentiality and Privilege Act. As a result, the authority that Roberts relies upon that pertains to mediation communications under that Act (or its predecessor) is inapposite. *Paranzino v. Barnett Bank of South Florida, N.A.*, 690 So. 2d 725 (Fla. 4th DCA 1997), for example (*see* Roberts's Mot. at 5), concerns a court-ordered mediation participant's disclosure of a "mediation communication," protected by former Section 44.102(3), Florida Statutes (1993). That is not the case here.

Rule 1.420 of the Florida Rules of Civil Procedure gives the court authority to dismiss a party's pleading for the party's failure to comply with the rules or a court order. Here, however, Roberts cannot cite a single rule or court order that Dershowitz's affidavit violated. Moreover, striking a pleading is an extreme remedy to be used "upon showing of deliberate and contumacious disregard of the trial court's authority," *Marin v. Batista*, 639 So. 2d 630, 630 (Fla. 3d DCA 1994), *disapproved on other grounds by Ham v. Dunmire*, 891 So. 2d 492 (Fla. 2004), and, again, Roberts cites no rule or court order that was somehow violated. Roberts cannot transform her counsel's baseless objection in a deposition into a "court order" meriting unquestioning deference by Dershowitz.[1]

Even when Roberts looks for cases outside of Florida to try to support her motion, the best she can do is cite to an unreported New York federal trial court decision holding that, on an unopposed motion, an offer of settlement may be sealed. *See Delollis v. Fuchs,* No. 12-CV-2331

[1] Roberts's counsel stated in October 2015 that she would bring her objections to the Court's attention for resolution, but failed to do so. *See* Mot. in Limine, Ex. A. With additional depositions being scheduled, including the continuation of Dershowitz's own deposition, Dershowitz finally raised the issue with the Court more than two months later.

(DRH)(AKT), 2012 WL 5867370, at *2 (E.D.N.Y. Nov. 16, 2012). *Delollis* certainly does not mandate sealing an offer and does not require sanctions for any reason.

Roberts's claim for attorneys' fees fares no better. Roberts claims she is entitled to fees because Dershowitz's affidavit, as reported in the press, supposedly was an effort to "prejudice this Court and tarnish the reputations of the attorneys involved." Roberts is not even a party to this action or any other action before this Court, so her purported concern about the "prejudice [to] this Court" is quite curious. Likewise, the "attorneys involved" in the communications with Dershowitz have not alleged that their reputations have been tarnished in any way. And how either of these purported concerns would justify attorneys' fees to be paid to Roberts's counsel is baffling.

Of course, Roberts's assertions concerning the press coverage of this action are mere conjecture, again without any support. As this Court has noted in earlier hearings, the press has been covering this action since its inception. Moreover, Roberts is flatly incorrect that a press report about litigation subjects the parties to sanctions of attorneys' fees. If that were the case, then the Court would be compelled to sanction equally Plaintiffs' counsel, Jack Scarola, for speaking directly to the press, *see* Michele Dargan, *Epstein Victims' Attorneys Seek Partial Victory in Defamation Suit*, Palm Beach Daily News (Dec. 18, 2015), http://www.palmbeachdailynews.com/news/news/crime-law/epstein-victims-attorneys-seek-partial-victory-in-/npmqQ/ (including statement made by Plaintiffs' counsel to the press), and Plaintiff Paul Cassell, who has also communicated directly with the press about this action. *See, e.g.*, Am. Counterclaim, ¶ 42 (referencing email between Paul Cassell and ABC News reporter).

Finally, Roberts seeks an admonition from the court that if Dershowitz further violates "confidentiality orders and obligations" he would be subject to further sanctions. This begs the

question: what confidentiality order? To be clear, there is no Court order that has been violated here. There is no "confidentiality obligation" that has been violated. Roberts cites to none because no confidentiality agreement exists that the disputed affidavit supposedly violates.

CONCLUSION

Dershowitz's affidavit in support of the Motion in Limine was proper. The disputed communications were not settlement communications. Even if the Court were to conclude that the communications were settlement discussions—a finding that could be reached only after holding an evidentiary hearing—discovery concerning settlement communications is not prohibited. Roberts cites no authority for striking the affidavit or for sanctions. Therefore, Roberts's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed through the Clerk of Broward County by using the Florida Courts eFiling Portal and thus served by electronic mail: jsx@searcylaw.com, mep@searcylaw.com, scarolateam@searcylaw.com to: Jack Scarola, Esq, Searcy Denney Scarola Barnhart & Shipley, P.A., Counsel for Plaintiff, 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409; jonijones@utah.gov to: Joni J. Jones, Esq., Assistant Utah Attorney General, Counsel for Plaintiff Cassell, 160 East 300 South, Salt Lake City, Utah 84114; brad@pathtojustice.com to: Bradley J. Edwards, Esq, Farmer, Jaffe et al, 425 North Andrews Avenue, Suite 2, Ft. Lauderdale, FL 33301; cassellp@law.utah.edu, to: Paul G. Cassell, Esq.,; smccawley@bsfllp.com, sperkins@bsfllp.com, ftleserve@bsfllp.com to: Sigrid S. McCawley, Esq., Boies Schiller & Flexner, LLP, 401 E. Las Olas Blvd, Suite 1200, Ft. Lauderdale, FL 33301, this 26th day of January, 2016.

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