

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Case No.: 2:18-cv-13330
Hon. Marianne O. Battani

v.

THE CHARTER TOWNSHIP OF MILFORD,
a Michigan municipal corporation, **TOWNSHIP
OF MILFORD BOARD**, a public body, **DONALD
D. GREEN**, in his personal capacity and in his
official capacity as Supervisor of Milford Township,
and **TIMOTHY C. BRANDT**, in his personal capacity
and in his official capacity as Building and Zoning
Administrator of Milford Township,

Defendants.

**PLAINTIFFS' MOTION TO COMPEL PRODUCTION
OF SUBPOENAED DOCUMENTS FROM NONPARTY
MICHAEL DARGA AND INCORPORATED BRIEF IN SUPPORT**

Plaintiffs, through their counsel, Maddin, Hauser, Roth & Heller, P.C., state for their Motion to Compel Production of Subpoenaed Documents from Nonparty Mike Darga as follows:

1. Plaintiffs seek an order compelling the production of six emails in the possession of nonparty Michael Darga according to Mr. Darga's attorney, Kevin Gleeson, Defendants have asserted that these six emails are "privileged" and exempt from disclosure.

2. Notably, Mr. Darga and HRC are not claiming that the communications are privileged; Defendants alone assert privilege.

3. By way of background, on December 4, 2018, Plaintiffs duly served a Subpoena on counsel for Mr. Darga, an associate of Hubbell, Roth & Clark, Inc. (“HRC”); the Subpoena ordered Mr. Darga to testify at deposition and produce certain documents. A copy of the Subpoena is attached as **Exhibit 1**.

4. Mr. Darga is an associate of HRC and is not an employee of Milford or any other Defendant.

5. HRC, through Mr. Darga, initially approved the topographical and grading plan created by Boss Engineering on behalf of Plaintiffs; before Milford’s interference, Mr. Darga concluded that Boss Engineering’s proposed plan was acceptable, without conditions, and would not alter the Hacks’ property’s “predevelopment conditions.” *See* August 24, 2018 Darga letter attached as **Exhibit 2**.

6. Thereafter, Defendant Township Board of Milford unlawfully intervened, directed Mr. Darga to revoke his initial approval, and directed Mr. Darga to impose additional requirements unauthorized by law and unmerited under the circumstances, thereby preventing Plaintiffs from constructing their driveway. *See* October 8, 2018 Darga letter attached as **Exhibit 3**.

7. The Subpoena to Mr. Darga directed Mr. Darga to produce all

documents, including any communications, relating to the construction of the Plaintiffs' driveway and/or their property. *See* **Exhibit 1**.

8. On December 21, 2018, Mr. Darga's counsel, Kevin J. Gleeson of Sullivan, Ward, Asher & Patton, P.C., produced documents to Plaintiffs' counsel; however, Attorney Gleeson informed undersigned counsel that "[s]ome of the emails have been declared as privileged **by the Township** and therefore are not provided. . . . I will provide a list of those documents removed from the file." A copy of Attorney Gleeson's December 21 email is attached as **Exhibit 4**.

9. On December 21, 2018, Attorney Gleeson emailed Plaintiffs' counsel a letter enclosing a privilege log identifying the above-referenced documents that had been declared privileged and thus not produced. A copy of Attorney Gleeson's December 21 letter is attached as **Exhibit 5**.

10. In essence, the list contains eight emails with the dates of the email and the sender and recipients of the emails. *Id.*

11. Plaintiffs do not contest that two of those eight emails—emails between Attorney Gleeson and Mr. Darga—constitute attorney-client privileged communications and are therefore exempt from disclosure.

12. However, six of the eight emails identified as "privileged" were either between Mr. Darga and Jennifer H. Elowski, or among Mr. Darga, Ms. Elowsky, and Milford officials.

13. Attorney Elowsky is Defendants' counsel and, and is clear based on Attorney Gleeson's representation, does not represent HRC or Mr. Darga; Defendants' assertion of attorney-client privilege is improper.

14. To the extent that Attorney Elowsky emailed her actual clients attorney-client privileged information, and included third-party Mr. Darga, Attorney Elowsky waived the attorney-client privilege. *Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007) (holding that attorney-client privilege was waived where privileged communication was voluntarily disclosed to third-party).

15. Accordingly, on January 2, 2019, undersigned counsel emailed Attorney Gleeson, contested that the above-referenced six emails were privileged, and requested production. *See* email to Gleeson attached as **Exhibit 6**.

16. Attorney Gleeson emailed Plaintiffs' counsel and reiterated that "[t]he Township has declared those [emails] as privileged . . . and we are obligated to honor that position until the court tells us otherwise." Attorney Gleeson's email is attached as **Exhibit 7**.

17. On notice to the commanded person, the serving party may move the court for an order compelling production of documents. Fed. R. Civ. P. 45 (d)(2)(B)(i).

18. The scope of discovery through a subpoena is the same as that

applicable to Rule 34 and other discovery rules and, therefore, subject to the general relevancy standard applicable to discovery under Fed. R. Civ. P. 26(b)(1).

19. A party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1).

20. Plaintiffs sought concurrence in this motion, and such concurrence was denied.

ACCORDINGLY, Plaintiffs respectfully requests that this Court grant this Motion and enter and Order that:

A. Compels Mr. Darga to produce the six emails to Plaintiffs’ counsel within seven (7) days of entry of the Court’s order;

B. In the alternative, directs Mr. Darga to promptly provide the six emails to the Court for the Court’s *in camera* inspection and determination as to whether privilege prohibits disclosure of the six emails to Plaintiffs’ counsel; and

C. Awards Plaintiffs any other relief this Court deems just and proper under the circumstances.

Respectfully submitted,

/s/ R.J. Cronkhite

R.J. Cronkhite (P78374)

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Dated: February 15, 2019

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

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THE CHARTER TOWNSHIP OF MILFORD,
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and **TIMOTHY C. BRANDT**, in his personal capacity
and in his official capacity as Building and Zoning
Administrator of Milford Township,

Defendants.

**BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF THE
SUBPOENAED DOCUMENTS FROM NONPARTY MICHAEL DARGA**

STATEMENT OF ISSUE PRESENTED

1. Are Plaintiffs entitled to production of the subpoenaed documents from nonparty Michael Darga?

Plaintiffs answer: Yes

CONTROLLING AUTHORITY

Fed. R. Civ. P. 45

Fed. R. Civ. P. 26

Maday v. Pub. Libraries of Saginaw, 480 F.3d 815 (6th Cir. 2007)

Ross v. City of Memphis, 423 F.3d 596 (6th Cir. 2005)

I. STATEMENT OF FACTS

On December 4, 2018 a Subpoena was issued by Plaintiffs to nonparty Mike Darga (“Darga”) of Hubbell, Roth & Clark, Inc. (“HRC”) to testify at deposition and produce documents. A copy of the Subpoena is attached as **Exhibit 1**. Darga is an Associate of HRC, which is an engineering firm used by Defendant Charter Township of Milford.

Darga, on behalf of HRC, initially approved the topographical and grading survey done by Boss Engineering on behalf of Plaintiffs which concluded there was no drainage issue with respect to constructing Plaintiffs’ driveway. *See* August 24, 2018 Darga letter attached as **Exhibit 2**. Thereafter, Defendant Township Board of Milford directed HRC to revoke its initial approval and demanded additional requirements, thereby preventing Plaintiffs from constructing their driveway. *See* October 8, 2018 Darga letter attached as **Exhibit 3**. The Subpoena to Darga commanded that he produce all documents, including any communications, relating to the construction of the Plaintiffs’ driveway and/or their property. *See* **Exhibit 1**.

On December 21, 2018, Darga’s counsel, Kevin J. Gleeson (“Gleeson”) of Sullivan, Ward, Asher & Patton, P.C., produced documents to Plaintiffs’ counsel, however, he stated that “Some of the emails have been declared as privileged by the Township and therefore are not provided. . . I will provide a list of those

documents removed from the file.” A copy of the Gleeson email is attached as **Exhibit 4**. On December 21, 2018, Gleeson emailed Plaintiffs’ counsel letter with a list of those documents that had been declared privileged and not produced. A copy of the Gleeson letter is attached as **Exhibit 5**. In essence, the list contains eight emails with the dates of the email and the sender and recipients of the emails. *See Exhibit 5*. However, the list was not a proper privilege log as required by Fed. R. Civ. P. 26(b)(5)(A)(ii), for the emails he claims are privileged, Darga did not “describe the nature of the documents . . . and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”

Moreover, on January 2, 2019, Plaintiffs’ counsel emailed Gleeson contesting that six of the eight emails withheld as privileged were between Darga and Jennifer H. Elowsky (“Elowsky”), who represents Defendants and not Darga or HRC in this case, and to the extent that she copied any of the Defendants on those six emails, the attorney-client privilege was waived. *See* email to Gleeson attached as **Exhibit 6**. Plaintiffs’ counsel requested that the six emails be produced as neither Darga nor HRC has any standing to assert the attorney-client privilege regarding communications between Elowsky and Defendants. *See Exhibit 6*.

On February 11, 2019, Gleeson emailed Plaintiffs’ counsel and reiterated that the “emails between the Township’s counsel and HRC The Township has

declared those as privileged . . . and we are obligated to honor that position until the court tells us otherwise.” See Gleeson email attached as **Exhibit 7**. As discussed more fully below, Plaintiffs seek an order from this Court compelling Darga to fully comply with the Subpoena and produce the six emails.

II. ARGUMENT

A. Applicable Legal Standard

Federal Rule of Civil Procedure 45 governs nonparty discovery and the subpoena power of the litigants in compelling production of materials from those nonparties. With respect to nonparties, pursuant to Fed. R. Civ. P. 45(a), a party may serve a subpoena on a nonparty commanding that party to “attend and testify; produce designated documents, electronically stored information, or tangible things in that person’s possession, custody, or control; or permit the inspection of premises” at a specified time and place. When a nonparty fails to produce documents, on notice to the nonparty, the party serving the subpoena may move the court for an order compelling production. Fed. R. Civ. P. 45 (d)(2)(B)(i).

The scope of discovery through a subpoena is the same as that applicable to Rule 34 and other discovery rules and, therefore, subject to the general relevancy standard applicable to discovery under Fed. R. Civ. P. 26(b)(1). *Laethem Equip. Co. v. Deere and Co.*, No. 05-CV-10113, 2007 WL 2873981, at *4 (E.D. Mich. Sept. 24, 2007). The scope of discovery extends to “any nonprivileged matter that

is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 33(a). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

With respect to a claim of privilege, the party asserting the privilege bears the burden of establishing that the privilege exists. *Atlantech, Inc. v. American Panel Corp.*, 2011 WL 2078222 * 3 (E.D. Mich May 24, 2011) citing *Ross v. City of Memphis*, 423 F.3d 596, 606 (6th Cir. 2005). A party's mere assertion that certain information is privileged is insufficient to meet this burden. *Id.*

B. The six emails are not privileged and should be produced.

Notably, Mr. Darga and HRC are not claiming that the communications are attorney-client privileged. Rather, Defendants claim the communications with Mr. Darga are privileged.

As identified in Mr. Darga's privilege log, all six allegedly privileged emails included Mr. Darga, who is not represented by Elowsky; Attorney Gleeson was not part of these emails. Elowsky does not represent either HRC or Mr. Darga and Defendants cannot claim that Elowsky's communications with Mr. Darga are privileged.

In some of her six emails to Mr. Darga, Elowsky apparently copied her clients (Defendants). Elowsky's involvement of Mr. Darga in her emails including her client constitutes waiver of any attorney-client privilege, to the extent it existed

at all. *Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007) (holding that attorney-client privilege was waived where privileged communication was voluntarily disclosed to third-party); *Carfagno v. Jackson Nat'l Life Ins. Co.*, 2001 WL 34059032 *7 (W.D. Mich. Feb. 13, 2001).

III. CONCLUSION

Plaintiffs respectfully requests that this Court grant this Motion and enter and Order that:

A. Compels Mr. Darga to produce the six emails to Plaintiffs' counsel within seven (7) days of entry of the Court's order;

B. In the alternative, directs Mr. Darga to promptly provide the six emails to the Court for the Court's *in camera* inspection and determination as to whether privilege prohibits disclosure of the six emails to Plaintiffs' counsel; and

C. Awards Plaintiffs any other relief this Court deems just and proper under the circumstances.

Respectfully submitted,

/s/ R.J. Cronkhite

R.J. Cronkhite (P78374)

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(248) 351-7017

rcronkhite@maddinhauser.com

Dated: February 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on **February 15, 2019**, I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

/s/ R.J. Cronhite
Attorney for Plaintiffs