

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

T G PLASTICS TRADING CO., INC.,)	
d/b/a NATIONAL PLASTICS TRADING CO.,)	
Plaintiff,)	
)	
v.)	C.A. No. 09-336-M
)	
TORAY PLASTICS (AMERICA), INC.,)	
Defendant.)	

MEMORANDUM AND ORDER

JOHN J. McCONNELL, JR., United States District Judge.

The defendant, Toray Plastics (America), Inc. (Toray), has asked the Court to hold the plaintiff, T G Plastics Trading Co., Inc., d/b/a National Plastics Trading Co. (National Plastics), in civil contempt for violating a Protective Order and to sanction the plaintiff for that violation. National Plastics has objected and countered with a request for sanctions against Toray for pursuing the contempt motion without a factual or legal basis. The Court has considered the arguments of the parties and denies Toray’s motion to hold National Plastics in contempt and denies National Plastics’ request for sanctions.

BACKGROUND

A 2006 breach of contract action involving these parties produced a Stipulation and Order Protecting Confidentiality of Discovery Materials (Protective Order). *Toray v. Nat’l Plastics*, C.A. No. 06-219 (Original Suit). The Protective Order included several provisions that “govern[ed] the handling of confidential information in th[ose] proceedings.” (Protective Order at 1, Original Suit, C.A. No. 06-219, ECF No. 29.) The Protective Order further provided that it was “intended to regulate the handling of [c]onfidential [i]nformation during the pretrial period

of th[at] litigation,” but “remain[ed] in force and effect until modified, superseded or terminated on the record by written stipulation of the parties or by Order of the Court.” (*Id.* at 1, 5.)

The parties subsequently settled the Original Suit pursuant to a Settlement Agreement and Release (Settlement Agreement) that provided for monetary payment and a seventeen-year business relationship requiring Toray to sell exclusively to National Plastics “one hundred percent (100%) of all scrap plastic, other scrap, second quality materials, downgraded materials, recyclable materials not reused internally and aged film.” (ECF No. 47-2 at 3.) Toray also agreed to provide to National Plastics information regarding entities approaching Toray to purchase these materials, and National Plastics agreed to “make its best efforts to maximize pricing.” (ECF No. 47-2 at 4.) The Original Suit was therefore dismissed by stipulation. (Original Suit, C.A. No. 06-219, ECF No. 55.)

National Plastics requested and received from Toray confidential information to ensure that Toray was complying with the terms of the Settlement Agreement that resolved the Original Suit. Toray provided National Plastics with a copy of the Protective Order from the Original Suit and asked that National Plastics agree to abide by the Protective Order’s terms, except regarding the destruction of disclosed confidential information, which was governed by an addendum to which the parties agreed. (ECF Nos. 47-3, -4, -5.) After receiving the signed Protective Order, Toray provided sales information to National Plastics. (ECF No. 47-7.)

In June of 2009, National Plastics filed this suit, alleging that Toray had breached the terms of the Settlement Agreement by failing to sell exclusively to National Plastics “one hundred percent (100%) of all scrap plastic, other scrap, second quality materials, downgraded materials, recyclable materials not reused internally and aged film.” (ECF No. 1 at 3.) In December of 2009, National Plastics provided Brian Dersovitz, an individual it had hired as a

consultant, with the sales information that it had received from Toray. (ECF No. 47-8.) Mr. Dersovitz is employed by American Trading International (ATI), a company to which National Plastics sells Toray scrap material.

The issue now before the Court is National Plastics' sharing of confidential information with Mr. Dersovitz. Toray has asked that National Plastics be held in civil contempt; be ordered to return all confidential information; and be ordered to pay Toray's legal fees and costs, pay for court ordered discovery so Toray can investigate the extent of the disclosure, and pay \$10,000 to the Rhode Island Bar Foundation. (ECF No. 47 at 1-2.) National Plastics has countered with a request that Toray be sanctioned for bringing its motion without a factual or legal basis and that Toray be ordered to pay National Plastics' legal fees and pay \$10,000 to the Rhode Island Bar Foundation.

ANALYSIS

A. Civil Contempt

The Supreme Court has called the judicial contempt power "a potent weapon." *Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). Because of "the contempt power's virility and damage potential, courts have created a number of prudential principles designed to oversee its deployment." *United States v. Saccoccia*, 433 F.3d 19, 27 (1st Cir. 2005) (quoting *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991)). Among those principles is the discretion given to a court in deciding whether to find that a party has committed civil contempt. *Id.* (explaining that a finding of contempt is reviewed for an abuse of discretion). A party seeking a finding of civil contempt based on non-compliance with a court order bears the burden of proving that: "(1) that the alleged contemnor had notice that he was 'within the order's ambit'; (2) that the order was 'clear and unambiguous'; (3) that the

alleged contemnor had the ability to comply; and (4) that the order was indeed violated.” *Id.* (citations omitted). For factual determinations, the moving party ““must prove civil contempt by clear and convincing evidence.”” *Id.* (quoting *Langton v. Johnston*, 928 F.2d 1206, 1220 (1st Cir. 1991)).

To be clear and unambiguous, a protective order must allow “the putative contemnor [to be] ‘able to ascertain from the four corners of the order precisely what acts are forbidden.’” *Id.* at 28 (quoting *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir. 2002)). Courts “must read any ambiguities or omissions in . . . a court order as redounding to the benefit of the person charged with contempt.” *Id.* (citations omitted). Further, the analysis is not applied “in the abstract,” so rather than being “clearly worded as a general matter,” the order must “clearly and unambiguously forbi[d] *the precise conduct on which the contempt allegation is based.*” *Id.* (emphasis in original).

For example, in *Saccoccia*, a court order specifically prohibited criminal defendant Saccoccia and his attorneys from “alienating, dissipating, or transferring ‘\$140,000,000 in U.S. currency for which th[ose] defendants . . . [we]re jointly and severally liable.’” *Id.* at 28-29. The attorneys accepted fees from Saccoccia that had come from substitute assets rather than tainted assets. The government moved to recover the attorneys’ fees on a civil contempt theory based on a violation of the court order and the district court granted the motion. The First Circuit reversed, holding that although “the purpose of the [o]rder was to preserve assets” for potential subsequent forfeiture, the order did not distinguish between substitute and tainted assets and “could have been interpreted in various ways.” *Id.* at 29, 31.

Here, the Protective Order – which was entered in the Original Suit – specifically stated that it “govern[ed] the handling of confidential information in th[ose] proceedings,” and that it

“[wa]s intended to regulate the handling of [c]onfidential [i]nformation during the pretrial period of th[at] litigation” (Original Suit, C.A. No. 06-219, ECF No. 29 at 1, 5.) The Original Suit was dismissed in its entirety. (Original Suit, C.A. No. 06-219, ECF No. 55.) Although the Protective Order also provided that the court “retain[ed], after th[at] action [wa]s terminated, jurisdiction over it and [the parties] for the purposes of enforcing th[e] Protective Order,” the immediately preceding paragraph explains that the parties would have sixty days to return confidential information to the producing party. (Original Suit, C.A. No. 06-219, ECF No. 29 at 5-6.) That language in the Protective Order gives the court continuing jurisdiction until the parties had each returned to the other all confidential information. Therefore, according to its terms, the Protective Order does not apply to the current litigation notwithstanding the fact that the parties agreed to continue to treat certain exchanged information as confidential. Because it does not govern conduct in this litigation, the Protective Order did not “clearly and unambiguously forbi[d] *the precise conduct on which the contempt allegation is based*. See *Saccoccia*, 433 F.3d at 27 (emphasis in original). Even if the language was not as clear, the Court cannot conclude that the conduct at issue was clearly and unambiguously prohibited because the Court “‘must read any ambiguities or omissions in . . . a court order as redound[ing] to the benefit of the person charged with contempt.’” See *UTGR, Inc. v. Mutuel/Gaming Clerks Union, Local 334*, C.A. No. 09-046, 2010 WL 231122, at *2 (D.R.I. Jan. 12, 2010) (quoting *NBA Props., Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990)) (alteration in original).

Further, even if the Protective Order entered in the Original Suit governed this litigation, applying the First Circuit’s civil contempt analysis, which “focus[es] on the ‘clear and unambiguous’ prong together with the violation prong,” *Saccoccia*, 433 F.3d at 27-28, the Court finds that the Protective Order was not in fact violated. According to an affidavit from National

Plastics' former attorney, Mr. Dersovitz was hired as an "independent consultant" and, after signing the acknowledgment as required by the Protective Order, received confidential information. (Aff. of Scott P. Landry, Esq., ECF No. 50 Ex. C.) The Protective Order contemplated different levels of disclosure: (1) it permitted disclosure to certain groups, such as counsel or employees of the parties assisting with the litigation, freely and without any acknowledgment; (2) it required signed acknowledgment for disclosure to certain other groups, including independent experts and consultants; and (3) it required prior written authorization of the other party for disclosure to groups not referenced in the Protective Order. (See Original Suit, C.A. No. 06-219, ECF No. 29 at 2-4.) Because it did not define independent consultant, the Protective Order did not clearly and unambiguously prohibit the conduct at issue. See *Saccoccia*, 433 F.3d at 27-28. Although Toray argues that National Plastics should have notified Toray with whom National Plastics had shared confidential information because that was Toray's expectation, the Protective Order required prior written consent only for disclosure to a person in a group other than those listed in paragraph six of the Protective Order. (Original Suit, C.A. No. 06-219, ECF No. 29 at 4.) Thus, even if the Protective Order governed disclosure of information in this case, it was not violated because information was disclosed to Mr. Dersovitz, an independent consultant, only after he had signed an acknowledgement as required by the Protective Order.

B. Sanctions

National Plastics has requested that the Court sanction Toray for pursuing its motion for civil contempt. (ECF No. 50 at 12.) National Plastics contends that Toray filed its motion without reasonable inquiry and declined to withdraw its motion after National Plastics explained that Mr. Dersovitz was retained as an independent consultant. National Plastics has asked that it

be awarded its fees and that Toray be ordered to pay \$10,000 to the Rhode Island Bar Foundation.

The Court has inherent power to sanction a party which has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *See Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 13 (1st Cir. 1995) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)). However, this inherent power “must be exercised with restraint and discretion” and used only “sparingly” and in “egregious circumstances.” *Id.* (citations omitted).

Although Toray’s motion for contempt is denied, the Court does not find that Toray’s conduct rises to the level of sanctionable conduct. Toray filed its motion to protect information that it thought National Plastics had improperly shared with a third party. Toray position is that National Plastics cannot abide by the terms of the Settlement Agreement by “mak[ing] its best efforts to maximize pricing” if it is sharing Toray’s pricing information with Mr. Dersovitz, who is employed by ATI, a National Plastics’ customer. Here, civil contempt is not appropriate but neither are sanctions against Toray for trying to remedy what it perceives as a problem.

CONCLUSION

The Court denies Toray’s motion to hold National Plastics in civil contempt and denies National Plastics’ request to sanction Toray.

SO ORDERED:



John J. McConnell, Jr.
United States District Judge

November 3, 2011