

STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

SOCORRO ELECTRIC COOPERATIVE, INC.,

Plaintiff,

v.

CHARLENE WEST, et al.,

No. D1314-CV-2010-0849

Judge: Mitchell

Defendants,

And

CHARLES WAGNER, individually and
on behalf of those similarly situated, et al.,
Cross-Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,
et al.,

Cross-Claim Defendants.

PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

Cross Claim Defendants Socorro Electric Cooperative, Inc., *et al*, by and through their counsel of record, Kennedy & Han, P.C., hereby brings this, their Motion for Protective Order.¹ By and through this Motion, Defendants seek a Protective Order preventing Plaintiff Wagner from circumventing New Mexico's rules of discovery by attempting to use Inspection of Records requests to gain access to information directly related to the current litigation.

Counsel for Plaintiff Charles Wagner has been contacted regarding the instant Motion, and Plaintiff opposes said Motion.

¹ For purposes of simplicity and ease of reading, Cross Claim Defendants are referred to throughout this Motion as "Defendants." Cross Claim Plaintiff is similarly referred to only as "Plaintiff".

In support of their Motion, Defendants state as follows:

Introduction:

As has been thoroughly discussed by and through Defendants various Motions to Dismiss and Motion for Partial Summary Judgment (all filed 1/25/2012), Mr. Charles Wagner finds himself in the peculiar position of being both a Trustee of the Socorro Electric Cooperative, Inc., and a Plaintiff attempting to sue both the Cooperative and his fellow Trustees. Although Mr. Wagner filed his suit (via a Cross Claim) over 16 months ago, Plaintiff has yet to submit *any* formal discovery requests or interrogatories in the suit. Rather than follow the clearly established Rules of Civil Procedure, Plaintiff is now attempting (and apparently has been attempting for some time) to use the Inspection of Public Records Act to make requests for privileged information, and information which would otherwise be subject to objection by Defendants and their Counsel in the course of regular discovery.

Defendants seek a Protective Order to prevent all such actions on the part of Plaintiff Wagner and to require Plaintiff Wagner to comply with the Rules of Civil Procedure in regards to all future requests for information and evidence in this lawsuit.

Undisputed Statements of Fact:

- 1) Late night on January 18, 2012, Plaintiff Charles Wagner sent an email to the General Manager of the Socorro Electric Cooperative. See, Email of Charles Wagner, attached hereto as Exhibit A.
- 2) In the January 18th email, Plaintiff Wagner discusses the salaries and compensation received by the Cooperative's attorneys going back to the year 2003. See, Exhibit A.

- 3) In the January 18th email, Plaintiff Wagner espouses his own theories of law and liability, and makes statements regarding the actions of Mr. Dennis Francish, the Cooperative's corporate counsel during portions of the current litigation. See, Exhibit A.
- 4) In the January 18th email, Plaintiff Wagner requests copies of the attorney expenses and services bills from June 10, 2010 to the present, including billing statements from Mr. Francish's office and "any other attorneys' bills paid or to be paid by SEC to date." This would include the bills to be paid to Kennedy & Han, P.C., which currently is representing the Defendants in the Cross Claim. See, Exhibit A.
- 5) In the January 18th email, Plaintiff Wagner expressly attempts to create further litigation, by suggesting that the Cooperative's new corporate counsel consider bringing suit against earlier counsel as an opportunity to recover "wasted assets." See, Exhibit A.
- 6) Despite the fact that he is the Plaintiff in ongoing litigation, Plaintiff Wagner made his email requests without reference to the Rules of Civil Procedure and without notifying the counsel of record in the current litigation.
- 7) At or after the Cooperative's monthly Board of Trustees' Meeting on January 25, 2012, Plaintiff Wagner delivered a written request for various litigation documents concerning the Cooperative's engagement of, and payments to, the Kennedy & Han law firm. See, Request of Charlie Wagner, attached hereto as Exhibit B.
- 8) Although he is the Plaintiff in ongoing litigation, Mr. Wagner has requested copies of attorney invoices, letters of engagement, privileged corporate minutes, and a statement of purpose regarding the Cooperative's retention of the Kennedy & Han

law firm to represent the Cooperative against the allegations contained in Mr. Wagner's Cross Claim. See, Exhibit B.

9) In regards to the January 25th request, Mr. Wagner again failed to make his request to the Cooperative's counsel of record in the current litigation, and he failed to follow any of the requirements of the New Mexico Rules of Civil Procedure regarding requests for discovery. See, Exhibit B.

10) It is undisputed that Mr. Wagner has continued to participate in monthly Trustee meetings, vote on Cooperative business, and receive compensation from the Cooperative since he filed his suit in September 2010. Mr. Wagner does so despite the fact that he is currently the named Plaintiff in the current suit.

Arguments of Law:

In New Mexico Courts, Rule 1-026(A) establishes the methods by which parties to litigation may obtain discovery of information, documents and other evidence. This and the other Rules of Civil Procedure related to discovery were "adopted to eliminate surprise and allow for the full preparation of a case." *Redman v. Board of Reg. of N.M. School for Visually Handicapped*, 102 N.M. 234, 239, 693 P.2d 1266, 1271 (N.M.App. 1984). In order to further this policy goal, the Court has "broad authority to manage pretrial discovery" and is "vested with the authority to limit discovery." *Lewis v. Samson*, 1999-NMCA-145, ¶25; *Reaves v. Bergsrud*, 1999-NMCA-75, ¶14.

In order to insure that the discovery process is not abused, Rule 1-026(c), NMRA 2011, provides the Court with the authority to "make any order which justice requires to protect a party from annoyance, embarrassment, oppression or undue burden or expense" in the conduct of

discovery. The Court possesses “broad discretion” to determine whether a good cause exists to issue a protective order. *Does I – III v. Roman Catholic Church of Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶13.

In the current suit, Plaintiff/Trustee Wagner has wholly failed to comply with the basic requirements of civil litigation. Rather than pursue legitimate discovery, he has sought to use the Cooperative’s Bylaws to request documents which would be wholly and self-evidently objectionable and/or privileged under the rules of discovery. Here, Plaintiff is asking for a copy of Defendants’ attorney engagement letter, Defendants’ attorney fee bills (apparently including the notations as to services performed for each hour billed), and a statement of the purpose for which Defendants engaged the attorney. All of this information is self-evidently protected from disclosure by the attorney/client privilege and/or the attorney work product doctrine.

However, the problems presented by Plaintiff Wagner’s refusal to comply with basic discovery requirements extend beyond the current request. Defendant Socorro Electric Cooperative and the individual named Defendants are each represented by counsel in this matter. So is Plaintiff Wagner. Yet Plaintiff Wagner personally continues to bring his requests directly to the Cooperative, bypassing his counsel and Defendants’ counsel and apparently ignoring the existence of his own Cross Claims.² Each such request represents an intentional refusal to comply with the regular, clearly established rules of civil discovery.

Plaintiff Wagner has based his direct requests to Defendant Cooperative on the corporate Bylaws, which require the Cooperative to make all reasonable efforts to comply with the Inspection of Public Records Act. Yet, New Mexico has long recognized that corporate Bylaws

² As a matter of professional courtesy, Defendants’ counsel presumes that Plaintiff’s counsel has been unaware of Plaintiff’s inappropriate conduct. Any evidence to the contrary, or which suggests that counsel has known about, participated in, or received documents based on Plaintiff Wagner’s inappropriate conduct, will be brought to the attention of the Court at the appropriate time.

must be read in light of existing common law and statute. Any interpretation of Bylaws which is not “consistent with the law of the land” is invalid. See, *State ex rel. Black v. Aztec Ditch Co.*, 25 N.M. 590, 185 P.549 (1919). To the extent that Plaintiff’s interpretation of the corporate Bylaws is in direct contradiction to the discovery process outlined and required by the Rules of Civil Procedure, such an interpretation is invalid.

Defendant Socorro Electric cannot be compelled to set aside the basic litigation processes and protections simply because Plaintiff/Trustee Wagner has chosen to ignore the fact that he has brought a significant, complex lawsuit against the Cooperative to whom he owes a fiduciary duty of care. Plaintiff Wagner cannot pretend that he is simply a disinterested member of the Cooperative. By the very nature of adversarial civil litigation, Plaintiff Wagner’s current interests are inherently opposed to the interests of Defendant Socorro Electric. Any information provided by the Cooperative to Plaintiff Wagner is necessarily potential evidence to be used in the ongoing litigation.

WHEREFORE, premises considered, Defendants request that this Court issue a Protective Order, relieving them of any and all duties to disclose *any* information to Plaintiff Wagner under the Cooperative’s Bylaws or the Inspection of Public Records Act. Defendants further request that this Court expressly order Mr. Wagner, as the Plaintiff in this ongoing litigation, to present any and all further requests for information or documentation by and through the discovery processes established by the New Mexico Rules of Civil Procedures. Finally,

Defendants further request that the Court grant any such other and further relief as it may find to be in the interests of justice.

Respectfully submitted,

KENNEDY & HAN, P.C.

/s/ Darin M. Foster
Paul J. Kennedy
Darin M. Foster
201 12th Street N.W.
Albuquerque, New Mexico 87102
Counsel for Cross Claim Defendants

CERTIFICATE OF SERVICE:

I certify that a copy of this
Motion was served by the Court's
electronic filing system to the following
counsel of record on this 1st day of February 2012.

William Ikard / Jordan Haedicke
Ikard Wynne LLP
2801 Via Fortuna, Bldg. 7, Ste. 501
Austin, TX 78746

Lee Deschamps
Deschamps & Kortemeier Law Offices, P.C.
P.O. Drawer 389
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575-835-0777
Fax 575-838-2922
Counsel for Cross Claim Plaintiff

/s/ Darin M. Foster
Darin M. Foster

From: Charlie Wagner <cawagner@gilanet.com>
Date: January 18, 2012 10:56:33 PM MST
To: Joseph Herrera <jherrera@socorroelectric.com>
Subject: Attorneys' fees and legal cost.
Reply-To: Charlie Wagner <cawagner@gilanet.com>

Dear Joseph,

My records of the subject fees and expenses paid by Socorro Electric Cooperative (SEC) to and for Mr. Dennis Fransich from 2003 through 2006 totaled \$109,435, an average of \$27,400 per year.

The records of fees and expenses paid by SEC to and for Ms. Joanna Aguilar's legal services from 2006 through 2009 totaled \$65,860, an average of \$16,465 per year.

From January 7, 2010 through June 10, 2010, the last date for which I have received copies of Mr. Fransich's billings to SEC, the amount of \$18,700 was paid to him.

In keeping with my duties of oversight and being informed about the business of this cooperative, please provide me with copies of attorney expenses and services bills from June 10, 2010 through the most recent billing statements from Mr. Fransich and any other attorneys' bills paid or to be paid by SEC to date.

As you know there is no indemnity insurance to cover suits initiated by the board of trustees and filed by the cooperative against other parties. Such suits as that filed by Mr. Fransich in June of 2010 are at the cost of cooperative assets. It is the duty of the board of trustees to safeguard corporate assets against risk for the benefit of the cooperative (membership). Considering the extraordinary income derived by attorney Fransich in advising the board to sue all the members/owners when he was retained to represent the cooperative's

Exhibit A

best interest (to benefit the members) seems to be an action opposed to the best interest of the cooperative. Please advise if you have any problem in complying with this request to inspect the records.

- FYI: I think the co-ops new attorney's attention should be drawn to this as an opportunity to recover the cooperative's assets wasted in this unprecedented seemingly wrong headed action by the board and Mr. Fransich. There could have been a selfish motive on his part considering that he did not want to renew his contract after Judge Mitchell's ruling.

Sincerely,

Charlie Wagner, Trustee Socorro Electric Cooperative, Inc.

1/25/12 from C. Wagner

Question; Page 9 check # 45292,.....Kennedy & Han P.C.....Services rendered.

\$30,795.29

I request under SEC's Inspection of Records Bylaw the following documents:

- A copy of the invoice showing;
- What time period the billing covers;
- Copy of the letter of engagement or the contract showing fee schedule, hourly rate charged, etc.;
- Minutes of the meeting when the board approved the contract or engagement of this firm showing;
- The purpose for which the firm was hired.

This is submitted January 25, 2012 by Charlie Wagner, Trustee District V

Delivered by Hand

Exhibit B