

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 10490

SYMPHONY SERVICE CORP.,

Plaintiff,

v.

MOTRICITY, INC.,

Defendants.

ORDER

THIS CAUSE, designated a complex business case by Order of the Chief Justice of the Supreme Court of North Carolina, pursuant to section 7A-45.4(b) of the General Statutes of North Carolina, and assigned to the undersigned Special Superior Court Judge for Complex Business Cases, by Order of the Senior Special Superior Court Judge for Complex Business Cases, came to be heard upon the Motion to Strike and for Sanctions of the Defendant Motricity, Inc. ("Motricity's Motion," filed by "Motricity"), and was so heard October 16, 2007; and

THE COURT, having considered the arguments, authorities cited, affidavits, and other submissions of counsel,¹ concludes that the evidence to date supports the following FINDINGS:

1. Sometime in 2006, Defendant Motricity entered into an agreement with Plaintiff Symphony Services Corp. ("Symphony").

2. John Rodger Koopman ("Koopman") was employed as Director of Engineering at Motricity in January, 2007. (Koopman Aff. ¶ 6, June 14, 2007.)

¹ Included in such submissions are documents presented to the court by Defendants for *in camera* review (the "*In Camera* Documents"). The *In Camera* Documents consist of communications at relevant times between Susan Ross, in-house counsel to Motricity, and employees of Motricity regarding the matter at dispute in this civil action. The court deems the *In Camera* Documents to be privileged and will maintain them under seal.

3. During the course of his employment at Motricity, Koopman was involved in management of Motricity's relationship with Symphony. (Koopman Aff. ¶ 6, June 14, 2007.)

4. In the context of a deteriorating relationship between Symphony and Motricity, Koopman communicated directly with Motricity's Senior Counsel, Susan Ross, about both the factual and legal implications of such relationship. As part of his duties, Koopman was materially involved in preparation of one or more documents regarding such relationship (Ross Aff. ¶ 2). The communications between Koopman and Susan Ross involved the very factual and legal issues that are at issue in this civil action.

5. Koopman's employment with Motricity terminated in March, 2007. (Koopman Aff. ¶ 6, June 14, 2007.)

6. Counsel for Symphony ("Symphony's Counsel") contacted Koopman by telephone on May 29, 2007. (Parrott Aff. ¶ 5.) Symphony's Counsel stated that he would like to talk with Koopman in behalf of Symphony, explained who he was, and informed Koopman that he was under no obligation to talk. (Parrott Aff. ¶ 5; Koopman Aff. ¶ 2, Sept. 18, 2007.)

7. On May 30, 2007, Symphony's Counsel and Koopman again spoke over the telephone. (Parrott Aff. ¶ 5.) During the course of such conversation, Symphony's Counsel again explained who he was and instructed Koopman that he was under no obligation to talk. (Parrott Aff. ¶ 5; Koopman Aff. ¶ 3, Sept. 18, 2007.) Symphony's Counsel also explained that he did not want Koopman to discuss any communications Koopman had with Motricity's counsel and that Koopman was free to retain independent counsel if he so desired. (Koopman Aff. ¶ 3, Sept. 18, 2007.) Symphony's Counsel

further instructed Koopman that should he ask a question that required Koopman to disclose communications with Motricity's counsel, Koopman should not answer the question but should tell Symphony's Counsel that the question required such disclosure. (Parrott Aff. ¶ 6.) At no point during this meeting did Koopman indicate that a question asked by Symphony's Counsel required Koopman to disclose communications with Motricity's counsel. (Parrott Aff. ¶ 8.) Symphony's Counsel avers that at no point during this meeting was he under the impression that Koopman was disclosing information protected by either the attorney-client privilege or the work-product doctrine. (Parrott Aff. ¶ 8.)

8. On June 4, 2007, Koopman met with Symphony's Counsel at their office. (Parrott Aff. ¶ 11.) Symphony's Counsel again explained who he was, that Koopman was under no obligation to talk, and that he did not want Koopman to discuss any communications Koopman had with Motricity's counsel. (Parrott Aff. ¶ 11–12; Koopman Aff. ¶¶ 5–8, Sept. 18, 2007.) At one point during this meeting, Koopman indicated that a question asked by Symphony's Counsel would require Koopman to disclose communications he had had with Susan Ross, Motricity's counsel. (Parrott Aff. ¶ 14.) Symphony's Counsel instructed Koopman not to answer such question, changed topics, and continued the meeting. (Parrott Aff. ¶ 14.) Symphony's Counsel avers that at no point during this meeting was he under the impression that Koopman was disclosing communications protected by the attorney-client privilege. (Parrott Aff. ¶ 14.)

9. During the June 4, 2007 meeting, Symphony's Counsel also inquired whether Koopman had signed a confidentiality agreement or severance agreement with

Motricity. Koopman stated that he did not recall signing any such agreements. (Parrott Aff. ¶ 13; Smith Aff. ¶ 7; Koopman Aff. ¶¶ 5–8, Sept. 18, 2007.)

10. Notwithstanding such representation, Koopman had executed a Nondisclosure, Noncompetition, and Intellectual Property Protection Agreement on or about January 1, 2007. (Motricity’s Mot. Ex. F.)

11. Koopman avers that at no time during the course of the above-referenced conversations with Symphony’s Counsel did he disclose any communications he had with Motricity’s counsel. (Koopman Aff. ¶¶ 4, 9, Sept. 18, 2007.)

12. Following the above-referenced meetings, Symphony’s Counsel drafted an affidavit for Koopman. Symphony’s Counsel met with Koopman at their office so that Koopman could review and revise such affidavit. (Parrott Aff. ¶ 15–16.) On June 14, 2007, Koopman verified the affidavit, averring that he participated in an undertaking by Motricity to manufacture reasons under which Motricity could terminate its agreement with Symphony “for cause” and thereby avoid termination fees. (Koopman Aff., June 14, 2007.)

13. Symphony’s Counsel neither requested nor obtained consent from Motricity’s General Counsel prior to conducting the above-referenced meetings with Koopman. (Haynes Aff. ¶ 2.)

14. On August 31, 2007, Symphony filed an Opposition to Designation of Action as Mandatory Complex Business. The June 14, 2007 affidavit of Koopman was attached as exhibit A to such motion.

BASED UPON the foregoing FINDINGS, the court CONCLUDES that:

1. Despite his sworn affidavit testimony, during the course of his employment with Motricity, Koopman had material communication with Motricity's counsel regarding the very subject matter at dispute in this civil action and Motricity's strategy regarding the same. Further, Koopman worked directly with Motricity's counsel in preparing documents related to Motricity's legal position regarding the claims alleged in this civil action. The *In Camera* Documents reflect such communications and document preparation, demonstrate Koopman's material involvement, and strongly support the conclusion that a material part of such communications and/or documents were protected by the attorney-client privilege or work product doctrine. Consequently, Koopman is deemed to have participated substantially in the legal representation of Motricity in the instant civil action. The Koopman affidavits are not forthcoming relative to such issues.

2. Accordingly, Symphony's Counsel's conversations with Koopman, conducted without the consent of Motricity's counsel, were improper under Rule 4.2 of the Rules of Professional Conduct ("Rule 4.2"). Revised Rules of Professional Conduct of the North Carolina State Bar, Rule 4.2 cmt. 9 (2006) (providing that under Rule 4.2 consent of an organization's lawyer is required for communication with a former constituent of that organization who participated substantially in the legal representation of the organization in the matter). Symphony's Counsel argues that it took appropriate and substantial precautions to avoid soliciting improper information and that finding its actions violated Rule 4.2 would be tantamount to imposing a strict liability standard. However, there is nothing before the court to show that Symphony's Counsel made

inquiries designed to determine whether Koopman was substantially involved in the legal representation of Motricity related to this matter.

3. Despite Koopman's averments, having reviewed the *In Camera* Documents, the court concludes that a material part of the information Koopman shared with Symphony's Counsel was protected by either the attorney-client privilege or the work-product doctrine²; that Koopman should have recognized and disclosed the same; and that Koopman was without the power to waive such protections on behalf of Motricity.

4. Notwithstanding the above, the court concludes that Symphony's Counsel did not knowingly violate Rule 4.2 or knowingly solicit protected information; and that it has not been so tainted by the knowledge it gained from Koopman so as to be unable to serve as counsel in this matter.

NOW THEREFORE, based on the foregoing CONCLUSIONS, it is hereby ORDERED that the Motion to Strike and for Sanctions of the Defendant is GRANTED in part and DENIED in part, as follows:

1. The June 14, 2007 Affidavit of John Rodger Koopman shall be, and hereby is, STRICKEN.

2. Unless otherwise ordered by a court of competent jurisdiction, John Rodger Koopman shall be, and hereby is, precluded from offering any further testimony for the Plaintiff in this action.

² The court has also reviewed the evidence before it for evidence that the crime-fraud exception to the attorney-client privilege is applicable to Koopman's communications with Motricity's counsel, this issue having been raised by Symphony. On the evidence presented, the court does not find grounds to apply such exception.

3. During pendency of this civil action, neither Symphony's Counsel nor any other agent of the Plaintiff shall have any further dialogue or contact regarding the Defendant with John Rodger Koopman.

4. Defendant's motion to disqualify Symphony's Counsel is DENIED.

5. Except as explicitly GRANTED herein, the Motion to Strike and for Sanctions of the Defendant is hereby DENIED.

6. No costs are assessed relative to Motricity's Motion.

SO ORDERED, this the 23rd day of October, 2007.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases