

CAUSE NO. DC-22-02562

COMMISSION FOR LAWYER DISCIPLINE,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
SIDNEY POWELL	§	
(File Nos. 202006349, 202006347,	§	DALLAS COUNTY, TEXAS
202006393, 202006599, 202100006,	§	
202100652, 202101297, 202101300,	§	
202101301, 202103520, 202106068,	§	
202106284, 202106181)	§	
	§	
Defendant.	§	116 th JUDICIAL DISTRICT

**SIDNEY POWELL’S SUPPLEMENTAL
REPLY TO BAR’S RESPONSE TO SIDNEY POWELL’S
MOTION FOR PARTIAL SUMMARY JUDGMENT,
RULES §§ 3.03(a)(1); 3.03(a)(5); AND 8.03(a)(3)**

TO THE HONORABLE ANDREA K. BOURESSA:

Sidney Powell (“Ms. Powell”) files her Supplemental Reply to the Bar’s Response to her Motion for Partial Summary Judgment a traditional motion for summary judgment against the Commission for Lawyer Discipline (“Bar”) on Claims 3, 4 and 6.

A. INTRODUCTION

1. Ms. Powell has two distinct motions for summary judgment before the

Court: a traditional motion for partial summary judgment filed on July 20, 2022 (“Traditional Motion”), and a no-evidence motion for summary judgment filed on December 28, 2022 (“No-E Motion”).

2. The Bar in an effort to buy time and to defer from its void of evidence claims that the Traditional Motion should be treated by the court as a hybrid motion for summary judgment. Thus the Traditional Motion is untimely because the Bar alleges it has not had sufficient time to conduct discovery and that Ms. Powell has failed to comply with an Order entered by the Court on Petitioner’s Motion to Compel. That is an incorrect argument because the Court can treat the Traditional Motion, if it is a hybrid motion as two motions and rule separately on each. Clearly, the Bar simply has no evidence to offer as summary judgment proof in response to the Traditional Motion.

3. The Bar filed a joint response to both Ms. Powell’s motions for summary judgment but it does not cite to any evidence. The Bar instead suggests that an inference can be drawn from what occurred in the Georgia Lawsuit. However, that does not meet the scintilla standard. More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, “ ‘rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.’ ” *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex.1995) (quoting *Transportation Ins.*

Co. v. Moriel, 879 S.W.2d 10, 25 (Tex.1994)). At this late stage, the Bar now wants a continuance or denial of the Traditional Motion, a motion that has been on file for over 164 days, while there only remains seven days in the fact discovery period after the submission date.

B. SUMMARY JUDGMENTS

4. There are three types of motion for summary judgment. The first type of motion for summary judgment is the traditional motion, which depends on summary-judgment evidence. See Tex. R. Civ. P. 166a(c). The second type of motion for summary judgment is the no-evidence motion, which is usually made without summary-judgment evidence. See Tex. R. Civ. P. 166a(I). The third type of motion for summary judgment is the hybrid motion, which combines a traditional motion with a no-evidence motion. See *Mitchell v. MAP Res.*, 649 S.W.3d 180, 187 n.6 (Tex.2022); *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex.2013); *Buck v. Palmer*, 381 S.W.3d 525, 527 n.2 (Tex.2012). In a hybrid motion, the movant presents grounds appropriate for both traditional summary judgment and no-evidence summary judgment in a single motion. *Draughon v. Johnson*, 631 S.W.3d 81, 88 n.2 (Tex.2021); see *B.C. v. Steak N Shake Opers., Inc.*, 598 S.W.3d 256, 257 n.1 (Tex.2020); *Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex.2004).

5. The movant should clearly set forth the standards on which the summary

judgment is sought. *Waite v. Woodard, Hall & Primm, P.C.*, 137 S.W.3d 277, 281 (Tex.App.–Houston [1st Dist.] 2004, no pet.).

6. A defendant may move for a traditional summary judgment at any time. Tex. R. Civ. P. 166a(b).

7. The no-evidence motion for summary judgment cannot be filed until after the nonmovant has had “an adequate time for discovery.” Tex. R. Civ. P. 166a(i); *Agar Corp. v. Electro Circuits Int’l*, 580 S.W.3d 136, 148 (Tex.2019); *Fort Brown Villas III Condo. Ass’n v. Gillenwater*, 285 S.W.3d 879, 882 (Tex.2009). A hybrid motion includes a no-evidence motion.

8. But TRCP 166a(i) does not require that discovery be completed. *Dishner v. Huitt-Zollars, Inc.*, 162 S.W.3d 370, 376 (Tex.App.–Dallas 2005, no pet.); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex.App.–Houston [14th Dist.] 2000, pet. denied).

9. When a no-evidence motion for summary judgment is filed before the end of the discovery period, it is considered timely as long as the nonmovant had adequate time for discovery. See Tex. R. Civ. P. 166a(i); *McInnis v. Mallia*, 261 S.W.3d 197, 200 (Tex.App.–Houston [14th Dist.] 2008, no pet.).

10. The amount of time necessary to be considered “adequate time” depends on the facts and circumstances of each case. See *McInnis*, 261 S.W.3d at 201. The

courts examine the following factors when determining whether the nonmovant had adequate time for discovery: (1) the nature of the claim, (2) the evidence necessary to controvert the motion, (3) the length of time the case was on file, (4) the length of time the no-evidence motion was on file, (5) whether the movant requested stricter deadlines for discovery, (6) the amount of discovery already conducted, and (7) whether the discovery deadlines in place were specific or vague. *McInnis*, 261 S.W.3d at 201; *Community Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 278 (Tex.App.–El Paso 2004, no pet.).

11. A no-evidence motion should identify and list the elements of the nonmovant’s claims or defenses on which the movant requests a no-evidence summary judgment. *Holloway v. Texas Elec. Util. Constr., Ltd.*, 282 S.W.3d 207, 213 (Tex.App.–Tyler 2009, no pet.).

12. The no-evidence motion must state that there is no evidence to support one or more specific elements of a claim or defense on which the nonmovant has the burden of proof at trial. Tex. R. Civ. P. 166a(i); *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex.2015); *Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex.2014); *Timpte Indus. v. Gish*, 286 S.W.3d 306, 310 (Tex.2009).

13. When a no-evidence motion for summary judgment does not challenge specific elements, it should be treated as a traditional motion for summary judgment

under TRCP 166a(c), which imposes the burden of proof on the movant, not as a motion under TRCP 166a(i), which imposes the burden on the nonmovant. *Michael v. Dyke*, 41 S.W.3d 746, 751–52 (Tex.App.–Corpus Christi 2001, no pet.); *Amouri v. Southwest Toyota, Inc.*, 20 S.W.3d 165, 168 (Tex.App.–Texarkana 2000, pet. denied); *Weaver v. Highlands Ins.*, 4 S.W.3d 826, 829 n.2 (Tex.App.–Houston [1st Dist.] 1999, no pet.). Ms. Powell does not challenge a single element of the Bar’s pleadings in the Traditional Motion, she provides evidence to disprove one element as the rules require. Ms. Powell does not state that “the Bar has no-evidence” in one single place in the Traditional Motion nor does she list the elements of the claims that the Bar has no evidence to prove.

14. When a motion is ambiguous about whether it was no-evidence or traditional motion, court presumes it was filed as traditional motion under TRCP 166a(c). *Hamlett v. Holcomb*, 69 S.W.3d 816, 819 (Tex.App.–Corpus Christi 2002, no pet.).

15. Moreover, a court may consider the traditional portion of a hybrid motion without considering the no-evidence portion but is not required to, it will typically consider the no-evidence grounds first. *B.C. v. Steak N Shake Opers., Inc.*, 598 S.W.3d 256, 260–61 (Tex.2020); see *Community Health Sys. Prof’l Servs. v. Hansen*, 525 S.W.3d 671, 680 (Tex.2017); *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244,

248 (Tex.2013). Therefore, the Bar is either confused about treating a traditional motion as a no-evidence motion or attempting to mislead the Court because that argument is contrary to the law. Regardless of what the Bar's intent is, the Traditional Motion must be treated and ruled on as a traditional motion under Tex. R. Civ. P. 166a(c). Ms. Powell is entitled to judgment as a matter of law as to the claims in the Traditional Motion.

C. DISCOVERY ISSUES

16. On October 10, 2022, the Court held a hearing on the Bar's Motion to Compel. On November 18, 2022, the Court entered an order granting in part the Mar's Motion to Compel ("Order").

17. Ms. Powell fully complied with the Order. Prior to the Order being entered, to wit: on November 11, 2022, before the Order was entered Ms. Powell provided the identity, by bates-label which documents produced were responsive to each request; then on November 23, 2022, provided the privilege log between Ms. Powell and non-client affiants. On November 23, 2022 an email was sent to the Bar stating:

"Regarding the Order signed by Judge Bouressa, dated November 18, 2022 - while the order provides Ms. Powell has until December 19, 2022, to comply, we believe Ms. Powell has fully and completely complied with the items in the Order with the document attached to this communication.

Interrog. 11: list is attached showing: name, date, location and type of

communication between Ms. Powell and any non-client Affiant exchanged prior to the entry of a final order in the litigation in which the non-client Affiant's affidavit was used is on the Privilege Log.

Req. Prod. 11: You were provided a list identifying by bates-label the documents produced by Ms. Powell responsive to each request for production.

Req. Prod. 3: all communications between Ms. Powell and any non-client Affiant during the period described are listed in the attachment, all are being withheld under core work-product privilege and were listed in the Privilege Log produced.

Req. Prod. 5, 6, 7, 8: these were all produced in the initial production in this case (in addition to providing them during the hearing process) and identified in the list sent to you, identifying by bates-label the documents produced by Ms. Powell responsive to each request for production.

All documents withheld in response to any of the items in the order for work-product privilege have been included in the Privilege Log and the list provided today.”

See Exhibit “1” attached hereto.

18. On December 7, 2022, the Traditional Motion was re-set on the submission docket for January 13, 2022. This was, after it was initially set on the submission dockets on August 18, 2022, and then again on November 28, 2022, to accommodate the Bar.

19. On the eve of the submission date, January 12, 2023, the Bar files a Second Motion to Compel, claiming that Ms. Powell had failed to comply with the Order

when on November 23, 2022, Ms. Powell sent the email referenced above to the Bar stating she had complied.

20. The Order was specific about matters listed in the Privilege Log, it holds:

“The Court considered the parties’ arguments concerning attorney-client and work-product privilege and finds as follows: Respondent’s clients have not waived privilege; Respondent has not waived any client’s privilege on behalf of that client; and the Commission has not shown itself entitled to invade such privilege.

Then the Court inserted in handwriting:

“Documents withheld exclusively on the basis of work-product privilege should be included in Respondent’s privilege log. No ruling is made re: those documents, pending any further hearing.”

21. The Bar has had over 160 days to prepare its response and provide evidence to controvert Ms. Powell’s Traditional Motion. The Court should not consider the Bar’s belated arguments Ms. Powell failed to comply with the Order because she, in fact, complied with the Order. Moreover, the Bar has not even alleged the existence of any evidence to support its opposition to the Traditional Motion and there is none. The Bar raises arguments at this late stage because it does not have more than a scintilla of evidence to defeat the Traditional Motion. The Court must grant the Traditional Motion, in all things.

Respectfully submitted,
HOLMES LAWYER, PLLC

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COUNSEL FOR POWELL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been delivered, by efileTexas.gov to all attorneys of record on January 12, 2023.

/s/ Robert H. Holmes
Robert H. Holmes

EXHIBIT “1”

From: rholmes@swbell.net
Sent: Wednesday, November 23, 2022 10:46 AM
To: Kristin Brady; 'Rachel Craig'
Cc: Mike McColloch; Karen Cook
Subject: Commission v. Powell Cause No. DC-22-02562
Attachments: Priv Log Comms Between Powell and Affiants.pdf

Ms. Brady,

Regarding the Order signed by Judge Bouressa, dated November 18, 2022 - while the order provides Ms. Powell has until December 19, 2022, to comply, we believe Ms. Powell has fully and completely complied with the items in the Order with the document attached to this communication.

Interrog. 11: list is attached showing: name, date, location and type of communication between Ms. Powell and any non-client Affiant exchanged prior to the entry of a final order in the litigation in which the non-client Affiant's affidavit was used is on the Privilege Log

Req. Prod.: You were provided a list identifying by bates-label the documents produced by Ms. Powell responsive to each request for production.

Req. Prod. 3: all communications between Ms. Powell and any non-client Affiant during the period described are listed in the attachment, all are being withheld under core work-product privilege and were listed in the Privilege Log produced.

Req. Prod. 5, 6, 7, 8: these were all produced in the initial production in this case (in addition to providing them during the hearing process) and identified in the list sent to you, identifying by bates-label the documents produced by Ms. Powell responsive to each request for production.

All documents withheld in response to any of the items in the order for work-product privilege have been included in the Privilege Log and the list provided today.

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Robert Holmes on behalf of Robert Holmes
Bar No. 9908400
rholmes@swbell.net
Envelope ID: 71743340
Status as of 1/13/2023 9:22 AM CST

Case Contacts

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