

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

MICHIGAN INSTITUTE OF  
UROLOGY, P.C.,

Plaintiff,

vs.

Case No. 2016-143-CB

KIMBERLY KUSHNER,

Defendant.

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CLERK OF COURT  
MICHIGAN

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OPINION AND ORDER

Plaintiff have filed a motion to compel and for sanctions. Defendant has filed a response and requests that the motion be denied.

In addition, Defendant has filed a motion to cancel the creditor's exam at issue in this matter. Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Defendant is one of Plaintiff's former employees. During her employment, Defendant allegedly secretly diverted some of Plaintiff's corporate funds to her own use by forging checks. Upon discovering Defendant's wrongful actions, Plaintiff reported Defendant to law enforcement. On October 2, 2015 the United States Attorney for the Eastern District of Michigan filed charges against Defendant for mail fraud and forfeiture. On December 2, 2015, Defendant plead guilty to felony mail fraud in violation of 18 USC 1341.

On January 15, 2016, Plaintiff filed its complaint in this matter ("Complaint"). In the Complaint, Plaintiff alleges that Defendant converted its funds to her own use

(Counts I (Common Law) and II (Statutory)), engaged in fraudulent conduct (Count III), and was unjustly enriched by her actions (Count IV). On April 22, 2016, the parties executed a consent judgment in the amount of \$1,250,000.00. On May 12, 2016, Plaintiff obtained a subpoena to require Defendant to appear for a creditor's exam. On June 6, 2016, Defendant appeared for the exam. However, Defendant responded to various questions by invoking the Fifth Amendment privilege against self-incrimination. On June 13, 2016, Plaintiff filed its instant motion to compel Defendant to provide responses to the questions she invoked the privilege in connection with, and requests that the Court impose sanctions. Defendant has since filed a response to the motion and a motion to cancel the creditor's exam at issue in this matter. Both motions involve the same issues. The Court has held hearings in connection with both motions and taken the matters under advisement.

## II. Arguments and Analysis

Unlike a criminal defendant's right to refuse to testify, the privilege against self-incrimination does not entitle a person to refuse to provide testimony in a civil action; rather, a person may invoke the privilege only after a potentially incriminating question has been posed. *Larrabee v Sachs*, 201 Mich App 107, 110; 506 NW2d 2 (1993). Once the witness invokes the protection of the Fifth Amendment, it is up to the trial court to determine whether any direct answer could implicate the witness and, on that basis, to either compel the witness to answer or sustain his refusal to do so. *People v. Joseph*, 384 Mich 24, 29–30, 179 NW2d 383 (1970); *People v. Hoffa*, 318 Mich 656, 661–663, 29 NW2d 292 (1947).

A party to a civil action's ability to invoke the Fifth Amendment, and the Court's role in determining whether that right may be invoked was addressed by the Michigan Supreme Court in *In re Grand Jury Proceedings No. 93*, 164, 384 Mich 24, 29; 179 NW2d 383 (1970). Specifically, the Court explained:

[The Fifth Amendment's] protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that he is mistaken. However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

*Id.* at 29-30. [Internal Citations Omitted].

In determining whether an answer may be incriminating, a trial court should keep in mind that an answer does not need to, in and of itself, support a conviction; rather, if the answer could furnish a chain of the link of evidence need in order to prosecute, the invocation of the Fifth Amendment is permissible. *Id.* at 31. However, the tendency to incriminate must be a reasonable one, and an answer may not be withheld because it might possible under some circumstance form part of a crime. *Id.* at 32 [Internal Citation Omitted]

In this case, Plaintiff has not identified any particular question that it contends Defendant improperly responded to by invoking the Fifth Amendment. Further,

Defendant has not provided any explanation whatsoever as to what basis she had for invoking the right not to testify. Consequently, it is impossible to determine whether Defendant could invoke the Fifth Amendment privilege to any or all of the questions he was asked. As a result, the Court is satisfied that an evidentiary hearing must be held to determine which questions, if any, Defendant could respond to by invoking the Fifth Amendment. However, the Court notes that Defendant has previously plead guilty to criminal charges stemming from her theft of money from Plaintiff, and that the ordinary rule is that once a person is convicted of a crime she no longer has the privilege against self-incrimination as to that crime. *Reina v United States*, 364 US 507, 513 (1960). Accordingly, Defendant can only invoke the privilege if the question at issue could be answered in a manner that could implicate Defendant in a crime other than the crime she already plead in connection with.

#### IV. Conclusion

For the reasons set forth above, Plaintiff's motion to compel and for sanctions is hereby set for an evidentiary hearing on **September 16, 2016 at 1:30 pm**. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: AUG 02 2016

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge