

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IMO:)
THE ESTATE OF JAMES VINCENT)
TIGANI, JR., deceased, THE J. VINCENT) C. A. No. 7339-ML
TIGANI, JR., aka JAMES VINCENT TIGANI,)
JR. REVOCABLE TRUST, U/A)
dtd. APRIL 10, 1995)

MASTER'S REPORT
(Motion to Compel)

Oral Draft Report: December 19, 2012
Exceptions Submitted After Briefing: February 18, 2013
Final Report: March 20, 2013

David J. Ferry, Jr., Esquire, Rick S. Miller, Esquire, and Thomas R. Riggs, Esquire, of
Ferry, Joseph and Pearce, P.A., Attorneys for Petitioner Bruce W. Tigani.

Neil R. Lapinski, Esquire and Phillip A. Giordano, Esquire, of Gordon Fournaris &
Mammarella, P.A., Attorneys for Respondent Josephine C. Tigani.

LEGROW, Master

INTRODUCTION

This action involves a petition filed by Bruce W. Tigani (“Bruce”)¹ to remove his mother, Josephine C. Tigani (“Josephine”), as executrix of the estate of James Vincent Tigani, Jr. and trustee of the James Vincent Tigani, Jr. Revocable Trust, Under Agreement dated April 10, 1995. The parties presently are engaged in a period of limited discovery directed toward the issue of whether Josephine had capacity to execute a series of documents that she contends divested Bruce of standing to bring this action. On September 11, 2012, Bruce filed a motion to compel (the “Motion”) that raised two primary issues: (1) whether Bruce could take discovery of Josephine’s attorneys, and (2) the temporal scope of the discovery to which Bruce was entitled. I issued a draft report from the bench on December 19, 2012 granting in part and denying in part the Motion. On December 20, 2012, Bruce filed his notice of exceptions to the draft report (the “Notice of Exceptions”). He took exception to my ruling that Josephine had not waived the attorney-client privilege, as well as to my ruling limiting discovery to Josephine’s capacity to execute the particular documents that form the basis of the standing argument. Bruce also took exception to several rulings on specific discovery requests. For the reasons that follow, I modify my draft report on certain of these issues. This is my final report on the Motion.

¹ I use the parties’ first names for the sake of clarity. No disrespect is intended.

BACKGROUND

Josephine is the trustee of the James Vincent Tigani, Jr. Revocable Trust, Under Agreement dated April 10, 1995 (the “Trust”) as well as the executrix of the estate of James Vincent Tigani, Jr. (the “Estate”). The Trust is the residuary beneficiary of the Estate. Immediately after the death of James Vincent Tigani, Jr. on October 23, 2011, Josephine executed a series of documents that altered her own will and exercised her limited testamentary power of appointment in the Trust in favor of her own revocable living trust (the “October 2011 Documents”). On March 20, 2012, Bruce filed his petition to remove Josephine as executrix and trustee and for an accounting (the “Verified Petition”). About one week later, Josephine moved to dismiss the Verified Petition (the “Motion to Dismiss”).

In April 2012, while the parties were briefing the Motion to Dismiss, Josephine executed the First Amendment to the First Complete Amendment to her trust, with the purpose of removing Bruce as a contingent beneficiary of the Trust (the “April 2012 Documents”). Following argument on the Motion to Dismiss, I ruled that Bruce could conduct limited discovery to investigate whether Josephine had the requisite testamentary capacity when she executed the April 2012 Documents. Bruce propounded discovery requests on June 28, 2012. On July 31, 2012, the same day she responded to Bruce’s discovery requests, Josephine executed a codicil to her will to irrevocably exercise her testamentary power of appointment in the Trust (the “July 2012 document”). At some

time thereafter, Bruce's counsel sent a letter to counsel for Josephine indicating that Josephine's responses to the discovery requests were deficient.²

On September 11, 2012, Bruce filed his Motion to compel responses to Josephine's purportedly deficient discovery responses.³ The Court held oral argument on the Motion on December 19, 2012. At the conclusion of the argument, I made several rulings from the bench. As to Josephine's attorney-client privilege, I ruled that to the extent that she intended to call any of her attorneys to testify with respect to her capacity, she would waive the privilege with respect to that attorney. I also noted that work product associated with any attorney testimony on which Josephine intends to rely at trial may need to be produced, subject to the protections afforded by Rule 26(c)(3), which guards an attorney's mental impressions, conclusions, opinions, and legal theories. Additionally, I ruled that although the permissible scope of discovery includes investigation into Josephine's mental state and health before April 2012, it does not allow for inquiry into her capacity to execute the October 2011 Documents. I explained that because Josephine's mental state and thought processes at the time she executed the October 2011 Documents do not bear on her capacity to execute the April and July 2012 Documents, discovery should be limited to those later documents. Finally, I ruled on the specific interrogatories and document production requests made by Bruce, many of which related to the two aforementioned issues.

² The parties' briefs do not agree on the date of that letter. In his opening brief in this matter, Bruce asserts that the letter was sent on July 31, 2012. In her response brief, Josephine states that the letter was sent on August 17, 2012.

³ On September 25, 2012, Bruce filed an amended motion to compel. This is the operative document for purposes of my draft and final reports.

In his Notice of Exceptions, Bruce primarily requests a broader scope of discovery than I initially permitted, arguing that he cannot measure the progression of what he contends is Josephine's delusionary behavior and conduct without exploring her mental state even before she executed the April 2012 Documents. I agree, and I revise my draft report in this final report to reflect a broader scope of permissible discovery. I will first address the issue of discovery surrounding the October 2011 Documents. I will then detail the boundaries of Josephine's attorney-client privilege and the work product doctrine as they apply to the Motion. Once I have clarified these two exceptions, I will revise as necessary my rulings as to Bruce's specific discovery requests.

ANALYSIS

I. Discovery into the October 2011 Documents

In my draft report, I ruled that investigation into Josephine's mental capacity during the time before she executed the April 2012 Documents was within the permissible scope of discovery, but that discovery into the execution of the October 2011 Documents was not permissible because Josephine was not relying on the October 2011 Documents to advance her standing argument and such investigation would not shed light on Josephine's capacity to execute the April and July 2012 Documents. Upon further reflection, however, that limitation is both artificial and potentially unmanageable, and I therefore revise my ruling.

Court of Chancery Rule 26(b) establishes a liberal standard of discovery, permitting inquiry into any information that "appears reasonably calculated to lead to the

discovery of admissible evidence.”⁴ Josephine has engaged in a multistage process of estate planning that began with the October 2011 Documents. As Bruce argues in his opening brief in support of his exceptions, discovery into the execution of those documents will provide him with a clearer picture of the circumstances leading up to the April and July 2012 Documents, and that information is likely to bear upon Josephine’s capacity to execute the later documents. Indeed, an adequate investigation into Josephine’s mental capacity during the period before she executed the April 2012 Documents will necessarily include an examination of her capacity to execute the October 2011 Documents, which were executed only a few months earlier.

The interdependence of the October 2011 Documents and the April 2012 Documents further persuades me to expand the scope of discovery established in my draft report. The changes Josephine made to her own estate, as well as to the Trust, work together to remove Bruce as a beneficiary. These documents do not stand alone, nor do the actions Josephine took in executing each of them. Therefore, in the course of discovery, it would be difficult for the parties to separate documents and communications relating to the April 2012 Documents from those relating to the October 2011 Documents. For these reasons, I expand the scope of discovery to any non-privileged information that is related to Josephine’s capacity to execute the October 2011 Documents.

⁴ See, e.g., *Pfizer, Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999).

II. Josephine's Waiver of the Attorney-Client Privilege

In the Motion, Bruce argued that Josephine had waived the attorney-client privilege with respect to her capacity to execute the April and July 2012 Documents because (1) Josephine's interrogatory responses revealed that she intended to call several attorneys as witnesses in this action, and (2) the case was the functional equivalent of a will contest, and therefore fell within the exception to attorney-client privilege set forth in Rule 502(b)(2) of the Delaware Uniform Rules of Evidence. In my draft report, I held that Josephine had waived the attorney-client privilege to the extent she intended to call any of her attorneys to testify as to her capacity, and that Bruce therefore was entitled to seek discovery of those attorneys, both through written discovery and deposition.⁵ I further held that the exception set forth in Rule 502(b)(2) did not apply because Josephine is not deceased.⁶

A party cannot use the attorney-client privilege as both a sword and shield by "tak[ing] a position in litigation and then erect[ing] the attorney-client privilege in order to shield itself from discovery by an adverse party who challenges that position."⁷ But Josephine is aiming to do just that by calling her attorneys to testify as to her mental capacity to execute certain estate planning documents and then claiming privilege to prevent Bruce from inquiring into the communications that may form the basis of the

⁵ I granted Josephine time to reconsider her decision to call her attorneys in light of that ruling, and ordered her to submit revised discovery responses within two to three weeks. The revised discovery responses were delayed by the exceptions process, but will be due within two weeks of the date of this final report.

⁶ My ruling regarding the application of Rule 502(b)(2) remains unchanged in my final report.

⁷ *Pfizer Inc.*, 1999 WL 33236240, at *1.

attorney's testimony. In her response brief to Bruce's exceptions, Josephine asserts that Ms. Beste was the attorney of record for the April and July 2012 Documents, and as such, she will be the attorney who testifies about Josephine's capacity to execute those documents. In line with my draft report, I maintain that if Josephine intends to call Ms. Beste to testify at trial, then Josephine has waived the privilege as to Ms. Beste and Bruce is entitled to depose her. I do not, however, intend to imply that the waiver of attorney-client privilege necessarily applies to Ms. Beste alone. As I have expanded the scope of discovery in this ruling to include the October 2011 Documents, Josephine may need to revise the list of attorneys she will call to testify on her capacity to execute those earlier documents. That decision, of course, constitutes a waiver of privilege as to that attorney.

In addition, attorney-client privilege does not attach to all information that could be learned from Josephine's attorneys simply by virtue of that person's status as an attorney.⁸ Bruce argues that Emmanuel Fournaris, one of Josephine's attorneys, is a necessary witness with knowledge of Josephine's state of mind as it relates to her execution of the documents at issue. In support of that position, he points to a March 19, 2011 e-mail that Mr. Fournaris sent to Bruce, in which Mr. Fournaris discussed Josephine's state of mind surrounding her estate-planning actions.⁹ This e-mail is not protected by attorney-client privilege, and information relating to its contents therefore is

⁸ For example, the privilege does not apply to communications between an attorney and his client where the circumstances indicate that the client did not intend the communication to remain confidential. *See Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992). Further, it does not apply to a communication between attorney and client when the attorney is acting in a non-attorney role. *See Texaco, Inc. v. Phoenix Steel Corp.*, 264 A.2d 523, 524 (Del. Ch. 1970) (explaining that the communication is protected by attorney-client privilege only if the attorney is *acting as a lawyer* in connection with that communication") (emphasis added).

⁹ The email is reproduced in Bruce's opening brief on page 7.

discoverable. In addition, as acknowledged by counsel for Josephine at oral argument, Mr. Fournaris represented Josephine as her business advisor in the family business. Any information regarding, or impressions of, Josephine's mental state that Mr. Fournaris may have gathered while serving in that role also is not protected by privilege.¹⁰ For these reasons, Bruce is permitted to conduct discovery into the contents of the March 19, 2011 e-mail Mr. Fournaris sent him, as well as Mr. Fournaris's knowledge of Josephine's mental capacity to the extent that such knowledge was obtained from Mr. Fournaris's work as a business advisor to Josephine.

An additional waiver of the attorney-client privilege occurred while the parties were briefing the exceptions to the draft report. Josephine produced to Bruce's counsel an expert report by Dr. Robert L. Sadoff, M.D., who apparently will testify on Josephine's behalf regarding her capacity. Dr. Sadoff interviewed Peter Gordon, Esq., as part of his examination of Josephine's capacity, and in his report he relays Mr. Gordon's opinion of Josephine's mental state, noting that Mr. Gordon felt that Josephine has "no problem with her cognition" and that she "understands what he tells her" about her estate planning.¹¹ Dr. Sadoff relies on Mr. Gordon's opinion to form part of the basis of his expert opinion. Josephine cannot hope to pass off Mr. Gordon's opinion as part of the expert report while maintaining her attorney-client privilege as to him. To the contrary, by including Mr. Gordon's impressions of Josephine's mental capacity in an expert report, Josephine has waived the privilege as to Mr. Gordon's knowledge of her mental

¹⁰ See *Texaco, Inc.*, 264 A.2d at 524.

¹¹ Petitioner's Reply Br. Ex. A.

capacity, and therefore, Bruce may depose Mr. Gordon as to his knowledge of this issue.¹²

In line with the expansion of the scope of discovery, I extend my ruling on related work product to include work product that relates to the October 2011 Documents. I caution, however, that Josephine will only waive attorney-client privilege by injecting an attorney's testimony into the trial. As such, the work product of those attorneys who testify on her behalf will remain protected by Court of Chancery Rule 26(c)(3), which protects mental impressions, conclusions, opinions, or legal theories of that attorney concerning the litigation. This means that attorney work product is subject to the same limitations as those I laid out in my draft report. Privileged work product created post-litigation must be added to Josephine's privilege log due to the on-going nature of Josephine's estate planning.

III. Bruce's Specific Discovery Requests

In accordance with the above modifications to my draft report, I adjust my rulings as to each of Bruce's specific discovery requests as needed. As to Interrogatory No. 12, and Josephine's failure to hand over a complete privilege log, I expect that the added clarity of this final report will allow Josephine to now produce a full privilege log that

¹² See *Marceau Investments v. Sonitrol Holding Co.*, C.A. 12065, 1991 WL 137146 at *2 (Del. Ch. July 2, 1991) (explaining that the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each opinion, become discoverable by virtue of Court of Chancery Rule 26(b)(4)(A)(i)). Even if the underlying facts and opinions would otherwise be privileged, the privilege claim is waived to the extent that the party determines to call an expert witness to testify based upon those facts and opinions. *Stearrett v. Newcomb*, 521 A.2d 636, 638 (Del. Super. 1986).

includes any privileged documents relating to the October 2011 Documents that previously were excluded. Documents and correspondence responsive to Bruce's Request for Production No. 11 may now fall within the scope of discovery to the extent that such correspondence relates to the October 2011 Documents. Similarly, Bruce's Requests for Production No. 14-21 may be affected by this expansion of the scope of discovery. Requested items that are responsive in that they relate to the October 2011 Documents, or to the testimony of any attorneys added to testify on Josephine's capacity surrounding the execution of the October 2011 Documents, must be produced. Finally, I expect that if counsel for Josephine has any "counterindicating facts" regarding the completeness of Josephine's responses to Requests for Production Nos. 19 and 20, they will dig deeper to make sure she has produced all responsive documents.¹³ Simply asking a client if she has responsive documents does not satisfy an attorney's discovery obligations.

CONCLUSION

Other than the modifications set forth above, I affirm the rulings in my draft report. Exceptions to this report are stayed pending a ruling on Josephine's capacity to execute the documents in question.

I also would like to use this opportunity to alert the parties to an issue that came to my attention while the Notice of Exceptions was under submission. Between approximately 2008 and 2011, I was a patient at the dental practice owned by James

¹³ *Preferred Investment Services, Inc. v. T&H Bail Bonds, Inc.*, C.A. No. 5886-VCP, TRANSCRIPT 16:14 (Del. Ch. Jan 5, 2013).

Tigani III. I ceased being a patient in that practice when my insurance changed after I was appointed as a Master in this Court. I had not connected the names until recently, when I was reviewing old records in my home office. I am not certain what role, if any, James Tigani III will play in this case. After reviewing the Delaware Judge's Code of Judicial Conduct, I have no concerns about my ability to fairly or impartially judge this matter, nor do I believe that there is a basis to recuse myself from this case. If either party has concerns, however, or would like to discuss this issue, counsel jointly should contact my chambers to arrange a teleconference.

Respectfully submitted,

/s/ Abigail M. LeGrow
Master in Chancery