

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

BRUCE R. MILLER and :
DEAN D. LAVIGNE, : C.A. No. 04C-12-002 WLW
 :
 :
 Plaintiffs, :
 :
 :
 v. :
 :
 :
 JACK LINGO, INC., OCEAN ATLANTIC :
 AGENCY, INC., ROBERT V. WITSIL, :
 JR., KATHLEEN B. DEOUL and ESTATE :
 OF NEAL DEOUL, :
 :
 :
 Defendants. :

Submitted: May 19, 2006
Decided: June 8, 2006

ORDER

Upon Plaintiffs' Motion to Quash or Modify Subpoena Issued by Defendant Robert V. Witsil, Jr. Directed to Shawn Tucker, Esquire or in the Alternative for a Protective Order. Granted in Part; Denied in Part.

Henry A. Heiman, Esquire of Heiman Gouge & Kaufman, LLP, Wilmington, Delaware and Eugene M. Lawson, Jr., Esquire of Fletcher Heald Hildreth, P.L.C., Arlington, Virginia; attorneys for the Plaintiffs.

Cynthia G. Beam, Esquire of Reger Rizzo Kavulich & Darnall, LLP, Wilmington, Delaware; attorneys for Defendant Jack Lingo, Inc.

C. Scott Reese, Esquire of Cooch & Taylor, P.A., Wilmington, Delaware; attorneys for the Defendant Ocean Atlantic Agency, Inc.

Daniel A. Griffith, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorneys for Defendant Robert V. Witsil, Jr.

James D. Taylor, Jr., Esquire of Klett Rooney Lieber & Schorling, Wilmington, Delaware; attorneys for Defendant Kathleen B. Deoul.

WITHAM, R.J.

Bruce Miller, et al. v. Jack Lingo, Inc., et al.
C.A. No. 04C-12-002 WLW
June 8, 2006

This motion was to be heard on May 19, 2006. At the time of oral argument, the Court determined that the issues presented by the parties would be decided on the pleadings filed. This is the Court's decision.

Plaintiffs, Bruce Miller and Dean LaVigne, filed a Motion to Quash or Modify the Subpoena Issued for Shawn Tucker, Esq. ("Mr. Tucker"), or in the Alternative for a Protective Order. Plaintiffs assert that Mr. Tucker was their counsel in matters concerning the property involved in this case and, therefore, a client-attorney privilege exists, which Plaintiffs are not waiving. Plaintiffs also argue that the subpoena was invalid because it was not properly served, did not allow a reasonable time for compliance, and requires disclosure of privileged information.

Defendants contend that Plaintiffs and Mr. Tucker suggested the March 17 date, so they served Mr. Tucker with a subpoena seeking his deposition on that date. Defendants also contest the claim that Mr. Tucker's communication is protected by the client-attorney privilege, since the information they seek pertains to an "opinion letter" produced by Mr. Tucker discussing what he believed to be the zoning status of the disputed property. Defendants argue that even if a privilege does exist, it does not cover this communication because Mr. Tucker is essentially an expert.

For the reasons set forth below, Plaintiffs motion should be *granted* in part and *denied* in part.

Discussion

Superior Court Civil Rule 45(c) says, in relevant part, "(3)(A) On a timely motion, the Court shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance, (ii) requires disclosure of privileged or other protected matter

Bruce Miller, et al. v. Jack Lingo, Inc., et al.

C.A. No. 04C-12-002 WLW

June 8, 2006

and no exception or waiver applies, or (iii) subjects a person to undue burden.” Superior Court Civil Rule 45(b) controls service of subpoenas and requires that they be served by the Sheriff or any person over 18 who is not a party to the lawsuit. Additionally, Superior Court Civil Rule 26(b)(1) states, in pertinent part, “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Rule 26(c)(1) and (4) also permit this Court to make an order that the discovery not be had, or that the scope of discovery be limited if the moving party shows good cause.

In the case *sub judice*, it appears that the information Defendants seek from Mr. Tucker does not relate to his representation of Plaintiffs. The subpoena appears to be broad and seeks information that is privileged. The subpoena also was not served properly. However, quashing the subpoena would only prolong this Court’s decision regarding the discovery request. Therefore, instead of quashing the subpoena, the most expedient way of handling this matter would be to issue a protective order, confining the deposition questions to the opinion letter. In an email between Plaintiffs’ and Defendants’ counsel, Defendants’ counsel provided a non-exhaustive list of questions he intended to ask Mr. Tucker. Those questions are: (1) what documentation he reviewed as referenced in page 1 of his report; (2) what information he was looking for in his research; (3) the content of his discussions with Richard Ruof, as referenced in page 1 of the report; and (4) the factual bases of his conclusion that the property was not zoned O-1. If discovery could be limited to questions along

Bruce Miller, et al. v. Jack Lingo, Inc., et al.

C.A. No. 04C-12-002 WLW

June 8, 2006

those lines, the issue of privilege should not be a concern.

Therefore, instead of quashing the subpoena, this Court will grant Plaintiffs' motion for a protective order and confine the questions to those regarding the opinion letter and only documents that pertain to the letter, are not privileged and may be produced.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

oc: Prothonotary

xc: Order Distribution