

I. INTRODUCTION

By Order dated October 28, 2008 (the "October 28 Order," attached hereto as Exhibit A), this Court stated that it intends to adopt the "Alternative Ruling" in Magistrate Judge Denlow's June 9, 2008 Memorandum Order and Opinion (the "Magistrate Order"). However, this Court granted Defendants until November 12, 2008 to file their objections to that Alternative Ruling. As set forth below, the Alternative Ruling is in error and should not be adopted by this Court because Plaintiff put all documents relating to his (and his attorneys') pre-filing investigations at issue in this case. Accordingly, Plaintiff should be ordered to produce all documents on his privilege logs that pre-date the filing of his Complaint.

Alternatively, even if this Court believes that Plaintiff has not yet put these documents at issue, the privilege question cannot finally be decided at this time. In such event, "Plaintiff must make his own decision as to what potentially privileged communications to reveal to support his case." (October 28 Order, p. 2.) Accordingly, if the Court adopts the Alternative Ruling, Defendants reserve the right to reassert waiver based on what happens in discovery, summary judgment or other proceedings with respect to the defenses that have at various times been referred to as the "absurd result," "unclean hands" or "fraud on the court" defenses (the "Defenses").

II. PROCEDURAL HISTORY¹

A. The Privilege Dispute

On October 30, 2007, this Court stated that the Defenses are very persuasive. (10/30/07 Transcript, attached hereto as Exhibit C, pp. 2-3 & 6; see also, October 28 Order, p. 1 --

¹ The Procedural History set forth herein is limited to those events that relate directly to the Alternative Ruling. A more comprehensive Procedural History was set forth in Defendants' Response to Plaintiff's Objection to the Magistrate Order (at pp. 1-5) -- which is attached hereto as Exhibit B and incorporated by reference as if set forth fully herein.

“Defendants’ ‘unclean hands’ argument [is] very persuasive.”) Accordingly, this Court bifurcated this case to allow for discovery and a summary judgment process regarding the Defenses before any discovery on Plaintiff’s malpractice claims. (Ex. C, pp. 2-3 & 7-8.)

Following bifurcation, Defendants served written discovery regarding the Defenses on Plaintiff and Spehar Capital, LLC (“SC”). Plaintiff objected to this discovery and filed a Motion for a Protective Order (the “Protective Motion”), based on the work product doctrine. As a result of the Protective Motion, this Court ordered Plaintiff to produce a privilege log identifying the documents that he claims are privileged. This Court also referred to Magistrate Denlow any discovery issues arising out of Plaintiff’s privilege log designations.

Thereafter, Plaintiff produced his privilege logs -- which asserted the attorney-client privilege and work product doctrine with respect to many documents responsive to Defendants’ discovery requests. Defendants objected to Plaintiff’s privilege log designations because, among other things, Plaintiff put these documents “at issue” in this case. Magistrate Denlow considered the parties’ privilege dispute and, on June 9, 2008, issued the Magistrate Order.

B. The Magistrate Order

The Magistrate Order contains a “Primary Ruling” and an “Alternative Ruling.” In relevant part, the Primary Ruling required Plaintiff and SC to produce all documents on the privilege logs that pre-date the filing of the Complaint in this case. The Primary Ruling reasoned that those documents were put “at issue” by this Court -- by virtue of its analysis of the Protective Motion and Defendants’ motion to reconsider the denial of their motion to dismiss.

The Magistrate Order also contained an “Alternative Ruling” that, by its own terms, would apply only if this Court did not intend to put the pre-filing documents “at issue” and reversed the

Primary Ruling. In relevant part, the Alternative Ruling held that: (1) “Plaintiff has affirmatively stated that his pre-filing investigations and that of his attorneys led him to file this suit in good faith;” but (2) Plaintiff has not yet committed an “at issue” waiver because he has not yet “referred to specific documents or communications between himself and his attorney to support this assertion.” (Mag. Ord, p. 16; emphasis added.)

C. Objections To The Magistrate Order

Plaintiff timely objected to the Primary Ruling, and that objection was fully briefed and submitted to this Court. Defendants timely objected to the Alternative Ruling. However, because the Alternative Ruling (and Defendants’ objection thereto) were contingent on the outcome of Plaintiff’s objection to the Primary Ruling, Defendants asked that briefing on their objection to the Alternative Ruling be stayed until this Court ruled on Plaintiff’s objection to the Primary Ruling.

In its October 28 Order, this Court sustained Plaintiff’s objection to the Primary Ruling, stating that:

This Court did not intend to inherently put all privileged communications regarding [Plaintiff’s] motivation for filing the instant lawsuit at issue by opening discovery on the “unclean hands” issue. The Court merely opened discovery regarding [Plaintiff’s] motivation for filing this lawsuit, and [Plaintiff] must now make his own decisions as to what potentially privileged communications to reveal in order to support his case. . . . Therefore, this Court rejects Judge Denlow’s [P]rimary [R]uling. (October 28 Order, p. 2.)

This Court’s rejection of the Primary Ruling triggered the Alternative Ruling and Defendants’ objection thereto. And, as will now be shown, Defendants’ objection to the Alternative Ruling should be sustained -- and Plaintiff and SC should be ordered to produce all documents that pre-date the filing of the Complaint -- because Plaintiff voluntarily and affirmatively put those

documents at issue in this case. In so doing, Plaintiff waived any attorney-client privilege or work product protection that might otherwise apply to those documents.

III. ARGUMENT

An “at issue” waiver of the attorney-client privilege and/or work product doctrine occurs when the privilege holder: (A) voluntarily injects a factual or legal issue into the case; and (B) truthful resolution of that issue requires an examination of privileged communications. Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987). See also, Garcia v. Zenith Electronics Corp., 58 F.3d 1171, 1175 at n. 1 (7th Cir. 1995) (“attorney-client privilege is generally waived when the client asserts claims or defenses that put his attorney’s advice at issue in the litigation”).

The rationale for at issue waiver is as follows:

[I]t would be entirely unfair for a case to turn on an issue upon which one party has no knowledge and is barred from access to the necessary information while the other party is able to use the information to establish its claim while shielding it from disclosure.

Abbott Labs. v. Alpha Therapeutic Corp., 200 F.R.D. 401, 410-11 (N.D. Ill. 2001). In short, the at issue waiver ensures that a litigant cannot use the privileges as both a shield and a sword.

But, that is exactly what happened here. Specifically, as will now be shown: (A) Plaintiff voluntarily injected into this case his and his attorneys’ pre-filing investigations as the purported basis for filing this case in good faith; and (B) the truthful resolution of this issue requires an examination of Plaintiff’s purportedly privileged communications that were part of those alleged investigations.

A. Plaintiff Injected The Pre-Filing Investigations As An Issue In This Case

No one disputes that Plaintiff affirmatively argued that the Defenses should be rejected because he filed this case in good faith based upon his and his attorneys' pre-filing investigations. Indeed, the Magistrate Order so holds, and Plaintiff did not object to that holding. (See Mag. Ord., p. 16 -- "Plaintiff has affirmatively stated that his pre-filing investigations and that of his attorneys led him to file this suit in good faith.") (Emphasis added.)

This unobjected-to holding in the Magistrate Order is entirely consistent with Plaintiff's position from the get-go. In response to Defendants' motion to dismiss, Plaintiff affirmatively argued that it was his decision to file this case -- signifying that he had a good faith basis to do so. (Docket No. 25, pp. 25-26.) Likewise, in response to Defendants' motion to reconsider the denial of their motion to dismiss, Plaintiff affirmatively argued that he is pursuing this case in good faith based upon his pre-filing investigation:

- [I]f Plaintiff decided to file this case because he believes that the claims against [D]efendants are meritorious (which he did), then this case cannot be a fraud. (Docket No. 53, p. 6; emphasis added.)

Finally, Plaintiff affirmatively argued in his Protective Motion that, as a result of his and his attorneys' pre-filing investigations, he filed this case in good faith:

- At the conclusion of his (and his attorneys') pre-lawsuit investigation, Plaintiff concluded that meritorious claims exist against at least [Defendants] and Charles Trautner. Thus, Plaintiff filed this case. (Docket No. 72, ¶6.)

As such, there is no question that Plaintiff voluntarily injected into this case the issue of whether he filed this case in good faith based upon his and his attorneys' pre-filing investigations.

B. Truthful Resolution Requires Examination Of Privileged Materials

Plaintiff's argument that he filed this case in good faith based upon the pre-filing investigations cannot be truthfully resolved without examining the entire content of those investigations -- including any privileged material therein. Indeed, an examination of those materials is the only way this Court can truthfully resolve the questions that naturally arise out of Plaintiff's argument. These questions include, without limitation, the following:

- Did an investigation actually take place?
- If so, what did that investigation consist of?
- Was it a legitimate investigation that critically examined conflicting or contradictory information -- or did Plaintiff accept as true any information supporting his claim while ignoring (or not even looking for) any information that refuted it?
- Did Plaintiff do any investigation other than to accept as true everything he was told by SC -- who is the party funding this case and stands to gain the most from it?
- What was the result of the investigation and would an objective Bankruptcy Trustee have filed this case given the result of the investigation?
- Did Plaintiff consider moving to vacate the underlying judgment that SC obtained against CMGT?
- Given all the information available to Plaintiff, was it objectively reasonable for him to decide to pursue this malpractice case instead of (or without first seeking to) vacate the underlying judgment?

Without an examination of the documents relating to the purported pre-filing investigations, this Court cannot truthfully answer any of these questions. Rather, as it stands right now, none of these questions will be fully examined or truthfully resolved. Instead, if the Affirmative Ruling stands, all we will ever know is what is contained in the non-privileged documents that Plaintiff

chooses to produce and whatever other non-privileged information is revealed through other discovery. But, since Plaintiff has affirmatively raised, and relied upon, the pre-filing investigations as the basis for his decision to file this case, Plaintiff cannot now choose what evidence will be made available to resolve that issue. Instead, by affirmatively raising the issue, Plaintiff has put all of the relevant evidence at issue.

C. Not Necessary For Plaintiff To Rely On A Specific Document

Although the Magistrate Order acknowledges that Plaintiff voluntarily injected the pre-filing investigations as an issue in this case, the Alternative Ruling holds that no at issue waiver occurs until Plaintiff relies on a specific privileged document to support this argument:

[I]f Plaintiff wishes to use documents or other privileged communications from its pre-filing investigations to show that he filed the lawsuit in good faith, then he will waive the privilege. Plaintiff asserts, however, that he does not intend to use such communication[s] to defend these allegations. Therefore, because Plaintiff has not yet used specific communications to defend the allegations, and because Plaintiff states that he does not intend to do so, the Court finds Plaintiff has not yet put these privileged communications at issue, and has accordingly not waived any communications that are otherwise protected by [the] attorney-client privilege or the work product doctrine. (Mag. Ord., pp. 17-18.)

Respectfully, this result would allow Plaintiff to use the privilege as a sword and shield and defeat the rationale for the at issue waiver doctrine set forth in Abbott Labs. Specifically, the Alternative Ruling means that the outcome of the Defenses may turn on an issue about which Plaintiff and/or SC control all of the evidence. Yet, Plaintiff is now asserting the privilege to prevent access to all of that evidence and, instead, to restrict the record to the non-privileged information that Plaintiff chooses to use in support of its arguments. If the Alternative Ruling stands, Defendants will never have access to all of the evidence regarding Plaintiff's pre-filing investigation/good faith

argument and will have no opportunity to discover if there is information in the supposedly privileged files that contradicts the argument that Plaintiff injected into this case.

Consider the following scenario that would seem to be permitted by the Alternative Ruling. Plaintiff could take the stand and testify that he filed this case in good faith based upon his and his attorneys' pre-filing investigation. If he said nothing more, Plaintiff would not have relied upon any specific privileged communications and, therefore, under the Alternative Ruling, no waiver will have occurred. But, if this happens, Plaintiff will clearly create the impression -- even if he does not specifically so testify -- that his attorneys did a legitimate investigation and that, after that investigation, those attorneys blessed this case and had no reservations about it being filed. Yet, without access to the documents and other "privileged" information relating to the investigation, Defendants will be at a significant disadvantage and will lack the full ability to challenge that investigation.

In this regard, this case is no different than a claim to impose liability against an employer for the sexual harassment of one its employees by another employee. In that context, the employer-defendant frequently attempts to avoid liability by arguing that it consulted counsel and conducted a good faith investigation after becoming aware of the situation. In Johnson v. Rauland-Borg Corp., 961 F. Supp. 208 (N.D. Ill. 1997), for example, the employer-defendant asserted that it acted reasonably by employing outside counsel to investigate the matter. Id. at 210. The Johnson court held that the assertion of this defense resulted in an at issue waiver:

Whether the [employer] acted reasonably will depend on the advice it received from [outside counsel] following her investigation. Since the [employer] placed the reasonableness of its conduct following notification of [the plaintiff's] sexual harassment allegations at issue; it must reveal the legal advice it received. Id.

And, this waiver occurs merely by placing the investigation at issue -- even before specific privileged materials are relied upon. This issue was directly confronted in Harding v. Dana Transport, Inc., 914 F.Supp. 1084 (D.N.J. 1996). There, the employer-defendant tried to defeat this type of sexual harassment claim by asserting that it conducted an investigation involving outside legal counsel. The employer-defendant in Harding specifically disclaimed any reliance upon the specifics of that investigation and stated that it was relying only on the fact that the investigation took place. Id. at 1093. Even with this limitation, the Harding court found that the employer-defendant waived the attorney-client privilege and work product doctrine by putting the investigation at issue.

The Harding court reasoned that “[w]ithout having evidence of the actual content of the investigation, neither the plaintiffs nor the fact-finder at trial can discern its adequacy.” Id. at 1096. In the end, the Harding court held that an employer-defendant relying on an investigation by outside counsel puts at issue, among other things: what information was conveyed between the party and counsel; were all the material facts provided to counsel; did counsel give a well-informed decision; and was counsel’s advice followed. Id. at 1095. As noted above, these are the exact questions that are raised by Plaintiff’s reliance on his and his attorneys’ pre-filing investigations in this case. None of these questions can be answered unless all of the materials from the investigations are produced.

Here, Plaintiff chose to voluntarily inject the investigations as an issue in this case. Indeed, Plaintiff already used that argument to prevail on Defendants’ motion to dismiss, Defendants’ motion to reconsider and Plaintiff’s Protective Motion. Having already asserted and obtained relief based upon this issue, Plaintiff has waived the attorney-client privilege and work product doctrine.

Another apt analogy is a case where the defendant asserts an advice of counsel defense. There, the mere assertion of the advice of counsel defense -- even without reliance upon a specific

privileged document -- results in a waiver because the only way to prove that defense is to introduce the advice -- which is privileged -- into evidence. Blackhawk Molding Co. v. Portola Packaging, Inc., No. 03 C 6060, 2004 WL 2211616, at *1 (N.D. Ill. Oct. 1, 2004) (“a party who relies on an advice-of-counsel defense waives attorney-client privilege with respect to the subject matter of the legal advice relied upon”). Courts have likewise found waiver in the context of other claims that, by definition, implicate privileged materials. See Transp. Ins. Co. v. Post Express Co., No. 91 C 5750, 1996 WL 32877, at *3 (N.D. Ill. Jan. 25, 1996) (waiver following assertion of claim for bad faith denial of insurance claim); Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr., Inc., No. 97 C 3805, 1998 WL 387705, at *2 (N.D. Ill. June 24, 1998) (waiver following assertion of affirmative defense that necessarily implicated attorneys’ files relating to formation of a company). Accordingly, Plaintiff’s “good faith” response to the Defenses -- which can be proven only by introducing the content of the pre-filing investigations -- results in a waiver.

D. Case Law Does Not Require Reliance On A Specific Privileged Communication

1. The Dexia and Beneficial Franchise Cases

The Alternative Ruling (at 17) cites two cases -- Dexia Credit Local v. Rogan, 231 F.R.D. 268 (N.D. Ill. 2004) and Beneficial Franchise Co., Inc., 205 F.R.D. 212 (N.D. Ill. 2001) -- in support of its holding that an at issue waiver does not occur until Plaintiff actually relies upon a specific privileged communication. Respectfully, these two cases do not apply because neither one holds that a party can maintain the privilege after affirmatively injecting into the case an issue that can be truthfully resolved only by examining privileged communications.

Dexia: Dexia involved a fraud claim that was not based upon, and did not by definition implicate, privileged materials. However, the defendant argued that privileged materials should,

nonetheless, be produced because they were relevant to the case and vital to its defense. Dexia, 231 F.R.D. at 275. The Dexia court rejected that at issue waiver argument because the plaintiff did not seek to use any of the documents that it claimed were privileged. Id.

In contrast, Plaintiff here is attempting to defeat the Defenses by affirmatively raising an issue that is based upon, and by definition, implicates his attorneys' pre-filing investigation and communications. As such, unlike the plaintiff in Dexia, Plaintiff put these purportedly privileged documents at issue, and they are relevant and vital to an issue affirmatively raised by Plaintiff.

Beneficial Franchise: In Beneficial Franchise, the court did not even address the question of whether a party must rely upon a specific communication before waiver occurs. Rather, the issue in that case was whether the defendant's mere denial of the plaintiff's allegation of bad faith -- i.e., without an affirmative argument that the defendant acted in good faith -- was enough to cause a waiver. The Beneficial Franchise court held that it was not.

Again, that is not the issue before this Court. If Plaintiff here had just denied the Defenses, then under Beneficial Franchise, he arguably may have been entitled to assert the privileges. But, Plaintiff chose to go further. As the unobjected-to portion of the Magistrate Order (p. 17) establishes, "Plaintiff has affirmatively stated that his pre-filing investigations and that of his attorneys led him to file this suit in good faith." Because Plaintiff is not just denying the Defenses, but is affirmatively trying to defeat them based on his "good faith"/pre-filing investigations argument, an at issue waiver has occurred and Beneficial Franchise does not apply.

2. Cases Cited In Dexia And Beneficial Franchise

Dexia and Beneficial Franchise rely principally upon two cases -- Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc., 301 Ill. App. 3d 336 (1998) and Hayes v. Burlington No. and Santa Fe

Railway Co., 323 Ill. App. 3d 474 (2001) -- neither one of which applies here. Both Fischel & Kahn and Hayes address arguments that an at issue waiver occurred because the party asserting the privilege raised an issue about which privileged documents were relevant. However, in both cases, the claim raised was not based upon, and did not necessarily turn on, the privileged documents or the information contained therein. Rather, those documents and that information was merely relevant to the claim. That is much different than this case, in which Plaintiff's attempt to defeat the Defenses is expressly premised on purported pre-filing investigations that consist primarily of the very documents that Plaintiff now claims are privileged.

3. Other Cases

Finally, the Alternative Ruling and Plaintiff have cited several other cases relating to the at issue waiver doctrine but, as will now be shown, none of them applies.

Claffey v. River Oaks Hyundai, 486 F. Supp. 2d 776 (N.D. Ill. 2007): The Claffey plaintiff alleged a willful violation of the Fair Credit Reporting Act ("FCRA"). In response, the defendant asserted that it did not act willfully because it adopted "reasonable procedures" to ensure compliance with the FCRA. The plaintiff argued that the defendant's "reasonable procedures" argument waived the privilege because one of the "reasonable procedures" was consultation with an attorney. Like Plaintiff here, the defendant in Claffey argued that there was no waiver until it relied on a specific privileged communication to support its argument.

The Claffey court held that the defendant could not create the impression that it relied on advice from its counsel without waiving the privilege:

Were [the defendant] allowed to create this impression but still maintain its attorney-client privilege, it would in effect be using the privilege as both a shield and a sword, which is not permitted. [The defendant] cannot have it both ways; it cannot seek

refuge in consultation with counsel as evidence of its good faith yet prevent [the plaintiff] from discovering the contents of the communication. If, therefore, [the defendant] actually relies on any documents or other evidence that would tend to suggest that its procedures included consultation with counsel, it will be deemed to have waived its attorney-client privilege.

Id. at 779 (internal citations, alterations and quotation marks omitted; emphasis added).

This analysis helps Defendants. Here, any reference to Plaintiff's reliance on his attorneys' pre-filing investigation would create the impression that Plaintiff's attorneys blessed this case and/or that their investigation supports the Complaint. But, under Claffey, Plaintiff is not allowed to create this impression without waiving the privilege. Accordingly, Plaintiff has already waived the privilege by relying upon his attorneys' pre-filing investigation in an attempt to defeat the Defenses.

Murata Man. Co. v. Bel Fuse, Inc., No. 03 C 2934, 2007 WL 781252 (N.D. Ill. Mar. 8, 2007): This case is inapplicable because the Murata court stated twice that a waiver did not occur because the issues raised did not rely upon, or require examination of, any privileged communications. Id. at *7-8. In contrast, as set forth above, Plaintiff's "good faith"/pre-filing investigation argument can be truthfully resolved only by examining the privileged documents.

E. Practical Implications

Finally, the holding that there is no at issue waiver unless and until Plaintiff actually relies upon a specific protected communication could give rise to a logistical nightmare. Plaintiff could conceivably wait until an evidentiary hearing or trial to decide to waive the privilege by introducing a specific protected communication into evidence. What happens then? Surely, Plaintiff would not be allowed to ambush Defendants at trial, leaving Defendants with only the opportunity to cross-examine Plaintiff about the privileged communications during trial. But, what is the remedy? Will

the Court adjourn the trial and send the case back to Day One of discovery to allow Defendants to do discovery regarding all of Plaintiff's otherwise privileged communications?

IV. RESERVATION OF RIGHTS

A. Available From Another Source

Defendants argued to Magistrate Denlow that, even if no at issue waiver occurred, the work product doctrine still does not apply because Defendants have: (1) a substantial need for these materials; and (2) no alternative means of obtaining substantially equivalent information. (See Fed. R. Civ. P. 26(b)(3)(A)(ii).) The Alternative Ruling rejected that argument because "Defendants might be able to obtain evidence regarding this issue elsewhere." (Mag. Ord., p. 29.) Among other things, the Alternative Ruling suggests that Defendants can depose Plaintiff, SC and various CMGT shareholders. Defendants will do so and will follow Magistrate Denlow's directive to try to secure substantially equivalent information from another source. However, Defendants reserve their right to re-assert that some or all of the documents listed on Plaintiff's privilege logs are subject to discovery under Fed. R. Civ. P. 26(b)(3)(A) if Defendants cannot obtain substantially equivalent information elsewhere.

B. If No At Issue Waiver

Finally, if this Court concludes that no at issue waiver has occurred at this time, then Plaintiff "must now make his own decisions as to what potentially privileged communications to reveal in order to support his case." (October 28 Order, p. 2.) Accordingly, Defendants reserve the right to re-assert that Plaintiffs committed an at issue waiver based upon the evidence that Plaintiff discloses, or relies upon, during future discovery, summary judgment or other proceedings relating to the Defenses.

V. CONCLUSION

For the foregoing reasons, the Alternative Ruling should be rejected, and Plaintiff should be ordered to immediately produce all documents that pre-date the filing of the Complaint.

Respectfully submitted,

MAYER BROWN LLP AND RONALD GIVEN

By: /s/ Stephen Novack
One Of Their Attorneys

CERTIFICATE OF SERVICE

Stephen Novack, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Defendants' Objection to the "Alternative Ruling" in Magistrate Judge Denlow's June 9, 2008 Memorandum Opinion And Order to be served through the ECF system upon the following:

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on this 12th day of November, 2008.

/s/ Stephen Novack