Order Form (01/2005)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Virginia M. Kendall	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 C 5486	DATE	2/20/2009
CASE TITLE	GROCHOCINSKI vs. MAYER BROWN ROW & MAW et al		

DOCKET ENTRY TEXT

Having been entered in error, this court's order dated January 30, 2009 [doc # 124] is vacated. This Court therefore adopts Judge Denlow's alternative ruling.

■[For further details see text below.] Notices mailed by Judicial staff.

STATEMENT

Plaintiff David Grochocinski ("Grochocinski"), in his capacity as Chapter 7 Trustee for the bankruptcy estate of CMGT, Inc., brought suit against Defendants Mayer Brown Rowe & Maw LLP, Ronald B. Given and Charles v. Trautner (collectively "Defendants"), alleging legal malpractice. Defendants brought a Motion to Dismiss, arguing in part that Grochocinski's case should be dismissed because it amounted to a fraud on the Court, or, as this Court has framed it, because he filed the suit with "unclean hands." This Court denied the Motion to Dismiss and the Motion to Reconsider that followed; however, it found Defendants' "unclean hands" argument very persuasive. As such, this Court bifurcated the case and ordered the parties to conduct discovery solely on the issue of "unclean hands" so that this Court, with all the relevant facts in front of it, could decide whether the case should be dismissed on that basis. Grochocinski then brought a Motion for a Protective Order, and following discussion of some of the relevant privilege issues, this Court ordered Grochocinski to prepare a privilege log listing any document to which he wanted to assert privilege and submit it to Magistrate Judge Denlow for his review. In addition, this Court referred all issues regarding the discovery of privilege matters to Judge Denlow.

Grochocinski argued in Judge Denlow's Court that documents related to his pre-lawsuit investigation and mental impressions of his case were privileged and thus not discoverable. Defendants argued that such documents were not privileged because the pre-lawsuit investigation had been put at issue and because Grochocinski waived the attorney-client and work product privileges. Judge Denlow issued a Memorandum Opinion and Order on June 9, 2008 that included both a primary ruling and an alternative ruling that would come into effect if this Court refused to adopt the primary ruling. In the primary ruling, Judge Denlow granted the protective order regarding communications that took place after the filing of the lawsuit but denied the protective order regarding communications that preceded the filing of the lawsuit. In so ruling, Judge Denlow held that this Court's orders placed the communications preceding the filing of the instant lawsuit "at issue" and thus waived any privilege that would otherwise apply. Grochocinski objected to Judge Denlow's primary ruling, arguing that

this Court did not and in fact could not order the production of privileged documents. This Court agreed, set aside the primary ruling and stated its intent to adopt the alternative ruling. Defendants now object to Judge Denlow's alternative ruling.

In the alternative ruling, Judge Denlow found that Grochocinski did not put his pre-filing investigations "at issue" and therefore did not waive any privilege that otherwise applied. Specifically, Judge Denlow noted that a party does not waive privilege by simply denying allegations of bad faith. "A waiver of attorney-client privilege occurs only when the party to whom the privilege belongs affirmatively puts at issue the specific communications, documents, or information on which the privilege attaches." As such, Judge Denlow held that Grochocinski had not waived attorney-client privilege because although he had stated that his pre-filing investigations led him to file the suit in good faith, he had not yet relied on those communications in defending the allegations of bad faith.

Under Federal Rule of Civil Procedure 72, when a magistrate judge issues a written order on a nondispositve matter and a party files a timely objection, this Court should consider the objection and set aside any part of the order that is clearly erroneous or contrary to law. Fed.R.Civ.P. 72(a). Here, Defendants argue that it is not necessary for Grochocinski to put specific documents or communications at issue for the at issue waiver to apply and that Grochocinski put the privileged communications at issue by affirmatively arguing that he had a good-faith basis to file his case based upon his attorneys' pre-filing investigations. In the alternative, Defendants reserve their rights to assert either 1) that they are entitled to the privileged information because substantially equivalent information is not available elsewhere and 2) that Grochocinski has waived the privilege by putting privileged matters at issue if either situation arises. Judge Denlow's alternative ruling is supported by applicable caselaw, and this Court therefore adopts the alternative ruling but recognizes the Defendants' reservation of rights.

Under Illinois law, attorney client privilege may be waived when attorney-client communications are put "at issue" by the party holding the privilege. *Fischer & Kahn, Ltd. v. New Van Straaten Gallery, Inc.*, 703 N.E.2d 634, 636 (Ill.App.Ct. 1998). To waive attorney-client privilege, the privilege-holder must do more than simply deny allegations but rather must "inject a new factual or legal issue into the case." *Claffey v. River Oaks Hyundai*, 486 F.Supp.2d 776, 778 (N.D.Ill. 2007) *citing Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987). Although the authority is not uniform, some courts have interpreted the "at issue" waiver doctrine narrowly, holding that "to waive the privilege, the party to whom the privilege belongs must affirmatively put at issue the specific communication, document or information to which the privilege attaches." *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 275 (N.D.Ill. 2004) (no at issue waiver where Dexia did not seek to use any of the documents for which it asserted privilege) *citing Beneficial Franchise Co., Inc. v. Bank One*, 205 F.R.D. 212, 216 (party must attempt to prove a claim or defense by disclosing attorney-client communication in order to waive privilege) (N.D.Ill. 2001); *Claffey*, 486 F.Supp.2d at 779-79 (waiver occurs only where a party uses privileged communications to defend itself or attack its opponent); *Murata Manf. Co., Ltd. v. Bel Fuse, Inc.*, No. 03 C 2934, 2007 WL 781252, at *7 (N.D.Ill. March 8, 2007) (no waiver of privilege where responses to interrogatories did not rely on the substance of confidential communications); *contra Lama v. Preskill*, 818 N.E.2d 443, 450 (Ill.App.Ct. 2004) (plaintiff who argued that the statute of limitations did not apply to her medical malpractice claim due to delay in discovery of her injuries waived privilege as to documents from a meeting with her lawyer while she was still in the hospital) *but see In re Estate of Wright*, 881 N.E.2d 362, 367 (refusing to apply *Lama* outside of its stated facts). Applying this rule effectively prevents parties from selectively disclosing privileged documents that are to their benefit while concealing detrimental documents. *Dexia*, 231 F.R.D. at 276 *citing Beneficial*, 205 F.R.D. at 216.

Therefore it was not clear error for Judge Denlow to require that Grochocinski put specific

communications at issue in order to find a waiver of attorney-client privilege, and Defendants do not argue that Grochocinski did in fact put specific communications at issue. This Court therefore adopts Judge Denlow's alternative ruling. Defendants' reservations of rights, however, are well taken, and they may reassert their claims of necessity or at issue waiver if and when they deem such assertions warranted as discovery on the "unclean hands" issue proceeds.

So ordered.