

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

DAVID GROCHOCINSKI, not individually)	
but solely in his capacity as the Chapter 7)	
Trustee for the bankruptcy estate of)	
CMGT, INC.,)	
)	
Plaintiff,)	
)	No. 06 C 5486
v.)	
)	Judge Virginia M. Kendall
MAYER BROWN LLP, f/k/a MAYER)	
BROWN ROWE & MAW LLP and)	
RONALD B. GIVEN)	
)	
Defendants.)	

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

Defendants Mayer Brown LLP, f/k/a Mayer Brown Rowe & Maw LLP, and Ronald B. Given (together, the "Defendants"), by their attorneys, respectfully submit the following response in opposition to Plaintiff's Motion for Protective Order (the "Motion").

BACKGROUND

1. Plaintiff filed its two-count legal malpractice complaint against Defendants on August 23, 2006. Defendants moved to dismiss the Complaint for reasons that included defenses that the parties and the Court have at various times referred to as the "unjust result," "unclean hands" or "fraud on the court" defense. The remainder of this Response will refer to it as the "unclean hands defense."

2. Plaintiff has argued that the unclean hands defense should be rejected because Plaintiff filed this case with a good faith belief that its malpractice claims are meritorious. For example, Plaintiff has argued as follows:

- [Defendants] also fail to present any evidence that [Plaintiff] acted fraudulently or in bad faith. (Plaintiff's Response to Lawyer Defendants' Motion to Dismiss at p. 26);
- if [Plaintiff] filed this case with a good-faith belief that the malpractice claims are meritorious, then this case cannot be a fraud (Plaintiff's Response in Opposition to Defendants' Motion to Reconsider and/or for Other Relief at p. 1.);
- the critical element to defendants' fraud theory is not whether Spehar has a financial interest in this case -- it is whether [Plaintiff] knowingly filed meritless or untrue claims (id., p. 5);
- absent evidence that [Plaintiff] knowingly pled false allegations in the complaint, this case cannot be a fraud (id., p. 5);
- if [Plaintiff] decided to file this case because he believes that the claims against defendants are meritorious (which he did), then this case cannot be a fraud (id., p. 6); and
- [a]t the conclusion of his (and his attorneys') pre-lawsuit investigation, Plaintiff concluded that meritorious claims exist against at least [Defendants] (Plaintiff's Motion for Protective Order at p. 3).

3. By Order dated June 28, 2007, the Court denied the bulk of Defendants' motion to dismiss. In so doing, the Court relied, in part, on Plaintiff's argument that he had not acted in bad faith or fraudulently in filing the Complaint. (6/28/07 Order at p. 7.)

4. On July 13, 2007, Defendants filed their motion to reconsider. Although, after full briefing and argument, the Court denied that motion, the Court -- by Order dated October 30, 2007 -- bifurcated this action to first allow for fact discovery and summary judgment motions regarding the unclean hands defense.

5. Pursuant thereto, Defendants promptly initiated such discovery. Among other things, on November 20, 2007, Defendants served a third-party subpoena for documents and deposition testimony upon Spehar (the "Spehar Subpoena"). (A copy of the Spehar Subpoena is included with

Exhibit 1 to Plaintiff's Motion.) Among other things, the Spehar Subpoena seeks the production of documents that Spehar gave to Plaintiff before the Complaint was filed and documents relating to any pre-filing investigation done by Plaintiff.

6. After service of the Spehar Subpoena, Spehar's counsel contacted Defendants' counsel to request a two week extension of time to produce responsive documents. Defendants' counsel agreed to this extension with the understanding that Spehar would appear for deposition testimony no later than January 18, 2008.

7. At no time did Spehar's counsel indicate that Spehar was in possession of responsive documents that might implicate the work-product doctrine relative to the present malpractice action against Defendants. The only potential privilege objection identified by Spehar's counsel related to documents or communications regarding the separate lawsuit that Spehar filed years ago against CMGT in California state court that ultimately caused CMGT's bankruptcy.

8. Prior to filing this Motion -- and despite the fact that Plaintiff's counsel contacted Defendants' counsel to obtain an extension of time to respond to the discovery directed to Plaintiff -- Plaintiff's counsel did not inform Defendants' counsel that Plaintiff had any objection relating to the Spehar Subpoena. Specifically, Plaintiff's counsel did not contact Defendants' counsel to discuss the issues raised by its Motion as is required by Local Rule 37.2 and the standing Case Management Procedures of the Court.

9. The Motion seeks a protective order and argues that Plaintiff should be allowed to pre-review any documents responsive to the Spehar Subpoena to determine if Plaintiff believes that the work-product doctrine applies to any of the documents. Only after Plaintiff's pre-review would the responsive documents be produced to Defendants.

10. Ironically, Plaintiff's Motion actually bolsters the unclean hands defense because it as much as admits that Spehar is the real party in interest asserting this malpractice claim against Defendants.

11. As will now be discussed, the Motion is deficient and should be denied for at least two reasons. First, Plaintiff has not complied with Local Rule 37.2 or the standing Case Management Procedures of the Court, both of which require informal efforts to resolve a discovery dispute before a motion is filed.

12. Second, the work-product doctrine cannot possibly apply because it was waived by Plaintiff when he interjected into this case the scope and content of his pre-filing investigation -- including his communications with Spehar -- by affirmatively arguing that the unclean hands defense should be rejected because this case was filed with a good faith belief that Plaintiff's malpractice claims have merit. By interjecting his own state of mind at the time of filing, Plaintiff has placed his own (and his attorneys') investigation and mental impressions at the heart of the unclean hands defense.

ARGUMENT

Local Rule 37.2

13. As a threshold matter, Plaintiff's Motion should be denied because Plaintiff failed to comply with Local Rule 37.2. This rule provides that the Court will not hear any discovery motion brought under Fed. R. Civ. P. 26 or 37 "unless the motion includes a statement (1) that after consultation in person or by telephone and good faith attempts to resolve differences they are unable to reach an accord, or (2) counsel's attempts to engage in such consultation were unsuccessful due to no fault of counsel's."

14. Likewise, this Court's standing Case Management Procedures set forth on this Court's web page state as follows:

The Court believes that parties can and should work out most discovery disputes and discourages the filing of discovery motions. The Court will not hear or consider any discovery motion unless the movant has complied with the "meet and confer" requirement of Local Rule 37.2. The motion must state with specificity when and how the movant complied with Local Rule 37.2.

15. Here, Plaintiff's Motion contains no statement that Plaintiff even attempted to contact Defendant's counsel about the issues raised in the Motion -- much less a statement that there was a good faith effort to resolve this dispute or that an informal conference could not take place.

16. Indeed, as noted above, Plaintiff did not even inform Defendants' counsel that Plaintiff had any objection to the Spehar Subpoena before filing the Motion. On this basis alone, Plaintiff's Motion should be denied.

Waiver

17. Alternatively, Plaintiff's Motion should be denied on the merits because, for the reasons that follow, the work-product doctrine cannot possibly apply to any documents responsive to the Spehar Subpoena.

18. Application of the work-product doctrine in federal case is governed by federal law. Abbott Labs. v. Alpha Therapeutic Corp., 200 F.R.D. 401, 405 (N.D. Ill. 2001); Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc., 176 F.R.D. 269 (N.D. Ill. 1997).

19. It is Plaintiff's burden to prove that the work-product doctrine applies. Allen v. Chicago Transit Authority, 198 F.R.D. 495, 499 (N.D. Ill. 2001) ("burden is on the discovery opponent to establish that the work product doctrine immunizes the documents at issue from

discovery”).

20. In his Motion, Plaintiff speculates that Spehar may have possession of documents that Plaintiff claims are protected by the work-product doctrine. For example, Plaintiff speculates that Spehar may have possession of documents that include or repeat the questions that Plaintiff’s attorneys asked Spehar as part of their pre-filing investigation. (Mot., ¶4.) Plaintiff also speculates that Spehar may have other memoranda prepared by Plaintiff or Plaintiff’s attorneys that reflect their mental impressions concerning the malpractice claims against Defendants. (*Id.* at ¶5.)

21. Because Plaintiff has not identified the documents in question, whether the work-product doctrine would even be implicated, as Plaintiff speculates, **is an issue that cannot be decided at this time, and Defendants respectfully reserve their rights with respect thereto.** Nevertheless, Plaintiff’s Motion can and should be denied at this time because the work-product doctrine cannot possibly apply under the circumstances. That is because it was waived when Plaintiff placed its pre-filing investigation at issue in this case.

22. The work-product doctrine is waived when the party asserting it has placed its work-product at issue. Abbott Labs., 200 F.R.D. at 410; Ins. Corp. of Ireland, Ltd. v. Board of Trustees of Southern IL Univ., 937 F.2d 331, 334 n. 3 (work-product doctrine waived when party put its state of mind at issue). The at-issue waiver applies “when a holder relies on a legal claim or defense, the truthful resolution of which will require examining confidential communications.” Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987).

23. The rationale for the at-issue waiver is as follows:

› [The at-issue waiver] is also a matter of common sense as it 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., 200 F.R.D. at 410-11.

24. The facts in Pyramid are directly analogous to the facts in this case. In Pyramid, the plaintiff brought a claim under a part of the Illinois Franchise Disclosure Act that had a one-year statute of limitations. The defendant argued that the claim was not timely because the plaintiff knew about its purported claim more than one year before filing as evidenced by the fact that the plaintiff met with a lawyer more than a year before filing its claim. In response to the defendant's limitations defense, the plaintiff asserted that it was not made aware of any claim under the Disclosure Act when it met with that lawyer.

25. To pursue its limitations defense, the defendant in Pyramid sought discovery regarding the communications between the plaintiff and its lawyer. Among other things, the defendant sought documents regarding what the plaintiff told the lawyer and what the lawyer told the plaintiff more than a year before the case was filed. Under those facts, the Pyramid court held that the plaintiff waived both the attorney-client privilege and work-product doctrine by placing its communications with its lawyer at issue.

26. A directly analogous factual scenario is before this Court. In this case, Defendants raised the unclean hands defense. In response, Plaintiff's have affirmatively argued that the unclean hands defense must be rejected because he filed this case with a good-faith belief that his claims were meritorious. In so doing, Plaintiff has, at the very least, placed at issue the scope and result of his pre-filing investigation. But, that is exactly the type of information that Plaintiff now says is protected by the work-product doctrine.

27. For example, Plaintiff suggests that the questions he asked Spehar are protected. But,

the scope and content of the questions Plaintiff asked Spehar are directly relevant to whether or not Plaintiff conducted an adequate investigation before filing his Complaint. Indeed, since Plaintiff has relied upon his pre-filing investigation to argue that the case was filed in good faith, Defendant must be allowed to discover what the pre-filing investigation consisted of -- including, without limitation what questions Plaintiff asked (and did not ask) of the fact witnesses that were contacted.

28. Likewise, Plaintiff suggests that its pre-filing memoranda are protected. However, because these memoranda are part of the basis for Plaintiff's alleged good faith belief that his claims are meritorious, Plaintiff has placed the preparation, and content, of these memoranda at issue.

29. As noted by Abbott Labs., a key rationale for the at-issue waiver is that a party cannot place a matter at issue and then avoid discovery about that matter. Here, Plaintiff has placed his subjective beliefs and impressions of his malpractice claims at issue. Thus, it would be inherently unfair for Plaintiff to now block production of the documents that contain and/or helped form those beliefs and impressions.

Conclusion

30. For these reasons, Plaintiff's Motion for Protective Order should be denied and Defendants should be granted such other and further relief as is appropriate.

Respectfully submitted,

MAYER BROWN LLP AND RONALD GIVEN

/s/ Stephen Novack
One Of Their Attorneys

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CERTIFICATE OF SERVICE

Stephen Novack, an attorney, hereby certifies that he caused a true and correct copy of the foregoing **Defendants' Response to Plaintiff's Motion for Protective Order** by electronically filing the document with the Clerk of Court using the ECF system to:

Edward T. Joyce
Arthur W. Aufmann
Robert D. Carroll
EDWARD T. JOYCE & ASSOC., P.C.
11 S. LaSalle St.
Chicago, IL 60603

on this 11th day of December, 2007.

/s/ Stephen Novack