

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

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 ROWE & MAW LLP,)	
RONALD B. GIVEN, and CHARLES W.)	
TRAUTNER,)	
)	
Defendants.)	

PLAINTIFF’S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

I. Introduction

1. Through the course of moving to dismiss this case and moving for reconsideration of this Court’s denial of their motion, Defendants have made a variety of allegations to support what they have characterized as Plaintiff’s “fraud on the court” or Plaintiff’s “unclean hands.” However, the only such allegation that has raised any concern by the Court is Defendants’ two-part allegation that: (a) Plaintiff could have easily vacated the default judgment obtained by Spehar in California; but (b) instead of doing so, Plaintiff elected to let that judgment stand so that he could bring a malpractice case and earn a fee for himself.

2. That is the limited context in which this Court allowed discovery to go forward on the “unclean hands” issue. In no way did this Court invite Defendants to pursue discovery directed at their various other allegations, such as that Plaintiff filed this case without conducting a sufficient pre-suit investigation of the merits of his claims. Indeed, this Court has never expressed any concern about the extent of Plaintiff’s pre-suit investigation, as evidenced by the facts that: (a) Plaintiff’s allegations of malpractice are based in part on e-mail communications

attached as exhibits to Plaintiff's complaint, and (b) this Court concluded that the e-mails are consistent with Plaintiff's allegations. See, e.g., Memorandum Opinion and Order at 13-14:

While the Lawyer Defendants advised CMGT via email after the California Lawsuit had been filed that, with respect to the lawsuit, they "[did] not represent CMGT and [did] not expect to," the Complaint alleges that the Lawyer Defendants nevertheless provided legal advice regarding that lawsuit both before and after sending that email to CMGT. Indeed, Exhibit 16 to the Complaint is an email from Given to Franco and others providing an assessment of the Spehar litigation and the "Purported Spehar TRO." That email instructs the recipients to "[f]eel free to contact [Franco] or me with any questions...you might have regarding the current situation." (Cplt., Exh. 16 thereto). That the Lawyer Defendants advised CMGT with respect to the dispute with Spehar - even though the Agreement purports to limit the scope of their representation of CMGT - suggests that an attorney-client relationship arose between the Lawyer Defendants and CMGT with respect to the Spehar dispute and a concomitant duty of care on the part of the Lawyer Defendants.

3. Even though the parties apparently have differing views about the allowable scope of Defendants' "unclean hands" discovery, that is not the reason why Plaintiff has filed the instant motion for protective order (the "motion"). Plaintiff's motion does not raise any dispute over the scope of allowable discovery. Instead, the motion simply presents an issue of procedural mechanics--i.e., how Plaintiff intends to raise issues of work product privilege with respect to documents that Defendants have subpoenaed from Spehar.¹

4. Plaintiff believes that his proposal--to review Spehar's documents before they are produced, create a privilege log and then file a motion for protective order regarding the documents listed on the log--is fair and reasonable. Nevertheless, Plaintiff did not want to presume that this procedure would be acceptable to the Court. Consequently, Plaintiff filed the motion to obtain this Court's approval.

¹ Accordingly, Defendants argument regarding Local Rule 37.2 is irrelevant.

5. In response, Defendants never address the fairness or reasonableness of Plaintiff's proposed procedure. Instead, Defendants seek to argue the merits of whether the work product privilege applies to documents which Plaintiff has not yet listed on his privilege log. Defendants' argument is premature and, as discussed herein, meritless.

6. Defendants argue that Plaintiff waived the work product privilege with respect to all pre-lawsuit work product material by arguing, in response to Defendants' motion to reconsider, that this case cannot be a fraud because Plaintiff filed it in good-faith. Defendants' argument takes Plaintiff's response out of the context in which it was made, and falsely presumes that Plaintiff put privileged work product at issue. Defendants' argument also gives the "unclean hands" issue an overly broad and unsupported definition. Resolution of the "unclean hands" issue does not, as Defendants argue, require disclosure of all of Plaintiff's pre-lawsuit work product material.

7. Thus, Defendants' argument that Plaintiff waived the work product privilege as to all of his pre-lawsuit work product documents should be rejected.

II. Relevant Facts

8. On August 23, 2006, Plaintiff filed his complaint against Defendants for legal malpractice.

9. Thereafter, Defendants moved to dismiss Plaintiff's complaint, arguing that Plaintiff's allegations fail to establish the elements of a legal malpractice claim. Defendants also argued that this case is a "fraud on the judicial system."

10. In support of their "fraud" defense, Defendants relied on: (a) the California default judgment that Spehar obtained, (b) the fact that Plaintiff did not file a motion to vacate the default, and (c) the agreement between Spehar and Plaintiff (approved by the bankruptcy

court) pursuant to which Spehar agreed to pay certain litigation costs. From these facts, Defendants speculated that Plaintiff could have easily vacated the California default judgment, but he intentionally neglected to do so because he decided to instead join forces with Spehar to bring the malpractice case and obtain a fee.

11. Defendants' speculation is dead wrong. In fact, Plaintiff could *not* have obtained an order vacating the default judgment. Under California law, a default judgment can be vacated only under two circumstances: first, if the defaulting party [CMGT] can demonstrate to the court that the judgment was entered as a result of the party's (or the party's attorney's) mistake, inadvertence, surprise, or *excusable* neglect; or second, if the defaulting party [CMGT] obtains an affidavit from its attorney [Defendants] attesting to the attorney's mistake, inadvertence, surprise or neglect. Cal. Civ. Proc. Code § 473(b) (2006). Here, CMGT's failure to appear in Spehar's California lawsuit was not because of mistake, inadvertence, surprise or excusable neglect; it was because of Defendants' negligence. Moreover, Defendants never would have provided Plaintiff with an affidavit attesting to their negligence. (*See*, Defendants' Responses to Plaintiff's Requests to Admit, attached hereto as Exhibit A.)

12. When this Court denied the bulk of Defendants' motion to dismiss, the Court explained that "[i]t would be inappropriate to levy so harsh a sanction as dismissal upon the Trustee absent clear and convincing evidence that the Trustee – and not just Spehar – orchestrated a fraud on the judicial system. At this point, the only evidence before this Court is a copy of the facially valid default judgment entered by the California Court." (Op. at pg. 7.)

13. After the Court denied Defendants' motion to dismiss, Defendants filed a motion to reconsider, arguing that the Court did not understand that Spehar is the "real party in interest." (Mot. to Reconsider at pp. 1-2.) In response, Plaintiff argued that even if Spehar is the "real

party in interest,” the Court correctly concluded that Defendants must prove that Plaintiff committed a fraud on the judicial system. In that regard, Plaintiff argued that even if Spehar is the “real party in interest,” Defendants cannot prove that this case is a fraud on the court without proving that Plaintiff lied in his Complaint or filed this case in bad-faith. In reply, Defendants asserted that Plaintiff’s good-faith argument was irrelevant because they were not challenging the Court’s denial of their “fraud on the court” argument. (Reply in Support of Mot. to Reconsider at pp. 1-6.) According to Defendants’ reply, the Court should have dismissed Plaintiff’s complaint regardless of whether Plaintiff committed a fraud or acted in good-faith because the outcome of this litigation will be “unjust” if Plaintiff prevails. (*Id.*)

14. The only purported “evidence” Defendants presented in support of their “fraud on the court” and “unjust result” defenses was the California default judgment, the absence of a motion to vacate the default and the bankruptcy court-approved agreement between Spehar and Plaintiff. Defendants never presented any evidence or credible argument that Plaintiff lied in his Complaint, failed to sufficiently investigate his claims or does not believe that his claims have merit. Moreover, this Court has never expressed any concern over that non-issue.

15. Instead, during the hearing and ruling on Defendants’ motion to reconsider, the Court expressed concern about Plaintiff’s decision not to file a motion to vacate the California default judgment. The Court then ordered limited discovery to address whether Plaintiff’s decision was based on a good faith belief that the motion would be futile, or a bad faith plan to let the judgment stand and pursue the malpractice case in order to make a fee. This motion does not seek resolution of a dispute over that discovery--it seeks approval of Plaintiff’s proposed procedure for asserting the work product privilege to the extent that it applies to the documents subpoenaed by Defendants.

III. Plaintiff Has Not Waived the Work-Product Privilege

16. Defendants argue that Plaintiff has completely waived the work-product privilege by placing his and his attorney's work product documents "at issue" in this case. In support of their argument, Defendants rely on the so-called "at issue waiver" doctrine.

17. An "at-issue waiver" does not occur simply by the assertion of a claim or defense; rather, 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. *Quality Croutons, Inc. v. George Bakeries, Inc.*, No. 05 C 4928, 2006 WL 2375460, at * 4 (N.D.Ill. Aug. 14, 2006.) Stated another way, a waiver occurs by: (a) asserting a claim or defense, and (b) attempting to prove that claim or defense by disclosing or describing a privileged document. *Beneficial Franchise Company, Inc. v. Bank One, N.A.*, 205 F.R.D. 212, 216 (N.D.Ill. 2001).

18. According to Defendants, Plaintiff put all of his (and his attorney's) pre-lawsuit work product at issue by arguing (in response to Defendants' motion to reconsider) that, even if Spehar is the "real party in interest," Plaintiff did not commit a fraud on the court because he filed this case with a good-faith belief that the malpractice claims are meritorious. As previously explained (see ¶13), this is the argument that Defendants claimed was irrelevant to their motion to reconsider. Now, all of a sudden, this argument--which has nothing to do with Plaintiffs' decision not to file a motion to vacate in California--is supposed to establish a blanket waiver? Defendants are clearly grasping at straws.

19. The simple fact is that Plaintiff has not attempted to prove any claim or defense by disclosing or describing a privileged document. Because Plaintiff has not attempted to prove

a claim or defense by putting specific privileged material at issue, Defendants' argument that Plaintiff has waived the work product privilege should be rejected.

20. Finally, because Defendants devoted significant attention to *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.*, Plaintiff will briefly address that case. Contrary to Defendants' assertion, *Pyramid* is not analogous to the instant case. In *Pyramid*, the plaintiff affirmatively alleged that the statute of limitations was tolled by the so-called "discovery rule." In support of that assertion, the plaintiff alleged facts regarding (a) information it learned from its attorneys, and (b) when it learned that information from its attorneys. The court therefore concluded that the plaintiff had put at issue certain defined communications with its former attorneys by attempting to defeat the statute of limitations. In contrast here, Plaintiff has not placed at issue any specific, defined work product documents.

21. In sum, no case stands for the proposition that a plaintiff waives the work product privilege as to pre-lawsuit work product material by arguing, in response to an accusation that he has orchestrated a fraud on the court, that he filed his case in good faith.

IV. CONCLUSION

For all of the reasons stated herein and in Plaintiffs' motion, Plaintiff's motion for a protective order should be granted.

Dated: December 12, 2007

Respectfully submitted,
DAVID GROCHOCINSKI, not individually,
but solely in his capacity as the Chapter 7
Trustee for the bankruptcy estate of
CMGT, INC.
BY: /s/ Robert D. Carroll
Plaintiff's attorneys

Edward T. Joyce
Arthur W. Aufmann
Robert D. Carroll
EDWARD T. JOYCE & ASSOC., P.C. - Atty No. 32513
11 South LaSalle Street, Ste., 1600

CERTIFICATE OF SERVICE

The undersigned attorney, certifies that on December 12, 2007, he caused **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER** to be served upon

Stephen Novack
Mitchell L. Marinello
Steven J. Ciszewski
NOVACK AND MACEY LLP
100 N. Riverside Plaza
Chicago, IL 60606

by electronically delivering a copy through the Court's CM/ECF filing system

and

Kenneth A. Franklin
RODI POLLOCK PETTKER CHRISTIAN & PRAMOV
444 South Flower Street, Suite 1700
Los Angeles, California 90071-2901

by next day U.P.S. service.

/s/ Robert D. Carroll