UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No.: 9:17-bk-07843-FMD
Chapter 7

Gabriel C. Murphy,

Putative Debtor.
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ORDER GRANTING IN PART AND DENYING IN PART DEBTOR'S MOTION FOR DETERMINATION THAT DOCUMENTS PRODUCED BY CREDITORS ARE NOT SUBJECT TO PRIVILEGE

THIS CASE came on for hearing on January 11, 2018, of Debtor's *Motion for Determination that Documents Produced by Creditors Are Not Subject to Privilege* (Doc. No. 68) (the "Motion"). Due to the possibility that the documents at issue are protected by the attorney-client privilege, the Motion was filed under seal with access restricted to the Court, counsel for parties to the dispute, and the Office of the United States Trustee.[1]

A. Facts

This involuntary bankruptcy was initiated by petitioning creditors Investment Theory, LLC, Digital Technology, LLC, and Guaranty Solutions Recovery Fund 1, LLC (collectively, the "Petitioning Creditors").[2] Debtor contests the involuntary bankruptcy, and a trial is scheduled on Debtor's Motion to Dismiss[3] in late February 2018.

In preparation for trial, Debtor served requests for production on Petitioning Creditors. On December 29, 2017, Petitioning Creditors produced documents and e-mails responsive to Debtor's request for production. A week later, on January 5, 2018, counsel for Petitioning Creditors, Mr. Thames, sent a letter (the "Clawback Letter") to Debtor's counsel, Mr. Zinn,[4] stating that the documents produced included the inadvertent disclosure of seven e-mail communications that are subject to the attorney-client privilege. These e-mails are Bates-stamped as TMH00498 - TMH00503. Mr. Thames requested that Mr. Zinn return or destroy these documents.

Debtor contends that some of the subject e-mails are not protected by the attorney-client privilege because they were copied to third parties and that the attorney-client privilege was waived because Petitioning Creditors failed to take steps to prevent the inadvertent disclosure.

At the January 11, 2018 hearing, Mr. Thames advised the Court that he personally reviewed all of the documents for production, including a lengthy e-mail chain, over a busy holiday week and inadvertently failed to exclude the seven e-mails at issue. Mr. Thames also stated that due to the intervening holiday, he did not realize his inadvertent disclosure until a week later and immediately sent the Clawback Letter.

At the conclusion of the January 11, 2018 hearing, the Court instructed Debtor to file with the Court the request for production to which Debtor considered the seven e-mails at issue to be responsive. Mr. Thames was instructed to file a privilege log, and the Court took the matter under advisement.

Debtor filed his First Request for Production of Documents (the "Request for Production") with the Court.[5] Paragraph 22 of the Request for Production requests Investment Theory, LLC, to:

> Produce copies of all documentations and correspondence between you and the Other Parties, which relates to: (i) Debtor; or (ii) Bankruptcy Litigation; or (iii) Investment Theory Judgment; or (iv) Guaranty Solutions Judgment; or (v) Investment Theory; (vi) Guaranty Solutions; or (vii) Crowd Shout, Ltd.; or (viii) Marital Dissolution Action, from January 1, 2013 to the present.

[1] *See* Debtor's Emergency Motion to File Paper and Pleading Under Seal (Doc. No. 64) and Order Granting Emergency Motion for Authority to File Paper and Pleading Under Seal (Doc. No. 65).
[2] Doc. No. 1.
[3] Doc. No. 7.
[4] Doc. No. 68, Exhibit B.
[5] Doc. No. 71.

"Other Parties" are defined in the document production request both by name and as including the parties' "representatives or attorneys."

As directed by the Court, Investment Theory, LLC, ("Investment Theory") filed a privilege log.[6] The privilege log contains a preliminary statement advising the Court that Investment Theory had timely responded to the Request for Production and had objected to paragraph 22 of the Request for Production on the grounds that it was "over-broad, legally irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence." Investment Theory also advises the Court that Michael Connolly is the principal for Investment Theory, and that Ted Scott is Michael Connolly's administrative assistant.

In its privilege log, Investment Theory asserts privileges, including the attorney-client privilege, for a series of e-mail communications including the seven e-mails at issue here.

B. Analysis

Although Debtor concedes that the disclosure of the subject e-mails was inadvertent, he argues that some are not protected by the attorney-client privilege because they were copied to third parties and that the attorney-client privilege was waived because Petitioning Creditors failed to take steps to prevent the inadvertent disclosure.

Debtor contends that state privilege law applies. A claim of privilege in federal court is resolved by federal common law, unless the action is a civil proceeding and the privilege is invoked with respect to an element of a "claim or defense for which state law supplies the rule of decision."[7] Where, as here, a court's jurisdiction is invoked based upon a federal question even where there are pendent state law claims, federal law of privilege governs.[8] Because the applicable Florida law and the federal common law on the issues of attorney-client privilege are so substantially similar, the Court's determination is the same under either analysis.[9]

The attorney-client privilege protects from disclosure confidential documents and communications between a client and the client's attorney that were made for the purpose of obtaining or rendering legal advice.[10] The Florida attorney-client privilege is codified in section 90.502, Florida Statutes. Section 90.502 provides that the attorney-client privilege applies to confidential communications between a lawyer and client made during the rendition of legal advice to the client. "Client" is a defined term and includes any person or corporation who consults with a lawyer for the purpose of obtaining legal advice.[11]

With the exception of one e-mail discussed below, the subject e-mails were either to or from Mr. Connolly and his attorneys. Generally, the e-mails discuss the strategy behind scheduling dates and times for depositions in pending litigation and efforts to collect on a judgment. These e-mails are communications between a client and his attorney and are protected from production by the attorney-client privilege.

Although Debtor argues that the communications are not privileged because Ted Scott was included on some of the e-mails, a communication that is shared with the client's agent does not destroy the attorney-client privilege when it is "in furtherance of the rendition of legal services to the client" and to "[t]hose reasonably necessary for the transmission of the communication."[12] This principle—that the privilege is not waived when another professional is communicated with in furtherance of legal advice—is commonly recognized as the "agency exception."[13] This agency exception has been recognized to apply to secretaries and law

[6] Doc. No. 73.
[7] Fed. R. Evid. 501.
[8] *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992) ("Courts that have confronted this issue in the context of the discoverability of evidence have uniformly held that the federal law of privilege governs even where the evidence sought might be relevant to a pendent state claim.")
[9] *In re Int'l Oil Trading Co., LLC*, 548 B.R. 825, 831 (Bankr. S.D. Fla. 2016).
[10] *Upjohn Co. v. United States*, 449 U.S. 383, 399, 101 S. Ct. 677, 687, 66 L.Ed.2d 584 (1981).
[11] Fla. Stat. § 90.502(1)(b).
[12] Fla. Stat. § 90.502(1)(c).
[13] *See e.g.*, *Young v. Taylor*, 466 F.2d 1329, 1332 (10th Cir. 1972); *Royal Bahamian Ass'n, Inc. v. QBE Ins. Corp.*, 2010 WL 3637958 (S.D. Fla. Sept. 20, 2010).

clerks.[14] Based on the record before it and the fact that Ted Scott is Mr. Connolly's administrative assistant, the Court concludes that Ted Scott is Mr. Connolly's agent and that the communications between Mr. Connolly, his attorney, and his agent, Ted Scott, were reasonably necessary to further the transmission of the communications.

The single e-mail communication that is excepted from this analysis is an e-mail from Debtor's state court counsel, Lauren Heatwole, to Mr. Connolly's attorney requesting possible deposition dates, document TMH00501.[15] Because this communication is between counsel and opposing counsel it is not a protected communication.[16] To the extent that the document Bates-stamped TMH00501 includes a second e-mail that is protected by the attorney-client privilege, it shall be redacted.

Having determined that most of the e-mails are protected communications, the Court next considers whether Investment Theory's counsel waived the privilege by failing to take adequate steps to protect the documents from disclosure. Under Florida law, courts typically look at five factors in determining whether a disclosure was inadvertent: (i) the reasonableness of precautions taken to prevent inadvertent disclosure; (ii) the number of inadvertent disclosures; (iii) the extent of the disclosure; (iv) any delay and measure taken to rectify the disclosures; and (v) whether the overriding interests of justice would be served by relieving a party of its error.[17] Federal Rule of Evidence 502 adopts similar factors.[18]

Here, each of these factors weighs in favor of a finding that the privilege has not been waived. At the hearing, Mr. Thames said that he personally reviewed all of the documents for production. Of the hundreds of documents, only seven e-mails were inadvertently disclosed. The Court finds that by personally reviewing all of the documents to be produced, Mr. Thames took adequate steps to protect the disclosure of privileged information. The number of inadvertent disclosures was small relative to the volume of the production. Mr. Thames also stated that due to the intervening holiday, he realized the disclosure a week later. He stated that upon this realization he immediately sent the Clawback Letter. The Court finds that there was no delay in taking actions to rectify the disclosure.

Therefore, the Court finds that with the exception of the document Bates-stamped TMH00501, the e-mails are protected communications, and the privilege has not been waived by virtue of the inadvertent disclosure.

Accordingly, it is

ORDERED:

1. That the Motion is GRANTED IN PART and DENIED IN PART.

2. Investment Theory, LLC, is directed to turn over the document Bates-stamped TMH00501 to Debtor redacted as set forth above.

3. Debtor is directed to immediately return or destroy the remaining documents in accordance with the Court's ruling above.

DATED: January 18, 2018.

/s/ Caryl E. Delano

Caryl E. Delano
United States Bankruptcy Judge

Brian D. Zinn, Esquire
Fort Myers, Florida
Counsel for Debtor

Richard R. Thames, Esquire
Jacksonville, Florida
Counsel for Petitioning Creditors

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[14] *In re Int'l Oil Trading Co., LLC*, 548 B.R. at 833 (citing *Young v. Taylor*, 466 F.2d at 1332)).

[15] The Court notes that the total e-mail transmission is included on documents TMH00502 and TMH00503, but these pages contain only boiler plate disclaimers routinely included in e-mails sent by attorneys. Because they include no relevant information, turnover of these pages is not required.

[16] *In re PWK Timberland*, LLC, 549 B.R. 366, 374 (Bankr. W.D. La. 2015).

[17] *In re Fundamental Long Term Care, Inc.*, 515 B.R. 874, 882 (Bankr. M.D. Fla. 2014).

[18] *In re Fundamental Long Term Care, Inc.*, 515 B.R. at 882 n. 30 (noting that the Federal Rules of Evidence adopt similar factors in Rule 502).