

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:17-bk-1712-FMD
Chapter 11

ATIF, Inc.,

Debtor.

Daniel J. Stermer, as Creditor Trustee,

Plaintiff,

v. Adv. Pro. No. 9:18-ap-531-FMD

Old Republic National Title Insurance Company,
Old Republic National Title Holding Company,
and Attorneys' Title Fund Services, LLC,

Defendants.

**ORDER DENYING IN PART AND
GRANTING IN PART DEFENDANTS'
MOTION FOR RECONSIDERATION**

THIS PROCEEDING came before the Court without a hearing to consider *Defendants Old Republic National Title Holding Company's and Old Republic National Title Insurance Company's Motion for Reconsideration* (the "Motion").¹ Plaintiff, Daniel J. Stermer, as Creditor Trustee, filed a Memorandum in Opposition to the Motion.²

Defendants Old Republic National Title Holding Company ("OR Holding") and Old Republic National Title Insurance Company ("OR Title") (together, the "OR Defendants") ask the Court to reconsider the Order on Motion to Compel Filed by Plaintiff, Creditor Trustee (the "Order").³ In the Order, the Court directed the OR Defendants to produce to Plaintiff "any and all documents

provided by Carlton Fields and listed on the privilege logs, which they have withheld as privileged." The Motion is denied in part and granted in part as set forth herein.

A. Background

In this adversary proceeding, Plaintiff alleges that OR Title and OR Holding entered into a Master Agreement with Debtor, pursuant to which Debtor transferred cash and investments, intellectual property, title claims, real estate, and other assets to OR Title. Plaintiff's Second Amended Complaint includes two counts to recover actually fraudulent transfers from OR Title, and six counts to recover constructively fraudulent transfers from OR Title.⁴

On February 15, 2019, Plaintiff served a Subpoena to Produce Documents on Carlton Fields Jorden Burt, P.A. ("Carlton Fields").⁵ Carlton Fields objected to the Subpoena, and the OR Defendants joined in the Objection to assert the attorney-client privilege for communications with Carlton Fields.⁶ In response to the OR Defendants' joinder, Plaintiff filed a Motion to Compel Production of Documents from Carlton Fields, asserting, *inter alia*, that the crime-fraud exception to the attorney-client privilege applies to the requested documents.⁷

On October 7, 2019, after extensive briefing by the parties and several hearings, the Court announced its oral ruling on Plaintiff's Motion to Compel.⁸ Generally, the Court relied on the two-part test used by the Eleventh Circuit Court of Appeals in *United States v. Cleckler* to evaluate whether the crime-fraud exception applies in a particular case:

First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or

¹ Doc. No. 128.

² Doc. No. 129.

³ Doc. No. 117.

⁴ Doc. No. 51.

⁵ Doc. No. 33, Exhibit 1.

⁶ Doc. Nos. 33, 39.

⁷ Doc. No. 43.

⁸ Doc. Nos. 116, 119.

fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.⁹

In its evaluation, the Court considered Plaintiff's evidence regarding four "badges of fraud," and determined that Plaintiff had shown a prima facie case of the OR Defendants' fraudulent conduct in connection with the fraudulent transfers. The Court also considered Plaintiff's evidence regarding Carlton Field's representation of the OR Defendants in the transactions, and determined that Plaintiff had made a showing that Carlton Field's assistance was in furtherance of the fraudulent transfers or closely related to them. Accordingly, the Court found that Plaintiff satisfied the two-part test for the application of the crime-fraud exception to the attorney-client privilege, and directed the OR Defendants to produce all documents provided by Carlton Fields that were listed on the privilege logs and withheld as privileged.¹⁰

In their Motion for Reconsideration of the Order, the OR Defendants primarily contend that "the Court erred by not considering the OR Defendants' reasonable explanation and rebuttal evidence," and that "the Court erred by not performing an *in camera* review."

B. The Court properly considered the evidence under the standard established by the Eleventh Circuit.

First, the OR Defendants assert that the crime-fraud exception analysis involves a shifting burden, and that the Court did not consider evidence that

they presented to rebut Plaintiff's prima facie showing of fraud. According to the OR Defendants, once the party seeking to establish the crime-fraud exception has made a prima facie showing that the client was engaged in fraudulent conduct, the burden shifts to the party invoking the attorney-client privilege to rebut the prima facie showing by providing a reasonable explanation of the conduct.¹¹ Here, the OR Defendants contend that they provided a reasonable explanation for the transfers, and that they also provided evidence to rebut the "badges of fraud" found by the Court.

But in *United States v. Cleckler*, the Eleventh Circuit stated that it employs a two-part test to examine the applicability of the crime-fraud exception – a prima facie showing of the client's fraud and the attorney's assistance in the fraud. *Cleckler* does not hold that the burden shifts to the party asserting the privilege once the prima facie showing is made.¹² And more recently, in *Drummond Company, Inc. v. Conrad & Scherer, LLP*, the Eleventh Circuit again held that the crime-fraud exception applies when the two-part test is satisfied, without discussing any additional steps in the analysis after the initial showing is made.¹³ In fact, both *Cleckler* and *Drummond Company* cite the Eleventh Circuit's opinion in *In re Grand Jury Investigation (Schroeder)*¹⁴ for its statement of the two-part test, and *Schroeder* explains that the rationale underlying the prima facie standard means that the proceedings should not be turned into mini-trials for resolving conflicting evidence.

Further, in reaching its decision on the crime-fraud exception, the Court did consider "everything that's in the record on this issue."¹⁵ For example, in the oral ruling on Plaintiff's Motion to Compel, the Court recited all of the submissions by the parties,

⁹ *United States v. Cleckler*, 265 F. App'x 850, 853 (11th Cir. 2008).

¹⁰ Doc. No. 117.

¹¹ To support their position that the burden shifts after presentation of a prima facie case, the OR Defendants cite *Barba v. Shire US, Inc.*, No. 13-21158-CIV, 2015 WL 7015324 (S.D. Fla. Nov. 12, 2015); *JTR Enterprises, LLC v. An Unknown Quantity of Colombian Emeralds, Amethysts and Quartz Crystals*, 297 F.R.D. 522 (S.D. Fla. 2013); and *In re Holdsworth*, 495 B.R. 544 (Bankr. M.D. Fla. 2013). The statement regarding shifting burdens in each of these cases stems from the

decision of the Third Circuit Court of Appeals in *Haines v. Liggett Group Inc.*, 975 F.2d 81 (3d Cir. 1992), and not from a decision of the Eleventh Circuit Court of Appeals.

¹² *United States v. Cleckler*, 265 F. App'x at 853.

¹³ *Drummond Company, Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1335 (11th Cir. 2018).

¹⁴ *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987).

¹⁵ Doc. No. 119, Transcript of October 7, 2019 hearing, p. 9.

including the OR Defendants' Supplemental Response to Plaintiff's Statement of Facts and Motion to Compel, and the OR Defendants' Limited Supplemental Response to Plaintiff's Motion to Compel.¹⁶ The Court also heard extensive argument by all parties, including the OR Defendants, in at least five hearings in this proceeding on March 25, 2019, May 8, 2019, June 10, 2019, July 22, 2019, and September 16, 2019.¹⁷

For these reasons, the Court denies the OR Defendants' Motion to the extent that it asserts that "the Court erred by not considering the OR Defendants' reasonable explanation and rebuttal evidence." The Court properly considered the evidence presented by all parties under the standard established by the Eleventh Circuit Court of Appeals in *Cleckler and Drummond Company*.

C. The Court will perform an *in camera* review of the documents.

The OR Defendants also assert in their Motion that the Court erred by not performing "an *in camera* review to determine which, if any, of the Privileged Materials fall within the crime-fraud exception."¹⁸ Plaintiff contends that the OR Defendants waived their right to request an *in camera* review.

Waiver is "an intentional relinquishment or abandonment of a known right or privilege."¹⁹ Here, the record reflects that the suggestion for an *in camera* inspection was only mentioned twice during the course of the litigation over the crime-fraud exception, and those brief references were by the Court and not by the parties.²⁰ Although the OR Defendants did not react positively to the Court's suggestion, the Court finds that the OR Defendants did not intentionally relinquish their right to seek

an *in camera* review of the documents listed on the privilege log.

In addition, the United States Supreme Court has established the standard for determining whether an *in camera* inspection is appropriate in evaluating the application of the crime-fraud exception. The Court stated:

Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," . . . that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.²¹

Citing *Zolin*, the bankruptcy court in *In re Settlers' Housing Service, Inc.*, held that "[b]ecause judicial review entails less of an intrusion into the attorney-client relationship, a 'lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege.'"²²

Here, the OR Defendants request an *in camera* inspection in an effort to show that the crime-fraud exception does not apply. The Court previously determined that (1) Plaintiff has shown a prima facie case of the OR Defendants' fraudulent conduct in connection with the allegedly fraudulent transfers, and that (2) Plaintiff also made a showing that Carlton Field's assistance was in furtherance of the fraudulent transfers or was closely related to them.²³

Under these circumstances, where the party asserting the attorney-client privilege is seeking the Court's review of the documents, and where a

¹⁶ Doc. Nos. 98 and 104.

¹⁷ Docs. 47, 69, 79, 90, and 105.

¹⁸ Doc. No. 128, p. 12.

¹⁹ *In re RDM Sports Group, Inc.*, 260 B.R. 915, 924 (Bankr. N.D. Ga. 2001)(quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

²⁰ Doc. No. 79, Transcript of June 19, 2019 hearing, pp. 26, 29; and Doc. No. 90, Transcript of July 22, 2019 hearing, pp. 48-49, 55.

²¹ *United States v. Zolin*, 491 U.S. 554, 572, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)(citation omitted).

²² *In re Settlers' Housing Service, Inc.*, 558 B.R. 285, 292 (Bankr. N.D. Ill. 2016)(quoting *United States v. Zolin*, 491 U.S. at 572).

²³ Doc. No. 119, pp. 13-14.

prima facie case for the application of the crime-fraud exception has already been determined, the Court finds that the *Zolin* standard for *in camera* review is satisfied.

Accordingly, it is

ORDERED:

1. The Motion for Reconsideration is denied to the extent that the OR Defendants assert that the Court erred by not considering their rebuttal evidence.

2. The Motion for Reconsideration is granted to the extent that the OR Defendants ask the Court for an *in camera* inspection of the documents provided by Carlton Fields and listed on the privilege logs, which the OR Defendants have withheld as privileged. The OR Defendants/Carlton Fields are directed to submit the documents to the Court on or before **November 8, 2019**.

DATED: November 1, 2019.

/s/ Caryl E. Delano

Caryl E. Delano
Chief United States Bankruptcy Judge