

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Case No. 8:19-bk-09946-CED
Chapter 11

Heritage Hotel Associates, LLC,

Debtor.

**ORDER ON DEBTOR'S OBJECTION TO
CCP SP HOTEL LLC'S PRIVILEGE LOG**

THIS CASE came on for consideration without a hearing of Debtor's *Objection to CCP's Privilege Log Filed Pursuant to this Court's Order of December 15, 2020 (Doc. No. 423)* (Doc. No. 426) (the "Objection"), the response to the Objection filed by CCP SP Hotel, LLC ("CCP") (Doc. No. 427) (the "Response"), and Debtor's reply to CCP's response to the Objection (Doc. No. 428) (the "Reply").

To provide the context of this dispute, a brief background is necessary. Debtor previously owned a hotel property franchised as an Indigo Hotel (the "Hotel Property"). Valley National Bank ("Valley") was Debtor's principal lender and the holder of a promissory note secured by a first mortgage on the Hotel Property. Debtor entered into a contract to sell the Hotel Property to a third party, but was hindered in its efforts to close on the sale because of complications relating to an adjoining parcel. Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code in order to facilitate the sale of the Hotel Property under a plan of reorganization.

Debtor succeeded in confirming its Chapter 11 plan, but the proposed sale of the Hotel Property fell through. In the midst of the COVID-19 pandemic, Debtor endeavored to find another

buyer for the Hotel Property. An individual, Punit Shah ("Mr. Shah"), entered into a contract to purchase the Hotel Property. Shortly thereafter—Debtor contends the day after Mr. Shah terminated contact with Debtor—CCP commenced negotiations with Valley to purchase its note and mortgage. Thereafter, CCP acquired the obligations underlying Valley's claim in the bankruptcy case.¹ By that time, Debtor had significantly defaulted on its mortgage obligation to Valley, and issues related to Valley's claim for default interest were pending before the Court.

Ultimately, Debtor obtained a new offer for the purchase of the Hotel Property. Over CCP's objection, the Court granted Debtor's motion to sell the Hotel Property, with the undisputed portion of CCP's claim (as determined by the Court) being paid at closing and the balance of CCP's claim attaching to the sales proceeds.² The sale of the Hotel Property closed on September 28, 2020.³

Meanwhile, on September 2, 2020, CCP filed Claim No. 35-1 as amending the claims previously filed by Valley.⁴ Debtor filed an objection to CCP's claim (the "Objection to Claim") that includes objections to CCP's claims for appraisal fees, legal fees, and costs. Debtor contends that these expenses do not relate to CCP's enforcement of the loan documents, but instead relate to CCP's efforts to obtain ownership of the Hotel Property.⁵ The Objection to Claim, although partially ruled upon by the Court, is scheduled for trial on February 8, 2021.

This discovery dispute arises in connection with CCP's responses to Debtor's discovery requests. Pursuant to this Court's order, CCP provided Debtor with a privilege log.⁶ Debtor objected to approximately 85 documents listed on the privilege log because the redactions in those documents were emails to which a third party, Mr. Shah, was a recipient.

¹ Doc. No. 428, ¶¶ 4 and 5.

² Doc. No. 304.

³ Doc. No. 358.

⁴ The prior claims filed by Valley were Claim Nos. 27-1, 29-1, 30-1, and 31-1.

⁵ Doc. No. 330, ¶¶ 11-13.

⁶ Doc. Nos. 426-1 and 426-2 (Exhibit A to the Objection).

As set forth in the Objection, the Response, and the Reply, the issue before the Court is whether portions of the email communications are protected from production by the attorney-client privilege.⁷ Debtor contends, first, that the attorney-client privilege does not apply to the emails at issue because Mr. Shah was a recipient of the emails; second, that CCP's attorney, John Anthony, Esq., previously represented that his law firm, Anthony & Partners, LLC, does not represent Mr. Shah; and third, that the email communications are relevant to Debtor's contention that the attorney's fees claimed by CCP are not reasonable because they were incurred for the purpose of pressuring Debtor and its principals into conveying the Hotel Property to CCP, and not for the purpose of protecting CCP's interest in obtaining payment of its claim.

In its Response, CCP acknowledges that Mr. Anthony "has indicated to opposing counsel in this matter that he does not represent Shah individually, and cannot produce Shah for deposition," but asserts that Mr. Shah is the authorized representative of RSKS Investments, LLC ("RSKS"); Anthony & Partners does, in fact, represent RSKS; and RSKS provided a "significant portion of the necessary funds to acquire the obligations underlying the CCP Claim from Valley."⁸ CCP's counsel represents that CCP and RSKS are "joint clients" with a common interest, and therefore asserts that communications between Anthony & Partners and its joint clients are protected by the attorney-client privilege.⁹

In its reply, Debtor suggests that CCP and Mr. Shah should be required to (1) file an affidavit with the Court identifying when Mr. Shah and/or RSKS retained Anthony & Partners, and (2) provide a copy of the written fee agreement with Anthony & Partners or, if the fee agreement is verbal, provide an affidavit that it is a verbal agreement and state the terms of the agreement.¹⁰

⁷ CCP produced redacted copies of the email communications without the portions that it asserts are protected by the attorney-client privilege.

⁸ Doc. No. 427, ¶ 6.

⁹ *Maplewood Partners, L.P. v. Indian Harbor Insurance Company*, 295 F.R.D. 550, 594 (S.D. Fla. 2013).

¹⁰ Doc. No. 428, ¶ 3.

The Court concurs with the parties' contentions. Generally, "attorney-client communications are no longer confidential once they have been disclosed to third parties."¹¹ But under the co-client exception and common interest doctrine, an exception to waiver of the attorney-client privilege may occur where a lawyer represents two clients in the same case.¹² If Anthony & Partners represents both CCP and RSKS, communications between the clients and Anthony & Partners are protected by the attorney-client privilege. However, the Court concurs with Debtor's contention that in light of Mr. Anthony's admission that he informed opposing counsel that he did not represent Mr. Shah individually—perhaps as an explanation for his failure to produce Mr. Shah for deposition¹³—both Mr. Shah and Mr. Anthony should provide a statement under oath regarding the retention and produce a copy of any written fee agreement. Accordingly, it is

ORDERED:

1. On or before January 12, 2021, Mr. Shah and John Anthony, Esq., shall file affidavits or declarations under penalty of perjury under 28 U.S.C. § 1746 regarding the date that Mr. Shah and/or RSKS retained Anthony & Partners and attach a copy of any written fee agreement; if the fee agreement is verbal, the affidavits or declarations shall so state and shall recite the terms of the verbal agreement.

2. The Court reserves jurisdiction on the issue of attorney's fees.

DATED: January 6, 2021.

/s/ Caryl E. Delano

Caryl E. Delano
Chief United States Bankruptcy Judge

¹¹ *In re Fundamental Long Term Care, Inc.*, 515 B.R. 874, 881 (Bankr. M.D. Fla. 2014)(citing *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987)).

¹² *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451, 463, 470 (Bankr. M.D. Fla. 2013).

¹³ This raises another issue, not presently before the Court.