UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-CV-21199-CMA/O'Sullivan

ANDREA ROSSI and LEONARDO CORPORATION,

Plaintiffs,
v.

THOMAS DARDEN; JOHN T. VAUGHN, INDUSTRIAL HEAT, LLC; IPH INTERNATIONAL B.V.; and CHEROKEE INVESTMENT PARTNERS, LLC,

Defendants.

INDUSTRIAL HEAT, LLC and IPH INTERNATIONAL B.V.,

Counter-Plaintiffs,
v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,
And

J.M. PRODUCTS, INC.; HENRY JOHNSON; FABIO PENON; UNITED STATES QUANTUM LEAP, LLC; FULVIO FABIANI; and "JOHN DOE" a/k/a "James A. Bass",

Third-Party Defendants.

PLAINTIFFS' APPEAL OF JUDGE O'SULLILVAN'S APRIL 20, 2017 RULING THAT DOCUMENT IH-00079768 IS A PRIVILEGED COMMUNICATION

Plaintiffs, LEONARDO CORPORATION and ANDREA ROSSI, by and through their undersigned counsel, hereby appeal Magistrate Judge O'Sullivan's April 20, 2017 Order

determining that document IH-00079768 ("the document") is protected by the attorney-client privilege. ECF No. 266.

Background

In or around November 2016, Defendants produced the document – a November 2015 communication between Defendant Thomas Darden and an Israeli individual named Zalli. On February 1, 2017, Defendants notified Plaintiffs via letter that they had inadvertently produced the document which they claimed should have been withheld pursuant to the attorney-client privilege and attorney work product doctrines. Having reviewed the document prior to Defendants' letter, Plaintiffs maintained that the document evinced no legal advice, no pursuit thereof, was not cited in Defendants' Privilege Log, and had been merely marked as "Confidential[1]," as opposed to "Privileged."

One of the issues in this case is the timing of the performance of a contractual "Guaranteed Performance Test", the successful completion of which would entitle Plaintiffs to a payment of $89 million. Defendants argue that the Guaranteed Performance Test was never performed, and, if it was, it was not performed timely. In support of their position, Defendants claim that they had oral conversations with Plaintiff Andrea Rossi notifying him of their contention that the time for performance of the Guaranteed Performance Test had passed.[2] Plaintiffs deny that such oral conversations ever took place. This is where the present document comes into play. Upon recollection of undersigned counsel, in his email to Zalli, Defendant Darden admits that Defendants never informed Plaintiffs that Defendants believed the time for performance of the

[1] Virtually ever document produced in this case by Defendants had been marked either "Confidential" or "Highly Confidential – Attorneys Eyes Only."

[2] Defendants must contend such notice was oral, as there is no written communication in support of their contention.

Guaranteed Performance Test had passed, instead leaving the matter purposefully open and ambiguous.

At a February 23, 2017 hearing regarding this document, Defendants argued that although the document sought business advice rather than legal advice, the document is protected by the attorney-client privilege because Defendants were purportedly setting the stage to establish an attorney-client relationship. Based upon Defendants' argument and a review of the document, Judge O'Sullivan determined that the document was a privileged communication, ECF No. 152, because Defendants intended therewith to establish an attorney-client relationship. *See* **Ex. 1**. Plaintiffs sought reconsideration of the Court's Order on March 9, 2017, which relief was denied. *See* **Ex. 2**. Subsequent to Judge O'Sullivan's Order, Plaintiffs destroyed the document.

On March 23, 2017, Plaintiffs filed their appeal of the above-referenced determination to Judge Altonaga. ECF No. 217. Following a hearing thereon, the Court denied Plaintiffs' appeal, ECF No. 231, without prejudice, and with direction that Plaintiffs may re-argue the matter before Judge O'Sullivan to closely reconsider the document pursuant to the standard set forth in *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051-MD-ALTONAGA/SIMONTON, 2012 U.S. Dist. LEXIS 151014, at *35 (S.D. Fla. Oct. 18, 2012), and to raise the crime-fraud exception to the attorney-client privilege.

Pursuant to such direction, Plaintiffs brought the matter to Judge O'Sullivan, who did, in fact, analyze the document with respect to *In re Denture Cream Prods.* Judge O'Sullivan again determined that the subject document was protected by the attorney-client privilege. ECF No. 266. Specifically, Judge O'Sullivan found:

> Under the In Re: Denture Cream standards which counsel has provided a copy of to me, I'm going to persist in my prior ruling that this November 4, 2015 e-mail is attorney-client privileged. The communication was made in contemplation of legal services. There's a narrative about issues that were raised and then there's a

> request for legal assistance. The person who this was sent to is an attorney. And so the next one, if the employee made the communication, did so at the direction of his or her corporate superior; here Mr. Darden made it, who was the corporate superior, I don't think that's an issue in this case.
>
> The next one, I believe, the superior made the request of the employee as part of the corporation's efforts to secure legal advice or services. Again, doesn't apply in this instance.
>
> The fourth one, the content of the communication relates to the legal services being rendered and the subject matter of the communications are within the scope of the employee's duties. Again, we have Mr. Darden who is the head of this company, and so it's clearly within his duties. And the content of the communication, although it relates to business, it relates to a legal issue within the business. And so I find that the subject that the communication relates to the legal services which are requesting to be rendered. And the last one, which is whether it was disseminated to anybody else, is not at issue in this case. And the last one, which is that the party claiming the attorney-client privilege must show the primary purpose of the communication in question was for the purpose of obtaining legal advice, not business advice. Counsel had made that argument, I've reviewed the document and it's clear, although it relates to a business issue, the request is for legal advice in regards to that business issue. And so therefore, I find that that should be privileged.

Ex. 3 at 87-88.

For the reasons set forth below, Plaintiffs respectfully appeal the Magistrate Judge's decision.

I. Standard for Appeal.

On June 29, 2016, in accordance with the provisions of 28 U.S.C. § 636(c), the parties jointly and voluntarily elected to have a Magistrate Judge decide discovery disputes and issue final orders and judgments with respect thereto. ECF No. 20-2.

Federal Rule of Civil Procedure 73(c) provides that where the parties have consented to a United States Magistrate Judge to conduct proceedings "[i]n accordance with 28 U.S.C. §636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to

the court of appeals as would any other appeal from a district-court judgment." Fed. R. Civ. P. 73(c); 28 U.S.C. § 636(c)(3). In contrast, Federal Rule of Civil Procedure 72(a) provides that a party may appeal a Magistrate Judge's Order on a non-dispositive matter to the District Court. Fed. R. Civ. P. 72(a). Pursuant Rule 72, the District Court reviews the issues on appeal *de novo* and must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a), (c).

Given that Magistrate Judge O'Sullivan's determinations are non-final, Plaintiffs direct this appeal to the District Court in an abundance of caution to preserve Plaintiffs' appellate rights.

II. Standard for Determining Attorney-Client Privilege.

The attorney-client privilege protects only those "confidential communications between a client and the client's attorney made for the purpose of obtaining or rendering legal advice." *Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 582-83 (S.D. Fla. 2013); § 90.502(1)(c), Fla. Stat. The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976). "The attorney-client relationship must exist at the time of the communication." *United States v. Capodilupo*, Case No. 76-1687-Civ-CA., 1977 U.S. Dist. LEXIS 16943, at *9 (S.D. Fla. Mar. 11, 1977). "Because application of the attorney- client privilege obstructs the truth-seeking process, it must be narrowly construed." *Maplewood Partners*, 295 F.R.D. at 582-83 (quoting *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) ("Testimonial exclusionary rules and privileges contravene the fundamental principle that the public ... has a right to every man's evidence, and therefore must be strictly construed.")).

The party asserting the attorney-client privilege has the burden of proving that "the primary purpose of the communication in question was for the purpose of obtaining legal advice, not

business advice." *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051-MD-ALTONAGA/SIMONTON, 2012 U.S. Dist. LEXIS 151014, at *35 (S.D. Fla. Oct. 18, 2012). To establish that a communication is protected by the attorney-client privilege, a corporate defendant must demonstrate that the document satisfies the following requirements:

> (1) the communication would not have been made but for the contemplation of legal service;
>
> (2) the employee making the communication did so at the direction of his or her corporate superior;
>
> (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
>
> (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties; and
>
> (5) the communication is not disseminated beyond those person who, because of the corporate structure, need to know its contents.

Id. at 38.

III. Legal Analysis

A. The Document Does Not Satisfy the Attorney-Client Privilege Standard.

The document, IH-00079768, does not satisfy the first and/or third prongs of *In re Denture Cream Prods.* in that the document does not contemplate or relate to legal services. Rather, it is apparent by the language of the document, in addition to the facts and circumstances surrounding Defendants' communications with Zalli, that Defendants sought assistance regarding a business problem and for private investigation services. Notably, in a subsequent, non-privileged communication between Defendant Darden and Zalli, Darden provided Zalli and an associate of

his – an individual named Uzi Shaya - with a list of names, phone numbers, and addresses of persons associated with Dr. Rossi. *See* **Ex. 4**. Mr. Shaya, upon information and belief, carried out Defendants' and Zalli's private investigation work (as opposed to legal work), as noted by Mr. Shaya's repeated communications of a potential witness in this matter. *See* **Ex. 5**.

Other than such harassment of potential witnesses, Defendants have not provided any affidavit, testimony, or other evidence to indicate that Defendants' retained Zalli for any legal purpose, or that Defendants' communication with Zalli was, in fact, pertaining to legal services. Even if legal services were, in some vague way, contemplated by the communication, Defendants bear the burden of demonstrating that "the ***primary purpose*** of the communication" was for the purpose of obtaining legal advice, not business advice. *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051-MD-ALTONAGA/SIMONTON, 2012 U.S. Dist. LEXIS 151014, at *39 (S.D. Fla. Oct. 18, 2012) (emphasis supplied). Defendants have not met that burden. Moreover, **Ex. 4** refers to additional e-mail communications between Defendants, Zalli, and/or Mr. Shaya. Notwithstanding such reference, and notwithstanding Defendants' after-the-fact argument that communications with Zalli are protected by attorney-client privilege, Defendants failed to reference Zalli (or Mr. Shaya) and/or any communications therewith on their 191-page Privilege Log. The absence of any such additional communications leads to the conclusion that no legal services were ever provided. Instead, the only services provided were the investigative services (if they can be called that) ultimately provided by Mr. Shaya.

B. Even if the document is privileged, the document is subject to the crime/fraud exception

Even if the Court were to find that the document is protected by the attorney-client privilege – and it is not – the Court must conduct an *in camera* review of the document to determine whether Defendants have conducted a fraud upon the Court. "[I]t is well established that an otherwise valid

assertion of privilege, either attorney-client or work product, can be overcome by the proper invocation of the crime/fraud exception." *Gutter v. E.I. DuPont de Nemours*, 124 F. Supp. 2d 1291, 1298 (S.D. Fla. 2000). "The crime/fraud exception requires disclosure of otherwise privileged communications or material obtained in the course of the attorney's duties on the client's behalf which are made or performed in furtherance of a crime, fraud, or other misconduct fundamentally inconsistence with basic premises of the adversary system." *Id.*; *see also, e.g., Morgan v. Campbell*, 816 So. 2d 251 (Fla. 2d DCA 2002) (Courts have the power to review, for fraud upon the court, false testimony relating to central issues of the case); *Tri Star Invs. v. Miele*, 407 So. 2d 292, 293 (Fla. 2d DCA 1981) ("[N]o litigant has a right to trifle the courts.").

The document in question demonstrates that Defendant Darden knowingly and intentionally committed the crime of perjury in the course of his sworn deposition when he testified under oath that he informed Dr. Rossi as early as January 2014 that the Guaranteed Performance Test pursuant to the License Agreement could not be performed. *See* **Ex. 6**. at 123-125. Darden further testified that he had conversations with Dr. Rossi explaining that they were "out of the contract or, you know, the deal is over or the – you know, the time has passed." *Id.* at 125:6-8.

Notably, not only did Defendant Darden's testimony directly contradict the information set forth in the document at issue, Defendants' counsel subsequently relied upon and cited to Darden's perjured testimony in support of their Response to Plaintiffs' Motion for Partial Summary Judgment. ECF No. 237. Specifically, in support of their Response, Defendants argued that "Thomas Darden told Rossi back in late 2013 or in 2014 that the time for commencing the Guaranteed Performance test had passed." *Id.* at 9. Defendants' furtherance of Darden's fraud warrants an exception to any attorney-client privilege that may have attached to the document.

For the reasons set forth above, this Court should overrule Magistrate Judge O'Sullivan's April 20, 2017 Ruling and find that the document in question is not protected by the attorney-

client privilege, or, if it is so protected, that the crime/fraud exception applies and therefore the document should be re-produced to Plaintiffs for use in these proceedings.

WHEREFORE, Plaintiffs, LEONARDO CORPORATION and ANDREA ROSSI, respectfully request that this Court conduct an *in camera* review of the document to determine, *de novo*, whether the document is protected by the attorney-client privilege, and if so, whether the crime/fraud exception applies.

Dated: May 4, 2017.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

The undersigned counsel hereby certifies that, in compliance with Rule 7.1(a)(3), Federal Rules of Civil Procedure, that undersigned counsel has conferred with counsel for Defendants in a good faith effort to resolve by agreement the issues raised in this Motion. At the time of filing the present Motion, Defendants have not agreed to the relief requested.

/s/Brian W. Chaiken, Esq.
Brian W. Chaiken

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was served by in the manner specified below on May 4, 2017 on all counsel or parties of record on the attached Service List.

/s/Brian W. Chaiken
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