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 MAGISTRATE JUDGE O'SULLILVAN'S 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 February 23, 2017 Order determining that document IH-00079768 ("the document") is protected by the attorney-client privilege. [DE 152.]

Background

On February 1, 2017, Defendants notified Plaintiffs via letter that they had inadvertently produced a November 2015 communication between Defendants and an Israeli individual named Zalli; Defendants claimed that the document 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 marked "Confidential."

At a February 23, 2017 hearing on the matter, Defendants argued that although the document did not seek legal advice, the document is protected by the attorney-client privilege because through the document Defendants were setting the stage to establish an attorney-client relationship. Based upon Defendants' argument and a review of the document, Magistrate O'Sullivan determined that the document was a privileged communication because Defendants intended therewith to establish an attorney-client relationship. Plaintiffs sought reconsideration of the Court's Order on March 9, 2017, which relief was denied. Subsequent to Magistrate Judge O'Sullivan's Order, Plaintiffs destroyed the document.

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

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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. [DE 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

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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).

The party asserting the privilege also bears the burden of "demonstrating that a privilege applies to a particular communication, i.e., that the confidentiality of the communication is more important than the public interest in transparency." *Maplewood Partners*, 295 F.R.D. at 583-84. Here, Defendants must meet their burden by "a preponderance of the evidence." *Id*. (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993)).

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

As a preliminary matter, Defendants have never established an attorney-client relationship with Mr. Zalli that would render the document protected by the attorney-client privilege. *See Capodilupo*, 1977 U.S. Dist. LEXIS 16943, at *9. At the February 24, 2017 hearing on the matter, Defendants provided no affidavit, testimony, or other evidence evincing an attorney-client relationship with Mr. Zalli. Instead, Defendants' counsel argued that the document is privileged because, having not yet formed an attorney-client relationship, the document was intended to establish such a relationship over the course of this and subsequent communications with Mr. Zalli.

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Yet Defendants' argument is belied by their failure to include any such communications – including the document in question – on their Privilege Log. There are no references to Mr. Zalli whatsoever that would corroborate Defendants' position that over the course of time Defendants and Mr. Zalli ever established an attorney-client relationship.[1] In addition, it is apparent from the face of the document that it was not prepared "for the purpose of obtaining legal advice" rather than business or other advice. *See In re Denture Cream*, 2012 U.S. Dist. LEXIS 151014, at *35.

In fact, Plaintiffs are aware of only one other document involving Mr. Zalli, and Magistrate Judge O'Sullivan determined that that document is not privileged since it: (a) contained no legal information or advice whatsoever and (b) copied a third individual named Uzi Sha. *See* [DE 152]; IH-00084752. Document IH-00084752, which simply lists names and addresses of various individuals, does not support Defendants' contention that they over time established an attorney-client relationship with Mr. Zalli. Accordingly, the narrow construction of the attorney-client privilege requires the document in question be disclosed to Plaintiffs. *See Maplewood Partners*, 295 F.R.D. at 582-83.

What both the document in question and IH-00084752 do indicate is that, as explained in Plaintiffs' Motion for Sanctions for Bad Faith Litigation Conduct [DE 167], Defendants used foreign individuals to improperly tamper with and/or harass Plaintiffs' witnesses. As described in greater detail in the Motion for Sanctions, Mr. Uzi Sha – the man copied on correspondence in which Mr. Zalli was included – attempted on numerous occasions to bribe one of Plaintiffs' witnesses into changing his position with respect to this case. [DE 167 at 4-6.]

[1] Moreover, Mr. Zalli is an Israeli individual who does not practice within the territories described in the License Agreement. The territories covered by the License Agreement include North America, Central America and the Caribbean, South America, China, Russia, Saudi Arabia, and the Arabian Emirates. *See* License Agreement § 2.

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The document in question likewise supports Plaintiffs' position that Defendants knowingly and intentionally perjured themselves in the course of their sworn deposition testimony when they took a position diametrically opposed to the position taken in the document. 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. *See, 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.").

For the reasons set forth above, the document in question is not protected by the attorney-client privilege, should be produced to Plaintiffs, and at a minimum should be reviewed by the Court.

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.

Dated: March 23, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 23, 2017, I electronically filed the foregoing Motion with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties on the attached Service List at their e-mail addresses on file with the Court.

/s John W. Annesser, Esquire
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