



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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COUNTY OF FAIRFAX

CITY OF FAIRFAX

January 25, 2019

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Re: *Randal Lowe Plumbing, LLC v. Peachtree Communities, LLC*, CM 2018-405

Dear Mr. Whittaker, Mr. Cummins, and Mr. Sack:

This matter is before the court on Plaintiff's motion for reconsideration of the court's order of December 14, 2018 granting Defendant's motion to quash a *subpoena duces tecum* served by Plaintiff on the Sack Law Firm, PC. For the reasons that follow, the motion is denied in part and granted in part.

Background

As described in Defendant's *Memorandum Of Points And Authorities In Support of The Motion To Quash Foreign Subpoena Duces Tecum*, and Plaintiff's *Opposition to the motion to quash*, this matter arises from an underlying dispute in the Superior Court of Dekalb County, Georgia, between Plaintiff and Defendant in which Plaintiff obtained a judgment against Defendant dated October 12, 2016. Defendant has not paid that judgment.

Defendant's counsel, the Sack Law Firm, PC, also represents Peachtree

Investment Group LLC, which is not a party to the Georgia case. Among other matters, the Sack Law Firm represented Peachtree Communities and Peachtree Investment Group in the sale of substantially all the assets of Peachtree Communities to Century Communities of Georgia, LLC some four years ago.

In October, 2017, Plaintiff sought discovery from Defendant in the Georgia case, but Defendant did not respond to those discovery requests, and Plaintiff did not pursue the discovery. Plaintiff also sought discovery from Century Communities and, when Century Communities objected, moved to compel production in the Georgia court. The Georgia court ordered Century Communities to produce documents, but ordered Plaintiff to maintain the confidentiality of those documents and use them only in aid of execution of the judgment. Century Communities produced a redacted Asset Purchase Agreement.

Having not pursued discovery against Defendant in Georgia when Defendant did not respond to Plaintiff's discovery requests (for reasons which remain unknown to the court), Plaintiff served the Sack Law Firm with a *subpoena duces tecum* that seeks the production of, among other things, "any and all documents" related to the asset sale and "any and all communications" between the Sack Law Firm and its clients regarding the sale.

According to the affidavit of James Sack, the managing partner of the Sack Law Firm, "any relevant information, documentary or otherwise, that the Sack Law Firm possesses, it possesses solely by virtue of its attorney-client relationship with Peachtree Communities and Peachtree Investment Group."

Analysis

In arguing against the motion to quash, Plaintiff primarily relies upon *Virginia Power v. Westmoreland-LG&E Partners*, 259 Va. 319, 526 S.E.2d 750 (2000), for the proposition that the "attorney-client privilege does not attach to a document merely because a client delivers it to his attorney." 259 Va. 319, 325.¹ Plaintiff focuses its reliance on the Court's statement that the privilege

attaches to a document even if the document does not contain, or is not accompanied by, a written request for legal advice, *if the proponent of the privilege sustains its burden of proof to show that the document was prepared with the intention of securing legal advice on its contents.* (Emphasis added).

259 Va. 319, 326.

Virginia Power v. Westmoreland-LG&E Partners is a very different case than the instant case. In *Virginia Power v. Westmoreland-LG&E Partners*, what was at issue was a single draft letter prepared by James S. Brown, an officer of Westmoreland Energy, "to memorialize a conversation he had with John Mable of Virginia Power" 259 Va. 319, 325. Brown sent the draft letter to Lawrence Folks at Hadson Power Systems (Westmoreland Energy's partner in Westmoreland-LG&E Partners) and either Brown or Folks sent the letter to Charles

¹ Plaintiff acknowledges that the Court held that "the privilege does attach to a document prepared with the purpose of being sent to counsel for legal advice." *Id.*

Schwenck, in-house counsel to Hadson Power Systems. Schwenck conferred with Brown regarding the letter and it was discussed at a meeting of Brown, Folks, Schwenck, and Charles Brown (another official with Westmoreland Energy). The draft letter was never sent to Mable.

While the Court's opinion is not explicit, it appears that the draft letter was sought to be obtained *from the client*, Westmoreland-LG&E Partners, *not from the in-house attorney*, Schwenck, and certainly not from an independent law firm. Thus, the holding of *Virginia Power v. Westmoreland-LG&E Partners* -- that a party may, in discovery, obtain a document from a party opponent unless the party opponent shows that the document was prepared with the intention of securing legal advice on its contents -- is not applicable where a *subpoena duces tecum* was served *directly on a party's independent law firm*, not on the party, to obtain documents that the party opponent apparently made little effort to obtain from the party, even though there was apparently a forum available in which discovery could have been pursued.

Plaintiff has pointed the court to no case that concerned the service of a *subpoena duces tecum* on an independent law firm.

In the absence of any governing law from the Virginia appellate courts, this court must apply, and draw guidance from, the fundamentals of the attorney-client relationship as set forth in the Virginia Rules of Professional Conduct, which, *inter alia*, state:

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

Confidentiality of Information, Prof. Conduct Rule 1.6, Comment 2b (2000).

In the instant case, the documents sought are possessed by the Sack Law Firm "solely by virtue of its attorney-client relationship with Peachtree Communities and Peachtree Investment Group." Thus, the Sack Law Firm has a duty to maintain confidentiality of documents relating to the representation and any effort to compel production of those documents must be undertaken consistent with the Virginia Rules of Professional Conduct.

Although the court's research did not locate a Virginia appellate decision on facts similar to the instant matter, the issue was addressed in *Fisher v. United States*, 425 U.S. 391 (1976), which explained, consistent with the Virginia Rules of Professional Conduct:

Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. (Citations omitted). The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. (Citations omitted). . . . [The privilege] protects only those disclosures -- necessary to obtain informed legal advice -- which might not have been made absent the privilege. (Citations omitted). *This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process*

following transfer by the client in order to obtain more informed legal advice. (Citations omitted). . . . (Emphasis added).

425 U.S. 391, 403-404 (1976).

This court believes that it is a fair inference, because the documents sought are possessed by the Sack Law Firm "solely by virtue of its attorney-client relationship with Peachtree Communities and Peachtree Investment Group," that the documents sought were obtained by the Sack Law Firm to provide legal assistance to Defendant. See *Grant v. Harris*, 116 Va. 642, 648, 82 S.E. 718, ___ (1914) ("confidential communications between an attorney and his client made because of that relationship and concerning the subject matter of the attorney's employment, are privileged from disclosure, even for the purpose of administering justice").

That being the case, to compel production of the documents sought by *subpoena duces tecum* from the Sack Law Firm, the court concludes that the only approach which gives meaning to the Virginia Rules of Professional Conduct is to impose on Plaintiff the burden to show that the documents could have been obtained by court process from Defendant when they were in Defendant's possession. Without such a showing by Plaintiff, the court concludes that the documents are not available to Plaintiff from the Sack Law Firm.

Plaintiff has made no such showing at this time.² Rather, Plaintiff failed to pursue discovery against Defendant in Georgia when Defendant did not respond to Plaintiff's discovery requests, so Plaintiff (as well as this court) has no idea what documents could have been obtained by court process from Defendant when Defendant was in possession of them. Thus, Plaintiff has not made a showing that the documents it now seeks from the Sack Law Firm could have been obtained by court process from Defendant when Defendant was in possession.

Further, to obtain the documents from the Sack Law Firm, Plaintiff must show that the documents were the result of "transfer by [Defendant]" to the law firm. Again, Plaintiff has made no such showing at this time.³

Although the above analysis addresses the primary issues raised by Plaintiff, the court will specifically address the last two arguments raised by Plaintiff in its motion to reconsider.

First, in light of the above analysis, the court concludes that it properly

² Plaintiff asserts that the documents it requests in Request Nos. 2-5 were "unequivocally" not "prepared with the intention of securing legal advice on [their] contents." Motion at 3 (emphasis added). It may well be true that the requested documents were not "prepared" with the "intention of securing legal advice on [their] contents" but that is not the relevant consideration; the relevant consideration is whether the documents were *obtained* by the law firm for the purpose of providing legal advice to Defendant.

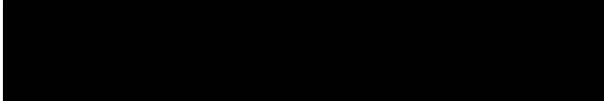
³ The Declaration of James Sack does not show that the documents were the result of "transfer by [Defendant]" to the law firm. The Declaration states only that the documents the Sack Law Firm possesses are "possesse[d] solely by virtue of its attorney-client relationship with Peachtree Communities and Peachtree Investment Group," without indicating the source of the documents.

did not require the Sack Law Firm to produce a privilege log.

Second, the court will allow Plaintiff to serve a *subpoena duces tecum* on the Sack Law Firm if Plaintiff pursues further post-judgment discovery in Georgia against Defendant, but is unable to obtain discovery from Defendant, and Plaintiff shows that the documents could have been obtained by court process from Defendant when they were in Defendant's possession and that the documents were the result of "transfer by [Defendant]" to the law firm.

An appropriate order will enter.

Sincerely yours,



Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

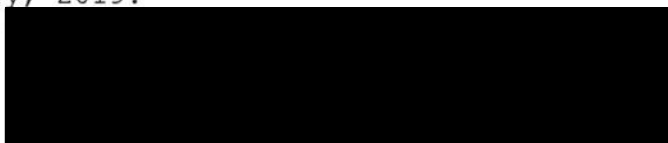
RANDAL LOWE PLUMBING, LLC)	
)	
Plaintiff)	
)	
v.)	CM 2018-405
)	
PEACHTREE COMMUNITIES, LLC)	
)	
Defendant)	

ORDER

THIS MATTER came before the court on Plaintiff's motion for reconsideration of the court's December 14, 2018 order quashing a *subpoena duces tecum* issued to the Sack Law Firm.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby DENIES Plaintiff's motion to reconsider in part and GRANTS Plaintiff's motion to reconsider in part.

ENTERED this 25th day of January, 2019.



Richard E. Gardiner
Judge

**ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR
THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA**

Copies to:

Shawn C. Whittaker
Counsel for Plaintiff

Tom Cummins
Counsel for Defendant

James Sack
Counsel for The Sack Law Firm, PC