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JUL 17 2006

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina (26)

IN RE:

Marine Energy Systems Corporation,

Debtor.

W. Ryan Hovis, Trustee for Marine Energy
Systems Corporation,

Plaintiff,

v.

General Dynamics Corporation, Electric Boat
Corporation, Siemens Westinghouse Power
Corporation, and Viacom, Inc.,

Defendants.

C/A No. 97-01929-W

Adv. Pro. No. 98-80220-W

Chapter 7

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law recited in the attached Order of the Court, Plaintiff's Motion for a Protective Order is granted in part and denied in part. Within five (5) days of the entry of the attached Order, Plaintiff shall produce to the Defendants the documents required to be produced by the attached Order. The remaining documents on Plaintiff's amended privilege logs are protected from production.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
July 17, 2006

ENTERED

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L. G. R.

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Chapter 7

ORDER

ENTERED

JUL 17 2006

L. G. R.

This matter comes before the Court on Motion for a Protective Order ("Motion") filed by W. Ryan Hovis ("Plaintiff"), as Trustee for Marine Energy Systems Corporation ("MESC"). Based upon the facts of the case and applicable law, this Court makes the following Findings of Facts and Conclusions of Law.¹

FINDINGS OF FACT

1. Defendants General Dynamics Corporation and Electric Boat Corporation ("Defendants") served their Second Set of Interrogatories and Request for Production on Plaintiff on October 26, 2005.

2. Plaintiff failed to timely respond to these discovery requests. Defendants thereafter attempted to confer with Plaintiff's counsel to obtain the answers to the discovery requests but did not receive answers after corresponding several times with Plaintiff's

¹ To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

counsel.

3. On December 28, 2005, Defendants filed a motion to compel Plaintiff to provide answers to Defendants' discovery requests.

4. Plaintiff thereafter responded to Defendants' discovery requests. Defendants nevertheless prosecuted the motion to compel on grounds that Plaintiff's answers were insufficient and evasive.

5. After a hearing on the matter, the Court granted Defendants' motion to compel by order entered on March 28, 2006. The Court found Plaintiff's responses to Defendants' second set of interrogatories to be deficient and ordered Plaintiff to amend his responses.

6. Plaintiff moved to reconsider the order compelling Plaintiff to amend his discovery responses on the limited grounds that the order may require Plaintiff to produce documents protected by the attorney-client privilege or the work product doctrine. The Court denied Plaintiff's motion to reconsider on grounds that Plaintiff was entitled to seek a protective order if the propounded discovery seeks protected documents.

7. On April 25, 2006, Plaintiff moved for a protective order on grounds that certain documents, appearing in two privilege logs initially produced by Plaintiff in response to Defendants' discovery requests, are protected from discovery pursuant to the attorney-client privilege and the work product doctrine.

8. Defendants opposed the Motion on grounds that Plaintiff's privilege logs were insufficient because the logs did not provide sufficient information for Defendants to ascertain whether the described documents are protected from production. Defendants sought to compel Plaintiff to produce all documents appearing in its initial privilege logs on

grounds that Plaintiff waived any privilege by failing to produce adequate privilege logs.

9. On May 23, 2006, the Court entered an order finding that Plaintiff's initial privilege logs were insufficient. The Court allowed Plaintiff to amend his privilege logs but reserved the right to deny the Motion on grounds that the initial privilege logs were insufficient.

10. Plaintiff filed and served amended privilege logs on May 31, 2006 and on June 7, 2006.

11. On June 16, 2006, Defendants responded to the amended privilege logs and contend that several documents described in the logs are not protected from production or that Plaintiff has again failed to provide sufficient information to determine if the document is protected by the asserted privilege. Defendants delineate eleven categories of deficiencies, described in Defendants' response as categories A through K, and annotated Plaintiff's amended privilege logs with corresponding notation as to the documents that fall within the described categories.

12. On June 28, 2006, Plaintiff responded to Defendants' allegation of deficiencies with regard to the amended privilege logs. Plaintiff contends that all documents are properly described and protected from discovery.²

13. Plaintiff produced copies of the disputed documents on the amended privilege logs for *in camera* review.

CONCLUSIONS OF LAW³

Discovery under the Federal Rules of Civil Procedure is broad in scope and freely

² Defendants moved to strike Plaintiff's response on the eve of the issuance of this opinion on grounds that the response is not allowed by a previous order of the Court. Considering the ruling herein and the stage of this proceeding, it is unnecessary to consider the Defendants' motion to strike at this time.

³ To the extent Defendants identify a document as meeting more than one category, the document shall be protected from production if the Court finds that Plaintiff has demonstrated that a privilege is applicable.

permitted. See Carefirst Of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390, 402 (4th Cir. 2003). Trial courts have broad discretion in their resolution of discovery problems that arise in cases pending before them. See id. To obtain a protective order, the “party resisting discovery must establish that the information sought is covered by the rule and that it will be harmed by disclosure.” In re Wilson, 149 F.3d 249, 252 (4th Cir. 1998) (affirming discovery ordered by a bankruptcy court). If the party makes this initial showing, then the party seeking materials must then establish that the information is sufficiently necessary and relevant to his case to outweigh the harm of disclosure. See id. Plaintiff seeks a protective order on three grounds. Plaintiff contends that the documents appearing in the amended privilege logs are either protected by the attorney-client privilege or by the work-product doctrine or that the documents are personal and confidential in nature.

The attorney-client privilege would generally protect the disclosure of confidential communications between MESC and its counsel. See United States v. (Under Seal), 748 F.2d 871, 874-875 (4th Cir. 1984). Since the privilege impedes the full and free discovery of truth, the privilege is strictly construed. See In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984). The burden is on Plaintiff, as the proponent of the privilege, to establish “(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and

(b) not waived by the client.” See United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). The attorney-client privilege may be waived if the document and the privilege are not adequately described on the privilege log. See Rambus, Inc. v. Infineon Technologies, 220 F.R.D. 264, 272-274 (E.D. Va. 2004) (finding that a court may deem a privilege waived if the information provided on the privilege log is inadequate to ascertain whether the privilege is properly asserted).

The attorney work product doctrine excepts from discovery documents prepared in anticipation of litigation. See United States v. Nobles, 422 U.S. 225, 237-238, 95 S.Ct. 2160 (1975), Gallerizzo, 174 F.3d at 403. The burden is again on the Plaintiff to show that the documents were: (1) prepared by, or under the direction of, an attorney and (2) prepared in anticipation of litigation. See Rambus, 220 F.R.D. at 272 (citing In re Grand Jury Proceedings, 102 F.3d 748, 750 (4th Cir. 1996)). Like the attorney-client privilege, the work product privilege may be waived if Plaintiff fails to satisfy his burden on the privilege log. See Rambus, 220 F.R.D. at 272 (holding “the descriptions in the log must satisfy the claiming party's burden.”). See also, Wilson, 149 F.3d at 252 (finding that the party resisting discovery must make the initial showing that the document is protected).

Finally, with respect to the documents that allegedly contain personal or confidential information, the Supreme Court has found that the discovery Rules “do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action.” See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 30, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

A. Category "A" and "C" Documents

Defendants seek production of facsimile cover pages between MESC and its counsel, described as Category "A" documents, and seek protection of an internal memorandum prepared by MESC's in-house counsel, described as a Category "C" document. The Court has not identified any published case regarding whether facsimile cover pages are protected from disclosure. From a review of the documents, it appears that some of the documents do not contain any information other than an unidentified facsimile was exchanged between MESC and its counsel. These documents contain nothing in the nature of legal advice or a request for such advice. Particularly, the documents identified as facsimile cover pages dated May 31, 1996, February 12, 1999, June 27, 1994, March 31, 1995, January 25, 1995, the two facsimiles on May 31, 2005 and the folder of facsimile reports do not reveal the nature of communications between MESC and its counsel, other than the unprotected fact that MESC had attorneys with whom it communicated. The Court therefore finds that these Category "A" documents should be produced because they do not qualify for the attorney-client privilege as set forth in Jones. The Court additionally finds that such documents should be produced based upon Plaintiff's initial failure to adequately identify these documents and the applicable privilege in Plaintiff's initial privilege log. See Rambus, 220 F.R.D. at 272 (finding a party may waive a privilege by failing to produce an adequate privilege log).

The remaining Category "A" documents appear to contain confidential communication between MESC and its counsel. Therefore, the Court finds that such documents are protected from disclosure. Likewise, the Court finds that the document identified as a Category "C" document is protected from disclosure. The amended privilege

log indicates that this document was prepared in response to legal services requested by MESC. Nothing in the document indicates otherwise and therefore document is protected from disclosure pursuant to the standard set forth in Jones.

B. Category "B" Documents

Defendants' Category B identifies documents concerning legal bills, invoices, and retainer agreements. The attorney-client privilege does not extend to billing records except to the extent that such records reveal confidential information concerning legal advice rendered to the client. See Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999). Likewise, retainer agreements are generally not privileged since they do not reveal anything about the advice sought or given. See In re Sheffield, 280 B.R. 719, 721 (Bankr. D. Ala. 2001) (citing cases).

Based upon *in camera* review, it appears that the majority of Category "B" documents do not describe the nature of legal advice provided to MESC. However, the following are protected pursuant to the attorney client privilege:

1. Letter dated November 16, 1998 from Robert Franklin to Gilliam, which encloses the November 3, 1998 invoices of Murray and Murray (attached invoices are not protected) and
2. Letter dated October 15, 1998 from Robert Franklin to Susan Swarens, which encloses invoices of Murray and Murray (attached invoices are not protected).

With regard to the remaining documents, Plaintiff shall produce within five (5) days of the entry of this Order all other documents set forth on the amended privilege logs, which fall within Category B. The Court additionally finds that such documents should be

produced based upon Plaintiff's initial failure to adequately identify these documents and the applicable privilege in Plaintiff's initial privilege log. See Rambus, 220 F.R.D. at 272 (finding a party may waive a privilege by failing to produce an adequate privilege log).

C. Category "D" Documents

Defendants identify numerous documents as Category "D" documents. Plaintiff contends that these documents are protected from disclosure as attorney work product because the documents reflect the mental impressions and opinions of MESC's counsel. Defendants assert that these documents are not protected from disclosure because they were not prepared in anticipation of litigation.

It appears that these documents are generally documents containing the opinions of MESC's in-house counsel on various matters and notes and drafts of documents prepared by MESC's outside counsel. However, only two documents identified by the Plaintiff appear to have been prepared by an attorney in anticipation of litigation. The document identified on page 31 of Plaintiff's first amended privilege log, as a document prepared on 8/3/95, indicates that the document was prepared by an MESC attorney in light of potential claims against MESC. A review of the actual document supports this assertion in the privilege log. Thus, this document is protected from disclosure under the work product doctrine. See In re Grand Jury Proceedings, 102 F.3d at 750. Likewise, the document identified on page 66 of Plaintiff's second amended privilege log, as a document prepared on 5/13/95, indicates that the document was prepared by an MESC attorney in light of pending indictments. This documents is also protected by the work product doctrine. See id.

With regard to the remaining documents, despite the Court having provided Plaintiff with two opportunities to file an adequate privilege log, there is no indication in Plaintiff's

amended privilege logs that any of these other Category "D" documents were prepared in anticipation of litigation. Indeed, a review of the actual documents appears to indicate that many of the documents were not even prepared for or by MESC and the Court was unable to determine that they were prepared in anticipation of litigation. The Court therefore orders that these documents be produced to Defendants within five (5) days of the entry of this Order because the amended privilege logs are inadequate in this respect and because Plaintiff otherwise failed to make a sufficient showing that these documents are protected. See Wilson, 149 F.3d at 252 (finding that the party resisting discovery must make the initial showing that the document is protected). The Court additionally finds that such documents should be produced based upon Plaintiff's initial failure to adequately identify these documents and the applicable privilege in Plaintiff's initial privilege log. See Rambus, 220 F.R.D. at 272 (finding a party may waive a privilege by failing to produce an adequate privilege log).

D. Category "E" Documents

This category consists of a life insurance policy for a former employee of MESC and certain W-4 tax withholding forms of several employees. Plaintiff asserts that these documents are protected because they contain personal and confidential information regarding MESC's former employees. Plaintiff has not asserted that these documents are protected by a recognized privilege. See Rhinehart, 467 U.S. at 30 (finding that the discovery rules encompass private information). Plaintiff appears to have conceded the relevancy of the documents at issue by including the documents on the amended privilege logs, by not opposing the motion to compel on grounds of relevancy, and by not seeking to protect the documents from disclosure based upon relevance. See e.g., Sonnino v.

University of Kansas Hosp. Authority, 221 F.R.D. 661, 670-671 (D. Kan. 2004) (finding boilerplate objections contained in discovery responses may be waived if not raised in response to a motion to compel).

The Court observes that the W-4 tax withholding forms contain personal and confidential information such as the individual employees' social security numbers. The Fourth Circuit has previously noted that "the harm that can be inflicted from the disclosure of a [social security number] to an unscrupulous individual is alarming and potentially financially ruinous." See Greidinger v. Davis, 988 F.2d 1344, 1353 (4th Cir. 1993) (finding a Virginia statute infringed upon the right to vote by requiring individuals to disclose their social security numbers on public voter registration applications). Courts in this Circuit have previously refused to compel parties to disclose personal information about employees of a party. See e.g., McDougal-Wilson v. Goodyear Tire and Rubber Co., 232 F.R.D. 246, 252 (E.D.N.C. 2005) (finding a company would not be compelled to disclose the social security numbers of its employees and ordering the production of redacted documents). The Court therefore finds that Plaintiff produce the documents identified as Category "E" documents except that Plaintiff may redact any social security numbers contained in the documents. The Court additionally finds that such documents should be produced based upon Plaintiff's initial failure to adequately identify these documents and the applicable privilege in Plaintiff's initial privilege log. See Rambus, 220 F.R.D. at 272 (finding a party may waive a privilege by failing to produce an adequate privilege log).

E. Category "F" Documents

Defendants identify certain documents as non-privileged because either the author is not an MESC attorney or a client. There are four documents within this category. One such

document involves a legal bill of MESC; however, the document was not transmitted from an attorney but rather from a third party and therefore is not protected by the attorney-client privilege as set forth in Jones. See 696 F.2d at 1072; In re Grand Jury Proceedings, 727 F.2d at 1356 (finding that the attorney-client privilege is lost when disclosure is made to a third party). Two of these documents involve legal representation for William Gilliam (“Gilliam”) and New Charleston Capital (“NCC”). Plaintiff asserts these documents were commingled with MESC’s files and are protected by the attorney-client privilege held by these parties. Any protection that these documents enjoyed should have been asserted by these parties and has been lost by NCC’s and Gilliam’s failure to protect the confidential nature of these documents. See In re Grand Jury Proceedings, 727 F.2d at 1356 (finding that the inadvertent disclosure of a privileged communication may result in the waiver of the privilege). Therefore, Plaintiff shall produce to Defendants these three documents, described as Category “F” documents, within five (5) days of the entry of this Order. The Court additionally finds that such documents should be produced based upon Plaintiff’s initial failure to adequately identify these documents and the applicable privilege in Plaintiff’s initial privilege log. See Rambus, 220 F.R.D. at 272 (finding a party may waive a privilege by failing to produce an adequate privilege log).

The fourth and final document in this category is a document from Gilliam, in his capacity an agent for MESC, to counsel for MESC. The description of this document, identified as a document dated February 23, 1999, appears to meet the requirements for protection under the attorney-client privilege. The document itself also appears to meet the requirements for protection and therefore the Court finds that it is protected from disclosure.

F. Category "G" Documents

Defendants allege this category of documents is not privileged because the recipient of the documents is not MESC or an attorney of MESC. According to Plaintiff's amended privilege logs and based upon an *in camera* review, it appears that the recipient is in fact MESC or its counsel. The Court therefore finds that Category "G" documents are protected from disclosure.

G. Category "H" and "J" Documents

Defendants seek to compel production of Category "H" documents on grounds that the privilege logs fail to indicate if the documents are privileged because they concern a meeting but do not identify the attendees of the meeting. Category "J" is identified as a document containing notes, by an unidentified author, of a meeting with counsel for MESC regarding MESC's bankruptcy. Presumably, Defendants are implying that any privilege that may have attached to these documents may have been waived if the information contained therein was communicated to a third party. Plaintiff's description of the meetings indicates that the notes reflect communications between MESC and its counsel and an *in camera* review of the documents supports this assertion. There is nothing to indicate that the privilege has been waived and thus the Court finds that these documents are protected by the attorney-client privilege.

H. Category "I" Documents

Category "I" identifies three documents for which Defendants contend that any applicable privilege was waived by Plaintiff's failure to identify these documents in his initial privilege logs. The Court has reviewed the amended privilege logs and Plaintiff's initial privilege logs. It appears that these three documents were identified on pages 2 and

20 of Plaintiff's initial privilege log. It also appears, based upon an *in camera* review of the documents, that these documents are protected by the attorney-client privilege and therefore the Court finds that they are protected from disclosure.

I. Category "K" Documents

Finally, Plaintiff seeks production of Category "K" documents on grounds that these documents are not protected by the attorney-client privilege because the documents concern communications between NCC and its counsel. These documents are not protected from discovery because any privilege that attached to the documents was waived by NCC's intentional or inadvertent failure to maintain the secrecy of these documents. See In re Grand Jury Proceedings, 727 F.2d at 1356 (finding that the inadvertent disclosure of a privileged communication may result in the waiver of the privilege). The Court additionally finds that such documents should be produced based upon Plaintiff's initial failure to adequately identify these documents and the applicable privilege in Plaintiff's initial privilege log. See Rambus, 220 F.R.D. at 272 (finding a party may waive a privilege by failing to produce an adequate privilege log).

CONCLUSION

Based upon the foregoing, Plaintiff's Motion is granted in part and denied in part. Plaintiff shall produce the documents as ordered herein within five (5) days from the entry of this Order. All other documents described on Plaintiff's amended privilege logs are protected from production.

AND IT IS SO ORDERED.

Columbia, South Carolina,
July 12, 2006


UNITED STATES BANKRUPTCY JUDGE