

Window World of Baton Rouge, LLC v. Window World, Inc.; Window World of St. Louis, Inc. v. Window World, Inc., 2019 NCBC Order 3.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WILKES COUNTY

15 CVS 1

WINDOW WORLD OF BATON
ROUGE, LLC; WINDOW WORLD OF
DALLAS, LLC; WINDOW WORLD
OF TRI STATE AREA, LLC; and
JAMES W. ROLAND,

Plaintiffs,

v.

WINDOW WORLD, INC.; WINDOW
WORLD INTERNATIONAL, LLC;
and TAMMY WHITWORTH,

Defendants.

**ORDER ON REQUEST FOR RULE
53(g) EXCEPTIONS AND AMENDED
ORDER FOR SUPPLEMENTAL
BRIEFING AND EVIDENCE ON *IN*
CAMERA REVIEW DOCUMENTS**

WILKES COUNTY

15 CVS 2

WINDOW WORLD OF ST. LOUIS,
INC.; WINDOW WORLD OF
KANSAS CITY, INC.; WINDOW
WORLD OF SPRINGFIELD/PEORIA,
INC.; JAMES T. LOMAX III;
JONATHAN GILLETTE; B&E
INVESTORS, INC.; WINDOW
WORLD OF NORTH ATLANTA,
INC.; WINDOW WORLD OF
CENTRAL ALABAMA, INC.;
MICHAEL EDWARDS; MELISSA
EDWARDS; WINDOW WORLD OF
CENTRAL PA, LLC; ANGELL P.
WESNERFORD; KENNETH R.
FORD, JR.; WORLD OF WINDOWS
OF DENVER, LLC; RICK D. ROSE;
CHRISTINA M. ROSE; WINDOW
WORLD OF ROCKFORD, INC.;
WINDOW WORLD OF JOLIET, INC.;
SCOTT A. WILLIAMSON;
JENNIFER L. WILLIAMSON; BRIAN
C. HOPKINS; WINDOW WORLD OF
LEXINGTON, INC.; TOMMY R.
JONES; JEREMY T. SHUMATE;

WINDOW WORLD OF PHOENIX
LLC; JAMES BALLARD; and TONI
BALLARD,

Plaintiffs,

v.

WINDOW WORLD, INC.; WINDOW
WORLD INTERNATIONAL, LLC;
and TAMMY WHITWORTH,
individually and as trustee of the
Tammy E. Whitworth Revocable
Trust,

Defendants.

1. **THIS MATTER** is before the Court upon Defendants Window World, Inc. and Window World International, LLC's (the "Window World Defendants") January 18, 2019 letter requesting, among other things, that the Court allow the Window World Defendants to file exceptions to the Special Master's Report (the "Request") in the above-captioned cases. The Court hereby memorializes its oral rulings from the January 23, 2019 telephone conference concerning the Request.

2. By Order and Opinion dated September 28, 2018, as amended by Order dated October 12, 2018 (together, the "*In Camera* Review Order"), the Court, in the exercise of its discretion and for good cause shown, concluded that an *in camera* review of certain documents was necessary to assess the propriety of claims of privilege asserted by the Window World Defendants and to assist the Court in resolving Plaintiffs' Motion to Compel and Motion for Sanctions for Defendants' Wrongful Assertions of Privilege and Plaintiffs' Motion for Finding of Waiver of Attorney-Client Privilege and Work-Product Doctrine as to Certain Topics (collectively, the "Privilege Motions"). Specifically, the Court ordered an *in camera*

review of (i) the Challenged Documents and (ii) approximately 10% of the documents identified in the Window World Defendants' 2018 Privilege Logs (the "Sample Log Documents" and, together with the Challenged Documents, the "Review Documents").

3. The Court further concluded, in the exercise of its discretion and for good cause shown, that it was in the interests of justice and the needs of these actions that a special discovery master be appointed to conduct the *in camera* review. With the consent of the parties and pursuant to Rule 53 of the North Carolina Rules of Civil Procedure, the Court appointed the Honorable W. David Lee (the "Special Master") to serve as special discovery master and to conduct the *in camera* review.¹ The Court deferred ruling on the Privilege Motions pending the results of the *in camera* review.

4. On January 3, 2019, the Special Master submitted to the Court a final report (the "Special Master's Report") setting forth his conclusions (i) as to the propriety of the claims of privilege for each Review Document and (ii) as to the accuracy of document descriptions set forth on the 2018 Privilege Logs. (*See* Special Master's Report, ECF No. 684 (15 CVS 1), ECF No. 721 (15 CVS 2).)

5. By Order dated January 17, 2019 (the "January 17 Order"), the Court, after reviewing the Special Master's Report and carefully examining the Review Documents that the Special Master identified either as not privileged or as containing non-privileged communications, concluded, in the exercise of its discretion, that the Window World Defendants shall have an opportunity to present argument and

¹ The Court appointed Judge Lee by Order dated October 12, 2018.

evidence, on a sealed and *ex parte* basis, concerning the Window World Defendants' assertion of privilege as to the following Sample Log Documents:

- A. Sample Log Document No. 5;
- B. Sample Log Document No. 11;
- C. Sample Log Document No. 12;
- D. Sample Log Document No. 19 as to the March 15, 2012 Notice of Electronic Filing;
- E. Sample Log Document No. 29;
- F. Sample Log Document No. 30;
- G. Sample Log Document No. 31;
- H. Sample Log Document No. 32;
- I. Sample Log Document No. 36;
- J. Sample Log Document No. 40;
- K. Sample Log Document No. 42 as to Dana Deem's November 7, 2013 e-mail and James McBride's November 7, 2013 e-mail;
- L. Sample Log Document No. 43;
- M. Sample Log Document No. 45;
- N. Sample Log Document No. 53;
- O. Sample Log Document No. 59;
- P. Sample Log Document No. 60;
- Q. Sample Log Document No. 61;
- R. Sample Log Document No. 62;

- S. Sample Log Document No. 63 as to Beth Vannoy's November 5, 2014 e-mail to Ritchie Taylor;
- T. Sample Log Document No. 65;
- U. Sample Log Document No. 69;
- V. Sample Log Document No. 72;
- W. Sample Log Document No. 80 as to Ritchie Taylor's October 18, 2011 e-mail to Beth Vannoy;
- X. Sample Log Document No. 83;
- Y. Sample Log Document No. 84 as to Beth Vannoy's November 9, 2011 e-mail to Jay Vannoy and Dana Deem's November 9, 2011 e-mail to Beth Vannoy;
- Z. Sample Log Document No. 87 as to Dana Deem's November 23, 2011 e-mail to Beth Vannoy;
- AA. Sample Log Document No. 109 as to Beth Vannoy's March 25, 2013 e-mail to Ritchie Taylor and Bridgett Beck's e-mail to Beth Vannoy;
- BB. Sample Log Document No. 110 as to Dana Deem's March 16, 2013 e-mail to Beth Vannoy;
- CC. Sample Log Document No. 111 as to Dana Deem's April 17, 2013 e-mail to Beth Vannoy;
- DD. Sample Log Document No. 113 as to Beth Vannoy's May 15, 2013 e-mail to Dana Deem;

- EE. Sample Log Document No. 122 as to Beth Vannoy's August 12, 2013 e-mail to Ritchie Taylor and Dana Deem's August 12, 2013 e-mail;
- FF. Sample Log Document No. 127 as to Beth Vannoy's January 6, 2014 e-mail to Ritchie Taylor and Dana Deem's January 6, 2014 e-mail to Beth Vannoy;
- GG. Sample Log Document No. 130;
- HH. Sample Log Document No. 133 as to Beth Vannoy's April 24, 2014 e-mail to Bridgett Mathis and Ritchie Taylor's April 24, 2014 e-mail to Beth Vannoy;
- II. Sample Log Document No. 135 as to Dana Deem's June 2, 2014 e-mail to Beth Vannoy;
- JJ. Sample Log Document No. 137;
- KK. Sample Log Document No. 142 as to Ritchie Taylor's November 6, 2014 e-mail to Beth Vannoy;
- LL. Sample Log Document No. 143; and
- MM. Sample Log Document No. 146 as to James McBride's February 18, 2015 e-mail and Tammy Whitworth's February 18, 2015 e-mail.²

(collectively, the Sample Log Documents identified in A–MM shall be referenced hereafter as the “Identified Sample Log Documents”).

² The January 17 Order also included Sample Log Document Nos. 126, 128 (as to Jay Vannoy's February 26, 2014 e-mail), and 136 (as to Beth Vannoy's July 23, 2014 e-mail). The Court has subsequently determined, however, that the Window World Defendants shall not be required to present specific argument and evidence as to those Sample Log Documents under the January 17 Order but may do so in their discretion.

6. The Court ordered the Window World Defendants to submit a brief, for the Court's eyes only, together with supporting exhibits and affidavits, setting forth their position as to their claim of privilege concerning the Identified Sample Log Documents no later than February 1, 2019.³

7. The Window World Defendants now request that (i) they be allowed to submit exceptions to the Special Master's Report pursuant to Rule 53(g) of the North Carolina Rules of Civil Procedure and (ii) the Court extend the deadline both as to the filing of exceptions and the briefing ordered in the January 17 Order. By letter dated January 22, 2019, Plaintiffs indicated that they do not consent to the Window World Defendants' Request "because Plaintiffs did not understand the Court's [*In Camera* Review Order] to incorporate the complete process contemplated under Rule 53, including Rule 53(g)(2)'s provisions regarding filing exceptions to the Report and applying to the Court to take action on the Report."

8. Rule 53(g) provides, in relevant part, as follows:

All or any part of the report may be excepted to by any party within 30 days from the filing of the report. Thereafter, and upon 10 days' notice to the other parties, any party may apply to the judge for action on the report. The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions.

N.C. R. Civ. P. 53(g)(2).

³ Our appellate courts have held that "[t]he burden is always on the party asserting the privilege to demonstrate each of its essential elements." *In re Investigation of the Death of Miller*, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003). "In practical terms, this burden requires the proponent to explain, through *ex parte* submissions if necessary to maintain confidentiality, the significance or meaning of an otherwise cryptic document." *United States v. (Under Seal)*, 748 F.2d 871, 876 (4th Cir. 1984); *see, e.g., Santrade, Ltd. v. GE*, 150 F.R.D. 539, 548 (E.D.N.C. 1993) (noting that a court can allow a party the "opportunity to address *ex parte* any concerns of the court about the basis of claiming privilege for a given document").

9. It appears to the Court that Rule 53(g) permits any party in this action to make exceptions to the Special Master's Report. The Court thus concludes, in the exercise of its discretion, that all parties should be given the opportunity to submit exceptions in accordance with that Rule, and responses to those exceptions, pursuant to the terms and conditions set forth in this Order.⁴

10. The Court further concludes, in the exercise of its discretion, that the January 17 Order should be modified in certain respects. This Order therefore supersedes and replaces the January 17 Order as to the Window World Defendants' duty to provide supplemental briefing and argument concerning the Identified Sample Log Documents.

11. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **ORDERS** as follows:

A. The Window World Defendants shall have through and including February 11, 2019 to submit a brief, together with supporting exhibits and affidavits, setting forth their position as to their claim of privilege concerning the Identified Sample Log Documents (the "Sample Log Submission"). The Window World Defendants shall submit their brief and supporting materials, unredacted, by e-mail to the Court's law clerk at daniel.d.mcclurg@ncbusinesscourt.net and in hard copy form. The Window World Defendants shall also file their brief and supporting materials in redacted form under seal on

⁴ Because the Special Master's Report was filed on January 3, 2019, the current deadline for filing exceptions under Rule 53(g) is February 4, 2019.

the Court's docket, with redactions only as to information the Window World Defendants reasonably contend is subject to the attorney-client privilege or the work-product doctrine. The Window World Defendants' brief shall not exceed 3,750 words.

- B. Plaintiffs shall have through and including February 25, 2019 to submit a brief and supporting materials in response to the Sample Log Submission. Plaintiffs' brief shall not exceed 3,750 words and shall be filed under seal.
- C. The Window World Defendants shall have through and including February 11, 2019 to submit exceptions to the Special Master's Report in accordance with Rule 53(g). The Window World Defendants shall submit the exceptions, unredacted, by e-mail to the Court's law clerk at the address above and in hard copy form. The Window World Defendants shall also file the exceptions in redacted form under seal, with redactions only as to information relating to the Sample Log Documents that the Window World Defendants reasonably contend is subject to the attorney-client privilege or the work-product doctrine. The Window World Defendants' exceptions shall not exceed 7,500 words. The Window World Defendants may incorporate by reference into their exceptions some or all of their Sample Log Submission, as they may deem appropriate.

- D. Plaintiffs shall have through and including February 11, 2019 to submit exceptions to the Special Master's Report in accordance with Rule 53(g). Plaintiffs' exceptions shall not exceed 7,500 words and shall be filed under seal.
- E. The Window World Defendants shall have through and including February 25, 2019 to file a response to Plaintiffs' exceptions to the Special Master's Report. Any such response shall not exceed 7,500 words and shall be filed under seal.
- F. Plaintiffs shall have through and including February 25, 2019 to file a response to the Window World Defendants' exceptions to the Special Master's Report. Any such response shall not exceed 7,500 words and shall be filed under seal. Should the Window World Defendants incorporate into their exceptions portions of their Sample Log Submission, the Court will consider Plaintiffs' request, if made, to expand the word limitation hereunder commensurately.
- G. The Court will notice a hearing on these matters by separate order.

SO ORDERED, this the 24th day of January, 2019.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge