

Global Textile Alliance, Inc. v. TDI Worldwide, LLC, 2019 NCBC Order 5.

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

GLOBAL TEXTILE ALLIANCE,
INC.,

Plaintiff,
v.

TDI WORLDWIDE, LLC et. al.,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 7304

**ORDER ADOPTING SPECIAL
DISCOVERY MASTER'S AMENDED
RECOMMENDATION ON STEVEN
GRAVEN'S MOTION TO COMPEL**

THIS MATTER comes before the Court on the Special Discovery Master's ("SDM")¹ Amended Recommendation (attached hereto and referred to as "the Recommendation") on Defendant Steven Graven's Motion to Compel Documents Logged on Plaintiff's Privilege Log and to Overrule Instructions during Deposition ("Motion to Compel"). The Court has thoroughly reviewed the Recommendation, the motion, briefs, and exhibits filed with the SDM (ECF Nos. 411–414), the applicable legal authorities, and other appropriate matters of record, and has reviewed in camera a sample of the allegedly privileged documents at issue and the "Plaintiff's Privilege Log ISO Opposition to Defendant Steven Graven's Motion for Relief" (ECF No. 426), and concludes that the Recommendation should be ADOPTED, and the Motion to Compel GRANTED, for the reasons set forth below.

¹ On July 27, 2018, the Court appointed as SDM retired Superior Court Judge Lindsay Davis to rule on the frequent and numerous discovery disputes arising between the parties in this action. (ECF No. 342.) Because this particular matter involved a question of attorney-client privilege, the Court asked the SDM to issue his order as a recommendation for the Court's consideration.

The instant matter involves a dispute between Plaintiff Global Textile Alliance, Inc. (“GTA”) and Defendant Steven Graven (“Graven”) over GTA’s claim of attorney-client privilege regarding certain correspondence and oral communications between GTA, its counsel in this matter, and a third-party to this lawsuit, Stefaan Haspeslagh (“Haspeslagh”). In conjunction with its production of documents to Graven, GTA provided a privilege log that identified certain correspondence between “GTA and/or its outside counsel and [] Haspeslagh conveying and/or summarizing legal advice regarding matters giving rise to the instant litigation” that was being withheld on the basis of attorney-client privilege and the attorney work product doctrine.² (ECF No. 412, Exh. A.) In addition, during the deposition of Remy Tack (“Remy”), GTA’s CEO, on advice of counsel, Remy declined to answer questions regarding the contents of communications with GTA’s counsel at which Haspeslagh was present. (S. Graven’s Mot. to Compel, ECF No. 412, at p. 9.)

On December 27, 2018, Steven Graven filed with the SDM the Motion to Compel (“Motion to Compel”). (ECF No. 412.) In the Motion to Compel, Graven argued that Haspeslagh’s inclusion in the correspondence, and presence during communications, between GTA and its counsel waived the protection of the attorney-client privilege, and that none of the potential exceptions to waiver of the privilege were applicable. In the Motion to Compel, Graven requests that GTA be compelled

² Although GTA has listed attorney work product as a basis for withholding the documents in its log, it makes no argument in support of application of the work product doctrine and the Court does not consider the doctrine. GTA has not placed any other objections to the requested information and documents at issue in this Motion to Compel.

to produce the documents it withheld as privileged, and that GTA's deponent be compelled to respond to the deposition questions on which it had claimed privilege.³

On January 22, 2019, GTA filed with the SDM its Response in opposition to the Motion to Compel. (ECF No. 411.2.) GTA did not argue that Haspeslagh was GTA's agent or employee, but rather contended that Haspeslagh was either Luc Tack's agent or the functional equivalent of Luc Tack's employee for purposes of communicating with GTA's counsel. Alternatively, GTA argued that Haspeslagh's participation in the communications should not waive the privilege because he was necessary, or highly useful, for the effective communication between GTA and its counsel.

On February 8, 2019, Graven filed with the SDM his Reply in support of the Motion to Compel. (ECF No. 414.)

Both parties also filed with the SDM evidentiary exhibits and other documents, the most significant of which were portions of the deposition transcripts of Luc Tack, the sole shareholder and owner of GTA (ECF Nos. 411.5 and 414.1), and Remy (ECF Nos. 411.6 and 414.2), and the affidavit of Luc Tack (ECF No. 411.4). GTA did not submit an affidavit from Haspeslagh. GTA also did not submit any of the allegedly privileged documents to the SDM for in camera review.

³ Graven claims that Plaintiff's counsel instructed "witnesses" not to answer questions regarding communications in which Haspeslagh participated, but provided evidence regarding only Remy's refusal to answer such questions. Accordingly, the Court considers Graven's request with regard to Remy's deposition testimony only.

On February 5, 2019, the SDM held hearing on the Motion to Compel at which counsel presented oral argument. On February 7, 2019, the SDM issued the Recommendation granting the Motion to Compel as follows:

1. At the relevant time, Mr. Haspeslagh was not Luc Tack's agent, or the functional equivalent of Luc Tack's employee, and [] his presence during communications between Luc Tack and GTA's outside counsel was not necessary or highly useful for the effective consultation between GTA or Luc Tack and GTA's outside counsel.
2. GTA has not carried its burden of showing that the attorney-client privilege applies to [c]onfidential correspondence between GTA and/or its outside counsel and Stefaan Haspeslagh conveying and/or summarizing legal advice regarding the matters giving rise to the instant litigation.
3. Steven Graven's motion to compel should be granted and GTA should be required to produce documents withheld from production.
4. Steven Graven's motion to compel should be granted and witnesses who were instructed not [to] answer questions at depositions based on the claim of attorney-client privilege should be required to answer fully those and other questions reasonably to follow from such answers.

(Attached to this Order as Exhibit A.)

The Recommendation is now before the Court for consideration.

The burden is on the party asserting an attorney-client privilege to establish that the communication at issue is protected by the privilege. *In re Investigation of Miller*, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003). "This burden may not be met by mere conclusory or *ipse dixit* assertions, or by a blanket refusal to testify. Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to

establish the privilege with respect to each disputed item.” *Id.* (citations and quotations omitted). The party claiming the privilege must show “some objective indicia” that it applies. *Multimedia Publ'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 576, 525 S.E.2d 786, 792 (2000) (emphasis in original); *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 537, 645 S.E.2d 117, 123 (2007) (party asserting privilege “failed to provide the trial court with ‘objective indicia’ that all the meeting’s attendees were encompassed within the privilege, and we hold the trial court did not err in ordering production of [the document at issue].”)

The evidence presented to the SDM showed that Haspeslagh is not an employee of or consultant to GTA and has no role with GTA. Haspeslagh is not an attorney, but rather, is educated and experienced in financial matters and taxes. Luc Tack testified that Haspeslagh does not advise him regarding GTA, or the lawsuit. Luc Tack also testified that he has placed the responsibility for this lawsuit on Remy and does not receive regular reports from Remy on the developments in the lawsuit. (ECF Nos. 411.5 and 414.1.)

Remy testified that Haspeslagh does “very little” for GTA and has no responsibility over any subject matter of GTA’s operations. Remy further testified that Haspeslagh is not an agent for GTA, and has not provided advice to Remy or GTA regarding this lawsuit. (ECF Nos. 411.6 and 414.2)

In response to the Motion to Compel, GTA provided an affidavit from Luc Tack. Luc Tack claims that he has a close professional and personal relationship with Haspeslagh, and Haspeslagh “acts as a personal confidant to” Luc Tack. (ECF No.

411.4.) Luc Tack states that he “knows” Haspeslagh will maintain the confidentiality of communications from Luc Tack, but does not claim that he or GTA have a written confidentiality agreement with Haspeslagh. Luc Tack further states that Haspeslagh has “extensive knowledge of GTA” and is “uniquely positioned to advise” him regarding business and litigation matters regarding Luc Tack’s business interests. (*Id.*) However, GTA has not provided any evidence regarding the nature of Haspeslagh’s unique knowledge of GTA, or that Haspeslagh possesses information which Luc Tack and other individuals do not also possess.

Luc Tack also states that Haspeslagh has acted as Luc Tack’s agent by attending GTA Board meetings in his place. (*Id.*) However, the mere fact that Haspeslagh may act as Luc Tack’s agent for some purposes does not extend the privilege to his participation in communications with counsel regarding this litigation. *Brown*, 183 N.C. App. at 536, 645 S.E.2d at 122 (“Courts across the country have . . . recognized that corporations involve special considerations and the mere fact that an employee is the company’s ‘agent’ in some respects does not necessarily require that a communication involving that employee be found privileged.”).

Finally, Luc Tack claims that Haspeslagh “served as an invaluable confidant to [Luc Tack] as [he] received legal advice regarding the matters giving rise to the instant litigation,” “was instrumental in advising [Luc Tack] in conversations with GTA senior officials on various, confidential matters in anticipation of this litigation,” and “actively contributes to conversations between senior management officials and

outside counsel [on] [Luc Tack's] behalf.” (ECF No. 411.4.)⁴ Again, however, GTA does not provide evidence regarding on what topics Haspeslagh has provided specific advice to Luc Tack or how any advice relates to GTA communications with its counsel regarding this lawsuit. For example, GTA does not claim that Haspeslagh provided information to GTA’s counsel that permitted counsel to render legal advice to GTA. Neither GTA nor Luc Tack claims that they would be unable to conduct communications with GTA’s counsel without Haspeslagh’s participation. See *Technetics Group Daytona, Inc. v. N2 Biomedical, LLC*, 2018 NCBC LEXIS 116, at *12 (N.C. Super. Ct. Nov. 8, 2018) (“Even when the client’s ultimate goal is legal advice, the privilege does not extend to consultation with a third party that is merely useful or convenient. The third party’s involvement must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.” (citation and quotations omitted)).

The Court has reviewed the evidence and adopts the SDM’s findings that GTA failed to meet its burden of establishing that Haspeslagh was Luc Tack’s agent, the functional equivalent of Luc Tack’s employee, or that his presence during communications between Luc Tack and GTA’s outside counsel was necessary or highly useful for the effective consultation between GTA or Luc Tack and GTA’s outside counsel. The Court concludes that GTA waived the attorney-client privilege

⁴ To the extent Luc Tack’s affidavit testimony contradicts his earlier, sworn deposition testimony regarding whether Haspeslagh has advised Luc Tack regarding this lawsuit, the Court gives little weight to the affidavit testimony. Cf. *Cousart v. Charlotte-Mecklenburg Hosp. Auth.*, 209 N.C. App. 299, 306–07, 704 S.E.2d 540, 545 (2011) (concluding that the second affidavit of plaintiff’s expert could not be considered because it contradicted his prior deposition testimony).

by Haspeslagh's participation in communication between GTA and its counsel in this case. Therefore, the Court ADOPTS the Recommendation, GRANTS the Motion to Compel, and ORDERS as follows:

1. GTA shall on or before March 8, 2019, produce the documents withheld on the basis of attorney-client privilege on the grounds that they constituted “[c]onfidential correspondence between GTA and/or its outside counsel and Stefaan Haspeslagh conveying and/or summarizing legal advice regarding the matters giving rise to the instant litigation.”
2. GTA shall make Remy Tack, who was instructed not to answer questions in his deposition about communications between GTA and its counsel in which Haspeslagh participated based on the claim of attorney-client privilege, available to respond to such questions and other questions reasonably to follow from such responses. Remy Tack shall not, however, be required to travel to the United States for such deposition if GTA will permit Steven Graven's counsel to take the deposition by video conference or other telephonic means.

This, the 26th of February, 2019.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge
for Complex Business Cases