IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

RCC, INC.,	*	
Plaintiff,	*	
vs.	*	Civil No. 323447
GIUSEPPE CECCHI,	*	
Defendant.	*	

OPINION AND ORDER

This matter comes before the Court on the Defendant's Motion to Compel Production of Documents and the Plaintiff's Opposition thereto. The Plaintiff maintains the documents sought are covered by the attorney-client privilege.[1] The Defendant argues the privilege has been waived by the disclosure of the communications to third parties. For reasons set forth hereafter, the Court shall grant the motion to compel.

INTRODUCTION

The Plaintiff herein, RCC, Inc. (RCC), is a Maryland corporation with its principal place of business in Corona Del Mar, California. RCC is engaged in the business of developing retirement communities across the United States. Beginning as early as 1980, RCC entered into a series of limited partnerships with the Defendants for the development of a number of condominium regimes at Leisure World of Maryland, a retirement community in Silver Spring, Maryland. The Defendant, Guiseppe Cecchi (Cecchi), through various companies he controlled under the name "IDI", served as the general partner for the limited

[1] Plaintiff does not assert that the documents are covered under the work-product privilege.

partnerships. As a result of information first discovered in 2007, RCC has brought various claims against the Defendants for breach of contract, breach of fiduciary duties and negligence. Among other things, RCC alleged the Defendants concealed from them certain material information regarding the financial condition of the partnerships.

For more than ten years, RCC has used the accounting firm of Deloitte Tax LLP, also known as Deloitte & Touche and Seiler & Co. "to assist with an assortment of confidential financial matters." [Plaintiff's Opposition to Defendant's Motion to Compel: hereinafter "Opposition," p. 2.] In addition to the accounting firms, since approximately 1995, RCC has used the services of outside counsel, Richard Sherman and his firm, Irell & Manilla LLP, on matters relating to the limited partnership.

The documents sought by the Defendants involve communications by and between Plaintiff, RCC, Inc., its accountants, Deloitte Tax LLP (DT), Seiler & Company (SC), and outside counsel, Irell & Manilla, LLP (IM). At the Court's direction, the Plaintiff provided the documents and a privilege log to the Court for an *in camera* review. The documents are contained in a binder and divided into two broad categories. Documents involving communications between RCC and outside counsel are collectively referred to as the "Sherman documents", a reference to lead counsel at IM, Richard Sherman. Communications principally involving the accounts are referred to as the "Deloitte documents". The accountant communications typically involve RCC or IM, occasionally both. Sometimes the "involvement" amounts to no more than copying RCC or IM on an e-mail exchange. The documents consist largely of printed copies of e-mail exchanges, frequently with other documents attached.

ARGUMENT

The Plaintiff asserts that the withheld documents are protected by the attorney/client privilege. To the extent the communications involve the accountants, the Plaintiff maintains the privilege extends to those documents under the "intermediary doctrine" citing *Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436 (D. Md. 2005) (hereinafter *NDC*) and/or the "derivative privilege" doctrine citing *Black & Decker Corp. v. United States*, 219 F.R.D. 87 (D. Md. 2003). The Plaintiff further submits that under *Newman v. State*, the ultimate test of whether the attorney/client privilege is waived by the presence of a third party is "whether the client reasonably understood the conference to be confidential notwithstanding the presence of third parties." 384 Md. 285, 303 (2004). Here, given their long-term relationship with the accountants, RCC reasonably believed the confidential nature of their communications would be unaffected by the involvement of their accountants. Accordingly, the privilege is not waived.

The Defendants respond that the attorney/client privilege has been waived. With respect to the "Deloitte documents", citing *E.I. du Pont de Nemours & Co. vs. Forma-Pack, Inc.*, 351 Md. 396 (1998), and *Black & Decker*, they assert Plaintiff has failed to meet its burden of establishing the "derivative privilege" applies to the documents withheld. Defendants submit Plaintiff's privilege log does not establish that legal advice was sought and, if so, by whom. The accountants involved are regularly employed by the Plaintiff to provide accounting services or business advice. They were not retained for purposes of obtaining legal advice. They have served as RCC's accountants for over 10 years. Further, relatively few of the communications were initiated by or directed solely to an attorney. Concerning the "intermediary doctrine," the Defendants argue the doctrine has not heretofore

been recognized by the Maryland courts. The only circuit court to consider its application rejected it.

With respect to the "Sherman documents," they further submit that the documents appear to represent counsel's notes rather than communications. No work product privilege has been asserted. Finally, with respect to both the Sherman and the Deloitte documents, they argue any attorney/client privilege has been waived because the Plaintiff has placed its knowledge of the financial condition of various entities owned by the parties at issue in this case.

For reasons set forth in the Plaintiff's Opposition to the Defendant's Motion to Compel, the Court finds the Defendant's argument that the Plaintiff has waived the attorney/client privilege by putting its knowledge of the company's financial condition at issue to be unavailing. Accordingly, the Court will not discuss it further. In addition, for reasons set out below, the Court finds it unnecessary to separately address the Defendant's argument that the "Sherman documents" do not involve communications.

ANALYSIS

With respect to all documents, RCC bears the burden of establishing the attorney-client privilege protects those documents they seek to withhold. "[T]he party who is resisting discovery and is asserting a protective privilege bears the burden of establishing its existence and applicability." *Forma-Pack*, 351 Md. at 406 (internal citations omitted). Further, "Because the application of the attorney-client privilege withholds relevant information from the fact finder, the privilege contains some limitations and should be narrowly construed." (internal citations omitted) *Id*. at 415.

a. "derivative privilege"

In general, there are two requirements for applicability of the attorney-client privilege. " 'Only those attorney-client communications *pertaining to legal assistance* and *made with the intention of confidentiality* are within the ambit of the privilege.' In discussing the 'legal advice' prong of the attorney-client privilege, the court in *Lanasa v. State*, 109 Md. 602, 71 A. 1058 (1909), stated '[T]o make the communications privileged, they … *must relate to professional advice* and to the subject matter about which such advice is sought.' '[F]or the privilege to apply, the client's confidential communication 'must be for the *primary* purpose of soliciting legal rather than business advice.' " (internal citations omitted) *Forma-Pack*, 351 Md. 396, at 415, 416.

Black & Decker, relied on by Plaintiff, cites the seminal case of *U.S. v. Kovel*, 296 F.2d 918 (2d. Cir. 1961), for the proposition that "the attorney-client privilege may protect exchanges between the client and an accountant when the accountant enables communication with the attorney by 'translating' complex accounting concepts." 219 F.R.D. at 90. The court in *Black & Decker* noted "cases decided after *Kovel* have narrowly interpreted the concept of the derivative privilege." *Id*. Where accountants were involved, most courts have limited *Kovel's* application to instances where the accountant was **necessary** to facilitate the communication between the client and the attorney.

One such case is *U.S. v. Ackert*, 169 F.3d 136 (2d. Cir. 1999) cited with approval in *Black & Decker*. There, the court held "… a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's right to represent the client." 169 F.3d at 139. In arriving at their opinion, the *Ackert* court noted that "the purpose of the privilege is

'to encourage clients to make full disclosure to their attorneys.' " *Id*. Where the accountant's advice is what is sought, that purpose is not being served.

Focusing on the nature of the services the accountants provided, *Black & Decker* adopted a four factor analysis to determine whether the "derivative privilege" applied: "1) to whom was the advice provided – counsel or the client; 2) where client's in-house counsel is involved, whether counsel also acts as a corporate officer; 3) whether the accountant is regularly employed as the client's auditor or adviser; and 4) which parties initiated or received the communications." 219 F.R.D. at 90. Clearly these questions address, at least indirectly, the nature of the communications, that is, whether they involve business advice versus legal advice.

The *Black & Decker* court found the records were not privileged because "An application of those factors to this case do not compel the clear conclusion that (the accountant) was needed to facilitate communications between plaintiff and their attorneys." *Id.* The court opined the accountants were providing tax and business advice, which had a legal component. However, the record did not support a finding that the advice "… was provided primarily to assist the plaintiff's attorney in rendering legal advice. Therefore, the derivative privilege protection recognized by *Kovel* …" was not applicable. *Id*. at 91.

Here, as well, it is impossible to tell from a review of the documents and the "privileged description" in the privilege log the nature of the advice being sought or offered and the role being served by the intermediaries. The accountants have provided services to the Plaintiff for "more than a decade." (Plaintiff's Opposition, p. 2). A number of communications claimed to be privileged go back more than 10 years, long before any problems apparently arose between the parties. (Documents 147, 148, 149 and 162). It is

frequently difficult to tell who initiated the communication and why it was initiated. Accordingly, under the test of *Black & Decker*, the Plaintiffs have failed to meet their burden of establishing that the accountants were necessary for the translation of information involving legal advice.

b. intermediary doctrine.

In the alternative, Plaintiffs suggest the documents are privileged under the "intermediary doctrine." A thorough review of the authorities cited, however, suggests that the "intermediary doctrine" and the "derivative privilege" are in reality one and the same. Regardless of which doctrine is being discussed, most courts trace the doctrine back to *Kovel*.

The Plaintiffs cite to *NDC* as support for the "intermediary doctrine." There, the plaintiff (NDC) sought discovery of the defendant's (Murphy's) communications with his attorney. The plaintiff asserted the attorney-client privilege was waived because Murphy communicated with his attorney through his financial adviser (McMaster). The magistrate judge, citing *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), held that the records were protected. The plaintiff appealed to the District Court arguing that Murphy had failed to demonstrate McMaster's services as an intermediary were necessary as required under *Lindsey*. Therefore, the attorney-client privilege was waived.

The *NDC* court rejected the plaintiff's argument that pursuant to *Lindsey* "a client must demonstrate a fundamental inability to communicate without the help of the intermediary." 233 F.R.D. at 439. In the *NDC* court's view, "*Lindsey's* core holding (is) that in considering whether a client's communication with his or her lawyer through an agent is privileged under the intermediary doctrine, the critical factor is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." (internal

citations omitted) *Id.* In *Lindsey*, the court simply noted the parties dispute "whether the use of an agent for communication between the attorney and the client must be 'reasonably necessary' in order for the agent to fall within the attorney-client privilege." 158 F.3d 1263, 1279. After noting the dispute, the *Lindsey* court said assuming the intermediary must be reasonably necessary, the President had demonstrated the necessity. *Lindsey* never actually addressed the issue of whether the services of the intermediary must be proven to be necessary.

Although *Lindsey* did not modify *Kovel* as *NDC* suggests, it did expand the "derivative privilege" doctrine in one respect. Many courts applying *Kovel* have held that the intermediary services must be limited to the translation of information to and from the attorney. *Lindsey* rejected such a narrow interpretation. The evidence in *Lindsey* showed that while serving as an intermediary between the President and his private counsel (Bennett), Mr. Lindsey at times offered Bennett his own opinions and advice. The *Lindsey* court observed that a number of courts since *Kovel* have held the intermediary doctrine applies even to agents that add value to the attorney-client communications. Accepting that general proposition, they opined that there are, however, limits to the value that may be added.

After noting that the privilege should be strictly confined and that without imposing limitations the privilege would quickly engulf all manner of services performed for a lawyer, the court stated "it would stretch the intermediary doctrine beyond the logic of its purpose to include Lindsey's legal contributions as an extra lawyer and we decline to do so. Those contributions, rather than facilitate a representation of the President's personal counsel, constitute Lindsey's own independent contribution to the President's cause and cannot, therefore, be said to be covered by the intermediary doctrine. One lawyer does not need

another lawyer providing supplementary legal advice to facilitate communication regarding matters of legal strategy." *Id*. at 1281. Accordingly, while *Lindsey* does expand the holding of *Kovel* to a limited extent, it does not expand *Kovel* as far as the *NDC* court suggests.

After discussing and distinguishing *Black & Decker*, the *NDC* court cites *In re Bieter Co.,* 16 F.3d 929 (8th Cir. 1994) as support for the application of the "intermediary doctrine" to the facts before it. However, *Bieter* is not on point. That case involves an analysis of which employees should be deemed as the "functional equivalent" of the client for purposes of the privilege when the client is a corporation. In addressing that issue, the *Bieter* court first looked to proposed Federal Rule 503, which was an attempt to codify the attorney-client privilege. According to *Bieter***,** despite the fact that Congress failed to enact the rule, many federal courts have relied upon it as an accurate definition of the federal common law attorney/client privilege. 16 F.3d at 935. The proposed rule extended the attorney-client privilege to communications between the attorney and the client or his "representative." However, "representative" is not defined.

In an effort to determine the meaning of "representative," *Bieter* looked to an earlier 8th Circuit case, *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). The *Diversified* court adopted a five part test to determine which employees should be deemed the client for purposes of the privilege when the client was a corporation: "[T]he attorney/client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice, (2) the employee making the communication did so at the direction of his corporate's superior; (3) the superior made the request so that the communication could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not

disseminated beyond those persons who, because of the corporate structure, need to know its contents." 572 F.2d at 609

Although the intermediary in *Bieter* was not an employee of the corporation, the Court nevertheless employed the *Diversified* factors, and found that in all relevant respects he was the "functional equivalent" of the client. Accordingly, they held that the attorney's communications with him and those that occurred in his presence with the client were privileged. *See* also *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001).

While the "functional equivalent" doctrine certainly appears broader than the "derivative privilege" doctrine, it presumably applies only where the client is a corporation. It is not at all clear from a review of these documents whether RCC or one of its principals, Heidi Cortese, is the client. In the latter case, the "functional equivalent" would not apply. Even assuming RCC is the client and assuming the "functional equivalent" analysis would extend to the outside accountants involved here, the Plaintiff nevertheless failed to provide sufficient information for the Court to determine whether the five part test of *Diversified* is met with respect to any particular communication. Therefore, assuming Plaintiff's reference to an "intermediary doctrine" in *NDC* is in reality a reference to the "functional equivalent" doctrine, the Plaintiff's attempts to rely upon it are nevertheless unavailing.

c. Newman

The Plaintiff's final argument rests upon the holding of the Court of Appeals in *Newman v. State*, 384 Md. 285 (2004). Seizing upon the language of the *Newman* court, the Plaintiff suggests that the **only** test of whether the attorney/client privilege attaches to a

communication is whether the client reasonably understood the communication to be confidential. "Because the attorney/client privilege is held and waived by the client, our essential inquiry is 'whether the *client* reasonably understood the conference to be confidential' *notwithstanding* the presence of third parties." (internal citations omitted) *Id*. at 306. While the quote is accurate, the facts of *Newman* are inapposite to those in the present case.

In *Newman*, Elsa Newman hired an attorney (Freidman) to represent her in a contentious divorce and custody dispute. On an occasion when Newman went to Freidman's office to seek his advice about the case, she appeared distraught over the possibility of losing custody of the children. A long-time friend and confidant, Marjorie Landry (Landry), accompanied Newman to Freidman's office. In an effort to calm Newman, Freidman invited Landry to be present when he spoke to Newman. During the meeting, Newman discussed killing one of her children and blaming her husband. She also discussed planting evidence of child pornography on him. Freidman subsequently disclosed the information to the authorities pursuant to Maryland Rules of Professional Conduct, Rule 1.6(b) permitting an attorney to disclose a confidential communication to prevent the client from committing a criminal act that the attorney believes is likely to result in substantial harm to another.

In a later prosecution of Newman for an assault on her husband, and related crimes, the trial court permitted the State over Newman's objection to call Freidman as a witness to testify about the conversation. Reversing Newman's conviction, the Court of Appeals held that the presence of Landry during the communication between Newman and Freidman did not waive the attorney-client privilege. The Court of Appeals found that Landry's presence was at the request of the attorney for purposes of facilitating the communication. She did not

participate at Newman's suggestion or request. The Court reasoned that "… because the decision to include the third party was not made by the client, but rather by the attorney.", Newman reasonably understood the communication to be confidential and subject to the privilege. 384 Md. at 308.

In arriving at its decision, the Court cited with approval to the case of *Rosati v. Kuzman*, 660 A.2d 263 (R.I. 1995). In that case, the Supreme Court of Rhode Island held the privilege was not waived by the presence of the client's parents during communications between the client and his attorney. The *Rosati* court found the parents had played "a vital role in (their son's) defense." 660 A.2d 263, 267. They helped find the attorney for their son and "remained invaluable confidants" to him throughout the legal proceedings. *Id*.

Both cases involved direct communications between the client and the attorney involving legal advice in the presence of a third party who had a close personal relationship with the client, akin to that of a family member, and enjoyed a position of trust. Implicit in the holding of both courts is that the presence of the third party was reasonably necessary. The Court finds *Newman* should be limited to its fact. To hold otherwise would extend the attorney-client privilege exponentially, a result that was almost certainly not intended by the Court of Appeals.

CONCLUSION

The Plaintiff has failed to meet its burden of establishing the subject documents are protected by the attorney-client privilege. In the first instance, the Plaintiff must establish that what was being sought or offered pertained to legal not business advice. Where legal advice was sought or offered, because third parties were involved, the Plaintiff must demonstrate that

the privilege has not been waived under either the "derivative privilege" doctrine or the "functional equivalent" test. Contrary to Plaintiff's assertion, the "derivative privilege" doctrine and the "intermediary doctrine" are one and the same. The latter is not a separate doctrine that relieves the party claiming the privilege of the obligation of demonstrating that the services of the intermediary were "reasonably necessary." If the client is an individual then the Plaintiff must establish the documents are protected under the "derivative privilege" doctrine. If the client is a corporation, then the Plaintiff must establish that the third parties are the "functional equivalent" of the client employing the five factor test of *Diversified*.

Because the Plaintiff has failed to provide sufficient facts for the Court to make the necessary findings, the Motion to Compel is granted. However, the Court shall stay the effect of its Order for 10 days to give the Plaintiff the opportunity to provide declarations or affidavits under seal to the Court for further *in camera* review.

IT IS SO ORDERED this _____ day of November, 2010, by the Circuit Court for Montgomery County, Maryland.

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MICHAEL D. MASON, JUDGE
Circuit Court for Montgomery County, MD.