

2008 Mar 25 AM 08:10

CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

RANDALL JOSEPH HAKE and
MARY ANN HAKE,

Debtors.

BUCKEYE RETIREMENT CO.,
L.L.C., LTD.,

Plaintiff,

vs.

RANDALL JOSEPH HAKE and
MARY ANN HAKE,

Defendants.

CASE NUMBER 04-41352

ADVERSARY NUMBER 06-4153

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION TO COMPEL RETURN
OF ATTORNEY-CLIENT COMMUNICATIONS BY LETSON,
GRIFFITH, WOODALL, LAVELLE & ROSENBERG, CO. L.P.A.
Not Intended For National Publication

The following Memorandum Opinion is not intended for national
publication and carries limited precedential value. The

availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

Before the Court is Motion to Compel Return of Attorney-Client Communications by Letson, Griffith, Woodall, Lavelle & Rosenberg Co., L.P.A. ("Motion for Return") (Doc. # 258) filed by subpoenaed party Letson, Griffith, Woodall, Lavelle & Rosenberg Co., L.P.A. ("Letson") on February 5, 2008.¹ The Motion for Return seeks to compel Plaintiff Buckeye Retirement Co., L.L.C. Ltd. ("Buckeye") to "return certain attorney-client communications that were inadvertently produced by Letson pursuant to a subpoena duces tecum" issued by Buckeye on November 2, 2007. (Motion for Return at 1.)

Buckeye filed Plaintiff's Response to Letson Griffith's Motion to Compel Return of Alleged Attorney-Client Communications (Buckeye's First Response") (Doc. # 255) on January 11, 2008. A corrective entry was made on the docket on January 14, 2008, as follows: "No Motion Pending in Adversary to Which it Responds." On February 5, 2008, Letson filed Motion for Leave to File *Instanter* a Reply Brief in Support of Motion to Compel Return of Attorney-

¹Letson filed this same motion in error in the main bankruptcy case on January 3, 2008.

Client Communications by Letson, Griffith, Woodall, Lavelle & Rosenberg Co., L.P.A. ("Motion for Leave") (Doc. # 259), to which was attached Reply Brief in Support of Motion to Compel Return of Attorney-Client Communications by Letson, Griffith, Woodall, Lavelle & Rosenberg Co., L.P.A. ("Letson's Reply Brief"). On February 13, 2008, Buckeye filed Plaintiff's Response to Letson Griffith's Motion to Compel Return of Alleged Attorney-Client Communications ("Buckeye's Second Response") (Doc. # 260). Although Buckeye did not re-file its First Response after Letson properly filed the Motion for Return in this adversary proceeding, Buckeye incorporated the First Response into its Second Response. (Buckeye's Second Response at 2).

Buckeye's Second Response refers to Letson's Reply Brief, as if this Court had granted the Motion for Leave. Accordingly, this Court will hereby grant the Motion for Leave.

The Court in rendering this opinion has considered the Motion for Return, Buckeye's First Response, Letson's Reply Brief, and Buckeye's Second Response. As set forth below, this Court grants the Motion for Return.

I. THE DOCUMENT IN DISPUTE

Letson seeks return of "certain attorney-client communications," specifically a letter dated October 18, 2000, from James Rusnov to Ronald Hamo ("Letter" or "Px 13"). Buckeye identified the Letter as Px 13 for purposes of trial of the instant adversary proceeding, which was held from October 29, 2007, through

November 2, 2007. The Court denied the admission of Px 13 at trial (Trial Tr. at 736) and further denied Buckeye's Motion for Reconsideration on Admissibility of Plaintiff's Exhibit 13 ("Motion for Reconsideration") (Doc. # 221 filed on November 16, 2007) by Memorandum Opinion and Order dated March 21, 2008 (Doc. ## 261 & 262). Letson concedes that the Letter itself is not privileged, but Letson argues that the handwritten notes in the margins of the Letter constitute privileged communications between Michael Rosenberg, attorney for Randall J. Hake ("Debtor") and Mary Ann Hake (collectively, "Debtors"), and Debtors.

Despite Buckeye's argument in the First Response that "Letson Griffith has failed in its burden to show that Px 13 is covered by the attorney-client privilege" (Buckeye's First Response at 8), it is beyond doubt that the handwritten notes on the Letter constitute confidential communications between Debtors and Michael Rosenberg in his capacity as Debtors' attorney. (Trial Tr. at 735.)

Furthermore, Buckeye has waived its ability to argue that the Letter does not contain privileged communications. When the issue of admissibility of Px 13 came up at trial, Buckeye acknowledged that it did not want a clean copy of the Letter admitted into evidence, but only sought the admission of Px 13 because the document contained the handwritten notes of Debtors' "estate planning attorney" in his capacity as attorney for Debtors. (Trial Tr. at 927-28.) Buckeye argued at trial that it wanted the admission of the handwritten notes for the express purpose of demonstrating that Mr. Rosenberg had provided certain advice to

Debtors. (Trial Tr. at 727-28.) At no time during the trial when admission of Px 13 was being discussed (Trial Tr. at 727-33, 735-36, 927-28) or in the Motion for Reconsideration did Buckeye contend that the Letter did not contain confidential communications between Debtor and his attorney. The privileged nature of the handwritten notes was taken as a given. The Motion for Reconsideration dealt exclusively with the issue of whether Debtor waived the attorney-client privilege. Certainly the issue of waiver is not relevant if the document in question is not privileged in the first place.

Although this Court believes that the issue of privilege has been addressed in the Court's prior rulings on the exclusion of Px 13, this Court expressly finds that the handwritten notes on the Letter offered as Px 13 constitute confidential communications between Debtors and their attorney, which are covered by the attorney-client privilege.

II. IS THE MOTION FOR RETURN MOOT?

The Court will first address the issue raised in Buckeye's Second Response that the Motion for Return should be denied because it is moot. Buckeye argues that Letson acknowledges that it has "already obtained all of the relief that it now seeks[,] " because "'Judge Curran ordered Buckeye to return the [disputed] Letter under seal to the Court and destroy all remaining copies in its possession.'" (Buckeye's Second Response at 1-2.) Judge Curran's order appears to provide the relief sought in the Motion for

Return, but Buckeye fails to state in its Second Response whether it has complied with Judge Curran's order and actually returned the Letter to that court under seal and destroyed all remaining copies of such Letter.

Moreover, the Letter was produced by Letson in response to a subpoena issued in this adversary proceeding. Accordingly, it is appropriate for this Court to determine if Letson is entitled to have the Letter returned.

Buckeye continues to argue that the Letter is not privileged. It has utilized the document in filings in this Court and has not sought to have those filings redacted or portions filed under seal. In order to provide complete relief to Letson, any and all copies of the document previously filed by Buckeye on the public record would need to be removed or made unavailable to the general public. Judge Curran's order does not require Buckeye to retrieve previously filed or otherwise disclosed copies of the Letter. As a consequence, the Motion for Return is not moot.

III. WAIVER OF PRIVILEGE AND INADVERTENT DISCLOSURE

The Court incorporates its Memorandum Opinion and Order dated March 21, 2008, (Doc. ## 261 & 262) into this Memorandum Opinion as if fully rewritten and will not repeat the findings of fact and conclusions of law that already represent law of the case in this adversary proceeding. This Court has thoroughly addressed the issues of: (i) whether Debtors waived the attorney-client privilege associated with Px 13 by the alleged delay in asserting the

privilege; and (ii) whether the privilege was waived by inadvertent disclosure. In considering both of these arguments previously raised by Buckeye, the Court ruled that Debtors have not waived the attorney-client privilege with respect to Px 13. Only a client can waive the attorney-client privilege; Buckeye has expressly conceded that neither Debtor nor Debtor's bankruptcy counsel produced the Letter to Buckeye. (Trial Tr. at 731, 927.) Debtor asserted the privilege with respect to Px 13 as soon as Mr. Hake became aware, at trial, that the handwritten notes were made by Mr. Rosenberg in his capacity as Debtors' attorney. There was no delay in asserting the privilege. (Trial Tr. at 728-730.) Moreover, only the client - not the client's attorney - can waive the privilege; since Debtors did not produce the document, production of the Letter by Letson did not waive the privilege whether or not such production was "inadvertent."

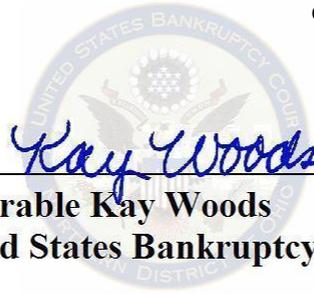
V. CONCLUSION

As set forth above, the Motion for Leave is granted.

Because the Court finds that Debtor neither produced Px 13 nor waived any privilege with respect to it, it finds the Motion for Return to be well taken. Letson is entitled to the return of the Letter identified in this Court as Px 13 and all copies of such document. Buckeye shall also attempt to retrieve or otherwise make unavailable to the public any and all copies that it has put into the public arena through court filings or otherwise. An appropriate Order will follow.

#

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

RANDALL JOSEPH HAKE and
MARY ANN HAKE,

Debtors.

BUCKEYE RETIREMENT CO.,
L.L.C., LTD.,

Plaintiff,

vs.

RANDALL JOSEPH HAKE and
MARY ANN HAKE,

Defendants.

ORDER GRANTING MOTION TO COMPEL RETURN
OF ATTORNEY-CLIENT COMMUNICATIONS BY LETSON,
GRIFFITH, WOODALL, LAVELLE & ROSENBERG, CO. L.P.A.

For the reasons set forth in this Court's Memorandum Opinion
entered on this date, the Court makes the following orders.

The Motion for Leave to File *Instanter* a Reply Brief in Support of Motion to Compel Return of Attorney-Client Communications by Letson, Griffith, Woodall, Lavelle & Rosenberg Co., L.P.A. ("Motion for Leave") (Doc. # 259) is granted.

The Motion to Compel Return of Attorney-Client Communications by Letson, Griffith, Woodall, Lavelle & Rosenberg Co., L.P.A. (Doc. # 258) is granted. Buckeye Retirement Co., L.L.C. Ltd. shall (i) attempt to retrieve, or otherwise make unavailable to the public, any and all any copies the Letter, identified in this Court as Px 13, that it has put into the public arena through court filings or otherwise; (ii) return the Letter and any and all copies of such document to Letson, Griffith, Woodall, Lavelle & Rosenberg Co., L.P.A. within ten (10) days after entry of this Order; and (iii) file with this Court a written status report regarding (i) and (ii) within twenty (20) days after entry of this Order.

IT IS SO ORDERED.

#