

NOT FOR PUBLICATION - FOR UPLOAD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Galt Capital, LLP, and Bruce)
Randolph Tizes,)
)
Plaintiffs,)
)
v.)
)
Edward A. Seykota,)
)
Defendant.)
)
Civ. No. 2002-63)
)
-----)
Edward A. Seykota,)
)
Counterclaimant,)
)
v.)
)
Galt Capital, LLP, and Bruce)
Randolph Tizes,)
)
Counterclaim)
Defendants,)
)
and Sydney Stern,)
)
Additional)
Counterclaim)
Defendant.)
)
-----)

ATTORNEYS:

A. Jeffrey Weiss, Esq.
St. Thomas, U.S.V.I.
For plaintiffs Galt Capital and Bruce Tizes

Boyd L. Sprehn, Esq.
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For defendant and counterclaimant Edward Seykota

Frederick G. Watts, Esq.

St. Thoams, U.S.V.I.

For defendant and counterclaimant Edward Seykota

Karin A. Bentz, Esq.

St. Thomas, U.S.V.I.

For counterclaim defendant Sydney Stern

MEMORANDUM

Moore, J.

Plaintiffs Galt Capital, LLP and Bruce Tizes have filed a motion arguing that defendant/counterclaimant Edward Seykota has waived the attorney-client privilege on communications with his former attorney, Sidney Machtinger, relating to the subject of this litigation. Because I find that Seykota has affirmatively placed his communications with Machtinger in issue, I will grant the plaintiffs' motion.

I. BACKGROUND

In November 2000, Seykota and Tizes entered into a partnership agreement to form Galt Capital as an investment advisor company. In late 2001, Seykota and Tizes had a falling out and Seykota allegedly abandoned Galt Capital in breach of the partnership agreement. Thereafter, Seykota and Tizes directly attempted to conclude a separation agreement to resolve all claims and disputes between them. After Seykota and Tizes were unable to resolve the dispute directly between themselves,

Seykota hired attorney Sidney Machtinger to negotiate and write up the separation agreement on his behalf.

The separation agreement allocated the investment accounts Seykota handled or developed during the life of the partnership by allowing Seykota to retain only his "personal accounts." The final sentence of the first paragraph of the separation agreement states: "Any personal accounts which Seykota has managed through Galt shall belong to him personally and are not required to be turned over to Galt." Although Machtinger had reduced the terms of the agreement to writing and Seykota signed it, Machtinger, on behalf of Seykota, found it necessary to clarify with Tizes which accounts were "personal" by an exchange of supplemental e-mails and memoranda. Central to the dispute in this litigation is which investment accounts were meant to be categorized as "personal accounts" that would belong to Seykota after the separation.

Seykota has asserted several defenses and counterclaims, including a claim to rescind the agreement due to mutual mistake and unilateral mistake. Specifically, Seykota alleges that "there has been a mutual mistake by the parties to the Seykota Separation Agreement, Seykota, Tizes and Galt as to the ownership of the monies in the Private Bank acct. no. 2360037048 and ED&F Mann acct. no. 068-001." Seykota also alleges that "there has

been a unilateral mistake by Seykota in entering into the Separation Agreement, and Tizes knew or had reason to know of the mistake at the time of the agreement." Galt and Tizes allege that these counterclaims place in issue Seykota's confidential discussions with Machtinger, with the result that Seykota has waived his right to assert attorney-client privilege regarding these communications.

II. ANALYSIS

Rule 26 of the Federal Rules of Civil Procedure provides that matters that are relevant but within the scope of the attorney-client privilege are not discoverable. *See Rohne-Poulenc Rorer, Inc. v. Home Indemnity Company*, 32 F.3d 851, 861 (3d Cir. 1994). The traditional elements of the attorney-client privilege protecting communications from disclosure in discovery are: (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 the 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 of 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. *Olive v. Isherwood, Hunter & Diehm*, 23 V.I. 168, 172 (D.V.I. 1987); see also *Rohne-Poulenc*, 32 F.3d at 862.

Implicit in this definition is the recognition that the attorney-client privilege may be waived under certain circumstances. The Third Circuit Court of Appeals has acknowledged that "a party can waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation." *Rohne-Poulenc*, 32 F.3d at 863; see also *Gov't Guar. Fund of the Republic of Finland v. Hyatt Corp.*, 177 F.R.D. 226, 38 V.I. 227 (D.V.I. 1997). Advice of counsel "is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner." *Rohne-Poulenc*, 32 F.3d at 863. Rather, the client must take "the affirmative step in the litigation to place the advice of the attorney in issue." *Id.*

I find that Seykota took such affirmative steps when he asserted his mutual and unilateral mistake counterclaims. These counterclaims necessarily place Seykota's communications with Machtinger at issue because, as Seykota acknowledges in his

opposition brief, Machtinger was acting as Seykota's representative in negotiating and concluding the separation agreement.¹ Without questioning Machtinger about the content of his discussions with Seykota, Galt and Tizes cannot verify whether Machtinger accurately represented Seykota's intentions in drafting the separation agreement, and, ultimately whether there was indeed a mistake. In *Government Guaranty Fund*, I ruled that the defendant could not rely on an attorney's declaration to support its opposition to the plaintiffs' motion for partial summary judgment and then deny the plaintiffs access to the attorney on grounds of the attorney-client privilege. 177 F.R.D. at 341-42; 38 V.I. at 238. Similarly, Seykota cannot use his attorney to negotiate a separation agreement on his behalf and willingly sign that agreement, later claim he did not understand its terms, then interpose the attorney-client privilege to shield from discovery his discussions with and instructions to Machtinger. In sum, because Galt and Tizes cannot defend Seykota's allegations of unilateral or mutual mistake without questioning Machtinger, I find that Seykota has placed his communications with Machtinger at issue in this litigation and,

¹ See Def.'s Opp'n to Pls.' Mot. to Deem Attorney-Client Privileged Waived at 4-5 ("Mr. Seykota chose to have his interests represented by Mr. Machtinger"); see also *id.* at 5-9 (describing Machtinger negotiating and concluding the separation agreement on Seykota's behalf).

consequently, that he has waived the attorney-client privilege on his communications with Machtinger.

ENTERED this 9th day of February, 2004.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

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