Not For Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	CASE NO.	10-31518 (LMW)
DOUGLAS M. NEWMAN,	CHAPTER	7
DEBTOR.		
HARBOR MARKETING, INC. and CHARLES BARROW,	ADV. PRO. NO.	10-3105
PLAINTIFFS	ECF NOS.	22, 32
vs.		
DOUGLAS M. NEWMAN,		
DEFENDANT.		

APPEARANCES

Jon P. Newton, Esq.
Brian O'Donnell, Esq.
Reid and Riege, P.C.
One Financial Plaza, 21st Floor
Hartford, CT 06103

Attorneys for Plaintiffs/Movants

Daniel P. Elliott, Esq.
David P. Friedman, Esq.
Murtha Cullina LLP
177 Broad Street
Stamford, CT 06901

Attorneys for Respondents Thomas J. Walsh, Esq. and Brody Wilkinson P.C.

Stephen P. Wright, Esq.
Harlow, Adams & Friedman
300 Bic Drive
Milford, CT 06461

Attorney for Defendant/Debtor

PARTIAL DECISION AND ORDER SCHEDULING FURTHER HEARING RE: MOTION TO COMPEL

Lorraine Murphy Weil, Chief United States Bankruptcy Judge

This is a discovery dispute which presents a novel question of statutory construction. Before the court in this adversary proceeding are the following: (a) the above-referenced plaintiffs' (the "Plaintiffs")[1] Motion To Compel (ECF No. 22, the "Motion to Compel") non-parties Thomas J. Walsh, Jr. and the law firm of Brody Wilkinson P.C. (of which Attorney Walsh is a principal, collectively with Attorney Walsh, the "Respondents") to produce certain documents allegedly belonging to two limited liability companies of which the corporate plaintiff is a member; and (b) the Respondents' objection (ECF No. 32, the "Objection") thereto.

I. BACKGROUND

A. Bankruptcy Proceedings

1. Chapter 7 Case

The above-referenced debtor (the "Debtor") commenced this chapter 7 case by a petition filed on May 20, 2010. The Debtor received his chapter 7 discharge on December 14, 2010.

2. Adversary Proceeding (In General)

The Plaintiffs commenced the above-referenced adversary proceeding by the filing of a complaint (ECF No. 1, the "Complaint") against the Debtor on November 23, 2010. (*See id.*) The Debtor filed an answer and special defenses on January 24, 2011.

[1] For the sake of simplicity, any reference to the Plaintiffs shall also include a reference to only one or the other of the Plaintiffs as the context dictates.

The Complaint asserts claims against the Debtor with respect to the Plaintiffs' investment in two Connecticut limited liability companies (collectively, the "LLCs"), the making of certain loans from the Plaintiffs to the LLCs, and the issuance of a guaranty by the Plaintiffs of two loans made by Citizens Bank Connecticut to the LLCs (all of the foregoing taken collectively, the "LLC Transactions"). (*See* ECF No. 1 at 2-10.) The Complaint sounds in four counts:

- Count One (Common Law Fraud)
- Count Two (Breach of Contract)
- Count Three (Violation of Connecticut Uniform Securities Act, Conn. Gen. Stat. § 36(b)-2 *et seq.*)
- Count Four (Violation of Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a *et seq.*)

(*See id.*) The Complaint also seeks a determination that such claims were not discharged in this chapter 7 case pursuant to 11 U.S.C. § 523(a)(2) and/or § 523(a)(6). (*See* ECF No. 1 at 1 ¶ 2.)[2]

---

[2] Section 523(a) of the Bankruptcy Code provides in relevant part as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt–
>
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing–
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

3. These Discovery Proceedings

The Plaintiffs served subpoenas (collectively, the "Subpoenas") dated January 31, 2011 upon the Respondents in this adversary proceeding commanding them to produce and permit inspection of those documents (the "Documents") listed on Schedule A to each of the Subpoenas. (*See* ECF No. 23-5 (Exhibit F).) The Plaintiffs allege that the Respondents "filed [an objection to the Document requests] on February 14, 2011 . . . ," (see ECF No. 22 at 6). However, that objection is not of record with this court. The Motion To Compel was filed on April 20, 2011. (*See* ECF No. 22.) The Objection was filed on May 24, 2011. (See ECF No. 32.) Briefing and oral argument have been had.

B. State Proceedings

1. Mediation

In 2004, the Debtor, Scott Holmes ("Mr. Holmes") and John Kinney ("Mr. Kinney") began the plans to create, finance and construct the business referred to in the Complaint as "North Branford Car Wash." All three men had ownership interests in the LLCs. All three men made financial capital contributions to the LLCs in connection with the planning and construction of the North Branford Car Wash. The relationship between Mr. Kinney and the Debtor deteriorated rapidly during the summer months of 2005. The foregoing resulted in a formal legal mediation (the

---

> (iv) that the debtor caused to be made or published with intent to deceive . . . ; or
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity . . . .

11 U.S.C.A. § 523 (West 2012)

"Mediation") in which an attorney in the Stamford office of what was then known as the law firm of Day, Berry & Howard LLP (now Day Pitney LLP) acted as a mediator, and at which the Debtor and Mr. Kinney (and perhaps Mr. Holmes) each had separate legal counsel. (*See* ECF No. 1 ¶¶ 14, 15, 16, 19, 22; ECF Nos. 14, 15, 16, 19, 22.) The result of the Mediation is not of record.

2. State Court Proceedings

On January 13, 2009, the Plaintiffs filed suit (the "State Court Proceedings") against the Respondents in Connecticut Superior Court (Judicial District of Waterbury). The revised complaint alleged a cause of action against the Respondents for legal malpractice and negligent misrepresentation with respect to the LLC Transactions. (*See* ECF No. 68-1 (Exhibit A) (state trial court decision).) It is alleged that substantial discovery from the Respondents was had by the Plaintiffs in the State Court Proceeding. After an eighteen-day bench trial, the court rendered a judgment for the Respondents. (*See id.*) That judgment has become final.

II. ARGUMENTS OF THE PARTIES

The Respondents allege that at least some of the Documents are subject to attorney-client privilege, mediation privilege and/or work product protection in respect of the LLCs.[3] The Plaintiffs argue that they are members of the LLCs and are entitled to inspect and copy the Documents pursuant to Section 34-144 of the Connecticut General Statutes. Further, the Plaintiffs argue, Section 34-144(c) trumps any privilege or protection that otherwise would apply (*i.e.,* the Plaintiffs' inspection and copying rights thereunder are virtually absolute). The Respondents take the opposite position and further argue that the LLCs' operating agreements provide for only limited inspection

[3] In his capacity as manager of the LLCs, the Debtor has asserted attorney-client privilege, mediation privilege and work product protection on behalf of the LLCs. (*See* ECF No. 32-1 ¶¶ 8, 9 (Debtor's affidavit).)

and copying rights and such provisions can and do override the inspection and copying rights set forth in Section 34-144(c).

III. ANALYSIS (C.G.S. § 34-144)

A. The Statute

Section 34-144 of the Connecticut General Statutes provides as follows:

> (a) A limited liability company shall keep at its principal place of business, or at such other location as may be stated in the operating agreement, the following: (1) A current and a past list, setting forth in alphabetical order the full name and last known mailing address of each member and manager, if any; (2) a copy of the articles of organization and all amendments thereto, together with executed copies of any powers of attorney pursuant to which the articles of amendment have been executed; (3) copies of the limited liability company's federal, state and local income tax returns and financial statements for the three most recent years or, if such returns and statements were not prepared for any reason, copies of the information and statements provided to, or which should have been provided to, the members to enable them to prepare their federal, state and local tax returns for such period; (4) copies of any effective written operating agreements, and all amendments thereto, and copies of any written operating agreements no longer in effect; and (5) other writings, if any, prepared pursuant to a requirement in an operating agreement.
>
> (b) A limited liability company may keep at its principal place of business, or at such other location as may be stated in the operating agreement, a writing or writings setting forth the amount of cash, if any, and a statement of the agreed value of other property or services contributed by each member and the times at which or events upon the happening of which additional contributions are to be made by each member, and any such writings on file shall constitute presumptive evidence as to the value of the member contributions described therein.
>
> (c) During ordinary business hours a member may, at the member's own expense, inspect and copy upon reasonable request any limited liability company record, wherever such record is located.
>
> (d) Members, if management of the limited liability company is vested in the members, or managers, if management of the limited liability company is vested in managers, shall render, to the extent the circumstances render it just and reasonable, true and full information of all things affecting the members to any member and to the legal representative of any deceased member or of any member under legal disability.

> (e) Failure of the limited liability company to keep or maintain any of the records or information required pursuant to this section shall not be grounds for imposing liability on any member or manager for the debts and obligations of the limited liability company.

Conn. Gen. Stat. Ann. § 34-144 (West 2012).[4]

B. Statutory Construction

1. A Limited Liability Company Operating Agreement Cannot Diminish the "Inspection and Copying" Rights Set Forth in Section 34-144(c)

The Respondents argue that the Plaintiffs agreed to only limited inspection and copying rights in the LLCs' operating agreements. That, the Respondents argue, trumps the inspection rights provided for in Section 34-144(c) which the Respondents label a mere "default" rule which applies only when the operating agreement fails to address the subject. The court does not agree.

The Respondents rely on *Kasten v. Doral Dental USA, LLC,* 733 N.W. 2d 300 (Wis. 2007), as support for their "default rule" argument. However, *Kasten* is inapposite because it construed a statutory provision which was, in relevant part, a "default rule" on its face. *See* W.S.A. § 183.0405(2) (West 2012) ("Upon reasonable request, a member may, at the member's own expense, inspect and copy during ordinary business hours any limited liability company record required to be kept under *sub.(1) and, unless otherwise provided in an operating agreement*, any other limited liability company record, wherever the record is located." (emphasis added)).[5]

---

[4] Prior to its amendment in 1994, the entire requirement of Section 34-144(a) theoretically could be diminished or eliminated by a contrary provision in the operating agreement. (*See* P.A. 94-217 § 13 (1994).) The 1994 amendment changed that (making only the location of the documents variable) and further inserted subsection (b) into the 1993 act and redesignated (among others) old subsection (b) as current subsection (c). (*See id.*)

[5] Subdivision (1) of the Wisconsin statute is analogous to Section 34-144(a).

Section 34-144(c) does not contain a provision permitting an operating agreement to abrogate its inspection and copying rights in whole or in part (*i.e.,* does not contain a provision making the members' statutory inspection and copying rights subject to a contrary provision in the operating agreement). *See* Conn. Gen. Stat. § 34-144(c). On the other hand, the record maintenance provision of Section 34-144(a) does contain limited express "default rule" provisions (both as to the rule concerning the location of certain documents, and an expansion of the document maintenance requirement). Moreover, there is an express "default rule" provision in Section 34-144(b). Furthermore, there are other express "default rule" provisions in other sections of the Connecticut Limited Liability Company Act. *See, e.g.,* Conn. Gen. Stat. §§ 34-142, 34-194, 34-208.

Given the absence of an express "default rule" provision in Section 34-144(c) when such a provision was expressly provided in other sections of the Connecticut Limited Liability Company Act, the court must conclude that the Legislature intended that a member's inspection and copying rights under Section 34-144(c) cannot be diminished by a contrary provision in the subject operating agreement.

2. "Any Limited Liability Company Record" within the Purview of Section 34-144(c) Does Not Extend Beyond Those Records Listed in Section 34-144(a) (and perhaps (b))

The Plaintiffs argue that, as members of the LLCs, pursuant to Section 34-144(c) they have a virtually absolute right to "inspect and copy upon reasonable request any limited liability company record" in the possession of the Respondents. The Plaintiffs further argue that the term "any . . . record" as used in Section 34-144(c) is broad enough to include all those documents described in

Schedule A to each of the Subpoenas. (*See* ECF No. 23 Exh. F.)[6] The Plaintiffs conclude that their expansive definition of "any . . . record" as used in Section 34-144(c) requires the Respondents to make such documents available to the Plaintiffs for inspection and copying without consideration of any issues of privilege or the like. On the other hand, the Respondents argue that "any . . . record" is a statutory reference only to those documents referred to in Section 34-144(a) (and perhaps (b)).

The term "record" is not defined in Section 34-144. That creates an issue of statutory construction that appears to be a novel one in Connecticut. The Connecticut Supreme Court has taken the following approach to statutory construction:

> We review the trial court's construction of § 8-8(a) "in light of well established principles that require us to ascertain and give effect to the apparent intent of the legislature. *Norwich v. Silverberg*, 200 Conn. 367, 370-71, 511 A.2d 336 (1986); *State v. Kozlowski*, 199 Conn. 667, 673, 509 A.2d 20 (1986); *Hayes v. Smith*, 194 Conn. 52, 57, 480 A.2d 425 (1984); *State v. Delafose*, 185 Conn. 517, 521, 441 A.2d 158 (1981); 2A Sutherland, Statutory Construction (4th Ed.1984) § 45.05. When the words of a statute are plain and unambiguous, we need look no further for interpretive guidance because we assume that the words themselves express the intention of the legislature. *Johnson v. Manson*, 196 Conn. 309, 316, 493 A.2d 846 (1985), *cert. denied*, 474 U.S. 1063, 106 S.Ct. 813, 88 L.Ed.2d 787 (1986); *Mazur v. Blum*, 184 Conn. 116, 118-19, 441 A.2d 65 (1981). When we are confronted, however, with ambiguity in a statute, we seek to ascertain the actual intent by looking to the words of the statute itself; *State v. Kozlowski, supra,* [at] 673 [, 509 A.2d 20]; *Dukes v. Durante*, 192 Conn. 207, 214, 471 A.2d 1368 (1984); the legislative history and circumstances surrounding the enactment of the statute; *State v. Kozlowski, supra,* [at] 673 [, 509 A.2d 20]; *DeFonce Construction Corporation v. State*, 198 Conn. 185, 187, 501 A.2d 745 (1985); *State v. Parmalee*, 197 Conn. 158, 161, 496 A.2d 186 (1985); *State v. Delafose, supra,* [at] 522 [, 441 A.2d 158]; and the purpose the statute is to serve. *Peck v. Jacquemin*, 196 Conn. 53, 64, 491 A.2d 1043 (1985); *Verrastro v. Sivertsen*, 188 Conn. 213, 221, 448 A.2d 1344 (1982); *Robinson v. Unemployment Security Board of Review*, 181 Conn. 1, 8, 434 A.2d 293 (1980)." *Rhodes v. Hartford*, 201 Conn. 89, 93, 513 A.2d 124 (1986). We note also that "[a] statute should not be interpreted in any way to thwart its purpose"; *Evening Sentinel*

---

[6] For example, the first document demand in Schedule A requires production of "[a]ll legal files maintained by you in connection with your representation of . . . [the LLCs] or of any of its members and managers."

> *v. National Organization for Women*, 168 Conn. 26, 31, 357 A.2d 498 (1975); and that "[i]n construing a statute, common sense must be used and courts will assume that [the legislature intended to accomplish] a reasonable and rational result. . . ." *Norwich Land Co. v. Public Utilities Commission*, 170 Conn. 1, 4, 363 A.2d 1386 (1975). We observe, finally, that "[t]his court traditionally eschews construction of statutory language which leads to absurd consequences and bizarre results." *State v. Rodgers*, 198 Conn. 53, 61, 502 A.2d 360 (1985), and cases cited therein.

Caltabiano v. Planning and Zoning Comm'n of the Town of Salem, 211 Conn. 662, 666-67 (1989).

In this case, legislative history and the like are unhelpful. *See* An Act Concerning the Limited Liability Company Act: Hearing on H.B. 6974 Before the Judiciary Committee, March 5, 1993. However, analysis of the structure of Section 34-144 *is* helpful. For example, Section 34-144 provides the members with another means of information gathering (in addition to Section 34-144(c)): Section 34-144(d)'s requirement for the management of the limited liability company to "render, *to the extent the circumstances render it just and reasonable,* true and full information of all things affecting the members . . . ,"[7] Conn. Gen. Stat. Ann. § 34-144(d) (West 2012) (emphasis added). The "just and reasonable" provision in Section 34-144(d) permits the court to consider privileges and the like. It does not seem reasonable for the Legislature to abrogate all privileges and the like by an overly broad definition of "any . . . record" when the broad category of "information" with a "just and reasonable" provision had been provided for in the same statute. Moreover, even under the Respondents' definition of "any . . . record," Section 34-144(a)(5) allows the members to broaden the scope of Section 34-144(c) pursuant to the operating agreement. *See* Conn. Gen. Stat. § 34-144(a)(5). Finally, the wholesale abrogation of evidentiary privileges and the like for which the Plaintiffs argue would, in the opinion of this court, lead to a bizarre and troubling result.

---

[7] The term "information" has a broad scope. *See Kasten,* 733 N.W. 2d at 316 ("It establishes a member right to 'true and full information,' without regard to whether that information is recorded and stored as a "record" or a "document.").

Accordingly, the court concludes that the Plaintiffs' proffered definition of "any . . . record" is unreasonable or, even if reasonable, is the less preferable of the two proffered definitions. *Cf. Red Hill Coalition, Inc. v. Town Plan and Zoning Comm'n of the Town of Glastonbury,* 212 Conn. 727, 737-38 (1989) ("When two constructions are possible, courts will adopt the one which makes the [statute] effective and workable, and not one that leads to difficult and possibly bizarre results." (internal quotation marks omitted)).[8]

At this point in the analysis, it is not necessary for the court to decide whether the existence of relevant privileges and the like would *per se* be determinative of "just and reasonable" within the purview of Section 34-144(d), or whether the existence of relevant privileges and the like would be but one factor in making that determination.

IV. CONCLUSION

The court has decided that the Respondents are not precluded by Section 34-144 from asserting otherwise valid claims of privilege and the like. However, documents do not become privileged merely because they are held by a party's attorney. *See United States v. Johnson,* 465 F.2d 793, 795 (5th Cir. 1972) ("[N]ot all documents in the hands of an attorney fall within the privilege."). If the Respondents are to assert privilege or the like, they must properly assert it in writing, prepare an appropriate privilege log and provide that log to the Plaintiffs (and the court). Only after the foregoing has been accomplished (and, possibly, an *in camera* review of disputed documents and an *in camera* hearing) will the court consider itself to be in a position to adjudicate issues of

---

[8] During oral argument the court may have indicated a contrary position. (*See* ECF No. 56 (transcript of July 25, 2011 Oral Argument) at 37:15-19 *et seq*.) However, after more mature consideration, the court has changed its mind. Because of the result reached above, it is unnecessary for the court to reach the Plaintiffs' estoppel argument.

privilege and the like and their relevance to a Section 34-144(d) analysis (or any other issues raised in the parties' papers and not specifically adjudicated herein). Accordingly, all such issues are reserved for later decision and these matters are continued to a nonevidentiary hearing on October 17, 2012 at 11:30 a.m. to give the court an opportunity to ascertain the full scope and status of this discovery dispute.

Dated: September 28, 2012 BY THE COURT

Lorraine Murphy Weil
Chief United States Bankruptcy Judge