UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
HARTFORD DIVISION

IN RE:	CASE No.	02-50852 (JJT)
FIRST CONNECTICUT CONSULTING GROUP, INC. and FIRST CONNECTICUT HOLDING GROUP LLC XXIII	CHAPTER	7
	(Jointly Administered)	
DEBTORS.		
RICHARD M. COAN, TRUSTEE and RONALD I. CHORCHES, TRUSTEE	ADV. PRO. No.	03-05045 (JJT)
	RE: ECF No.	649
PLAINTIFFS		
V.		
JAMES J. LICATA, CYNTHIA LICATA (a/k/a CYNTHIA CORTESE, a/k/a CYNTHIA CORTEZ), and FIRST CONNECTICUT CONSULTING GROUP, INC.		
DEFENDANTS.		

APPEARANCES

Paul N. Gilmore
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Hartford, CT 06103

Attorney for the Plaintiffs, Richard M. Coan, Trustee and Ronald I. Chorches, Trustee

John F. Carberry
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Attorney for the Defendant, Cynthia Licata

RULING ON TRUSTEES' MOTION TO DETERMINE APPLICABILITY OF ATTORNEY-CLIENT PRIVILEGE ASSERTED BY CUMMINGS & LOCKWOOD LLC AND ORDER ON TRUSTEES' SUPPLEMENTAL MOTION TO COMPEL COMPLIANCE WITH SUBPOENA *DUCES TECUM* (ECF NO. 649)

I. INTRODUCTION

Before the Court are: (1) the motion of the Chapter 7 trustees, Richard M. Coan and Ronald I. Chorches, (collectively, "Trustees") to determine the applicability of the attorney-client privilege claimed by Attorney John F. Carberry ("Attorney Carberry") of Cummings & Lockwood LLC (collectively, "C&L") on behalf of Cynthia Licata ("Ms. Licata") to three emails that C&L has withheld from production in response to the Trustees' subpoena *duces tecum* ("Subpoena"), and (2) the Trustees' supplemental motion to compel compliance with the Subpoena by producing the three emails (ECF No. 649). The Trustees argue that no privilege applies because other parties besides Attorney Carberry and Ms. Licata were present on each email (*Id.*). C&L acknowledges that third parties were present on each email, but argues that attorney-client privilege applies because all of the third parties were also C&L clients (ECF No. 661). The Court heard arguments on the motions on September 6, 2018 (ECF No. 663). Finding that C&L has not met its burden of proof, the Court holds that the attorney-client privilege does not apply and, accordingly, grants the Trustees' motion to compel.

II. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and derives its authority to hear and determine this matter on reference from the District Court pursuant to 28 U.S.C. §§ 157(a) and (b)(1). This is a core proceeding under 28 U.S.C. § 157(b)(2)(F).

III. FACTS AND PROCEDURAL HISTORY

The Court recites the following facts and procedural history, which are not in dispute:

1. On May 6, 2003, the Official Committee of Unsecured Creditors of First Connecticut Consulting Group, Inc. and James J. Licata ("Mr. Licata") initiated this adversary proceeding against, among others, Ms. Licata (ECF No. 1).

2. On March 31, 2010, the Trustees filed the operative complaint in this adversary proceeding (ECF No. 349), alleging fraudulent transfers from Mr. Licata to Ms. Licata under 11 U.S.C. §§ 544 and 548 and Conn. Gen. Stat. §§ 52-552e, 52-552f, and 52-552j and an action under the common law for the imposition of a constructive trust or recovery under the doctrine of unjust enrichment.

3. On April 5, 2013, the Court approved a stipulation for entry of final judgment ("Stipulated Judgment," ECF No. 466) between the Trustees and the Licatas. Therein, the Licatas stipulated that the evidence that would be presented at a trial could result in all of the challenged transfers to Ms. Licata being avoided under 11 U.S.C. § 550. The parties agreed that a final judgment awarding money damages of $1.625 million shall enter in favor of the Trustees and against Ms. Licata.

4. The defendants to the adversary proceeding aside from Ms. Licata were subsequently dropped as parties (ECF Nos. 472, 0:02; 481), after which, the Court confirmed the finality of the Stipulated Judgment (ECF No. 500).

5. This adversary proceeding was then closed on November 24, 2015.

6. On November 2, 2017, the Trustees moved to administratively reopen this adversary proceeding to enforce the Stipulated Judgment (ECF No. 506), which the Court granted on November 8, 2017 (ECF No. 508).

7. The Trustees then served subpoenas *duces tecum* on, among others, C&L (ECF No. 524). The Subpoena commanded the production of documents pertaining to C&L's

representation of Ms. Licata that related to: the probate of Ms. Licata's father, John Bawot Sr.; a property in Sarasota, Florida; a property in Greenwich, Connecticut; and the payment of legal fees. The Subpoena also commanded the production of any documents relating to Chiara Cortese, John Bawot Jr., or Christopher Cortese.[1] Additionally, the subpoena commanded production of any documents relating to John Meerbergen or Ferguson Cohen LLP that concerned Ms. Licata, the probate proceedings of John Bawot Sr., the Sarasota and Greenwich properties, Chiara Cortese, Christopher Cortese, or John Bawot Jr.

8. After C&L served responses articulating objections to the Subpoena, the Trustees filed a motion to compel (ECF No. 602). C&L objected to that motion (ECF No. 617).

9. The Court granted, with limitations, the Trustees' motion to compel, subject to revisions by the Trustees (ECF No. 631).

10. After C&L produced a privilege log of emails, the Trustees filed the instant motions, seeking a determination of the applicability of the attorney-client privilege to three emails and to compel the production of those emails should the privilege not apply (ECF No. 649).

11. According to the privilege log, the first disputed email was from Christopher Cortese to Ms. Licata, with Attorney Carberry CCed on the email, with the subject "Connecticut Ancillary Probate Proceedings" (ECF No. 649). In its objection to this motion (ECF No. 661), C&L admitted that Chiara Cortese also was CCed on this email.

12. The second disputed email was from Christopher Cortese to Ms. Licata and Attorney Carberry, with the subject "Closing of 515 River Road Property"[2] (ECF No. 649).

[1] Chiara Cortese and Christopher Cortese are two of Ms. Licata's children. John Bawot Jr. is Ms. Licata's brother.
[2] 515 River Road is the address of the Greenwich property referenced in ¶ 7.

13. The third disputed email was from Attorney Carberry to Ms. Licata and Mr. Licata, with the subject "Summary Process Action" (*Id.*).

14. C&L filed an objection to the Trustees' motions on August 23, 2018 (ECF No. 661), asserting that the attorney-client privilege applies to all three emails.

15. The Court held a hearing on that matter on September 6, 2018 (ECF No. 663).

16. At the hearing, the Trustees offered two exhibits into evidence: copies of (1) the Last Will and Testament of John Steven Bawot (Ex. 1) ("Will") and (2) the John Steven Bawot Living Trust (Ex. 2) ("Trust").[3] Both exhibits were admitted into evidence without objection.

17. The Will nominated Christopher Cortese and John Bawot Jr. as fiduciaries and personal representatives. Ex. 1. The Will also directed the personal representatives to consult with the trustee(s) of the Trust and pay estate expenses. *Id.* The residue after expenses was to be paid into the Trust. *Id.*

18. The Trust named Chiara Cortese as successor trustee of the Trust. Ex. 2.

19. Upon John Bawot Sr.'s death, the Trust granted to Ms. Licata a life estate in 3725 Meyer Place, Sarasota, Florida,[4] with the remainder to Chiara Cortese. *Id.*

20. Upon John Bawot Sr.'s death, the Trust granted the remainder and residue of the Trust estate to John Bawot Jr. and Chiara Cortese in equal shares. *Id.*

21. Attorney Carberry has represented that Ms. Licata, Mr. Licata, Christopher Cortese, and Chiara Cortese were all clients of C&L (ECF Nos. 661; 663, 0:02), which the Trustees do not dispute; however, Attorney Carberry has produced no documentation of any retention

[3] Both the Will and Trust pertain to John Bawot Sr.
[4] 3725 Meyer Place is the address of the Sarasota property referenced in ¶ 7.

agreement regarding any of these individuals to substantiate the timing, nature, and scope of the claimed representations.

IV. CONCLUSIONS OF LAW

A. Applicable Standards[5]

"To invoke the attorney-client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice." *Jansson v. Stamford Health, Inc.*, 312 F. Supp. 3d 289, 293 (D. Conn. 2018) (citation and internal quotation marks omitted). "The law is clear in this circuit that a person claiming the attorney-client privilege has the burden of establishing all the essential elements thereof. That burden is not, of course, discharged by mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." *Id.* at 294 (citation and internal quotation marks omitted). "Once a privileged communication has been disclosed purposely to a third party, the attorney client privilege is waived[.]" *United States v. United Techs. Corp.*, 979 F. Supp. 108, 111 (D. Conn. 1997); *see also Coastline Terminals of Conn., Inc. v. U.S. Steel Corp.*, 221 F.R.D. 14, 16 (D. Conn. 2003) ("Voluntary disclosure to a party outside the privilege destroys the attorney-client privilege

[5] No party has made any argument that the applicability of the attorney-client privilege is a matter of Connecticut law. Even still, the Court notes that, although the operative complaint alleged fraudulent transfers under both federal and Connecticut law and the Stipulated Judgment noted that the parties agreed that those allegations could be proven, the Stipulated Judgment only mentioned that any transfers were avoidable under federal law. Because the underlying proceeding is, thus, a matter of federal law, whether the attorney-client privilege applies is likewise a matter of federal law. Fed. R. Civ. P. 501. Regardless, Connecticut law also recognizes the basic elements of attorney-client privilege, *Gould, Larsen, Bennet, Wells & McDonnell, P.C. v. Panico*, 273 Conn. 315, 321, 869 A.2d 653 (2005), and places the burden of proving the privilege on the party asserting it. *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 267 Conn. 279, 330, 838 A.2d 135 (2004). Because no exception to the doctrine is claimed, the Court's decision would be the same under either federal or Connecticut law. *See State v. Gordon*, 197 Conn. 413, 423–24, 504 A.2d 1020 (1985).

because it destroys the confidentiality of the communication.") (citation and internal quotation marks omitted).

"[T]he attorney-client privilege may properly extend to communications that occur between an attorney in the presence of two or more clients that the attorney jointly represents. If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged . . . and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication. . . . [T]he rule recognizes that it may be desirable to have multiple clients represented by the same lawyer, and the scope of the co-client relationship is determined by the extent of the legal matter of common interest." *Supreme Forest Prods., Inc. v. Kennedy*, 2017 WL 120644, at *2 (D. Conn. January 12, 2017) (citations and internal quotation marks omitted); *see also Jansson*, 312 F. Supp. 3d at 302 ("The key consideration is that the nature of the parties' common interest be identical, not similar, and be legal, not solely commercial.") (citation and internal quotation marks omitted).

B. C&L Has Not Proven that the Disputed Emails Are Privileged

It bears noting that, although C&L claimed that all the parties to the emails were either legal counsel or a C&L client "pursuing a common interest" (ECF No. 661), C&L expressly disclaimed any common interest argument before the Court (ECF No. 663, 0:07). Therefore, the entirety of C&L's argument is that the three emails are privileged because all involved clients of C&L.

Looking at the three emails, however, it quickly becomes evident that C&L has not met its burden. The first email was from Christopher Cortese to Ms. Licata, with Attorney Carberry and Chiara Cortese listed on the CC line. The second email was from Christopher Cortese to Ms.

Licata and Attorney Carberry. The third email was from Attorney Carberry to Ms. Licata and Mr. Licata. All three of these emails involving Ms. Licata and Attorney Carberry show that third parties were either the senders or recipients of the information within each. Therefore, at least facially, the attorney-client privilege has been destroyed by the presence of third parties.

C&L, however, argues that each third party was a client of C&L. When asked whether C&L had retention letters for the other members of Ms. Licata's family, Attorney Carberry averred that he did for Christopher Cortese but not for Chiara Cortese (ECF No. 663, 0:07); however, he did not place into evidence any retention letters. Although the Trustees do not dispute that the Licatas and Corteses were clients of C&L, without evidence of the timing, nature, and scope their retention of C&L, it is impossible to know that each was a client pertaining to the substance of each email.

Although C&L has disclaimed any common interest argument, it is worth examining its parameters. In order to successfully invoke the doctrine, the clients of the same attorney must have an identical legal interest in a matter. Looking at the Will and the Trust, it is evident that the roles of the Corteses and Ms. Licata were not legally aligned. Whatever common personal or economic interest the three might share is of no moment. Concerning the administrations of the Will and the Trust, the three were, for all intents and purposes, legally adverse. Thus, even considering the common interest exception, an argument C&L disclaims, C&L has failed to meet its burden. It is outlandish to assert that because all the parties were clients, the emails are somehow privileged, which C&L asserts despite not even meeting the exception to the rule—an exception C&L disclaims—that the presence of third parties destroys the privilege. Therefore, the emails from Christopher Cortese to Ms. Licata were not confidential and cannot be withheld.

As to the final email from Attorney Carberry to the Licatas, it is undisputed that it concerned the summary process action against Ms. Licata and Chiara Cortese, not Mr. Licata. Whatever personal interest Mr. Licata might have in Ms. Licata's affairs is likewise irrelevant. He was not a party to the summary process action, so any communication from Attorney Carberry to Ms. Licata concerning it could not be disclosed to Mr. Licata without violating confidentiality. Having claimed no other privilege concerning it, the email from Attorney Carberry to the Licatas also cannot be withheld.

V. CONCLUSION AND ORDER

Because C&L has not met its burden of proving that the attorney-client privilege applies to the three emails, all three emails must be produced to the Trustees. The Trustees' supplemental motion to compel compliance with the subpoena *duces tecum* is therefore GRANTED. Such compliance shall be made within ten (10) days hereof.

IT IS SO ORDERED at Hartford, Connecticut this 21st day of September 2018.

James J. Tancredi
United States Bankruptcy Judge
District of Connecticut