

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

BRINCE WILFORD,

Plaintiff,

VS.

GABRIEL COLTEA,

Defendant.

NP
NO. 15-856-BC

DAVIDSON CO. CHANCERY CT.
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FILED

**MEMORANDUM AND ORDER GRANTING PLAINTIFF'S
SUPPLEMENTARY MOTION FOR BABC TO PRODUCE
DOCUMENTS HIGHLIGHTED ON PRIVILEGE LOG**

This case is before the Court to determine whether counsel (Bradley Arant Boult Cummings, LLP ("BABC")) representing a two-member LLC must produce to the Plaintiff/Investing Member of the LLC communications between BABC and the Defendant/Operating Member of the LLC.

The documents in issue have been designated as attorney/client communications and/or attorney work product, and are highlighted on the Privilege Log attached as Exhibit 1 to Plaintiff's August 24, 2015 *Supplemental Memorandum*, and are in the date range of May 19, 2015 through July 1, 2015 (the "Documents").

After studying the law cited by Counsel, the LLC Operating Agreement and argument of Counsel, it is ORDERED that, on or before Friday, September 18, 2015, BABC shall

produce the Documents to the Plaintiff under the terms of the September 3, 2015 Protective Order.

Production is ordered because the Court determines at this stage of the lawsuit:

- The Plaintiff has not sued the LLC, and the Plaintiff's claims have not yet been decided to be adverse to the LLC.
- There are actions which have been taken by the Defendant which have not yet been decided as coming within the Defendant's authority to speak and act for the LLC with LLC counsel, and these actions still present issues yet to be decided about whether the actions belong to the LLC members collectively.
- The Plaintiff has demonstrated that good cause exists for the Documents to be produced.

It is further ORDERED that until BABC's "rolling" production, beginning September 11, 2015, and motions related thereto are complete, it is premature for the Court to rule on the application of BABC to recover its fees and the motion of Plaintiff's counsel to recover fees. Those are held in abeyance.

This decision is based upon the following analysis of the law cited by Counsel in their respective briefs.

Context

BABC represents the LLC of which the Plaintiff and Defendant are the sole members. BABC and the Plaintiff have agreed the Documents are privileged. The issue is Plaintiff's access to the Documents. Because the Plaintiff is the Investing Member and Defendant is

the day-to-day Managing Member, BABC is concerned about its ethical obligation to preserve its attorney communications with and work product for the LLC.

The Plaintiff's claim to the Documents is that it filed this lawsuit as the Investing Member of the two-person LLC against the Operating Member alleging breach of the LLC Operating Agreement and breach of fiduciary duty. The Plaintiff alleges that the Defendant has failed to perform his responsibility under the Operating Agreement to provide LLC information to the Plaintiff upon request, has engaged in transactions above the monetary cap of his management authority, and has taken for himself a corporate opportunity. The Defendant denies the foregoing and has counterclaimed that he has validly terminated and is dissolving and winding up the LLC. The Plaintiff challenges the validity of the termination and dissolution. The Plaintiff has not sued the LLC.

The record at this preliminary stage of the lawsuit, where there is a complaint, answer, counterclaim and reply to counterclaim, is that there are open issues regarding whether:

1. The Defendant effectively terminated the LLC on April 3, 2015;
2. The termination commenced the dissolution and winding up of the affairs of the LLC;
3. The Defendant has in bad faith breached the Operating Agreement and fiduciary duties to the Plaintiff; and
4. The Defendant must account to the Plaintiff under certain provisions of the Operating Agreement.

Citing *Delta Financial Corp. v. Morrison*, 12 Misc. 3d 807, 813 (Supp. Ct. Nassau Co. 2006), BABC asserts the fiduciary duty exception to a member obtaining privilege communications between the LLC and counsel does not apply once there is an adversarial stance between the member who has filed the lawsuit and the LLC.

BABC is further concerned about its ethical obligation because an LLC can only act and speak through persons. Attorneys must have someone acting on behalf of the LLC to communicate with LLC counsel. *Montgomery v. eTrippid Technologies, LLC*, 548 F. Supp. 2d 1175, 1183 (D. Nev. 2008). In this case, pursuant to Section 4.1 of the Operating Agreement, the Defendant has the day-to-day responsibility and authority of managing and operating the Company. The Defendant is the Managing Member.

Merits Not Yet Decided

As a preliminary matter, the Court concludes that because the lawsuit is still in the stage of initial discovery to inform amending pleadings, adding parties and seeking relief *pendente lite*, arguments by either side that the other's position on the above issues is not legitimate is unavailing. It is not proper at this stage of the proceedings to weigh the strength of claims particularly because of the Defendant's access to information the Plaintiff does not have.

Analysis of Privilege Law

Within the foregoing context and from the authorities cited by Counsel, it is not apparent to this Court that *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), with its multi-factored indicia and requirement that a member must show good cause to access privileged documents, and its Delaware progeny *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Fund IBEW*, 95 A.3d 1264, 1278 (Del. 2014), are applicable. Their context is that the corporate entity is in a lawsuit against its stockholders for acting inimically to their interests, and the stockholders seek access to the entity's privileged documents.

The pending case, however, is not a lawsuit by the Plaintiff against the LLC. The LLC is not a party. The dispute is between the two individual members, the Plaintiff contending that the Defendant has acted in breach of the LLC Operating Agreement and fiduciary duties. BABC's capacity in this case is that it represents a nonparty. Thus, BABC's ethical concern of production of the Documents to Plaintiff does not appear to be implicated because it is the **members'** interest which became adverse when the Defendant announced the LLC was dissolved on April 3, 2015. At this stage of the lawsuit there is no decision that renders the Plaintiff and the LLC adverse. Accordingly *Garner* and *Wal-Mart* are not precise authority.

More on point is *In Re Newman*, 500 B.R. 328 (Bankr. D. Conn. 2013). Where the managing member's fraud and mismanagement of the LLC was in issue, the *Newman* analysis was that statutory criteria of "just and reasonable" for LLC members to obtain

privileged information from manager members was established. Significant to the *Newman* court was that the LLC was not a party to the action.

Further, the issues in this lawsuit do not pertain exclusively to conduct which comes within the Defendant's Managing Member responsibilities and authority. As noted at the outset there are open questions, not yet decided, about the construction of the Section 8.4 termination right of a member in consideration of the section 4.2(a)(v) requirement of approval by the Investing Member of dissolution. Because the issues in dispute in the lawsuit include matters requiring member consent, the "Collective Corporation Client" theory, where the members are considered to be the LLC, collectively, and may not assert the attorney-client privilege against one another, *see Montgomery*, 584 F. Supp. 2d at 1185, may be the applicable analogy. Under this analogy, there would be no ethical bar to BABC producing the Documents to the Plaintiff.

Even if, however, *Garner* and *Wal-Mart* are the applicable analytical model, the Plaintiff has demonstrated the good cause for production of the Documents those cases require.

The indicia present on this record are that:

- The Plaintiff is one of two members of the LLC and has a 50% voting interest.
- At this preliminary stage of the proceedings and having successfully challenged Defendant's partial motion for judgment on the pleadings, the Plaintiff's claim is colorable.

- Comparing the Documents in BABC's possession to those produced by Plaintiff is necessary for complete information on the Defendant's conduct in relation to the LLC.
- The Documents have been culled so as not to contain advice about the litigation.
- The Plaintiff is not "blindly fishing" for the reasons stated above in seeking production of these Documents.
- A Protective Order has been entered to address confidentiality.

The above analysis is the basis for the Court ordering production of the Documents.



ELLEN HOBBS LYLE
BUSINESS COURT JUDGE

cc: Steven Riley
Gregory Reynolds
Eugene Bulso, Jr.
Steven Nieters
Peter Sales



MAILED

9-14-15