IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Martin Finn, individually and Grins Sportspage, Inc.,	)	
	)	
Plaintiffs,	)	
	)	No. 13 L 772
v.	)	
	)	
Meckler, Bulger, Tilson, Marick, and Pearson, LLP and Michael I. Leonard,	)	
	)	
Defendants.	)	

ORDER

The attorney-client privilege is subject to waiver by the client. In this case, the plaintiffs previously waived their privilege both by disclosing certain documents to the defendants and by filing this lawsuit that places past attorney-client communications at issue. For those reasons, the defendants' motion is granted, documents claimed by the plaintiffs as privileged must be produced, and a prior court order is to be vacated.

Facts

The plaintiffs allege that the defendants gave the plaintiffs bad legal advice in a retaliatory discharge case filed against the plaintiffs by an ex-employee. The defendants allegedly advised the plaintiffs to accept a default judgment voluntarily so that whatever damages might be issued by the court could not be satisfied from the assets resulting from the sale of the plaintiffs' business. Regardless of the advice provided, Judge Alexander P. White issued on 28 August 2012 an order imposing a $131,630.54 judicial lien for an outstanding default judgment against the purchaser-successor to the plaintiffs' business and in favor of the ex-employee.

The plaintiffs filed this suit against the defendants claiming that the alleged bad legal advice resulted in the judicial lien. The defendants argue that they did not supply the alleged bad advice, but that it came from the plaintiffs' corporate attorneys, Burke Warren MacKay & Serritella, P.C., who handled the sale of the plaintiffs' business. To support this claim, the defendants point to an e-mail written by a Burke Warren attorney to his client with a copy going to the defendant Michael Leonard. The e-mail states, in part that: "The payments under the Note will be paid to the corp [sic] and as a result could be attached if the employee were to obtain a judgment against Grins in the lawsuit."

Based on that e-mail, the defendants subpoenaed Burke Warren for documents relating to its representation of and advice given to the plaintiffs. The plaintiffs initially indicated that none of Burke Warren's documents were privileged, but later reversed that position. After the defendants brought the current motion, the plaintiffs provided the Burke Warren documents for an *in camera* inspection before the court ruled on the propriety of the attorney-client-privilege claims.

Analysis

The attorney-client privilege is subject to waiver by the client. *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 569, 584 (2000). Such a waiver is implied when the client asserts a claim placing prior privileged communications with an attorney at issue in litigation. *Lama v. Pereskill*, 353 Ill. App. 3d 300, 305 (2d Dist. 2004), *citing Shapo v. Tires 'n Tracks, Inc.*, 336 Ill. App. 3d 387, 394 (1st Dist. 2002). Despite that legal principle, Burke Warren makes two arguments against the production of any of the documents it claims are privileged.[1]

On more than one occasion in their response brief, the plaintiffs argue that the at-issue implied waiver to the attorney-client privilege does not apply here because Burke Warren did not give the alleged bad advice. That argument is wrong for at least three reasons. First, the plaintiffs seek to distance Burke Warren from this litigation by suggesting that the sale of the plaintiffs' company and the entry of the voluntary default judgment were unrelated. That argument is soundly defeated by the allegations in the plaintiffs' complaint. Second, the plaintiffs' argument is disingenuous. Even if Burke Warren did not give the bad advice, that is no basis for the plaintiffs to withhold Burke Warren's documents. The plaintiffs have no right to prevent the defendants from investigating the defense to a claim based on attorney-client communications the plaintiffs voluntarily put at issue in their complaint. Further, if parties were permitted to withhold documents because they claimed they did nothing wrong, Rule 214 discovery would be far less time consuming. Third, it remains to be seen who, if anyone, gave the alleged bad advice. At this point, the defendants want Burke Warren's documents in hopes of discovering the source of the advice. This court does not know whether any of Burke Warren's documents will provide an answer, but they may, and that is all Rule 214 requires. What is evident to the court following its *in camera* inspection is that the Burke Warren documents concern legal advice provided both before and after the sale of the plaintiffs' business and the voluntary default. At a minimum, any of those documents could be relevant independently or relate to iterative oral communications.

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1 The plaintiffs' objection log indicates that they seek to shield certain documents based on the attorney-work-product doctrine. The plaintiffs have, however, failed to make any argument as to that doctrine; consequently it is waived.

The plaintiffs' second argument is that they have produced everything from Burke Warren that is relevant. While discovery relies to a considerable extent on one party trusting the other to produce all relevant materials, that trust is diminished when, as here, the plaintiffs seek to use its attorney-client privilege as both a sword and a shield. The decision to withhold documents is all the more troubling in light of the past instances in which the plaintiffs indicated that none of Burke Warren's materials were privileged and that they would be produced. The argument is also troubling because it misconstrues the defendants' document requests. The plaintiffs write on page nine of their response brief that: "there are no additional correspondence that pertain to this conversation [*i.e.*, the advice to take a voluntary default]." Had the defendants sought merely correspondence, they would have said so; rather, they are seeking documents. At a minimum, the plaintiffs chose their words badly; at worst, they are improperly seeking to limit the scope of discovery to their liking. Either way, the argument has no merit.

Based on these findings,

IT IS ORDERED THAT:

1. The defendants' motion to overrule the plaintiffs' privilege claims is granted;
2. By 31 January 2014, the plaintiffs are to produce to the defendants all documents provided to the court for *in camera* inspection;
3. By 31 January 2014, the plaintiffs are to retrieve the documents supplied to the court for *in camera* inspection;
4. The 7 October 2014 court order is vacated; and
5. The 26 February 2014 case management conference at 11:00 a.m. will stand with the remaining party depositions to be completed by that time, or for the parties to supply the court with firm dates for those depositions.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JAN 29 2014

Circuit Court 2075