

FSM SUPREME COURT TRIAL DIVISION

PACIFIC INTERNATIONAL, INC.,) CIVIL ACTION NO. 2014-046
)
Plaintiff,)
)
vs.)
)
THE NATIONAL GOVERNMENT OF THE)
FEDERATED STATES OF MICRONESIA, by)
and through its Agency, the FSM PROGRAM)
MANAGEMENT UNIT (PMU),)
)
Defendant.)
_____)

ORDER

Beauleen Carl-Worswick
Associate Justice

Decided: August 9, 2016

APPEARANCES:

For the Plaintiff: Marstella E. Jack, Esq.
P.O. Box 2210
Kolonias, Pohnpei FM 96941

For the Defendant: Clayton M. Lawrence, Esq.
Craig D. Reffner, Esq.
Assistant Attorneys General
FSM Department of Justice
P.O. Box PS-105
Palikir, Pohnpei FM 96941

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HEADNOTES

Evidence – Privileges

Evidence privileges will be governed by the principles of the common law, as they may be interpreted by the FSM courts. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 666 (Pon. 2016).

Evidence – Privileges

When prior FSM cases have not addressed a precise point, the court, in such instances, may look to authority from other jurisdictions in the common law tradition, such as the U.S. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 666 (Pon. 2016).

Evidence – Privileges

The attorney-client privilege protects communications between an attorney and client that were

made for the purpose of providing legal services. The privilege's effect is to safeguard these communications from being disclosed in litigation, since it acts a shield, to prevent adversaries from obtaining such exchanged information. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 666 (Pon. 2016).

Evidence – Privileges

The attorney-client privilege is deeply rooted in public policy and essential to the administration of justice. The privilege is traditionally deemed worthy of maximum legal protection. It remains one of the most carefully guarded privileges and is not readily to be whittled down. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 666 (Pon. 2016).

Evidence – Privileges

The attorney-client privilege applies only if: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court or his or her subordinate and in connection with this communication, is acting as a lawyer; 3) the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing primarily either an opinion on law, or legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and 4) the client has claimed and not waived the privilege. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 667 (Pon. 2016).

Evidence – Privileges

A justification for the attorney-client privilege is that it promotes disclosure of all relevant information by the client; enabling the attorney to effectively represent the client and dispense thorough legal advice. Without the privilege, there would most likely be a chilling effect, in that many clients would be reluctant to disclose all relevant information to the attorney, if adverse parties could utilize same against them in subsequent litigation. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 667 (Pon. 2016).

Evidence – Privileges

A justification for the attorney-client privilege is that an attorney must be able to openly communicate legal advice and strategy to the client, in order to adequately represent him or her and counsel would be hesitant to engage in such discourse, if adverse litigants could discover such communication in subsequent litigation. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 667 (Pon. 2016).

Evidence – Privileges

Because sound legal advice or advocacy serves public ends, the attorney-client privilege is necessary to promote full and unrestricted communication; consonant with the attorney-client relationship. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 667 (Pon. 2016).

Evidence – Privileges

Whether the attorney-client privilege attaches depends on the nature of the communication. In examining the nature of the communication, courts look to whether the attorney was retained to act in a capacity other than as an attorney, in which case, the communications may not be privileged. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 667 (Pon. 2016).

Evidence – Privileges

An uncertain attorney-client privilege – or one which purports to be certain, but results in widely varying applications by courts – is little better than no privilege. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 668 (Pon. 2016).

Evidence – Privileges

In determining the dominant purpose of the communication and thus whether the attorney-client privilege is implicated, the relevant question boils down to: was the exchange of information relevant to the rendition of legal services. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 668 (Pon. 2016).

Evidence – Privileges

The attorney-client privilege does not require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 668 (Pon. 2016).

Evidence – Privileges

When the communication documents exchanged by an attorney were intended to be confidential, the attorney-client privilege prevents their disclosure. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 668 (Pon. 2016).

Civil Procedure – Discovery; Evidence – Privileges

Since parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, a request for communication documents to and from an attorney are shielded by the attorney-client privilege and a motion to compel their production will be denied, but a motion to compel the production of communication documents to and from an engineer co-project manager will be granted. Pacific Int'l, Inc. v. FSM, 20 FSM R. 663, 668 (Pon. 2016).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On June 28, 2016, Plaintiff (PII) filed a Motion to Compel Discovery (*to wit*: production of Documents). An Opposition to this Motion to Compel, was filed by Defendant (FSM) on July 29, 2016. In issue is PII's January 21, 2016 First Set of Interrogatories and Request for Production, which were propounded upon the FSM; specifically the response to a document request.

DOCUMENT REQUEST NO. 1:

On October 10, 2011, Defendants notified PII that Dana W. Smith and Leony Yap, P.C.E. serve as Co-Project Managers of the Weno Phase I Construction Project. Please provide true copies of all communication documents to and from these individuals during the time either of them were project managers of said project.

RESPONSE TO DOCUMENT REQUEST NO. 1

Objection. Such request requires FSM to adopt the fact that Dana W. Smith and Leony Yap served as "Co-Project Managers of the Weno Phase I [C]onstruction Project." FSM has not been able to obtain[,] nor review[,] any document substantiating such claim. Therefore, FSM is without that Dana W. Smith and Leony Yap served as "Co-Project Managers" and it is not possible, at this time, to comply with such request. Moreover and to date, FSM has not been able to interview Leony Yap or Dana Smith. It is FSM's understanding that both of the individuals are out of the country.

Since no responsive documents were produced, PII maintains FSM Civil Rule 37, entitles the movant to an Order, which compels production of the coveted documents. In its Opposition, the FSM

acknowledges that both Dana W. Smith ("Smith") and Leony Yap were employed by the national government.¹ Notwithstanding, the FSM cites to the fact, that Smith is an attorney and his employment contract entailed serving in said capacity, while working in tandem with the Project Management Unit (PMU), which oversaw the Chuuk Roadway Project, as a "Co-Project Manager." Consequently, the FSM asserts, that the "communication documents" sought by PII, during Smith's tenure "as legal counsel to the PMU,"² are protected by the attorney-client privilege.

Article V of the FSM Rules of Evidence is captioned "Privileges" and Rule 501 sets forth, in pertinent part:

Except as otherwise required by the Constitution of the Federated States of Micronesia or provided by Act of Congress or in [R]ules prescribed by the Chief Justice[,] pursuant to Article XI of the Constitution, the privilege of a witness, person, government, State, or political subdivision thereof[,] shall be governed by the principles of the common law[,] as they may be interpreted by the [C]ourts of the Federated States of Micronesia
.....

The gravamen of the instant discovery dispute centers on whether PII's coveted "communication documents to and from [Smith]" come within the penumbra of the attorney-client privilege. Given the absence of case law on point within this jurisdiction, this Court will examine relevant U.S. Decisions for guidance. When prior FSM cases have not addressed a precise point, the Court, in such instances, may look to authority from other jurisdictions in the common law tradition. Individual Assurance Co. v. Iriarte, 16 FSM R. 423, 438 n.3 (Pon. 2009).

Attorney-Client Privilege

In a nutshell, the attorney-client privilege protects communications between an attorney and client, which were made for the purpose of providing legal services. The effect of the privilege is to safeguard these communications from being disclosed in litigation, since it acts a shield, to prevent adversaries from obtaining such exchanged information. The privilege is "deeply rooted in public policy"³ and essential to the "administration of justice."⁴ As such, the privilege is "'traditionally deemed worthy of maximum legal protection"⁵ and "it remains one of the most carefully guarded privileges and is not readily to be whittled down."⁶

¹ "[A]t this time, neither Leony Yap[,] nor Dana Smith[,] is currently employed by the FSM National Government, as their employment contracts have expired." The FSM's Opp'n to Mot. to Compel Discovery, at 3 (July 29, 2016).

² *Id.* at 3.

³ Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 963 (N.D. Ill. 2010) (citing *In re Ford Motor Co.*, 110 F.3d 954, 966 (3d Cir. 1997)).

⁴ *Id.* (quoting American Nat'l Bank & Trust Co. of Chi. v. Equitable Life Assurance Soc'y of the U.S., 406 F.3d 867, 878 (7th Cir. 2005)).

⁵ BNP Paribas v. Wynne, 967 So.2d 1065, 1067 (Fla. Dist. Ct. App. 2007) (quoting American Tobacco Co. v. State, 697 So. 2d 1249, 1252 (Fla. Dist. Ct. App. 1997)).

⁶ Pampered Chef, 737 F. Supp. 2d at 963 (citing Swidler & Berlin v. United States, 524 U.S. 399, 403, 118 S. Ct. 2081, 2084, 141 L. Ed. 2d 379, 384 (1998)).

The traditional elements of the attorney-client privilege which identify communications that may be prohibited from disclosure in discovery are:

The privilege applies only if (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 [or her] subordinate and (b) in connection with this communication[,] is acting as a lawyer; (3) the communication relates to a 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 on 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.

United States v. United States Shoe Machinery Corp., 89 F. Supp. 357, 358-89 (D. Mass. 1950).

There are two far-reaching justifications which underlie the privilege. The first justification is that the privilege promotes disclosure of all relevant information by the client; enabling the attorney to effectively represent the client and dispense thorough legal advice. Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584, 591 (1981) (citing Tammell v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 913, 63 L. Ed. 2d 186, 195 (1980)). Without the privilege, there would most likely be a chilling effect, in that many clients would be reluctant to disclose all relevant information to the attorney, if adverse parties could utilize same against them in subsequent litigation. The second justification is that conversely, an attorney must be able to openly communicate legal advice and strategy to the client, in order to adequately represent him or her and counsel would be similarly hesitant to engage in such discourse, if adverse litigants could discover such communication in subsequent litigation. In sum, because sound legal advice or advocacy serves public ends, the privilege is necessary to promote full and unrestricted communication; consonant with the attorney-client relationship.⁷

Notwithstanding the beneficial nature of the attorney-client privilege, some Courts have adopted a strict interpretation, to limit its scope. "Because the attorney-client privilege is an exception from the otherwise liberal construction of discovery rules, its use is not favored by Federal Courts. Therefore, assertions of attorney-client privilege are to be strictly confined within the narrowest possible limits[,] consistent with the logic of its principal." Cameron v. General Motors Corp., 158 F.R.D. 581, 586 (D.S.C. 1994).⁸ In short, whether the attorney-client privilege attaches, depends on the nature of the communication.

Nature of the Communication and the Dominant Purpose Test

In examining the nature of the communication, Courts have looked to whether the attorney was retained to act in a capacity other than as an attorney, in which case, the communications may not be privileged. In Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986), the Court held that communications regarding the ordinary business of a party is outside the scope of attorney-client privilege. In Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977), the Court similarly

⁷ Since the privilege serves the interests of justice, Courts have observed that it is worthy of maximum protection. Haines v. Liggett Group Inc., 975 F.2d 81, 90 (3d Cir. 1992).

⁸ *Accord In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1190 (4th Cir. 1991); United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986); *In re Grand Jury Investigation*, 599 F. 2d 1224, 1235 (3d Cir. 1979); National Labor Relations Bd. v. Harvey, 349 F.2d 900, 906 (4th Cir. 1965).

found that advice of counsel, rendered on non-legal matters, was not within the scope of the attorney-client privilege. Since the Co-Project Manager: Leony Yap, was an engineer, he was implicitly responsible for the technical aspects of the relevant construction project and therefore, correspondence to and from Co-Project Manager "Attorney" Smith (given his specialized professional status) involved legal intricacies (i.e. outside the purview of what can be considered the "ordinary business of the PMU").

It bears noting, that despite the aforementioned ambivalence, in terms of when the privilege is triggered, the Court overseeing In re Von Bulow, 828 F.2d 94 (2d Cir. 1987), seemed to frown on such skepticism. The Von Bulow Court opined: "An uncertain [attorney-client] privilege – or one which purports to be certain, but results in widely varying applications by Courts – is little better than no privilege." *Id.* at 100. Bottom line: in determining the dominant purpose of the communication and thus, whether the attorney-client privilege is implicated, the relevant question boils down to: was the exchange of information "relevant to the rendition of legal services." In re Allen, 106 F.3d. 582, 604 (4th Cir. 1997).

In the case at bar, the FSM maintains that Smith's employment contract with the National Government, was for the position of attorney and he served in said capacity, as "legal counsel to the PMU." Although Smith was ultimately appointed to serve as Co-Project Manager for the Chuuk Roadway Project, the subject appointment specifically referred to him as "PMU legal counsel Dana W. Smith." Furthermore, Smith, along with the Co-Project Manager (PMU Engineer Leony Yap) were supplanting an individual who had previously provided staff augmentation services to the PMU. As such, one can safely deduce that problems with the construction project had arisen and "Attorney" Smith's appointment was a proactive measure undertaken by the FSM; in anticipation of possible litigation. As noted by the FSM: "Mr. Smith's role as an attorney is further borne out by the fact that he is the sole individual[,] on behalf of the FSM[,] who was responsible for providing legal review and approval on all numerous change orders that came as a result of the Plaintiff's slovenly work." In fact, "[t]he [attorney-client] privilege does not require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged." Dunn v. State Farm Fire & Cas. Co., 977 F.2d 869, 873 (5th Cir. 1991). In conclusion, the communication documents exchanged by Attorney Smith, to which PII covet, were intended to be confidential and therefore the shroud of attorney-client privilege, as asserted by the FSM, prevents such disclosure.

Finally, FSM Civil Rule 26(b)(1) provides, in pertinent part: "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action" (emphasis added).

This Court finds, that PII's request for "communication documents to and from [Attorney Smith]," as reflected in Plaintiff's Document Request No. 1, are shielded by the venerable attorney-client privilege claimed by the FSM. On the other hand, the FSM voiced no objection to PII's request for "communication documents to and from [Co-Project Manager] PMU Engineer Leony Yap."⁹

Accordingly, this Court hereby DENIES Plaintiff's Motion to Compel Discovery in part: finding the communications sought to and from Attorney Dana W. Smith are protected by the attorney-client privilege asserted by Defendant. Furthermore, this Court hereby GRANTS Plaintiff's Motion to Compel Discovery, concerning production of communications to and from PMU Engineer Leony Yap.

* * * *

⁹ PII's Mot. to Compel Discovery at 2.