[Cite as *Huntington Natl. Bank v. Dixon*, 2010-Ohio-4668.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93604

HUNTINGTON NATIONAL BANK

PLAINTIFF-APPELLANT/
CROSS-APPELLEE

vs.

DEBRA DIXON, ET AL.

DEFENDANTS-APPELLEES/
CROSS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-585873

BEFORE: McMonagle, P.J., Stewart, J., and Cooney, J.

RELEASED AND JOURNALIZED: September 30, 2010

ATTORNEY FOR APPELLANT/CROSS-APPELLEE

Jennifer M. Monty
Weltman, Weinberg & Reis Co., LPA
Lakeside Place, Suite 200
323 Lakeside Avenue West
Cleveland, OH 44113

ATTORNEY FOR APPELLEES/CROSS-APPELLANTS

Orville E. Stifel, II
5310 Franklin Blvd.
P.O. Box 602780
Cleveland, OH 44102

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Plaintiff-appellant, Huntington National Bank, appeals from the trial court's order that it produce an unredacted copy of a document it claims is protected by attorney-client and work-product privileges and that its counsel, Robert Young, testify at a hearing about the contents of the document. Defendants/cross-appellants, James and Penny Dixon ("the Dixons"), cross-appeal from the trial court's order, contending that the trial court erred in limiting Young's testimony to the contents of the document.

I

{¶ 2} In March of 2006, the bank filed this action seeking foreclosure of a property owned by Debra Dixon, who is the Dixons' daughter. The Dixons were listed among the defendants since they had an interest in the property.

{¶ 3} The bank unsuccessfully attempted several times to serve the Dixons at 1215 Ramona Avenue in Lakewood, Ohio. Subsequently, the bank attempted service upon the Dixons at 11810 Lake Avenue in Lakewood, Ohio; service was again unsuccessful.

{¶ 4} On July 6, 2006, the bank's attorney, Robert Young, filed in the trial court an affidavit for service upon the Dixons by publication. The affidavit stated that service could not be made on the Dixons within the state of Ohio, and that the plaintiff had exercised "reasonable diligence" in trying to ascertain the Dixons' address, "including verifying that Directory Assistance has no listing; that the Post Office has no forwarding address on file; that the Credit Bureau Report has no new address for said Defendants." The affidavit concluded that the Dixons' residence was "unknown and cannot with reasonable diligence be ascertained."

{¶ 5} Young subsequently filed a proof of publication, and the bank then filed motions for summary judgment and default judgment, together with a certificate of readiness. The case was heard before a magistrate; the trial court subsequently entered judgment on the magistrate's

recommendation for the bank against Debra Dixon on the complaint for foreclosure and issued an order to the sheriff to sell the property.

{¶ 6} The Dixons subsequently filed a motion to vacate the order of sale and moved the court to strike the bank's certificate of readiness. They argued in their motion that they had never been served with the complaint and that the bank had failed to exercise due diligence prior to seeking service by publication. They asserted that a simple check of the county auditor's website would have shown the bank their residence address.

{¶ 7} The trial court denied the Dixons' motion. On appeal, this court held that the trial court had abused its discretion in denying the Dixons' motion without a hearing, reversed the trial court's order, and remanded for a hearing on the motion to vacate. *Huntingon Natl. Bank v. Dixon*, 8th Dist. No. 90414, 2008-Ohio-5250.

{¶ 8} Upon remand, the Dixons served a request for production of documents on the bank, requesting all documents that supported the averments made in Young's affidavit for service by publication. When the bank did not respond, they filed a motion to compel production of the documents. Huntington then served a written response to the Dixons' requests, but produced no documents, asserting attorney-client and work-product privileges.

{¶ 9} Prior to the hearing on the Dixons' motion to vacate the order of sale, the Dixons subpoenaed attorney Young to testify at the hearing regarding the steps he took to obtain service prior to filing his affidavit for service by publication. The subpoena also sought documents relating to his affidavit. Huntington filed a motion to quash/motion for protective order, requesting that the court quash the subpoena or enter a protective order preventing or limiting Young's testimony.

{¶ 10} The trial court proceeded with the hearing on the motion to vacate, without ruling on the Dixons' motion to compel or the bank's motion to quash. In lieu of producing Young, the bank produced a legal assistant from his firm, who testified that when efforts to serve the Dixons at 1215 Ramona Avenue in Lakewood proved unsuccesful, she attempted to serve them at 11810 Lake Avenue. The legal assistant testified that she got this address from her supervisor, but did not know how the supervisor got the address. She testified further that after this service proved unsuccessful, she consulted various computer search engines but none rendered an address for the Dixons, except for the Ramona Avenue address that was no longer valid. She did not keep a record of the computer screens she viewed. She then prepared the affidavit for service by publication for signature by Young.

{¶ 11} An investigator engaged by the Dixons testified at the hearing that a computer search of publicly available websites produced a number of hits revealing the Dixons' new address within minutes.

{¶ 12} At the conclusion of the investigator's testimony, the magistrate recessed the hearing until further notice. Thereafter, the court granted the Dixons' motion to compel and ordered Huntington to submit a privilege log regarding the requested documents. After reviewing the log, the court ordered the bank to produce all responsive documents for the court's in camera review. Huntington identified "Document 1," a computer printout of the internal account notes maintained by its law firm, Weltman, Weinberg & Reis, as the only document responsive to the discovery requests, and submitted a redacted copy of the document. The court again ordered the bank to submit an unredacted copy of "Document 1," and after reviewing the unredacted document in camera, ordered that it be provided to the Dixons' counsel in unredacted form. The court also denied the bank's motion to quash/motion for protective order and ordered that "Attorney Robert Young must be prepared to offer testimony limited to the contents of Document 1 * * *."

{¶ 13} The bank appeals from this order; the Dixons cross-appeal.[1]

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[1]Discovery orders are generally not appealable, but if the judgment orders a party to disclose allegedly privileged material, it is appealable under R.C. 2505.02(B)(4). *Chiasson v. Doppco Dev., LLC*, 8th Dist. No. 93112, 2009-Ohio-5013, fn.1.

II

{¶ 14} Huntington first contends that the trial court erred in ordering it to produce an unredacted copy of Document 1 to the Dixons' counsel. It asserts that only those notes in Document 1 regarding service on the Dixons should be required to be produced because the other notes contain information protected by either the attorney-client or work-product privileges.[2]

{¶ 15} Civ.R. 26(B)(3) sets forth what is commonly referred to as the work-product doctrine. It states: "[A] party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or that party's representative * * * only upon a showing of good cause therefore."

{¶ 16} There are two kinds of work product. "'Opinion work product,' revealing the mental impressions, legal theories, and conclusions of a lawyer or party involved in a case, is available to an opposing party only upon an exceptional showing of need, in rare and extraordinary circumstances, or when necessary to demonstrate that a lawyer or party has engaged in illegal conduct or fraud. 'Ordinary fact' or 'unprivileged fact' work product, such as witness statements and underlying facts, receives lesser protection. Written

[2]Huntington apparently concedes that part of the trial court's order regarding the 16 entries on Document 1 related to service on the Dixons and thus has waived any argument regarding privilege with respect to those entries.

or oral information transmitted to the lawyer and recorded as conveyed may be compelled upon a showing of 'good cause' by the subpoenaing party. 'Good cause' in Civ.R. 26(B)(3) requires a showing of substantial need, that the information is important in the preparation of the party's case, and that there is an inability or difficulty in obtaining the information without undue hardship." *Jerome v. A-Best Products Co.*, 8th Dist. Nos. 79139-79142, 2002-Ohio-1824, ¶20-21. (Internal citations omitted.)

{¶ 17} The existence of a Civ.R. 26(B)(1) privilege as well as Civ.R. 26(B)(3) good cause are discretionary determinations to be made by the trial court. Id. at ¶22, citing *State ex rel. Greater Cleveland Transit Auth. v. Guzzo* (1983), 6 Ohio St.3d 270, 271, 452 N.E.2d 1314. Absent an abuse of discretion, an appellate court may not overturn the trial court's ruling on discovery matters. *Jerome*, supra, ¶22; see, also, *Radovanic v. Cossler* (2000), 140 Ohio App.3d 208, 213, 746 N.E.2d 1184. "Abuse of discretion" connotes more than an error in judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 18} The issue presented by the Dixons' motion to vacate the sale is whether Huntington exercised "reasonable diligence" in trying to ascertain the Dixons' address prior to Young's filing of his affidavit for service by publication. Document 1, in its unredacted form, contains over 21 pages of

notes made by employees at Weltman, Weinberg & Reis, including its attorneys. As set forth on Huntington's privilege log, there are 16 entries on Document 1 made between March 6, 2006 and September 7, 2006 regarding the service issue relative to the Dixons. These entries indicate Huntington's attempts to serve the Dixons and determine their address, including what sources were searched prior to the filing of Young's affidavit. These 16 entries are "ordinary fact" work product obviously relevant to the issue of whether Huntington exercised "reasonable diligence" in trying to locate the Dixons before Young filed his affidavit. The Dixons have a substantial need for this information, it is essential to their preparation for the hearing on their motion to vacate the sale, and, as demonstrated by the vague testimony of the Weltman firm's legal assistant, they cannot obtain this information from another source. Accordingly, the good cause requirement sufficient to compel production of these 16 entries has been met and the trial court did not err in ordering their production.

{¶ 19} But the Dixons did not demonstrate good cause for production of the remainder of the entries on Document 1, which are protected by the work-product doctrine. Those entries are unrelated to the service issue and involve other aspects of the foreclosure action. Because the entries are not relevant to the Dixons' motion to vacate, there is no good cause for their production, and the trial court abused its discretion in so ordering.

{¶ 20} We are not persuaded by the Dixons' argument that they are entitled to an unredacted copy of Document 1 because Huntington waived any error in the trial court's ruling by not filing a timely privilege log. Specifically, the Dixons contend that Huntington's general assertions of attorney-client and work- product privilege in its initial written response to the Dixons' request for production of documents were insufficient under Civ.R. 26(B)(6)(a)[3] and Civ.R. 34(B),[4] both of which require that a party objecting to a document request under a claim of privilege identify and list the allegedly privileged documents the party seeks to withhold. Relying on *Perfection Corp. v. Travelers Cas. & Surety*, 8th Dist. No. 81954, 2003-Ohio-2750, and *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. No. 20579, 2001-Ohio-1517, the Dixons contend that Huntington's failure to file a privilege log with its first response to their request for production waived any error. The Dixons argue that the trial court erred in allowing Huntington to

[3]Under Civ.R. 26(B)(6)(a), "[w]hen information subject to discovery is withhled on a claim that it is privleged or subject to protection as trial preparation material, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim."

[4]Under Civ.R. 34(B), "[t]he party upon whom the request [for production of documents] is made shall serve a written response within a period * * * that is not less than twenty-eight days after the service of the request * * *. With respect to each item or category, the response shall state that inspection and related activites will be permitted as requested, unless it is objected to, * * * in which event the reasons for objection shall be stated."

subsequently provide its privilege log, thereby giving it "another bite at the apple."

{¶ 21} But *Perfection Corp.* is not on point. In *Perfection Corp.*, this court held that disputed documents were not protected by attorney-client privilege and the trial court properly ordered production of documents where the privilege log "fail[ed] to provide any evidence that any of the contested documents were either prepared by an attorney, at the direction of an attorney, or transmitted to an attorney." Id. at ¶17. There was no finding that the party asserting the privilege waived it for failure to timely file a privilege log or any discussion at all about the timeliness of the log.

{¶ 22} In *McPherson*, the defendant moved for a protective order in response to the plaintiff's request for production of documents. The trial court denied the motion and instructed the defendant to produce the documents. The defendant withheld some of the documents, however, claiming privilege. The plaintiff then moved to compel production of the withheld documents; in response, the defendant elaborated upon the privileged nature of the documents. The trial court granted the plaintiff's motion to compel and the defendant appealed.

{¶ 23} The Ninth District held that the defendant had waived its challenge to the production of the documents based on privilege "because [defendant] did not satisfy its burden of showing the privileged nature of

these documents and material in a timely fashion." Id. at ¶10. The appellate court held that even if the documents were privileged, the defendant's failure to list the documents that it deemed privileged or to provide any corroborative evidence to support its blanket assertion of privilege waived any privileges. Id.

{¶ 24} But the Eighth District has not adopted such a per se waiver rule and we decline to find waiver here. "'Failure to assert the privilege objection correctly can mean that the privilege is waived.' Given that such a result 'could impose substantial and unjustified burdens on litigants, however, most decisions regarding waiver due to failure to provide an adequate privilege log tend to be very case-specific. While some courts have held the failure to provide a privilege log within the applicable time to constitute a waiver of the asserted privilege, other courts have specifically 'reject[ed] a per se waiver rule that deems a privilege waived if a privilege log is not produced.' Indeed, in light of 'the harshness of a waiver sanction,' many courts 'have reserved the sanction for those cases where the offending party committed unjustified delay in responding to discovery.' Additionally, '[m]inor procedural violations, good faith attempts at compliance, and other such mitigating circumstances militate against finding waiver.'" *Berryman v. Supervalu Holdings, Inc.* (Mar. 31, 2010), S.D. Ohio No. 3:05cv169. (Internal citations omitted.)

{¶ 25} The trial court has the discretion to regulate discovery and apparently believed Huntington's initial written response was made in good faith, sufficient to allow it an opportunity to supplement its response with a more comprehensive privilege log. Huntington complied with this order. Accordingly, this court determines that Huntington's failure to produce a privilege log until so ordered does not warrant the harsh sanction of a waiver of privilege in this case.

{¶ 26} Last, the Dixons' argument that Huntington waived any error because it did not assert attorney-client privilege or any privilege allegedly arising from the Gramm-Leach-Bliley Act in the privilege log is irrelevant. Other than the 16 entries relating to service on the Dixons, the remaining entries are protected by the work-product doctrine, not attorney-client privilege or the Gramm-Leach-Bliley Act.

{¶ 27} Appellant's first assignment of error is sustained.

III

{¶ 28} The trial court denied Huntington's motion to quash/motion for protective order and ordered attorney Young to testify at the hearing on the Dixons' motion to vacate the sale, but limited his testimony to "the contents of Document 1 as described in the privilege log." Huntington contends that the trial court erred in denying its motion because Young's testimony is protected by attorney-client privilege.

{¶ 29} The attorney-client privilege is set forth in R.C. 2317.02(A):

{¶ 30} "An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, [shall not testify] except that the attorney may testify by express consent of the client * * *."

{¶ 31} "The attorney-client privilege bestows upon a client a privilege to refuse to disclose and to prevent others from disclosing confidential communications made between the attorney and client in the course of seeking or rendering legal advise. * * * Thus, the attorney-client privilege belongs to the client, and the only materials protected are those which involve communications with his attorney." *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322, 329, 612 N.E.2d 442.

{¶ 32} Huntington asserts that Young may not testify because it did not waive the attorney-client privilege. But Young's testimony is limited by court order to the steps he and his firm took to perfect service on the Dixons (as set forth in Document 1) and the sources he consulted (as set forth in Document 1) before determining that the Dixons' address could not be determined with "reasonable diligence." None of this testimony involves any confidential communications between Huntington and Young and, therefore, it is not protected by the attorney-client privilege.

{¶ 33} Huntington also asserts that the trial court should have quashed the subpoena under Civ.R. 45(C)(5), which provides that a court may quash or modify a subpoena unless the issuing party demonstrates a "substantial need" for the testimony or material. Huntington contends that the legal assistant's testimony at the hearing negated any need for Young's testimony. We disagree. Attorney Young made the averments contained in the affidavit regarding the reasonableness of the investigation, including those regarding the steps taken to effectuate service and the sources consulted before he concluded that the Dixons' address could not be ascertained with "reasonable diligence." The Dixons are therefore entitled to his testimony on this matter. Furthermore, the trial court did, in fact, modify the subpoena by ordering that Young's testimony is to be limited to the contents of Document 1 as identified on the privilege log, i.e., those entries related to service on the Dixons.

{¶ 34} We review a trial court's ruling on a motion to quash a subpoena for an abuse of discretion. *Chiasson*, supra at ¶10. We find no abuse of discretion here and appellant's second assignment of error is therefore overrruled.

IV

{¶ 35} In its third assignment of error, the bank contends that the trial court erred in ordering Young to appear at the hearing with only one day's

notice. This assignment of error is moot because the trial court stayed further proceedings on the motion to vacate pending this appeal and Young will undoubtedly receive ample notice for his appearance after remand. The bank's third assignment of error is therefore overruled.

V

{¶ 36} In their cross-appeal, the Dixons contend that the trial court erred in ordering Young's testimony "limited to the contents of Document 1 as described in the privilege log." The Dixons assert that this language is "susceptible of two interpretations" and ask us to interpret the language to mean that cross-examination of Young is not limited to only the contents of Document 1, but may extend to other areas of inquiry that are unprivileged and relevant to the service issues presented by their motion to vacate.

{¶ 37} Huntington apparently concedes that this interpretation of the order is correct: it states in its response brief that "the trial court was correct in limiting [Young's] testimony to the relevant issue in the case: whether service was proper."

{¶ 38} In any event, this court finds no error in the trial court's order limiting Young's testimony. The exact limitations to that testimony will be fleshed out by the trial court at the hearing on the Dixons' motion to vacate; as appellate courts do not engage in advisory opinions, *Kestranek v. Crosby*,

8th Dist. No. 93163, 2010-Ohio-1208, ¶33, we decline to speculate about how the trial court will interpret its own order.

{¶ 39} Cross-appellants' assignment of error is overruled.

It is ordered that the parties share equally in the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MELODY J. STEWART, J., and
COLLEEN CONWAY COONEY, J., CONCUR