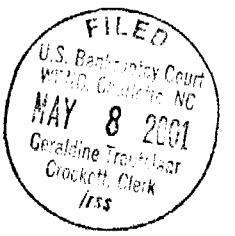
UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
WILKESBORO DIVISION



IN RE:	Case No. 98-50517
	Chapter 7
JOHN ROBERT MULLINS,	
Debtor.	
BARRETT L. CRAWFORD, Trustee in bankruptcy for John Robert Mullins, et.al.	Adversary Proceeding No. 98-5038
Plaintiffs,	
vs.	
JOHN ROBERT MULLINS,	
Defendant.	
FORD MOTOR CREDIT COMPANY	Adversary Proceeding No. 98-5045
Plaintiff,	
vs.	
JOHN ROBERT MULLINS,	
Defendant.	

JUDGMENT ENTERED MAY 8 2001

A hearing was held in these adversary proceedings on April 19, 2001, on the Defendant's Objection and Motion to Exclude Exhibit filed November 16, 2000 filed in Adv. No. 98-5045. Counsel have agreed that the same issues pertain to adversary proceeding, Adv. No. 98-5038, so the decision is made as to both.

In Adv. No. 98-5045, Ford Credit seeks determination of the debts owed it by Mullins and a declaration that these are nondischargeable in his bankruptcy. In the second suit, Adv. no.98-5038, Ford Credit and others, ask that Mullins' be denied a

bankruptcy discharge at all, based upon fraud. These proceedings have just finished discovery, and are now ready for trial.

In his current motion, Mullins asks that this Court exclude certain documents (letters), which Ford Credit has in its possession, as being subject to the attorney client privilege. Surprisingly, neither party presented testimony at hearing. The documents for which a privilege is claimed were attached to Mullins' Motion, were stipulated to and were received into evidence. Additionally, both attorneys represented the basic facts pertaining to this matter, which being undisputed, were treated as evidence. Finally, this Court takes judicial notice of the record in these proceedings and in the base case.

The undisputed facts are as follows. Mullins formerly ran a Ford dealership in Virginia. Ford Credit provided floor plan financing for the dealership. At some point, the two sides had a falling out, and began several years of litigation, first in the U.S. District Court for the Western District of Virginia (Case no. 95-0076A) and after Mullins filed bankruptcy, in this Court.

The documents in question today came to Ford Credit through discovery in the District Court litigation. In 1998, Ford Credit deposed two attorneys who had done legal work for Mullins and/or one of his companies, Vero Investments, Orange Ventures, Inc. and/or Palmetto Land & Development Co. One of these attorneys,

Gerald DeChow, was deposed in Florida on November 11, 1998. The other, Steve Wilson, was deposed on November 4, 1998.

The documents as to which the attorney-client privilege claim is asserted were produced by DeChow and/or Wilson to Ford Credit in those 1998 depositions.

Having already have been turned over, these documents were available for inspection at this most recent hearing. The attorneys were able to review each document and make specific arguments as to whether the privilege applies to each.

These arguments need not be individually restated. In general, Mullins says that each document is a privileged communication, relating to legal advice being sought by Mullins from an attorney. Several of these documents are addressed to (or from) one of the corporations, and not to or from Mullins. Still, Mullins contends that the privilege applies, and is held: (1) by him individually; (2) by him, as the Trustee of his son's trust; or (3) by him, as an employee/officer of Vero, the company on whose behalf the services were provided. Finally, since the attorney-client privilege belongs to the client, not the attorney, Mullins contends that the release of these documents by counsel in 1998 to Ford Credit did not waive the privilege.

Ford Credit, on the other hand, argues that several of these documents are not confidential in nature and do not fall under the privilege. Second, Ford Credit says that the voluntary release of

these documents by the attorneys, coupled with the passage of time, have caused a waiver of any attorney-client privilege that may have existed. Third, Ford Credit says Mullins has not shown that he holds a privilege in these documents, many of which pertain to legal work done for Vero. Finally, Ford Credit contends that these communications were made in furtherance of a fraud, and that due to the crime-fraud exception, the privilege does not apply.

Having reviewed these documents and after consulting the controlling authorities, the undersigned believes that the Motion should be denied. Movant has failed to meet his burden of showing (1) that an attorney-client privilege applies to these documents, and if it does, (2) that the privilege has not been waived.

Privilege claims are governed by Rule 501 of the Federal Rules of Evidence, which states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, 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 courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. Fed.R.Evid. 501; Jaffee v. Redmond, 518 U.S. 1, 8, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996).

These two adversary proceedings involve (1) dischargeability of a debt under Bankruptcy Code Section 523(a), and (2) whether the Debtor is entitled to a bankruptcy discharge under Code Section

727. Being questions of federal bankruptcy law, under Rule 501, the attorney-client privilege is determined under Federal common law.

An excellent summary of the Fourth Circuit case law pertaining to attorney-client privilege is contained in a recent case from the Eastern District of North Carolina, Scott v. Glickman, 2001 WL 209464 (E.D. NC January 12, 2001). This Court agrees with the analysis in that case. Rather, than repeatedly cite to Glickman, this Court will simply draw from that decision, and recite the cases which apply to the current matter.

The attorney-client privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). Its protection of "full and frank" communication between lawyer and client "encourages observance of the law and aids in the administration of justice." Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 348, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985).

However, since the privilege impedes discovery of the truth, it is narrowly construed. United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974; United States v. Oloyede, 982 F.2d 133, 141 (4th Cir.1992); In re Grand Jury

Subpoenas, 902 F.2d 244, 248 (4th Cir.1990); In re Grand Jury Proceedings, 727 F.2d at 1355.

The privilege does not protect all communications between an attorney and a lawyer, but only confidential communications occurring between a lawyer and a client. Hawkins v. Stables, 148 F.3d 379, 383-384 (4th Cir.1998). Thus, the simple relationship of attorney-client does not warrant a presumption of confidentiality. In re Grand Jury Proceedings, 727 F.2d at 1355-56. Rather, in all cases, the burden is on the party claiming the privilege to demonstrate its applicability. Jones, 696 F.2d at 1072.

In the Fourth Circuit, the claimant meets his burden by demonstrating four elements: (1) The asserted holder of the privilege is or sought to become a client; (2) the person to whom communication was made is a member of the bar, or the subordinate of a member, and in connection with the subject communication is acting as lawyer; (3) the communication relates to facts of which attorney was informed by his client, without the presence of strangers, for purpose of securing primarily an opinion on law or legal services or assistance in some legal proceeding, and not for purpose of committing crime or tort; and (4) the privilege has been claimed and not waived by client. United States v. Jones, 696 F.2d 1069, 1072 (4th Cir.1982). The burden of proof is two-sided. One must establish not only that the communication is privileged, but

also that the privilege has not been waived. United States of America V. Jones, 696 F.2d 1069, 1073 (4th Cir. 1982).

Obviously, the privilege can be waived by intentional acts. For example, voluntary disclosure to a third party waives the privilege not only as to the specific communication disclosed, but often as to all communications relating to the same subject matter. In re Sealed Case, 676 F.2d 793, 808-09 (D.C.Cir.1982). Likewise, selective disclosures made for tactical purposes will also waive the privilege. Id. at 818.

However, the inadvertent release of the information can also waive the privilege. In re Grand Jury Proceedings, 727 F.2d at 1356 (documents can lose their privileged status if the disclosing party does not take reasonable steps to ensure and maintain their confidentiality). Waiver through inadvertent release can be caused not only by the client, but by his attorney, as well. "[T]aking or failing to take precautions may be considered as bearing on intent to preserve confidentiality." In re Grand Jury Proceedings, 727 F.2d at 1356 (quoting In re Horowitz, 482 F.2d 72, 82 (2nd Cir.), cert. denied, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 (1973)).

The Fourth Circuit uses a factors test to determine if the privilege should be deemed waived by inadvertent disclosure. FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 481, n.2. (E.D.Va.1991). To be considered are the following: (1) the reasonableness of the precautions taken to prevent inadvertent

disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and, (5) the overriding issue of fairness. Marine Midland, 138 F.R.D. at 482.(citing Lois Sportswear v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y.1985)).

Reasonableness of the precautions taken to avoid an inadvertent disclosure is the primary factor. What is reasonable is in turn impacted by the number of documents involved. Id. at 483. The more documents involved in discovery, the less the chance that an inadvertently produced document will waive the privilege. Id.

Time constraints also affect what efforts are reasonable. Thus, where 17 million documents had to be screened in a three month period, no waiver of privilege occurred by an inadvertent release of a document. In such situations, the holder is "in a very practical way 'compelled' to produce privileged documents which it certainly would have withheld and would not have produced had the discovery program proceeded under a less demanding schedule".See Transamerica Computer Co., Inc. v. International Business Machines, Corp., 573 F.2d 646, 651-652 (9th Cir.1978).

On the other hand, in the Scott case cited above, an attorney's inadvertent release of a privileged letter in a single banker's box of documents to the other was held to waive the privilege. Scott v. Glickman, 2001 WL 209464 (E.D. NC January 12, 2001). Other Federal courts in North Carolina have ruled similarly.

See Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 48 (M.D.N.C.1987); Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 207 (M.D.N.C.1986).

Finally, when no special efforts are made to ensure confidentiality, an inadvertent production of documents pursuant to a discovery request waives the privilege. O'Leary v. Purcell Co., Inc., 108 F.R.D. 641, 646 (M.D.N.C.1985).

When viewed against this backdrop, the inadequacy of the evidentiary record to support this motion is obvious. Here, there is simply no evidence from which one could conclude that these documents are subject to the privilege. And even if it was conceded that they were, the evidence is insufficient to find that the 1998 disclosure of these documents was excusably inadvertent, so as to avoid waiver.

Mullins, who has not personally participated in any of the prior hearings in this case, was likewise not present at this most recent hearing so as to testify. Nor did he present any other witnesses in support of his motion. As noted, the evidentiary record is limited to the documents and a few agreed factual representations made by the attorneys at hearing. Taken together they only serve to show what documents are in dispute and how Ford Credit came to have them. The limited facts do not demonstrate a privilege as to these documents, particularly one

in favor of Mullins. They certainly do not demonstrate a justifiable, inadvertent waiver of the privilege.

Unanswered questions abound. Who is the client? Is it Mullins, Vero, or someone else? Most of the correspondence in question is addressed to Vero, not to Mullins personally, or to him as administrator of a trust. This record would not support even a finding that Mullins controls the privilege.

Were these documents intended to be privileged communications? Perhaps, but there are not enough facts in the record to draw such a conclusion. In fact, a contrary inference is suggested by some of the documents. For example some of the documents are attorney's cover letters, addressed to public registries. Certainly, no privilege pertains to communications sent to public registries or to any third party for that matter.

Do these communications relate to facts of which an attorney was informed by his client, outside the presence of strangers, for purpose of securing primarily an opinion on law or legal services or assistance in some legal proceeding? One can only speculate.

Does the crime fraud exception obviate this privilege claim? If the allegations pled in this adversary proceeding and the related adversaries (Adv. No. 00-5011, 00-5012, and 00-5013) are correct, these communications were part and parcel of an effort by Mullins to defraud his creditors.

Finally, there is the question of waiver. These documents were released to Ford Credit three years ago in the District Court litigation. This record does not reveal why these were produced. Did anyone assert the attorney-client privilege before turning over these documents to Ford Credit? Was Mullins or Vero aware at the time that the documents were being produced? Was the production compelled or voluntary? Were they produced inadvertently or intentionally? Did the holder of the privilege voluntarily choose to release this information, perhaps for a strategic purpose? What efforts were made to filter out privileged documents? What were the attendant circumstances? Was the production itself voluminous or limited? Was the time permitted short or lengthy? Why has nothing been done over the last few years to reclaim these documents? The record does not answer these questions.

On this record, one cannot find that these are now, or ever were, privileged documents. Mullins has failed to meet his burden of proof. The Motion is DENIED.

This the 7th day of May, 2001.

United States Bankruptcy Judge

CERTIFIED TO BE A TRUE AND
CORRECT COPY OF THE ORIGINAL
U. S. BANKRUPTCY COURT

WESTERNS DISTRICT OF N C.

BY: Robin S. Shackelford
DEPUTY CLERK

DATE: 5-8-01