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Order (MARTIN D. MARCHMAN)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MARTIN D. MARCHMAN,	)	
	)	Civil Action No.: 2005CV101076
Plaintiff,	)	
	)	
v.	)	
	)	
JACK FISHER,	)	
	)	
Defendant.	)	

FILED IN OFFICE
OCT 15 2007
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER

This case is before the Business Court on a series of discovery-related issues. After reviewing the record of the case, this Court finds as follows:

During the two years in which the case was pending before Judge Moore, numerous discovery disputes arose. On June 13, 2007, Judge Moore held a hearing on outstanding discovery issues and issued an Order on August 27, 2007, which addressed several but not all of the outstanding discovery issues.

On August 29, 2007, this case was transferred to the Business Court. During the initial Case Management Conference, held on September 11, 2007, and a follow-up conference call on September 24, 2007, the parties provided the Court with their list of unresolved discovery issues.

There are five discovery-related issues that remain before this Court and shall be addressed in this Order: (1) motions relating to memorandum from Defendant Jack E. Fisher to his attorney Donald Johnson, (2) motions relating to the subpoena of Donald Johnson, (3) Judge Moore's August 27th Order denying Plaintiff's Protective Order Motion, (4) Judge Moore's August 27th Order regarding the in-camera inspection of discovery documents, and (5) Plaintiff's Motion to Compel Production of Documents and for Other Discovery filed January 11, 2007.

1. Johnson Memo

Both parties agree that Defendant Jack E. Fisher's Motions to Compel, Seal, and Strike *filed* on March 5th, 8th, and 20th, respectively, regarding a memorandum written for Donald Johnson (hereinafter referred to as the "Johnson Memo"), are ripe for the Court's determination. The Johnson Memo was prepared by Defendant Fisher for Donald Johnson, who acted as attorney for Defendant Fisher and several of his business ventures. The Johnson Memo described the business relationship between Plaintiff and Defendant and some of the facts giving rise to this lawsuit and was inadvertently produced during discovery.

In accordance with the attorney-client privilege, Defendant petitions the Court to require Plaintiff to return or destroy all copies of the Johnson Memo and to prohibit its use in this case. Plaintiff, however, asserts that the crime/fraud exception to the attorney-client privilege authorizes his use of the Johnson Memo, which Plaintiff claims, directly contradicts Defendant's under-oath deposition testimony and verified interrogatory responses. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497 (1981).

In Marriott Corporation, defendants sued the hotel after their convention reservations were cancelled. Shortly after the cancelled reservations, the hotel's sales director prepared a memorandum for the in-house attorney in which the director described the events of the cancelled reservations. The memorandum contradicted "certain elements of the director's testimony at trial" and was admitted for impeachment purposes only. Id. at 501. Defendants appealed the admission of the memorandum citing the attorney-client privilege. Id.

The attorney-client privilege "may be a shield of defense as to crimes already committed, but it can not be used as sword or weapon of offenses to enable persons to carry out contemplated crimes against society, fraud or perjuries." Id. at 502 (declining to apply the crime/fraud

exception, but upholding the admission of the memorandum on the grounds that the corporate attorney-client privilege did not attach), citing, Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. App. 637, 639 (1934).

The Johnson Memo at issue in this case was not written to shield a past crime or fraud, in which case it would not be admitted under any circumstances. At this stage of the litigation, Defendant's statements do not rise to the level of perjury or fraud upon the Court; however, if Defendant testifies under oath in Court in a manner that directly contradicts the Johnson Memo, then Plaintiff may move to admit the evidence for impeachment purposes only under the crime/fraud exception.

Accordingly, Defendant's Motion to Compel the Return or Destruction of the Privileged Document, or, in the Alternative, for Protective Order to Prohibit the Use of Privileged Document or its Contents and for Sanctions, *filed* March 5, 2007, is hereby **DENIED in part** and **GRANTED in part**. The Johnson Memo may be used, if at all, in the limited circumstances where Defendant's in-Court testimony directly contradicts the memorandum and the Plaintiff successfully raises a crime/fraud exception to the attorney-client privilege for the purposes of admitting the evidence for impeachment.

Similarly, and in accordance with the reasons stated above, Defendant Jack E. Fisher's Emergency Motion to Seal Plaintiff's Consolidated Response Brief Filed on or About March 5, 2007 and Attached Exhibits Thereto, *filed* March 8, 2007, is hereby **GRANTED**. Defendant Jack E. Fisher's Motion to Strike Plaintiff's Consolidated Response Brief, *filed* March 20, 2007, is hereby **DENIED in part** and **GRANTED in part**. Plaintiff's response shall be stricken of any portion that relies upon the Johnson Memo.

2. Johnson Deposition and Request to Produce

Similarly unresolved is Donald G. Johnson, Esq.'s Objections and Motion to Quash Plaintiff's Subpoena for Deposition and Production of Documents and Motion for Protective Order Under Rule 26(c) and Memorandum of law in Support, filed January 29, 2007. Because the Plaintiff's motion to disqualify Defendant's counsel has been denied and the issue of the Johnson Memo has been resolved as stated above, this Court hereby **GRANTS** the Motion to Quash the Subpoena.

Under Judge Moore's August 27, 2007, Order the Court ordered an in-camera inspection of certain documents requested by Plaintiffs from Internal Revenue Service and Bank of North Georgia. Such further discovery and the ability of Plaintiff to obtain the needed documents directly from the Defendant, persuades the Court to **GRANT in part** the Motion for Protective Order. In the event, however, that Plaintiff needs additional damages-related discovery, not otherwise produced or available but through Mr. Johnson, Plaintiff may so petition the Court after a final ruling on the pending motion for summary judgment.

3. Judge Moore's August 27th Order Denying Plaintiff's Motion for Protective Order

In the August 27th Order, Judge Moore denied Plaintiff's Motion for Protective Order. Plaintiff petitioned this Court for clarification of the August 27th Order regarding the denial of the Motion for Protective Order on the grounds that the number of discovery disputes in the case made it unclear which motion was denied in that Order.

On January 17, 2006, Plaintiff filed a Motion to Disqualify, a Motion to Stay Discovery, and a Motion for Protective Order citing a potential conflict of interest on behalf of Defendant's counsel. During the June 13, 2007, hearing before Judge Moore, which was the basis for Judge Moore's August 27th Order, Plaintiff referred the Court to the group of three-related motions filed

regarding counsel's potential conflict of interest. While the Plaintiff also argued other discovery issues such as the disputes between Plaintiff and Defendant regarding financial documents from third parties, the disqualification issue was paramount in the hearing and in Judge Moore's August 27th Order. After denying the Motion to Disqualify, Judge Moore wrote, "[l]ikewise, based on the foregoing ruling, the Court finds there is little need to elaborate on Plaintiff's Motion for Protective Order to the extent said motion was based upon the current motion to disqualify counsel."

After reviewing the briefs on these motions, the transcript of the June 13, 2007, hearing before Judge Moore, and the August 27th Order, this Court finds that Plaintiff's Motion for Protective Order, *filed* January 17, 2006, was denied in Judge Moore's August 27th Order.

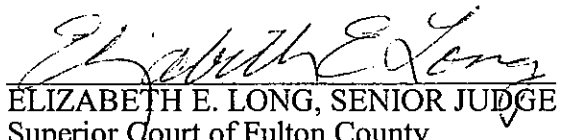
4. In-camera inspection of documents ordered in August 27th Order

The August 27th Order addressed the discovery dispute between Plaintiff and Defendant, which was embodied in a series of Defendant's Motions to Quash, *filed* January 4, 11, 18, and 29, 2007. The August 27th Order concluded that "any such discovery requested by Plaintiff to be first submitted to the appropriate court for in camera inspection within sixty (60) days from the date" of the Order. Plaintiff requested that this Court clarify the ruling and provide the parties with direction on how to execute. The August 27th Order is clear that the third parties upon whom discovery has been served shall be required to produce the requested documents, to be reviewed by the court in-camera. Such discovery, however, largely goes to the issue of damages and will be appropriately addressed by the Court after a final ruling on the pending motion for summary judgment. At that time and in conjunction with its order on summary judgment, the Court will provide further instructions for Defendant and the third parties ordered to produce documents.

5. Plaintiff's Motion to Compel Production of Documents and for Other Discovery

Plaintiff filed a Motion to Compel Production of Documents and Other Discovery on January 11, 2007, seeking to obtain the tax returns, financial statements, and bank statements of Defendant Fisher and certain of his business entities from 1997 through 2002. Such discovery requests speak to damages valuation and shall be handled, as with the documents to be reviewed in-camera, after this Court has issued a final ruling on the pending motion for summary judgment.

SO ORDERED this 15th day of October, 2007.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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