1-5-2023

Galaxy Next Gen. v. Elhert, Order on Discovery Issues

Kelly L. Ellerbe

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GALAXY NEXT GENERATION, INC., Plaintiff, v. BRADLEY EHLERT, Defendant/Counterclaim Plaintiff, v. GALAXY NEXT GENERATION, INC., EHLERT SOLUTIONS GROUP, INC., INTERLOCK CONCEPTS, INC., GARY LECROY, MAGEN MCGAHEE, WADE WALKER, TPI BUSINESS CONSULTANTS, LLC, BECKY QUINTANA, and SOMERSET CPAS, P.C., Counterclaim Defendants.	)	CIVIL ACTION FILE NO. 2021CV352606

ORDER ON DISCOVERY ISSUES

This matter comes before the Court on two separate discovery issues involving: (1) Plaintiff/Counterclaim Defendant Galaxy Next Generation, Inc.'s ("Galaxy's") effort to "claw back" a privileged document produced in an earlier, related action filed in Utah (the "Claw-Back Dispute") and (2) Defendant/Counterclaim Plaintiff Bradley Ehlert's ("Ehlert's") request for the Court to reconsider its earlier decision denying Ehlert's effort to obtain banking

information regarding a Galaxy-affiliated entity (the "R & G Dispute"). As these parties have been embroiled in some complicated and costly discovery disagreements, the Court directed these two disputes be presented via short letter briefs. (See 1st Am. CMO § 8.A.) Having reviewed record and considered the letter briefs, the Court enters this order addressing each dispute separately.[1]

1. STANDARD OF REVIEW

"[A] trial court has broad discretion to control all discovery matters." Smith v. Northside Hosp., Inc., 347 Ga. App. 700, 703 (2018). Georgia law allows for wide-ranging discovery such that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery (punctuation and citation omitted)." Id.; see also O.C.G.A. § 9-11-26(b).

The Court's wide discovery to control discovery extends to "the imposition of sanctions." Day v. Mason, 357 Ga. App. 836, 842 (2020).

[1] All four of the Galaxy and Ehlert letter briefs have been placed into the record by virtue of a Notice of Filing Letter Briefs and an Order to File Documents Under Seal, entered contemporaneously herewith.

2. THE CLAW-BACK DISPUTE

2.1 Background

2.1.1 The September 18, 2019 Email

The Claw-Back Dispute concerns a September 18, 2019 email communication sent to two Galaxy officers from an accounting firm, Somerset CPAs, P.C. ("Somerset"), employed by Galaxy (the "Email").[2] In the Email, Somerset outlined its assessment of the payroll tax liabilities of two companies that Ehlert sold to Galaxy. That sale is a key subject of this action. As to the significance of this Email, Ehlert claims, "it is likely dispositive on Galaxy's fraudulent nondisclosure claim with respect to those payroll tax liabilities." (Ehlert Claw-Back Brf. 1.) Ehlert does not contest Galaxy's assertion that this particular email was privileged under Georgia law. See O.C.G.A. § 43-3-29(b). However, he suggests that Galaxy has waived any such privilege for the reasons detailed below.

2.1.2 Galaxy Discloses the Email to Ehlert in Prior Utah Action

Galaxy and Ehlert were previously engaged in litigation in Utah involving many of the same disputes at issue here (the "Utah Action"). (Ord. on Mot. for Abatement, Dismissal, Restructuring and Sanctions 2-3.) Both parties agree that, unlike Georgia, Utah does not recognize an accountant-client privilege. (Galaxy Claw-Back Brf. n. 2; Ehlert Claw-Back Brf. 1.)

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[2] A copy of the Email is attached to Ehlert's Claw-Back Brief as Exhibit B.

Utah law requires the parties to make certain discovery disclosures at the outset of most civil cases. UT R RCP Rule 26(a)(1).[3] On July 30, 2020, Galaxy and certain other parties to the Utah Action submitted their Rule 26 Initial Disclosures which included a copy of the Email (the "Initial Disclosures").[4] Galaxy's current counsel also represented it in the Utah Action. (Ehlert Claw-Back Brf. Ex. A 1, 14.)

2.1.3 Galaxy's Demand for Return of the Email in this Action

In early August of 2021, the Utah Action was dismissed. (Ord. on Mot. for Abatement, Dismissal, Restructuring and Sanctions 3.) During that same general time frame, in the Superior Court of Fulton County, Galaxy commenced an action

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[3] Subject to certain exceptions not appliable here, UT R RCP Rule 26(a)(1) requires that, according to deadlines set by the rule,

> a party must, without waiting for a discovery request, serve on the other parties:
>
> (A) the name and, if known, the address and telephone number of:
>
> (i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and
>
> (ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;
>
> (B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries, and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);
>
> (C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;
>
> (D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and
>
> (E) a copy of all documents to which a party refers in its pleadings.

[4] A copy of the Initial Disclosures is attached to Ehlert's Claw-Back Brief as Ex. A.

against Ehlert, and soon thereafter Ehlert commenced an action against Galaxy and several other Defendants including Somerset. (Id. 3-4.) The two matters were subsequently consolidated into this action with Somerset now proceeding as a Counterclaim Defendant. (Id. 5, 20.)

The present dispute involving the Email first came to light in early October 2022 when "Somerset produced a log of thousands of documents withheld pursuant to Galaxy's instructions, primarily based on assertions of the accountant-client privilege." (Galaxy Claw-Back Brf., 1.) The following day Ehlert's counsel advised Galaxy's counsel he already had a copy of the Email which had been obtained more than two years earlier through the Initial Disclosures in the Utah Action. (Id.)

Immediately Galaxy's counsel sought to "claw back" the Email, claiming it had been produced "inadvertently" in the Utah action. (Id.) Ehlert's counsel denied Galaxy's claw-back request, disclaiming any obligation to return the document. (Id.; Ehlert Claw-Back Brf. 1.) As described by Galaxy, the parties engaged in some fervent discussions regarding the legal and professional obligations of Ehlert's counsel regarding use of the Email while issues regarding its privileged status were being discussed and/or litigated. (Id. 2.) Galaxy claims Ehlert's counsel "pledge[d] to sequester and refrain from using the Email" pending an in camera review by the Court. (Id.) According to Galaxy, Ehlert's counsel failed to honor this promise by, among other actions, attaching the Email to discovery requests and using it in a

deposition.[5] (Id.) Ehlert's counsel denies having made any promise to limit his use of the Email. (Ehlert Claw-Back Brf. 1.)

2.2 Analysis

Galaxy argues Ehlert and his counsel have directly violated several legal provisions and professional obligations by disclosing the Email after receiving the claw-back demand but before disputes regarding its privileged status were resolved. (Galaxy Claw-Back Brf. 3.)

First, Galaxy claims Ehlert violated USCR 5.5(2) which provides:

> [i]f information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. The producing party shall preserve the information until the claim is resolved. After being notified, a party:
>
> a. Shall promptly return, sequester, or destroy the specified information and any copies thereof;
>
> b. Shall not use or disclose the information until the claim is resolved;
>
> c. Shall take reasonable steps to retrieve the information if the party disclosed it before being notified; and
>
> d. May promptly present the information to the court for in camera review for determination of the claim.

Galaxy has cited no authority where this provision is used in relation to discovery obtained in a prior action. More notably, Galaxy has cited no authority where this

[5] Galaxy claims Ehlert's disclosures of the Email occurred both before and after this purported agreement. (Galaxy Claw-Back Brf. 2.)

provision is applied to discovery obtained in an action pending in another state. The rules themselves suggest their reach is not so ranging. See USCR 1.4 (The USCR "are to be given statewide application.") The Court finds Ehlert's counsel did not violate USCR 5.5(2) in its handling of the Email.

Second, Galaxy argues Ehlert's counsel violated the Court's Protective Order which Galaxy claims requires Ehlert "to return to the producing party" a document that the producing party claims was inadvertently produced. (Id.) However, Galaxy ignores the fact that the claw-back provisions of the Protective Order expressly address discovery that "is subject to a claim of attorney-client or attorney-work product . . ." (Protec. Ord. ¶ 10.)[6] Based on the privilege at issue, the Court finds no violation of the Protective Order.

Third, Galaxy asserts the recent disclosures of Ehlert's counsel violate Utah law. (Galaxy Claw-Back Brf. 3.) Galaxy relies on Rule 510(b) of the Utah Rules of Evidence which provides "[e]vidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege of the privilege if disclosure was compelled erroneously or made without opportunity to claim privilege." First, this Utah law is not applicable to this proceeding. Further, even if it were and the Court found Galaxy was erroneously compelled to produce the

[6] The Court notes the Protective Order, including its ¶ 10 addressing the inadvertent production of privileged documents, closely tracks the protective order that Galaxy requested the Court to enter. (Compare Protec. Order with Pl./Countercl. Def.'s Resp. in Opp. to Def. / Countercl. Pl.'s Mot. to Compel and the Galaxy Parties' Motion for Entry of a Protec. Ord. 10, Ex. A-1.)

Email or produced the Email without opportunity to claim privilege, this evidentiary rule would only govern the admissibility of the Email into evidence. That question is not presently before the Court. Galaxy also cites to an ethics provision governing members of the Utah State Bar. (Id.) However, nothing in the record suggests Ehlert's current counsel represented him in the Utah action, and Ehlert's current counsel has represented to the Court they are not licensed to practice in Utah. (Ehlert Claw Back Brf. 3.)

Fourth, Galaxy contends Ehlert's counsel has, violated various "other Georgia and Utah rules of professional conduct/ethical rules." (Galaxy Claw-Back Brf. 3.) Because Galaxy has failed to identify any particular provision it accuses Ehlert's counsel of violating, the Court will not address this claim.

Based on the peculiar facts of this situation, Galaxy's claw-back effort and its corresponding request for sanctions are **DENIED**. Simply put, the Court finds no violation of any clear legal requirement governing the return of the Email or the limitation of its use while privilege issues are being addressed.

To be clear, the Court has limited its review of issues surrounding the Email to the claw-back claims that have been presented and briefed. It addresses no other questions including whether providing the Email as part of Galaxy's Initial Disclosures in the Utah Action constitutes a waiver of Galaxy's accountant-client

privilege.[7] Once again, based upon the peculiar facts of this situation, the Court **ORDERS** Ehlert to sequester the Email and refrain from disclosing or using the Email until Galaxy's claims regarding its privileged status are resolved as outlined below.

Should Galaxy wish to assert the Email retains its privilege, it should, within **one week of the entry of this order,** present the Court via email with a letter brief no longer than three pages long outlining its position. Ehlert shall have **one-week after Galaxy presents it letter brief to the Court** to present its own letter brief in response which shall be submitted in the same fashion and subject to the same page limit. Should Galaxy fail to timely raise the privilege issue as outlined above, the Court's limitations on Ehlert's use of the Email shall cease.

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[7] In making the Initial Disclosures in the Utah Action, Galaxy and its co-Defendants stated they,

> do not waive, and expressly reserve, the right to object to the admission of the information provided in these Disclosures. . . In addition, by disclosing this information, Defendants do not waive and expressly reserve their right to object to the disclosure of any information insulated by one or more privileges, protections, or immunities from discovery . . . .

(Initial Disclosures 2.)

3. R & G DISPUTE

3.1 Background

3.1.1 Prior Dispute Concerning Banking Records for Galaxy and Galaxy-Related Entities

The Court previously addressed a dispute regarding Ehlert's request to obtain banking records from certain financial institutions for Galaxy and a number of purportedly affiliated entities, including some who were not parties, including R & G Sales, Inc. ("R & G"). (Order Re: Disc. Dispute Involving Galaxy Parties and Bradley Ehlert.) The Court allowed Ehlert to obtain the records from Galaxy and the two related entities that are parties to this case, Ehlert Solutions Group, Inc. and Interlock Concepts, Inc. (Id. 4.) The Court only allowed discovery as to one non-party Galaxy-related entity, Galaxy Next Generation Ltd. Co., based on Ehlert's assertions that Galaxy used an account titled in the name of this entity to conduct business. (Id. 4-5.) The Court specifically denied Ehlert's request to seek the banking information of R & G and other Galaxy-related entities on the grounds the requests were "overly broad and unnecessarily intrusive." (Id. 5.)

3.1.2 Ehlert's Request for Reconsideration

Ehlert and Galaxy began discussions regarding the sales transaction underlying this dispute in the spring of 2019. (Compl. ¶ 10; Ans. ¶ 10.) As Ehlert admits, R & G ceased operating in 2018 when it merged into Galaxy. (Ehlert R & G Brf. 1.) During the course of discovery, Ehlert has learned that subsequent to the

merger, vestiges of R & G remain in Galaxy's financial records, including the continued presence and/or use of R & G's tax ID number ("EIN"). (Id. 2.) Accordingly, Ehlert requests the Court reconsider its prior decision and permit "him to serve nonparty discovery requests seeking account information for accounts maintained under R & G Sales' EIN . . ." (Id. 3.)

2.2 Analysis

Ehlert's supports his request to obtain R & G's banking information with claims that even after the merger: (1) R & G's EIN appeared in certain contexts involving Galaxy, (2) that Galaxy wrote checks and received wires from R & G, and (3) Galaxy received and cashed nine U.S. Treasury checks payable to "R & G Sales Inc. dba Galaxy Next."[8] (Id. 2.)

In its response brief, Galaxy offers detailed information explaining the history of R & G, its relationship to the parents of Galaxy CEO Gary LeCroy, the parents' post-merger use of the R & G account to conduct their own personal and business affairs that are separate from Galaxy, the continued appearance of the R & G EIN in various Galaxy contexts, the transfers back and forth between R & G and Galaxy, etc. (Galaxy R&G Brf. 2-3.) Galaxy makes the specific representation, "there were

[8] Ehlert also points to a 2019 email from a Somerset employee who stated, "R&G Sales merged with Galaxy Next Gen, as now they are all one and the same." (Ehlert R & G Brf. 2, Ex. I.) The Court agrees with Galaxy that this one general statement found in the communication, which on its face does not appear to be complete, is insufficient to open the door for Ehlert to review R & G's banking records.

zero customer deposits, bills paid, or any other company related activity handled in R & G's accounts after the merger of R & G into Galaxy. (emphasis in original.)" (Id.)

While the Court will not recount in detail the explanation provided by Galaxy, it does find the explanation to be persuasive and **DENIES** Ehlert's request for reconsideration. Specifically, the Court finds the discovery requested is burdensome, intrusive, and unlikely to lead to the discovery of admissible evidence. However, pursuant to Galaxy's offer, it directs Galaxy to provide Ehlert with an affidavit verifying the factual assertions it makes in its letter brief. (Id. n. 2.)

4. CONCLUSION

In light of the foregoing, the Court **ORDERS**:

1. Galaxy's request to "claw back" the September 18, 2019 Email is **DENIED**.
2. Ehlert's request for reconsideration of the Court's decision restricting Ehlert's ability to conduct financial discovery as to R & G Sales, Inc. is **DENIED**. It is further **ORDERED** that Galaxy shall supply Ehlert with a sworn affidavit from an individual based on personal knowledge attesting to all of the facts regarding R & G contained within Galaxy's letter brief responding to Ehlert's reconsideration request. Such affidavit should be provided to Ehlert **no later than two weeks after the entry of this order**.

SO ORDERED this 5th day of January, 2023.

KELLY ELLERBE, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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