UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

Cite as: [Unpublished]

Party Concepts, Inc., Plaintiff v. American Greetings Corporation and Gibson Greetings, Inc., Defendants
(In re Party Concepts, Inc., Debtor)
Bankruptcy Case No. 01-34625-11
Adversary Case No. 01-3286-11

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

June 26, 2002

Craig A. Kubiak, Godfrey & Kahn, SC, Milwaukee, WI and Katherine Stadler, LaFollette Godfrey & Kahn, Madison, WI for Plaintiff
Michael B. Van Sicklen and Michelle I. Mettner, Foley & Lardner, Madison, WI for Defendants

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

The debtor/plaintiff, Party Concepts, Inc. ("Party Concepts") has filed an adversary proceeding naming American Greetings Corporation ("American Greetings") and Gibson Greetings, Inc. ("Gibson Greetings") as defendants.[1] American Greetings and Gibson Greetings now join in a motion to compel the production of all documents pertaining to a Stock Purchase Agreement and a Supply Agreement, the former of which is the focus of the breach of contract action against Gibson Greetings.

Before the debtor filed for bankruptcy and initiated this adversary proceeding, its President and CEO, William Heeter, sent a letter to American Greetings communicating its displeasure with, *inter alia*, American Greetings' potential interference with a non-compete covenant that Party Concepts had negotiated as part of a Stock Purchase Agreement with

[1] Party Concepts' complaint against these entities contains two counts: (i) a tortious interference count against American Greetings and (ii) a count for the alleged breach by Gibson of a covenant not to compete contained in a Stock Purchase Agreement between Gibson and PFW Acquisition Corp. (the predecessor to Party Concepts). Pursuant to a motion for summary judgment granted on behalf of American Greetings on June 24, 2002, the tortious interference claim is no longer extant.

Gibson Greetings.[2] Included with this letter was a memorandum from Party Concepts' counsel containing a legal analysis of the effect of American Greetings and Gibson Greetings recent merger[3] on the Stock Purchase Agreement and a Supply Agreement, which had also been previously consummated by Party Concepts and Gibson Greetings. Mr. Heeter had specifically asked Party Concepts' counsel to draft this memorandum so that it could be sent to American Greetings. However, the first page of the memorandum contained the designation "Personal and Confidential" in bold, capitalized, and underlined font. Immediately below that designation was the phrase "Attorney-Client Communication" in bold, italicized, and underlined font.[4]

American Greetings and Gibson Greetings now claim that Party Concepts has waived any attorney-client privilege to which the memorandum might have been entitled by disclosing it to American Greetings – an adverse party. American Greetings and Gibson Greetings request that all communications between the debtor and its counsel relating to the Stock Purchase Agreement and the Supply Agreement be revealed.

After the recent amendment to Fed. R. Civ. P. 26(b)(1), a court can limit discovery to the actual claims or defenses pled in a case. In addition, a court has the discretion under Federal Rule of Civil Procedure 26(b)(2)(iii) to limit discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account . . . the importance of the proposed discovery in resolving the issues." So, even though the attorney-client privilege was waived, allowing discovery of all communications between the debtor/plaintiff and their counsel regarding the Supply Agreement and Stock Purchase Agreement after the close of discovery and only a few weeks before trial is not compelled. A separate arbitration is being conducted to resolve the dispute about the Supply Agreement. Discovery of communications pertaining to the Supply Agreement could not possibly have any bearing on the adversary proceeding before this Court. In addition, any discovery of attorney-client communications pertaining to the Stock Purchase Agreement would only produce information irrelevant to the defenses pled by Gibson Greetings in this case.

Under Federal Rule of Civil Procedure 26(b)(1)[5] a party:

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[2] This non-compete covenant can be found in Article XII of the Stock Purchase Agreement.

[3] As a result of this merger, Gibson Greetings became a wholly owned subsidiary of American Greetings.

[4] The attorney who drafted the memorandum has filed a declaration in opposition to this motion claiming that the letter was not intended to be confidential or privileged, but that reformation of history smacks of duplicity and must be ignored.

[5] This Rule is incorporated by Bankruptcy Rule 7026.

> may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Pursuant to Federal Rule of Evidence 501[6], this Court must apply Wisconsin law to determine the implications of the attorney-client privilege in this case. Disclosure of the confidential memorandum to the debtor's adversary effectively waived any attorney-client privilege to which the document might have been entitled. See Wis. Stat. § 905.11 (a privilege is waived if "the person or his or her predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication"). Moreover, the defendants forcefully argue that the debtor should not be allowed to waive this privilege selectively in order to keep other portions of the communication under wraps. See Leybold-Hereaus Techs., Inc. v. Mideast Instrument Co., Inc., 118 F.R.D. 609, 614 (E.D. Wis. 1987) (holding that a party "cannot selectively disclose portions of privileged communications or give testimony favorable to themselves, without concomitant disclosure of other unfavorable portions of the privileged communications relating to the same subject.").

However, waiver of privilege alone, does not compel the production of additional documents. The 2000 amendments to Federal Rule of Civil Procedure 26(b)(1) "narrowed the scope of party-controlled discovery to matters 'relevant to the claim or defense of any party.'" 6 James WM. Moore, et al., Moore's Federal Practice, § 26.41[2][a], 26-109 (3d ed. 2001) *quoting* Fed. R. Civ. P. 26(b)(1) (2000). "Prior to the 2000 amendments, the parties were entitled to discovery of any information that was not privileged so long as it was relevant to the 'subject matter involved in the pending action.'" Id. *quoting* Fed. R. Civ. P. 26(b)(1) (1983).[7] "The [new] more highly focused definition of *relevance* reminds the courts that they have the authority to control discovery by confining it to the claims and defenses asserted in the pleadings and that they should exercise the authority more vigorously than they have in the past. " Id. at §26.41[6][c], 26-119.

In addition to narrowing the scope of discoverable material, Federal Rule of Civil Procedure 26(b)(1) reminds courts that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2) . . . ." In particular, Federal Rule of Civil Procedure 26(b)(2)(iii) empowers a court with the discretion to limit discoverable materials when the court determines that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account

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[6] Federal Rule of Evidence 501 provides that "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."

[7] In their brief submitted to this Court, the defendants quoted this outdated version of the Federal Rule.

the needs of the case, the amount in controversy, the parties' resources, the importance of the proposed issues at stake in the litigation, *and the importance of the proposed discovery in resolving the issues*." (emphasis added).[8] Moore's has summarized the interaction of these two Rules as they relate to a court's power over discovery:

> The definition restricting "relevant" discoverable evidence to that relating to the claims and defenses the parties have actually articulated, coupled with the redundant reminder in Rule 26(b)(1) that the courts should make certain that all discovery is conducted with the limitations of Rule 26(b)(2) in mind, is a clarion call for the courts to use their administrative authority to control discovery to eliminate those instances in which the parties stray far afield from the factual issues that are at the heart of their case and are verging on discovery abuse, rather than seeking a fair and just resolution of the case.

Moore's at §26.41[6][c], 26-199. This Court hears that clarion call. First, the Supply Agreement has no bearing whatsoever on the outcome of this adversary proceeding. Discovery of materials pertaining to it would certainly not aid in resolving any issues in this adversary proceeding.

Second, although the Stock Purchase Agreement is the focus of the debtor's breach of contract claim, discovery of matters pertaining to debtor's counsels' interpretation of it, would be a fishing expedition of no possible value to its defense. In defending the breach of contract claim against it, Gibson Greetings, has not suggested in its pleadings that the relevant section of the Stock Purchase Agreement is ambiguous. In fact, Gibson Greetings admits that "Article XII of the Stock Purchase Agreement speaks for itself." Defendants' Answer to Complaint at ¶ 25 and Answer to Amended Complaint at ¶ 24 and ¶ 25. This Court is not aware of any ambiguity in the Stock Purchase Agreement. Under Wisconsin law, which is the substantive law of this case, the parol evidence rule "prohibits introduction of extrinsic evidence to contradict the express language of an unambiguous contract." Caulfield v. Caulfield, 183 Wis.2d 83, 92, 515 N.W.2d 278, 282 (Wis.Ct.App. 1994); See Marshall & Ilsley Bank v. Milwaukee Gear Co., 62 Wis.2d 768, 777, 216 N.W.2d 1,6 (Wis. 1974) ("[w]here there is no ambiguity in the contract, either in a literal sense, or when applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters. . . ."). As a result, discovery of attorney-client communications concerning the Stock Purchase Agreement would only lead to evidence precluded by the parol evidence rule. Moreover, that inadmissible evidence does not appear "reasonably calculated" to uncover other evidence that might prove admissible. Fed. R. Civ. P. 26(b)(1). As newly amended Rule 26(b)(1) directs the courts to allow discovery "that is relevant to any claim or defense", this Court will limit discovery in this case to the defense actually pled by defendant Gibson Greetings (i.e., "that Article XII of the

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[8] Rule 26(b)(2) was specifically amended in 1993 "to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery. . . ." Fed. R. Civ. P. 26(b)(2) advisory committee's note (1993).

Stock Purchase Agreement speaks for itself"). The door should not be left open for Gibson to gather parol evidence that it admits would be useless at trial. The motion to compel is denied. It may so be ordered.