



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: September 19, 2017**

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

KEVIN BARNETT,

CASE NO. 07-02299-NPO

DEBTOR.

CHAPTER 7

**EDW INVESTMENTS, LLC AND
EDWIN WELSH**

PLAINTIFFS

VS.

ADV. PROC. 08-00086-NPO

**KEVIN BARNETT AND
DEREK HENDERSON, TRUSTEE**

DEFENDANTS

**ORDER: (1) DENYING MOTIONS TO
CLARIFY DISCOVERY ORDER; (2) DENYING
MOTIONS TO EXTEND TIME TO RESPOND TO SUBPOENA
DUCES TECUM; (3) DENYING JOINDERS IN MOTIONS TO
CLARIFY DISCOVERY ORDER; AND (4) RESETTING DISCOVERY
DEADLINE AND HEARING DATE ON DECLARATORY RELIEF ACTION**

This matter came before the Court for hearing on September 5, 2017 (the "Hearing"), on the following pleadings filed in the above-referenced adversary proceeding (the "Adversary"):

(1.) Motion and Incorporated Memorandum to Clarify Order (Adv. Dkt. 120 [sic]) ("Pitre's Motion to Clarify") (Adv. Dkt. 106) filed by David P. Pitre ("Pitre");

Combined Response to David Pitre's Motion and Incorporated Memorandum to Clarify Order (Adv. Dkt. 120) and Response to Rawlings & MacInnis, P.A.'s

Motion for Clarification (“Barnett’s Response to Pitre’s Motion to Clarify”) (Adv. Dkt. 117) filed by Kevin Barnett (“Barnett”); and

Plaintiffs’ Joinder in Pitre’s Motion and Incorporated Memorandum to Clarify Order (“Welsh and EDW’s Joinder in Pitre’s Motion to Clarify”) (Adv. Dkt. 119 & 120) filed by Edwin Welsh (“Welsh”) and EDW Investments, LLC (“EDW”).

(2.) Motion for Clarification of Non-Party Rawlings & MacInnis, P.A. and Motion for Extension of Time to Respond to Subpoena Duces Tecum (“Rawlings’ Motion to Clarify and Extend Time”) (Adv. Dkt. 107) filed by Rawlings & MacInnis, P.A. (“Rawlings”);

Combined Response to David Pitre’s Motion and Incorporated Memorandum to Clarify Order (Adv. Dkt. 120) and Response to Rawlings & MacInnis, P.A.’s Motion for Clarification (“Barnett’s Response to Rawlings’ Motion to Clarify and Extend Time”) (Adv. Dkt. 118) filed by Barnett;

Plaintiffs’ Partial Joinder in Non-Party Rawlings Motion to Clarify Order (“Welsh and EDW’s Joinder in Rawlings’ Motion to Clarify and Extend Time”) (Adv. Dkt. 121) filed by Welsh and EDW; and

Motion of Non-Party David Pitre to Join in the Motion for Clarification Filed by Fellow Non-Party, Rawlings & MacInnis, P.A. & Motion for Extension to Respond to Subpoena Duces Tecum (“Pitre’s Joinder in Rawlings’ Motion to Clarify and Extend Time”) (Adv. Dkt. 111) filed by Pitre, acting *pro se*.¹

At the Hearing, C. Victor Welsh, III represented Welsh and EDW; Pitre, who is a licensed Mississippi attorney, represented himself; John A. Waits represented Rawlings; and Dorsey R. Carson, Jr. represented Barnett. At the end of the Hearing, the Court ruled from the bench, denying: (a) Pitre’s Motion to Clarify; (b) Welsh and EDW’s Joinder in Pitre’s Motion to Clarify; (c) Rawlings’ Motion to Clarify and Extend Time; (d) Welsh and EDW’s Joinder in Rawlings’ Motion to Clarify and Extend Time; and (e) Pitre’s Joinder in Rawlings’ Motion to Clarify and Extend Time. In addition, the Court reset the discovery deadline and the hearing date on the Motion for Declaratory Relief, Injunctive Relief, Civil Contempt, and Other Relief (the “Motion

¹ Between the filing of Pitre’s Motion to Clarify and Pitre’s Joinder in Rawlings’ Motion to Clarify and Extend Time, counsel for Pitre withdrew his representation. (Adv. Dkt. 116).

for Declaratory Relief”) (Adv. Dkt. 43) filed by Welsh and EDW; Kevin Barnett’s Cross-Motion for Declaratory Relief, and Other Relief; and Response to Edwin Welsh and EDW Investments, LLC’s Motion for Declaratory Relief, Injunctive Relief, Civil Contempt, and Other Relief (the “Cross-Motion for Declaratory Relief”) (Adv. Dkt. 68), and other related pleadings (Adv. Dkt. 67, 70 & 79). The Motion for Declaratory Relief, the Cross-Motion for Declaratory Relief, and other related pleadings are referred to collectively as the “Declaratory Relief Action.” This Order memorializes and supplements that bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Adversary pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), (J) and (O). Notice of the Hearing was proper under the circumstances.

Facts

After a hearing held on July 31, 2017 (the “Discovery Hearing”), the Court entered the Order Granting in Part and Denying in Part Motion and Memorandum in Support of Motion to Compel Discovery Responses and Response to Plaintiffs’ Motion to Quash and Granting in Part and Denying in Part Plaintiffs’ Motion for Protective Order Re: Subpoenas for Production of Documents from Attorneys: Rawlings, Pitre, and Kelly (the “Discovery Order”) (Adv. Dkt. 102). In the pleadings presently before the Court, Rawlings, Pitre, and, to a limited extent, Welsh and EDW ask the Court to clarify the Discovery Order with respect only to its ruling on the Plaintiff’s Motion for Protective Order Re: Subpoenas for Production of Documents from Attorneys: Rawlings, Pitre, and Kelly (the “Motion to Quash”) (Adv. Dkt. 83). In the Motion to Quash, Welsh and EDW asked the Court to quash the Subpoenas to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Bankruptcy Case (or Adversary Proceeding) served on

Rawlings (the “Rawlings Subpoena”) (Adv. Dkt. 94) on July 19, 2017, and on Pitre² (the “Pitre Subpoena” or, together with the Rawlings Subpoena, the “Subpoenas”) (Adv. Dkt. 95) on July 19, 2017, on the ground, *inter alia*, that the documents requested contained attorney-client privileged communications. Counsel for Welsh and EDW sent a letter to Pitre and Wyatt Hazard (“Hazard”), counsel for Rawlings, on July 19, 2017, informing them that Welsh and EDW intended to file the Motion to Quash and that “this filing relieves the producing parties of any obligation to produce the requested documents until such time as the Court rules.” (Adv. Dkt. 117-1). A copy of the Motion to Quash was attached to the letter. (*Id.*). Neither Rawlings nor Pitre joined in the Motion to Quash, filed objections to the Subpoenas, or appeared at the Discovery Hearing.

In its thirty (30)-page Discovery Order, the Court clearly and thoroughly addressed all issues raised by Welsh and EDW in the Motion to Quash. The Court held that EDW waived the attorney-client privilege with respect to those communications between Welsh and Rawlings that EDW placed at issue in the legal malpractice suit it brought against its former attorney, Rawlings, in the Circuit Court of Madison County, Mississippi, in Civil Action No. CI2015-cv-00127 (the “Malpractice Suit”) for his alleged failure to pursue fraudulent transfer claims against Michelle Barnett and three (3) of her limited liability companies in a timely manner. The Court noted, however, that EDW did not waive the attorney-client privilege with respect to communications between Welsh and Pitre (EDW’s counsel) regarding the litigation of the Malpractice Suit. As a result, the Court ruled that Rawlings and Pitre must produce those documents related to the Malpractice Suit that did not contain privileged communications between Pitre and Welsh, within seven (7) days of entry of a protective order. On August 21, 2017, the Court entered the Protective

² At the Hearing, Pitre stated that he was not personally served with the Pitre Subpoena but that he did not dispute the sufficiency of service of process.

Order Governing the Production and/or Disclosure of Certain Discovery Materials (Adv. Dkt. 103). Accordingly, Pitre and Rawlings had until August 28, 2017, to produce the documents pursuant to the Discovery Order.

In Pitre's Motion to Clarify, Pitre seeks clarification of the Discovery Order "in order to protect himself from the undue burden or expense of producing documents or information which may ultimately not lead to discoverable evidence." (Adv. Dkt. 106 at 3). In paragraph six of Pitre's Motion to Clarify, "Pitre objects to Request No. 4 as vague, ambiguous, overly broad, or otherwise lack[s] sufficient precision or particularity to permit the formulation of a proper response." (*Id.* at 2). In attempting to respond to Request No. 4, Pitre alleges that he has located over two (2) years of electronically stored information and also has retrieved a standard-sized box of documents from storage. He complains about the amount of time, effort, and money he will have to expend to produce these documents.

In Rawlings' Motion to Clarify and Extend Time, Rawlings seeks clarification of "the procedure to be used in producing the documents 'related' to the malpractice Complaint." (Adv. Dkt. 107 at 4). Rawlings contends that in response to the Discovery Order he has already produced to Barnett the pleadings from the Malpractice Suit, as well as the settlement documents. He is in possession of other documents that may or may not be responsive to the Rawlings Subpoena. These documents were given to Pitre in electronic form on a computer diskette in response to EDW's request for a copy of its client files. They are numbered JR1,000 through JR3,598, totaling 2,598 documents, but not all of them are relevant to the Malpractice Suit. Rawlings made no attempt at that time to separate the documents related to the Malpractice Suit from other unrelated documents. In determining which of these 2,598 documents are related to the Malpractice Suit, Rawlings suggests one of the following alternative procedures: (1) that Welsh (or his counsel)

review and determine which documents relate to the malpractice litigation; (2) that counsel for Barnett compensate him for the time and labor required to review the document himself; or (3) that the Court appoint a “special master” to review the documents at the expense of Barnett and his counsel. Rawlings is concerned that Welsh may assert a claim against him if documents are produced that Welsh later determines to be unrelated to the Malpractice Suit and, therefore, protected by the attorney-client privilege. Finally, Rawlings asks for an extension of time to produce the requested documents.

In Pitre’s Joinder in Rawlings’ Motion to Clarify and Extend Time, Pitre joins in Rawlings’ request for clarification of the procedure to be used in producing the relevant documents and also seeks an extension of time to produce the documents responsive to the Pitre Subpoena. Additionally, Pitre asks the Court to require counsel for Barnett to reimburse him for all costs and expenses incurred in producing the documents.

Barnett has no objection to the Court clarifying the Discovery Order but opposes Pitre’s Motion to Clarify and Rawlings’ Motion to Clarify and Extend Time (together, the “Motions to Clarify”) to the extent they seek to object to the Subpoenas and/or compel him and/or his counsel to pay their expenses for complying with the Discovery Order. Those specific objections and requests, according to Barnett, are untimely and have been waived.

In Welsh and EDW’s Joinder in Pitre’s Motion to Clarify and Welsh and EDW’s Joinder in Rawlings’ Motion to Clarify and Extend Time, Welsh and EDW explain that Pitre and Rawlings relied on them to prevent the disclosure of documents protected by the attorney-client privilege. They interpret Barnett’s Response to Pitre’s Motion to Clarify and Response to Rawlings’ Motion to Clarify and Extend Time as an argument by Barnett that the attorney-client privileges recognized

in the Discovery Order have been waived by Rawlings and Pitre. For that reason, they claim that Barnett is attempting to circumvent the Discovery Order.

Discussion

Although Pitre and Rawlings in the Motions to Clarify purportedly seek “clarification” of the Discovery Order, they do not seek to rectify a computational or clerical mistake, which is ordinarily the type of relief addressed by a motion for clarification. *See* FED. R. CIV. P. 60(a). Rather, Pitre and Rawlings, being aggrieved by the Discovery Order, attempt to interpose at this late date objections to the Subpoenas based on the burden and expense they will incur as a result of having to produce the documents requested. They could have raised these same objections before entry of the Discovery Order but did not. That the Motions to Clarify are not what they purport to be is shown by the statements of counsel at the Hearing. For example, when questioned by the Court at the Hearing, counsel for Welsh and EDW described the Discovery Order as “a picture of clarity with regard to what documents should not be produced . . . on the basis of privilege,”³ and Pitre admitted, “I don’t find the [Discovery] Order to be ambiguous.”⁴

Rule 45 of the Federal Rules of Civil Procedure (“Rule 45”)⁵ grants two (2) procedural methods for objecting to a subpoena: (1) serving a written objection before the earlier of the time specified for compliance or fourteen (14) days after service of the subpoena under Rule 45(d)(2)(B) and/or (2) filing a motion to quash or modify a subpoena under Rule 45(d)(3). “Courts within the Fifth Circuit [Court of Appeals] have consistently held that failure to serve timely objections to a

³ 10:07:45-10:08:16 (Sept. 6, 2017). Because the Hearing was not transcribed, the reference is to the timestamp of the audio recording.

⁴ 10:11:30-10:11:48.

⁵ Rule 45 is made applicable in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9016.

Rule 45 subpoena generally results in a waiver of all grounds for objection.” *La. Generating, L.L.C. v. Ill. Union Ins. Co.*, No. 10-00516-JJB-SCR, 2011 WL 6259052, at *2 (M.D. La. Dec. 14, 2011).

Here, Pitre and Rawlings were both served with the Subpoenas on July 19, 2017. Thus, August 2, 2017, was the deadline for Pitre and Rawlings to serve written objections to the production of documents. Neither Pitre nor Rawlings, however, served a written objection or filed a motion to quash or modify before expiration of the deadline. Because they failed to follow the proper procedures available to them under Rule 45(d) to protect their interests, they have waived any objection to the Subpoenas based on undue burden and expense.

Although Welsh and EDW timely filed the Motion to Quash, their standing to challenge the Subpoenas was limited to their claims of attorney-client privilege and the work product doctrine. *Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979). Welsh and EDW lacked standing to challenge the Subpoenas on grounds of undue burden and expense placed upon Rawlings and Pitre in the absence of any objection by them on those grounds. Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, 2D FEDERAL PRACTICE AND PROCEDURE § 3025 (“A party may not ask for an order to protect the rights of another party or a witness if that party or witness does not claim protection for himself.”); *Stogner v. Sturdivant*, No. 10-00125, 2011 WL 4435254, at *5 n.5 (M.D. La. Sept. 22, 2011). Presumably, Pitre and Rawlings chose to rely on Welsh and EDW to protect their interests and, in doing so, waived their objections based on undue burden and expense as to the Subpoenas by not responding to them or filing a motion to quash in a timely manner.

In response to Welsh and EDW’s claim that Barnett is attempting to circumvent the Discovery Order, counsel for Barnett clarified that Barnett did not contend that Pitre and/or Rawlings had waived the attorney-client privilege in Barnett’s Response to Pitre’s Motion to

Clarify and Response to Rawlings' Motion to Clarify and Extend Time. Barnett's counsel stated on the record that he understood that the Discovery Order resolved the attorney-client privilege issue. The Court notes that Welsh and EDW could have obtained clarification of Barnett's position regarding this matter prior to the Hearing without seeking Court intervention. Nevertheless, clarification was not needed from the Court since it was resolved by stipulation on the record at the Hearing.

Counsel for Rawlings expressed a concern that the Discovery Order did not specifically state that the attorney-client privilege was not waived with respect to communications between Hazard and Rawlings regarding the litigation of the Malpractice Suit. To the extent the Subpoenas may be read as seeking documents that contain such communications, the Court made it clear at the Hearing that such documents are protected from disclosure.

The Motions to Clarify could be construed as motions for reconsideration. Because Rawlings and Pitre waived their objections by not timely responding, however, the Court finds that any reconsideration of the Discovery Order would be futile.

In Rawlings' Motion to Quash and Extend Time and Pitre's Joinder in Rawlings' Motion to Quash and Extend Time, Rawlings and Pitre seek an extension of time to produce the documents. The Court finds that the discovery deadline, including the deadline to produce documents responsive to the Subpoenas, should be extended to October 2, 2017. The Court further finds that the hearing on the Declaratory Relief Action, which was set to begin on October 2 and 3, 2017 (Adv. Dkt. 99) should be continued and reset for November 28 and 29, 2017.

IT IS, THEREFORE, ORDERED that Pitre's Motion to Clarify and Welsh and EDW's Joinder in Pitre's Motion to Clarify are hereby denied.

IT IS FURTHER ORDERED that Rawlings' Motion to Clarify and Extend Time, Welsh and EDW's Joinder in Rawlings' Motion to Clarify and Extend Time, and Pitre's Joinder in Rawlings' Motion to Clarify and Extend Time are hereby denied in part and granted in part. They are granted in part in that the deadline to produce documents responsive to the Subpoenas, as well as the discovery deadline, is hereby continued until October 2, 2017. They are denied in all other respects.

IT IS FURTHER ORDERED that the hearing on the Declaratory Relief Action is hereby continued and reset for November 28 and 29, 2017, at 9:00 a.m. in the U.S. Courthouse, Bankruptcy Courtroom 4C, 501 East Court Street, Jackson, Mississippi.

##END OF ORDER##