

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA
CASE NO. 12-034123 (07)

P & S ASSOCIATES GENERAL
PARTNERSHIP, etc. et al.,
Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.
Defendants.

**DEFENDANT FRANK AVELLINO'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL
BRIEF REGARDING HIS MOTION TO COMPEL PLAINTIFF TO PRODUCE
DOCUMENTS IN RESPONSE TO HIS SECOND REQUEST FOR PRODUCTION
DATED APRIL 29, 2014**

Defendant, Frank Avellino ("Avellino"), files this response to Plaintiff's Supplemental Brief in connection with Avellino's motion compelling Plaintiff Philip J. Von Kahle, as Conservator of P&S Associates and of S&P Associates (hereinafter "Plaintiff") to produce documents in response to Avellino's Second Request for Production dated April 29, 2014.

Introduction

On August 12, 2014, a hearing was held on Avellino's motion to compel. The only issue was with regard to Request 1 which sought documents relating to settlements or other resolutions Plaintiff entered into with the co-defendants in this action. Plaintiff refused to produce such documents claiming privilege and that such documents are irrelevant. At the hearing the Court indicated that he was inclined to require the production of such settlement agreements but with the monetary terms redacted. Plaintiff requested and the Court granted Plaintiff the opportunity to provide the Court with support for its contention that the non-monetary terms of the settlements were not discoverable. The Court directed Plaintiff to submit such support by

August 18, 2014, Avellino could provide a response by August 20, 2014, and the Court would further address the issue at the hearing scheduled for August 21, 2014 on Avellino's motion to dismiss the third amended complaint.

Plaintiff failed to comply with the Court's directive. Rather, a day late, on August 19, 2014 at 5:15 p.m., Plaintiff filed his supplemental brief (the "Brief"). The Brief completely misses the mark. The Brief first re-argues the issue that production of settlement agreements is irrelevant to the issue of set-off. The Brief then raises a straw argument that Mary Carter agreements are discoverable. While both of these arguments may be true, neither addresses the question of whether the non-monetary terms of the settlement agreements are discoverable.

Argument

I. Plaintiff's Set-Off Argument Was Previously Raised and is Otherwise Irrelevant

Relying upon case law previously cited in his response to the Motion to Compel, Plaintiff makes the same argument previously raised in opposition to the motion that the settlements entered into with other defendants are not discoverable because what other defendants paid in settlement is not relevant to a determination of Avellino's liability. This was argued at the hearing on the motion to compel and the Court agreed that the non-monetary terms of the settlement agreements are not discoverable. Plaintiff's rehashed argument fails to address the issue of whether the non-monetary terms of the settlement agreements are discoverable.

II. The Settlement Agreements are Discoverable Because the Contents of the Settlement Agreements May Lead to the Discovery of Admissible Evidence

Avellino does not dispute that the settlement agreements may not be admissible at trial. However, their inadmissibility at trial is not the determining factor of whether or not they are

discoverable. They are discoverable if it appears they are reasonably calculated to lead to the discovery of admissible evidence. Fla.R.Civ.P. 1.280 (b)(1).

In all likelihood the co-defendants with whom Plaintiff settled will be called as witnesses at trial. The provisions and the contents of the settlement agreements could lead to the discovery of admissible evidence relating to the witnesses' motivation of bias. Rule 90.608, Florida Evidence Code. Further, the settlement agreements may include concessions or admissions by Plaintiff or evidence of lack of liability of Avellino, again, which could lead to the discovery of admissible evidence. Since the settlement agreements apparently contain confidentiality provisions those provisions may limit or restrict the co-defendants from testifying or communicating with others, impeding Avellino from discovering admissible evidence, and impeding his ability to defend himself. Any basis for the confidentiality of the settlement agreements is outweighed by the right of Avellino to defend himself in this action.

Plaintiff attempts to avoid the discovery of these agreements by arguing that because they are not Mary Carter agreements, and are not admissible at trial, the terms of the settlement agreements are not relevant and cannot be discovered, and cite three cases for support. However the cases cited by Plaintiff are not applicable to the issue raised herein.

The Supreme Court in *Dosdourian v. Carsten*, 624 So.2d 241 (Fla. 1993) did not address the issue of whether or not a settlement agreement was discoverable; it was addressing the issue of whether or not settlement agreements, other than Mary Carter agreements, are admissible as evidence in a trial. The other two cases cited by Plaintiff, *Centex Homes v. Mr. Stucco, Inc.*, 2009 WL 294876 (M.D, Fla. Sept. 14, 2009) and *Wal-Mart Stores, Inc. v. Strachan*, 82 So.3d 1052 (Fla. 4th DCA 2011) addressed issues of whether a party could discover settlement agreements in order to bring their affirmative defenses of set-off (i.e. discover the amounts paid

by co-defendants), which has already been addressed and ruled upon by this trial court. No issues were raised in any of these cases whether the settlement agreements could be discovered relating to the motive, bias and inconsistent statements by the parties.

The trial court has broad discretion in discovery matters, which should be liberally construed. In the instant case, Plaintiff has not provided this court with any support to bar Defendant's discovery of the settlement agreements.

Conclusion

Plaintiff should be compelled to produce all settlement agreements and other documents evidencing the settlement or other resolution Plaintiff has reached with any other defendant in this action.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 this 20thth day of August, 2014.

By: /s/ Gary A. Woodfield
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