

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

DECARTO DRAPER; ENVIRO-TECH
SERVICES, LLC; and MIDWEST HR
SOLUTIONS, LLC,

Plaintiffs,

vs.

JOSH IRVING,

Defendant/Counter-Plaintiff/
and Third-Party Plaintiff,

vs.

DECARTO DRAPER,

Counter-Defendant,

and

UNIVERSAL DEVELOPMENT OF
MICHIGAN, LLC d/b/a DRAPER
GROUP USA,

Third-Party Defendant.

Case No. 13-01581-CKB

HON. CHRISTOPHER P. YATES

ORDER DENYING PLAINTIFFS' MOTION TO COMPEL PRODUCTION

On October 14, 2014, the plaintiffs submitted a motion to compel the production of a sworn statement prepared by Defendant Josh Irving at the behest of his attorneys. The plaintiffs believe that the sworn statement constitutes an acknowledgment by Irving that he owes money to all of the plaintiffs in connection with a Job Corps project funded by the United States Department of Labor. Irving responded to the plaintiffs' motion to compel by asserting attorney-client privilege. Thus, on October 24, 2014, the Court ordered Irving to submit the sworn statement for *in camera* review.

Defendant Irving, through counsel, complied with the order by submitting to the Court a copy of the sworn statement.* That submission was accompanied by a cover letter and other documents, which the plaintiffs characterized as an improper *ex parte* communication with the Court. Therefore, at a hearing on November 14, 2014, the Court furnished to the plaintiffs a copy of each document submitted by Irving except for the sworn statement. In addition, the Court assured the plaintiffs that the Court would not read the cover letter from Irving's counsel. Instead, the Court simply promised both sides a written ruling on the motion to compel.

The sworn statement consists of two pages and an attached list of the contractors entitled to "final checks for [the] Job Corps project." Although Irving signed the sworn statement on April 29, 2014, the statement apparently has not been presented to anyone other than Irving's attorneys. Kim Mauric, who worked for Irving at the Draper Group USA, received a draft of the statement *via* e-mail from Irving, who asked Mauric to review the figures for accuracy. See Plaintiffs' Motion to Compel Production, Exhibit 7 (Affidavit of Kim Mauric, ¶¶ 6-7). The plaintiffs contend that that disclosure waived the attorney-client privilege. The Court disagrees. To be sure, "[o]nce otherwise privileged information is disclosed to a third party by the person who holds the privilege," then "the privilege disappears." Leibel v General Motors Corp, 250 Mich App 229, 242 (2002). But the "privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents." See Augustine v Allstate Ins Co, 292 Mich App 408, 420 (2011). Defendant Irving simply enlisted his agent, Kim Mauric, to review his figures and accompany him to present the final product to his attorneys. See Plaintiffs' Motion to Compel Production, Exhibit 7 (Affidavit of Kim Mauric, ¶¶ 7-8). This disclosure did not waive the attorney-client privilege.

* To facilitate appellate review, the Court has filed the sworn statement under seal.

The plaintiffs also argue that the sworn statement should not be treated as privileged because Defendant Irving prepared the statement for submission to a court in another case. Historically, the scope of attorney-client privilege for documents furnished by a client to an attorney was coterminous with the attorney's actual disclosure of the documents to third parties. See United States v Schlegel, 313 F Supp 177, 179 (D Neb 1970). More recently, courts have held "that if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as 'the details underlying the data which was to be published' will not enjoy the privilege." United States v (Under Seal), 748 F2d 871, 875 (4th Cir 1984). But even under that rule, "[o]nly when the attorney has been authorized to perform services that demonstrate the client's intent to have his communications published will the client lose the right to assert the privilege as to the subject matter of those communications." Id. at 876. Irving hired counsel to assist him in a dispute involving competing claims to funds under a federal contract. Irving did not bring the sworn statement to his attorneys for the purpose of having his attorneys submit the statement in connection with that dispute. Rather, Irving's attorneys asked Irving to prepare the statement in order to assist the attorneys in representing Irving in that dispute. Thus, Irving did nothing to manifest his intent to have the sworn statement filed in court or published in any other manner. Accordingly, Irving did not "lose the right to assert the privilege" with respect to the sworn statement, see id., so the Court must deny the plaintiffs' motion to compel production of the sworn statement.

IT IS SO ORDERED.

Dated: November 19, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge