IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant, JUDGE: DAVID CROW

vs.

SCOTT ROTHSTEIN, individually, BRADLEY J. EDWARDS, individually,

Defendants/Counter-Plaintiff,
_____/

PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT/COUNTER-PLAINTIFF BRADLEY EDWARDS'S MOTION TO OVERRULE EPSTEIN'S OBJECTIONS AND COMPEL ANSWERS TO INTERROGATORIES

Plaintiff/Counter-Defendant Jeffrey Epstein ("Epstein"), by and through his undersigned counsel, hereby files this Memorandum of Law in Opposition to Defendant/Counter-Plaintiff Bradley Edwards's ("Edwards") Motion to Overrule Epstein's Objections and to Compel Answers to Interrogatories. In support thereof, Epstein states:

INTRODUCTION

Edwards's Motion requests that this Court, on the eve of trial, eviscerate the Attorney-Client Privilege and Order Epstein to disclose confidential communications he may have had with his counsel regarding his decision to file suit against Edwards. Interestingly, Edwards's Motion is seeking, at this late juncture, to overrule the Privilege

in order to prove one of the many elements necessary to his cause of action; information about which he could have inquired at any time during the last four (4) years. Furthermore, when Epstein sought leave to Amend his Affirmative Defenses last month, to add the exact information Edwards now seeks to obtain, Edwards vehemently objected to the amendment, and this Court denied Epstein's Motion. As such, Edwards cannot now receive an Order Overruling Epstein's invocation of the Attorney-Client Privilege and use as a "sword" the information that Epstein properly sought to use as a "shield."

MEMORANDUM OF LAW

Edwards correctly cites Rule 1.280 of the *Florida Rules of Civil Procedure* for the proposition that a party may obtain discovery "regarding any matter, not privileged, that is relevant to the subject matter of the pending action." *See Edwards's Motion,* p. 2. The threshold issue is that the information be "not privileged." FLA. R.CIV. P. 1.280(b)(6). Here, any communications between Epstein and his attorneys that may have occurred with respect to filing suit against Edwards are undeniably protected by the Attorney-Client Privilege. § 90.502 FLA. STAT. (2013); a privilege Epstein was prepared to waive in a limited capacity to assert his advice of counsel defense until Edwards vehemently objected to the assertion of that defense. Moreover, the law is clear that the attorney-client privilege **will not** be waived when the communications do not relate to any element that the **privileged party** has to prove. *Lee v. Progressive Exp. Ins. Co.*, 909 So. 2d 475, 277 (Fla. 4th DCA 2005) (emphasis added). A party does not waive the privilege because the subject of the communications relates to an issue that the opposing party has to prove if the privileged party did not bring up that issue in the litigation. *Id.* (holding that if an insurer wants to raise a defense that the insured did not give his attorney authorization to

settle a case in a bad faith action against the insurer, the insurer has the burden of proving that defense and the insured does not waive the attorney-client privilege because that is not an element the insured must prove).

Edwards's blanket assertion that these communications may have occurred between Epstein and his attorneys, in an effort by Epstein to commit a crime or fraud, are based on nothing more than Edwards's opinion, which is not enough to overcome the privilege. While Edwards relies on his "Statement of Undisputed Facts" in support of his assertion, *see Edwards's Motion*, p. 5; a motion he filed three years ago, this is not enough to overcome the privilege; especially in light of Epstein's Statement of Undisputed Facts in his Motion for Summary Judgment, which undeniably establishes what Epstein and others knew at the time Epstein filed suit; completely negating Edwards's claim. "Expansion of this exception [to the attorney-client privilege] to permit the disclosure of attorney-client communications based upon a mere assertion of a fraudulent design … would virtually eliminate the attorney-client privilege in any suit where there was any allegation of fraud or misrepresentation." *Robichaud v. Kennedy*, 711 So. 2d 186, 188 (Fla. 2d DCA 1998); *Florida Min. & Materials Corp.*, 556 So.2d at 519. In *Robichaud,* the defendants to a lawsuit accused the plaintiff of using his communications with a public defender for the purpose of a future commission of the crime of perjury, alleging that these communications led to his tailored testimony at a criminal trial. *Robichaud*, 711 So. 2d at 188. The court found that the defendants did not point to any evidentiary basis in support of this proposition and instead relied on conclusory accusations of criminal conduct on the part of the plaintiff. *Id*. Further, the defendants did not claim or show any criminal complicity on the part of the former

defense counsel. *Id.* Thus, the court held that with nothing before them but these "extraordinary allegations," the requirement of disclosure of communications protected by the attorney-client privilege departed from the essential requirements of the law. *Id. See also BNP Paribas v. Wynne*, 967 So. 2d 1065, 1067 (Fla. 4th DCA 2007).

The party seeking disclosure of privileged communications must first allege that the communication was made in an effort to perpetrate a crime or fraud and that party **must specify the crime or fraud**. *Butler, Pappas, Weihmuller, Katz, Craig, LLP v. Coral Reef of Key Biscayne Developers, Inc.,* 873 So. 2d 339, 342 (Fla. 3d DCA 2003) (emphasis added). Second, the party seeking disclosure "must establish a prima facie case that the party asserting the attorney-client privilege sought the attorney's advice in order to commit, or in an attempt to commit, a crime or fraud." *Id.* (quoting Florida Mining and Materials Corp. v. Continental Cas. Co., 556 So. 2d 518, 519 (Fla. 2nd DCA 1990); First Union Nat'l Bank v. Whitener, 715 So. 2d 979, 982 (Fla. 5th DCA 1998)). The client is then entitled to provide a reasonable explanation for the communication at an evidentiary hearing. *Id.* Finally, the **record evidence must specifically show that the attorney assisted in the crime or fraud**. *First Union Nat. Bank of Fla. v. Whitener*, 715 So. 2d 979, 983 (Fla. 5th DCA 1998) (finding that the record evidence suggested a true attorney-client relationship and not a conspiracy where the attorney acted merely as an agent of the client's fraud) (emphasis added). Here, Edwards has failed to meet this threshold burden, mandating denial of his Motion.

Most importantly, once Edwards has met his initial burden, determining whether the exception exists requires an adversarial proceeding to allow both parties to present

evidence and argument on the issue. *BNP Paribas v. Wynne*, 967 So. 2d 1065, 1067 (Fla. 4th DCA 2007). If the court accepts the party asserting the privilege's explanation, the privilege will remain. *Id*. However, if the court does not accept it after considering and weighing all of the evidence, a prima facie case exists as to the exception and the privilege is lost. *Id*. "Thus, the trial court must consider the evidence and argument rebutting the existence of the crime-fraud exception and must weigh its sufficiency against the case made by the proponent of the exception." *Id.* Courts have found that to apply the crime-fraud exception **without an evidentiary hearing** would be a departure from the essential requirements of law. *Id.* (emphasis added). Accordingly, Edwards must *first* establish his prima facie case and *then* the court must conduct an evidentiary hearing to determine whether or not the exception is applicable.

Moreover, as Edwards correctly recognized in his own Memorandum of Law filed with this Court on September 16, 2013, the prejudice caused by "changing positions" at the "eleventh hour" is not permitted by the courts. Edwards wrote: "In *Menard v. University Radiation Oncology Associates, LLP,* 976 So. 2d 69, 72-74 (Fla. 4th DCA 2008), the Fourth District Court of Appeal reversed a trial court decision to allow a party to change the position that it had taken throughout discovery regarding basic factual issues." *See Supplemental Memorandum filed by Edwards on September 16, 2013*, p. 9. Due to the fact that Edwards himself correctly recognizes the impropriety of, and argues against, such tactics, he should not be permitted to change his position and suddenly seek an entirely new area of discovery on the eve of trial. *See Grau v. Branham,* 626 So. 2d 1059, 1061 (Fla. 4th DCA 1993) ("Neither side should be required to engage in frantic discovery to avoid being prejudiced by the intentional tactics of the other party.").

Edwards's Motion further relied upon *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981), and its progeny, and avowed that "Florida courts have similarly focused **on prejudice and fairness** when considering the appropriate sanction for violation of a pretrial order," *see Supplemental Memorandum filed by Edwards on September 16, 2013*, p. 8 (emphasis added), properly recognizing the unfair prejudice created by the very act he now seeks this Court to permit. As Edwards himself quoted in his Motion, the "decision to exclude testimony 'sends out a strong message to those who do not adhere to the code of fair play advanced by Binger.'" *See Supplemental Memorandum filed by Edwards on September 16, 2013,* p. 11 (citing Menard v. University Radiation Oncology Associates, *LLP,* 976 So. 2d 69, 74 (Fla. 4th DCA 2008)). Consequently, this Court should deny Edwards's Motion to Overrule Epstein's Objections and to Compel Answers to Interrogatories; as in Edwards's own words, "this case has reached its 'eleventh hour,'" and to do so would cause unfairness and prejudice.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served, via electronic service, to all parties on the attached service list, this October 15, 2013.

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