

IN THE SUPREME COURT OF THE STATE OF NEVADA

READING INTERNATIONAL, INC.,

Supreme Court No. 72356

Petitioner,

District Court No. A-15-719860-B
Electronically Filed
Jun 28 2017 01:52 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

v.

EIGHTH JUDICIAL DISTRICT
COURT, IN AND FOR THE
COUNTY OF CLARK, AND THE
HONORABLE ELIZABETH
GONZALEZ, DISTRICT JUDGE,
DEPT. 11,

Respondents,

JAMES J. COTTER, JR., individually
and derivatively on behalf of
READING INTERNATIONAL, INC.

v.

MARGARET COTTTER, ELLEN
COTTER, GUY ADAMS, EDWARD
KANE, DOUGLAS McEACHERN,
JUDY CODDING, and MICHAEL
WROTNIAK,

Real parties in interest.

**JAMES J. COTTER JR.'S OPPOSITION
TO PETITIONER'S RULE 27(E) EMERGENCY MOTION FOR STAY
PENDING RESOLUTION OF WRIT PETITION**

I. INTRODUCTION

Petitioner and nominal defendant Reading International, Inc. (“RDI” or the “Company”) moves for a stay of the lower court’s orders of October 3, 2016, December 1, 2016 and January 20, 2017 granting a motion by plaintiff James J. Cotter, Jr. (“Plaintiff”) to compel the production of certain yet to be identified communications between certain of defendants and certain counsel (the “Orders”). By that motion (the “Stay Motion”), RDI argues that a stay is necessary to avoid frustrating the object of the writ petition it filed with this Court regarding the Orders and that Plaintiff “will not be harmed by a stay.” These contentions are erroneous, and a stay is not warranted, including for the following reasons:

First, and contrary to what the Stay Motion asserts, the object of RDI's writ petition will not be defeated if a stay is not granted. Although the Stay Motion raises the possibility of the production of a single document, that argument is a red herring. That document, like other documents, may and should be submitted to the trial court for the *in camera* review it ordered to determine which documents, if any, are subject to the Orders. In other words, no production of documents withheld on the basis of claims of privilege is about to occur.

Second, Plaintiff will suffer hardship and prejudice if a stay is granted. Unless and until the district court conducts the *in camera* review it ordered of certain documents and thereafter issues a further order, the parties will not know

what documents, if any, have been ordered produced and Plaintiff will be unable to prosecute this case.

Third, RDI is unlikely to prevail on the merits. Contrary to what RDI's writ petition suggests, what transpired in this case was a traditional use of privilege as a sword and shield by directors who testified affirmatively and voluntarily that the sole basis for a challenged decision they made was the substance of advice of counsel. This is not a case implicating Nevada's business judgment rule and not a case in which the directors merely recited the fact of legal advice as another indication of their efforts to fulfill their duty of care.

II. PROCEDURAL BACKGROUND AND STATUS

A. The Nature of the Case Below

The underlying action is a shareholder derivative action. The legal claims asserted are for breaches of fiduciary duties. Plaintiff not only is a shareholder of nominal defendant RDI, he was at all times relevant to the underlying action – and remains today – a member of RDI's board of directors. Thus, unlike certain high profile cases that have included writ petitions to this Court, Plaintiff in this case is not a former officer and/or director seeking monetary recovery from the company. On the contrary, he was and is a member of the Company's board of directors and is a shareholder suing derivatively on behalf of the Company.

B. The Issue Precipitating the Writ Petition and the Stay Motion

In most general terms, the case below arises from actions of individual defendants to wrongfully seize control of RDI and from their subsequent fiduciary breaches to entrench themselves and to further their own personal interests, to the detriment of the Company. One of the actions complained of in Plaintiff's pending Second Amended Complaint was a decision by two of three members of the RDI board of directors compensation committee, Guy Adams and Edward Kane, to authorize defendants Ellen Cotter and Margaret Cotter to exercise a supposed option to purchase 100,000 shares of RDI's voting stock ("the 100,000 Share Option"), which Plaintiff claims was part of the scheme to secure and retain control of RDI. Director defendants Adams and Kane volunteered at deposition that the sole basis for their decision to authorize the exercise of the 100,000 Share Option was the substance of advice from both "in house" and outside counsel.

C. The Orders That Are the Subject of the Stay Motion

Without acknowledging that the advice of counsel to other directors is privileged as to him, as distinct from other plaintiffs that at the time were party to the case but today are not, Plaintiff moved to compel the production of the advice invoked by director defendants Adams and Kane in defense of their action to authorize the exercise of the 100,000 Share Option. By order dated October 3, 2016 (Stay Motion Exhibit A), the district court ordered the production of certain

tailored categories of documents, based on the deposition testimony of Adams and Kane.

RDI filed a motion to reconsider, which motion Plaintiff understood to be an attempt to narrow the scope of documents that were the subject of the October 3, 2016 order to what in the Stay Motion is referred to as the “GT Memo.” RDI’s motion to reconsider was granted in part (in another respect) by order dated December 1, 2016 (Motion Exhibit B).

Plaintiff then filed a motion to reconsider or clarify the December 1, 2016 order, arguing that the district court, not the individual defendants and/or RDI, should determine what documents withheld on the basis of claims of attorney-client privilege should be produced pursuant to the district court’s October 3 and December 1, 2016 orders. By order dated January 23, 2017 (**Exhibit A**) (which is referenced in but not attached to the Stay Motion), the district court granted Plaintiff’s motion to reconsider and ordered that defendants deliver to the district court for *in camera* review 115 documents listed on the privilege logs of defendants Adams and Kane, for the district court to determine which, if any, of those documents are subject to the district court’s October 3 and December 1, 2016 orders.

D. Additional Procedural History

RDI filed a writ with respect to the district court's orders (the "Orders") on or about February 14, 2017. The district court previously entered a 30 day stay of its Orders and, in early March 2017, entered a 90 day stay of the Orders. The latter stay expired June 4, 2017. By order entered June 22, 2017, the district court memorialized a June 12, 2017 ruling denying RDI's request for a further stay.

As a result of the prior stays, defendants have not delivered to the district court the documents the district court ordered delivered for *in camera* review, the *in camera* review has not occurred and, of course, no determination has been made of which, if any, documents are subject to the district court's October 3 and December 1, 2016 orders. As a result, the depositions of Adams, Kane and others have not been resumed and/or taken, as the case may be, and discovery has not been concluded. As a result, other actions that remain to be completed prior to the case being ready for trial have not been completed. Plaintiff's day in court therefore has been delayed.

III. ARGUMENT

A. Introduction

Plaintiff's position is that the Court should deny the request for a stay so that defendants will deliver to the district court the documents that court by its January 23, 2017 order (**Exhibit A**) directed be delivered to it for *in camera* review, so that the district court can determine which, if any, of those documents

are subject to its October 3 and December 1, 2016 orders, and presumably then issue a further order. The so-called “GT Memo” also can be delivered to the district court, not Plaintiff, as part of the process of having the district court, not the individual defendants and/or RDI, determine which, if any, documents are subject to the district court’s October 3 and December 1, 2016 orders.

Once the district court has issued a further order following its *in camera* review of certain documents, the parties can make an informed choice about how they wish to proceed. Depending on the district court’s further order, it is possible that Plaintiff and/or defendants will revisit their respective decisions regarding how to proceed. For example, RDI could choose to withdraw or dismiss its writ petition and/or Plaintiff could agree to accept a subset of the documents Plaintiff believes the Orders require defendants to produce. None of that can or will happen, however, unless and until the district court conducts an *in camera* review of the subject documents and issues a further order.

B. A Stay Is Not Warranted

Contrary to what RDI argues, NRAP 8 does not support its position. Rather, each of the four factors identified in NRAP 8(c) weigh against granting a stay.

First, the object of the writ petition will not be defeated if a stay is not granted. Unless and until defendants have been ordered to produce particular documents to Plaintiff, they cannot colorably claim be at risk to lose any claims of

privilege or to be without effective remedy. Indeed, as it presently stands, the Motion implies (but, tellingly, does not definitively assert) that a single document, the “GT Memo,” may be subject to production to Plaintiff by July 12, 2017. Even as to that document, however, RDI can include it among the documents delivered to the district court for *in camera* review. Plaintiff has no objection to RDI doing so.

Thus, what the Stay Motion really seeks, without expressly requesting it, is relief from the obligation to deliver documents to the district court for an *in camera* review to determine which, if any, of them are subject to the district court’s October 3 and December 1, 2016 orders. But the Stay Motion proffers no rationale for such relief, which amounts to divesting the court below of the ability to apply its own orders and manage its own docket. Indeed, it is the latter point that in all likelihood accounts for the Stay Motion, as discussed immediately below.

Second, Plaintiff will suffer hardship and prejudice if a stay is granted. As a threshold matter, discovery cannot be completed until the parties know what documents, if any, will be produced regarding the decision of director defendants Adams and Kane to authorize the 100,000 Share Option. Other tasks, including supplemental briefing of summary judgment motions and argument of at least one motion *in limine*, cannot be completed until the limited discovery remaining is completed. Trial, which will occur on at least some claims (because of denial of

competing summary judgment motions by the individual defendants and by Plaintiff), is delayed indefinitely. Unless and until the court below issues a further order following *in camera* review of certain documents, Plaintiff is faced with a Hobson's choice: either continue to be unable to complete discovery and therefore the other tasks that need to be done to be in a position to try the case, or make an uninformed decision about whether to give up his right to certain (unknown) documents. Thus, the stay sought by the Motion is not only unnecessary, it is highly prejudicial to Plaintiff.

Third, RDI is unlikely to prevail on the merits of its writ petition. Although RDI in its writ petition attempts to depict the issue raised here as implicating Nevada's business judgment rule, such that the issue is substantially the same as that in another case before the Court in which a writ petition has been fully briefed and argued, that depiction is inaccurate. In this case, director defendants Adams and Kane did not testify that, in the course of satisfying their duty of care, one of several actions they took was to confer with qualified counsel. Instead, they affirmatively testified that the sole basis upon which they made the challenged decision to authorize the exercise of the 100,000 Share Option was the substance of privileged communications with lawyers. Where, as here, it is the substance of privileged communications rather than the fact of it that is invoked by a director defendant, the privileged communications must be disclosed in order for there to

be a truthful resolution of the case. *In re Comverge, Inc. S'holders Litig.*, 2013 WL 1455827, at *3 (Del. Ch. Apr. 10, 2013).

In this case, the district court found that Adams and Kane in testimony defended their challenged decision based solely on the substance of the advice of counsel:

THE COURT: Mr. Ferrario, I'm not going to talk to you about a hypothetical case. I am talking about the facts in this case where I have two witnesses who testified that their sole basis was they relied upon representation or the opinion of counsel in making a determination. That's this case. That's the one I'm deciding.

[Transcript of District Court Proceedings, October 27, 2016, Ex. B at 13:10-15]

(Exhibit B). Adams and Kane voluntarily made that assertion in their deposition testimony in defense of their challenged actions, presenting a different and discrete issue – use of privilege as a sword and shield – on which the district court's decision readily can be affirmed. "[T]he attorney client privilege was intended as a shield, not a sword." *Wardleigh v. Second Judicial District Court in and for the County of Washoe*, 111 Nev. 345, 354, 891 P. 2d 1180, 1186 (1995) (quotation and citation omitted). Thus, "the attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against the disclosure of such information would be manifestly unfair to the opposing party." *Id.* at 354-55, 891 P.3d at 1186. *See also Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, 276 F.Supp. 2d

1084, 1092 (D. Nev. 2003) ("Fundamental fairness compels the conclusion that a litigant may not use reliance on advice of counsel to support a claim or defense as a sword in litigation, and also deprive the opposing party the opportunity to test the legitimacy of that claim by asserting the attorney-client privilege... as a shield").

Finally, as to equitable considerations, a stay is inequitable to Plaintiff. Plaintiff is not a former executive suing his former employer, but instead remains a member of the RDI board of directors, such that documents in question are not privileged as to him outside the context of this derivative action, but nevertheless have been withheld from him as privileged in this action while contemporaneously being used to defend certain complained of conduct.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Motion be denied or, if it is granted, be granted only as to production of the so-called "GT Memo" to Plaintiff, but not as to the delivery of documents to the district court for *in camera* review.

YURKO, SALVESEN & REMZ, P.C.

/s/ Mark G. Krum

Mark G. Krum, Esq. (SBN 10913)
One Washington Mall, 11th Floor
Boston, MA 02108

Attorney for Plaintiff
James J. Cotter, Jr.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25 I hereby certify that I caused a copy of *James J. Cotter Jr. 's Opposition To Petitioner's Rule 27(E) Emergency Motion For Stay Pending Resolution of Writ Petition* to be served on the Petitioner, Reading International, Inc. and the Real Parties in Interest via electronic means through the Nevada Supreme Court's eFlex filing system. Electronic notification will be sent to the following:

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*Attorney for Margaret Cotter, Ellen
Cotter, Guy Adams, Edward Kane,
Douglas McEachern, Judy Coddling,
and Michael Wrotniak*

I further certify that a copy of *James J. Cotter Jr. 's Opposition To Petitioner's Rule 27(E) Emergency Motion For Stay Pending Resolution of Writ Petition* will be served on June 28, 2017 by Federal Express overnight delivery upon:

Judge Elizabeth Gonzalez
Eighth Judicial District Court of Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
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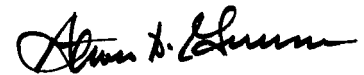
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Attorneys for Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, Judy Coddington, and Michael Wrotniak

/s/ Mark G. Krum

Mark G. Krum

Exhibit A



CLERK OF THE COURT

ORDR

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DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., individually and
derivatively on behalf of Reading International,
Inc.,

Plaintiff,

vs.

MARGARET COTTER, ELLEN COTTER,
GUY ADAMS, EDWARD KANE, DOUGLAS
McEACHERN, TIMOTHY STOREY,
WILLIAM GOULD, JUDY CODDING,
MICHAEL WROTONIAK, and DOES 1 through
100, inclusive,

Defendants.

and

READING INTERNATIONAL, INC., a
Nevada corporation,

Nominal Defendant.

T2 PARTNERS MANAGEMENT, LP, a
Delaware limited partnership, doing business as
KASE CAPITAL MANAGEMENT, et al.,

Plaintiffs,

vs.

MARGARET COTTER, ELLEN COTTER,

CASE NO.: A-15-719860-B
DEPT. NO. XI

Coordinated with:

Case No. P-14-082942-E
Dept. No. XI

Case No. A-16-735305-B
Dept. No. XI

Jointly Administered

Business Court

**~~PROPOSED~~ ORDER GRANTING IN
PART PLAINTIFF'S MOTION TO
RECONSIDER AND/OR CLARIFY ORDER
GRANTING IN PART RDI'S MOTION TO
RECONSIDER OR CLARIFY ORDER
GRANTING PLAINTIFF'S MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS AND COMMUNICATIONS
RELATING TO THE ADVICE OF
COUNSEL ON ORDER SHORTENING
TIME**

Date of Hearing: December 22, 2016
Time of Hearing: 8:30 a.m.

1 GUY ADAMS, EDWARD KANE, DOUGLAS
2 McEACHERN, WILLIAM GOULD, JUDY
3 CODDING, MICHAEL WROTNIAK, CRAIG
TOMPKINS, and DOES 1 through 100,
inclusive,

4 Defendants.

5 and

6 READING INTERNATIONAL, INC., a
7 Nevada corporation,

8 Nominal Defendant.

9
10 THIS MATTER HAVING COME BEFORE the Court on December 22, 2016, on
11 Plaintiff's Motion to Reconsider and/or Clarify Order Granting in Part RDI's Motion to
12 Reconsider or Clarify Order Granting Plaintiff's Motion to Compel Production of Documents and
13 Communications Relating to the Advice of Counsel on Order Shortening Time ("the Motion") and
14 the Court having reviewed the papers filed in support of and in opposition to the Motion, and
15 having considered the arguments of counsel and such other pleadings on file herein as the Court
16 saw fit, and good cause appearing therefor, the Court rules as follows:

17 IT IS HEREBY ORDERED THAT the Motion is GRANTED IN PART. The Court will
18 perform an *in camera* review of certain documents listed on the privilege logs of defendants
19 Adams and Kane for the purpose of determining whether those documents are subject to the
20 Court's orders of October 3, 2016 and December 1, 2016. The documents the Court will review *in*
21 *camera* are the documents numbered 1-115 on the Court's Exhibit 1 (Plaintiff's counsels' January
22 12, 2017 correspondence to the Court and all counsel of record). Defendants shall provide the
23 Court with copies of those documents for *in camera* review.

24 DATED this 10 day of January, 2017.

25
26 
DISTRICT COURT JUDGE

Jwr

and 1/18/17
Ble

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

Lewis Roca
ROTHGERBER CHRISTIE

Submitted by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Mark G. Krum

MARK G. KRUM (SBN 10913)

ERIK J. FOLEY (SBN 14195)

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Attorneys for Plaintiff

Exhibit B

APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANTS:

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CHRISTOPHER TAYBACK, ESQ.
MARK E. FERRARIO, ESQ.
KARA B. HENDRICKS, ESQ.
MARSHALL SEARCY, ESQ.
EKWAN RHOW, ESQ.

1 them. Because it's changed over time.

2 MR. FERRARIO: Okay. But the briefing --

3 THE COURT: Sort of like this case. I asked them if
4 they were going to, and then they thought about it and they
5 made a decision.

6 MR. FERRARIO: Well, that was our take from the Wynn
7 case, was that they were -- that they'd put it at issue. If
8 -- but, again, if a director simply says, okay, that I -- in
9 discharging my duty I consulted with counsel, okay --

10 THE COURT: Mr. Ferrario, I'm not going to talk to
11 you about a hypothetical case. I am talking about the facts
12 in this case where I have two witnesses who testified that
13 their sole basis was they relied upon the representations or
14 the opinion of counsel in making a determination. That's this
15 case. That's the one I'm deciding.

16 MR. FERRARIO: I understand.

17 THE COURT: I'm not going to get involved with you
18 in a hypothetical discussion. You can have that discussion in
19 Carson City, if you want.

20 MR. FERRARIO: I'd prefer not to have to go to
21 Carson City. And that's why I'm here doing -- having this --

22 THE COURT: I'm just telling you I don't want to
23 discuss hypothetical questions on this issue, because I've
24 tried to be very limited on a scope of this issue.

25 MR. FERRARIO: I understand. Okay. And that's

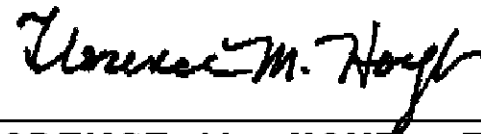
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT
Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

10/31/16

DATE