

IN THE SUPREME COURT OF NEVADA

Electronically Filed
Nov 23 2021 03:57 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

ROWEN SEIBEL; MOTI PARTNERS, LLC; MOTI PARTNERS 16, LLC; LLTQ ENTERPRISES, LLC; LLTQ ENTERPRISES 16, LLC; TPOV ENTERPRISES, LLC; TPOV ENTERPRISES 16, LLC; FERG, LLC; FERG 16, LLC; R SQUARED GLOBAL SOLUTIONS, LLC, DERIVATIVELY ON BEHALF OF DNT ACQUISITION LLC; GR BURGR, LLC; AND CRAIG GREEN,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, AND THE HONORABLE TIMOTHY
C. WILLIAMS, DISTRICT JUDGE,

Respondents,

-and-

DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC;
PHWLTV, LLC; AND BOARDWALK REGENCY CORPORATION,

Real Parties in Interest.

District Court Case No. A-17-751759-B, consolidated with A-17-760537-B

**PETITIONERS' MOTION REGARDING THE
DISTRICT COURT'S AUGUST 19, 2021, MINUTE ORDER**

JOHN R. BAILEY
Nevada Bar No. 0137

DENNIS L. KENNEDY
Nevada Bar No. 1462

JOSHUA P. GILMORE
Nevada Bar No. 11576

PAUL C. WILLIAMS
Nevada Bar No. 12524

BAILEY ♦ KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: (702) 562-8820
Facsimile: (702) 562-8821
jbailey@baileykennedy.com
dkennedy@baileykennedy.com
jgilmore@baileykennedy.com
pwilliams@baileykennedy.com

Attorneys for Petitioners

PETITIONERS' MOTION REGARDING THE
DISTRICT COURT'S AUGUST 19, 2021, MINUTE ORDER

Pursuant to NRAP 27, the Development Parties¹ respectfully move (the “Motion”) this Court for an Order prohibiting Caesars,² or any other party involved in this matter, from using the district court’s minute order dated August 19, 2021 (the “Minute Order”), including its quotations from *privileged* communications, for any purpose, pending this Court’s disposition of the Petition for Extraordinary Writ Relief (the “Petition”). (*See App. to Writ Pet.*, Vol. XVII at 3481-82.)

This Motion is made and based on the record before this Court and the following Memorandum of Points and Authorities.

¹ “Development Parties” refers to Rowen Seibel (“Seibel”), Craig Green (“Green”), and the “Development Entities,” *i.e.*, Moti Partners, LLC (“Moti”); Moti Partners 16, LLC (“Moti 16”); LLTQ Enterprises, LLC (“LLTQ”); LLTQ Enterprises 16, LLC (“LLTQ 16”); TPOV Enterprises, LLC (“TPOV”); TPOV Enterprises 16, LLC (“TPOV 16”); FERG, LLC (“FERG”); FERG 16, LLC (“FERG 16”); R Squared Global Solutions, LLC (“R Squared”), derivatively on behalf of DNT Acquisition LLC (“DNT”); and GR Burgr, LLC (“GRB”).

² “Caesars” refers to PHWLTV, LLC (“Planet Hollywood”); Desert Palace, Inc. (“Caesars Palace”); Paris Las Vegas Operating Company, LLC (“Paris”); and Boardwalk Regency Corporation d/b/a Caesars Atlantic City (“CAC”).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The district court—without first providing the Development Parties with an opportunity to seek appellate review—wrongfully disclosed their *privileged* communications to the opposing parties in this case through the Minute Order. As detailed below, this disclosure was improper. Numerous courts have explained that a trial court should not disclose privileged communications without giving the aggrieved party an initial opportunity to seek appellate review of the trial court's decision compelling the disclosure of privileged communications.

When the Development Parties sought to remedy the district court's error (to the extent it can be), the court only agreed to partially claw back its disclosure. The district court expressly authorized Caesars to utilize the privileged communications in responding to the Petition. However, enabling Caesars to utilize the privileged communications leaves the Development Parties in an impossible catch-22 situation where they must either: (a) refuse to address the privileged communications in an effort to maintain the privilege; or (b) address the privileged communications and risk a waiver of the privilege. The Development Parties should not be placed in such an untenable position.

In sum, the district court's disclosure of privileged communications was improper and its partial claw back was insufficient. Accordingly, this Court should

grant this Motion in its entirety and enter an order prohibiting Caesars (and all other parties to this case) from using the privileged communications in the Minute Order for any purpose (including in responding to the Petition).

II. RELEVANT PROCEDURAL HISTORY³

A. The District Court Grants Caesars' Motion to Compel Production of the Development Parties' Privileged Communications with Their Attorneys Based on the Crime-Fraud Exception.

On January 6, 2021, Caesars moved to compel attorney-client privileged communications based on the crime-fraud exception (the "Motion to Compel"). (7 PA 1341-60.) The district court granted the Motion to Compel and, on June 8, 2021, ordered (the "Initial Order") the Development Parties to submit their privileged communications for *in camera* review. (5 PA 970-79.)

B. This Court Denies the Initial Writ Petition Without Prejudice.

On June 16, 2021, the Development Parties sought writ relief from this Court challenging the Initial Order (the "Initial Writ Petition"), together with a request for an emergency stay. (5 AP 1078-93; 17 PA 3433-80.) They sought writ relief prior to the district court's *in camera* review based, in part, on concerns that the district court would disclose their privileged communications to Caesars *before*

³ A recitation of the facts relevant to these proceedings is contained in the Petition and, in the interests of brevity, is incorporated herein by reference.

giving the Development Parties an opportunity to seek appellate review. (5 AP 1085-86 n.3; 17 PA 3474 n.7.)

On June 18, 2021, this Court denied the Initial Writ Petition (and related stay request) as premature because the district court had not yet conducted its *in camera* review. (5 PA 1094-96.) The ruling was “without prejudice to petitioner’s ability to seek writ relief in the event [Seibel] is ordered to disclose the subject documents.” (*Id.*)

C. The *In Camera* Review and the Minute Order.

On June 18, 2021, the Development Parties submitted the privileged communications for *in camera* review. (5 PA 1097-1100.) On August 19, 2021, the district court issued the Minute Order, setting forth its decision. (17 PA 3481-82.) The district court identified *three* of the nearly 200 communications at issue as the basis for finding that *all* of the communications are discoverable. (*Id.*)

However, instead of simply citing or referencing the specific documents that formed the basis of its decision, *the district court quoted them, disclosing their contents to Caesars*—without affording the Development Parties an opportunity to seek appellate review. (*Id.*)

D. The Development Parties Seek to Claw Back the Minute Order.

On August 30, 2021, the Development Parties moved to claw back the Minute Order (the “Clawback Motion”). (5 PA 1103-18.) The district court

granted the Clawback Motion in part and denied it in part. (6 PA 1320-22.) The district court found that Caesars may utilize the Minute Order for purposes of the Petition. (*See id.*)

E. The Development Parties Seek Appellate Review.

On October 28, 2021, the district court entered an order compelling the Development Parties to disclose privileged communications to Caesars (the “Supplemental Order”). (6 PA 1262-78.) On November 5, 2021, the Development Parties filed their Petition, together with their Emergency Motion for Stay. On November 10, 2021, this Court entered an Order directing further briefing on the Petition and staying compliance with the Supplemental Order.

Caesars has until December 8, 2021, to file an answer to the Petition, after which the Development Parties will have until December 22, 2021, to file a reply. This Motion seeks to prevent Caesars from relying on the privileged communications in the Minute Order when responding to the Petition and from requiring the Development Parties to then decide whether to respond in kind (and risk a waiver of the privilege) or ignore the privileged communications in an effort to preserve the privilege (and risk their silence being construed against them).

III. ARGUMENT

When a district court conducts an *in camera* review of privileged communications and determines that the crime-fraud exception applies, the court

should give the aggrieved party an opportunity to seek appellate review of the decision *before* compelling the production of the communications or revealing them to the opposing party. *See In re GMC*, 153 F.3d 714, 717 (8th Cir. 1998) (“We stress that if the district court ultimately determines that the crime/fraud exception applies, it should keep the privileged communications under seal to prevent their further disclosure until all avenues of appeal have been exhausted.”); *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) (“Because of the sensitivity surrounding the attorney-client privilege, care must be taken that, following any determination that an exception applies, the matters covered by the exception be kept under seal or appropriate court-imposed privacy procedures until all avenues of appeal are exhausted.”); *Walanpatrias Found. v. AMP Servs.*, 964 So. 2d 903, 905 (Fla. Dist. Ct. App. 2007) (holding trial court’s order requiring production of privileged communications was “defective in that the order provides for an immediate turning over of the documents by the judge to [the party seeking the privileged communications], without further opportunity for appellate review of the judge’s decision following the *in camera* inspection.”); *accord In re Grand Jury Subpoena*, 190 F.3d 375, 388 (5th Cir. 1999).

Relatedly, this Court has consistently recognized that the compelled disclosure of privileged communications causes irreparable harm, thus warranting intervention to review the decision. *See Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev.

235, 249, 416 P.3d 228, 231 (2018); *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 130 Nev. 118, 122, 319 P.3d 618, 621 (2014); *Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 172, 252 P.3d 676, 679 (2011); *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995).

Here, the district court disclosed privileged communications to the adverse parties in this case—without giving the Development Parties an opportunity to seek appellate review. Specifically, the Minute Order—which was served on current and former counsel for all parties in this case—quotes from two privileged communications. (17 PA 3481-82.) This disclosure was improper.⁴ *See In re GMC*, 153 F.3d at 717; *Haines*, 975 F.2d at 97; *Walanpatrias Found.*, 964 So. 2d at 905; *In re Grand Jury Subpoena*, 190 F.3d at 388.

The district court failed to fully cure (to the extent possible)⁵ its improper disclosure of privileged communications—expressly authorizing Caesars to use the communications for purposes of responding to the Petition. However, it is

⁴ “In light of the particular sensitivity of many of the disputed documents and in order to avoid premature disclosure in the event [the aggrieved party] exercises his rights to challenge th[e] decision,” a district court should be “circumspect in its description of the various documents supporting its decision” to find that the crime-fraud exception applies to privileged communications. *See Transcon. Refrigerated Lines, Inc.*, No. 1:13-CV-2163, 2014 U.S. Dist. LEXIS 75320, at *39-42 & n.18 (M.D. Pa. June 3, 2014) (citing *Haines*, 975 F.2d at 97).

⁵ More “drastic remedies” may be necessary to fully cure the district court’s improper disclosure. *See Cotter*, 134 Nev. at 249, 416 P.3d at 231 (quoting *Wardleigh*, 111 Nev. at 351, 891 P.2d at 1184).

well settled that a “party cannot be expected to defend a privilege assertion by revealing the contents of what it hopes to keep secret.” *In re Zetia (Ezetimibe) Antitrust Litig*, No. MDL No. 2:18-md-2836, 2019 U.S. Dist. LEXIS 206524, at *51-52 (E.D. Va. July 16, 2019). Enabling Caesars to utilize the privileged communications that the district court improperly divulged to them places the Development Parties in an unfair position of deciding whether: (a) to refuse to address the privileged communications in an effort to maintain the privilege; or (b) to address the privileged communications and risk a waiver of the privilege. Rather than force the Development Parties into such an untenable position, this Court should bar Caesars from using the privileged communications in the Minute Order for any purpose whatsoever, including in responding to the Petition.

IV. CONCLUSION

The district court’s disclosure of privileged communications in the Minute Order, before the Development Parties could seek appellate review of the Supplemental Order, was improper. Accordingly, this Court should grant this Motion in its entirety and enter an order prohibiting Caesars from using the privileged communications in the Minute Order for any purpose.

DATED this 23rd day of November, 2021.

BAILEY ❖ KENNEDY

By: /s/ Dennis L. Kennedy
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY ❖ KENNEDY and that on the 23rd day of November, 2021, service of the foregoing was made by electronic service through the Nevada Supreme Court's electronic filing system, electronic service through the Eighth Judicial District Court's electronic filing system, hand delivery, and/or depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address(es):

JAMES J. PISANELLI
DEBRA L. SPINELLI
M. MAGALI MERCERA
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101

Email: JJP@pisanellibice.com
DLS@pisanellibice.com
MMM@pisanellibice.com
*Attorneys for Real Parties in Interest
Desert Palace, Inc.; Paris Las Vegas
Operating Company, LLC; PHWL, LLC;
and Boardwalk Regency Corporation*

HON. TIMOTHY C. WILLIAMS
DISTRICT JUDGE
EIGHTH JUDICIAL DISTRICT COURT
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

Email:
dept16lc@clarkcountycourts.us;
berkheimerl@clarkcountycourts.us

Respondent

/s/ Samantha Kishi
Employee of BAILEY ❖ KENNEDY