

## Bennett v. CIT Bank

2020

This dispute over insurance proceeds comes before the court on Plaintiffs Jeanette Bennett's and Maggie Bell's motion to compel Defendants CIT Bank, N.A. and CIT Group, Inc. to produce documents and the supplement to that motion. (Docs. 82 and 100).

CIT and the other Defendant in this case, Federal National Mortgage Association, shared with each other emails containing legal advice from their respective counsel. CIT withheld those emails from discovery on asserted grounds of attorney-client privilege. Plaintiffs move the court to compel CIT to produce the emails because, according to Plaintiffs, CIT and Fannie Mae waived the attorney-client privilege over the emails by sharing the emails with each other.

As explained below, the court will deny the motion to compel because an exception to the rule that a party waives the attorney-client privilege by disclosing privileged communications with a third party—Alabama's so-called “common interest doctrine”—applies to the facts of this case. Under the common interest doctrine, CIT and Fannie Mae did not waive the attorney-client privilege over the emails from their counsel by sharing the emails with each other because CIT and Fannie Mae shared a common legal interest in the matters discussed in those emails.

\* \* \*

The attorney-client privilege under Alabama law grants a client the right to “refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client ... between the client or a representative of the client and the client's attorney or a representative of the attorney ....” Ala. R. Evid. 502(b).

But the attorney-client privilege is subject to waiver. For example, and most relevant to this case, a client waives the attorney-client privilege if he “voluntarily discloses or consents to disclosure of any significant part of the privileged matter.” Ala. R. Evid. 510(a). Particularly, a client generally waives the attorney-client privilege if he shares confidential communications made between him and his attorney with non-client third parties. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Hatas, 287 Ala. 344, 252 So. 2d 7, 27 (1971).

The rule that a client may waive the attorney-client privilege by sharing otherwise privileged communications flows from the coexisting goals of discovery and the attorney-client privilege. . . . [T]he attorney-client privilege prevents discovery of confidential communications made between attorney and client to “encourage full and frank communication between attorneys and their clients.” Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

But, generally, if a client discloses communications made between him and his attorney, then those communications are no longer confidential. United States v. Suarez, 820 F.2d 1158, 1160 (11th Cir. 1987). Consequently, no rationale then exists to exclude the communications from discovery. *See id.* (“[A]t the point where attorney-client communications are no longer confidential, i.e., where there has been a disclosure of a privileged communication, there is no justification for retaining the privilege.”).  
9But Alabama law recognizes that the disclosure of confidential attorney-client communications to a third party in certain narrow circumstances does not always defeat the confidential nature of those statements and the communications remain privileged to fulfill the purpose of the attorney-client privilege. *See, e.g., Hatas*, 252 So. 2d at 28 (finding that privileged communications made between an attorney and his client in the presence of a \*1376 third party remain privileged when the third party is the same attorney's client or has a legal interest in the subject matter discussed). The common interest doctrine provides that if counsel communicates with his client in the presence of a third party who has “a sufficient common legal interest in the subject matter discussed,” then those communications remain confidential and thus privileged. Crenshaw v. Crenshaw, 646 So. 2d 661, 663 (Ala. 1994).

Of course, the attorney-client communications at issue in this case did not occur in the presence of a third party. Rather, counsel communicated with his client via email and then the client shared the email with a non-client third party. This case then raises the question of whether the breadth of the narrow circumstances of the common interest doctrine covers a client's sharing of his attorney's written communications with another person who has a strong common legal interest in the subject matter of the communications. For the following reasons, the court finds that it does.

Neither the Alabama Supreme Court nor the Eleventh Circuit has addressed whether the common interest doctrine applies to privileged communications made between an attorney and his client that the client then shares with a third party who has a common legal interest outside the presence of counsel. Instead, the Alabama Supreme Court has only discussed the common interest doctrine in cases where an attorney communicated with his client *in the presence* of third parties. *See Lynch*, 968 So. 2d at 16; Crenshaw, 646 So. 2d at 663; Hatas, 252 So. 2d at 28. For this reason, Plaintiffs assert that the common interest doctrine *only* applies to attorney-client communications made in the presence of a third party and thus does not protect the emails at issue in this case.

Although no Alabama Supreme Court case is directly on point, and the Alabama Supreme Court has so far only applied the common interest doctrine to facts different from the facts of this case, the Alabama Supreme Court has never held or suggested that the common interest doctrine *only* applies to communications made in the presence of a third person. And case law from the Alabama Supreme Court, the Seventh Circuit, and colleagues on this court provide convincing arguments that the common interest doctrine applies to privileged attorney-client communications that the client discloses to a third party who shares a sufficiently common legal interest.

The Alabama Supreme Court justified the existence of the common interest doctrine in Hatas. *See* 252 So. 2d at 27. In Hatas, a wrongful death case arising from a car accident, one of the three defendants in that case, Edward Partin, attended a conference with another person, Ms. Kelly, and Ms. Kelly's attorney. Mr. Partin was seeking legal advice from Ms. Kelly's attorney in connection with the car accident that formed the basis for the claims in Hatas. And the FBI had questioned Ms. Kelly about Mr. Partin's connection to the car accident. So, according to the Alabama Supreme Court, Mr. Partin and Ms. Kelly had a common legal interest in the matters discussed at the conference. *Id.* at 28. At trial in Hatas, an attorney asked Mr. Partin to testify about statements made at the conference. The trial court sustained an objection to the testimony and prevented Mr. Partin from testifying because the trial court found that the attorney-client privilege protected the statements from disclosure. Hatas, 252 So. 2d at 27. And the trial court ultimately entered judgment on the jury verdict in favor of the plaintiff. *Id.* at 11.

One of the other defendants in Hatas, the International Brotherhood of Teamsters, appealed. International asserted that the trial court erred in sustaining the objection to Mr. Partin's testimony because, according to International, Mr. Partin waived the attorney-client privilege over statements made at the conference by communicating in the presence of a third party, Ms. Kelly. The Alabama Supreme Court disagreed under the common interest doctrine. Hatas, 252 So. 2d at 28.

First, the Alabama Supreme Court noted that a client generally waives the attorney-client privilege over statements made between him and his attorney at a conference in the presence of a third person because “the presence of such third party defeats the confidential nature of the conference and thereby the privilege.” Hatas, 252 So. 2d at 27. But the Alabama Supreme Court found that this waiver rule and the rationale supporting it does not apply “when the third person is also a client as to the subject matter discussed in the conference [*o*]r *has a common interest in the matters discussed.*” Hatas, 252 So. 2d at 27 (emphasis added). So, because Mr. Partin and Ms. Kelly shared a common legal interest in the investigation into the car accident resulting in death, the Alabama Supreme Court found that “the matters discussed at that conference were ... confidential and accordingly constituted privileged communications as to strangers to the conference.” *Id.* at 28.

The court sees no rational reason to limit the common interest doctrine to only privileged communications made directly in the presence of a third party. If two parties share legal interests, then, according to the Alabama Supreme Court in Hatas, a communication that is privileged as to one party remains privileged when disclosed to the other party. Disclosing the privileged attorney-client communications outside the presence of counsel does not change the nature of the parties' shared interests. So the court finds that privileged attorney-client communications can remain privileged when the client shares those communications outside the presence of counsel with a third party who shares a common legal interest.

Here, CIT and Fannie Mae share a common legal interest in defending their legal rights to the insurance proceeds at issue in this case. CIT and Fannie Mae each solicited the legal advice contained in the two emails at issue only after Plaintiffs' counsel requested an accounting and informed them that she was seeking a balance from the foreclosure sale due to the estate. So, CIT and Fannie Mae shared the emails with each other only after they became united in their common goal to defend their asserted legal rights against Plaintiffs' claims. Thus, the common interest doctrine protects the emails from disclosure.