

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009167

05/15/2019

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

DESERT RIDGE COMMUNITY ASSOCIATION JEFFREY D GROSS

v.

B R E THUNDER DESERT RIDGE PROPERTY STEVEN MARTIN AARON
OWNER L L C, et al.

J GARY LINDER
MICHAEL J PLATI
JUDGE BRODMAN

RULING ON DISCOVERY DISPUTE

On May 15, 2019, the Court held oral argument on a discovery dispute. The Court reviewed the email submissions from the parties.

Defendant BRE subpoenaed the records of Butler Hansen, plaintiff DRCA's accountant. Butler Hansen has been DRCA's auditor since 2012. Butler Hansen refused to produce the records to BRE, but it did produce discs containing 134,000 records and provided the discs to DRCA's attorneys. Butler Hansen and DRCA contend that the documents are privileged.

A.R.S. § 32-749(A) provides an accountant's privilege to the accountant:

Certified public accountants practicing in this state shall not be required to divulge, nor shall they voluntarily divulge, client records or information they have received by reason of the confidential nature of their employment. Information derived from or as a result of a professional source shall be kept confidential as provided in this section, but this

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section does not modify, change or affect the criminal for bankruptcy laws of this state or the United States or limit the authority of this state or any agency of this state to subpoena and use the information in connection with any investigation, public hearing or other proceeding.

The documents in possession of the accountant are privileged. The Court was not persuaded that the privilege does not apply or that Butler Hansen is obligated to prepare a privilege log.

As an initial matter, the Court finds that the records sought from the accountant are not particularly relevant and are not proportional to the issues in this case. At issue is the interpretation of a contractual provision created and recorded more than 20 years ago. Butler Hansen didn't start working for DRCA until 2012, and Butler Hansen's interpretation of this provision in 2017 does not affect what the parties meant when they entered the contract decades ago. The thousands of pages of records relating to Butler Hansen's audit of DRCA have nothing to do with this issue. At most, communications between Butler Hansen and DRCA concerning Butler Hansen's flagging of the disputed contract provision could be relevant for the purpose of establishing DRCA's notice or DRCA's interpretation of the provision before litigation was filed. However, BRE's subpoena seeks much more than communications between DRCA and Butler Hansen concerning the disputed contract provision.

Moreover, recently amended Rule 45(E)(1)(A) provides that absent good cause, a subpoena may not seek production of materials that have already been produced in the action or that are available from parties to the action. Here, the Court finds no showing of good cause that the information sought from Butler Hansen could not be obtained from DRCA.

The Court rejects BRE's argument that Butler Hansen waived the accounting privilege by providing the documents to DRCA's attorneys. Providing documents to a client's counsel is not a waiver of privilege. And while members of the Association may have a right to inspect the Association's financial records, they do not have a right to the accountant's records. Butler Hansen represented the Association, not the individual members.

Finally, this matter is set for oral argument on competing dispositive motions on June 14, 2019. Requiring parties to review 134,000 documents for privilege while cross-dispositive motions are pending seems like an inefficient and potentially unnecessary endeavor.

In conclusion, the Court finds that BRE's subpoena is premature and disproportional to the issues in this case. For the reasons stated above the Court sustains Butler Hansen's objection to the subpoena.

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For future reference, the Court refers the parties to Rule 45(c)(5)(A) which provides that the party requesting a privilege log must generally pay the subpoenaed person's reasonable expenses in preparing the log. This Court has a practice of requiring parties seeking extensive documentation from third parties to do so on their own nickel. If a narrowed subpoena requesting documents subject to the accountant's privilege is still sought after the Court rules on the dispositive motions, the Court directs BRE to discuss with Butler Hansen's counsel the estimated costs of preparing a privilege log for any narrowed subpoena. Although BRE's attorney indicated that BRE would pay for the cost of preparing a privilege log, the Court's experience is that the cost of preparing such a log is occasionally significantly greater than the party agreeing to pay the cost believes is reasonable. The Court is much happier when the parties agree in advance for a range what the costs will be, instead of litigating the reasonableness of privilege log preparation costs.