

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

D&C Builders, Inc.)

Plaintiff)

2013 JUL 16 P 11:20)

CASE NO.
2013-CP-23-1833

v.)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Richard M. Buckley And Wells Fargo N.A.)

Defendant.)

Plaintiff's Attorney: Brian A. Martin, Bar No. 9791 Address: 212 Trade Street, Greer, SC 29651 phone: 864-879-7779 fax: 864-879-7171 e-mail: brian@martinlawsc.com other:	Defendant's Attorney: M. Stokely Holder, Bar No. 73892 Address: 704 E. McBee Avenue, Greenville, SC 29601 phone: 864-242-4899 fax: 864-242-4844 e-mail: holder@conlaw.com other:
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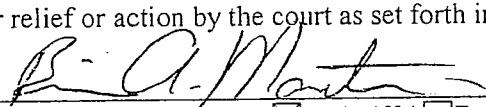
MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____
 Estimated Time Needed: _____ Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

July 16, 2013
 Date submitted

SECTION III: Motion Fee

PAID - AMOUNT: \$25.00
 EXEMPT: Rule to Show Cause in Child or Spousal Support
 (check reason) Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRPC)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.
 Other: _____

JUDGE: _____
 CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed: _____

Collected by: _____

MOTION FEE COLLECTED: _____
 CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
7th JUDICIAL CIRCUIT
C.A. NO.: 2013-CP-23-1833

D&C Builders, Inc.,)
)
Plaintiff,)

Vs.)

Richard M. Buckley and)
Wells Fargo National Association,)
)
Defendants.)

MOTION TO RECONSIDER,
CLARIFY AND AMEND ORDER
TO ISSUE INJUNCTION

Richard M. Buckley,)
)
Third-Party Plaintiff,)

Vs.)

Scott Dodenhoff,)
)
Third-Party Defendant.)

Now comes the Plaintiff, by and through its undersigned counsel, and would respectfully request and hereby moves that the Court reconsider, clarify and amend its ruling and Order issued on July 15, 2013 requiring Plaintiff to submit to this Court and to counsel for Defendant Buckley a detailed privilege log containing specific confidential information and knowledge Plaintiff contends that Defendant's existing counsel acquired through its prior representation of Plaintiff and that would be injurious to Plaintiff if used by the Defendant in the above referenced matter.

In support of this motion, Plaintiff would ask the Court to re-examine the record of the hearing held on July 8, 2013, the pleadings, affidavits submitted, the undersigned's letter to the

Court of July 11, 2013 attached hereto as Exhibit A, Defense Counsel's e-mail objection to such letter attached hereto as Exhibit B, and the undersigned's e-mail response to Defense Counsel's objection by e-mail response attached hereto as Exhibit C. This information, constituting all of the evidence and arguments offered to the Court in this matter, clearly shows that:

1. Defense Counsel asked the Court to require Plaintiff to justify its claim that Defense Counsel be disqualified from this matter pursuant to Rule 1.9 of the South Carolina Rules of Professional Conduct by disclosing exactly the specific confidential information Plaintiff contends Defense Counsel has which was obtained in its prior representation of Plaintiff and could be used against Plaintiff in this case.

2. Rule 1.9 of the South Carolina Rules of Professional Conduct does not require the disclosure of the specific confidential information but provides under Comment # 3 to such rule that the representation will be prohibited "if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance" the subsequent client's position.

3. Comment # 3 of Rule 1.9 of the South Carolina Rules of Professional Conduct also specifically states that "A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter."

4. The South Carolina Supreme Court applied the same standard in the controlling authority of *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996) when it held the standard under Rule 1.9 is "whether the affected lawyer would have or reasonably could have learned confidential information in the first representation that would be of significance in the second."

5. The Order of the Court as issued will require Plaintiff's Counsel to disclose confidential information not only obtained from Plaintiff by Defense Counsel through confidential attorney/client communications in the prior matter, but also confidential information obtained by the undersigned in confidential attorney/client communications between Plaintiff and its existing Counsel in the present matter.

6. The disclosure of such confidential information relayed in confidential attorney/client communications is exactly the information the Plaintiff seeks to prevent disclosure of and use by the Defendant's Counsel by its Motion to Disqualify Defendant's counsel in this matter.

7. In requiring Plaintiff's Counsel to disclose this confidential information to Defense Counsel, Plaintiff will be forced to refresh Defense Counsel's memory of confidential information obtained previously through confidential attorney/client communications but not currently recalled providing additional information for Defendant's Counsel to use to the advantage of Defendant and causing further harm to the Plaintiff.

8. In requiring Plaintiff's Counsel to disclose this confidential information to Defendant's Counsel, Plaintiff will be forced to disclose confidential information to Defense Counsel that may not have been previously disclosed to Defense Counsel in the prior representation again providing additional information for Defendant's Counsel to use to the advantage of Defendant and causing further harm to the Plaintiff.

9. The Plaintiff has not consented and does not consent to the disclosure of any confidential information relayed through confidential attorney/client communications it had with any of its attorneys.

10. The Order as issued will require the disclosure of confidential attorney/client communications between Plaintiff and Defense Counsel when they were representing Plaintiff in violation of Rule 1.6 of the Rules of Professional Conduct.

11. The Order as issued will require the disclosure of confidential attorney/client communications between Plaintiff and its existing Counsel in violation of Rule 1.6 of the Rules of Professional Conduct.

12. If the Court requires the disclosure of such confidential information obtained from confidential attorney/client communications, the Plaintiff will suffer irreparable harm because once that information is disclosed it cannot be undisclosed. Even under a protective order as issued by the Court, Defense Counsel will have such knowledge of the confidential information, some of which may not be remembered and some of which may not have been received, but all of which will provide information that will affect Defense Counsel's representation of the Defendant and the pursuit of this case on behalf of Defendant and to the disadvantage of the Plaintiff.


13. In the event the Court does not revise its Order, based on Rule 1.9 of the Rules of Professional Conduct, the Comments thereto and the Supreme Court's interpretation of this specific requirement of Rule 1.9 in *Townsend v. Townsend*, Plaintiff will likely succeed in challenging this requirement of this Order to provide such confidential information obtained through confidential attorney/client communications to Defense Counsel.

14. In the event the Court does not revise its Order and Plaintiff is required to disclose confidential information obtained through confidential attorney/client communications by this Order, there is no other remedy available to the Plaintiff other than an injunction against Defendant and Defense Counsel prohibiting them from accessing and reviewing such confidential information.

15. Plaintiff has objected to providing Defendant and Defense Counsel this confidential information at the hearing on July 8, 2013, in the letter to the Court of July 11, 2013 and in the e-mail response to Defendant's proposed Order of July 11, 2013 because of the potential irreparable harm to the Plaintiff, and has requested clarification and direction in avoiding disclosure of confidential attorney/client communications in violation of the Rules of Professional Conduct.

THEREFORE, based on the foregoing, the existing record in this matter including the pleadings, motions, affidavits, exhibits, arguments, the existing law of South Carolina, the Rules of Professional Conduct, and the preservation of the sanctity of confidential attorney/client communications, Plaintiff respectfully requests that the Court reconsider its ruling and Order of July 15, 2013, clarify the specific information that the Court desires to review from the Plaintiff including how Plaintiff is to address information obtained in verbal communications that constitute confidential attorney/client communications, and that the Court enjoin Defendant and Defendant's Counsel from reviewing or accessing such confidential information being provided for the Court's review pursuant to such Order. A proposed Order to this affect, absent the specific information the Court is requesting to view is attached for the Court's convenience.

Respectfully submitted this 16th day of July, 2013.


Brian A. Martin (SC Bar #: 9791)
Brian A. Martin, LLC
212 Trade Street
Greer, SC 29651
(864) 879-7779
Attorney for Plaintiff

Greenville, South Carolina
July 16th, 2013

BRIAN A. MARTIN_{LLC}

ATTORNEY AT LAW

LICENSED IN SC & NC

212 TRADE STREET
GREER, SOUTH CAROLINA 29651

T(864) 879-7779 • F(864) 879-7171
BRIAN@MARTINLAWSC.COM

July 11, 2013

VIA E-MAIL AND U.S. MAIL

The Honorable Edward W. Miller
Greenville County Courthouse
305 E. North St., Suite 219
Greenville, SC 29601

Re: *D & C Builders, Inc. v. Richard M. Buckley, et. al.*
Case #: 2013-CP-23-1833

Dear Judge Miller:

I appreciate your consideration and the opportunity to present arguments before you yesterday regarding Plaintiff's Motion to Disqualify Defendant's Attorney and Law Firm. I will also apologize in advance if my request for clarification in this letter is duplicative from your instructions at the hearing. But in trying to prepare the Privilege Log you requested at the hearing, if I understand your instructions correctly, I find myself in a significant ethical dilemma and believe that I do need a written Order instructing me in how to proceed.

To summarize what transpired at the hearing, Defendant's Motion to Dismiss was called and I requested the Court hear Plaintiff's Motion to Disqualify prior to the Motion to Dismiss such that the conflict of interest issue could be addressed prior to any further actions on the case by Mr. Holder and the current law firm. I was allowed to proceed and made the following argument that law firm be disqualified based on a material conflict of interest:

1. Plaintiff is a "Former Client" under Rule 1.9 of the Rules of Professional Conduct where law firm previously represented Plaintiff in another case involving the foreclosure of a mechanic's lien in Spartanburg County from July 1, 2011 to July 31, 2012.
2. Plaintiff performed the construction work for Defendant Buckley that is at issue in the present case while Plaintiff was being represented by law firm in the prior case.
3. Law firm is in violation of Rule 1.9(a) in that the interests of Plaintiff and Defendant are adverse, Plaintiff did not consent to law firm representing Defendant in the present case, and the two cases are substantially related.
4. The cases are substantially related within the definition of Rule 1.9 to justify such disqualification in that:

- a) Both cases involve the foreclosure of a mechanic's lien by Plaintiff over construction work performed by Plaintiff and involve the same asserted counterclaims against Plaintiff, including improper and defective construction, inaccurate billing, lack of supporting documentation, and negligence, as well as the same asserted defenses, including law firm asserting the same defenses on behalf of the Defendant in the Answer in the present case that it asserted on behalf of the Plaintiff in the Reply to Counterclaims in the prior case.
 - b) Pursuant to the definition of "substantially related" contained in Comment 3 to Rule 1.9, that due to these competing representations by law firm, there is a substantial risk that confidential factual information as would normally have been obtained from Plaintiff by law firm in the prior representation would materially advance Defendant's position in the present case.
 - c) Pursuant to the Supreme Court's definition of "substantially related" in the case of *Townsend v. Townsend*, 323 S.C. 309 (1996), in determining whether a matter is "substantially related", one should consider, among other things, whether the affected lawyer would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.
 - d) Pursuant to Comment 3 to Rule 1.9, in the case of an organizational client (of which Plaintiff is), general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such representation.
 - e) Pursuant to Comment 3 to Rule 1.9, a former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.
 - f) That the services provided to Plaintiff in the prior case are identical to the services being provided to Defendant in the present case because the claims, counterclaims and defenses are the same.
5. That Plaintiff has demonstrated through Affidavit that he provided law firm information during its representation of Plaintiff in the prior case, some of which was confidential, including, but not limited to confidential information about the corporate structure and operations of the Plaintiff, confidential financial information and impact of the outcome of prior case on other projects of Plaintiff, the authority and actions of representatives of Plaintiff.
 6. That law firm has already demonstrated either its intent to use, the substantial risk that it could use or at least the relevance and potential to use any such confidential information and/or other information (not necessarily confidential) obtained in its prior representation of Plaintiff to the disadvantage of Plaintiff in violation of Rule 1.9(c)(1) by making allegations in its Answer, Counterclaims and Third-Party Claims on behalf of Defendant in the present case that include:
 - a) Plaintiff did not have a functioning corporate structure and did not follow corporate formalities;

- b) Plaintiff was insolvent prior to and/or during construction of the project (while same law firm was attempting to recover \$75,000 for Plaintiff in prior case.);
 - c) Plaintiff was grossly undercapitalized prior to and during construction of project.
7. Based upon these circumstances, law firm has a material conflict of interest and should be disqualified from representing Defendant in the present matter.

Attorney for Defendant then presented the following information and arguments against disqualification:

- 1. Attorney for Plaintiff contacted Attorney for Defendant several weeks prior to the filing of Motion to Disqualify concerned about the potential conflict of interest.
- 2. Attorney for Defendant advised he did not believe there was a conflict of interest, that the two cases are not substantially related and that he is not aware of any confidential information obtained in the prior case that would be relevant or useful in the present case.
- 3. If Attorney for Plaintiff could identify specific confidential information obtained in the prior case that would be relevant in the present case, Attorney for Defendant would reconsider the issue.
- 4. Attorney for Plaintiff never provided any specific confidential information he contended was relevant but proceeded to file the Motion to Disqualify.
- 5. Attorney for Plaintiff has still not provided any specific confidential information he contends was obtained by law firm in the prior representation that would be relevant and useful in the present representation to warrant disqualification.
- 6. Defendant presented an Affidavit from Attorney John H. Heckman to the extent that Defendant was referred to law firm by Mr. Heckman and not through Defendant's prior knowledge of law firm's previous representation of Plaintiff.
- 7. Defendant presented Affidavits from Attorneys for Defendant, M. Stokely Holder, John T. Crawford and Townes B. Johnson wherein each states:
 - a) They were aware of law firm's prior representation of Plaintiff prior to undertaking representation of Defendant.
 - b) They did not believe that the two cases were related in any way.
 - c) They did not remember any confidential information disclosed to them during the prior representation of Plaintiff.
 - d) They did not recall Plaintiff sharing any information about the Defendant or the project for Defendant during the prior representation of Plaintiff.
 - e) In the prior representation, they did not obtain any information from Plaintiff regarding its financial status or the impact the outcome of the prior representation would have on that financial status.
 - f) Any information obtained in the prior representation was a matter of public record.
 - g) They do not believe the duties required in representing Defendant in the present case conflict with the duties required in representing Plaintiff in the prior case.
 - h) They do not believe forwarding the interests of the Defendant in this matter will improperly injuriously affect Plaintiff.
- 8. Defendant presented an Affidavit of Pamela Burns-Byers Buckley stating:
 - a) Defendant was referred to law firm by Attorney John H. Heckman.

- b) Defendant was not aware that law firm had previously represented Plaintiff until disclosed by law firm.
 - c) Law firm advised Defendant that it did not believe any conflict existed in representing Defendant.
 - d) Plaintiff had previously and voluntarily disclosed to Defendant information and details about the prior representation, including details of the case, the financial status of the company, and the impact the outcome would have on the financial status of the company.
 - e) Plaintiff had shared information with Defendant regarding the corporate structure, financial status, ongoing operations, authorized representatives and their authority.
 - f) Plaintiff had shared extensive details with Defendant regarding the company and its ongoing legal matters.
 - g) All claims filed on behalf of Defendant are based on knowledge gained solely through Defendant's personal dealings with Plaintiff and not through any information from law firm.
9. Defendant has filed an Amended Answer, Counterclaims and Third-Party Claim removing the Counterclaim against Plaintiff that contains the allegations that:
- a) Plaintiff did not have a functioning corporate structure and did not follow corporate formalities;
 - b) Plaintiff was insolvent prior to and/or during construction of the project (while same law firm was attempting to recover \$75,000 for Plaintiff in prior case.);
 - c) Plaintiff was grossly undercapitalized prior to and during construction of project.
10. Defendant offered the South Carolina Court of Appeals case of *Madison v. Graffix Faabrix, Inc.*, 304 S.C. 321 (S.C.App. 1991) wherein states:
- "an attorney is not prevented from representing a subsequent client against a former client where the duties required of him do not conflict with those required in the first employment. The test of whether the attorney's employment is inconsistent with his duty to the former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in which he formerly represented him, and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship."
11. The prior representation of Plaintiff involved a simple mechanic's lien foreclosure and was a setoff claim whereas the current case involves fraud by the Plaintiff such that the facts of the two cases are polar opposites.
12. The prior case was resolved amicably by the parties and dismissed with prejudice.
13. Law firm was not approached about current representation until a half year later after prior case was dismissed.
14. There was no confidential information given to law firm as alleged in Plaintiff's affidavit and any information given wasn't confidential as the same information was provided to Defendant pursuant to the conversations referenced in the Affidavit of Pamela Burns-Byers Buckley.
15. Based on the standard in *Madison*, that the two cases are not related, that law firm is not aware of any confidential information gained in the prior representation of Plaintiff

or related to the current case that will be compromised in the current representation of Defendant, and that Plaintiff has not provided any specific confidential information he contends was obtained in the prior representation that could be used to his disadvantage in the current matter, the Motion to Disqualify should be denied.

In rebuttal to these arguments, I presented the following:

1. Amendment of the Pleadings does not eliminate the risk of harm to the Plaintiff in law firm using information that fueled the allegations of inadequate corporate structure and insolvency to begin with to the disadvantage of the Plaintiff in the other claims or at some future point in the collection on a judgment should one be obtained.
2. Amendment of the Pleadings also does not address the prohibition of law firm's representation under Rule 1.9(a) if these cases are substantially related.
3. The Supreme Court's definition of "substantially related" in the *Townsend* case in 1996 provides more direction in this matter than the Court of Appeals decision in *Madison* in 1991 by defining "substantially related" to include situations where the attorney "would have or reasonably could have learned confidential information in the first representation that would be of significance in the second."
4. That in *Townsend*, the attorney also claimed no confidential information was used but the Court stated the lawyer should have recognized the risk that information gained in the first matter might prove relevant in the second.
5. To Defendants point that Plaintiff has not provided any confidential information that could be used, Comment 3 to Rule 1.9 specifically provides that "A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter."
6. The Comment also says that a conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.
7. That Plaintiff has ready and can submit to the Court copies of the Pleadings, Affidavits and communications from the prior case for the Court to compare with the present case in order for the Court to see that the nature of the services law firm provided to Plaintiff in the prior case are the same as they are proposing to provide to Defendant in the present case, that the claims, counterclaims and defenses are the same, that both cases involve allegations against plaintiff of poor quality construction, financial improprieties and negligence.

It was at this point that you requested what confidential information Plaintiff was contending the law firm obtained in the prior case that would be material in the present case or what information was Plaintiff contending law firm had that was confidential that could be used against it. When I indicated that I was not prepared to disclose such confidential information, you instructed me to prepare a Privilege Log with the information for you to review and to forward to the Defendants counsel and that we would resume the hearing after that information was reviewed. I will again apologize, for this is the point at which I became confused. In attempting to prepare what I believe you are requesting, it began to appear as if

in complying with your request, I would be violating my own ethical responsibilities to my client. So before I proceed further, I believe it prudent to request clarification by written order as to what you are requesting I provide.

My understanding of your instruction at the hearing is for me to prepare a Privilege Log that contains the specific information my client provided to law firm in the prior representation as confidential attorney/client privileged communications that Plaintiff now contends was confidential information that could be used against the Plaintiff in the current matter. I understand that law firm contends there are none and that if there were any then the Affidavit of Pamela Burns-Byers Buckley supports such information is no longer confidential, and perhaps your instruction to provide the Privilege Log to Defendant's counsel is so that they can confirm whether the claimed information is indeed confidential information they received. My concerns with this instruction are that it seems to require me and my client to 1) disclose confidential attorney/client communications both between Plaintiff and law firm and Plaintiff and me; and 2) to not only provide these confidential attorney/client communications for the Court to evaluate, but also to provide them to counsel for Defendants to review.

In thinking further about providing the information you requested, I am concerned that complying with this instruction (as I understand it) without a written order may subject me to claims of violating Rule 1.6 of the Rules of Professional Conduct in that I would be disclosing confidential attorney/client communications both between my client and the law firm of which I am currently not privy and also confidential attorney/client communications between my client and myself. I am also concerned that requiring such confidential attorney/client communications be provided to the Defense for their review would be prejudicial to the Plaintiff in the event, as indicated in the Affidavits, Attorneys do not recall some of the information at this time but would have their memories refreshed by that contained in the Privilege Log, or should a more specific Affidavit be required of Ms. Buckley the information to refresh her memory would be readily available to the detriment of the Plaintiff. Finally, in the event that the Motion to Disqualify is ultimately denied, having provided the Defendant with the confidential attorney/client communications Plaintiff contends justify disqualification would essentially provide the Defense additional information that could also be used against the Plaintiff in the present case.

In order to be sure I am providing the correct information that you were seeking in your instruction to prepare the Privilege Log, and particularly in light of my own ethical obligations if I am being requested to disclose confidential attorney/client communications, I would request that you issue a written Order specifically clarifying what information you are requesting I provide in the Privilege Log for your review. I would also request that I not be required to provide this information to the Defense but for your review only to protect from it being used by the Defense as indicated above.

For your convenience, I have attached a draft Order including as much information as I felt confident of with regard to your instructions. I am also glad to complete the Order for your review if you would provide me the instructional language as to what you are specifically requesting that I include in the privilege log and whether or not you are specifically requiring me to provide this information to the Defense for their review despite my objections.

I apologize for the length of this letter, but felt it important to be sure I was clear in my understanding of the arguments I presented, the arguments Defendant presented and your instructions as I understood them. I certainly do not intend to misstate or mischaracterize the Defendant's position on this matter and would encourage them to clarify any argument or position of theirs I have left out or misstated. My purpose is simply to obtain specific clarification as to the information you are requesting I provide in the Privilege Log for your review and have that in a written order for my own protection if it is requiring me to disclose confidential attorney/client communications.

Thank you for your time and consideration and I await your further instruction. Should you have any questions or need additional information, please feel free to give me a call at your leisure.

Sincerely,

A handwritten signature in black ink, appearing to read "B. A. Martin". The signature is fluid and cursive, with a horizontal line extending to the right.

Brian A. Martin

Enclosure

Cc: Scott Dodenhoff, D&C Builders, Inc.
H. Stewart James, Esq.
Thomas A. Shook, Esq.
M. Stokely Holder, Esq.

"EXHIBIT B"**Brian A. Martin**

From: Stokely Holder [holder@conlaw.com]
Sent: Thursday, July 11, 2013 11:58 AM
To: Brian A. Martin; emillerj@sccourts.org
Cc: 'Stewart James'; ashook@finkellaw.com
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley
Attachments: Proposed Order.doc

Dear Judge Miller,

In brief response, I'm not quite sure what purpose the lengthy "summary" provided by Mr. Martin serves. The court reporter's record of the hearing together with the documents of public record speak for themselves. I am unaware of any concern heretofore expressed by the Court as to what transpired at the hearing, the legal authority at issue, or the import of the Court's ruling. The majority of the lengthy letter provided by Mr. Martin appears to be an attempt to prolong the arguments already made to the Court and/or an attempt to move the court to reconsider an order that has yet to be signed or filed by the Court (on a motion that has not been ruled on).¹

In response to Mr. Martin's concerns regarding the publication of the privilege log, it bears noting that the Court ruled in fairly clear terms that the privilege log will be subject to a protective order. Based on the breadth of Mr. Martin's letter to the Court, together with the lack of support produced to date by the Plaintiff in support of its Motion, the undersigned finds it interesting that Mr. Martin omitted this portion of the court's ruling from his letter. And, from a practical standpoint, the undersigned finds it disconcerting that one of the concerns expressed by Mr. Martin regarding the production of the privilege log is that it not be provided to my office. In light of the motion being held in abeyance pending the court's review of the privilege log (under a protective order) and in light of Mr. Martin's position that this alleged confidential information is allegedly already in my office's possession, I cannot think of a valid reason for this qualification.

For the Court's reference, please find attached a complete draft of a proposed order which we feel accurately reflects the Court's ruling on this matter.

Should the Court have any questions or concerns, we will be glad to work with the Court and Mr. Martin to address same.

Respectfully,

Stokely Holder

¹ Based on the repeated representations of Plaintiff's counsel that the underlying case and the prior case are similar in virtually all respects, we simply direct the Court's attention to the documents of public record in each case, including the pleadings. The significant differences between the two cases are glaring.

7/16/2013

Brian A. Martin

From: Brian A. Martin [brian@martinlawsc.com]
Sent: Thursday, July 11, 2013 1:18 PM
To: 'Stokely Holder'; 'emillerj@sccourts.org'
Cc: 'Stewart James'; 'ashook@finkellaw.com'
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

With all due respect to Mr. Holder, I certainly agree that the record of the hearing, documents submitted and legal authority will speak for itself. My lengthy summary of BOTH arguments of Plaintiff and Defendant as well as my understanding of instruction by the Court was solely for the purpose of providing as full of an understanding of all circumstances to assist in clarifying your direction regarding the Privilege Log. If I incorrectly stated or mischaracterized Mr. Holder's arguments presented at the hearing in any way, I certainly would like for him to address those to be sure your instructions to me are clear. I am not trying to extend the arguments but am asking to be clear on what you are requesting I provide.

To that end, I do appreciate Mr. Holder pointing out that the Court's direction at the hearing that the Privilege Log would be subject to a protective Order was not included in the summary. It should have been and was not left out intentionally. By my letter, I am asking that you reconsider requiring the Privilege Log be provided to Mr. Holder even under a protective order for the reasons stated in my letter and the risk that in complying, I may end up inadvertently providing information to the Defendant that they do not already have or do not recall.

If it is your Order that such information be provided under a Protective Order, I would ask that such requirement be included in the Order issued and will be glad to provide a revised proposed Order containing such language.

Should the Court consider using Mr. Holder's submitted Order, I would object to the last sentence of the second paragraph beginning with "Through a referral from another law firm" be removed as this was an argument of Defendant that was not ruled on by the Court at the hearing and would seem to bear no relevance to the issue of what information should be included in the Privilege Log. I would also ask that you specifically address in the Order how information and knowledge not contained in any prepared documents or witnessed by anyone other than client and attorneys (ie. verbal communications) be addressed, including information provided during confidential attorney/client conversations. Mr. Stokely's proposed Order does not seem to address that situation and is a primary concern of mine in not violating my own ethical obligations to my client.

Again, I am not asking for anything further in this matter than written clear direction from the Court on the information to be provided in the Privilege Log, including what type and specific information the Court wants to see, how to address verbal information provided in confidential attorney/client communications and for the Court to reconsider requiring this information be provided to the attorneys for the Defendant for their review.

Please let me know if you need anything further. Sincerely, Brian A. Martin

Brian A. Martin, LLC
Attorney at Law
212 Trade Street
Greer, SC 29651
(864) 879-7779
(864) 879-7171 Fax
brian@martinlawsc.com

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7/16/2013

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
13th JUDICIAL CIRCUIT
C.A. NO.: 2013-CP-23-1833

D&C Builders, Inc.,)

Plaintiff,)

Vs.)

Richard M. Buckley and
Wells Fargo National Association,)

Defendants.)

ORDER

Richard M. Buckley,)

Third-Party Plaintiff,)

Vs.)

Scott Dodenhoff,)

Third-Party Defendant.)

Date of Hearing:

July 8, 2013

Judge:

Honorable Edward W. Miller

Attorney for D&C Builders, Inc.:

Brian A. Martin, Esq.

Attorney for Richard M. Buckley:

M. Stokely Holder, Esq.

An Order was previously issued and filed by the Court in this matter on July 15, 2013 requiring Plaintiff to prepare and submit a privilege log. That Order is hereby rescinded and replaced with the following Order:

The instant matter came before me on the 8th day of July, 2013 pursuant to the Motion filed by Plaintiff D&C Builders, Inc. ("Plaintiff") to disqualify M. Stokely Holder, Esquire, and the law

firm of Kenison, Dudley & Crawford, LLC (collectively, "KDC") from representing Defendant Richard M. Buckley.

Attorneys Townes B. Johnson, III, and John T. Crawford, Jr. of KDC represented Plaintiff D&C Builders, Inc. in a prior lawsuit that was filed in September, 2011 and dismissed with prejudice in July, 2012 (hereinafter, the "2011 Action"). Plaintiff D&C Builders, Inc., through separate counsel, initiated the underlying action against Defendant Buckley in February, 2013 (hereinafter, the "2013 Action").

It is the Plaintiff's contention that the present representation by KDC of Defendant Buckley in the current 2013 Action conflicts with KDC's prior representation of Plaintiff D&C Builders, Inc. in the 2011 Action. In particular, the Plaintiff claims that KDC's current employ is inconsistent with their duty to Plaintiff pursuant to their prior representation of Plaintiff in the 2011 Action. More specifically, the Plaintiff contends that KDC's representation of Defendant Buckley, in forwarding his interest in this 2013 Action is prohibited by Rule 1.9 of the Rules of Professional Conduct, will injuriously affect the Plaintiff because KDC will be called on in this 2013 Action to use against the Plaintiff knowledge and information, including confidential information acquired by KDC through confidential attorney/client communications with Plaintiff, in KDC's former representation of Plaintiff in the 2011 Action.

For the reasons that follow, the Plaintiff's Motion shall be held in abeyance.

The Plaintiff shall have until 5:00p.m. on July 26, 2013 to submit to this Court a privilege log containing the following specific information and knowledge for the Court's review that Plaintiff contends KDC acquired through its prior representation of Plaintiff and which could injuriously affect Plaintiff if used by KDC in this 2013 Action:

(1)

The Plaintiff shall not be required to provide a copy of its submission to counsel for Defendant Buckley. Defendant Buckley and KDC are hereby specifically restricted and enjoined from accessing and/or reviewing such information submitted to the Court pursuant to this Order until further Order of the Court.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Disqualify is hereby held in abeyance subject to the terms herein and submission of the information requested by the Plaintiff in accordance with the terms herein, and the Defendant and KDC are hereby specifically restricted and enjoined from accessing and/or reviewing such information submitted to the Court.

IT IS SO ORDERED!

Edward W. Miller
Judge, 13th Judicial Circuit

July __, 2013
Greenville, South Carolina