

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FEB - 5 2013

TIM RHODES
COURT CLERK

36 _____

Oklahoma Department of Securities,)
<i>ex rel.</i> Irving L. Faught, Administrator ,)
)
Plaintiff,)
)
v.)
)
)
2001 Trinity Fund, L.L.C. and)
Robert Arrowood,)
)
Defendants.)

Case No. CJ-2012-6164

**MOTION TO COMPEL OF DEFENDANT ROBERT ARROWOOD
AND BRIEF IN SUPPORT**

Defendant Robert Arrowood hereby moves this Court to compel Defendant Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator to produce certain documents withheld from discovery to Defendant Arrowood on the basis of privilege. In support of this Motion to Compel, Defendant Arrowood shows the Court as follows:

Introduction

On October 2, 2012, a local Oklahoma City television station ran a story about Defendant Robert Arrowood under the headline "Ponzi Scheme." The station reported that the Oklahoma Department of Securities ("ODS") had accused Mr. Arrowood and his company, Defendant 2001 Trinity Fund, L.L.C. (the "Fund"), of stealing millions of dollars from dozens of Oklahoma investors through the sale of oil and gas leases, and compared his activities to those of Bernie Madoff. ODS claimed in the report that Mr. Arrowood accepted money from the investors and then used it to fund his "lavish lifestyle." Irving L. Faught, the Administrator of ODS, personally appeared in the news report to condemn Mr. Arrowood. While the Petition filed by

ODS against Mr. Arrowood was pictured in the report, Mr. Arrowood was not served and was unaware of ODS's intention to do so until after the report aired.

Not surprisingly, this case has had a devastating impact on Defendant Arrowood and his reputation, both personally and professionally. As but one example, Mr. Arrowood has been unable to pursue certain planned oil and gas projects, because his suppliers now distrust him and are wary of continuing to do business with him. Mr. Arrowood vehemently denies ODS's allegations, and it is thus essential that Mr. Arrowood be able to fully and aggressively defend himself in this action and clear his name and that of his business.

To this end, counsel for Defendant Arrowood contacted counsel for ODS and requested to review the information used to compile the allegations in the Petition. While ODS initially assured Mr. Arrowood's counsel that the material would be forthcoming, recent discovery responses from ODS indicate that the agency intends to assert either the attorney work-product or the attorney-client privilege with regard to the most crucial documents. Defendant Arrowood contends that the requested documents do not fall within the scope of the privileges asserted by ODS in the first instance. In any event, even if the claimed privileges are otherwise applicable, Mr. Arrowood's need for the requested information far outweighs ODS's claim of privilege, such that access to the information should be granted by this Court.

Factual Background

1. On September 28, 2012, ODS filed its Petition for Permanent Injunction And/Or Other Equitable Relief against Defendants Robert Arrowood and 2001 Trinity Fund, L.L.C.
2. The Petition asserts causes of action against Mr. Arrowood and the Fund for the offering and selling of unregistered securities and failure to register as an agent for the sale of securities in violation of the Oklahoma Uniform Securities Act of 2004 (the "Act").

3. The Petition stated in part as follows:

Beginning in at least 2008, Arrowood, through the Fund, began to offer and sell securities in the form of promissory notes to investors for the stated purpose of financing the purchase of leases. Despite receiving little net revenue from the purchase and resale of leases during the relevant time period, Arrowood continued to accept money from investors and continued to spend investor money for cars, vacations, clothing, motorcycles, landscaping, jewelry, sporting event tickets, and other personal expenses.

[Petition at ¶ 4].

4. In support of the allegations in the Petition, ODS cited only to bank records of the Fund and other Arrowood companies. ODS attempts to link certain deposits and withdrawals or expenditures, without more, as proof positive of Mr. Arrowood's nefarious scheme. [Petition at ¶¶ 9-17].

5. As stated above, Mr. Arrowood vigorously denies the allegations made against him by ODS, and specifically denies that the promissory notes were securities, and thus under the jurisdiction of ODS.

6. In order to prepare his defense, counsel for Mr. Arrowood contacted ODS to request that he be allowed to review the information against his client. While ODS indicated he would be allowed to do so, no such review has yet been permitted.

7. As a result, on November 27, 2012, Defendant Arrowood served discovery requests on ODS, requesting the identities of all individuals providing information to ODS with regard to Mr. Arrowood or the allegations in the Petition, and all related documentation.

8. In response, ODS essentially produced only the documents, including bank records, which were provided to it by Mr. Arrowood in the first instance. ODS has resisted

production of other documents, including notes of witness interviews, on the basis of privilege and § 1-607 of the Act.

9. The undersigned represents to this Court that he has conferred with counsel for ODS in an attempt to resolve this dispute without judicial intervention, but has been unable to do so.

Argument and Authorities

The law is clear and long established that the party asserting a privilege has the burden of establishing its existence. *Miller v. Doctor's General Hospital*, 76 F.R.D. 136, 139 (W.D. Okla. 1977). As the court stated in *Miller*, a party's "bald assertion that production of the requested information would violate a privilege is not enough." *Id.* ODS has provided only such a bald assertion that the discovery requested by Defendant Arrowood is privileged, which should not be accepted by this Court, particularly given the nature of ODS's allegations against Mr. Arrowood. As stated above, ODS has accused Mr. Arrowood of defrauding the public in what has been characterized as a Ponzi scheme, comparing him with the likes of Bernie Madoff. Mr. Arrowood denies the allegations unequivocally and is entitled to a full and fair opportunity to defend himself and his business reputation. ODS's unilateral assertion of privilege should be rejected by this Court, and the material requested by Defendant Arrowood should be produced to him.

In any event, even if the requested information is deemed to be privileged, the law is also clear that the Court is allowed to weigh the application of the privilege against the genuine needs of the litigant seeking discovery. Accordingly, a litigant may gain access to otherwise privileged information upon showing (1) a substantial need for the materials in the preparation of the party's case; and (2) that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *State of Florida, ex rel. Butterworth v. Industrial*

Chemicals, Inc., 145 F.R.D. 585, 588 (N.D. Fla. 1991) (citing Fed.R.Civ.P. 26(b)(3)). *See also Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*, 258 F.R.D. 95, 106 (S.D.N.Y. 2009) (holding that “[i]n certain circumstances, a party’s assertion of factual claims can, out of considerations of fairness to the party’s adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted”).

In *Industrial Chemicals*, the court held that discovery depositions taken by the State of Florida during a two year investigation into alleged anti-trust violations were not protected by the attorney work-product privilege. In so holding, the court stated unequivocally that “the State seems to believe that it can conduct a broad-based, one-sided discovery, and then, after it has completely prepared for trial, hide the results from the defendant. This goes well beyond the protection of mental processes....” *Id.* (internal quotations omitted). The court also emphasized that application of this balancing “reposes a great deal of discretion in the trial judge, who, of course, acts as the fact finder in discovery disputes.” *Id.*

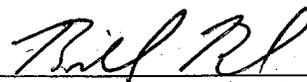
The need to balance the work-product privilege against the opposing party’s need for information was also addressed in *United States v. Davis*, 131 F.R.D. 391 (S.D.N.Y. 1990), a civil action against a government contractor for breach of contract and rescission. The court found that the contractor made the requisite showing of substantial need and lack of availability so as to override the government’s claim of work-product privilege with regard to transcripts of witness interviews, which had been taken as part of a concurrent criminal investigation. The court succinctly observed that, “had this been a criminal case, where the breadth of discovery is much more limited, General Dynamics undoubtedly would have been entitled to the interview transcripts in question. Thus, we see no reason why in this civil case against it General Dynamics should be entitled to any less discovery.” *Id.* at 395-396. *See also United States v.*

Gutpa, 848 F.Supp.2d 491 (S.D.N.Y. 2012) (holding that a prosecutor had a *Brady* obligation with regard to production of material prepared by the SEC in a corresponding civil proceeding, including notes taken by an SEC attorney during witness interviews).

The above rationale clearly applies to the facts of this case. There is no question that the requested materials would be required to be produced to Defendant Arrowood if this were a criminal as opposed to a civil proceeding, and thus he should be entitled to the all of the requested information in this civil action as well. ODS has leveled very serious accusations against Mr. Arrowood that have impacted every facet of his business and personal life. ODS should not now be able to hide behind an unsubstantiated claim of privilege to prevent Mr. Arrowood's access to the documents needed to prepare his defense in this action. Basic justice and fairness require no less.

In the alternative, Defendant Arrowood requests that this Court conduct an *in camera* review of the requested discovery to properly evaluate ODS's claim of privilege. *See United States v. Davis*, 131 F.R.D. 391, 396 (S.D.N.Y. 1990) (directing the government to submit, for *in camera* inspection, a complete transcript of the witness interviews and a proposed redacted transcript, redacting only the attorney's mental impressions, conclusions and legal theories).

Respectfully Submitted,

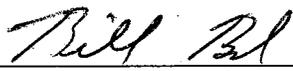


William H. Bock, OBA# 13888
Michelle L. Greene, OBA# 17507
WILLIAM H. BOCK, INC.
6492 N. Santa Fe Ave., Suite A
Oklahoma City, OK 73116
Telephone: (405) 848-5400
Facsimile: (405) 848-5479

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 8, 2013, a true and correct copy of the foregoing Motion to Compel of Defendant Robert Arrowood was mailed by first-class mail, postage prepaid, to:

Shaun Mullins
Gerri Kavanaugh
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, OK 73102



William H. Bock