

~~UNDER SEAL~~ Seal Removed per 7-19-17 order

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

U.S.A. FUNDRAISERS, LLC,)
)
Plaintiff,)
)
VS.)
)
GREAT AMERICAN)
OPPORTUNITIES, INC.,)
)
Defendant.)

NF
NO. 16-957-BC

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**MEMORANDUM AND ORDER: (1) DENYING PLAINTIFF'S MOTION
TO COMPEL UNDER THE CRIME-FRAUD EXCEPTION AND
(2) REVISING RULE 16 DEADLINES**

Plaintiff's Motion to Compel

On June 9, 2017, oral argument was conducted on Plaintiff's motion to compel production of inadvertently produced emails between the Defendant and Defendant's in-house Counsel. In support of production, the Plaintiff asserted the crime-fraud exception to the attorney-client privilege.

After considering the law, argument of Counsel and the record, it is ORDERED that the Plaintiff's motion to compel is denied. Although the Court concludes that it is likely the crime-fraud exception exists in Tennessee to be applied under the appropriate circumstances, the exception is not applicable on the facts of this case. From the authorities provided by

both sides, the Court concludes that the essential element of a showing of a serious crime or fraud has not been made. The analysis and authorities on which this decision is based are as follows.

The context for the Plaintiff's motion to compel is its theory of the case, quoted as follows:

In late June 2016, . . . GAO's CEO, Henry Bedford, stepped in and assumed the lead role in finalizing a Buyout Agreement that would allow GAO to buy its way out of its exclusive Tumbler Agreement with USA Fundraisers. At the time, the Tumbler Agreement required GAO to purchase Sports Licensed Drinkware Products (tumblers) exclusively from USA Fundraisers for two more years. . . . Mr. Bedford began to implement a secret plan to cut ties with USA Fundraisers in violation of the Tumbler Agreement.

Discovery has revealed that GAO's plan from the top executives down to the lower level project managers was to lead USA Fundraisers to believe things were "business per usual" while GOA instead implemented a strategy to sever the relationship. Throughout the month of July, Mr. Bedford repeatedly assured USA Fundraisers that the Buyout Agreement was "top of list" and that GAO "plan[ned] to come to an agreement" about the buyout. USA Fundraisers alerted Mr. Bedford on multiple occasions that it had already begun to make significant changes to its organizational structure in reliance upon GAO's assurances. Nevertheless, Mr. Bedford continued to assure USA Fundraisers that the parties were on track to finalize the Buyout Agreement.

During the weeks leading up to GAO's unilateral termination of the Tumbler Agreement, Mr. Bedford's fraudulent assurances to USA Fundraisers were well known within GAO. Mr. Bedford even forwarded his fraudulent communications with USA Fundraisers to his in-house counsel. During this time GAO's in-house counsel was busy drafting the documents to rescind the Tumbler Agreement and cut all ties with USA Fundraisers, thereby playing a central role in the ongoing fraud of leading USA Fundraisers to think things were "business per usual" when it was the opposite.

Mr. Bedford's July 26 and 27, 2016 emails with his in-house counsel regarding the cancellation notice fall squarely within the crime-fraud exception to the attorney-client privilege. Mr. Bedford continued to assure USA Fundraisers that GAO intended to reach an agreement while simultaneously working with his attorneys to draft the cancellation letter. Moreover, the attorneys were aware of Mr. Bedford's ongoing assurances. Because these communications played a central role in GAO's fraudulent scheme, USA Fundraisers requests this court to review the five cancellation notice emails *in camera* and compel GAO to produce them.

* * *

In the end, GAO never did alert USA Fundraisers of its true intentions to sever the relationship. As a result of Mr. Bedford's repeated assurances, Mr. Kitchens executed the sale of USA Fundraisers' Tumbler Division to an employee on June 29, just hours before he received GAO's surprise cancellation notice. Mr. Kitchens took this step in the good faith and justifiable belief that GAO intended to execute the Buyout Agreement, which did not include USA Fundraisers' Tumbler Division. If, at any point, Henry Bedford had been honest with Mr. Kitchens about GAO's reconsideration of the Buyout Agreement, Mr. Kitchens would not have sold his valuable Tumbler Division. Instead, GAO's fraudulent course of conduct throughout the month of July cause USA Fundraisers to suffer significant and irreversible harm.

Plaintiff's Motion to Compel Production of Documents Under Crime-Fraud Exception, May 26, 2017, at pp. 1-3, 6.

As identified by Counsel, there are not reported Tennessee cases in which a state court has addressed the applicability of the crime-fraud exception. *See Royal Surplus Lines Ins. Co. v. Sofamor Danek Grp., Inc.*, 190 F.R.D. 505, 509 (W.D. Tenn. 1999) (“[N]o reported decisions from Tennessee have squarely confronted the fraud portion of the exception, nor have the Tennessee courts addressed the evidentiary standard necessary to satisfy the exception in order to compel the production of documents.”).

Federal courts in Tennessee have suggested that, in their view of Tennessee law, the privilege may exist and would generally be consistent with federal common law. *Id.* While *Royal* purported to apply Tennessee law, it never reached a determination regarding the crime-fraud exception because it found the documents at issue were not privileged or related to the alleged fraud. *Id.*

The Court is persuaded by the authorities cited at pages 4-6 of the Plaintiff's *Reply* filed June 8, 2017, that Tennessee law would recognize and apply the crime-fraud exception under appropriate circumstances. The Court is persuaded of that by the many federal courts that have recognized and applied the exception as cited at pages 4-6 of the Plaintiff's *Reply*.

Nevertheless, the Court concludes that the facts of this case are insufficient to qualify for the exception. The case law cited by the Defendant establishes that there must be a serious crime or fraud to defeat the privilege. *Royal Surplus Lines*, 190 F.R.D. at 510 (quoting *In re Antitrust Litigation*, 805 F.3d 155, 164 (6th Cir. 1986)).

Detracting from the degree of culpability of the misleading alleged in this case is that the parties' negotiations and the timing of the communications in issue were pursuant to a Non-Disclosure Agreement ("NDA"). The terms of the NDA provide that the parties' discussions and communications are not binding and do not constitute a commitment to contract.

The Parties acknowledge and agree that their discussion and exchange of information under this Agreement shall not commit or bind the Parties to any present or future contractual relationship between them and that only a subsequent and mutually executed and delivered written definitive agreement

or any order of a Party acknowledged and accepted by the other Party, whichever applies, shall evidence any such commitment.

This provision of the NDA, the Court finds, detracts from the reliance element of the Plaintiff's assertion of fraud, and, therefore, the facts of this case do not qualify for application of the exception. For these reasons, the Court has denied Plaintiff's motion to compel.

It is further ORDERED that Defendant's motion for sanctions is denied. The motion sought to impose sanctions on Plaintiff's Counsel for filing the documents in issue for an *in camera* inspection before making a *prima facie* showing to the Court. Given the uncertainty under Tennessee law about the crime-fraud privilege, the Court denies awarding sanctions.

Modification of Rule 16 Order

In addition to oral argument on the motion to compel, a Rule 16 Conference was conducted. The following case management deadlines are ORDERED.

1. Having received no report by June 16, 2017, that the following deponents are not available the week of July 24, the depositions of (last names only are used) Bedford, Kitchen, Neth, Rigby and Betras are to be conducted that week. The deposition of Corley is to be completed by August 25, 2017. These depositions are to be completed prior to mediation.

2. Mediation is to be conducted prior to September 22, 2017.

3. If the case is not settled in mediation, a telephone conference shall be conducted on September 27, 2017 at noon to set a schedule for further discovery. Counsel for the Plaintiff shall file a notice with the Court prior to the September 27 telephone conference that the case has not settled if no such report has been filed by the mediator.

4. Paragraph 5 of the Rule 16 Order setting a deadline for summary judgments is vacated.

5. During the September 27, 2017 telephone conference, the Court shall determine deadlines for identification and production of expert witness opinions and reports.

Lastly, to assure that none of the proprietary matters filed by the parties under seal in this case appears in this *Memorandum and Order*, this ruling is temporarily placed under seal

It is further ORDERED that the this *Memorandum and Order* shall be unsealed on July 14, 2017, unless before that date a motion is filed identifying the portion(s) of the *Memorandum and Order* that should be redacted from the public record.



ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efile as applicable to:

Andrea Taylor McKellar

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