IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PATRICIA FOX, on behalf of herself and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	**Case No. 12 C 9350**
RIVERVIEW REALTY PARTNERS (f/k/a Prime Group Realty Trust); FIVE MILE CAPITAL PARTNERS LLC; RIVERVIEW REALTY, LLC; RIVERVIEW REALTY MERGER SUB, LLC; FIVE MILE CAPITAL II CHICAGO REIT PREFERRED INVESTOR SPE LLC; FIVE MILE CAPITAL II CHICAGO REIT EQUITY INVESTOR LLC; JEFFREY A. PATTERSON; JAMES G., GLASGOW, JR.; SCOTT R. LEITMAN; DAVID L. REYNOLDS; SHAWN R. TOMINUS; JOHN M. SABIN; GEORGE R. WHITTEMORE; JAMES F. HOFFMAN, PAUL G. DEL VECCHIO; STEVEN R. BARON, and VICTORIA A. CORY,	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION FOR DISQUALIFICATION

MATTHEW F. KENNELLY, District Judge:

Defendants have moved to disqualify the attorneys for Patricia Fox and to disqualify Fox herself as a representative of the putative class on the ground that counsel, and Fox, received documents protected by defendant Five Mile Capital Partners' attorney-client and work product privileges.

Fox filed this lawsuit on November 21, 2012. In her original complaint, Fox (on behalf of a putative class of minority shareholders of Prime Group Realty Trust) alleged

that PGRT, its directors, and Five Mile (PGRT's majority shareholder) and its affiliates breached fiduciary duties owed to plaintiffs as minority shareholders in connection with a proposed cash-out merger transaction between PGRT and Five Mile. Her claim regarding the merger was that it was unfair to the minority shareholders and that the defendants had failed to provide the minority shareholders necessary information to cast an informed vote. Fox's complaint included an allegation that the merger was part of a larger scheme involving PGRT and Five Mile. Specifically, Fox alleged the following:

> The proposed merger represents the final episode of a saga during which PGRT (and its Board) have maneuvered with Five Mile (and its affiliates) to undermine the rights of the Series B preferred shareholders. In this final episode, Defendants (defined below) seek to fully and finally take PGRT and its valuable assets from the Series B preferred shareholders, for inadequate consideration, and place it in the hands of Five Mile.

Compl. ¶ 3. Her legal claims, however, attacked only the proposed cash-out merger. *See id.* ¶¶ 80-84, 86-91, 94-96, 99-100, 104-06, 112 & 116-17.

Fox moved for a preliminary injunction barring the merger from proceeding. The Court held an evidentiary hearing and, on December 21, 2012, denied Fox's motion. *See Fox v. Prime Group Realty Trust*, No. 12 C 9350, 2012 WL 6680349 (N.D. Ill. Dec. 21, 2012).

Fox filed an amended complaint on January 29, 2013. The amended complaint included far more extensive allegations regarding the history of PGRT's dealings with Five Mile. Fox also broadened her legal claims to include allegations that the entirety of defendants' dealings that effectuated the change of control of PGRT constituted breaches of their fiduciary duties. *See, e.g.*, Am. Compl. ¶¶ 124-25.

The current dispute arises from documents provided to Fox's counsel by Samuel Orticelli, a former trustee of PGRT (the equivalent of a corporate director). In late June 2013, defendants served a document subpoena on Orticelli. On July 15, the day before the documents were to be produced, Clinton Krislov, one of Fox's attorneys, advised defendants' counsel that he was representing Orticelli in connection with the subpoena. Krislov advised defense counsel on July 25 that he was reviewing Orticelli's documents and would produce them shortly. On August 7, defendants subpoenaed Orticelli to appear for a deposition to take place on August 26. On August 20, Krislov advised defendants that Orticelli's documents might contain information subject to PGRT's privilege attorney-client privilege "as against Five Mile." Mot. for Disqualification, Ex. 3 at 2. Krislov stated that he had not "researched whether an acquired company's privilege continues after the acquisition as against the acquirer. And I presume that the privilege may then belong to the acquiring company." *Id.* Defense counsel replied that Orticelli had documents that were subject to PGRT's privilege and that he had no right to waive the company's privilege. Defense counsel also objected to Krislov's continued representation of Orticelli and reserved the right to seek counsel's disqualification. Krislov declined to withdraw from representing Orticelli, and production of the documents began shortly after that.

After reviewing Orticelli's documents, defense counsel wrote Krislov on August 23. *See id.*, Ex. 9. Defense counsel asserted that Orticelli had provided Krislov with documents protected by PGRT's attorney client privilege and had breached his ongoing duty as a former trustee to keep them confidential, and that Krislov and his co-counsel had improperly reviewed documents that were subject to an adverse party's privilege.

Defense counsel asserted that Krislov was required to withdraw not just as counsel for Orticelli but also as counsel for Fox and the putative class, and to turn over all copies of Orticelli's documents. *Id.* at 2. Krislov declined, and the present motion followed.

Defendants contend that Krislov and his co-counsel improperly obtained and reviewed documents subject to an adverse party's privileges. They ask the Court to disqualify all of plaintiffs' counsel from representing Fox and the putative class; disqualify Fox from serving as a class representative; order plaintiffs' counsel and Fox to locate and destroy or return all of defendants' privileged documents and information and certify their compliance; prohibit them from communicating with others, including other attorneys, about the contents of the documents and information; and prohibit Orticelli from doing so as well. In response, Fox and her counsel argue that the documents are not privileged; any privilege was waived; and disqualification is an inappropriate remedy in any event.

The case is in federal court pursuant to diversity jurisdiction. As a result, issues regarding evidentiary privileges are governed by state law. Although PGRT is a Maryland trust, its affairs were managed in Illinois during the relevant period, and both sides seem to agree that Illinois privilege law applies (though they cite cases from other jurisdictions). As in any diversity case, the Court's obligation is to predict how the Illinois Supreme Court would decide the relevant questions. *See, e.g., ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Protection Dist.*, 672 F.3d 492, 498 (7th Cir. 2012). Absent guiding decisions by that court, this Court consults and follows the decisions of intermediate appellate courts unless there is a convincing reason to predict the state's

highest court would disagree. *Id.* (citing and quoting *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940)).

1. Plaintiff argues that disclosure of the materials to Orticelli waived any privilege protection. Plaintiff's theory is that because, as a trustee, Orticelli was representing the class B shareholders, he was in an adverse position to that of other board members. As a result, plaintiff contends, PGRT and its counsel waived any privileges by disclosing the materials to him. The Court disagrees. As a trustee, Orticelli owed his loyalty to PGRT. Plaintiff's contention finds no persuasive support in the law.

2. Plaintiff argues that the "fiduciary" exception to the attorney-client privilege applies and that as a result, the documents in question are not protected by the attorney-client privilege vis-à-vis the shareholders. There is no Illinois Supreme Court decision addressing the applicability of this exception. A handful of Illinois Appellate Court decisions state that the exception has not been recognized in Illinois and then explain why, if recognized, it would not apply in the particular situation. *See, e.g., MDA City Apartments LLC v. DLA Piper LLP*, 2012 IL App (1st) 111047, ¶¶ 16-19, 967 N.E.2d 424, 429-30 (2012); *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶¶ 35-36, 966 N.E.2d 523, 536-37 (2012), *Mueller Indus., Inc. v. Berkman*, 299 Ill. App. 3d 456, 468-69, 927 N.E.2d 794, 806-07 (2010). None of these decisions is good authority for failing to apply the exception, because none of them deals with the question of whether the exception *should* apply as a matter of Illinois law.

The Court believes that if faced with the issue, the Illinois Supreme Court would adopt the exception. "Under [the fiduciary] exception, which courts have applied in the

context of common-law trusts, a trustee who obtains legal advice related to the execution of fiduciary obligations is precluded from asserting the attorney-client privilege against beneficiaries of the trust." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2319 (2011). The exception was first developed in English trust law in the 19th century, and it has become firmly established in U.S. law as well. *See id.* at 2321-22. *See also, e.g., Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 787 (7th Cir. 2005) (adopting the exception in the ERISA fiduciary duty context; "[T]he attorney-client privilege should not be used as a shield to prevent disclosure of information relevant to an alleged breach of fiduciary duty."). Given its general acceptance, there is every reason to that the Illinois Supreme Court would adopt it, and no good reason to believe otherwise. Doing so would be consistent with that court's general view that the privilege is to be "strictly confined within its narrowest possible limits," because it is "inherently inconsistent with the search for the truth because it prevents otherwise relevant and admissible evidence from being disclosed." *People v. Radojcic*, 2013 IL 114197, ¶ 42, ___ N.E. 2d ___ (Nov. 21, 2013).

3. The Court also believes that if faced with the issue, the Illinois Supreme Court would extend the fiduciary exception, with limitations, to the shareholder-corporation context, consistent with the Fifth Circuit's decision in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). *See also In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 294 (7th Cir. 2002) (citing Garner with approval for the proposition that "a corporate attorney has no right or obligation to keep otherwise confidential information from shareholders"). The authority for applying the exception outside the context of a shareholder derivative suit is mixed, but *Garner* itself included both direct

and derivative claims. It is logical to apply the exception in the present situation, in which minority shareholders are suing a trust for alleged oppression and an effective freeze-out.

4. The fiduciary exception does not lead to automatic disclosure of attorney-client privileged materials. "[T]here is a tension between the need of shareholders to ensure that the corporation is not being run inimically to their interests and the need of corporate managers to run the corporation without constant supervision-by-litigation." *Mueller Indus., Inc.*, 299 Ill. App. 3d at 469, 927 N.E.2d at 809. The party seeking disclosure must make a showing of good cause. This requires consideration of a number of factors, described in *Garner* as follows:

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Garner, 430 F.2d at 1104.

These factors counsel in favor of application of the exception here. The putative class represents all of the (former) public shareholders of PGRT; their claims involve oppression at the hands of the trust and its trustees; they have asserted colorable claims, which have survived a motion to dismiss; the communications in question do not involve advice regarding the legal

consequences of past actions but rather what actions (potentially impacting the shareholders) the trust should take; they do not involve advice regarding the present litigation; and there is no apparent issue of trade secrets or information subject to confidentiality for reasons separate from the privilege.

For these reasons, the Court concludes that the attorney-client privilege does not protect Orticelli's documents from disclosure to Fox or her attorneys.

5. Some of the documents that Orticelli provided to Krislov are also subject to a claim of work product protection. Defendants argue that the *Garner* exception does not apply to the work product doctrine. The Court agrees; Fox has offered no persuasive authority to the contrary.

6. Fox also argues, however, that not all of the documents as to which defendants have advanced a work product claim are actually protected by that doctrine. The Illinois work product doctrine protects material prepared by or for a party in preparation for litigation. *See* Ill. Sup. Ct. R. 201(b)(2). It protects against disclosure of the theories, mental impressions, or litigation plans of a party's attorney, *see Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 108, 432 N.E.2d 250, 252 (1982), and it is "designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts." *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 196, 579 N.E.2d 322, 329 (1991).

Defendants' privilege log states that work product protection is claimed as to documents 1, 3, 4, 8, 10, 13, 14, 15, 16, and 21. Several of these—documents 4, 8, 14, 15, and 16—include discussion of a proposed settlement in

a lawsuit referred to as the Rameson case, and two of them—documents 1 and 14—contain discussion of the status of the Rameson case. The work product doctrine applies to these six documents.

Document 21 is the minutes of a board meeting. It includes discussion of negotiations between PGRT and Five Mile. There is no indication that litigation was pending or contemplated. There is a passing reference to the fact that an attorney updated the board on the fact that the plaintiff in a case called Konstand had appealed the dismissal of that case, but the minutes provide no information about what the lawyer said. Defendants have failed to show that the work product doctrine applies to this document.

Documents 3 and 10 discuss a proposal to issue to the preferred shareholders (which included Fox) one common share for each share of preferred stock. Document 3 is outside counsel's opinion regarding this proposal, addressed to PGRT's general counsel, and document 10 is the general counsel's memorandum to the members of the board of trustees that generally tracks the opinion letter from outside counsel. Nothing about these documents suggests that they were prepared in connection with pending or contemplated litigation. Document 10 includes a reference to the Rameson litigation, but only to state that the recipients of the memorandum should not disclose it to Rameson because management was attempting to conclude a confidentiality agreement with him. Defendants have failed to show that the work product doctrine applies to these documents.

7. The Court has concluded that of the documents Orticelli provided to Fox's attorneys, none are protected vis-à-vis Fox by the attorney-client privilege, and only six are protected by the work product doctrine. The Court's order will direct Fox's counsel to locate and turn over to defense counsel, within three days, all copies of these documents and will prohibit them from communicating with anyone regarding these documents' contents.

Defendants have not identified, however, any substantial relationship between these documents and the present lawsuit. The six documents all concern the Rameson litigation. Most of them concern a proposed settlement in that case, and two of them involve discussions of the status of the Rameson case. All of them appear to be rather innocuous, at least on their face. The Court is unable to see how they might bear on any issue in the present case. In fact, when asked at oral argument to identify how they were prejudiced by plaintiff's counsel's review of the documents, defendants focused on documents 3 and 10—which the Court has held are not protected by privilege—not on documents 1, 4, 8, 14, 15, or 16.

The Court has admonished attorney Krislov regarding the manner in which he handled these documents. Even though the Court has ruled that an exception to the attorney-client privilege applies and that defendant has failed to establish the applicability of the work product doctrine as to some of the documents, it was apparent on the face of the documents that they were authored by or involved discussions with counsel, and they were labeled as work product or privileged. A prudent lawyer in Krislov's situation would have sought instructions immediately upon receiving the documents—or would have declined the representation of Orticelli to begin with, given

the risk involved. Krislov, however, acted imprudently. By doing so, he prolonged the litigation unnecessarily. Krislov and the other attorneys for Fox would be well advised to decline further representation of Orticelli.

The Court does not believe, however, that disqualification of plaintiff's attorneys is warranted. Disqualification would be an unduly drastic remedy on the present record. *See Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982) (disqualification "is a drastic measure which courts should hesitate to impose except when absolutely necessary"). The Court is unpersuaded that counsel's possession and review of a small number of work product-protected materials that have no apparent bearing on the present dispute warrant depriving Fox of the counsel of her choice. If, for example, Krislov had received plainly privileged documents regarding a personal injury dispute involving PGRT and had mishandled them, no viable argument could be made that his disqualification in an unrelated dispute was required. The present situation is not all that different.

8. Finally, there is no basis on the present record for disqualification of Fox as a putative class representative. The Court is unwilling to assume, without evidence, that Fox reviewed the small number of work product-protected documents at issue. And even if she had, this would no more be a basis to disqualify her than it would be to disqualify Krislov and the other attorneys for Fox.

Conclusion

For the reasons stated above, the Court denies defendants' motion for disqualification of plaintiff's counsel and plaintiff [# 109]. The Court directs plaintiff's counsel to locate and turn over to defense counsel, within three days, all copies of

documents 1, 4, 8, 14, 15, and 16 identified in defendants' privilege log and prohibits plaintiff's counsel from communicating with anyone regarding these documents' contents. The case is set for a status hearing on December 18, 2013 at 9:30 a.m. for the purpose of resetting the class certification briefing schedule and any other pertinent schedules and deadlines.

MATTHEW F. KENNELLY
United States District Judge

Date: December 10, 2013