

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: 8:19-00383 PSG (ADSx) Date: December 12, 2019

Title: Joseph Cook, et al. v. Fullerton Supportive Housing, L.P., et al.

Present: The Honorable Autumn D. Spaeth, United States Magistrate Judge

Kristee Hopkins
Deputy Clerk

None Reported
Court Reporter / Recorder

Attorney(s) Present for Plaintiff(s):
None Present

Attorney(s) Present for Defendant(s):
None Present

Proceedings: (IN CHAMBERS) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’ MOTION TO COMPEL DEFENDANTS TO PROVIDE SUPPLEMENTAL RESPONSES FOR DEPOSITIONS

I. INTRODUCTION

On September 27, 2019, Plaintiffs Joseph Cook and Lirvaneethza Cook (“Plaintiffs”) filed a Motion to Compel Defendants to Provide Supplemental Responses for the Depositions of Melissa Bayles and Jessica Gutierrez (“Motion to Compel”). [Dkt. No. 23]. Plaintiffs assert that counsel for defendant The John Stewart Company (“Defendant”) improperly raised objections based on the attorney-client privilege during the depositions of Melissa Bayles and Jessica Gutierrez, two resident managers for Defendant, a property manager. [Id.]. Thus, Plaintiffs move to compel Defendants to provide supplemental responses to five deposition questions to Ms. Bayles and four deposition questions to Ms. Gutierrez. [Id.]. In response, Defendants argue that the information sought in the deposition questions would be protected by attorney-client privilege and Defendant’s counsel’s objections were proper. [Id., pp. 7–8].

On December 11, 2019, the Court held a hearing on Plaintiffs’ Motion to Compel, and all parties appeared through counsel. [Dkt. No. 39]. Having considered the Motion to Compel, the related filings by the parties, and the arguments of counsel during the

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hearing, the Court grants the Motion to Compel, in part, and denies the Motion to Compel, in part, as explained in more detail below.

II. STANDARD OF REVIEW

The Motion to Compel concerns whether Defendant’s counsel’s attorney-client privilege objections during the depositions of Ms. Bayles and Ms. Gutierrez were proper. Under the attorney-client privilege, confidential communications made between a client and an attorney to obtain legal services are protected from discovery. Fisher v. United States, 425 U.S. 391, 403 (1976) (citations omitted). “A party asserting the attorney-client privilege has the burden of establishing the existence of an attorney-client relationship *and* the privileged nature of the communication.” United States v. Graf, 610 F.3d 1148, 1156 (9th Cir 2010) (quotations and internal alterations omitted). “Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed.” Id.

The attorney-client privilege may cover communications between counsel and “lower-level employees”. Upjohn Co. v. United States, 449 U.S. 383, 391 (1981). At the same time, attorney-client privilege “extends only to *communications* and not to facts.” Id. at 395–96 (1981) (citation omitted); see also id. (“The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.”); Lopes v. Vieira, 688 F. Supp. 2d 1050, 1059 (E.D. Cal. 2010) (“Opposing parties may question corporate employees and officers to ascertain facts relevant to the pending litigation even if the particular fact was disclosed to counsel in a communication protected by the attorney-client privilege.” (citing Upjohn, 449 U.S.)).

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Deposition questions that seek to understand generally why witnesses or Defendant took a certain course of action may call for communications protected under the attorney-client privilege when the action was based on the advice of counsel. In deposition question 1 to Ms. Bayles, Plaintiffs' counsel essentially asks, "Why didn't Defendant the John Stewart Company ever send a 60-day notice to Ms. Gurrola?" See [*Id.*, p. 9]. This may have been at the direction of Defendant's legal counsel and, as such, the attorney-client privilege may apply. In fact, Defendant's present counsel asserted the privilege. In addition, deposition question 3 to Ms. Bayles, comprised of three sub-questions, asks generally, "Why didn't you ever send any written communication to Ms. Gurrola . . . ?" These questions may call for disclosure of communications with legal counsel. Again, Defendant's counsel asserted the privilege. Because questions 1 and 3 do not exclude the possibility of requiring the disclosure Defendant's confidential communications with legal counsel, this Court cannot say that it was improper for Defendant's counsel to assert the attorney-client privilege. Traditionally, deposing counsel will ask follow-up questions to determine an individual witness' personal knowledge and to determine whether the witness can give non-privileged testimony in response to the initial question. To some degree, that is what happened here.

B. Deposition Questions 2, 4, and 5 to Ms. Bayles and Deposition Questions 1, 3, and 4 to Ms. Gutierrez

Questions that ask about witness' independent reasons for taking a certain course of action inquire about facts, not communications. Deposition questions that seek disclosure of relevant facts are not protected by the attorney-client privilege. See Upjohn, 449 U.S. at 395–96. Deposition questions 2, 4, and 5 to Ms. Bayles and

¹ All references to specific deposition questions utilize the question numbering in the Motion to Compel. All citations to electronically-filed documents refer to the CM/ECF pagination.

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deposition questions 1, 3, and 4 to Ms. Gutierrez refer to their independent actions. See, e.g., [Dkt. No. 23, pp. 14–15, Deposition Question 2 to Ms. Bayles (“At any time did you ever make an independent decision that you needed to terminate Ms. Gurrola’s tenancy . . . ?”); Id., p. 20, Deposition Question 3 to Ms. Gutierrez (“At any time did you independently consider issuing a 60-day notice to Ms. Gurrola . . . ?”)]. Such questions ask about Ms. Bayles’ and Ms. Gutierrez’s individual actions or reasons for taking a certain course of action, independent of advice of legal counsel. Plaintiffs’ counsel may well have asked, “At any time did you ever make an independent decision, *independent of advice of legal counsel*, to issue a notice?” The phrasing of the deposition questions necessarily excludes attorney advice on their decisions and, as such, there is no possibility that the witness’ answers would disclose confidential attorney communications. Further, follow-up questions that ask, “why” or “why not”, flow from the initial act asked about, such as in deposition question 1 to Ms. Gutierrez. (“[D]id you ever independently issue a three-day notice to perform or quit . . . ? Why not?”) [Id., p. 20]. In other words, the follow-up question asks, “Why didn’t you independently decide to issue a three-day notice to perform or quit?” It still asks about the witness’ independent decisions for acting or not. Thus, deposition questions 2, 4, and 5 to Ms. Bayles and deposition questions 1, 3, and 4 to Ms. Gutierrez seek disclosure of the relevant facts that are not protected under the attorney-client privilege. Moreover, they seek the non-privileged information sought by deposition question 1 and 3 to Ms. Bayles.

C. Deposition Question 2 to Ms. Gutierrez

At the hearing on the Motion to Compel, Plaintiffs’ counsel admitted that deposition question 2 to Ms. Gutierrez was asked and answered during the deposition twice. Plaintiffs’ counsel agreed that a supplemental response to this question is not required.

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IV. CONCLUSION

Therefore, the Motion to Compel is GRANTED as to deposition questions 2, 4, and 5 to Ms. Bayles and deposition questions 1, 3, and 4 to Ms. Gutierrez, and DENIED as to deposition questions 1 and 3 to Ms. Bayles and deposition question 2 to Ms. Gutierrez.

IT IS SO ORDERED.

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