

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ELVIS PRESLEY ENTERPRISES, INC.,)	
EPPF, LLC and GUESTHOUSE AT)	
GRACELAND, LLC,)	
)	
Plaintiffs,)	
)	No. 2:18-cv-02718-SHM-dkv
v.)	
)	
)	
CITY OF MEMPHIS, TENNESSEE,)	
)	
Defendant.)	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS'
MOTION TO COMPEL THE CITY TO PRODUCE DOCUMENTS IMPROPERLY
WITHELD BASED ON "JOINT DEFENSE AGREEMENT" PRIVILEGE
and
ORDER DENYING MOTION FOR EVIDENTIARY HEARING

Before the court is the motion, filed on January 31, 2020, by the plaintiffs, Elvis Presley Enterprises, Inc., EPPF, LLC, and Guesthouse at Graceland, LLC (collectively "EPE"), to compel the defendant, City of Memphis, Tennessee (the "City"), to produce documents withheld on the basis of a "joint defense agreement" privilege. (Pls.' Mot. to Compel, ECF No. 136.) The City filed a response in opposition on February 14, 2020. (Def.'s Resp., ECF No. 175.) EPE filed a reply to the City's response on February 21, 2020. (Pls.' Reply, ECF No. 188.) In its reply, EPE requested that the court hold an evidentiary hearing to determine whether the City has wrongfully withheld documents. (*Id.* at 5.) EPE also

filed a separate motion for an evidentiary hearing. (ECF No. 189.) The motion to compel has been referred to the United States Magistrate Judge for determination. (Order of Reference, ECF No. 154.)

A hearing was held on March 2, 2020. Clarence Wilbon and Ben Fox, attorneys for EPE, and Jonathan Lakey and Carl Jacobson, attorneys for the City were present. Robert Spence and Jerrick Murrell, attorneys for nonparty Economic Growth Engine Industrial Development Board ("EDGE"), were also present. At the hearing, the City was ordered to file a revised privilege log by March 10, 2020. On March 10, 2020, the City filed a revised privilege log setting forth the documents the City contends are protected by the joint defense agreement privilege. (Notice of Filing Revised Privilege Log, ECF No. 216.)

For the reasons that follow, EPE's motion to compel is granted in part and denied in part. EPE's motion for evidentiary hearing is denied.

I. BACKGROUND

EPE served the City with its first set of requests for production of documents ("RFPs") in July 2019. (Pls.' Mot. to Compel 1, ECF No. 136.) The City timely served its responses to EPE's first set of RFPs in September 2019. (*Id.*) EPE argues that the City improperly withheld responsive documents by claiming the documents were subject to the "joint defense agreement" privilege.

(*Id.* at 2.) EPE contends that the City has not met its burden of establishing the validity of the alleged joint defense agreement. (*Id.*) Alternatively, assuming a valid agreement exists, EPE argues that the City improperly withheld documents dated prior to the commencement of the joint defense agreement. (*Id.*) In response, the City argues that it properly withheld documents pursuant to a valid oral joint defense agreement pursuant to their common interest of defending EPE's state court lawsuits and correctly provided a privilege log to EPE identifying the documents withheld. (Def.'s Resp. 4, ECF No. 175.)

In 2017 and 2018, EPE filed three lawsuits in Shelby County Chancery Court seeking a declaratory judgment that public funding of EPE's arena project would not violate an existing contract (the "Arena Use Agreement")¹ between the City, Shelby County ("the County"), and Memphis Basketball, LLC (the owner of the Memphis Grizzlies). (*Id.* at 2.) EPE filed the first lawsuit on November 15, 2017 against the City, Shelby County, and Memphis Basketball, LLC. (*Id.*) The first lawsuit was ultimately dismissed. (*Id.*) The second lawsuit was likewise dismissed. EPE filed the third lawsuit in June 2018 against the same three defendants named in

¹ (See Arena Use Agreement, ECF No. 1-3.)

the first lawsuit. (*Id.*) Counsel for EPE conceded at the hearing that the third lawsuit remains ongoing.²

The City claims that on November 16, 2017 – the day after EPE filed the first state court lawsuit – counsel for the City, the County, and Memphis Basketball, LLC “began communicating and collaborating on how to respond to EPE.” (Def.’s Resp. 3, ECF No. 175.) According to the City, the attorneys for the three state court defendants “did not expressly declare they were entering into a ‘joint defense agreement’ until early December 2017.” (*Id.* at 4.) The City concedes that there is no writing evidencing the alleged agreement.

As proof that an oral agreement exists, the City provided declarations from counsel for each of the three state court defendants. (See Decl. of John M. Jones, Ex. A, ECF No. 175-1; Decl. of David Wade, Ex. B, ECF No. 175-2; Decl. of Jonathan P. Lakey, Ex. C, ECF No. 175-3.) John M. Jones is the Chief Litigation Attorney / Deputy County Attorney for the County and represented the County in EPE’s Shelby County Chancery Court lawsuits. (Decl. of John M. Jones ¶ 2, Ex. A, ECF No. 175-1.) David Wade represented Memphis Basketball, LLC in EPE’s Shelby County Chancery Court

² The third lawsuit was dismissed by the Shelby County Chancery Court. The Tennessee Court of Appeals upheld the dismissal. The time for appealing the Tennessee Court of Appeals’ ruling on EPE’s motion for reconsideration has not expired.

lawsuits. (Decl. of David Wade ¶ 2, Ex. B, ECF No. 175-2.) Jonathan P. Lakey represented the City in EPE's Shelby County Chancery Court lawsuits. (Decl. of Jonathan P. Lakey ¶ 2, Ex. C, ECF No. 175-3.)

EPE's motion to compel raises the following issues: (i) whether, in December 2017, the City entered into a valid oral agreement with the County and Memphis Basketball, LLC regarding privileged communications arising out of EPE's Shelby County Chancery Court lawsuits; and (ii) if so, whether the City improperly withheld documents dated prior to the commencement of the oral agreement – that is, whether the agreement applies retroactively.

II. DISCUSSION

Under federal common law, the attorney-client privilege is normally waived by the disclosure of privileged information to a third party. *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999). One exception to this rule is the "joint defense doctrine," which "allows communications between one client (e.g., a defendant) and his attorney to be shared with a co-defendant without waiving the privilege where both are represented by the same attorney." *Polylok, Inc. v. Bear Onsite, LLC*, 2017 WL 1102698, at *7 (W.D. Ky. Mar. 23, 2017). A second exception is the "common interest" doctrine, which applies "where the parties are represented by separate attorneys but share a common legal

interest." *Id.*; see also *Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir. 1998) (recognizing the common-interest doctrine "which expands the coverage of the attorney-client privilege where two or more clients with a common interest in a matter are represented by separate lawyers and agree to exchange information concerning the matter"). Lower courts within the Sixth Circuit have characterized the two exceptions as distinct. See, e.g., *Polylok, Inc. v. Bear Onsite, LLC*, 2017 WL 1102698, at *6 (W.D. Ky. Mar. 23, 2017); *Ford Motor Co. v. Michigan Consol. Gas Co.*, 2013 WL 5435184, at *5 (E.D. Mich. Sept. 27, 2013); *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 347-48 (N.D. Ohio 1999). Because the City was not represented by the same attorneys as the County or Memphis Basketball, LLC, the court will construe the oral joint defense agreement under the common-interest doctrine.

Under the common interest doctrine, "privileged communication can be exchanged without waiving the privilege, provided that the parties have an identical legal interest with respect to the subject matter of the communication." *Ford Motor Co. v. Michigan Consol. Gas Co.*, 2013 WL 5435184, at *5 (E.D. Mich. Sept. 27, 2013) (citations and internal quotations omitted). "[L]itigation need not be actual or imminent for communications to be within the common interest doctrine." *Id.* (citing *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 n.6 (7th Cir. 2007)). "But like the joint-defense doctrine, for the common-interest doctrine to

apply, the underlying shared communication must be privileged.”
Id. (citing Restatement (Third) of the Law Governing Lawyers § 76)).

A. Whether an Oral Agreement Regarding Privileged Communications Exists

The district court for the Southern District of Ohio aptly summarized limitations on the common-interest doctrine and this court concurs.

First, the doctrine applies only when all attorneys and clients have agreed to take a joint approach in the matter at issue. *Id.* It is not necessary that parties express this agreement in writing; so long as the parties clearly and specifically agree to the joint venture in some manner, the doctrine will apply. *Id.* Communications made before an agreement to proceed jointly are not privileged. *Id.* (citing *United States v. Melvin*, 650 F.2d 641 (5th Cir. 1981)(communications made to a co-defendant to enlist his participation in a common defense not privileged because the co-defendant had not yet agreed to participate jointly)). Second, the doctrine applies only to protect communications regarding the common interest and intended to further that interest. Federal Rules of Evidence Manual 501.02(5)(e)(ii). Extraneous communications that do not further the common goal are not privileged. *Id.* Third, communications made between parties themselves, when no attorneys are present, may not be privileged, as some courts find that these communications are not likely tied to the parties' common legal interest. *Id.* (citing *United States v. Gotti*, 771 F.Supp. 535, 545 (E.D.N.Y. 1991)(finding that extending the doctrine to such communications is “neither supported in law nor in logic”)).

Cooley v. Strickland, 269 F.R.D. 643, 652-53 (S.D. Ohio 2010)

Based on the declarations provided by the City, the court is satisfied that in early December 2017, the City, the County, and

Memphis Basketball, LLC and their attorneys all entered into an oral agreement regarding privileged communications related to the defense of EPE's Shelby County Chancery Court lawsuits. (See Decl. of John Jones ¶ 6, Ex. A, ECF No. 175-1; Decl. of David Wade ¶ 9, Ex. B, ECF No. 175-2; Decl. of Jonathan P. Lakey ¶ 5, Ex. C, ECF No. 175-3.) The court is also satisfied that all three state court defendants had an identical "common interest" in the subject matter of EPE's Shelby County Chancery Court lawsuits. *Polylok*, 2017 WL 1102698, at *7. All three state court defendants are parties to the Arena Use Agreement. (See Arena Use Agreement, ECF No. 1-3.) EPE's November 15, 2017 lawsuit sought a declaratory judgment that public funding of EPE's arena project would not violate the Arena Use Agreement.

The only issue remaining is whether the oral agreement applies retroactively to communications made before December 2017.

B. Whether the Oral Agreement Regarding Privileged Communications Applies Retroactively

Based on the declarations provided by the City, the court is not satisfied that the oral agreement regarding privileged communications applies retroactively to privileged communications made before December 2017. In his declaration, Mr. Jones stated that the three state court defendants "entered into an oral joint defense agreement" in early December 2017. (Decl. of John Jones ¶ 6, Ex. A, ECF No. 175-1.) Mr. Jones did not state that the

agreement was intended to apply retroactively. (See *id.*) Similarly, Mr. Lakey's declaration mentions nothing about the oral agreement applying retroactively. (See Decl. of Jonathan P. Lakey ¶ 5, Ex. C, ECF No. 175-3.) Mr. Wade's declaration stated that he "believe[d] [the oral agreement] was effective retroactively commencing with the first meeting on November 16, 2017." (Decl. of David Wade ¶ 9, Ex. B, ECF No. 175-2.) This, alone, is not enough to establish that the oral agreement applies retroactively to communications made before December 2017. Thus, the documents withheld by the City on the basis of the oral "joint defense agreement" which were created prior to December 1, 2017 are not protected communications.

III. CONCLUSION

For the foregoing reasons, EPE's motion to compel is granted in part and denied in part. The City is ordered to produce all documents, created before December 1, 2017, it previously withheld on the basis of the "joint defense agreement" privilege. After review of the City's Revised Privilege Log, (ECF No. 216), the court is satisfied that all other communications listed on the City's revised privilege log are privileged attorney-client communications protected by the common-interest doctrine. The court finds that an evidentiary hearing is unnecessary. EPE's motion for evidentiary hearing is denied.

IT IS SO ORDERED this 12th day of March, 2020.

s/Diane K. Vescovo

DIANE K. VESCOVO

CHIEF UNITED STATES MAGISTRATE JUDGE