

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In Re:

CASEY MARIE ANTHONY,

Debtor.

Case No. 8:13-bk-00922-KRM
Chapter 7

ROY KRONK,

Plaintiff,

Adversary Proceeding

Case No. 8:13-ap-00629-KRM

v.

CASEY MARIE ANTHONY,

Defendant.

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEBTOR/DEFENDANT'S MOTION
TO STRIKE TESTIMONY OF DOMINIC CASEY AT SEPTEMBER 18, 2014
DEPOSITION (DOC. NO. 44) AND DEBTOR/DEFENDANT'S MOTION FOR
PROTECTIVE ORDER AS TO DISCOVERY RELATED TO DOMINIC CASEY,
DEBTOR/DEFENDANT'S PRIVATE INVESTIGATOR (DOC. NO. 43)**

Plaintiff Roy Kronk ("Plaintiff"), by and through his undersigned counsel, hereby files this Response in Opposition to Debtor/Defendant Casey Marie Anthony's ("Defendant") Motion to Strike Testimony of Dominic Casey at September 18, 2014 Deposition (Doc. No. 44) and Defendant's Motion for Protective Order as to Discovery Related to Dominic Casey, Defendant's Private Investigator (Doc. No. 43) (the "Motions"), and respectfully submits as follows:

BACKGROUND

The Bankruptcy Case and Adversary

1. On January 25, 2013, the Defendant filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code.

2. On July 22, 2013, Plaintiff filed his Complaint against the Defendant pursuant to 11 U.S.C. § 523(a)(6), initiating the above captioned Adversary Proceeding (Doc. No. 1). Plaintiff filed an Amended Complaint on November 26, 2013 (Doc. No. 21) (the "Complaint").

3. Defendant was the mother of Caylee Marie Anthony. Defendant was charged with her daughter's murder, was tried, and was acquitted of that charge. *State v. Anthony*, Orange County, Florida, Case No. 2008-CF-015606-A-O (the "Criminal Proceeding").

4. The gist of the Complaint is that Defendant, through her agents, intentionally defamed Plaintiff by, among other things, accusing Plaintiff of murdering her child, and that such actions were calculated, willful, and malicious.

5. Before and during the Criminal Proceeding, Dominic Casey was a private investigator through his own company, D&A Investigations, Inc. ("D&A"). His involvement in the Criminal Proceeding is described on his company website:

D&A Investigations, Inc. was retained by the law firm representing Casey Anthony in July 2008 to investigate the circumstances surrounding Caylee's disappearance. Shortly thereafter, Casey Anthony also retained D&A Investigations, Inc. to provide the same services and entered into a separate Letter of Engagement, as did George and Cindy Anthony.

D&A actively investigated this case beginning in July 2008, throughout Casey Anthony's death penalty trial in 2011 and beyond. Our investigation is complete. D&A independently funded this investigation to determine the 'actual' circumstances surrounding the murder of Caylee Marie Anthony. Neither D&A or its owner, Dominic Casey have ever received any payment whatsoever for our investigation, from any entity.

<http://www.dgator.com/Pages/CayleeMarieAnthony.aspx>. A copy of the webpage is attached hereto as **Exhibit A**.

6. As Dominic Casey was directly in contact with Defendant at the times that Plaintiff accuses Defendant of defaming him, Dominic Casey has significant, relevant evidence regarding the intentions of Defendant and whether her conduct was "willful and malicious."

The 2014 Dominic Casey Deposition by Plaintiff

7. In order to determine whether Dominic Casey has relevant evidence, on September 18, 2014, Plaintiff deposed Dominic Casey in this adversary proceeding (the "2014 Deposition").

8. Defendant was given notice by Plaintiff prior to the 2014 Deposition and Defendant did not file a motion for protective order or take any action to otherwise prevent the 2014 Deposition.

9. Dominic Casey appeared at the 2014 Deposition, with his own counsel, and counsel for the Defendant also attended.

10. During the 2014 Deposition, Dominic Casey confirmed exactly what Plaintiff has been alleging all along, *i.e.*, that Defendant and her agents actively worked to blame others for the death of Defendant's daughter, and that the strategy "was all about framing people."

11. Plaintiff will bring copies of the 2014 Deposition transcript to the hearing but has not filed copies on the public record, at this time, at the request of Defendant's counsel. Plaintiff reserves all rights to file and cite to the transcript in later pleadings.

12. At this point, Defendant's counsel raised a privilege objection, claiming that some or all of Dominic Casey's testimony was privileged, pursuant to both the work product doctrine and the investigator's privilege under § 493.6119(1), *Florida Statutes*.

13. In response, Dominic Casey stated that the privilege has been explicitly waived by Defendant.

14. Plaintiff has been able to confirm that Defendant did in fact waive "any and all privileges" on the record during the Criminal Proceeding as a "strategic decision" made by the Defendant. At a deposition of Dominic Casey by the State of Florida on March 28, 2011 ("2011 Deposition") Jose Baez, criminal counsel for Defendant, together with Deborah Ferwerda, counsel for Dominic Casey, stated as follows:

MR. BAEZ: Back on the record. The defense is going to make a strategic decision to waive any and all privileges as it pertains to Mr. Dominic Casey.

MS. FERWERDA: That means you can speak freely --

MR. BAEZ: Speak freely.

MS. FERWERDA: -- about everything that happened during representation.

Dominic Casey Deposition in the Criminal Proceeding, 16:23-25; 17:1-6, March 28, 2011). A true and correct copy of the 2011 Deposition is attached hereto as **Exhibit B**.

15. In fact as further evidence of waiver, Dominic Casey has written and published a book entitled "Privilege Waived," which book is available for sale on Amazon.com.

MEMORANDUM OF LAW

I. The Investigator's Privilege Does Not Apply

The first and simplest issue is that the investigator's privilege does not protect or prohibit testimony by Dominic Casey that would be relevant to this action. Section 493.6119, *Florida Statutes*, states as follows:

- (1) Except as otherwise provided by this chapter **or other law**, no licensee, or any employee of a licensee or licensed agency shall

divulge or release to anyone other than her or his client or employer **the contents of an investigative file** acquired in the course of licensed investigative activity.

(emphasis added).

This statute has been held to be inapplicable in federal court when the rule of decision is based on federal law. *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 981 F. Supp. 2d 1207 (N.D. Fla. 2013). In *Ubiquiti Networks*, a party attempt to block access to a private investigator's file in discovery. *Id.* at 1208. The court refused to apply the privilege. *Id.* The court noted that privileges in federal court are governed by Rule 501, *F.R.C.P.*, and that there is no federal common law rule otherwise providing for such a privilege. *Id.* at 1208-09. The court stated as follows:

The common law has never recognized a private investigator's privilege. Nor should it. Parties to a lawsuit should be able to obtain and present all relevant, admissible evidence—from any source—except when there are good grounds to the contrary.

Id. at 1209.

Moreover, the court noted that the statute included an exception: "the privilege does not apply when 'other law' so provides. . . . 'Other law' includes Federal Rule of Evidence 501 and the other federal provisions requiring compliance with a valid federal subpoena." *Id.*

This action is governed by federal law rule of decision, *i.e.*, dischargeability pursuant to 11 U.S.C. § 523. Therefore, the investigators privilege does not apply.

Additionally, the privilege, by its own terms, only protects "the contents of an investigative file." What Dominic Casey testified to during the 2014 Deposition is that he witnessed Defendant and her agent's strategy of framing others for the death of her daughter. This testimony is not related to the contents of his investigative file which he may have compiled

during his investigation. It is, instead, his testimony regarding the intent -- the willful and malicious intent -- of Defendant and her agents to defame others.

II. Any Other Privileges, Including Work Product, Have Been Explicitly Waived

During the Criminal Proceeding, Defendant waived "any and all privileges" which may have prohibited testimony by Dominic Casey. Section 90.507, *Florida Statutes*, states as follows:

A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication.

Federal law is consistent. "Once the attorney-client privilege has been waived, the privilege is generally lost for all purposes and in all forums." *Genentech, Inc. v. U.S. Intern. Trade Com'n*, 122 F.3d 1409, 1416-17 (Fed. Cir. 1997). In *Genentech*, the Federal Circuit stated as follows:

When the attorney-client privilege has been waived, whatever the subject matter of the waiver, the privilege is gone. The client, therefore, may no longer use the privilege to prevent access to the communications in question **by either the party who successfully challenged the privilege claim or by anyone else in the present or future litigation**. Having had the opportunity to assert and address the privilege claim in a judicial proceeding, the privilege holder is thereafter barred, under the doctrine of res judicata and collateral estoppel, from relitigating the resolved claim.

Id. (quoting Rice, *Attorney-Client Privilege* § 9:85, at 9-295) (emphasis added).

There is no doubt that whatever privilege may have formerly prohibited testimony by Dominic Casey regarding his investigation, if any, was waived by the Defendant during the 2011 Deposition. The waiver was comprehensive, unlimited, and referred to all matters of Dominic Casey's representation. The waiver was clearly made as a "strategic decision," and such a

decision fully and final waives the privilege. *See Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994) *opinion modified on reh'g*, 30 F.3d 1347 (11th Cir. 1994) (quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir.1982)) ("Selective disclosure for tactical purposes waives the privilege.").

III. The Work Product Doctrine Does Not Apply to Mr. Casey's Testimony

Dominic Casey's testimony that Defendant and her agents actively sought to frame others, including Plaintiff, for the death of her daughter is not protected "work product." Rule 26(b)(3), *F.R.C.P.*, provides as follows:

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Rule 26, by its own terms, applies only to "documents and tangible things." "[F]ederal law governs application of the work-product protection, even in diversity cases." *Stern v. O'Quinn*, 253 F.R.D. 663, 674 (S.D. Fla. 2008). "The burden to demonstrate the applicability of the work-product doctrine falls on the shoulders of the party claiming the protection." *Id.*

Dominic Casey's testimony regarding the conspiracy he witnessed to defame Plaintiff and others is not a document prepared in anticipation of litigation and is not otherwise going to intrude upon the Defendant's attorneys' opinions, impressions, or trial preparation. It is testimony regarding a fact which he noticed during his representation, the fact that Defendant

and her agents planned from the beginning to falsely accuse others, including Plaintiff, for the death of Caylee Marie Anthony. No stretching of the work product doctrine, no matter how creative, will make such testimony prohibited.

Furthermore, as the court found in *Stern v. O'Quinn*, 253 F.R.D. 663, 674 (S.D. Fla. 2008), an investigator's file is not protected by the work product doctrine when it is relied upon by a party in defending itself. Defendant made the strategic decision to waive any and all privileges regarding all aspects of Dominic Casey's representation because that action favored the Defendant in the Criminal Proceeding. Defendant cannot resurrect that protection now that it is not favorable. *See id.* at 677. ("Implicit in the holding of this case is the idea that it is simply not fair to allow a party to wield the work-product protection as a sword to cut out the heart of an opposing party's case while simultaneously brandishing it as a shield from disclosure of any Achilles heels.").

CONCLUSION

Neither the investigator's privilege nor the work product doctrine operates to bar the testimony of Dominic Casey regarding the intentional plan of Defendant to accuse others for the death of her daughter. The investigator's privilege only applies to the contents of an investigative file and does not apply in federal court. The work product doctrine protects an attorney's impressions and opinions, not evidence of a concerted effort to unjustly blame Plaintiff for a murder he did not commit. Defendant seeks to prevent Plaintiff from gathering evidence from a person who had direct interaction with her and her agents and who can testify to the crucial issue of Defendant's intent, evidence which Defendant refuses to provide to Plaintiff herself as she has repeatedly taken the 5th Amendment privilege to justify her refusal to discuss these issues.

WHEREFORE, Plaintiff respectfully requests that (1) Defendant's Motion for Protective Order as to Discovery Related to Dominic Casey and Defendant's Motion to Strike Testimony of Dominic Casey at September 18, 2014 Deposition be denied, (2) an Order be entered authorizing Plaintiff to continue his deposition of Dominic Casey, and (3) for such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

/s/ Michael A. Nardella

Howard S. Marks, Esquire

Florida Bar No. 0750085

Michael A. Nardella, Esquire

Florida Bar No. 51265

Burr & Forman, LLP

200 South Orange Avenue, Suite 800

Orlando, Florida 32801

Phone: (407) 540-6600

Fax: (407) 540-6601

E-mail: hmarks@burr.com

mnardella@burr.com

ATTORNEYS FOR ROY KRONK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 12, 2015, a true and correct copy of the foregoing Motion was electronically filed with the Court using the CM/ECF system which will send an electronic service copy to: David L. Schrader, Esq., Counsel for Defendant, at dschraderlaw@gmail.com, dschraderlaw.assistant@gmail.com; and J. Cheney Mason, Esq., Special Counsel for Defendant, at chenmas4@aol.com.

/s/ Michael A. Nardella

Michael A. Nardella