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IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

EIGIGU HOLDINGS CORPORATION, Plaintiff -v- LEANDER LEANDER and LIJUN LEANDER, Defendants	Civil Action No. 2014-067 **RESPONSE TO DEFENDANTS LEANDERS' OPPOSITION TO PLAINTIFF'S MOTION TO DISQUALIFY MASEK**

ADDITIONAL BACKGOUND

It appears that a bit more historical background is required in order to clarify the issues raised by Masek in opposing the Plaintiff's Motion to disqualify him. (*See* Defendants Leanders' Opposition [to] Plaintiff's Motion to Disqualify Defense Counsel ["Defs.' Opp'n], filed Dec. 8, 2014.)

Initially, when Eigigu Holdings Corporation ("EHC") first began trying to sort out the mess it found itself in with regard to the subject property and leases, it sought from Tsitsi, who had been overseeing all lease-related matters without accountability, only receipts of payments that he had allegedly made to the traditional landowners. (See Adeang Affidavit ¶ 3, in the attached Affidavit by EHC Director Vyko Adeang, hereinafter "Adeang Aff.") Tsitsi repeatedly told EHC

that he did not have any receipts. (Adeang Aff. ¶ 4.) Shortly after Tsitsi's services were terminated (Am. Mem. Ex. B [13 July 2012 Ltr. from Michael Aroi to Rubin Tsitsi], Nov. 18, 2014), Tsitsi then offered to provide copies of payments, stating:

> I am prepared to work with you and provide whatever assistance or input during this interim period with copies of payments made from 15th July 2004 onwards to counter strauss [sic] ridiculous claims.

(Am. Mem. Ex. D [2 Aug. 2012 Ltr. from Rubin Tsitsi to David Aingimea].)

When EHC again asked for the receipts, Tsitsi verbally withdrew his statement and told EHC he had already given over everything. (Adeang Aff. ¶ 5.) Thereafter, Chairman Aingimea and a couple of EHC's Directors went to the bank, with Tsitsi, to inquire about the payment accounts. (Adeang Aff. ¶ 6.) They were informed by the bank that the accounts had been closed by Tsitsi quite some time before that and that there was no EHC money in the bank. (Adeang Aff. ¶ 7.) Tsitsi, moreover, refused to allow EHC to inspect his "office," which was in his residence at the back of the hotel, on the premises. (Adeang Aff. ¶ 8 .)

EHC's primary concern, at that point, was simply to remove Tsitsi from the premises and from any further influence over the tenants, in the hope that it would then be able to straighten out, and regain control over, its business. (Adeang Aff. ¶ 9.) When it finally inspected the residence after Tsitsi left, EHC found that Tsitsi had left absolutely no records of any kind behind—nothing. (Adeang Aff. ¶ 10.) While there are theoretically other possibilities, the most likely scenarios are that Tsitsi gave everything he had to Masek, arranged with Masek for all records to be deposited with someone else, or destroyed all records at some point before vacating. (Adeang Aff. ¶ 11.) Masek is the one person most likely

to have information on exactly what happened or did not happen. It is critical, therefore, that EHC be able to question Masek under oath.

I. THE FAILURE-TO-SEEK-DISCOVERY ARGUMENT

That said, the documents EHC is now trying to get are not the receipts showing payments to the traditional landowners—that matter has now been settled—but, rather, all the subleases and agreements between Tsitsi and the Leanders, as well as the sub-sublease documents between the Leanders and their tenants that may have been signed or otherwise approved by Tsitsi. The Defendants argue that EHC has all the subleases. (Defs.' Opp'n 2, 6.) It first quotes language from a letter from EHC stating: "We now have copies of all the [sub] leases allegedly made on behalf of EHC with tenants at the Eastern Gateway." (Defs.' Opp'n 2 n.1 (quoting Defs.' Opp'n Ex. A [11 May 2012 Ltr. from David Aingimea to Rubin Tsitsi].) The Defendants misconstrue the statement. What that language actually refers to is subleases made on behalf of EHC—that would have included the sublease to the Leanders. EHC was not stating that it had copies of the leases between the sublessees and their lessees, the sub-sublessees. Moreover, contrary to the Defendants' assertion that the documents now sought are all in the public record, including the leases between the Leanders and the sub- sublessees (Defs.' Opp'n 4), they are not. (Adeang Aff. ¶ 12.) Because Tsitsi failed and refused to provide any records at all, EHC was forced to go to the Land Registration Authority ("LRA") to attempt to get copies of the leases there. (Adeang Aff. ¶ 13.) In fact, there were only two minor sub-subleases on file with the LRA—the majority of the sub-subleases between the Leanders and their tenants

were not available there. (Adeang Aff. ¶ 14.) Importantly, the documents and/or related information now sought were not essential in the earlier cases, as the Leanders, through Masek, clearly acknowledge, stating numerous times that the earlier cases in which Masek served as opposing counsel did not involve the lease agreements that are the subject of the current litigation. (Defs.' Opp'n 3 ("The cases wherein Masek represented Tsitsi did not involve the sub-lease agreements that are the subject of the current litigation"); *id.* at 6 ("Sub-leases were not at issue in any of cases wherein Masek represented Tsitsi").)

It follows that the Defendants' repeated arguments that the Plaintiff could have sought these documents in one or more of the prior cases then in litigation is spurious, at best. (*See* Defs. Opp'n 4 (Benjamin never attempted to obtain the documents by discovery in the Tsitsi action); *id.* at 6-7 (same).) The prior cases involving EHC were an action against EHC by Tsitsi for "unpaid wages and entitlements" (*see* Civ. Act. No. 2012-202; *see also* Am. Mem. Ex. D [Aug. 2, 2012 Ltr. from Rubin Tsitsi to David Aingimea]) and an action by EHC to have Tsitsi removed from the premises (*see* Civ. Act. No. 2013-005). The underlying reason for both actions was, of course, Tsitsi's termination. All that would have been relevant to EHC's proofs was its reason for the termination.

An employer enjoys complete discretion in what reason it offers for terminating an employee or even in whether it offers any reason, so long as the reason is not unlawful and does not violate any contractual terms, and is not required to obtain evidence to support any other reason. *See, e.g.*, *Butler v. Ind. Dep't of Employment &Training Servs. Review Bd.*, 633 N.E.2d 310, 312 (Ind. Ct. App. 1994) (whether other grounds than that offered by the employer for

discharge of employee may have existed was irrelevant in unemployment compensation proceeding); *see also Border v. City of Crystal Lake*, 75 F.3d 270, 275-76 (7th Cir. 1996) (employer's history of treating its employees fairly and retaining them unless there was a "reason" not to, did not undermine its power to terminate them at will, for no reason). The documents now sought were not necessary to EHC's proofs in either case. There was no pressing reason—in fact, no reason at all, at the time, to request those documents. To the extent that the documents would have been relevant to Tsitsi's proofs, it would have been up to Tsitsi to provide them. He not only did not do so, but he rebuffed all informal requests for them.

The need for the documents and/or information about the transactions underlying them became apparent only as EHC started sorting out the mess left by Tsitsi. Clearly, EHC had no way of knowing that Tsitsi would die and that it would need the subject documents, after Tsitsi's death, for the current ligation. Moreover, Tsitsi's history of first refusing to hand over records, then offering to do so, then backtracking, creates questions about what records exist and where there are. The Defendants' argument that Benjamin should have attempted to obtain the documents and information in the prior cases is, therefore, without any merit whatsoever.

II. THE FAILURE-TO-DEPOSE-MASEK ARGUMENT

The Defendants argue that the Plaintiff should be foreclosed from seeking to have Masek disqualified because it failed to take Masek's deposition. (Defs.' Opp'n 7.) In fact, the rules do not generally provide for or permit discovery from a verifying attorney. As the California courts have explained:

> "Depositions of opposing counsel are presumptively improper, severely restricted, and require 'extremely' good cause—a high standard. [Citations.]" (*Carehouse Convalescent Hospital v. Superior Court* (2006) 143 Cal.App.4th 1558, 1562, 50 Cal.Rptr.3d 129.).

Melendrez v. Cal. Super. Court, 215 Cal. App. 4th 1343, 1352-53, 156 Cal. Rptr. 3d 335, 342-43 (2013), *review denied* (July 17, 2013).

The Defendants rely on *Optyl Eyewear Fashion International Corp. v. Style Cos.*, 760 F.2d 1045 (9th Cir. 1985). (Defs.' Opp'n 7.) In *Optyl*, the court did make the statement that the party seeking disqualification had not deposed opposing counsel prior to its request. 760 F.2d at 1049. That statement was made in passing, however, and the question of whether such deposition would have been proper was not addressed. In that case, moreover, the party opposing disqualification had provided evidence showing that the matter in issue was covered by attorney-client privilege, as the attorney's involvement in drafting the letter in issue had been limited to giving legal advice. *Id.* In the present case, as explained *infra*, Masek's involvement with the documents sought, if any, had nothing to do with giving legal advice.

If Masek has any of the documents sought or information about them or the transactions involving them, and if they are not covered by privilege, then the proper course of action is to seek his disqualification because of need to call him as a witness, *not* to depose him, which, as noted, would be presumptively improper. The Defendants make statements that Masek never discussed the subleases with Tsitsi and that Tsitsi never gave him documents related to the sublease to the Leanders. (Defs.' Opp'n 3 (Masek "was never furnished with any documents relating to Nauru Council's sub-lease with the Leanders"); *id.* at 8

(Masek and Tsitsi "never discussed the Leanders' sub-lease agreements with the Nauru Council/ECH" and Tsitsi never gave him "any documents relating to the sub-leases between ECH/Nauru Council and the Leanders"); *id.* at 9 (Masek has "no information regarding the formation of the sub-leases between the Leanders and EHC").) Masek, by affidavit, similarly asserts that he never received or had any of the documents in issue, but he even more carefully parses his words, and qualifies his denials, stating:

> Of note is the fact that sub-leases at the Eastern Gateway Property was NOT an issue in the this [sic] case. Sub-leases were never discussed in this case, and furthermore, no documentation regarding sub-leases was ever provided to me by Mr. Tsitsi *in regards to this case*.
>
> . . . I reviewed several documents for that hearing, [sic] most all such documents involved a court case filed in Nauru by Eigigu against Tsitsi, and other documents wherein David Aingimea from Eigigu made contradictory statements. I did not received [sic] any sub-leases or review any sub-leases *in preparation for that hearing*.
>
> * * *
>
> At no point in my representation of Mr, [sic] Tsitsi on any case did I *receive* "receipts," "records of lease negotiations" or other documents Benjamin thinks might exist. Sub-leases were never an issue in either of the cases between Tsitsi and Eigigu.

(Masek Aff. ¶¶ 4, 6, 13 (emphasis added).) Importantly, Masek never actually states that he has no relevant information, or even that he has no documents. Given that he is the one person who is most likely to have information and/or documents, or access thereto, it is imperative that the Plaintiff be able to call him as a witness, and the arguments to the contrary come up

short because his denials simply defy the elements of believability.

III. THE ATTORNEY-CLIENT ARGUMENT

The Defendants also argue that Masek would not be able to testify, based on attorney-client privilege. (Defs.' Opp'n 8-9.) Masek cannot have it both ways. He cannot first claim that the documents/information sought were not a part of the cases in which he represented Tsitsi, and then claim that they are covered by attorney-client privilege.

As noted in the Plaintiff's Amended Memorandum, attorney-client privilege protects only matters involved in seeking legal advice. *See Lindley v. Life Inv'rs Ins. Co. of Am.*, 267 F.R.D. 382, 391-92 (N.D. Okla. 2010) (attorney-client privilege protects confidentiality of client's communications in seeking legal advice), *aff'd in pertinent part*, Nos. 08-CV-0379- CVE-PJC, *et al.*, 2010 WL 1741407 (N.D. Okla. Apr 28, 2010); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403-04 (8th Cir. 1987) (same); *cf. In re Vanderbilt*, 57 N.Y.2d 66, 75, 439 N.E.2d 378, 383-86, 453 N.Y.S.2d 662, 667-70 (1982) (discussing coverage of attorney- client privilege, which covers only disclosures necessary for, and made for the purpose of, obtaining legal advice and only if material would have been privileged if it had remained with the client). The assertion of attorney-client privilege requires a two-pronged review:

> First, it must be determined whether the material sought was received by the attorney under circumstances giving rise to the attorney-client privilege. Second, if the attorney-client privilege attaches, attention is then directed to whether the material would be protected by some privilege had it remained in the client's possession.

Vanderbilt, 57 N.Y.2d at 76, 439 N.E.2d at 383, 453 N.Y.S.2d at 668 (citing *Fisher v. United States*, 425 U.S. 391, 402-05 (1976)).

As a matter of law, there can be no attorney-client privilege in the present case since, by Masek's own assertion, the cases in which he represented Tsitsi did not involve leases or subleases—unless, of course, Tsitsi sought legal advice from him regarding those matters separate from the two legal actions. (Masek Aff. ¶ 3.) Masek has provided no evidence either way on that issue.

It is also possible that Tsitsi provided information and/or documents to Masek related to business reasons. Where an attorney provides business, rather than legal, advice to a client, no privilege attaches, even if resulting from a confidential request. *Lindley*, 267 F.R.D. at 391-92; *Se. Pa. Transp. Auth. v. Caremarkpcs Health, L.P.*, 254 F.R.D. 253, 258-59 (E.D. Pa. 2008). As one court explained:

> [P]rivilege does not protect client communications that relate only business or technical data. *See First Wis. Mortgage Trust v. First Wis. Corp.*, 86 F.R.D. 160, 174 (E.D.Wis.1980); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 515 (D.Conn.) ("[l]egal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality"), *appeal dismissed*, 534 F.2d 1031 (2d Cir.1976).

Simon, 816 F.2d at 403-04. Masek has provided no evidence either way on that issue either.

Even if Masek were to provide evidence that information and documents were provided to him in connection with an attempt by Tsitsi to seek legal advice related thereto, so as to satisfy the first prong, the Defendants cannot show that either would be protected by some other privilege had they remained in Tsitsi's possession. This is true, as a matter of law, because all records related to any leases, subleases, or sub-subleases that Tsitsi had are the property of his employer, ECH, and cannot, therefore, be privileged as to ECH. Corporate records, which belong to the corporation, are held for the entity by the employee, as custodian, only in an

agency capacity. *E.g.*, *Braswell v. United States*, 487 U.S. 99, 106 (1988); *Gloves, Inc. v. Berger*, 198 F.R.D. 6, 10-11 (D. Mass. 2000). As one court has stated:

> [I]t is axiomatic that materials or products developed by an employee in the course of his or her employment, absent any agreement to the contrary, belong to his or her employer.

Wieder v. Chem. Bank, 202 A.D.2d 168, 169, 608 N.Y.S.2d 195, 196 (1994); *see also, e.g.*, *O'Leary v. Sterling Extruder Corp.*, 533 F. Supp. 1205, 1206 (E.D. Wis. 1982) (stating the principle that "all papers, accounts, notes, records, etc., made by the employee during the term of employment belong to the employer" as a contractual term); *Lamb v. Money Transfer Sys., Inc.*, No. 12-CV-6584 CJS, 2013 WL 5216442, at *15 (W.D.N.Y. Sept. 16, 2013) (quoting *Wieder*, 202 A.D.3d at 169, 608 N.Y.S.2d at 196).

There can be no question that any records that Tsitsi had and information about them that he may have imparted to Masek belong to Tsitsi's employer, ECH. They could not, therefore, be withheld from ECH on the basis of any privilege whatsoever. The fact that Tsitsi may have given them to Masek, or to someone else through Masek, cannot, accordingly, endow them with attorney-client privilege.

CONCLUSION

For all of the foregoing reasons, as well as those in Plaintiff's Initial and Amended memoranda, because the documents and related information sought are critical to the Plaintiff's proof and because Masek is the only person who may have, have access to, or have information about these documents, this Court should grant the Plaintiff's request to disqualify Masek.

Dated: December 16, 2014

Gordon C. Benjamin
Counsel to Plaintiff

AFFIDAVIT OF COUNSEL

I, Gordon C. Benjamin, do solemnly declare and affirm under the penalties of perjury that the matters and facts set forth above are true to the best of my knowledge, information, and belief.

Dated: December 16, 2014

Gordon C. Benjamin
Counsel to Plaintiff