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Summary of Las Vegas Sands Corp. v. Eighth Judicial Dist. Court, 130 Nev. Adv. Op. 69

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PROFESSIONAL RESPONSIBILITY: ATTORNEY-CLIENT PRIVILEGE

Summary

The Court determined whether a former CEO is within a “class of persons” allowed to use the corporation’s privileged documents in litigation against the corporation.

Disposition

The current management of a corporation controls the attorney-client privilege. There is no class of persons outside of a corporation’s current directors and officers that is allowed to access the client’s privileged or confidential information in litigation over the client’s objection.

Factual and Procedural History

This case stems from Steven Jacobs’ termination as chief executive officer and president of Sands China Ltd. Around the time he was let go, Jacobs compiled approximately forty gigabytes of emails and other communications, which he still possesses. Jacobs filed a complaint against Las Vegas Sands Corporation (LVSC), Sands China’s parent corporation, approximately three months after his termination, alleging that Sands breached his employment contract. Approximately nine months later, Jacobs disclosed that he possessed the documents at issue in this matter. A short while later, the parties met to discuss the documents. Sands claimed that the documents may be subject to Sands’ attorney-client privilege and requested that Jacobs return the documents. Jacobs declined to return the documents.

LVSC files a motion for a protective order and for return of the documents

About a month after Jacobs declined to return the documents, LVSC filed a protective order seeking return of the documents. LVSC argued, *inter alia*, that the documents were subject to Sands’ attorney-client privilege and therefore Jacobs had no right to them. The district court expressed concern that it could not consider the motion because the Nevada Supreme Court had imposed a stay on the underlying matter pursuant to a previous writ petition that Sands China filed with the Nevada Supreme Court. LVSC offered to withdraw the motion and file a separate action challenging Jacobs’ possession of the documents in order to not violate the stay.

LVSC files a second action in district court in an attempt to obtain a ruling on Jacobs’ possession of the purportedly privileged documents

LVSC filed a complaint against Jacobs alleging theft/conversion of the documents and asking for both preliminary and permanent injunctive relief. The district court granted temporary injunctive relief, prohibiting Jacobs from leaking the documents for fourteen days, giving LVSC time to file an emergency writ petition with the Nevada Supreme Court requesting a carve-out

¹ By Michael Bowman.

exception from the stay. LVSC filed an emergency writ petition with the Nevada Supreme Court that was subsequently denied.

At a subsequent hearing, the district court determined that the issue was a jurisdictional discovery dispute that could be settled in this case. The district court stated that LVSC must pursue its discovery in this case and dismissed the second action without prejudice. The district court also ordered the parties to establish a protocol that (1) ordered Jacobs to hand over copies of the documents to an independent vendor, (2) allowed both LVSC and Jacobs to inspect the documents and assert any privilege, and (3) provided that the district court would conduct an in-camera review to resolve any disputes.

After providing the documents to a court-ordered ESI vendor pursuant to an ESI protocol, Jacobs files a motion to return the documents

Pursuant to the ESI protocol, LVSC received the documents from the ESI vendor, reviewed them, and completed a privilege log. Subsequently, Jacobs filed a motion for return of the documents from the ESI vendor. Jacobs alleged that LVSC's privilege log was deficient. Furthermore, Jacobs argued that the "collective corporate client" doctrine applied, and that LVSC could not withhold access of the proof, especially because he helped to create it. In sum, Jacobs argued that he had the right to use any documents that were created while he was CEO of Sands China. LVSC argued that it was the sole holder of the privilege and that it had not waived the privilege.

The district court grants Jacobs' motion, ruling that Jacobs is among the "class of persons" legally entitled to view and use privileged documents that pertain to his tenure at Sands China

The district court ruled that Jacobs was within the "class of persons" allowed to view and use the privileged documents. Therefore, the district court granted Jacobs' motion for return of the documents. LVSC filed this petition for writ of prohibition or mandamus two days later, asking the Nevada Supreme Court to vacate the district court's order allowing Jacobs to use the documents.

Discussion

At the outset, Jacobs claims that writ relief is unavailable to petitioner because LVSC did not appeal the district court's ruling in the second matter. However, the district court's order actually granted relief by stopping Jacobs from leaking the documents for fourteen days. Additionally, the district court's ruling in the second issue required LVSC to pursue its privileges in the current matter; it did not reach the merits of the "class of persons" exception to the corporate attorney-client privilege. Therefore, the Nevada Supreme Court stated that LSVC should not be estopped from filing its writ petition.

[The Court exercised its] discretion to consider Sands' petition for a writ of prohibition

“A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court.”² Although the Nevada Supreme Court will usually refuse to review issues revolving around discovery disputes, the Court has chosen to intervene when (1) a discovery order requires disclosure of privileged information, or (2) the trial court issues a blanket discovery order without regard to relevance.³

Here, the Nevada Supreme Court decided to exercise its discretion because the district court's order permits injurious use of potentially privileged information.

Standard of review

The district court has sound discretion over discovery issues, and the Nevada Supreme Court will not disrupt that discretion absent a clear abuse of discretion.⁴ That said, here the issue involves the proper scope of the attorney-client privilege, which is governed by statute in Nevada.⁵ Statutory interpretation is a question of law subject to de novo review⁶, and therefore the proper standard of review in this matter is de novo review.

The district court erred when it ruled that Jacobs may use Sands' assertedly privileged documents in litigation on the grounds that Jacobs was within a class of persons entitled to review Sands' privileged information

Nevada privilege law grants the attorney-client privilege to the client corporation's current management

“Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language.”⁷ However, if a statute is open to more than one reasonable interpretation, it is ambiguous, and the Nevada Supreme Court will look to legislative history and interpret the statute in a way that conforms to public policy and reason.⁸

Here, LVSC argued that NRS 49.095⁹ unambiguously allows a client to prohibit any person from divulging privileged communications. The Nevada Supreme Court agreed that the statute unambiguously gives a client that right. However, a corporation is not a living being that can make decisions on its own; people within the company have to make the decisions. Therefore, the issue is the scope of persons who may assert the privilege and whether there should be an exception for situations where a corporation's current management attempts to invoke the privilege against a former director or officer.

² Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 & n.6 (2012).

³ Valley Health Sys., L.L.C. v. Eighth Judicial Dist. Court, 127 Nev. Adv. Op. 15, 252 P.3d 676, 679 (2011).

⁴ Club Vista, 276 P.3d at 249.

⁵ See NEV. REV. STAT. § 49.035-115 (2013).

⁶ Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

⁷ Leven v. Frey, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007).

⁸ Great Basin Water Network v. Taylor, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

⁹ NEV. REV. STAT. § 49.095 (2013).

[The Court declined] to adopt an exception to the attorney-client privilege based on a litigant's status as a former officer or director of a corporation

LVSC argued that the privilege belongs to the client corporation's current management, and therefore Jacobs' status as a former executive does not entitle him access to LVSC's privileged communications. Additionally, LVSC argued that the district court's order goes against the purpose of the privilege because allowing former employees access to privileged documents to use against the corporation in litigation would stifle the current management's willingness to interact with counsel.

The "collective corporate client" or "joint client" exception to corporate attorney-client privilege

There is an exception to the corporate attorney-client privilege called the "collective corporate client" or "joint client" exception. This exception is founded on the idea of one collective corporate client that includes each individual board member, as well as the corporation.¹⁰ Jacobs argued that ample caselaw adopting the corporate client exception supported the district court's decision in this matter. Jacobs primarily relied on *People v. Greenberg*, a New York case in which the appellate court held that former executives were "within the circle of persons entitled to view privileged materials without causing a waiver of the attorney-client privilege."¹¹

"The entity is the client" approach

LVSC relies on two cases for the premise that a corporation's current management solely holds the privilege. In the first case, *Commodity Futures Trading Comm'n v. Weintrub*¹², the U.S. Supreme Court held that "[d]isplaced managers may not assert the privilege over the wishes of current managers, even as to statements that the [displaced managers] might have made to counsel concerning matters within the scope of their corporate duties."¹³ In the second case, *Montgomery v. eTreppe Techs., LLC*¹⁴, the court found that a former officer may not use his former employer's privileged documents in litigation against said employer.¹⁵

[The Court declined] to adopt an exception to the attorney-client privilege based on a litigant's status as a former officer or director of a corporation

The Nevada Supreme Court noted that recent case law follows the "entity is the client" approach. Additionally, the Court was persuaded by the policy behind this approach and deemed it consistent with Nevada privilege law. Furthermore, the Court found that allowing a former employee access to privileged information on the basis of his or her prior position inconsistent with the purpose behind the privilege. Also, the Court stated that such a scenario would have a

¹⁰ See *Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788, 815–16 (Wis. 2002) (Abrahamson, C.J., dissenting).

¹¹ 851 N.Y.S. 2d 196, 200–02 (App. Div. 2008).

¹² 471 U.S. 343 (1985).

¹³ *Id.* at 349.

¹⁴ 548 F.Supp.2d 1175 (D. Nev. 2008).

¹⁵ *Id.* at 1187.

chilling effect on correspondence between counsel and corporate executives. The Court therefore held that Jacobs is not entitled to use LVSC's privileged communications in litigation against LVSC.

Conclusion

Because the current management of a corporation controls the attorney-client privilege, the district court erred in allowing Jacobs, a former executive with the corporation, to use the documents over Sands' claim of privilege.