

STATE OF NORTH CAROLINA
CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
11 CVS 2780

COUNTY OF CATAWBA d/b/a
CATAWBA VALLEY MEDICAL
CENTER,

Plaintiff,

v.

FRYE REGIONAL MEDICAL CENTER,
INC., and TATE SURGERY CENTER,
LLC,

Defendants.

ORDER

THIS MATTER is before the Court on Plaintiff County of Catawba's ("Plaintiff") Amended Motion to Compel Discovery ("Plaintiff's Motion") and Defendants Frye Regional Medical Center, Inc. ("Frye") and Tate Surgery Center, LLC's ("Tate") (collectively, "Defendants") Motion to Compel Discovery ("Defendants' Motion") in the above-captioned case. Having considered Plaintiff's and Defendants' Motions, the briefs and exhibits filed in support and opposition to the Motions, and the arguments of counsel at the October 15, 2013, hearing, the Court GRANTS in part and DENIES in part Plaintiff's Motion and DENIES Defendants' Motion.

I. Factual Background

A. Plaintiff's Motion

1. On September 11, 2011, Plaintiff filed the Complaint in this action arising out of an alleged, failed joint venture with Defendants.

2. On May 8, 2013, pursuant to Rules 30(b)(5) and 30(b)(6) of the North Carolina Rules of Civil Procedure, Plaintiff issued notice to Frye of its intent to depose individuals to be

chosen by Frye who could testify on behalf of the company about eleven topics, along with a request for the production of certain documents (“Rule 30(b)(6) Notice”).

3. Frye subsequently objected to nine of the eleven topics outlined in the Rule 30(b)(6) Notice, and refused to produce a witness or the requested documents.

4. During this time, Plaintiff allegedly learned through the deposition of Kristy Waters (“Waters”), the Chief Financial Officer of the Southern States Region at Frye’s parent corporation Tenet Healthcare Corporation (“Tenet”), that Waters and her supervisor, John Holland, regularly prepared Quarterly Certifications accompanied by cover memos. These Quarterly Certifications assessed Tenet’s financial risks, and Tenet regularly used them to prepare required filings to the United States government pursuant to the Sarbanes Oxley Act (“SOX”).

5. Because Plaintiff believed the Quarterly Certifications and memos should have been produced in response to its previous discovery requests, Plaintiff renewed its request to Frye for such documents but limited the request to only portions of the documents that refer to Tate. Frye objected to the discovery request asserting attorney-client privilege and the attorney work product doctrine. Frye also argues that this request is misdirected since Tenet generated the documents, and any request for their production should go through Tenet.

6. In response to Frye’s objections, Plaintiff filed its Motion seeking to compel Frye (1) to designate one or more persons to testify on behalf of the company and produce related documents pursuant to the Rule 30(b)(6) Notice and accompanying request for documents, and (2) to produce documents responsive to the request for portions of the Quarterly Certifications and memos referencing Tate.

B. Defendants' Motion

7. On May 30, 2012, Frye served its First Request for Production of Documents, and on June 14, 2012, Frye served its First Set of Interrogatories and Second Request for Production of Documents (collectively, "Frye Discovery Requests"). Plaintiff responded to the Frye Discovery Requests on August 1, 2012, and August 10, 2012. In response to the requests for documents, Plaintiff contends it produced documents as they are held in the usual course of business.

8. After reviewing the documents produced, Frye requested that Plaintiff supplement its responses by categorizing its production according to the requests that the documents respond to. However, Plaintiff refused to categorize its document production.

9. On March 14, 2013, Tate served its First Set of Interrogatories and First Request for Production of Documents ("Tate Discovery Requests"). Through the Tate Discovery Requests, Defendants again asked Plaintiff to categorize the previously produced documents. Plaintiff objected to the Tate Discovery Requests on the grounds that the requests were unduly burdensome and sought information protected by the attorney work product doctrine. Specifically, Plaintiff contends that Defendants only served the Tate Discovery Requests to get Plaintiff to re-produce all the documents previously exchanged in discovery, categorized according to the issues in the Complaint.

10. In response, Defendants filed their Motion seeking to compel Plaintiff to supplement and respond to the Frye and Tate Discovery Requests, for sanctions against Plaintiff for failing to make discovery, and for attorneys' fees accrued in pursuing Defendants' Motion. At the hearing, counsel for Defendants clarified that Defendants merely sought to have Plaintiff label and categorize the earlier discovery according to the requests.

II. Legal Standard

11. Pursuant to Rule 26 of the North Carolina Rules of Civil Procedure (“Civil Procedure Rule(s)”),

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.

N.C. R. Civ. P. 26(b)(1).

12. However, the Court may limit discovery “if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative . . . ; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive” N.C. R. Civ. P. 26(b)(1a).

13. During discovery, a party may take the deposition of a corporation by naming the corporation in the notice and describing “with reasonable particularity the matters on which examination is requested.” N.C. R. Civ. P. 30(b)(6). “In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf The persons so designated shall testify as to matters known or reasonably available to the organization.” *Id.*

14. Also, pursuant to Civil Procedure Rule 34, a “party may serve on any other party a request (i) to produce . . . any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served” N.C. R. Civ. P. 34(a). Thus, the parties may request any documents relevant to the subject matter involved and not subject to a recognized privilege, like the attorney-client privilege.

15. Courts in North Carolina apply a five-part test to determine whether attorney-client privilege applies to a particular communication:

(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

In re Investigation of the Death of Miller, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003).

16. “The burden is always on the party asserting the privilege to demonstrate each of its essential elements.” *Id.* at 336, 584 S.E.2d at 787. To meet this burden, the party asserting the privilege must produce sufficient evidence rather than relying on “mere conclusory” assertions. *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 534, 645 S.E.2d 117, 121 (2007) (quotation omitted).

17. In responding to document requests, “[a] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request” N.C. R. Civ. P. 34(b)(1).

III. Analysis

A. Plaintiff’s Motion

18. In Plaintiff’s Motion, Plaintiff seeks to compel the deposition of Frye, pursuant to Rule 30(b)(6), and production of Tenet’s Quarterly Certifications and accompanying memos.

19. First, as to the Rule 30(b)(6) Notice, Frye argues that a number of the topics outlined in the notice request information not “known or reasonably available” to the company because the company and its designee would be required to conduct burdensome calculations and compilations not done in the ordinary course of business.

20. While the Court is cognizant of the fact that the Rule 30(b)(6) Notice, by its nature, imposes a heavy burden on Frye and its designee, this burden does not relieve Frye of its obligation to appoint a designee to provide deposition testimony on behalf of the company. Rule 30(b)(6) clearly states that, upon notice from the requesting party, the organization “shall designate” a representative to “testify as to matters known or reasonably available to the organization.” N.C. R. Civ. P. 30(b)(6). Having considered Plaintiff’s Motion and the arguments of counsel, the Court finds no basis to relieve Frye of its obligation under Rule 30(b)(6). Therefore, the Court concludes that Frye must respond to the Rule 30(b)(6) Notice, designate a witness to testify on the company’s behalf, and produce corresponding documentation, to the extent required under Rule 30(b)(6).¹

21. Second, regarding the Quarterly Certifications and memos, Frye withheld these documents from its production primarily based on a claim of attorney-client privilege. However, the attorney-client privilege may only be raised or waived by the client. *See Miller*, 357 N.C. at 338, 584 S.E.2d at 788. “Although an attorney may assert the privilege when necessary to protect the interests of the client, the privilege belongs solely to the client.” *Id.* at 338-39, 584 S.E.2d at 788. “It is not the privilege of the court or any third party.” *Id.* (emphasis omitted).

22. In this case, the documents in question reflect communications between a Tenet employee and Tenet executives and counsel.² Although Frye appears to be a subsidiary of Tenet, Frye remains a third party to any privileged communications between Tenet and its counsel, and therefore, has no standing to assert a claim of privilege over such communications. Indeed,

¹ At the hearing, counsel for Frye indicated that a portion of the information requested may not be reasonably available to the company. Without more information, the Court does not conclude that this assertion relieves Frye of its obligation to produce a witness to testify on its behalf as to those matters that are known or reasonably available to the company.

² Following the hearing, Defendants provided the disputed documents to the Court for an *in camera* review.

Frye's counsel stated during the hearing that the privilege belonged to Tenet, not Frye.

Therefore, the Court concludes that only Tenet or an attorney on its behalf may raise a claim of privilege over the requested portions of the Quarterly Certifications and accompanying memos.

23. However, to preserve the integrity of the attorney-client privilege, Tenet should be given notice and allowed to intervene in this action to protect its claim of privilege as to any documents sought by Plaintiff before any portion of the documents is turned over to Plaintiff.³ EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 22 (5th ed. 2007). If Tenet does not intervene to preserve the privilege, then Frye must produce the documents to Plaintiff.⁴

24. Wherefore, the Court GRANTS in part and DENIES in part Plaintiff's Motion.

B. Defendants' Motion

25. In its response to Defendants' Motion, Plaintiff asserted that it responded to Defendants' discovery requests and produced the documents as they were kept in the usual course of business. Defendants do not refute this contention. However, Defendants argue that Plaintiff should be compelled to categorize and label these documents according to the request to which they respond. The Court disagrees.

26. Pursuant to Civil Procedure Rule 34, a responding party may produce documents either in the order they are kept in the usual course of business or in a categorized fashion according to the requests. N.C. R. Civ. P. 34(b)(1). It appears to the Court that Plaintiff complied with the Civil Procedure Rules in responding to the Frye Discovery Requests by

³ Because Tenet, as the privilege holder, will bear the burden to prove the documents are privileged, the Court makes no determination at this time regarding the privileged nature of the documents in question.

⁴ Frye also argues that, because Tenet created the documents, the request for their production should be sent to Tenet, not Frye. The Court finds this argument unavailing. Pursuant to Civil Procedure Rule 34, Plaintiff may request any document within the scope of Rule 26(b) that is in Frye's possession. The author's identity is irrelevant. Thus, given that Frye does not dispute its possession of the documents, this argument fails.

producing the documents requested as they were kept in the usual course of Plaintiff's business. Thereafter, Plaintiff rightfully objected to the duplicative requests in the Tate Discovery Requests that sought to have Plaintiff re-produce documents already provided to Defendants. Therefore, having considered Defendants' Motion, the briefs and exhibits in support and opposition, and the arguments of counsel, the Court concludes that Defendants are not entitled to the relief requested.⁵

27. Accordingly, the Court DENIES Defendants' Motion.

IV. Conclusion

28. Based on the above, the Court hereby GRANTS in part and DENIES in part Plaintiff's Motion and DENIES Defendants' Motion. As such, the Court ORDERS as follows:

- a. Within thirty (30) days of the entry of this Order, Frye shall respond to Plaintiff's Rule 30(b)(6) Notice, and thereafter, work with Plaintiff to schedule the deposition of its designee;
- b. Within five (5) days of the entry of this Order, Frye must notify Tenet that Plaintiff requested the Quarterly Certifications and accompanying memos provided to Frye, and that, to assert the attorney-client privilege, Tenet must seek to intervene in this case by December 2, 2013;

⁵ Given this conclusion, the Court does not address Plaintiff's remaining arguments or Defendants' other demands for relief.

c. If Tenet fails to intervene by December 2, 2013, then Frye must produce to Plaintiff the requested portions of the Quarterly Certifications and accompanying memos referencing Tate by December 9, 2013; and

d. All other requested relief is DENIED.

29. SO ORDERED, this the 29th day of October, 2013.

/s/ Calvin E. Murphy
Calvin E. Murphy
Special Superior Court Judge