

Creditors' Forbearance and Settlement Privilege: Not all Communications Regarding Forbearance Will Attract the Cloak of Privilege

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Bella Senior Care Residences Inc. (BSCRI), was the operator of a senior care facility. BSCRI owed money to Canada Life Assurance Company (CLAC), pursuant to a credit agreement between BSCRI, CLAC, and Stonebridge Financial Corporation (Stonebridge), CLAC's agent (the Credit Agreement).

According to CLAC, BSCRI had been in default of the Credit Agreement since 2008. However, BSCRI did not file a Notice of Intention to Make a Proposal to its creditors until December of 2017. Between 2008 and 2017, CLAC, Stonebridge, and BSCRI corresponded on a number of occasions regarding possible forbearance by CLAC on the Credit Agreement, as well as the addition of terms and tightened controls over BSCRI.

Shortly after filing its Notice of Intention to Make a Proposal, BSCRI agreed to sell the Niagara Falls senior care facility. The Court approved the sale, and the amount was sufficient to repay CLAC the Principal and Interest owing under the Credit Agreement. The parties disagreed on whether or not CLAC had an obligation to pay "Redeployment Costs" pursuant to the Credit Agreement.

In a pending motion to determine the issue, BSCRI wanted to use the correspondence between itself, CLAC and Stonebridge as evidence. CLAC and Stonebridge argued that the materials were protected by settlement privilege, and therefore could not be used in the motion.

Accordingly, the issue before the Court was whether or not the correspondence between the parties regarding possible forbearance and other additional controls on BSCRI were protected by settlement privilege.

The Court found that it was not protected by settlement privilege. The Court reaffirmed the test for settlement privilege to be composed of the following three branches:

1. a litigious dispute must be in existence or within contemplation;

2. the communication must have been made with the intention that it would not be disclosed to the court in the event that the negotiations failed; and
3. the purpose of the communication must be an attempt to effect a settlement. In applying the test, the court must examine the communications between the parties as a whole, in context, to determine whether or not the rationale for settlement privilege exists in the circumstances.

In the circumstances of this case, the Court found, inter alia, that branch number 3 was not satisfied. While CLAC and Stonebridge had argued that their offer to revise the calculation of the debt service ratio for BSCRI and allow intercompany loans were offers made by CLAC to effect a settlement, the Court disagreed. While these offers had been made in 2015, by 2017, CLAC was seeking to expand its entitlements under the Credit Agreement, and were not offering a compromise. In the Courts view, the offer of forbearance was "effectively meaningless" given the stringent requirements that came with it.

The Court held that the better way to view the forbearance, when coupled with fact that CLAC had informed BSCRI that they would pursue its remedies under the Credit Agreement if BSCRI did not agree, was that it was essentially an ultimatum. As a result, the Court declined to extend settlement privilege to the communications.

Accordingly, counsel should be cognizant of the limits of settlement privilege. When dealing with the enforcement of remedies pursuant to credit agreements, the cloak of privilege may not completely cover the body of communications between the parties.

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