

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WILLIAM PACKER, SR., et al,	:	CIVIL ACTION
Plaintiffs	:	
	:	
v.	:	
	:	
ELMER HANSEN, JR., et al,	:	
Defendants	:	NO. 98-380

M E M O R A N D U M

Newcomer, J. November , 1999

Presently before this Court are a series of motions to compel filed by plaintiffs, responses thereto, and corresponding reply briefs thereto. Specifically, plaintiffs' motions consist of: (1) Motion to Compel POD 27, Inc. to Comply with Plaintiffs' Subpoena Requiring the Production of Documents; (2) Motion to Compel Susquehanna Road Associates to Comply with Plaintiffs' Subpoena Requiring the Production of Documents; (3) Motion to Compel Hansen Properties, Inc. to Comply with Plaintiffs' Subpoena Requiring the Production of Documents; and (4) Motion to Compel Hansen Properties to Comply with Plaintiffs' Subpoena Requiring the Production of Documents. For the reasons set forth below, plaintiffs' Motions will be granted in part and denied in part. In addition, before this Court is Third Party Herb Gable's Motion to Quash Subpoena. For the reasons set forth below, said Motion will be granted.

A. FACTUAL BACKGROUND

Plaintiffs instituted this action on January 23, 1998, bringing claims under the Racketeer Influenced Corrupt Organization Act ("RICO"), as well as common law claims of fraud,

civil conspiracy, breach of fiduciary duty, and unjust enrichment. Plaintiffs allege Elmer F. Hansen, Jr. defaulted on several mortgage notes, on which he was primarily liable, with a total value of several million dollars. When plaintiffs sought payment from Mr. Hansen on the notes, he told them that the only asset of value he had was an interest in a golf course. Plaintiffs further assert Mr. Hansen used Magellen Finance Corporation ("Megellan") as a conduit for himself and his children to buy out plaintiffs' interest in the golf course, after misrepresenting its value to plaintiffs as well as using Megellan as a depository for excess cash from Mr. Hansen's varied business interests.

B. PLAINTIFFS' MOTIONS

The present slew of motions filed by plaintiffs stems from a series of subpoenas served on September 2, 1999 by plaintiffs to third-party respondents POD 27, Inc. ("POD 27"), Susquehanna Road Associates ("SRA"), Hansen Properties, Inc. ("Hansen Inc."), and Hansen Properties ("Hansen Prop."). All the subpoenas and requests for documents were the same in the following regard: (1) allegedly, they were all personally served by Allan Passen on Bud Hansen on September 2, 1999 at 1767 Sentry Parkway, Suite 200, Blue Bell, Pennsylvania; (2) they all provided 18 days, until September 20, 1999, for the production of the documents; (3) they all requested the following five sets of documents from respondents:

(a) "Your federal and state tax returns for 1993, 1994, 1995, 1996, 1997 and 1998."

(b) "All financial statements prepared by you or on your behalf for the following years: 1993, 1994, 1995, 1996, 1997 and 1998."

(c) "Your books and records for 1998,¹ including, but not limited to, your general ledger."

(d) "All documents relating to any loans entered into by you."

(e) "All documents relating to the acquisition of any property by you."

After service of the subpoenas, respondents then failed to produce the requested documents. Subsequently, plaintiffs filed the instant Motions to compel the parties' compliance with the subpoenas.

Each of the respondents counter plaintiffs' Motions with substantially the same arguments. Respondents claim that: (1) proper service was not made on respondents since Elmer "Bud" Hansen was not served; and (2) the requested federal and state tax returns, books and records, and records on any loans fall outside the scope of permissible discovery. Plaintiffs then counter respondents' arguments by contending that respondents

¹Upon observation of the "true and correct" copies of the subpoenas provided as Exhibits "A" in each of plaintiffs' Motions, this Court notices that there is a difference in the subpoenas served on POD 27 and SRA from those served on the others. The third, fourth, and fifth document requests to Hansen Inc. and Hansen Prop. include "the period 1993 to 1998," whereas the requests for documents from POD 27 and SRA do not. Counsel for both parties misrepresent these differences in their respective briefs, but this Court will presume the copies of the subpoenas as they appear in each of the Motions' Exhibits are in fact the true and correct copies.

waived their rights to object to the subpoenas because they failed to submit objections until September 20, 1999 - 4 days after the 14 day window during which time objections to subpoenas may be filed, as provided by Federal Rule of Civil Procedure 45(c)(2)(B). In the case of SRA, plaintiffs argue that it did not file any objection at all. Alternatively, plaintiffs argue that if this Court finds that respondents did not waive their rights to object to the subpoenas, respondents' objections are without merit.

1. Discussion

Plaintiffs argue that respondents waived their right to object to their subpoenas because they failed to file objections within the 14 day period specified in Rule 45(c)(2)(B) after service of the subpoena. According to the rule, a non-party served with a subpoena requesting production of documents must serve any objection in writing to the requesting party's counsel within 14 days of service of the subpoena. Moreover, the court in Barnes Foundation v. The Township of Lower Merion, et al., 1997 WL 169442 (E.D. Pa.) noted that the 1991 amendments to Rule 45, that extended the former 10 day period to 14 days, inferred that while the changes to the rule provided additional protection to the subpoenaed person, they also made it reasonable to construe the new time limits more strictly so that failure to file a timely objection would result in a waiver of the right to object to enforcement of the subpoena. Id. at *2 n.4.

The court in Barnes, however, did not require that this Court construe a failure to file a timely objection as a waiver - it merely noted that it was reasonable to do so. In the instant case, respondents POD 27, Hansen Inc., and Hansen Prop. filed objections 4 days late, but still within the time allowed for production. This Court declines to consider respondents' delay in objecting by 4 days as a waiver of their rights to object to the subpoenas. This Court is not convinced that the late objections were so disruptive of the discovery process as to warrant such severe sanctions, particularly in light of the

claims of improper service. See Bove v. Worlco Data Systems, Inc., 1987 WL 7627 (E.D. Pa.) Consequently, this Court finds that the right to object to plaintiffs' subpoenas was not waived by POD 27, Hansen Inc., and Hansen Prop.

In the case of SRA, however, this Court must find that its right to object was waived because no objections were ever filed. It appears to this Court that defense counsel represented SRA as well as the others third-party respondents in this matter, and there is no evidence to show why SRA may have failed to object while the others did not. This Court must assume then, that the right to file objections was waived in SRA's case and SRA should be compelled to comply with plaintiffs' subpoena.

As to the respondents' argument that they were improperly served with the subpoenas, plaintiffs argue in their Reply brief that respondents failed to raise such an argument when answering the subpoenas. In addition, plaintiffs point to the fact that defense counsel failed to mention the allegedly improper service despite numerous conversations regarding other discovery matters in the case. This Court finds that respondents were not harmed by having said subpoenas served to Mr. Elmer F. Hansen, Jr. at Hansen Properties, Inc. in Pennsylvania. In fact, they were sufficiently served and noticed of the subpoenas with still enough time for three of the respondents to file objections within 18 days of service.

Respondents' real contention concerns the scope of permissible discovery for the requested documents. First,

respondents argue that the federal and state tax returns should not be discoverable because they are intrinsically highly sensitive documents. Respondents allude to a previous Order of this Court of November 4, 1998 which stated:

The Motion is denied to the extent that defendants seek the production of plaintiffs' tax returns, the Court finding that defendants have not shown a compelling need or why the same information is not discoverable by other means.

Plaintiffs claim that the Order only held that the requested tax returns were not discoverable at that particular time, and now, upon further discovery, it has become apparent that disclosure of the tax returns is in fact necessary.

Although courts have imposed broader restrictions on the scope of discovery when a non-party is targeted, discovery rules are to be accorded broad and liberal construction. See Thomson v. Glenmede Trust Co., et al., 1995 WL 752422, *2; Zukoski, 1994 WL 637345, at *3; American Health Sys v. Liberty Health Sys., 1991 WL 30726, *2. In addition, the determination of relevance is within the district court's discretion. See Thomson, 1995 WL 752422, at *2. However, as a general matter, tax returns are confidential communications between the taxpayer and the government, and both public policy and concern for the taxpayer's privacy interests counsel against their general discoverability. DeMasi v. Weiss, 669 F.2d 114, 119-20 (3d Cir. 1982). It is widely recognized, however, that in appropriate circumstances, tax returns are the proper subject of a discovery inquiry, and that there is no privilege against disclosure. See

id. Terlescki v. E.I. DuPont de Nemours & Co., 1992 WL 75015,
*1. This Court agrees with plaintiffs that the discoverability of tax returns must be addressed separately for each particular request and that this Court's Order of November 4, 1998 did not summarily bar the discoverability of all tax returns requests in this case.

In determining whether tax returns are discoverable, this Court must apply a two-part test. First, the party seeking discovery bears the burden of demonstrating relevance. If relevant, the tax returns will be discoverable, unless the party resisting discovery meets its burden of proving there is no compelling need for the tax returns because the information available in the tax returns can be obtained from other sources.

Plaintiffs allege that POD 27 is a corporation that is owned by four trusts whose beneficiaries are defendant Hansen's four children, and controlled and run on a day to day basis by Mr. Hansen. Plaintiffs seek tax returns from POD 27 to account for the various transactions between defendant Hansen and his related entities with Magellan and to determine whether POD 27 properly accounted for his receipt of loan payments and interest payments from Magellen. Plaintiffs argue that this information pertains directly to their RICO allegation that Magellan was utilized to defraud other creditors.

Plaintiffs claim that Hansen Inc. is another corporation owned by four trusts whose beneficiaries are defendant Hansen's four children. Furthermore, Mr. Hansen sits

on Hansen Inc.'s Board of Directors and is its president. Plaintiffs argue that they need Hansen Inc.'s tax returns to determine whether the corporation properly accounted for the forgiveness of debt, and whether such forgiveness was accounted for on its income tax returns relevant to plaintiffs' allegations regarding defendants' use of Megellan as a subterfuge.

According to plaintiffs' allegations, Hansen Prop. was operated by defendant Hansen as an "umbrella entity," a partnership formed with Hansen and his wife to use "Hansen Properties" as a fictitious trade name in order to conduct business transactions. Plaintiffs assert that they need Hansen Prop.'s tax returns to explore the extent of defendant Hansen's use of Magellen as a subterfuge, whether Hansen Prop. properly accounted for loan forgiveness resulting from Magellan's acquisition of its outstanding debt, and whether such forgiveness was accounted for on its income tax returns.

This Court finds that plaintiffs have satisfied their burden of showing the relevancy of the information sought from the four respondents' respective tax returns to warrant the discovery of the returns. In response, respondents' counsel claims that plaintiffs need to prove that their need for the returns is compelling and demonstrate the least intrusive means of obtaining the desired information. That is not true. The burden in fact rests on the respondent to prove that there is no compelling need for the tax returns because the information sought from the returns can be obtained from other sources. POD

27, SRA, Hansen Prop., and Hansen Inc. do not satisfy this burden. Consequently, this Court compels the four respondents to comply with plaintiffs' Motion to produce their tax returns from 1993 through 1998.

This Court further determines that plaintiffs have shown that the financial statements prepared by respondents or on their behalf as well as respondents' books and records are relevant as well. Therefore, this Court compels the respondents to produce all such financial statements prepared for the years 1993 through 1998. As for the books and records, POD 27 and SRA shall provide their books and records for 1998, including, but not limited to, their general ledgers, while Hansen Prop. and Hansen Inc. shall provide plaintiffs their books and records for the years 1993 through 1998.

This Court also finds that the documents relating to loans and the acquisition of property by respondents is relevant to plaintiffs case. However, the amount of documents requested by plaintiffs is much too burdensome for respondents POD 27, Hansen Inc. and Hansen Prop. to produce at this stage of discovery. Unlike tax returns, financial statements, books and records, documents to loans and the acquisition of property may not be as neatly and regularly kept. Such documents may consist of financial records, legal memoranda, letters, contracts, and a plethora of other materials from a variety of sources. It is simply too much to ask of these third-party respondents to produce all documents to any loans or the acquisition of any

property. Even when the scope of years is narrowed for Hansen Prop. and Hansen Inc., this Court finds that these last two document requests are overbroad and places too heavy a burden on non-parties such as these respondents here.

C. THIRD PARTY HERB GABLE'S MOTION TO QUASH SUBPOENA

Mr. Herb Gable is a third-party to this action and was served with a subpoena by plaintiffs on October 21, 1999. This subpoena requested for production:

(1) "All work papers and copies of all tax returns for POD 27, Inc. from 1993 to the present."

(2) "All work papers and copies of Susquehanna Road Associates, Inc. from 1993 to the present to the extent they have not been previously produced."

(3) "All work papers and copies of all tax returns for Commonwealth Realty Advisors from from 1993 to the present to the extent they have not been previously produced."

(4) "Copies of all tax returns in your possession for Magellan Finance Corporation for the years 1993, 1994, 1995, 1996, 1997, and 1998."

(5) "All work papers and copies of all tax returns for Plymouth Meeting Associates from 1993 to the present."

(6) "Copies of all tax returns in your possession for Elmer F. Hansen Jr. and G. Eileen Hansen for the years 1993 through to 1998."

1. Discussion

Allegedly, Mr. Gable was the preparer of the tax returns and financial statements for the Hansen entities. Despite this Court's finding, with regard to the plaintiffs' Motion above, that plaintiffs have shown the relevancy of the tax returns and financial documents at issue, this Court declines to

compel Mr. Gable to produce the tax returns and financial documents of other third-parties. This Court relies on the principle that broader restrictions on the scope of discovery apply when a non-party is targeted, particularly when a non-party is asked to compel documents and records of another non-party. This Court determines that it would be too burdensome to require Mr. Gable to comply with plaintiffs' subpoena. Moreover, in light of this Court's ruling on plaintiffs' Motions as set forth above, such compulsion may be duplicative as well. Accordingly, Third Party Herb Gable's Motion to Quash Subpoena is granted.

O R D E R

AND NOW, this day of November, 1999, upon consideration of the following Motions, responses thereto, and any subsequent relay briefs, it is hereby ORDERED as follows:

(1) Plaintiffs' Motion to Compel POD 27, Inc. to Comply with Plaintiffs' Subpoena Requiring the Production of Documents is GRANTED in part and DENIED in part.

POD 27 shall produce the following to plaintiffs within 5 days of this Order:

- (a) Federal and state tax returns for 1993 through 1998.
- (b) All financial statements prepared by it or on its behalf for the years 1993 through 1998.
- (c) Books and records for 1998, including, but not limited to, POD's general ledger.

Plaintiffs' requests for POD to turn over all documents relating to any loans entered into by POD and all documents relating to the acquisition of any property by POD is DENIED as overbroad and lacking specificity.

(2) Plaintiff's Motion to Compel Susquehanna Road Associates to Comply with Plaintiffs' Subpoena Requiring the Production of Documents is GRANTED.

(3) Plaintiffs' Motion to Compel Hansen Properties, Inc. to Comply with Plaintiffs' Subpoena Requiring the Production of Documents is GRANTED in part and DENIED in part.

Hansen Inc. shall produce the following to plaintiffs within 5 days of this Order:

- (a) Federal and state tax returns for 1993 through 1998.
- (b) All financial statements prepared by it or on its behalf for the years 1993 through 1998.
- (c) Books and records for the period 1993 to 1998, including, but not limited to, Hansen Inc.'s general ledger.

Plaintiffs' requests for Hansen Inc. to turn over all documents relating to any loans entered into by Hansen Inc. and all documents relating to the acquisition of any property by Hansen Inc. is DENIED as overbroad, overly burdensome, and lacking specificity.

(4) Plaintiffs' Motion to Compel Hansen Properties to Comply with Plaintiffs' Subpoena Requiring the Production of Documents is GRANTED in part and DENIED in part.

Hansen Prop. shall produce the following to plaintiffs within 5 days of this Order:

- (a) Federal and state tax returns for 1993 through 1998.
- (b) All financial statements prepared by it or on its behalf for the years 1993 through 1998.
- (c) Books and records for the period 1993 to 1998, including, but not limited to, Hansen Prop.'s general ledger.

Plaintiffs' requests for Hansen Prop. to turn over all documents relating to any loans entered into by Hansen Prop. and all documents relating to the acquisition of any property by Hansen Prop. is DENIED as overbroad and lacking specificity.

(5) Third Party Herb Gabel's Motion to Quash Subpoena is GRANTED, as pertaining to the document requests for tax returns and tax related documents.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.