

**Cajowski v Bromberg**

2007 NY Slip Op 32722(U)

August 17, 2007

Supreme Court, Suffolk County

Docket Number: 0021034/1999

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 21034/1999

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

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KEVIN CAJOWSKI, JOANNE CAJOWSKI,  
SUPERIOR OUTBOARD, INC.,

Plaintiffs,

-against-

BRUCE BROMBERG, B & T BOAT CO.,  
INC.,

Defendants.

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SUPERIOR OUTBOARD, INC.,

Plaintiff,

- against-

CNA INSURANCE COMPANY, VALLEY  
FORGE INSURANCE COMPANY,  
CONTINENTAL CASUALTY COMPANY,  
BRIDGEHAMPTON NATIONAL BANK and  
HARRIS BANK GLENCOE-NORTHBROOK,  
N.A.,

Defendants.  
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ORIG. RETURN DATE: APRIL 5, 2007  
FINAL SUBMISSION DATE: MAY 10, 2007  
MTN. SEQ. #: 006  
MOTION: MG

ORIG. RETURN DATE: APRIL 5, 2007  
FINAL SUBMISSION DATE: MAY 10, 2007  
MTN. SEQ. #: 007  
MOTION: MD

**Action No. 1 - Index No. 21034/1999**

**Action No. 2 - Index No. 7355/2001**

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FORGE INSURANCE COMPANY,  
CONTINENTAL INSURANCE COMPANY,

Third-Party Plaintiffs,

- against -

BRUCE BROMBERG, B & T BOAT COMPANY,  
INC., and WESTLAKE BOAT RENTAL, INC.,

Third-Party Defendants.

-and-

KEVIN CAJOWSKI, JOANNE CAJOWSKI,

Additional Defendants  
on the Counterclaims,

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BRIDGEHAMPTON NATIONAL BANK,

Second Third-Party Plaintiffs,

-against-

BRUCE BROMBERG, B & T BOAT COMPANY,  
INC., and WESTLAKE BOAT RENTAL, INC.,

Second Third-Party Defendants.

-and-

KEVIN CAJOWSKI, JOANNE CAJOWSKI,

Additional Defendants  
on the Counterclaims,

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**ATTORNEYS FOR DEFENDANTS**

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Upon the following papers numbered 1 to 7 read on this motion TO QUASH  
SUBPOENA AND CROSS-MOTION TO COMPEL  
Notice of Motion and supporting papers 1-3; Notice of Cross-Motion and supporting papers  
4-6; Answering Affirmation and supporting papers 7; it is,

**ORDERED** that this motion by defendants BRUCE BROMBERG, B & T BOAT COMPANY, INC., and WESTLAKE BOAT RENTAL, INC. (“defendants”), for an Order quashing a subpoena duces tecum, dated February 16, 2007, served upon DEAN H. STRATTON by counsel for plaintiffs in Action No. 1 (“plaintiffs”), is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

**ORDERED** that this cross-motion by plaintiffs for an Order, pursuant to CPLR 2302(b), compelling the production of original records of DEAN H. STRATTON, as specified in a subpoena duces tecum, dated February 16, 2007, served by counsel for plaintiffs, is hereby **DENIED** for the reasons set forth hereinafter.

The above-captioned actions, consolidated for joint trial purposes by Order dated September 16, 2003 (Werner, J.), involve, among other things, insurance proceeds from a fire that occurred on or about July 14, 1998, at the premises owned by defendant BROMBERG where the plaintiffs were the tenants. Defendant CNA in Action No. 2 issued the insurance checks in controversy.

In the instant application, defendants seek an Order quashing the subpoena duces tecum, dated February 16, 2007, served upon DEAN H. STRATTON by counsel for plaintiffs. Plaintiffs have filed a cross-motion to compel the production of Mr. Stratton's original records, as specified in the subpoena duces tecum. According to his affidavit, Mr. Stratton is a certified public accountant whose only connection to these three defendants was as the tax return preparer, and the only documents in his possession relating to these defendants are either copies of tax returns or materials used in preparation of tax returns. Defendants argue that pursuant to 26 USC § 7216, Mr. Stratton is prohibited from disclosing any information furnished in connection with the preparation of tax returns. In addition, defendants contend that the proper course of action would have been to timely seek the records directly from defendants, but even in that instance, defendants' tax returns would only be discoverable upon a strong showing that the information contained therein is indispensable to

the claim and cannot be obtained from other sources (see e.g. *Altidor v State-Wide Ins. Co.*, 22 AD3d 435 [2005]).

In opposition, plaintiffs have filed a cross-motion seeking the production of Mr. Stratton's original records. Plaintiffs argue that although the United States Code prohibits disclosure of tax returns, such disclosure may be had pursuant to court order. Hence, plaintiffs filed the instant cross-motion. Plaintiffs allege that there is no other way of obtaining records to show how assets of the parties were exchanged during the time that the plaintiffs were taking over defendants' business, and that such records are essential to the prosecution of this action.

Section 7216 of Title 26 of the United States Code (commonly known as the "Internal Revenue Code"), provides in pertinent part:

Disclosure or use of information by preparers of returns.

(a) General rule. Any person who is engaged in the business of preparing, or providing services in connection with the preparation of, returns of the tax imposed by chapter 1 [26 USCS §§ 1 et seq.], or any person who for compensation prepares any such return for any other person, and who knowingly or recklessly--  
(1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or  
(2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return,

shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than \$ 1,000, or imprisoned not more than 1 year, or both together with the costs of prosecution.

(b) Exceptions.

(1) Disclosure. Subsection (a) shall not apply to a disclosure of information if such disclosure is made--

\* \* \*

(B) pursuant to an order of a court.

26 USC § 7216. It is apparent that disclosure of the material sought by the subject subpoena duces tecum (which was not So-Ordered) is proscribed by the federal statute, unless granted by court order.

Further, New York courts have repeatedly held that a party seeking disclosure of tax returns must make a strong showing that the information is necessary and relevant to the claims asserted and cannot be obtained from other sources (*Kerman v Friedman*, 21 AD3d 997 [2005]; *Samide v Roman Catholic Diocese of Brooklyn*, 5 AD3d 463 [2004]; *Active Fire Sprinkler Corp. v American Home Assurance Co.*, 203 AD2d 218 [1994]; *Grassi & Co., CPAs, P.C. v McKelvey*, 15 Misc 3d 1104[A] [Sup Ct, Nassau County 2007]). Disclosure of tax returns is disfavored since income tax returns contain confidential and private information (*Walter Karl, Inc. v Wood*, 161 AD2d 704 [1990]; *Briton v Knott Hotels Corp.*, 111 AD2d 62 [1985]).

By Order dated May 9, 2007, this Court denied plaintiffs application for an Order compelling defendants to produce certain documents demanded in a Notice to Take Deposition Upon Oral Examination of defendant BROMBERG, dated April 10, 2006. The Notice to Take Deposition included seventeen (17) pages of document demands. As the parties had previously entered into a discovery stipulation, dated January 5, 2005, in which it was agreed that plaintiffs would serve upon defendants any interrogatories and/or demands for discovery and inspection within thirty (30) days thereof, the Court found the document demands to be untimely, and denied the motion. In support of the instant motion to quash, defendants have asserted the same untimeliness argument.

The Court finds that plaintiffs have failed to make the requisite strong showing to warrant disclosure of defendants' tax returns. In particular, the Court finds that the information sought from the tax returns and supporting documents can be obtained from other sources. Plaintiffs have submitted a lengthy list of documents referred to at defendant BROMBERG's deposition, but that were not in defendant BROMBERG's possession at the time of the deposition. The list recites numerous financial documents, including bills of sale, cash receipts ledger, "officer's loan account" ledger, banking records, credit card account statements, and records relating to the claim submitted by defendants to CNA. Defendant BROMBERG testified that he believed the documents were at his residence in Florida. In light of this testimony, the Court assumes that counsel for plaintiffs made certain document requests of defendant BROMBERG during the course of the deposition. However, plaintiffs have not provided a copy of the

deposition transcript to the Court. Nevertheless, it therefore appears that the information contained in the tax returns can be obtained from other sources. As such, given the federal statute, the controlling precedent in this State, and the facts of this case, the Court is reluctant to issue an Order permitting disclosure of defendants' tax returns and supporting documentation in Mr. Stratton's possession.

Moreover, pursuant to CPLR 2302(b), a motion for a subpoena to compel production of original records or documents shall be made on at least one day's notice to the person having custody of the records or documents (CPLR 2302[b]). Here, plaintiffs have not submitted proof that they served the instant cross-motion upon Mr. Stratton on at least one day's notice, or that they served the cross-motion upon Mr. Stratton at all (CPLR 2302[b]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2302:4).

In view of the foregoing, defendants' motion to quash the subpoena duces tecum, dated February 16, 2007, served upon Mr. Stratton by counsel for plaintiffs, is granted. The cross-motion by plaintiffs to compel the production of the original records of Mr. Stratton, as specified in the subpoena duces tecum dated February 16, 2007, is denied.

Finally, defendants' application for an award of costs on the motion and cross-motion is denied. Defendants had not moved for this affirmative relief within their notice of motion (see CPLR 2214[a]).

The foregoing constitutes the decision and Order of the Court.

Dated: August 17, 2007

  
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HON. JOSEPH FARNETI  
Acting Justice Supreme Court