

**Fox v Baer**

2010 NY Slip Op 31784(U)

July 13, 2010

Sur Ct, Nassau County

Docket Number: 353496/D

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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ABBY H. FOX and DONNA C. BAER, as Co-Executors  
of the Estate of

MAURICE BAER,

Deceased,

Petitioners,

File No. 353496/D

-against-

Dec. No. 26536

AARON BAER, BAER and BAER, and  
BAER and BAER LLP,

Respondents.

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Before the court is a motion pursuant to CPLR 3124 made by petitioners Abby H. Fox and Donna C. Baer (“Executors”) seeking to compel respondents Aaron Baer (“Aaron”), Baer and Baer, and Baer and Baer LLP to produce responsive documents and for an award of costs and attorneys’ fees related to such motion and a cross-motion by Aaron pursuant to CPLR 3103 seeking a protective order to maintain the confidentiality of certain disclosure material and costs and attorneys’ fees with respect to the motions.

The underlying special proceeding was commenced on December 15, 2009 by the filing of a petition by Aaron Baer pursuant to SCPA 2105 and seeks to compel the Executors to deliver certain personal property to Aaron. Pursuant to an order to show cause dated May 12, 2010, Aaron sought related relief and the Executors were temporarily restrained from alienating any estate assets pending the hearing, but not the determination, of that motion. On the May 26, 2010 return date of the order to show cause the restraint was vacated.

Aaron is the brother of decedent Maurice Baer and his petition avers that they were business partners for more than fifty years and were engaged in the business of accounting (a functioning CPA firm), real estate investment, property management and consulting. The

petition further avers that pursuant to a Partnership Agreement dated November 1, 1955, upon Maurice's death, Aaron became entitled to purchase Maurice's interest in the partnership and to purchase Maurice's "interest in all other ventures where they are co-partners..." on favorable financial terms set forth in the agreement and that he effectively exercised this option. Aaron asserts that he and Maurice were co-partners in ownership of commercial real properties known as 265 W. 37<sup>th</sup> Street in New York City and 873 Broadway in New York City, and that these two properties are currently owned by 265 W. 37<sup>th</sup> Street LLC and 873 Broadway LLC respectively. Both LLC's had a member or members other than Aaron and Maurice at the time of Maurice's death. As discussed below, it is ownership of Maurice's interest in the two LLC's and several other properties and the distributions therefrom that is at issue.

The Executors oppose the petition and have submitted an attorney's affirmation in opposition dated May 25, 2010. In substance, the Executors' position is that these properties were not owned by Aaron and Maurice as "co-partners," so the purchase option is inapplicable.

On January 20, 2010, this court entered its Preliminary Conference Order on consent of counsel. As relevant to the subject motions, the order provided for document demands by January 27, 2010 and document production by March 15, 2010. The order further provided for a "draft confidentiality stipulation to be provided by respondents by 1/27/10."

It appears that Aaron's counsel prepared a proposed confidentiality stipulation and presented it to the Executors' counsel, who found it over arching and declined to execute it. The court's order did not require the execution of a confidentiality agreement.

The Executors duly served their "Petitioners' First Request for the Production of Documents." The attorney affirmation submitted in support of the CPLR 3124 motion states that

Aaron has refused to provide documents or information in response to such request and gave the Executors' refusal to execute the confidentiality agreement as the stated and primary reason for such non-production. On March 15, 2010, Aaron's counsel served "Respondents' Responses and Objections," but produced no documents. The response highlights that the primary reason for the non-production of any documents was the lack of the requested confidentiality agreement.

Counsel's affirmation addresses the communications between the parties concerning the proposed confidentiality stipulation in an apparent effort to justify the Executors' position in not agreeing to the proposal from Aaron's counsel. The court will not address relative responsibility in that regard except to note that it concludes that the parties made a good faith effort to resolve the issues as required by NYCRR 202.7(c). There was no requirement for a confidentiality agreement or stipulation and it appears that none was executed.

Aaron's cross-motion seeks a protective order respecting certain "disclosure material" described only as "tax returns, bank statements and other types of documentation that are customarily afforded confidential status." The cross-motion is supported solely by an attorney affirmation that is short on details regarding the purportedly confidential documents and why their production without a confidentiality order would cause "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]). Aaron does not object to production of these documents, but has refused to produce them without a suitable confidentiality stipulation or order in place.

It is well settled that the statements of an attorney, not made on personal knowledge, are legally insufficient to establish that the contents of a document constitute a trade secret (*Bristol, Litynski, Wojcik, P.C. v Town of Queensbury*, 166 AD2d 772, 773 [3d Dept 1990]; *Rooney v*

*Hunter*, 26 AD2d 891 [4th Dept 1966]). This conclusion would apply equally to purportedly confidential documents such as tax returns and bank statements that a party claims might cause prejudice or disadvantage. Counsel's affirmation focuses on the failed attempts to execute an agreement rather than facts and reasons why confidentiality is necessary. The court further notes that even should it grant Aaron's CPLR 3101 motion, it would not excuse Aaron's refusal to produce documents other than tax returns and financial materials.

Disclosure in New York civil actions is guided by the principle of "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101[a]). The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 1968] [internal quotation marks omitted]; see *Tower Ins. Co. of N.Y. v Murello*, 68 AD3d 977 [2d Dept 2009]). The Court of Appeals' interpretation of "material and necessary" in *Allen* has been understood "to mean nothing more or less than 'relevant' " (Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:5).

CPLR 3103(a) provides that "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Under CPLR 3103(a), "material confidential in nature ...shall be accorded judicial safeguards where possible" (*McLaughlin v G.D. Searle, Inc.*, 38

AD2d 810, 811 [2d Dept 1972]). Under the proper circumstances the court is empowered to condition the production of specified documents on execution of a confidentiality agreement (*see Yatter v William Morris Agency, Inc.*, 273 AD2d 83 [1<sup>st</sup> Dept 2000]). A protective order may bar the dissemination of information to anyone other than counsel working on the case (*Liebman & Charme v Lanzoni*, 164 Misc 2d 302 [Civ Ct, NY County 1995]). Generally the party seeking a protective order bears the burden of demonstrating entitlement to such order (*Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452 [2d Dept 1994]).

Disclosure of tax returns is disfavored since income tax returns contain confidential and private information (*Walter Karl, Inc. v Wood*, 161 AD2d 704 [2d Dept 1990]; *Briton v Knott Hotels Corp.*, 111 AD2d 704 [2d Dept 1985]). The party seeking to obtain production of income tax returns must make a strong showing of necessity and an inability to obtain the information contained in the income tax returns from any other source (*Samide v Roman Catholic Diocese of Brooklyn* 5 AD3d 463 [2d Dept 2004]; *Walter Karl, Inc. v Wood*, 161 AD2d 704, [2d Dept 1990]; *Abbene v Griffin*, 208 AD2d 483 [2d Dept 1994]).

Here, however, Aaron does not object to the production of the tax returns. In any event, the Executors have made a sufficiently strong showing of necessity. The tax returns will demonstrate the nature of the respective interests of Aaron and Maurice in the reporting entity which inevitably bears on the critical issue of whether Aaron and Maurice were co-partners in the venture. Moreover, since Maurice is most likely the recipient of forms K-1 with respect to such returns, the executors of his estate are entitled to these documents on that basis as well.

Trial courts have “broad power to regulate discovery to prevent abuse” (*Barouh Eaton Allen Corp. v International Bus. Machs. Corp.*, 76 AD2d 873, 874 [2d Dept 1980]). This

includes the power to enjoin the dissemination of discovery material to those not directly involved in the case (44A NY Jur 2d Disclosure § 384 [2010], citing, among others, *Seaman v Wyckoff Heights Med. Ctr., Inc.*, 8 Misc 3d 628 [Sup Ct, Nassau County 2005], *affd in part, appeal dismissed in part* 25 AD3d 598 [2d Dept 2006], *leave to appeal dismissed* 7 NY3d 864 [2006], and *affd as modified on other grounds* 25 AD3d 596 [2d Dept 2006]). Having the authority and exercising it, however, are two different things.

It is noted that Aaron has not denominated the specific documents with respect to which he claims confidentiality or privilege and there is no presentation respecting the requirements for a protective order under CPLR 3101(a).

Based upon the parties' submissions and the discussion set forth above, the Executors' motion is granted to the extent of requiring production of all requested documents within twenty (20) days of service of a copy of this order with notice of entry, and is otherwise denied. The cross-motion is denied in all respects.

This is the decision and order of the court.

Dated: July 13, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court