

**Hirsch v Grassi & Co., CPAs**

2011 NY Slip Op 31997(U)

July 13, 2011

Supreme Court, New York County

Docket Number: 113019/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Judge A. Middle

PART 11

Index Number : 113019/20  
 HIRSCH, LELAND  
 vs.  
 GRASSI & CO., CPAS  
 SEQUENCE NUMBER : 003  
 COMPEL DISCLOSURE

7 COPIES  
2 IN ENVELOPE  
1 to TRUIS  
4 TO JJ

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for compel discovery  
**FILED**  
 PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... JUL 18 2011  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_  
 NEW YORK  
 COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision order.

Dated: July 13, 2011 \_\_\_\_\_ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
LELAND HIRSCH, CHARLOTTE HIRSCH,  
HARBORAGE ISLE CONSULTING, INC.,  
HIRSCH FAMILY TRUST, HIRSCH HOLDINGS, LLC.,  
LELAND HIRSCH FAMILY PARTNERSHIP, and  
LELAND HIRSCH REVOCABLE TRUST

Index No. 113019/10

**FILED**

Plaintiffs,

**JUL 18 2011**

-against-

GRASSI & CO., CPAs, and LOUIS GRASSI,  
Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
JOAN A. MADDEN, J.:

Plaintiffs Leland Hirsch, Charlotte Hirsch, Harborage Isle Consulting, Inc., Hirsch Family Trust, Hirsch Holdings, LLC., Leland Hirsch Family Partnership, and Leland Hirsch Revocable Trust (together "plaintiffs") move pursuant to CPLR 3124 to compel the disclosure of documents in response to plaintiffs' First Request for the Production of Documents. Defendants Grassi & Co., CPAs, and Louis Grassi ("Grassi") oppose the motion.

Background

Plaintiffs retained Grassi to provide accounting and tax related services from approximately 2004 through 2010. In mid-2010, after becoming dissatisfied with Grassi's service, plaintiffs decided to engage a new accountant, Stanley Blicht ("Blicht") of the accounting firm Farber, Blicht, Eyerman & Herzog, LLP. ("Farber Blicht"). Plaintiffs thereafter requested that Grassi provide Blicht with client files, tax returns, and copies of all working papers prepared or obtained in connection with their engagement.

On August 16, 2010, Grassi sent a waiver letter to Blicht, demonstrating willingness to comply with plaintiffs' request so long as Blicht agreed not to comment on or provide expert testimony as to the quality of Grassi's work product. Blicht refused to sign the waiver, and Grassi thereafter rebuffed (on August 26, September 8, and October 1) repeated efforts by plaintiffs and Blicht to gain access to plaintiffs' client files, tax returns, and working papers.

On October 4, 2010, plaintiffs commenced this action, and moved by an Order to Show Cause for an order directing Grassi to produce the entire work product generated on their behalf so they could file their 2009 tax returns before the October 15 deadline. By a decision and order dated October 13, 2010, this court denied that part of plaintiffs' motion seeking the work papers, finding at that juncture, the record was insufficient to establish plaintiffs' entitlement to the papers.

On October 18, 2010, plaintiffs served their First Request for Production of Documents, requesting all documents concerning Grassi's performance of tax and accounting services for plaintiffs.<sup>1</sup> Grassi subsequently responded on November 2, 2010, objecting to each and every document request. While recreating Grassi's work product to complete plaintiffs' 2009 tax returns, Blicht allegedly uncovered potential instances of Grassi's accounting malpractice.

On January 10, 2011, plaintiffs moved for leave to file a first amended complaint,<sup>2</sup> and made the instant motion to compel. By decision and order dated July 11, 2011, this court

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<sup>1</sup> Specifically, plaintiffs requested: (1) All engagement letters or retainer agreements between plaintiffs and Grassi; (2-5) All documents concerning Grassi's performance of tax and accounting services for plaintiffs; (6) All documents concerning Grassi's August 16th waiver letter requesting that Blicht waive their right to comment upon the quality of Grassi's work; (7) All billing statements or invoices for services rendered from Grassi and all supporting documentation for such statements or invoices; (9) All client files, tax returns, and work papers generated on behalf of plaintiffs and their related entities for which Grassi received payment, including, but not limited to (a) all supporting documentation used to prepare 1099 INT, 1099 DIV, and 1099 B for all accounts held at Merrill Lynch and Fidelity, (b) 1099 Form for FMH Capital, (c) all hedge fund and partnership K-1s, (d) all documents regarding real estate taxes, (e) all documents regarding charitable contributions as reported on schedule A, (f) supporting schedules of realized gains and losses as reported on schedule D, (g) all documents regarding the sale of art, (h) all W-2s; (10) All client files, tax returns, and work papers generated by Grassi for Artec Systems Group, Inc. and Michael Leland, Ltd.; (11) All documents concerning document retention policies or procedures of Grassi, including but not limited to documents identifying the processes and requirements for the destruction of work papers and or work product; (12) All documents concerning Grassi's policies or procedures regarding the furnishing of client files, tax returns, and work papers to clients/former clients.

<sup>2</sup> Plaintiffs sought to add claims for negligence and professional malpractice in relation to the recording of a mortgage interest expense deduction and income twice on the 2008 tax return. Plaintiffs also sought to add a claim for prima facie tort.

[\* 4]

granted plaintiffs' motion for leave to amend to the extent of permitting plaintiffs to add causes of action for negligence and professional malpractice in relation to (1) the recording of income twice on plaintiffs' 2008 tax return, and (2) Grassi's failure to deliver client files, tax returns, and work papers in a timely manner. Accordingly, plaintiffs' motion to compel disclosure of documents must be viewed in context of these two remaining causes of action.

### Discussion

CPLR 3101(a) provides that a party is entitled to the "full disclosure of all evidence material and necessary in the prosecution or defense of an action." The Court of Appeals has liberally interpreted the terms "material and necessary" to mean "relevant," so that "the test is one of usefulness and reason." Allen v. Crowell-Collier Publ'g Co., 21 N.Y.2d 403, 406-07 (1968). See Anonymous v. High School for Environmental Studies, 32 A.D.3d 353, 358 (1st Dep't 2006) ("New York has long favored an open and far-reaching pre-trial discovery."). Thus, "any facts bearing on the controversy which will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity" must be disclosed upon request. Allen, 21 N.Y.2d at 406.

Plaintiffs contend that, under this standard, they are entitled to the documents sought in their First Request for Documents. Grassi counters that each request made by plaintiffs is burdensome and vexatious, asserting that plaintiffs have most of the documents in their possession, with the exception of Grassi's work papers. Grassi also contends, *inter alia*, that since plaintiffs are not entitled to the work papers, as determined by the court in its decision and order dated October 15, 2010, that such documents are neither material nor necessary to the causes of action, and plaintiffs are merely engaged in a "fishing expedition." However, Grassi's contentions are unavailing.

First, as described above, this court denied that aspect of plaintiffs' Order to Show seeking Grassi's working papers as the record at that time was insufficient to ascertain whether

[\* 5]

plaintiffs were entitled such papers. Notably, the court wrote “[we] make no determination as to whether the work [papers] are otherwise discoverable.” Simply put, as the request for the work papers was made at the onset of the case and before Grassi had an opportunity to answer the complaint, the discovery principles governing Article 31 of the CPLR did not apply at that time. Therefore, as set forth below, the court finds that plaintiffs are entitled to a substantial part of the discovery they seek, as such discovery is “material and necessary” to plaintiffs’ causes of action for negligence and professional malpractice.

The first category of documents sought by plaintiffs are all documents, including client files, tax returns, and work papers, in connection with Grassi’s performance of tax and accounting services for plaintiffs and their related entities<sup>3</sup> (Requests ¶2-5, 9,10). With respect to the specific requests for client files and tax returns, it is apparent that such information is “material and necessary” to the controversy, which concerns whether Grassi committed professional malpractice by failing to timely produce these documents to plaintiffs’ new accountants.

Indeed, these documents are required to be produce under the standards of professional accounting, with the exception of the working papers (discussed below), as promulgated by the American Institute of Certified Public Accountants (“AICPA”).<sup>4</sup> AICPA Professional Standards ET §501.02. See N.Y. Comp. Codes R. & Regs., tit. 8, §29.10(a)(8)(unprofessional conduct in the profession of accounting includes refusing to furnish to a client upon request (i) copies of tax returns; or, (ii) copies of reports or other documents that were previously issued to or for such client; or, (iii) any accounting or other records belonging to or obtained for the client which the

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<sup>3</sup> *Supra*, note 1.

<sup>4</sup> AICPA promulgates generally accepted accounting principles (GAAP) which set the standards of the accounting profession. In addition, state law may impose additional regulations on professional accountants.

[\* 6]  
accountant may have had occasion to remove from the client's premises or to receive for the client's account).

Accordingly, plaintiffs' discovery requests for all client files and tax returns are "relevant" to "sharpening the issue" as to whether Grassi, by allegedly failing to deliver said documents in a timely manner, departed from accepted professional standards. Allen, 21 N.Y. at 406-07. See Cumis Ins. Soc'y., Inc. v. Tooke, 293 A.D.2d 794, 798 (3rd Dep't 2002). However, to the extent such documents were already provided to plaintiffs in response to the October 4, 2010 Order to Show Cause, Grassi is not required to produce such documents, conditioned on Grassi providing an affidavit of a person with knowledge of the records setting forth the documents provided to plaintiffs in connection with the Order to Show Cause.

The next issue concerns plaintiffs' entitlement to discovery of Grassi's work papers. The First Request for the Production of Documents defines work papers as:

Grassi's records for the procedures applied, the tests performed, the information supporting, and the material conclusions reached for work produced in the practice public accountancy, including, but not limited to an audit, review, compilation, forecast, projection, programs used to perform professional services, analyses, memoranda, letters of confirmation and representations, copies or abstracts of company documents and schedules or commentaries prepared or obtained by Grassi.

(Definitions ¶12).

Grassi contends that plaintiffs are not entitled to discovery of these documents under the AICPA standards of professional accounting, and that these documents are not relevant to the controversy. In support of this contention, Grassi notes that AICPA states that work papers<sup>5</sup> are

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<sup>5</sup> Work papers are defined as including, but not limited to, audit programs, analytical review schedules, and statistical sampling results, analyses, and schedules prepared by the client at the request of the accountant. AICPA Professional Standards ET §501.02.

[\* 7]  
the property of the accountant, and that such documents do not need to be provided to the client upon their request.<sup>6</sup> AICPA Professional Standards ET §501.02.

Grassi's position is unavailing. First, under the AICPA when a client hires a new accountant, it is customary that the predecessor accountant will make him or herself available to the successor for consultation and to make available certain work papers. See AICPA Professional Standards AR §400.08. Section 400.08 further provides that:

[t]he predecessor accountant should determine which working papers are to be made available for review and which may be copied. Id. Ordinarily, the predecessor accountant should provide the successor access to documentation relating to matters of continuing accounting significance and those relating to contingencies Id. Valid business reasons (including, but not limited to unpaid fees), however, may lead the predecessor to decide not to allow access to the working papers. Id. The Predecessor accountant may decide to reach an understanding ("waiver") with the successor accountant [regarding] the use of the working papers.

Id. In addition, AICPA stipulates that state law may impose stricter requirements on the working papers of accountants. AICPA Professional Standards ET §501.02

The New York State Board of Regents<sup>7</sup> imposes such additional requirements on the professional accountant, stating that unprofessional conduct in the practice of accountancy includes

refusing to furnish to a client upon request: (iv) copies of information contained in an accountant's working papers, if such information would ordinarily constitute part of the client's books *and* is not otherwise available to the client. Such information shall include client owned records or records which the licensee receives from a client. In addition, it shall include any records, tax returns, reports, or other documents and information which are contained in an accountant's working papers that were prepared for the client by the accountant and for which the accountant has received payment from the client

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<sup>6</sup> The court acknowledges that the definition of work papers used by plaintiffs in their First Request for the Production of Documents is broader than the definition set forth by AICPA.

<sup>7</sup> In New York State, admission to the practice of public accountancy and the regulation of the profession is supervised by the New York Board of Regents and administered by the Education department. N.Y. Educ. L. §6504.

See N.Y. Comp. Codes R. & Regs., tit. 8, §29.10(a)(8)(iv) (emphasis added).

In any event, even assuming *arguendo* that certain of work papers sought by plaintiffs are not required to be furnished under the applicable professional standards, plaintiffs' discovery requests are not governed by these standards but rather by Article 31 of the CPLR. Under the CPLR, the work papers sought by plaintiffs are discoverable as they are relevant to their claims that Grassi committed professional malpractice by failing to provide them with work papers. Herbert H. Post & Co. v. Bitterman, Inc., 219 A.D.2d 214, 228 (1st Dep't 1996) (noting that accountant's work papers were produced in discovery in accountant malpractice action arising from failure to discover embezzlement scheme); Golden National Mortgage Banking Corp. v. KPMG Peat Marwick, 12/2/99 N.Y.C 137 (col. 1) (directing accountant to release work papers sought in discovery which were relevant to plaintiff's claim that accountants refusal to turn over the papers violated New York's professional standards imposed on accountants). Furthermore, even though it may later be determined that the professional accounting standards did not require Grassi to provide some or all of these work papers, and/or that plaintiffs were not damaged by the failure to turn them over, plaintiffs are not precluded from obtaining these documents at this juncture. In this regard, the court notes that an accountant's work papers are not protected by any privilege. See Karta Industries, Inc. v. Insurance Co. of State of Pennsylvania, 258 A.D. 375 (1st Dep't 1999); U.S. v. Pizzo, 260 F. Supp 216, 220 (S.D.N.Y. 1966) (stating that there is no privilege for an accountant-client relationship or work product of an accountant in New York); Accordingly, Grassi is required to comply with plaintiffs' discovery requests for the work papers.

Plaintiffs next request all engagement letters between or among plaintiffs and Grassi, all documents concerning Grassi's August 16<sup>th</sup> waiver letter, and all billing statements, invoices, and supporting documents for services Grassi rendered to plaintiffs (Requests ¶1, 6, 7). With respect to the request for all engagement letters, it is clear that such documents are relevant to

the controversy. Engagement letters between an accountant and client confirm that the accountant will conduct services in conformity with the generally accepted accounting principles (GAAP), and provide reasonable assurance to the client that the services will be performed to deter errors and irregularities that are material to financial statements. Similarly, the billing statements and invoices are "relevant" to the causes of action, as they demonstrate whether Grassi had a valid business reason for withholding the work papers from Blicht, which it would customarily disclose under AICPA.

As for the request for disclosure of all documents concerning Grassi's waiver letter, such documents are equally "material and necessary" insofar as they are relevant to whether Grassi properly withheld its work papers under the applicable professional standards.

Lastly, the court finds that plaintiffs' request for all documents concerning Grassi's retention policies and procedures regarding the furnishing of client files, tax returns, and work papers to former clients (Requests ¶11, 12) are relevant in "sharpening the issue" of negligence and professional malpractice. These documents are useful in reducing any potential "delay or prolixity" of the controversy, and are directly related to 8 N.Y.C.R.R. §29.10(a)(11), which sets standards for an accountant's retention of working papers.


#### Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion to compel is granted, and Grassi shall respond to plaintiffs' First Request for Documents within 45 days of this decision and order; and it is further

ORDERED that a status conference shall be held on August 18, 2011 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY 10007.

DATED: July 13 2011

  
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J.S.C.