

Schiller v Guthrie
2011 NY Slip Op 34147(U)
December 12, 2011
Supreme Court, Westchester County
Docket Number: 7709/11
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
GERARD M. SCHILLER and GERARD SCHILLER, MD
& DEBRA S. GUTHRIE, MD, A New York General
Partnership-at-Will,

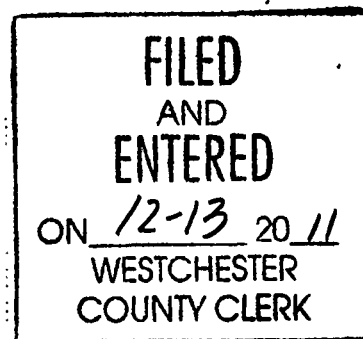
Plaintiffs,

-against-

DEBRA S. GUTHRIE, MD,

Defendant,

-----X
LEFKOWITZ, J.



DECISION & ORDER

Index No. 7709/11
Motion Date: Dec. 12, 2011
Seq# 4-6

FILED
DEC 13 2011
TIMOTHY C. DONN
COUNTY CLERK
COUNTY OF WESTCHESTER

The following papers numbered 1 to 49 were read on these motions by: (1) plaintiffs for an order (a) compelling discovery, (b) directing that no confidentiality order is needed, or directing defendant to sign the confidentiality order already executed by plaintiffs, (c) precluding defendant from offering evidence concerning information that defendant has failed to produce, (d) striking defendant's pleadings, and (e) for sanctions and an award of legal costs; and (2) defendant for (a) an order quashing plaintiffs' out of state third-party subpoenas, dated November 9, 2011, to financial institutions, Chase Bank USA NA, JP Morgan Chase Bank NA, and American Express/Datamark, (b) a protective order against said subpoenas and any further subpoenas directed to financial institutions with whom defendant has accounts, and (c) sanctions for the attorneys fees and costs associated with this motion.

Orders to Show Cause - Affirmations - Exhibits	1-25,37-46
Affirmations in Opposition - Exhibits	26-35,47-48
Memoranda of Law	36,49

Upon the foregoing papers and the proceedings held on December 12, 2011, these motions are determined as follows:

On or about March 30, 2011, this action commenced by plaintiffs filing a summons and complaint. Plaintiff Gerard M. Schiller, MD and defendant Debra S. Guthrie, MD, were

once married, and jointly owned a professional medical practice. Drs. Schiller and Guthrie were divorced pursuant to the judgment of divorce dated February 3, 2009 (Lubell, J.).¹

In this action, plaintiffs allege that plaintiff, Dr. Schiller, incurred certain fees and expenses in connection with the preparation and filing of corrected federal, state and New York City tax returns for the period January 1, 2006 through October 31, 2006, on behalf of the business partnership Schiller and Guthrie owned jointly. According to Dr. Schiller, he needed to amend the business' 2006 tax returns because the business was, for tax purposes, a general partnership instead of a sole proprietorship.² Plaintiffs further assert that defendant is responsible for one-half of the professional fees and expenses which have already been paid by Dr. Schiller on the partnership's behalf as a result of the filing of the amended 2006 tax returns.

On or about June 1, 2011, plaintiffs served plaintiffs' first demand for discovery and inspection of documents to defendant. On or about June 17, 2011, the court so-ordered the preliminary conference stipulation, wherein the parties agreed that all responses to discovery inspection demands would be served on or before September 16, 2011. On or about September 16, 2011, defendant responded to plaintiffs' first demand for discovery and inspection of documents.

On or about November 9, 2011, plaintiffs served three out-of-state third party subpoenas on the following entities: Chase Bank USA NA, JP Morgan Chase Bank NA, and American Express/Datamark, returnable November 30, 2011. The subpoenas seek various financial documents including defendant's account statements, transaction slips, deposit slips, for credit card accounts or bank accounts.

Plaintiffs' Motion to Compel, Preclude, Strike and for Sanctions/Attorneys' Fees

Plaintiffs move to compel defendant to produce certain financial documents which were requested by plaintiffs in their June 1, 2011 demand for discovery and inspection of documents. Plaintiffs aver that defendant was the partnership administrator and, as such, was and remains the repository of the partnership financial information. Plaintiffs further argue that they are entitled to the requested information and that the matrimonial stipulation signed by Drs. Schiller and Guthrie in 2008 does not bar the discovery since it did not address the unresolved tax matter at issue in this action.

¹ On or about April 29, 2008, Drs. Schiller and Guthrie entered into a stipulation of settlement to discontinue the matrimonial proceedings pending against them.

² According to documents submitted by plaintiffs in support of their motion, the business should have been considered a partnership instead of a sole proprietorship because, among other things, the funds derived from the practice were used jointly by the two partners to finance business and family expenses.

Plaintiffs assert that defendant has failed to comply with discovery obligations by merely objecting to plaintiffs' discovery demands without producing a single document. Plaintiffs also assert that defendant did not timely object to the discovery demands. Plaintiffs aver that the documents requested are relevant in that the requests seek partnership financial records related to partnership income and expenses. In addition, plaintiffs state that even though certain credit cards were solely in defendant's personal name, defendant used these credit cards, including an American Express and VISA card, for partnership expenses. Plaintiffs also argue that defendant's Chase bank account was used to deposit monies paid to her as practice administrator. Furthermore, according to plaintiffs, defendant has stated that many of the documents sought by plaintiffs reside on defendant's home computer and therefore plaintiffs' discovery requests seek an electronic data preservation plan in order to ensure that plaintiffs will be able to access said electronic data. Plaintiffs argue that defendant's conduct in avoiding discovery obligations amounts to willful conduct and warrants precluding defendant from introducing evidence at trial, striking defendant's answer and imposing sanctions and attorneys' fees.

Plaintiffs further argue that a confidentiality order is not warranted in this case. Plaintiffs aver that as defendant's partner, Dr. Schiller has the unfettered right to the partnership documents. Also, plaintiffs assert that to the extent the court deems that a confidentiality order is required, defendant should sign the draft order provided by plaintiffs.

In opposition to plaintiffs' motion, defendant argues that pursuant to the 2008 stipulation and 2009 judgment of divorce, Dr. Schiller expressly waived all rights to any further financial disclosure from defendant, including the production of documents. Defendant further argues that documents related to defendant's personal finances, defendant's own professional practice following the dissolution of the joint practice, and those documents in the 2005 and 2007 time frame are not relevant to the claims at issue in this litigation. Furthermore, defendant asserts that since Dr. Schiller has already filed the amended tax return for the 10 month period in 2006, no additional documents from defendant are necessary. Defendant's counsel further states that all documents are being preserved.

With respect to the confidentiality order, defendant argues that the draft that defendant has proposed is the appropriate order to be utilized under the circumstances of this case. The order defendant has drafted differs from plaintiffs' confidentiality order in that defendant's order identifies two types of confidential information: confidential information and highly confidential information that is for attorneys' eyes only.³ Defendant argues that the "highly confidential" category is necessary here because Dr. Schiller has already misused information concerning the professional practice to intentionally injure defendant. Defendant further states that in the prior

³ The latter category is defined to include "Confidential information as to which the producing party maintains a good faith concern that the confidential information is of such a sensitive nature that disseminating the confidential information to the other party would impede the producing party's ability to compete fairly in his/her medical practice or poses a concern regarding the potential misuse of such information by the other party or other detrimental injury."

proceedings between the parties, Dr. Schiller took numerous steps to interfere with defendant's practice, including making false and derogatory oral and written statements impugning defendant and her practice. Finally, defendant argues that plaintiffs have not demonstrated any basis for the court to impose sanctions or attorneys' fees as defendant has timely responded to discovery requests and raised proper objections.

Defendant's Motion to Quash, for a Protective Order and for Sanctions/Attorneys' Fees

Defendant argues that plaintiffs improperly served out-of-state subpoenas on financial institutions for documents that are irrelevant, and are the same documents that plaintiffs improperly seek from defendant and are the subject of plaintiffs' motion to compel. Defendant asserts similar arguments made in opposition to plaintiffs' motion to compel in support of defendant's arguments that the documents sought by the subpoenas are irrelevant and overbroad in time frame. In addition, defendant argues that the subpoenas are unauthorized by the CPLR and unenforceable as plaintiffs served the subpoenas by fax and by mail to entities outside New York state. Defendant further asserts that the court should issue a protective order to block plaintiffs from re-serving the subpoenas in New York state.

In opposition to defendant's motion, plaintiffs argue that the reason for their serving the subpoenas at issue was to prevent the documents from being destroyed. Since the documents requested date as far back at 2005, plaintiffs state that it was their understanding that documents dated 2005 would be destroyed in the beginning of 2012. Additionally, plaintiffs argue that given defendant's failure to produce the documents requested, plaintiffs did not believe that the documents would be produced by plaintiffs prior to January 1, 2012. Accordingly, plaintiffs state that they served the financial institutions to ensure that the documents would be preserved. Plaintiffs also aver that they served the subpoenas electronically because the companies prefer that method of service, and that none of the entities have objected to service in that manner.

With respect to the substance of the documents specifically requested, plaintiffs make similar arguments to the arguments made in their motion to compel, including that production of the documents is relevant and not barred by the 2008 stipulation or the 2009 judgment of divorce.

Analysis

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." 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 Publishing Co.*, 21 NY2d 403, 288 NYS2d 449 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]). However, "a party does not have the right to uncontrolled and unfettered disclosure." (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 873 NYS2d 145 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 845 NYS2d 124 [2d Dept 2007]). CPLR 3103(a) provides the Court may issue a protective order "denying, limiting, conditioning or regulating the

use of any disclosure device” to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”

“The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Patterson v New York City Health & Hosps. Corp. [Queens Hosp. Ctr.]*, 284 AD2d 516 [2d Dept 2001]; see *Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]). To invoke the drastic remedy of striking a pleading a court must determine that the party’s failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d at 997; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). “Willful and contumacious conduct can be inferred from repeated noncompliance with court orders, *inter alia*, directing depositions, coupled with no excuses or inadequate excuses” (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

With respect to plaintiffs’ motion, plaintiffs are entitled to certain discovery demanded in the June 1, 2011 discovery demands. Plaintiffs have made a proper showing that all financial documents related to Drs. Schiller and Guthrie’s joint practice for the time frame January 1, 2006 through October 31, 2006 are relevant. In addition, to the extent that defendant utilized a personal bank account or credit card for business expenses, documents concerning those accounts are relevant to the claims at issue in this litigation since these documents are relevant to whether the business operated as a partnership. Accordingly, all documents concerning the January 1, 2006 through October 31, 2006 time frame related to the parties’ joint practice, or defendant’s personal bank accounts or credit cards that were used for business purposes or expenses for the joint practice shall be produced on or before January 10, 2012. In addition, to the extent that the documents produced will include electronic documents, defendant shall, in response to Demand 5, state the manner in which the relevant documents are being preserved.

Plaintiffs have failed to demonstrate that defendant’s conduct in failing to produce the documents demanded amounts to willful or contumacious conduct justifying a preclusion order, striking defendant’s answer, or awarding sanctions or attorneys’ fees.

With respect to the confidentiality order, the draft order submitted to the court is not supported by the case law in that to the extent the parties dispute the confidential/highly confidential designation, the burden is on the party seeking to remove the designation rather than on the party seeking to maintain the designation (see *Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499 [2d Dept 2007]). Nevertheless, defendant has adequately demonstrated the need for the “highly confidential” category of documents. Accordingly, the parties are directed to resubmit the confidentiality order, on or before January 10, 2012, to be so-ordered by the court in accordance with this decision and order.

With respect to defendant’s motion to quash, a New York subpoena may not be served outside the state (see *e.g.*, *Siemens & Halske, GmbH v Gres*, 37 AD2d 768 [1st Dept 1971]; see also *Siegel*, N.Y. Prac. 383 [4th ed. 2011]). Here, plaintiffs have served unenforceable subpoenas that call for documents which this court is ordering be produced by defendant directly.

Accordingly, defendant's motion to quash the subpoenas is granted and defendant's motion for a protective order is also granted to the extent that plaintiffs are prevented from re-serving these financial institutions within New York state if defendant possesses the documents requested. To the extent defendant is no longer in possession of such documents and they are otherwise discoverable pursuant to this decision and order, plaintiffs may re-serve these institutions in New York state properly pursuant to the CPLR.⁴ Defendant's motion for attorneys' fees and costs associated with making this motion is denied on the basis that defendant has failed to demonstrate that plaintiffs' conduct is willful or contumacious.

In view of the foregoing, it is

ORDERED that the branch of plaintiffs' motion to compel production of documents is granted to the extent that on or before January 10, 2012, defendant shall serve a supplemental response to Demand 5 and produce all documents responsive to the June 1, 2011 discovery demands concerning the January 1, 2006 through October 31, 2006 time frame and related to the parties' joint practice, or defendant's personal bank accounts or credit cards that were used for business purposes or expenses for the joint practice; and it is further

ORDERED that the branch of plaintiffs' motion related to the confidentiality order is denied. The draft order submitted to the court is not supported by the case law in that to the extent the parties dispute the confidential/highly confidential designation, the burden is on the party seeking to remove the designation rather than on the party seeking to maintain the designation. While defendant has adequately demonstrated the need for the "highly confidential" category of documents, the parties are directed to resubmit the confidentiality order, on or before January 10, 2012, to be so-ordered by the court in accordance with this decision and order; and it is further

ORDERED that the branches of plaintiffs' motion to preclude defendant from introducing evidence at trial is denied, to strike defendant's answer, and for sanctions and legal costs are denied; and it is further

ORDERED that the branch of defendant's motion to quash the out-of-state subpoenas is granted; and it is further

ORDERED that the branch of defendant's motion for a protective order is granted to the extent that plaintiffs are directed not to serve the financial institutions served out-of-state in New York state if defendant possesses the documents requested. To the extent defendant is no longer

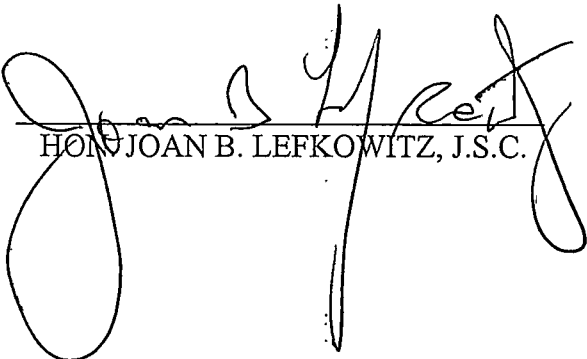
⁴ Since the court has determined that the relevant time frame for production of the financial documents begins January 1, 2006, documents from the 2005 time frame are not relevant. Accordingly, an order directing the banks to preserve documents dated in the 2005 time frame is not necessary.

in possession of such documents and they are otherwise discoverable pursuant to this decision and order, plaintiffs may re-serve these institutions in New York state so long as they are served properly pursuant to the CPLR; and it is further

ORDERED that the branch of defendant's motion for attorneys' fees and costs is denied; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on January 18, 2012 at 9:30 a.m.

Dated: White Plains, New York
December 12, 2011



HON JOAN B. LEFKOWITZ, J.S.C.

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cc: Compliance Part Clerk