

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

**FILED AND
ENTERED ON
DATE
June 30, 2005
WESTCHESTER
COUNTY CLERK**

-----X

MIRIAM OSBORN MEMORIAL HOME ASSOCIATION,

Petitioner,

Index No: 17175/97
18077/98
16567/99
16113/00
16626/01
18115/02
16987/03

-against-

THE ASSESSOR OF THE CITY OF RYE, THE
BOARD OF ASSESSMENT REVIEW OF THE CITY
OF RYE, AND THE CITY OF RYE,

Respondents,

DECISION & ORDER

-and-

THE RYE CITY SCHOOL DISTRICT,

Intervenor-Respondent.

-----X

DICKERSON, J.

MOTION TO QUASH TRIAL SUBPOENA FOR LOEB & TROPER WORK PAPERS

On May 16, 2005, Intervenor-Respondent [" the Respondents "] served a trial subpoena *duces tecum* on the Loeb & Troper accounting firm, the Petitioner's outside independent auditor, seeking " Copies of

all accountants' work papers in connection with their audit of Sterling Home Care, Inc. and Miriam Osborn Memorial Home Association for the years ending December 31, 2002 and December 31, 2003 "1. On May 19, 2005, Petitioners made an oral application pursuant to C.P.L.R. § 2304 to quash Respondents' trial subpoena.

The Rationale Of The Trial Subpoena

The Respondents assert² that the subpoenaed documents directly relate to the anticipated expert testimony of the Petitioner's accounting expert, Patrick Donnellan. It is the position of the Respondents that since they believe that Mr. Donnellan will comment on the audited financial statements prepared by Loeb & Troper, and since the Respondents intend to use the Loeb & Troper work papers to impeach Mr. Donnellan's expert conclusions, there is no basis to quash the subpoena compelling their production. Respondents also state that " In view of the fact that Mr. Donnellan's expert testimony focuses on, among other things, the accuracy of the audited financial reports prepared by Loeb & Troper and his review of those reports, Loeb & Troper's work papers are needed for proper cross-examination. "3

No Evidence Of Expert's Review Of Documents

According to Petitioner, " Mr. Donnellan's expert report was served and filed four and one-half months ago, and there has been no showing that Mr. Donnellan reviewed the subpoenaed documents in connection with his expert testimony. "4

Twice Sought & Twice Denied

The Court is aware that Respondents have twice sought and twice been denied permission to subpoena the very documents at issue herein. On December 13, 2002, Respondents served a " Motion to Compel Disclosure ", seeking leave to, among other things, issue a subpoena *duces tecum* to Loeb & Troper for " All work papers concerning the preparation of audited financial statements prepared on behalf of [The Osborn] [and] [Sterling Home Care] "5. By Decision dated March 31, 2003, the Court [Rosado, J.] held that " the School District has completely failed to meet [the] standard " applicable to nonparty discovery.6 By Notice of Motion dated May 5, 2003, Respondents sought reargument of their application to subpoena Loeb & Troper's work papers. The Court [Justice Rosado] adhered to its prior Decision and Order and denied Respondents' motion to reargue.

DISCUSSION

Documents " Material and Relevant "

The law in New York State regarding a subpoena *duces tecum* is set forth in Matter of Niagara Mohawk Power Corp. v. Town of Moreau Assessor, 8 A.D.3d 935, 779 N.Y.S.2d 608 (3d Dept. 2004). That case involved trial subpoenas and subpoenas *duces tecum* which were served on Respondent's experts seeking documents relating to the analyses of the subject properties as well as documents relating to appraisals of other hydroelectric facilities conducted within the last five years. Respondents moved to quash these subpoenas. Petitioners subsequently moved for issuance of an additional trial subpoena and subpoena *duces tecum* requesting documents concerning appraisals and other valuation analyses of hydroelectric facilities that were prepared by Respondent's appraiser Thompson during the previous five years. Petitioners also moved to subpoena the Town Clerk of Moreau seeking any appraisals of the three hydroelectric facilities at issue within the previous three years. Respondents cross-moved to quash those subpoenas as well. The Supreme Court granted petitioners' motions for additional subpoenas and denied respondents' motion and cross motions to quash the various subpoenas. The Appellate Division affirmed, stating that the purpose of a subpoena *duces tecum* is "to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial

proceeding' [Matter of New York State Department of Labor v. Robinson, 87 A.D.2d 877, 878, 449 N.Y.S.2d 321 [1982]]. Because a subpoena *duces tecum* cannot be used ' as part of a fishing expedition or to ascertain the existence of evidence' [Bostic v. State of New York, 232 A.D.2d 837, 839, 649 N.Y.S.2d 200 [1996], *lv. denied* 89 N.Y.2d 807, 655 N.Y.S.2d 887 [1997]], there must be a good faith showing of ' some real factual predicate ' suggesting that the documents that have been requested are reasonably likely to contain the information being sought [People v. Gissendanner, 48 N.Y.2d 543, 550, 423 N.Y.S.2d 893 [1979]; see Bostic V. State of New York , *supra* at 232 A.D. 2d 839; Matter of Constantine v. Leto, 157 A.D.2d 376,378, 557 N.Y.S.2d 611 [1990], *affd.* 77 N.Y.2d 975, 571 N.Y.S.2d 906 [1991]]." The Court concluded that " petitioners have made a sufficient showing that the documents they seek are material and relevant to the factual issues in this tax certiorari proceeding."

No Relevance Shown

In the instant matter, the Respondents claim that they need the Loeb & Troper work papers to understand and test Mr. Donnellan's expert conclusions⁷. However, there has been no showing that Petitioner intends to introduce the Loeb & Troper work papers on its case. Mr. Donnellan does not state in his expert report that he reviewed Loeb & Troper work papers⁸. His testimony will be based on his review of Petitioner's

audited financial statements and tax returns, Sterling Home Care's audited financial statements and tax returns, documents furnished in the substantiation audit conducted by Weiser, LLP which do not include the Loeb & Troper work papers, and Petitioner's level of care reports. Therefore, Mr. Donnellan intends to testify about Petitioner's financial records that were either produced in discovery or during the substantiation audit or that already exist in evidence. Those records do not include Loeb & Troper work papers.

Accuracy Of Audited Financial Statements Not An Issue

The Respondents also state that they need the Loeb & Troper work papers because Mr. Donnellan will be testifying as to the accuracy of Petitioner's audited financial statements⁹. However, the Donnellan report only addresses the consistency between different financial reports ("any differences [in the reports] can be reconciled after the different reporting requirements are taken into account"¹⁰, and the accuracy of the audited financial statements are not at issue here.

No Reliance Upon Work Papers To Form Opinion

The Respondents also claim that they require the Loeb & Troper work papers to "impeach Mr. Donnellan's expert conclusions"¹¹. Mr. Donnellan, however, did not prepare the Loeb & Troper work papers, nor

did he subscribe to any statements in the work papers. He also did not review or rely upon the work papers to form the basis of his opinions. Therefore, these documents cannot be used to impeach any testimony he may give at trial.

The court in Niagara Mohawk Power Corp., *supra*, at 8 A.D. 3d 937, permitted the subpoena of property appraisals for impeachment purposes in the very limited factual situation in which the appraiser had in fact relied upon the subpoenaed appraisal documents. In Orange and Rockland Utilities, Inc. v. Assessor of Haverstraw, 2004 WL 2472472 (Sup. Ct. West. Co. October 21, 2004), this Court held that the non-party appraisals Petitioners sought to use during cross examination of Respondent's appraisers could not be used for impeachment purposes where they were not relied upon by the expert witness. In the matter at bar, the Respondents do not contend that Mr. Donnellan relied on the subpoenaed documents and it is Petitioner's position that he did not rely upon the Loeb & Troper work papers in preparing his expert opinion.

Level Of Care Reports

The Respondents also contend that the Loeb & Troper work papers "will be relevant to the continued position of the Osborn throughout the trial that the level of care reports are somehow inaccurate in that they are not [audited]....I suspect the work papers will demonstrate they were relied on by the accountants"¹². However, " the Loeb & Troper

accountants never reviewed the Osborn's level of care reports for their audits nor are they contained or referenced in the Loeb & Troper audit work papers sought "¹³. Mr. Donnellan intends to affirmatively address the level of care reports but he has not reviewed or relied on the Loeb & Troper work papers.

Reasonableness Of Methodology

The fact that Mr. Donnellan may state his opinion on the reasonableness of the methodology for calculating the amount of subsidized care provided by Petitioner, as reflected in The Osborn's audited financial statements, does not make the Loeb & Troper work papers relevant, particularly where those documents were not reviewed by Mr. Donnellan in rendering his opinion.

Conclusion

This Court is of the opinion that there is no basis for production of the Loeb & Troper work papers. There is simply no connection between these work papers and either the unaudited level of care reports or the testimony of any witness elicited by Petitioner in the presentation of its case. There has been no "good faith showing of 'some real factual predicate' suggesting that the documents that have been requested are

reasonably likely to contain the information being sought." [Niagara Mohawk Power Corp., *supra*, at 8 A.D. 3d 937].

Accordingly, the subpoena *duces tecum* served on Loeb & Troper on behalf of Intervenor-Respondent is quashed in its entirety.

Dated: White Plains, N.Y.
June 30, 2005

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

TO: Peter G. Bergmann, Esq.
Cadwalader, Wickersham & Taft, LLP
Attorneys for Petitioner
100 Maiden Lane
New York, N.Y. 10038

John E. Watkins, Jr., Esq.
Attorney for Petitioner
175 Main Street
White Plains, N.Y. 10601

Robert A. Weiner, Esq.
McDermott, Will & Emery
Attorneys for Respondents
50 Rockefeller Plaza
New York, N.Y. 10020-1605

Kevin Plunkett, Esq.
Corporation Counsel
City of Rye
Thacher Proffitt & Wood LLP
50 Main Street, 5th Floor
White Plains, N.Y. 10606

ENDNOTES

1. Letter of Robert Weiner dated June 10, 2005 [" Weiner Ltr. I "] at Ex. A; Letter of Peter Bergmann dated June 17, 2005 [" Bergmann Ltr. I "] at Ex. A.
2. Weiner Ltr. I.
3. Weiner Ltr. I at p. 3. Bergmann Ltr. I was submitted in support of Petitioner's motion to quash and in response to Weiner Ltr. I. This was followed by a letter from Robert Weiner dated June 22, 2005 [" Weiner Ltr. II "] responding to Bergmann Ltr. I, and finally by a letter from Peter Bergmann dated June 24, 2005 [" Bergmann Ltr. II "] in further support of Petitioner's application to quash the trial subpoena *duces tecum*.
4. Bergmann Ltr. I at p. 1.
5. Bergmann Ltr. I at Ex. B which is Exhibit K to Motion to Compel Disclosure.
6. Bergmann Ltr. I at Ex. D at p. 4. The Court relied on Lanzello v. Lakritz, 287 A.D.2d 601, 731 N.Y.S.2d 763 (2d Dept. 2001)("A party seeking discovery from a nonparty witness must show special circumstances...Special circumstances requires a showing that the information cannot be obtained elsewhere").
7. Weiner Ltr. I.
8. Donnellan's Expert Report is Ex. H to Bergmann Ltr. I.
9. Weiner Ltr. I at p. 3.
10. Donnellan Report, para. 3.
11. Weiner Ltr. I at p. 3.
12. Bergmann Ltr. I at p. 6, Ex. g.
13. Bergmann Ltr. I at p. 6.