

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT COURT OF APPEAL - SECOND DIST.

DIVISION EIGHT

FILED

MAY 25 2011

JOSEPH A. LANE

Clerk

DOUGLAS E. JOHNSTON et al.,

B231979

Petitioner,

(Super. Ct. No. BC440923)

v.

(Ronald M. Sohigian, Judge)

SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF
LOS ANGELES,

Respondent.

ALTERNATIVE WRIT OF MANDATE
and ORDER

WELLS FARGO BANK, N.A.,

Real Party in Interest.

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES:

The court has read and considered (1) the petition for writ of mandate filed on April 1, 2011, (2) the preliminary opposition filed on April 4, 2011, (3) the further preliminary response filed on April 15, 2011, and (4) the reply filed on April 25, 2011.

After considering the above, it appears to this court that the respondent trial court abused its discretion, but only to the extent that it required petitioners' to produce tax returns sought by real party in interest.

Tax returns are privileged. (See *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718-723 (*Schnabel*).) Although the privilege is not absolute, courts

have held it does not apply in only very specific circumstances. Thus, in *Schnabel*, the Supreme Court explained that the privilege “is waived or does not apply in three situations: ‘(1) there is an intentional relinquishment [citation], (2) the “gravamen of [the] lawsuit is so inconsistent with the continued assertion of the taxpayer’s privilege as to compel the conclusion that the privilege has in fact been waived” [citation], or (3) a public policy greater than that of confidentiality of tax returns is involved [citation].’ ” (*Schnabel v. Superior Court, supra*, 5 Cal.4th at p. 721.)

While real party in interest purported to invoke all three of these exceptions, the record before this court does not contain facts that can support the compelled disclosure of the returns at this time.

1. Intentional Relinquishment. Even assuming *arguendo* that petitioners’ former counsel could have “intentionally relinquished” the privilege on petitioners’ behalf, the record does not establish such intentional relinquishment. The fact that counsel produced two of the individual petitioner’s tax returns in August 2010 under highly ambiguous circumstances is insufficient to establish an intentional relinquishment with respect to other returns, even with respect to the individual petitioner, much less with respect to the other petitioners. Similarly, the fact that petitioners’ former counsel agreed to provide tax returns and other documents in exchange for a continuation of the deadline to file a motion to compel did not result in a waiver of the privilege when those documents were not produced. At most, it freed real party in interest to file a motion to compel.

2. Gravamen of Lawsuit Inconsistent With Privilege Assertion. The second *Schnabel* exception cannot be invoked against a *defendant* based on the allegations in a *plaintiff’s* complaint. (Compare *Wilson v. Superior Court* (1976) 63 Cal.App.3d 825 [taxpayer could not assert the tax return privilege in malpractice action she filed against accountants she hired to advise and handle her tax problems].)

3. Public Policy Exception. Finally, real party in interest has not identified any public policy that is sufficient to outweigh the privilege at this time. In *Schnabel v. Superior Court, supra*, 5 Cal.4th at p. 721, the Supreme Court explained that this privilege “has been narrowly construed, and has been applied only when warranted by a legislatively declared public policy.” While it is true that a plaintiff who has obtained a writ of attachment is entitled to considerable and detailed discovery regarding a defendant’s assets, the fact such an attachment has issued is not enough, in and of itself, to override the privilege. (Cf. *Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268, 275 [“the fact that . . . a fact finder has found a basis for imposing punitive damages does not, standing alone, constitute a basis for compelling the disclosure of tax return information”].) To the extent that real party in interest asserts that compelled disclosure of confidential tax returns is justified because petitioners have refused to comply with “legitimate discovery requests,” the record does not support such disclosure, at least not at this time. Real party in interest appears to rely solely on the fact that it was required to file a motion to compel, which the trial court granted. However, the mere fact that a motion to compel is granted is not enough to support the compelled disclosure of privileged material.

There may be circumstances in this case where the compelled disclosure of tax returns may be warranted. At this time, however, real party in interest has failed to demonstrate that petitioners’ have “interfered with [plaintiff’s] ability to prove [its] case” or “undermined the discovery process and the judicial system’s ability to ensure an ordered process designed to uncover the truth.” (*Weingarten v. Superior Court, supra*, 102 Cal.App.4th at p. 271.)

Based on the above, and good cause appearing therefor, you are directed to:

(a) vacate only that portion of your April 12, 2011 order requiring petitioners to produce tax returns, and to thereafter enter a new and different order

denying petitioners' discovery motions to the extent they seek production of tax returns, or

(b) in the alternative,

SHOW CAUSE before this court, in its courtroom at 300 South Spring Street, Los Angeles, California, at 1:00 p.m. on July 26, 2011, why you have not done so and why a peremptory writ of mandate requiring you to do so should not issue.

If the respondent court elects to proceed under alternative (a) above, the respondent court is directed to deliver to this court (via facsimile or other method of delivery) a copy of the minute order reflecting its action on or before June 16th, 2011.

If the respondent court elects not to proceed under alternative (a) above, real party in interest may serve and file a written return to the petition on or before June 23, 2011.

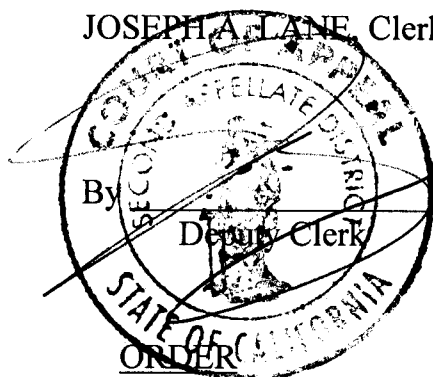
Petitioner may serve and file a reply within 7 days after the return is filed.

By order of this court.

ATTEST my hand and the seal of this court this 26th day of May, 2011.

JOSEPH A. LANE, Clerk

MAY 26 2011



Let the foregoing writ issue.

BIGELOW, P. J.

FLIER, J.