

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA
CASE NO. 12-034123 (07)

P & S ASSOCIATES GENERAL
PARTNERSHIP, etc. et al.,

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**DEFENDANT FRANK AVELLINO'S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION TO COMPEL HIM TO PRODUCE DOCUMENTS**

Defendant, Frank Avellino ("Avellino"), by and through his undersigned counsel, files this memorandum of law in opposition to Plaintiffs' Motion to Compel Defendant Frank Avellino to Produce Documents. The documents sought consist of private financial records of Avellino and his wife that have no relevance to this action and are protected from disclosure by Florida's constitution. Plaintiffs have failed to meet their burden to overcome the Avellinos' privacy rights and their motion should be denied.

Factual and Procedural Background

Plaintiffs served a Fourth Document Request to Avellino which requests, inter alia, documents from a non-party, 27 Cliff, LLC ("27 Cliff") (Request Numbers 4, 5, 6, 8, and 9). Avellino produced responsive documents to Request Number 4, and responded that he had no documents in response to Requests Number 5, 6, and 8.¹ Request Number 9 asks for "To the extent not already produced in response to a request, all documents concerning 27 Cliff, LLC".

¹ Avellino did not object to these requests even though Plaintiffs failed to serve a subpoena on 27 Cliff, LLC, a non-party, because they request documents which are relevant to the issues raised in the Fifth Amended Complaint. These requests sought documents which reflected payment of funds from Michael Sullivan to Avellino through the entity 27 Cliff, which payments to Avellino are at issue in the Fifth Amended Complaint.

This discovery request is overbroad and does not comply with Florida Rule of Civil Procedure 1.350(b) to "...describe each item and category with reasonable particularity", nor does it specify a time frame for same.

Notwithstanding its non-compliance with the Florida Rules of Civil Procedure, this Court overruled Avellino's overbroad objections, and required Avellino to respond to the requests, but permitted privileges, such as personal or financial privacy to be raised. Pursuant to the Court Order dated May 12, 2015, Avellino responded to Request Number 9 by asserting a privilege of private and confidential information, and provided a privilege log, which identifies "Quickbooks General Ledger of 27 Cliff, LLC" as the privileged documents. Plaintiffs' Motion to Compel seeking the production of the privileged documents alleges that Avellino's invocation of Art. I, Section 23, Florida Constitution should be overruled because there is no governmental intrusion to assert the right to privacy, and that such provision only protects the information of a natural person. Plaintiffs' argument is flawed and its motion should be denied.

Argument

Contrary to Plaintiffs' contention, courts have recognized that court orders compelling discovery, such as the instant one, constitute state action that may impinge on constitutional rights, including the privacy rights raised in Article I, Section 23 of the Florida Constitution. *See Berkeley v. Eisen*, 699 So.2d 789 (Fla. 4th DCA 1997). The Florida Supreme Court has recognized, "...the potential for invasion of privacy is inherent in the litigation process". *Rasmussen v. South Florida Blood Serv., Inc.*, 500 So.2d 533, 535 (Fla. 1987). The financial information of private persons is entitled to protection by Florida's constitution right of privacy, if there is no relevant or compelling reason to compel disclosure. *Mogul v. Mogul*, 730 So.2d

1287, 1920 (Fla. 5th DCA 1999). Moreover, there must be a compelling reason for disclosure of a non-party's financial record. *Borck v. Borck*, 906 So.2d 1209 (Fla. 4th DCA 2005).

Plaintiffs' reliance on *Bd. Of County Com'rs of Palm Beach County v. D.B.*, 784 So.2d 585, 591 (Fla. 4th DCA 2001) is misplaced. There, the court held that an adult entertainment performer, who was required to provide personal information in connection with obtaining a required license, did not have a reasonable expectation of privacy so as to preclude such information being included in a publically available data base. The production of such information was not at issue, but rather the subsequent public availability of such information. The court held that since Florida's right to privacy is subservient to the Public Records Act, there was no government intrusion. This case provides no support for Plaintiffs' claim that the Florida's right to privacy is not available in litigation discovery.

The burden to prove the confidential financial information requested is relevant is on the party seeking the information, and it is limited to those matters related to the litigation as framed by the parties' pleading. *Spry v. Prof'l Emp'r Plans*, 985 So.2d 1187, 1188-89 (Fla. 1st DCA 2008); *Roussio v. Hannon*, 146 So.3d 66 (Fla. 3rd DCA 2014).

In the instant case, 27 Cliff is not a party to the action, and there are no allegations contained in Plaintiffs' Fifth Amended Complaint which specifically address or name 27 Cliff. The only involvement this entity has with any allegations in this lawsuit is that it was the recipient of \$260,159.16 paid by Sullivan and Powell on behalf of Avellino. Avellino does not dispute that 27 Cliff LLC received these monies and in fact Avellino produced the Account Quick Report from 27 Cliff which reflects the dates and amounts of payments it received from Sullivan and Powell. (A copy is attached as Exhibit A; Bate Stamp Number Avellino_P&S000692).

Plaintiffs' only argument or reason why the General Ledger of 27 Cliff could possibly be relevant to the pleadings raised, or why there is a compelling reason that such confidential financial records be produced is that 27 Cliff is related to Avellino and it received payments. Motion, ¶ 3. Neither of these facts is disputed nor do they create a reason to overcome Avellino and his wife's right to privacy. In fact, the financial documents of 27 Cliff, other than the document produced, are not relevant to any of the issues raised by the pleadings in this matter.

Furthermore, Plaintiffs' contention that the right to privacy only protects the information of a "natural person" and therefore is not available to the Avellinos is simply wrong and in any event misses the point. The Avellinos are the natural persons who claim that the 27 Cliff records, which amount to their personal finances, constitute an invasion of their privacy. As sworn to by Avellino in his Declaration, which has been previously provided to Plaintiffs and the Court, and is attached herein as Exhibit B, the financial information which Avellino seeks to protect is that of he and his wife, Nancy Avellino, both natural persons. 27 Cliff was nothing more than a checking account utilized by Avellino and his wife as a personal checking account from which they paid everyday living expenses. *See* Declaration of Avellino. 27 Cliff was never involved in any business, nor did it have any business dealings with Plaintiffs, Michael Sullivan or any entity controlled by Michael Sullivan. *See* Declaration of Avellino. It was merely the bank account into which Sullivan caused the transfer of \$260,159.16 to Avellino. *See* Declaration of Avellino. Thus, the constitutional privacy rights are properly applied to the financial information of the Avellinos sought by Plaintiffs.

Bianchi & Cecchi Services, Inc. v. Navalimpianti USA, Inc., 159 So.3d 980 (Fla. 3rd DCA 2015), upon which Plaintiffs rely to support their contention that the Avellinos are unable to claim a privacy right under the Florida constitution to 27 Cliff documents actually undercuts

their position. In *Bianchi & Cecchi Services* the court addressed the question of whether an evidentiary hearing was required when a non-party objects to a subpoena requesting financial information, holding that it was not. In so ruling the court recited the existing law that when seeking confidential records from a third party a court must weigh the requesting party's need for such records against the privacy interests of the objecting non-party, not merely whether such records are relevant. The court cited to *2245 Venetian Court Bld 4, Inc. v. Harrison*, 149 So.3d 1176 (Fla. 2d DCA 2014). *Harrison* involved discovery post judgment and whether a corporation whose documents were sought could assert the constitutional right to privacy on behalf of its shareholders, officers and directors. The court recognized the rule that ordinarily a corporation cannot raise privacy rights on behalf of third persons unless its standing could be established, but even in the absence of third party standing, a "trial court can consider the constitutional rights of third parties who would be substantially affected by the outcome of the litigation" quoting from *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, 945 (Fla. 2002). *Harrison* makes clear that this Court may and should consider the privacy rights of the Avellinos in determining whether 27 Cliff documents are to be produced.

Plaintiffs have failed to establish a need for the financial information requested that outweighs the privacy rights of Avellino and his wife, a non-party to this action. See *Rouso v. Hannon*, 146 So.3d 66, 71 (Fla. 3rd DCA 2014) (when confidential discovery is sought from a third party it is not only subject to mere relevance inquiry respondents must establish a need for the information that outweighs the privacy interest of the third party). The specific details on what and how Avellino and his wife spent the monies from the 27 Cliff account are not relevant and are private matters which are entitled to be kept secret.² *Rouso*, 146 So.3d at 70. If such

² Additionally the General Ledger reflects monies which were not paid by Sullivan and Powell, which other monies are clearly the personal financial information of Avellino and his wife, which are unrelated to this litigation.

financial documents were compelled by this Court to be disclosed, it would cause irreparable harm to Avellino and his wife. *See Spry v. Professional Employer Plans*, 985 So.2d 1187 (Fla. 1st DCA 2008).³

Based on the foregoing it is respectfully submitted that Plaintiffs' Motion to Compel Defendant Frank Avellino to Produce Documents should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 this 10th day of August, 2015.

HAILE, SHAW & PFAFFENBERGER, P.A.

Attorneys for Defendant Avellino
660 U.S. Highway One, Third Floor
North Palm Beach, FL 33408
Phone: (561) 627-8100
Fax: (561) 622-7603
gwoodfield@haileshaw.com
bpetroni@haileshaw.com

By: /s/ Gary A. Woodfield
Gary A. Woodfield, Esq.
Florida Bar No. 563102

³ It would also be improper to compel disclosure of this financial information at this time, because it is tantamount to allowing financial discovery in aid of execution, without first having a trial and any final judgment entered against Avellino.

SERVICE LIST

THOMAS M. MESSANA, ESQ.
MESSANA, P.A.
SUITE 1400, 401 EAST LAS OLAS BOULEVARD
FORT LAUDERDALE, FL 33301
tmessana@messana-law.com
Attorneys for P & S Associates General Partnership

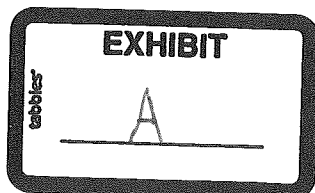
LEONARD K. SAMUELS, ESQ.
ETHAN MARK, ESQ.
STEVEN D. WEBER, ESQ.
BERGER SIGNERMAN
350 EAST LAS OLAS BOULEVARD, STE 1000
FORT LAUDERDALE, FL 33301
emark@bergersingerman.com
lsamuels@bergersingerman.com
sweber@bergersingerman.com
DRT@bergersingerman.com
Attorneys for Plaintiff

PETER G. HERMAN, ESQ.
TRIPP SCOTT, P.A.
15TH FLOOR
110 SE 6TH STREET
FORT LAUDERDALE, FL 33301
pgh@trippscott.com
ele@trippscott.com
*Attorneys for Defendants Steven F. Jacob
and Steven F. Jacob CPA & Associates, Inc.*

JONATHAN ETRA, ESQ.
MARK F. RAYMOND, ESQ.
SHANE MARTIN, ESQ.
CHRISTOPHER CAVALLO, ESQ.
BROAD AND CASSEL
One Biscayne Tower, 21st Floor
2 South Biscayne Blvd.
Miami, FL 33131
mraymond@broadandcassel.com
ssmith@broadandcassel.com
ccavallo@broadandcassel.com
msouza@broadandcassel.com
smartin@broadandcassel.com
msanchez@broadandcassel.com
Attorneys for Michael Bienes

27 CLIFF, LLC
Account QuickReport
All Transactions

Type	Date	Name	Memo	Split	Amount
FEES					
Sullivan & Powell					
Deposit	3/10/2004	Michael D. Sullivan & Associates, Inc	Sullivan	NORTHERN TRUST BANK	51,983.82
Deposit	3/1/2005	Michael D. Sullivan & Associates, Inc	Deposit	NORTHERN TRUST BANK	50,265.57
Deposit	3/6/2006	Michael D. Sullivan & Associates, Inc	2005	NORTHERN TRUST BANK	37,488.61
Deposit	3/5/2007	Michael D. Sullivan & Associates, Inc	2006	NORTHERN TRUST BANK	89,616.87
Deposit	1/30/2008	Michael D. Sullivan & Associates, Inc	2007	NORTHERN TRUST BANK	50,804.49
Total Sullivan & Powell					260,159.16
Total FEES					260,159.16
TOTAL					260,159.16



IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 12-034123 (07)

P & S ASSOCIATES GENERAL
PARTNERSHIP, etc. et al.,

Plaintiffs,

vs.

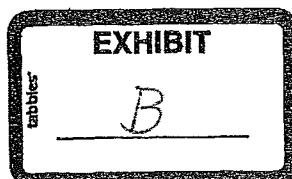
MICHAEL D. SULLIVAN, et al.

Defendants.

DECLARATION OF FRANK AVELLINO

I, Frank Avellino, affirm under penalty of perjury as follows:

1. I am a named defendant in the above captioned action. I submit this declaration in response to Plaintiffs' motion to compel certain discovery from both me and my wife, who is not a party to this action.
2. I am the sole manager of 27 Cliff, LLC ("27 Cliff"), a Florida limited liability company formed in 2003 as part of my wife and my estate planning. See Operating Agreement attached as Exhibit "A". The sole member of 27 Cliff is Frank J. Avellino and Nancy Carroll Avellino as tenants by the entirety. See Articles of Organization attached as Exhibit "B". 27 Cliff is inactive and was administratively dissolved in 2010 for failure to file an annual report.
3. When active, 27 Cliff was nothing more than a checking account utilized by me and my wife as a personal checking account from which we paid for some of our everyday living expenses.



4. 27 Cliff was never involved in any business and it had nothing to do with the Plaintiffs in this action, Michael Sullivan or any entity controlled by him. It was merely the bank account into which Sullivan caused the transfer to me of \$260,159.16.

5. Other than the QuickBooks print out previously produced that shows the deposit of the \$260,159.16 Michael D. Sullivan & Associates, Inc. transferred into 27 Cliff's bank account, I am not aware of any other document evidencing any payments to me or any entity within my control.

6. I am aware that in the annual filings for 27 Cliff for 2008 and 2009 Nancy Carroll Avellino is identified as a manager. This is simply a mistake. I have always been the sole manager of 27 Cliff. At no time has my wife been a manager of or had any involvement in the management or operation of 27 Cliff.

I declare under penalty of perjury that the foregoing is true and correct.

March 30, 2015
Palm Beach, Florida


Frank Avellino