

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

CASE NO.: CACE 12-034123 (07)

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

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**DEFENDANT MICHAEL BIENES'S RESPONSE
IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS WITH SUPPORTING MEMORANDUM OF LAW**

Defendant, Michael Bienes, hereby files this Response in Opposition to Plaintiffs' Motion to Compel Defendant Bienes to Produce Documents in Response to Plaintiffs' Third Request for Production, stating:

INTRODUCTION

1. On June 11, 2014, Plaintiffs served their Third Request for Production of Documents.
2. On July 30, 2014, per an agreed extension, Bienes timely served his Responses and Objections to the Third Request ("Response"). The Response objects to requests nos. 1 through 4 and states "none" with respect to requests nos. 5 and 6.
3. On August 7, 2014, Plaintiff moved to compel Bienes to respond and produce documents responsive to requests nos. 1 through 4 of the Third Request.

BROAD and CASSEL

One Biscayne Tower, 21st Floor 2 South Biscayne Blvd. Miami, Florida 33131-1811 305.373.9400

4. The motion should be denied. Requests 1 through 4 (i) seek irrelevant documents, (ii) impermissibly seek discovery of private financial information and likely constitute impermissible and premature discovery in aid of execution, and (iii) are exceedingly overbroad and vague. For these reasons, explained in more detail below, Plaintiffs' motion to compel should be denied and Bienes's objections sustained.

ARGUMENT

5. While the permissible scope of discovery is indeed broad, it is not unlimited. *See East Colonial Refuse Serv., Inc. v. Velocci*, 416 So. 2d 1276, 1277 (Fla. 5th DCA 1982); *see also* Fla. R. Civ. P. 1.280(b). To be discoverable, the information sought must be relevant to the proceeding and admissible or reasonably calculated to lead to the discovery of admissible evidence. *Allstate Ins. Corp. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). *See also Velocci*, 416 So. 2d at 1277; *see also McCarty v. Estate of Schultz*, 372 So. 2d 210, 212 (Fla. 3d DCA 1979) (party may not utilize the discovery process for a "mere fishing expedition or general inquisitorial examination of papers with a view to ascertaining whether something of value may or may not show up"). And even if this relevance standard is met, "the particular items or information sought to be discovered may be privileged and therefore beyond permissible discovery." *See Velocci*, 416 So. 2d at 1278-78, n.2 (citing *Central Florida Skates, Inc. v. Thomas*, 393 So. 2d 1200 (Fla. 5th DCA), *rev. denied*, 402 So. 2d 608 (Fla. 1981)). Thus, the trial court has broad discretion to refuse discovery of irrelevant information, deny requests that are unreasonable and oppressive, and protect privileged information.¹ Here, requests 1 through 4

¹ *See Sunrise Shopping Center, Inc. v. Allied Stores Corp.*, 270 So. 2d 32, 34 (Fla. 4th DCA 1972) (trial court had discretion to quash third-party subpoena that was unreasonable and oppressive because witness did not have knowledge of facts asserted); *Travelers Indem. Co. v. Salido*, 354 So. 2d 963, 964 (Fla. 3d DCA 1978) (trial court erred in not quashing subpoena that requested irrelevant information because discovery "cannot be utilized to explore all the minute details of a controversy or delve into immaterial or inconsequential matters").

run afoul of both requirements—they seek documents that are irrelevant and call for disclosure of protected financial information. And as if that were not enough, the requests also are overbroad and vague.

I. The motion to compel should be denied because requests 1 through 4 seek irrelevant information.

6. Documents are relevant if they relate to a claim or defense of a party. *See* Fla.R.Civ.P. 1.280(b). Here, Plaintiffs ask for documents relating to Bernard Madoff and his company, or exchanged between Bienes and Bernard Madoff and his company. These documents only could relate to Plaintiffs’ decidedly stale claims—claims which were recently dismissed by this Court as time-barred under the applicable statutes of limitations and repose. *See* Order Granting Defendants Frank Avellino and Michael Bienes’ Motion to Dismiss Third Amended Complaint dated August 24, 2014, dismissing Counts VIII, X, XI and XII of the Third Amended Complaint. While the Order affords Plaintiffs one, final opportunity to amend to state timely causes of action, that Plaintiffs will be able to do so is highly unlikely. And even if Plaintiffs are eventually able to re-plead their stale, Bienes should not be compelled to produce documents relative to those claims until *after* Plaintiffs demonstrate timely claims can, in fact, be pled. Accordingly, and at a minimum, Plaintiffs’ motion to compel should be denied pending their filing of a Fourth Amended Complaint that states viable causes of action to which the sought-after discovery relates.

II. The motion to compel should be denied because requests 1 through 4 seek protected financial information.

7. Plaintiffs’ motion should also be denied because requests 1 through 4 seek Bienes’s and his family’s private financial information without any relevant or compelling reason for doing so. “Article I, section 23, of the Florida Constitution protects the financial

information of persons if there is no relevant or compelling reason to compel disclosure.” *Rowe v. Rodriguez-Schmidt*, 89 So. 3d 1101, 1103 (Fla. 1st DCA 2012) (citing *Borck v. Borck*, 906 So. 2d 1209, 1211 (Fla. 4th DCA 2005)). “This is because ‘personal finances are among those private matters kept secret by most people.’” *Id.* (citing *Woodward v. Berkery*, 714 So.2d 1027, 1035 (Fla. 4th DCA 1998)).

8. Moreover, “the burden to prove the information is relevant or reasonably calculated to lead to the discovery of admissible evidence is on the party seeking the information.” *Id.* (citing *Spry v. Prof'l Emp'r Plans*, 985 So.2d 1187, 1188–89 (Fla. 1st DCA 2008)). This determination can be made only after an evidentiary hearing. *Id.* It is a departure from the essential requirements of law for a court to order production of personal financial information without first conducting an evidentiary inquiry into its relevance. *Rowe*, 89 So. 2d at 1103. The assertions or arguments of a party’s attorney are not sufficient evidence of relevance. *See DiSarrio v. Mills*, 711 So. 2d 1355, 1357 (Fla. 2d DCA 1998).

9. The motion to compel must be denied even if the requests were instead categorized simply as premature discovery in aid of execution (very premature, as Plaintiffs do not even have an operative complaint pending). Florida courts are unequivocal in holding that a party may be irreparably harmed if forced to reveal financial information where no judgment has yet been entered. *See Friedman v. Heart Inst. of Port St. Lucie, Inc.*, 863 So.2d 189, 194 (Fla.2003) (general rule is that financial information is ordinarily discoverable only in aid of execution after judgment). Much like ordering discovery of protected financial information without a compelling reason, were the trial court to prematurely allow discovery in aid of a non-existent judgment, it would be not just revisable error, but would amount to a departure from the essential requirements of law. *See Delmonico v. Crespo*, 59 So. 3d 337 (Fla. Dist. Ct. App. 2011)

(citing *In re Estate of Posner*, 492 So.2d 1093, 1093 (Fla. 3d DCA 1986) (finding “the probate court departed from the essential requirements of law when it permitted contingent creditors to take pre-judgment discovery in aid of execution”)).

10. Requests 1 through 4, on their face, seek nothing relevant to the claims currently at issue in this dispute. Rather, they ask for information relating to Bienes’s and his family’s investments. This financial information is not relevant to the claims or defenses of any party and Plaintiffs offer no compelling reason for its disclosure.

III. The motion to compel should be denied because requests 1 through 4 are overbroad in scope and vaguely worded.

11. Finally, Plaintiffs’ motion to compel should be denied because request nos. 1 through 4 are woefully overbroad and vague. They seek all documents “relating to” Bernard L. Madoff and his company, Bernard L. Madoff Investment Securities, LLC, ostensibly from January 1, 1960, through the present day: an astoundingly broad period spanning more than 54 years. Plaintiffs’ supplied definitions do not help their cause. The term “related to” is as vaguely defined as the requests are irrelevant: “directly or indirectly, refer to, reflect, mention, describe, pertain to, arise out of or in connection with or in any way legally, logically, or factually be connected with the matter discussed.” Bienes simply cannot offer an informed response given the vagueness and breadth of the requests.

CONCLUSION

For the reasons stated above, Plaintiffs’ motion to compel should be denied and Bienes’s objections to requests nos. 1 through 4 of the Third Request sustained.

WHEREFORE, Defendant, Michael Bienes, respectfully requests that the Court enter an Order: (i) denying Plaintiffs’ motion to compel, (ii) sustaining his objections to requests nos. 1

through 4 of the Third Request, (iii) awarding Bienes his reasonable attorneys' fees and costs incurred defending Plaintiffs' motion to compel, and (iv) awarding such other and further relief as the Court deems just and proper under the circumstances.

Dated this 10th day of September, 2014.

Respectfully submitted,

/s/ Shane P. Martin

Mark F. Raymond (373397)

mraymond@broadandcassel.com

ssmith@broadandcassel.com

Jonathan Etra (686905)

jetra@broadandcassel.com

msoza@broadandcassel.com

Shane P. Martin (056306)

smartin@broadandcassel.com

msanchez@broadandcassel.com

BROAD AND CASSEL

One Biscayne Tower, 21st Floor

2 South Biscayne Boulevard

Miami, Florida 33131

Telephone: 305.373.9400

Facsimile: 305.373.9443

Counsel for Defendant, Michael Bienes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2014, this notice and the aforementioned interrogatories were served via E-mail to: **(i)** Thomas E. Messina, Esq., Thomas Zeichman, Esq., Messina, P.A., 401 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, FL 33301 (tmessana@messana-law.com, tzeichman@messana-law.com) (Counsel for Plaintiffs); **(ii)** Leonard K. Samuels, Esq., Etan Mark, Esq., Steven D. Weber, Esq., Zachary P. Hyman, Esq., Berger Singerman LLP, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301 (lsamuels@bergersingerman.com, emark@bergersingerman.com, sweber@bergersingerman.com, zhyman@bergersingerman.com) (Counsel for Plaintiff Margaret Smith); **(iii)** Peter G. Herman, Esq., Tripp Scott, 110 S.E. 6th Street, 15th Floor, Ft. Lauderdale, FL 33301 (pgh@trippscott.com) (Counsel for Steven Jacob and Steven F. Jacob CPA and Associates); **(iv)** Paul V. DeBianchi, Esq., Paul V. DeBianchi, P.A., 111 S.E. 12th Street, Ft. Lauderdale, FL 33316 (Debianchi236@bellsouth.net); **(v)** Gary A. Woodfield, Esq., Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 (gwoodfield@haileshaw.com, bpetroni@haileshaw.com, eservice@haileshaw.com) (Counsel for Defendant Frank Avellino); **(vi)** Harry Winderman, Esq., One Boca Place, 2255 Glades Road, Boca Raton, FL 33431 (harry4334@hotmail.com); **(vii)** Matthew Triggs, Esq., Andrew Thomson, Esq. Proskauer Rose LLP, 2255 Glades Road, Suite 421 Atrium, Boca Raton, FL 33431 (mtriggs@proskauer.com, athomson@proskauer.com, florida.litigation@proskauer.com); and **(viii)** Robert J. Hunt, Esq., Debra D. Klingsberg, Esq., Hunt & Gross, P.A., 185 Spanish River Boulevard, Suite 220, Boca Raton, FL 33431 (bobhunt@huntgross.com, dklingsberger@huntgross.com, eService@huntgross.com, Sharon@huntgross.com).

/s/ Shane P. Martin

Shane P. Martin