

Not Reported in Cal.Rptr.3d

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Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

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Court of Appeal, Second District,
Division 8.

ZIFFREN, BRITTENHAM, BRANCA, FISCHER,
GILBERT-LURIE & STIFFELMAN, Petitioner,

v.

SUPERIOR COURT of the State of California for
the County of Los Angeles, Respondent;
Marcia ZIFFREN, Real Party in Interest.

No. B167832.

(Los Angeles County Super. Ct. No. BD348605).

Sept. 17, 2003.

ORIGINAL PROCEEDING in mandate. Rolf M. Treu, Judge. Petition granted. Greenberg Glusker Fields Claman Machtinger & Kinsella, Dale F. Kinsella, Michael J. Kump and David E. Lederman for Petitioner Ziffren, Brittenham, Branca, Fischer, Gilbert-Lurie & Stiffelman.

Kaufman, Young, Spiegel, Robinson & Kenerson, Robert S. Kaufman, Lance S. Spiegel, Scott K. Robinson; Morrison & Foerster and Seth M. Hufstедler for Petitioner Kenneth Ziffren.

No appearance for Respondent.

Law Offices of Bernard N. Wolf, Bernard N. Wolf, Jaffe and Clemens, Bruce A. Clemens and David M. Luboff for Real Party in Interest.

COOPER, P.J.

INTRODUCTION

*1 We are called upon to resolve another discovery

dispute that arose in the context of the marital dissolution action between Marcia and Kenneth Ziffren. The trial court ordered a third-party law firm to produce voluminous documents spanning a 14-year period despite evidence the production would cost the firm almost \$6 million, take over 39,000 hours to complete, and invade the privacy rights of the law firm's clients, all of which outweighed any potential usefulness of the requested documents. We conclude the trial court abused its discretion and direct it to vacate its order.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2001, Marcia served Kenneth with a request for production of documents concerning Kenneth's businesses, investments, and other assets, including his interest in the law firm of Ziffren, Brittenham, Branca, Fischer Gilbert-Lurie & Stiffelman (the law firm). Kenneth is a member of the law firm, which represents clients in the entertainment industry. Including subparts, Marcia's document request asked for the production of over 200 categories of documents, many of which were owned and maintained solely by the law firm, not Kenneth.

In April 2002, the law firm moved for a protective order regarding the potentially privileged law firm documents Marcia had sought from Kenneth. The motion was never decided because Marcia and the law firm resolved their dispute by stipulation. Pursuant to a July 15, 2002 stipulation, the law firm agreed to the following: (1) to produce redacted copies of operative contracts in effect from January 1, 1995 to the date of production, between the law firm and its clients (with the client and attorney names redacted); and (2) to allow Marcia's representatives to review and obtain copies of all operative contracts in effect between January 1, 1995 and the date of production, between any client of the law firm and any third party, by which the client

had received or will receive compensation in which the law firm has a percentage interest (with client and attorney names redacted). Marcia's representatives reviewed the documents at the law firm from July 15 to July 22, but then refused to continue their review.

In January 2003, Marcia served Kenneth with a second request for documents, which again included requests for law firm documents. Among other things, Marcia requested all contracts "between any client of [the law firm] and any third party, by which the client has received or will receive compensation in which [the law firm] has a percentage interest or other pecuniary interest." This time, the category of the third party documents covered the period from January 1, 1988 through the date of production.

Counsel for the law firm asserted the request was an incursion into the privacy rights of the law firm's clients, and attempted to resolve the discovery dispute. When the attempt failed, the law firm filed a motion for a protective order. In short, the law firm argued producing the documents would be too burdensome and expensive, invade its clients' constitutional right of privacy, and provide information that was irrelevant to a valuation of the law firm and Kenneth's interest in it.

*2 Marcia did not dispute that the requested client contracts contained personal financial information protected by the right of privacy. Rather, she argued the requested documents were relevant because a determination of the law firm's right to future compensation from "percentage" clients was necessary to value the community's interest in revenues received after he and Marcia were separated, i.e., 2001. Marcia explained that future compensation could be calculated by multiplying the law firm's agreed percentage rate by the amount of future client compensation disclosed in the third party contracts.

On May 23, 2003, the trial court denied the motion for a protective order. The trial court found the re-

quested documents were relevant to the action and that Marcia's need for the documents outweighed the privacy interests of the law firm's many clients. The trial court further found Marcia's need for the documents outweighed the law firm's burden in producing them. The trial court ordered that all documents be produced without redaction at the offices of Marcia's counsel.

The law firm filed a petition for writ of mandate challenging the trial court's order. Kenneth joined in the petition. We issued an order indicating our intent to grant the petition and issue a peremptory writ of mandate in the first instance. (See *Palma v. U.S. Fasteners, Inc.* (1984) 36 Cal.3d 171; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232; see also *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1290 (*Liberty Mutual*).) After receiving and considering further briefing, we grant the petition.

DISCUSSION

I. Standard of Review

A trial court's ruling on a motion for a protective order may be vacated where there has been an abuse of discretion. (*Liberty Mutual, supra*, 10 Cal.App.4th at pp. 1286-1287; *Rosemont v. Superior Court* (1964) 60 Cal.2d 709, 715; *Britt v. Superior Court* (1978) 20 Cal.3d 844, 848.) A trial court abuses its discretion in ordering discovery where there is a showing that substantial interests will be impaired by allowing the disclosure. (See *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 171.)

While writ proceedings are disfavored in reviewing discovery orders, they are appropriate when the challenged ruling compelling discovery would violate a third party's constitutional right of privacy or impose an unreasonable burden on the responding party. (*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal .App.4th 347, 355; *Calcor Space Facility, Inc. v. Superior Court* (1997) 53

Cal.App.4th 216, 223, 226(*Calcor*); *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1060-1061.) Writ review is appropriate in this case because the trial court's order requires the law firm to disclose documents that are protected by the right of privacy and because the production would be unduly burdensome.

2. Controlling Law

*3 "Although the scope of civil discovery is broad, it is not limitless."(*Calcor, supra*, 53 Cal.App.4th at p. 223.) "[T]rial judges must carefully weigh the cost, time, expense and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed if the discovery is ordered. A carelessly drafted discovery order may result in cost and inconvenience far outweighing the potential usefulness of the material ordered to be produced."(*Ibid.* [writ of mandate granted based upon burdensome nature of request for documents from non-party]; see Code Civ. Proc., §§ 2017, subd. (c), & 2019, subd. (b).)

Where discovery involves matters encompassed by the constitutional right of privacy, we must recognize that judicial discovery orders inevitably involve state-compelled disclosure, subject to constitutional constraints. (*Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 252(*Save Open Space*).) Therefore, "the ordinary yardstick for discoverability, i.e., that the information sought may lead to relevant evidence, is inapplicable. [Citation.] Moreover, it is not enough to show the matters encompassed by the right of privacy are merely relevant to the issues of ongoing litigation."(*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 392(*Juarez*).) Rather, the party seeking discovery must demonstrate a "compelling need" for the discovery, "and 'that compelling need must be so strong as to outweigh the privacy right when these two compelling interests are carefully balanced.'" (*Save Open Space, supra*, 84 Cal.App.4th at p. 252,

quoting *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853-1854; *Juarez, supra*, 81 Cal.App.4th at p. 392.)

Furthermore, our Supreme Court has specified that "when one spouse in a marriage dissolution proceeding seeks discovery from a third party, the court is required to balance the spouse's need for discovery against the privacy interests of the third party. In weighing the need of the spouse, the court should consider all relevant factors, including how the requested information would help resolve the issues that remain between the spouses; any relationship between either spouse and the third party; the information that the other spouse or third party has already provided or agreed to provide; and any specific reasons to distrust the adequacy or reliability of the information already obtained or offered.

"In weighing the privacy interests of the third party, the court should consider the nature of the information sought, its inherent intrusiveness, and any specific showing of a need for privacy, including any specific harm that disclosure of the information might cause. For example, the third party may demonstrate that public disclosure of confidential information would damage its competitive position or embarrass persons not involved in the litigation. Upon request, the court should review the information in camera before production to assess its value to the requesting spouse and the harm disclosure might cause to the third party. Any discovery order should be carefully tailored to protect the interests of the requesting spouse in obtaining a fair resolution of the issues while not unnecessarily invading the privacy of the third party. Also upon request, the court should consider appropriate protective orders. [Citations.]" (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 714(*Schnabel*).)

3. Application

*4 The evidence before the trial court clearly demonstrated that the requested documents were unlikely to resolve the relevant issues between the

spouses. It also demonstrated that if the documents had any limited probative value, it was greatly outweighed by the burden in producing them, as well as by the intrusion into the privacy rights of the law firm's clients. The evidence showed the following.

First, in their declarations, Marcia's two forensic accountants stated they needed the third party contracts in order to conduct a valuation of the community interest in the law firm. Of particular interest was the determination of the law firm's value after the couple's separation based upon law firm work performed during the marriage. Despite this claim of need, one of Marcia's accountants, Jeffrey H. Kinrich, stated that historical data could be used to estimate Kenneth's community property interest in the law firm. Kinrich stated, "My understanding of California law is that the court generally must *value and divide community property assets* in the original divorce litigation.... [¶] In my experience, the value of businesses and professional practices frequently is impacted by multiple variables, which are not knowable with precision. Part of the task of any business appraiser is to quantify the value of the business or practice by using methods that have been established to be generally reliable in dealing with such variables. Business appraisers do this regularly. [¶] A common methodology among appraisers involves the use of historical data patterns to project future income streams. By looking at historical trends, it often is possible to predict future income streams with reasonable accuracy. For example, if I am asked to determine the value of a manufacturing business, I cannot predict exactly which items will be ordered and sold in the upcoming year. However, given sufficient historical data, I can arrive at a reliable approximation of the value of that business. There is no reason that the same sort of analysis cannot be applied to the Ziffren Firm. *While it may be true that a given client receipt is not predictable, the aggregate receipts, and the portion of those receipts that are community property, are very likely to be estimable.*" (Italics added.)

Kinrich's declaration indicated that Kenneth's community interest in the law firm could be estimated from the vast array of historical data previously produced to Marcia. By the time of the May 23, 2003 hearing, Kenneth, either personally or through the law firm, had already produced over 38,000 pages of documents, including the following: (1) the law firm's federal income tax returns from 1986 through 2001; (2) the law firm's state tax returns from 1989 through 2001; (3) the law firm's cash receipt journals from January 1, 1987 through March 14, 2003; (4) the law firm's accounts receivable reports from 1987 through 2002; (5) the law firm's general ledgers from January 1, 1987 through February 2002; (6) the law firm's year end financial statements from 1986 through 2002; (7) all of the law firm's account statements for each investment or bank account maintained on behalf of the law firm from January 1, 1987 through February 2002; (8) loan payment and credit applications; (9) check registers; (10) the law firm's partnership agreements; (11) equipment leases and sublease agreements; and (12) the law firm's retainer agreements with its clients.

*5 In addition, the law firm had already incurred over \$50,000 to hire non-law firm personnel to produce documents responsive to Marcia's first document request. It had also spent hundreds of person-hours of its own staff to produce such documents. Marcia did not demonstrate that the extensive documents already produced did not provide the historical data necessary to make the community interest estimation described by Kinrich. Neither did she show that her experts were unable to provide that estimation without the third party contracts.

Second, the evidence showed that the task of producing over 14 years of client contracts would require the law firm to review 52,683 files (75,262 files minus 30% to account for empty files). Reviewing these files in order to accurately determine each contract was complete would take about 39,512 hours (45 minutes per file), at a cost of almost \$6 million (\$4.5 million if you subtract copying costs).

The evidence further indicated that even though the accounting firm of Deloitte & Touche would perform the review and production, such a massive undertaking would require the law firm's employees to be actively involved in the process for this lengthy period, which would further disrupt the law firm's operations. (See *Schnabel, supra*, 5 Cal.4th at p. 714; *Calcor, supra*, 53 Cal.App.4th at p. 223.)

Marcia contends that she disputed the law firm's evidence concerning its burden by introducing "solid evidence" that the law firm's figures were "exaggerated." This evidence consisted of a declaration from one of her forensic accountants, Terry M. Hargrave. But contrary to Marcia's contentions, Hargrave's declaration offered no concrete figures to rebut the law firm's evidence. Other than suggesting that "many more than two files can be reviewed in an hour," Hargrave offered nothing but conclusory statements.

Third, the evidence before the trial court demonstrated that the client contracts were unlikely to help resolve the issues that remain between the spouses. (See *Schnabel, supra*, 5 Cal.4th at pp. 713-714; *Calcor, supra*, 53 Cal.App.4th at p. 223.) As noted, Marcia contends that the client contracts will help resolve the issue of characterizing Kenneth's interest in the law firm by determining its right to future compensation from "percentage" clients after 2001, the year she and Kenneth separated. This computation will be performed by multiplying the law firm's percentage rate by the amount of future client compensation disclosed in the third party contracts.

Based upon the evidence before the trial court, the client contracts reveal the terms and conditions of a particular client's compensation with third parties, not with the law firm. Based upon this evidence, it appears that these contracts generally do not reveal a client's right to specific sums of money in the future. Rather, the evidence demonstrated that a client's income is typically based upon numerous contingencies, and includes residual income or varying levels of royalties payable far into the future. Thus,

contrary to Marcia's contentions, the law firm's percentage of a client's future income is not specifically calculable from these contracts.

*6 Fourth, the law firm submitted evidence that its clients expect the law firm to maintain the confidentiality of any documents that contain private and personal financial information. (See *Schnabel, supra*, 5 Cal.4th at 714.) Disclosure of such information for a 14-year period could seriously damage the law firm's relationship with its clients and its competitive position in the marketplace.

In sum, Marcia did not demonstrate a compelling need for the client contracts that outweighed those clients' right of privacy. The above evidence indicated that the burden, cost, and inconvenience in producing the requested third party contracts far outweighed any potential usefulness of those contracts. Also, the privacy interests of the law firm's many clients outweighed Marcia's claimed need for the contracts. Any need for the documents was diminished by (1) the fact Kenneth and the law firm had already produced extensive financial documents, often spanning a 16-year period, and (2) the conclusion by Marcia's forensic accountant that the community property interest in the law firm could be estimated from sufficient historical data. There was no evidence that the adequacy or reliability of the previously produced documents should be discredited. (See *Schnabel, supra*, 5 Cal.4th at p. 714.)

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue, directing the trial court to: (1) vacate its May 23, 2003 order denying the law firm's motion for a protective order and requiring the production of documents; and (2) issue a new order granting the motion and prohibiting the discovery of the requested records. Our stay of the May 23 order is dissolved.

The law firm shall recover its costs in this writ proceeding.

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We concur: BOLAND and VOGEL, (MIRIAM,
A.), JJ.
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