

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

BOB BROOKS and ALEXANDRA BROOKS,

Petitioners,

INDEX NO.: 001572/2009
MOTION DATE: 06/21/2010
MOTION SEQUENCE: 003 and 004

- against -

AQUA SHIELD, INC., IGOR KORSUNSKY and
ELENA KORSUNSKY,

Respondents.

The following papers read on this motion:

Order to Show Cause, Affirmation & Exhibits Annexed	1
Order to Show Cause, Affirmation & Exhibits Annexed	2
Affirmation of Elise Schwarz, Esq. in Support of Respondents' Opposition to the Order to Show Cause, Affidavits & Exhibits Annexed	3

PRELIMINARY STATEMENT

Petitioners and respondent Aqua Shield move to quash a subpoena duces tecum served upon Aqua Shield seeking further discovery in the form of documents and access to the office and computer network of Aqua Shield. Aqua Shield claims that proper service has not been made; rather, service was made upon Krol & O'Connor, counsel for Aqua shield, and that such service of other than a trial subpoena on counsel is inappropriate and ineffective. Petitioners claim that this action was stayed by Order of this Court dated June 5, 2009, that the subpoenas for personal income information of petitioners is overly broad, and were improperly served after discovery in the arbitration proceeding has concluded.

Both Igor Krol, Esq. and Elise Schwarz, Esq. claim to be counsel for Aqua Shield in the

arbitration proceeding. Ms. Schwarz claims to be counsel in both this action and the arbitration proceeding. She also claims to represent respondents Igor and Elena Korsunsky in both the action at law and the arbitration proceeding.

BACKGROUND

This action grows out of a shareholders agreement by and among Alexandra Brooks, Bob Brooks, Igor Korsunsky, and Yelena Korunskaya, and Aqua Shield, Inc., a New York Corporation. Each couple became the holder of a 50% interest in the Corporation. Among the provisions, contained in paragraph 19 is an arbitration clause states that “(a)ny controversy or claim arising out of or relating to thin (sic.) Agreement or its breach shall be settled by arbitration in the City of New York in accordance with the governing rules of the American Arbitration Association.”

The matter proceeded to arbitration. Requests of Respondents for records of Petitioners were, in large measure, produced, but only by repeated requests and applications to the Arbitrator. Expert reports were due on December 4, 2009, and respondents’ expert requested information from petitioners which had not been produced. As a consequence, respondent prepared subpoenas duces tecum which they served on counsel for petitioners.

The subpoenas which are the subject of this motion are contained at the Exhibit “Q” to the opposition papers. They were issued in connection with the arbitration proceeding. Despite the inclination to conclude that the legitimacy of the subpoenas issued in the arbitration proceeding are more appropriately considered by the arbitrator, Courts appear to have jurisdiction over the validity of subpoenas issued in the course of such proceedings.¹

Ms. Schwarz annexes to her opposition papers correspondence from her chosen expert, dated November 18, 2009.² This is contemporaneous with the expert disclosure schedule set by the arbitrator.³ Among the items considered essential by the expert were copies of the general

¹ *Amivest Corp. v. Morgantos N.U.*, 178 A.D.2d 180 (1 Dept. 1991). Trial court denied motion to quash subpoena issued in arbitration proceeding before New York Stock Exchange.

² Exh. “P”.

³ Exh. “O”.

ledger and cash receipt for the period 2000 to date, information with respect to the operation of Aqua Shield, a/k/a Aqua Shield Corp., a Florida corporation. Also regarded helpful were the personal income tax returns, state and federal, of Bob and Alexandra Brooks. He also sought access to the company computer network.

Each of the items contained in the subpoenas duces tecum are appropriate subjects of discovery, with the exception of the demand for personal income tax returns of the Brooks. Counsel has not made an adequate showing that these items are sufficiently essential to overcome the long-held reluctance of courts to produce them because of their likelihood to contain personal and confidential information.⁴ Nor, despite contentions that such production has been twice ordered by arbitrator, does the Court find substantiation of this claim in the documents to which it is directed.⁵

Mr. Krol, on behalf of Aqua Shield, contends that service of subpoenas upon them, as counsel for Aqua Shield, and the Brooks respectively, is inappropriate. Ms. Schwarz acknowledges that service was made upon counsel as opposed to the corporate or individual defendants.⁶ Service upon an attorney for a party is authorized, unless otherwise precluded by law.⁷

With respect to the service of a subpoena requiring attendance, or production of documents, however, the law requires service in the same manner as a summons.⁸ There are exceptions to this rule, but none applicable under these circumstances. It is also correct that “trial subpoenas” served upon counsel for a party, even for the production of an out-of-state employee,⁹

⁴ *Williams v. New York City Housing Authority*, 22 A.D.3d 315 (1 Dept. 2005).

⁵ Exhs. “I” and “K” to opposition papers.

⁶ Affirmation of of Elise Schwarz, Esq. at pp. 10 and 13.

⁷ CPLR § 2103 (b).

⁸ CPLR § 2303 (a).

⁹ *23/23 Communications Corp. v. General Motors Corporation*, 172 Misc.2d 821 (Sup. Ct. NY County 1997 [Friedman, J.]).

are valid and fully enforceable.

Despite movants' contentions, discovery in the arbitration proceeding, particularly as to expert disclosure, was not complete. The matter had not yet reached the trial stage, and, consequently, trial subpoenas, with their concessions to urgency, were inappropriate.

The motions to quash the subpoenas are granted as to the demand for the personal tax returns of the Brooks, and as to the balance of the subpoenaed information, the motion is granted subject to service of subpoenas upon Bob Brooks, Alexandra Brooks and Aqua Shield, Inc.

This constitutes the Decision and Order of the Court.

Dated: August 30, 2010


J.S.C.

ENTERED
SEP 01 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE