NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PEERVIEW, INC. AND TIMOTHY D. BACON,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
LIBERTY STONERIDGE LLC,	:	
Appellee	:	No. 466 EDA 2012

Appeal from the Order Entered January 27, 2012
In the Court of Common Pleas of Chester County
Civil Division No(s).: 2009-12247

BEFORE: FORD ELLIOTT, P.J.E., OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: March 19, 2013

Appellants, Peerview, Inc. and its CEO, Timothy D. Bacon, appeal from the order entered in the Chester County Court of Common Pleas denying their emergency motion to quash the subpoena of Appellee, Liberty Stoneridge, LLC. This subpoena, for deposition and discovery, was served on Appellants' accountant. We hold that an **accountant**-client privilege claim does not render an order immediately appealable under the collateral order doctrine, and that Appellants have waived an **attorney**-client privilege claim under Pa.R.A.P. 302(a). Accordingly, we grant Appellee's motion to QUASH this appeal.

In the underlying civil case, the plaintiff is Appellee and the defendant

---

* Former Justice specially assigned to the Superior Court.

is Ternary Software, Inc. ("Ternary").[1] On October 29, 2009, Appellee won a confession of judgment of $523,184.88, against Ternary. Appellee then attempted to collect judgment from several garnishees, including Appellants.

On August 19, 2011, Appellee filed a praecipe for writ of execution and a writ of execution for garnishment against Appellants.[2] The next document in the record relating to Appellants is Appellants' September 29, 2011 answer to interrogatories.[3] Appellants averred they retained Ternary's services in 2001 and terminated their services in December 2007, at which time they "reached an agreement for all outstanding debts, which was [sic] paid in full." Appellants' Garnishees Ans. to Interrogs, 9/29/11, at 1. The trial court notes: "[S]hortly" after Ternary and Appellants terminated their relationship, Appellants "sold [their] assets to Sylogent, LLC in exchange for 'substantial payments.'"[4] Trial Ct. Op., 4/13/12, at 1. Appellee filed a

---

[1] The caption of the certified record on appeal is ***Liberty Stoneridge v. Ternary Software, Inc.*** The record begins with the October 28, 2009 complaint for confession of judgment filed by Appellee against Ternary.

[2] The writ of execution for garnishment directed the sheriff to notify Appellants that they were "enjoined from paying any debt to or for the account of Ternary [ ] and from delivering any property of Ternary [ ] or otherwise disposing thereof[.]" Appellee's Writ of Execution for Garnishment, 8/19/11, at 2.

[3] Appellants filed an amended answer to interrogatories on the same day, and again on October 5th.

[4] We note that Appellee had filed another praecipe for writ of execution against the party "Sylogent f/k/a Peerview, Inc." Appellee's Praecipe for Writ of Execution, 7/11/11.

motion for summary judgment and Appellants filed a motion for both summary judgment and sanctions.[5]

On December 16, 2011, Appellants filed the underlying emergency motion to quash a subpoena, which averred the following. On December 9th, Appellee served on their accountant, Small and Associates, "a subpoena to compel testimony and produc[e] documents of [Appellants'] confidential and privileged **financial** records[.]" Appellants' Mot. to Quash Appellee's Subpoena, 12/16/11, at 1-2 (unpaginated) (emphasis added). Appellee did not, however, provide a copy of the subpoena to Appellants until December 14th. The subpoena requested:

> 1. All documents in Small and Associates possession, custody, and/or control in connection with [Appellants].
>
> 2. [Appellants'] tax returns and financial statements and balance sheets from 2007 to present.
>
> 3. All agreements and contracts for the sale of assets to Sylogent.
>
> 4. All documents involving the sale of assets of [Appellants] and all documents regarding funds paid to [Appellants] from Sylogent and their disbursement.

Id. at 3-4.

In their emergency motion to quash, Appellants characterized the requested information as "testimony and documents on [Appellants'] highly confidential and privileged **financial** records . . . which are wholly unrelated

[5] Each party filed a response to the other's summary judgment motion.

and irrelevant to any issue before the court." ***Id.*** at 2 (emphasis added). The motion enumerated the following two bases for quashal of Appellee's subpoena: (1) The "Subpoena seeks irrelevant, confidential, and privileged material which will not lead to the discovery of Ternary's assets;" and (2) The "Subpoena violates [Pennsylvania Rule of Civil Procedure] 4011 and seeks to circumvent Rule 4009.21."[6] ***Id.*** at 2, 4. At no point did Appellants articulate specifically an attorney-client privilege.

On January 4, 2012, Appellee filed a response to the motion to quash, admitting that it delayed in serving Appellants with the subpoena, but arguing there was no prejudice. Appellee's Resp. in Opposition to Appellants' Emergency Mot., 1/4/12, at 3. Appellee also averred that neither the documents nor testimony sought were confidential or protected by privilege.

On January 9, 2012, Appellants filed a reply to Appellee's response. Appellants accused Appellee of "seeking a fishing expedition of all of [their] records[.]" Appellants' Reply in Further Support of Appellants' Emergency Mot. to Quash, 1/9/12, at 2. In the "Legal Argument" section, Appellants presented claims under these four headings: "[Appellee's] Subpoena violates

---

[6] ***See*** Pa.R.C.P. 4009.21(a) (requiring party seeking production from non-party to give written notice to every other party of intent to serve subpoena at least twenty days before date of service), 4011(a)-(c) (prohibiting discovery which is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden or expense to deponent or any person or party, or is beyond scope of discovery set forth in Rules 4003.1 through 4003.6).

the Rules of Civil Procedure," "[Appellee] in [sic] not now nor ever been a shareholder of [Appellants]," "[Appellee] has misstated the facts and the law involving confidential and privileged records of an **accountant**," and "[Appellants] require the Court's intervention and protection from abuse." ***Id.*** at 4, 5, 6, 7. Although Appellants discuss the accountant-client privilege under the third heading, ***id.*** at 6-7, there is no mention of the attorney-client privilege in the remainder of their filing.

Furthermore, we note that in the last section, Appellants stated they "recently discovered that Robert Small, [their] former accountant, has engaged in behavior . . . which has violated his ethical oath." ***Id.*** at 7. Thus, Appellants explained, they terminated his services "on December 14, 2011 and instructed him to return [their] property as was their right under the PA CPA Law." ***Id.*** at 8. They also averred, for the first time: "Mr. Small is believed to have over 10 filing cabinet drawers of [Appellants'] materials, most of which has nothing to do with the direct financials of [Appellants]." ***Id.***

On January 27, 2012, the court issued an order denying Appellants' motion to quash the subpoena served on their accountant; this order is the basis of this appeal. On the same day, the court also denied both parties' motions for summary judgment, finding "there is a genuine issue of material fact as to whether [Appellants] owe[ ] a debt to [Ternary] which it would be required to pay to [Appellee.]" Order, 1/27/12. Appellants timely filed a

notice of appeal on February 7th and timely filed a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

On appeal, Appellants present five arguments in support of their claim that the court erred in denying their motion to quash Appellee's subpoena: (1) the subpoena requested documents protected by the **attorney-client** privilege; (2) the subpoena sought materials and testimony "that violate the informational privacy of [Appellants,] its shareholders, its former employees, and its clients who are non-parties to this litigation;" (3) "the subpoena [sought] disclosure of materials and information irrelevant to a garnishment;" (4) "the subpoena [sought] materials and testimony that violate the **accountant-client** privilege;" and (5) the appeal is properly before this Court under the collateral order doctrine. Appellants' Brief at 4-5 (statement of questions involved).

We first consider the question of whether this appeal is properly before this Court. The trial court opinion states that the underlying order "could be considered a collateral order and therefore, the appeal would be proper pursuant to Pa.R.A.P. 313." Trial Ct. Op., 4/13/12, at 2-3. However, the court suggests the following issues could be found waived for failure to raise them before the trial court: the "information [which] could potentially violate the attorney-client privilege" and the "informational privacy of [Appellants'] former employees and clients." ***Id.*** at 3-4 (citing Pa.R.A.P. 302(a)). With respect to the accountant-client privilege claim, the trial court reasoned that

63 P.S. § 9.11(a) "does not extend the common law attorney-client privilege to accountant-client relationships." ***Id.*** at 4.

Appellee has filed with this Court a motion to quash the appeal, arguing Appellants: (1) have failed to show the underlying order is an appealable collateral order; and (2) have waived their arguments on appeal for failure to preserve them with the trial court. Appellants filed a response. In light of the trial court opinion, the parties' briefs, the parties' filings in the trial court, and the motion to quash and response before this Court, we undertake two main analyses: whether Appellants have preserved a claim under the **attorney**-client privilege, and whether their invoking the **accountant**-client privilege supports appellate jurisdiction of this appeal.

This Court has stated:

> "An appeal may be taken only from a final order unless otherwise permitted by statute or rule." Collateral orders are one exception to this general rule. Pa.R.A.P. 313(a).
>
> > The collateral order doctrine allows for immediate appeal of an order which: (1) is separable from and collateral to the main cause of action; (2) concerns a right too important to be denied review; and (3) presents a claim that will be irreparably lost if review is postponed until final judgment in the case.
>
> "A discovery order is collateral only when it is separate and distinct from the underlying cause of action." This Court has previously considered the merits of an appeal from a discovery order requiring the production of documents where there is a "colorable claim of attorney-client [ ] privilege [which] made appellate review proper" at this stage of the proceedings.

Carbis Walker, LLP v. Hill, Barth and King, LLC, 930 A.2d 573, 577 (Pa. Super. 2007) (some citations omitted and alteration in original). This Court has also stated:

> Significantly, Pennsylvania courts have held that discovery orders involving potentially confidential and privileged materials are immediately appealable as collateral to the principal action. This Court has also recognized that an appellant's colorable claim of attorney-client and attorney work-product privilege can establish the propriety of immediate appellate review.

Berkeyheiser v. A-Plus Investigations, Inc., 936 A.2d 1117, 1123-24 (Pa. Super. 2007) (some citations omitted).

Finally, we note:

> "[T]he appellate courts of this jurisdiction **have found waiver [of the attorney-client privilege] when the communication is** made in the presence of or **communicated to a third party** or to the court, when the client relies on the attorney's advice as an affirmative defense, or when the confidential information is placed at issue."

Carbis Walker, LLP, 930 A.2d at 579 (emphases added and alteration in original).[7]

[7] The Pennsylvania Commonwealth Court has similarly stated:

> Application of the privilege requires confidential communications made in connection with providing legal services. In addition, **once the attorney-client communications have been disclosed to a third party, the privilege is deemed waived**. The party asserting the privilege has the initial burden to prove that it is properly invoked, and the party seeking to overcome

As stated above, the trial court opines that Appellants failed to preserve a claim that the information sought by Appellee is protected by the attorney-client privilege: "[T]here is no specific allegation of what information could potentially violate the attorney-client privilege." ***See*** Trial Ct. Op. at 4.

Appellee's instant motion to quash this appeal likewise argues that Appellants have waived the issue, and that their motion to quash the subpoena argued only that that the subpoena impermissibly sought irrelevant information, violated Rule 4011, and sought to circumvent Rule 4009.21. Appellee's Mot. to Quash & Dismiss Appeal, 5/17/12, at 5. Appellee advances an additional ground for waiver: that "once the attorney-client communications have been disclosed to a third party, the privilege is deemed waived." ***Id.*** at 4.[8] Appellee avers: "The documents that Appellants seek to protect are documents in the hands of the third party accountants (not attorneys), thus Appellants have waived any possible claim of attorney-client privilege to those documents." ***Id.***

> the privilege has the burden to prove an applicable exception to the privilege.

Joe v. Prison Health Servs., Inc., 782 A.2d 24, 31 (Pa. Commw. 2001) (emphasis added). "Although not binding on this Court, we may rely on decisions by the Commonwealth Court if we are persuaded by their reasoning." ***Szymanski v. Dotey***, 52 A.3d 289, 293 n.1 (Pa. Super. 2012).

[8] Appellee's Mot. to Quash & Dismiss Appeal at 4 (citing ***Nationwide Mut. Ins. Co. v. Fleming***, 992 A.2d 65, 68 (Pa. 2010)).

In a response, Appellants reply:

> It is further denied that the documents are "in the hands of the third party accountants." [Appellants] have stated in their reply brief to their motion to quash in the lower court that, following the asset sale, all of [their] records [were] boxed and put into long-term storage at an offsite facility held by [their] accountant, Small and Associates **(Reply brief at p. 7-8[.])** The accountants do not have authority to review the materials, nor are they even located in their offices.[9] Instead, the accountants offered storage space only, in one of their offsite facilities. At no time were privileged communications or work product released, communicated or revealed to the accountants. . . .

Appellants' Resp. to Appellee's Mot. to Quash, 5/23/12, at 9 (emphasis added).

Our review of the cited source—pages 7 and 8 of Appellants' reply filed in the trial court—reveals no such statements that: (1) they provided all of their documents, and not just documents pertaining to their accountant-client relationship; and (2) the documents were provided for storage purposes only. Those pages stated only that Appellants believe Mr. Small has "over 10 filing cabinet drawers of [Appellants'] materials" and Appellants have terminated him and instructed him to return their property.[10] ***See*** Appellants' Resp. to Appellee's Mot. to Quash at 9. Appellants also made no

[9] Appellants have provided no legal authority for the significance of the location of documents in analyzing whether a privilege applies to bar disclosure of the documents.

[10] ***See*** Appellants' Reply in Further Supp. of Appellants' Emergency Mot. to Quash at 2.

claim that "[a]t no time were privileged communications or work product released, communicated or revealed to the accountants." ***See id.***

We agree with the trial court and Appellee that Appellants did not raise an attorney-client privilege claim with the trial court, and that accordingly they have waived it pursuant to Pa.R.A.P. 302(a). ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Although Appellants employed the terms "privileged" and "protected" before the trial court, they did so in the context of "confidential and privileged financial documents" which were "currently in the possession of its' [sic] third party accountant." ***See*** Appellants' Emergency Mot. to Quash at 1. Appellants' emergency motion advanced no claim that their accountant was in possession of information protected by the attorney-client privilege. As stated above, neither their emergency motion to quash nor reply to Appellee's response even articulated the attorney-client privilege.

We likewise find waived Appellants' argument that they did not disclose the documents to their accountant—so as to waive any claim under the attorney-client privilege—but rather furnished them for the sole purpose of offsite, long-term storage. This claim—contrary to Appellants' claim on appeal—likewise was not raised before the trial court. Because they have raised it for the first time on appeal, we do not consider it. ***See*** Pa.R.A.P. 302(a); ***Cooper v. Frankford Health Care Sys.***, 960 A.2d 134, 143 (Pa.

Super. 2008) (noting different theory of relief may not be successfully advanced for first time on appeal).

Appellants rely on ***Berkeyheiser***, 936 A.2d 1117, for the principle "that where the discovery request was so broad as to violate [Rules of Civil Procedure] 4003.2 to 4003.5 and 4011, by its nature it must violate the attorney-client privilege[.]" Appellants' Brief at 17. We hold the facts of ***Berkeyheiser*** are distinguishable from those in the instant matter.

In ***Berkeyheiser***, the plaintiff served the defendant with notice of intent to serve discovery "subpoenas upon entities associated with" the defendant, which

> included the New Jersey State Police Private Detective Unit, Bucks County District Attorney's Office, Philadelphia City Solicitor's Office, New Jersey Transit, IRB, Delaware State Police, Liberty Mutual, Farmers and Mechanics Bank, Prudential Associates, St. Paul Travelers, Broadspire, Nextel, Quest, Verizon, Brownyard Claims Management, Inc., Brownyard Group, LocatePlus, Inc., and Intelius. The subpoenas sought the production of documents, dating back as many as seven years, related to [the defendant's] insurance coverage, telephone records, and business transactions.

Berkeyheiser, 936 A.2d at 1120 & n.2. The parties "litigate[d] numerous discovery motions." ***Id.*** The trial court granted relief on some claims, but generally allowed the requested discovery. ***See id.*** at 1121-22. The defendant appealed. ***Id.*** at 1122.

This Court first considered whether the appeal was properly before us under the collateral appeal doctrine. ***Id.*** We noted:

> [The plaintiff] initiated twenty-one subpoenas, four separate requests for production of documents, and three separate sets of interrogatories. The documents sought included, but were not limited to: all of [the defendant's] reports to the legal arm of the City of Philadelphia for the past five years; its corporate financial and banking records for the past five years; its phone records for the past two years; its insurance claims information for the past five years; its client identification and payment documentation for the past four years; **its communications with anyone, including counsel, regarding this matter**, and a "complete mirror" of all electronic data regarding any information requested in this discovery.

Id. at 1124 (emphasis added). This Court agreed with the defendant that "many of [the plaintiff's] discovery requests are so broad that they necessarily include disclosure of communications between attorneys and clients," and thus that the information was not discoverable under the attorney-client privilege. ***Id.*** at 1125.

In the instant matter, there was only one subpoena at issue, whereas in ***Berkeyheiser***, there were twenty-one subpoenas. ***See id.*** at 1124. Although the subpoena in the instant matter requested "[a]ll documents in [the accountant's] possession, custody, and/or control in connection with" Appellants, we reiterate that it was served only on Appellant's accountant. ***See*** Appellants' Mot. to Quash Appellee's Subpoena at 1-2. Without any further information—such as the waived claim that Appellants furnished the documents for storage purposes only—we do not hold that the discovery request, served upon Appellants' accountant, was "so broad that [it] necessarily include[d] disclosure of communications between attorneys and

clients." ***See Berkeyheiser***, 936 A.2d at 1124. Accordingly, we decline to grant relief under ***Berkeyheiser***. For the foregoing reasons, we hold Appellants cannot rely on an attorney-client privilege claim for purposes of whether the court's order is an appealable collateral order.

We next consider whether Appellants' argument that their accountant-client privilege rendered the underlying order appealable. Appellants rely on section 9.11a of the CPA Law, which provides:

> Except by permission of the client engaging him or the heirs, successors or personal representatives of a client, a licensee or a person employed by a licensee shall not be required to, and shall not voluntarily, disclose or divulge information of which he may have become possessed unless the sharing of confidential information is within the peer review process. This provision on confidentiality shall prevent the board from receiving reports relative to and in connection with any professional services as a certified public accountant, public accountant or firm. The information derived from or as the result of such professional services shall be deemed confidential and privileged. Nothing in this section shall be taken or construed as prohibiting the disclosure of information required to be disclosed by the standards of the profession in reporting on the examination of financial statements, or in making disclosures in a court of law or in disciplinary investigations or proceedings when the professional services of the certified public accountant, public accountant or firm are at issue in an action, investigation or proceeding in which the certified public accountant, public accountant or firm is a party.

See 63 P.S. § 9.11a.

Although Appellants repeatedly argue that an order requiring disclosure of generally "privileged" information is immediately appealable, they provide no authority that the accountant-client privilege specifically is

grounds for an appealable order. We agree with the trial court that ***Agra Enters., Inc. v. Brunozzi***, 448 A.2d 579 (Pa. Super. 1982), applies. ***See*** Trial Ct. Op. at 4. That decision provides, in pertinent part:

> [Section 9.11a] forbids a C.P.A., except by permission of his client, from divulging confidential information he obtained during performance of professional services. The relationship between an accountant and his client has been held to be one of confidentiality; however, the statute makes only a limited change in the common law, and it **does not extend the common law attorney-client privilege to the accountant-client relationships**.

Agra Enters., Inc. v. Brunozzi, 448 A.2d at 582 (emphasis added).

Furthermore, we compare section 9.11a with the Pennsylvania Judicial Code provision for the attorney-client privilege. That section states:

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S. § 5928; ***see also Carbis Walker, LLP***, 930 A.2d at 578-79. Section 9.11a of the CPA law requires merely that an accountant "shall not voluntarily, disclose or divulge information." ***See*** 63 P.S. § 9.11a. Section 5928 of the Judicial Code, however, specifically prohibits an attorney from testifying about a privileged matter in a civil court matter. ***See*** 42 Pa.C.S. § 5928. Accordingly, we reject Appellants' claim that an order, requiring disclosure of information claimed to be protected by the accountant-client privilege, is immediately appealable under the collateral order doctrine.

Finally, we consider Appellants' claim that this appeal is proper

because the underlying court order "requires disclosure of materials protected by . . . work-product [and] informational privacy rights[.]" Appellants' Brief at 30. Again, while advancing a general claim that an order relating to privileged information is immediately appealable, Appellants cite no authority specifically providing that an order requiring disclosure of "work-product" and information protected by "privacy rights" is immediately appealable.

For the foregoing reasons, we hold that the underlying discovery order is not appealable, and we quash.

Appellee's motion to quash granted. Appeal quashed.