

EBWS, LLC v. Britly Corp., No. 171-9-01 Oecv (Teachout, J., Feb. 23, 2009)

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**STATE OF VERMONT
ORANGE COUNTY**

EBWS, LLC)	
)	Orange Superior Court
v.)	Docket No. 171-9-01 Oecv
)	
BRITLY CORPORATION)	

ENTRY ORDER

**Plaintiff's Motion for Contempt (MPR #17), filed October 21, 2008
Defendant's Motion for Protective Order (MPR #18), filed November 5, 2008**

The present matter before the court is a post-judgment discovery dispute: whether defendant Britly Corporation must produce certain bank statements and tax returns by requesting them from the bank and government and paying any required research and copying fees.

Final judgment in the underlying action was entered in January 2008 on remand from the Vermont Supreme Court. *EBWS, LLC v. Britly Corp.*, 2007 VT 37, 181 Vt. 513. The total amount of the judgment was \$68,013, plus pre- and post-judgment interest, in favor of plaintiff EBWS, LLC.

In February 2008, EBWS propounded post-judgment discovery requests upon Britly in the form of written interrogatories and requests for production. Britly objected to many of the requests as overly broad, unduly burdensome, and irrelevant, and refused to produce a number documents. EBWS subsequently filed a motion to compel on July 28, 2008 (MPR #16). The motion sought an order compelling production of notes of annual corporate meetings, copies of stock certificates, documents related to incorporation, and "ten years of bank statements and tax returns." Britly did not file a response. The motion was granted by Judge DiMauro on August 18, 2008, with compliance ordered by September 5, 2008.

In the present motion for contempt, filed October 21, 2008 (MPR #17), EBWS asserts that Britly has failed to comply with the order compelling production of "ten years of bank statements and tax returns" because it produced only three years of tax returns (2001–2003) and no bank statements. EBWS contends that Britly is obligated to produce the requested documents even if they are not within its physical possession, because the corporation has the practical ability to obtain copies of the documents from the IRS and

from its bank. *Rathe Salvage, Inc. v. R. Brown & Sons, Inc.*, 2008 VT 99, ¶ 15. EBWS therefore requests that the court make a finding of contempt, that corporate officers Lawrence Tassinari and Linda Tassinari be taken into custody until the contempt is purged, *Horton v. Chamberlain*, 152 Vt. 351, 354 (1989), and that reasonable attorneys' fees be awarded pursuant to V.R.C.P. 37(a)(4).

Britly filed a response on November 5, 2008, stating that business operations had ceased, that there had been several moves and documents that were available had been produced, and that Mr. Tassinari has now produced all of the requested documents that are within his physical possession.

Britly contends that it no longer possesses copies of unproduced requested tax returns and bank statements, and that any copies held by the bank or the government are not within its control. Britly therefore characterizes production of the remaining documents as "impossible." See *In re Three Grand Jury Subpoenas*, 847 F.2d 1024, 1029 (2d Cir. 1988) (explaining that impossibility of compliance with a production order is a defense to contempt).

Britly also represents that the documents are equally available to both parties because copies of the bank statements may be requested from the Ledyard National Bank, and copies of the tax returns may be requested from the government. It appears that whomever requests the documents from the bank will be required to pay a "research fee" of \$20.00 per hour and a copying fee of \$1.00 per page. Britly seeks a protective order requiring EBWS to obtain the documents for itself (thereby incurring the research and copying expenses for itself) using an authorization form provided by Britly for that purpose.

Thus, the disputed issues are (1) whether the bank statements and tax returns are within the "possession, custody or control" of Britly and therefore must be produced; and (2) whether the expense of producing the documents should be paid by Britly or EBWS.

Whether the bank statements and tax returns are within the possession of Britly

The general rule is that parties must produce documents upon request so long as the documents are within the parties "possession, custody or control." V.R.C.P. 34(a). In light of both practical reality and the policy of liberal discovery, neither actual possession nor ownership is required when determining whether a particular document is within the "possession, custody or control" of a party. *Rathe Salvage, Inc. v. R. Brown & Sons, Inc.*, 2008 VT 99, ¶ 15; *Castle v. Sherburne Corp.*, 141 Vt. 157, 166 (1982).

Instead, the test is whether the party from whom the documents are requested has the "practical ability to obtain those materials." *Castle*, 141 Vt. at 166. This means that parties are obligated to produce documents that are physically held by other individuals or entities if the party has the practical ability to induce the third person to produce the requested documents. *Rathe Salvage, Inc.*, 2008 VT 99, ¶ 16.

It is well established that bank clients and taxpayers have the practical ability to induce their bank and the government to produce copies of past bank statements and tax returns. *Reeves v. Pennsylvania R. Co.*, 80 F. Supp. 107, 108–09 (D. Del. 1948) (tax returns); *Anderson v. A.C. & S., Inc.*, 615 N.E.2d 346, 348 (Ohio Ct. App. 1992) (tax returns); *Thomas v. Deloitte Consulting L.P.*, 2004 WL 1372954 at *4 (N.D. Tex. 2004) (bank statements). This makes sense as a general rule because bank clients and taxpayers normally have contractual and statutory rights to view their statements and returns; they are often the only parties who are able to do so. *Engel v. Town of Roseland*, 2007 WL 2903196 at *4 (N.D. Ind. 2007). Thus, tax returns and bank statements are generally viewed as being within a party’s “possession, custody or control” for purposes of Rule 34 even when they must be requested from the bank or from the government.

In the present case, there has been no suggestion that Britly cannot produce the disputed bank statements and tax returns simply by requesting them from the bank and government and paying any required fees. This means that the documents are within the possession, custody or control of Britly, and that their production is not “impossible.” The documents must be produced.

The proper time for raising objections to production of the documents was in response to the motion to compel. No objection was made on any basis. Once the motion was granted, Britly was obligated to produce the documents; objections regarding the custody of the documents were waived.

Whether Britly or EBWS should pay any expenses associated with production

The second question is whether the expense of obtaining the bank statements should be paid by Britly or EBWS. Britly represents that the bank will charge a \$20.00 per hour “research fee” and a \$1.00 per page copying fee in order to produce copies of past bank statements. Britly seeks a protective order requiring EBWS to obtain the bank statements for itself using an authorization form provided by Britly for that purpose.

The general spirit of the discovery rules is that the party complying with discovery requests bears the burden of finding and reproducing the documents requested unless the production request is unduly burdensome or expensive. V.R.C.P. 26(c). The court is not persuaded that a protective order is appropriate under the present circumstances because Britly’s objections to the expense and burden of producing the documents were not timely raised.

Britly did not file any response or objections when the motion to compel was filed. Thus, when the motion was granted in August 2008, it had the effect of ordering Britly to produce the requested documents at Britly’s own expense. The court will not now modify the August 2008 order compelling production when there is no reason why the arguments that Britly now raises related to expense and relevance could not have been raised at the appropriate time. Britly’s motion for a protective order is therefore denied.

ORDER

For the foregoing reasons:

- (1) Within 30 days of the issuance of this order, Defendant shall produce, at its own expense, any existing bank statements and tax returns that have not previously been disclosed;
- (2) Defendant's Motion for a Protective Order (MPR #18) is *denied*; and
- (3) Plaintiff's Motion for Contempt (MPR #17) is *reserved* pending compliance. If no request for hearing or sanctions is filed by March 31, 2009, the motion will be deemed withdrawn.

Dated at Chelsea, Vermont this ____ day of February, 2009.

Hon. Mary Miles Teachout
Superior Court Judge