IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

GFL ADVANTAGE FUND, LTD.,	:	September Term, 2001
Petitioner,	:	No. 3479
For an Order Permitting Service of Subpoenas Duces Tecum Upon S&T BANK, COMMUNITY BANKS, N.A., COUNTY NATIONAL BANK, FIRST UNION NATIONAL BANK, both in its own capacity and as the successor to CoreStates Bank, N.A., and Commonwealth Bank-Division of Meridian, SOVEREIGN BANK, both in its own capacity and as the successor to Mainline Federal Savings & Loan Association, MELLON BANK, N.A., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A., NESTLERODE & CO., INC., PERSONAL LINES INSURANCE BROKERAGE, INC., WILLIAMSPORT NATIONAL BANK and NITTANY BANK.	:	Commerce Program
	:	Control Nos. 043127, 041377, 072609 and 100762
In Aid of the Enforcement of a Judgment	:	
DOUGLAS R. COLKITT, MEDICAL LEASING ASSOCIATES, NO. 1, INC., MEDICAL LEASING ASSOCIATES NO. 2, INC., MEDICAL LEASING ASSOCIATES NO. 3, INC.,	:	
Intervenors.	:	

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW

This case involves GFL Advantage Fund, Ltd.'s ("GFL") *ex parte* efforts to locate the assets of Douglas R. Colkitt ("Colkitt"), against whom GFL has a $21 million judgment. Upon GFL's *ex parte* petition, this court authorized GFL to serve subpoenas on nine financial institutions to produce Colkitt's financial information and to temporarily restrict those

institutions from disclosing their document production to third parties, including the judgment debtor, Colkitt.

There are four motions pending. Douglas R. Colkitt, and Medical Leasing Associates No. 1, Inc., Medical Leasing Associates No. 2, Inc. and Medical Leasing Associates No. 3, Inc. (collectively referred to as "Medical Leasing Associates"[1]) have filed the following three motions: Petition for the Issuance of a Commission (Control No. 043127); Motion for Return of Documents and Sanctions (Control No. 041377); and Petition for Contempt (Control No. 072609). In addition, GFL has filed a Motion to Withdraw Previously Submitted Affidavits and Substitute New Affidavits Nunc Pro Tunc (Control No. 100762). This Opinion and a contemporaneous Order resolve all four motions.

Findings of Fact

1. Douglas R. Colkitt, M.D. is the founder and majority shareholder of two medical services businesses, EquiMed, Inc. and National Medical Financial Services Corporation ("National Medical"). See Colkitt v. GFL Advantage Fund, Ltd., 272 F.3d 189, 194 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 2588 (2002).

2. Colkitt borrowed money from GFL and entered into promissory notes that allowed GFL to exchange debt for shares of EquiMed, Inc. and National Medical. Id. at 194-95.

3. On April 4, 1997, GFL commenced an action docketed as GFL Advantage Fund, Ltd. v. Douglas R. Colkitt, Case No. 4:97-CV-0526 (M.D.Pa. 1997) (James F. McClure, Jr., J.) in the United States District Court for the Middle District of Pennsylvania against Colkitt for

[1] The three entities collectively referred to as Medical Leasing Associates are corporations owned by Colkitt's parents, Robert and Mary Jean Colkitt. Memorandum of Law In Support of Motion for Return of Documents, p.1., n.1.

breach of the promissory notes when Colkitt failed to repay money loaned to him by GFL. Colkitt filed counterclaims against GFL in that case as well.

4. On April 25, 2000, Judge James F. McClure, Jr. dismissed Colkitt's counterclaims, granted summary judgment in favor of GFL and entered judgment against Colkitt in the amount of $21,121,989.39. On July 17, 2000, Judge McClure denied reconsideration of the April 25, 2002 Order.[2]

5. A stay of execution was not entered in the case, and thus, on September 6, 2000, GFL sent post-judgment interrogatories and requests for production to Colkitt to aid in GFL's execution of the federal district court's judgment. Colkitt objected to the post-judgment discovery for two reasons. First, Colkitt argued that the applicable time period for which discovery was relevant was overly broad. In addition, Colkitt argued that the discovery requested information relating to jointly held assets to which Colkitt's spouse had a right to privacy pursuant to the Florida Constitution. Memorandum of Law In Support of Motion for Return of Documents, Ex. A, pp.1-2.

6. On December 11, 2001, the federal district court issued a writ of execution directing the United States Marshall to levy upon Colkitt's property in nineteen entities and financial institutions, including Nittany Bank, S&T Bank and Williamsport National Bank. See Memorandum of Law In Support of Motion for Return of Documents, Ex. B. (These three

[2] Colkitt appealed Judge McClure's Orders, and by an Opinion filed on November 16, 2001, the United States Court of Appeals, Third Circuit, affirmed those Orders. On June 17, 2002, the United States Supreme Court denied Colkitt's Petition for Writ of Certiorari to appeal the Third Circuit's decision.

entities later were recipients of subpoenas which, upon GFL's request, were authorized by this court.)

7. On January 22, 2001, GFL filed a motion to compel responses to its post-judgment discovery to which Colkitt filed a response on February 8, 2001. On June 6, 2001, Judge McClure ordered that Colkitt produce documents responsive to GFL's requests, whether the information related to assets that were held by him individually or jointly with a third party. Memorandum of Law In Support of Motion for Return of Documents, Ex. A. However, Judge McClure restricted GFL's discovery to the period starting after January 1, 1999. The Court's Order stated that "[u]pon receipt of [Colkitt's] information [from 1999 forward], if plaintiff remains dissatisfied with the information, it may request leave of court to seek information as to prior years." Id. The Court further directed GFL to "recast its discovery requests reducing to a significant extent the amount of detail in the subparts under each request category." Id.

8. Meanwhile, in March 2001, GFL registered the federal district court's judgment in the Supreme Court of the State of New York, New York County ("New York Court"). According to GFL, the New York Court ordered its file to be sealed. GFL's Memorandum of Law In Support of Its *Ex Parte* Motion, p. 4.

9. According to Colkitt and Medical Leasing Associates, they never received notice that the federal district court's judgment was registered in the New York Court. Transcript of April 11, 2002 Hearing, pp. 13-14.

10. GFL petitioned the New York Court to serve subpoenas duces tecum upon banking and financial institutions to obtain documents relating to accounts belonging to Colkitt,

and individuals and entities with connections to Colkitt. GFL's Memorandum of Law In Support of Its *Ex Parte* Motion, p. 4.

11. On August 16, 2001, the Honorable William A. Wetzel of the New York Court issued an Order that GFL was permitted to serve the requested subpoenas duces tecum. *Ex Parte* Motion, Ex. E. Upon GFL's petition, Judge Wetzel also issued a Commission dated August 16, 2001, to the Clerk of the Court of the Court of Common Pleas, Philadelphia County, authorizing the issuance of subpoenas duces tecum upon eleven entities with addresses in Pennsylvania. *Ex Parte* Motion, Ex. A.

12. The caption on Judge Wetzel's Order and Commission reads: In the Matter of the Application of GFL Advantage Fund, Ltd. For an Order Permitting the Service of Subpoenas Duces Tecum upon Citibank, N.A., CIBC World Markets Corp., TD Waterhouse, Goldman Sachs & Co., and Paul, Hastings, Janofsky & Walker LLP, In Aid of the Enforcement of a Judgment, Index No. 104871/01 (N.Y. Sup. Ct., New York County, 2001). That case was sealed, except as to those persons with written authorization. In addition, the subpoenas authorized by Judge Wetzel prohibited disclosure of the proceedings and the subpoenas to third parties, including Colkitt. *Ex Parte* Motion, Exs. A, E.

13. According to counsel for Colkitt and Medical Leasing Associates, neither Colkitt nor Medical Leasing Associates received notice that a New York Commission authorizing subpoenas was issued. Transcript of April 11, 2002 Hearing, pp. 14-15.

14. On August 28, 2001, GFL submitted to this court a motion entitled Petitioner's Ex-Parte Motion to Enforce Request for Judicial Assistance Seeking to Compel Production of Documents from Third Parties and To Temporarily Seal the Record ("*Ex Parte* Motion"), as well

as a supporting memorandum of law and affidavits by Martin S. Kenney and James R. McGunn.[3] The *Ex Parte* Motion included a copy of Judge Wetzel's Commission and Order directing this court to issue subpoenas duces tecum. *Ex Parte* Motion, Exs. A, E.

15. In its *Ex Parte* Motion, GFL requested that the subpoenas be considered and issued *ex parte* because GFL feared that if Colkitt or Medical Leasing Associates were aware of the subpoenas, Colkitt would immediately transfer and conceal any funds that might be held in the accounts of the financial institutions to be subpoenaed, and GFL's efforts to discover Colkitt's assets in aid of executing on its $21 million judgment would be ineffectual. *Ex Parte* Motion, ¶ 8.

16. Martin S. Kenney ("Kenney"), whose affidavit GFL attached to the *Ex Parte* Motion, serves as the President and Chief Executive Officer of Interclaim Recovery Limited ("Interclaim"). According to Kenney's affidavit, "Interclaim conducts complex, multi-jurisdictional investigations which are intended to locate apparently concealed assets and to secure evidence attributing the same to sophisticated judgment debtors and/or individuals accused or convicted of serious forms of economic crime," and GFL retained Interclaim to determine the location of Colkitt's assets. Kenney Affidavit, 9/17/01, ¶¶ 1, 7. Kenney served as the lead analyst and supervisor of GFL's investigation of Colkitt's assets. Id. at ¶ 3. James R. McGunn ("McGunn") is also employed by Interclaim and investigated Colkitt's assets for GFL. McGunn Affidavit, 8/10/01, ¶¶ 1, 8.

[3] Although the docket reflects that this *Ex Parte* Motion was filed on September 27, 2001, the court had received the motion well before that date.

17. On August 30, 2001, this court held a hearing regarding GFL's *Ex Parte* Motion. After hearing GFL's arguments, this court requested that GFL's counsel provide a supplemental memorandum of law addressing whether there existed any federal or state regulations that would be impacted by a gag order imposed on the subpoenaed financial institutions to not disclose the production of information to its depositor, and if so, why the court had authority to issue such a gag order despite those regulations. In addition, the court requested that GFL's counsel list in its supplemental memorandum of law "actual facts, if any, of efforts to intentionally avoid execution on judgments or transfers, especially any findings by other courts that that was the case." Transcript of August 30, 2001 Hearing, pp. 24-25.

18. On or about September 19, 2001, GFL's counsel submitted to this court Petitioner's Supplemental Memorandum of Law In Support of its *Ex Parte* Motion to Enforce Request for Judicial Assistance Seeking to Compel Production of Documents from Third Parties and to Temporarily Seal the Record. In addition, GFL submitted a supplemental affidavit by Kenney.

19. On September 27, 2001, this court held a second hearing regarding GFL's *Ex Parte* Motion regarding, in part, the issue of whether the Pennsylvania Constitution prohibited the subpoenas which Judge Wetzel's Commission and Order had authorized and directed this court to issue.

20. By an Order docketed on September 27, 2001, this court issued an Order to Show Cause, under seal, for each of the financial institutions which would be respondents to the *ex parte* subpoenas to show why the subpoenas should not be issued.

21. On October 22, 2001, this court held a third hearing regarding GFL's *Ex Parte* Motion. GFL's counsel advised the court that none of the respondents to the subpoenas had filed objections to the discovery. Transcript of 10/22/01 Hearing, p. 3. At the hearing, GFL's counsel asked that this court extend the effective date of the subpoenas, as well as the restriction to not disclose the existence of the subpoenas to third parties, until December 7, 2001. Transcript of 10/22/01 Hearing, p. 4. By an Order dated October 22, 2001, this court extended the effective date of the subpoenas as well as the gag order until December 7, 2001.

22. GFL again petitioned this court for an extension of time during which the respondents were prohibited from disclosing the subpoenas or production of information. By an Order dated December 4, 2001, this court extended the non-disclosure period from December 7, 2001 until December 11, 2001.

23. Ultimately, in response to the *ex parte* subpoenas, GFL received documents from the respondent banks.

24. In December 2001, Colkitt and Medical Leasing Associates learned from a Florida state court's website that GFL had filed *ex parte* motions regarding their assets, and later discovered GFL's *Ex Parte* Motion in this court. Memorandum of Law In Support of Motion for Return of Documents, pp. 13-14.

25. On February 14, 2002, Colkitt and Medical Leasing Associates filed a Petition to Intervene in this court's proceedings regarding GFL's *Ex Parte* Motion.

26. On April 11, 2002, this court held a hearing on the Petition to Intervene, and by an Order dated that day, this court granted the Petition of Douglas R. Colkitt, M.D. and Medical Leasing Associates to Intervene.

27. By an Order dated April 11, 2002 (and docketed April 15, 2002), this court directed that pending resolution of the Motion for Return of Documents, GFL and its attorneys were precluded from using all records produced pursuant to the subpoenas duces tecum that were authorized by the September 27, 2002 Order.

28. On April 15, 2002, Colkitt and Medical Leasing Associates also filed a Motion for the Return of Documents Obtained by Way of Unlawful Discovery Proceedings and For Sanctions ("Motion for Return of Documents") as well as a supporting memorandum of law.

29. Then, on May 3, 2002, Colkitt and Medical Leasing Associates filed a Petition for the Issuance of a Commission directing the Notary Public of the State of Florida to compel the testimony of Louis Guinart at a deposition and the production of documents at that deposition. According to the petition, Mr. Guinart is the Director of Customer Service of the Property Appraiser's Office of Sarasota County, Florida, and would be able to testify regarding whether GFL's investigator used lawful methods of obtaining documents found in Colkitt's trash outside his Florida home. Colkitt and Medical Leasing Associates' Petition for the Issuance of a Commission, ¶¶ 5-6.

30. On May 16, 2002 and June 10, 2002, this court held evidentiary hearings on the Motion for Return of Documents to determine, in part, whether GFL or its attorneys made material misrepresentations upon which the court relied in granting the *Ex Parte* Motion.

31. On July 18, 2002, upon the request of counsel for Colkitt and Medical Leasing Associates, this court granted an extension of time for the parties to file post-hearing submissions. As requested, the movants' submission was due to be filed by August 8, 2002, and GFL's submission was due to be filed by September 9, 2002.

32. On July 31, 2002, Colkitt and Medical Leasing Associates filed a Petition for Contempt relating to GFL's alleged violation of this court's April 11, 2002 Order which disallowed the use of the subpoenaed documents pending the resolution of the Motion for Return of Documents.

33. Upon the stipulation of counsel for GFL and the counsel for Colkitt and Medical Leasing Associates, on August 14, 2002, this court granted a further extension of time for GFL to file its post-hearing submission until September 25, 2002.

34. On October 25, 2002, GFL filed a Motion to Withdraw Affidavits and Substitute New Affidavits Nunc Pro Tunc ("Motion to Substitute Affidavits"), as well as a Supplemental Submission in Further Support of the Motion to Substitute Affidavits. Colkitt and Medical Leasing Associates filed their Opposition to the Motion to Substitute Affidavits, and GFL subsequently filed a Reply.

Discussion and Conclusions of Law

This discussion will analyze each of the four pending motions in turn.

Motion for Return of Documents

The Motion for Return of Documents asserts three main arguments, as follows: (1) if the issuance of the *ex parte* subpoenas was based on 42 Pa.C.S. §5326, entitled "Assistance to tribunals and litigants outside this Commonwealth with respect to depositions," the court erred because Judge Wetzel's Commission and Order do not qualify as "a matter pending in a tribunal outside this Commonwealth," and thus, Section 5326 is inapplicable; (2) if the issuance of the subpoenas was based on Pa. R. Civ. P. 4009.21 and the other discovery rules of the Pennsylvania Rules of Civil Procedure, those Rules do not permit the *ex parte* nature of the subpoenas; and (3)

whether the issuance of the subpoenas was based on Judge Wetzel's Commission and Order, or the Pennsylvania Rules of Civil Procedure, the *ex parte* subpoenas violate the due process provisions of the United States Constitution and the Pennsylvania Constitution.

Upon GFL's *Ex Parte* Motion, this court issued the subpoenas based, in part, on Section 5326(a), which provides:

> A court of record of this Commonwealth may order a person who is domiciled or is found within this Commonwealth to give his testimony or statement or to produce documents or other things for use in a matter pending in a tribunal outside this Commonwealth. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this Commonwealth, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this Commonwealth issuing the order.

42 Pa.C.S. §5326(a).

In its *Ex Parte* Motion, GFL stated that after it obtained a judgment against Colkitt for $21 million in the United States District Court for the Middle District of Pennsylvania, it obtained an Order and Commission from Judge Wetzel of the New York Court to compel third-party discovery to discover Colkitt's assets. *Ex Parte* Motion, ¶¶ 1-3. GFL presented this court with Judge Wetzel's Commission and Order for this court to enforce pursuant to 42 Pa.C.S. §5326(a). Id. at Exs. A, E. The Commission directed the Clerk of Court, Court of Common Pleas of Philadelphia County, to issue the subpoenas duces tecum to the parties listed "as witnesses in the above-captioned proceeding pending in the Supreme Court, County of New York." Id. at Ex. A. The Commission also asked the court to "grant the additional relief as set

forth in the Order of this [New York] Court dated August 16, 2001," which was provided as Exhibit E to the *Ex Parte* Motion. Id. at Exs. A, E. The Order provided that the parties to be subpoenaed "refrain from communicating with any third party (including, but not limited to, the Judgment Debtor) . . . concerning the existence or nature of this proceeding, the fact of any Order or subpoena issued in connection herewith, the service of any such Order or subpoena, or compliance or efforts to comply with any such Order or subpoena." Id. at Ex. E.

Colkitt and Medical Leasing Associates argue that it was inappropriate for this court to rely on 42 Pa.C.S. §5326(a) because Judge Wetzel's Commission and Order, and the New York action as a whole, resulted from the registration of Judge McClure's judgment from the United States District Court for the District of Pennsylvania. They assert that the "New York proceeding was at best ancillary to the only 'matter,' in the true sense of the term, for which discovery was sought, viz., a federal lawsuit in Pennsylvania." Memorandum of Law In Support of Motion for Return of Documents, pp. 15-16. Colkitt and Medical Leasing Associates conclude, therefore, that the New York matter cannot qualify as a "matter pending in a tribunal outside this Commonwealth," and absent the existence of a pending matter outside Pennsylvania, 42 Pa.C.S. §5326(a) is inapplicable.

This court considered, and still considers the New York action, docketed as In the Matter of the Application of GFL Advantage Fund, Ltd. For an Order Permitting the Service of Subpoenas Duces Tecum upon Citibank, N.A., CIBC World Markets Corp., TD Waterhouse, Goldman Sachs & Co., and Paul, Hastings, Janofsky & Walker LLP, In Aid of the Enforcement of a Judgment, Index No. 104871/01 (N.Y. Sup. Ct., New York County, 2001), to be a "matter pending in a tribunal outside this Commonwealth," as used in 42 Pa.C.S. §5326(a). Although the

New York action certainly had its origins in the federal district court's judgment, the New York state court domesticated that judgment, placed it in its docket of active matters, accepted motions from GFL relating to the matter, decided those motions and issued orders in the case. Colkitt and Medical Leasing Associates have not provided this court with any cases defining the phrase, "matter pending in a tribunal outside this Commonwealth," that would provide the contrary.

Colkitt and Medical Leasing Associates further argue that even if this court could properly rely on Section 5326, Rule 4007.1(f) of the Pennsylvania Rules of Civil Procedure barred the issuance of the subpoenas. Memorandum of Law In Support of Motion for Return of Documents, pp. 17-18. Rule 4007.1(f) provides: "An application for an order pursuant to Section 5326(a) of the Judicial Code may be filed only in the county in which the person who is the subject of the order resides, is employed or regularly transacts business in person." Pa. R. Civ. P. 4007.1(f). The Comment to Rule 4007.1(f) explains the rule's rationale:

> New subdivision (f) of Rule 4007.1 responds to the concern that there should be a limitation upon the county from which an order may be sought so that the person who is the subject of the order is not put to unreasonable expense or burden. A resident of Erie should not have to travel to Easton to object to an order obtained in connection with litigation outside the Commonwealth.

Pa. R. Civ. P. 4007.1, Comment.

GFL stated in its *Ex Parte* Motion that the parties to be subpoenaed were "Pennsylvania-based," but later admitted in its opposition to the Motion for Return of Documents that "[u]pon information and belief, five of the eleven original respondents (two were later dismissed for unrelated reasons), maintained offices in Philadelphia. The remaining six were located throughout Pennsylvania: three in the Western District, two in the Middle District and one non-

Philadelphia based respondent, in the Eastern District." *Ex Parte* Motion, p. 1; Memorandum of Law In Opposition to Motion for Return of Documents, p. 16, n.10. Nonetheless, GFL argues that the subpoenas were proper because the issue of venue is properly raised by the recipient of the subpoena, and none of the subpoenaed parties filed an objection. Id. Given the underlying rationale of Rule 4007.1(f) to avoid inconvenience to the subpoenaed person, this court is inclined to agree with GFL that because no objections were filed by the subpoenaed parties, and five out of the eleven subpoenaed parties were located in Philadelphia, Rule 4007.1(f) did not bar an order pursuant to 42 Pa.C.S. §5326(a).[4]

The inquiry did not stop with Section 5326(a), however. A broader issue was whether or not the United States Constitution and the Pennsylvania Constitution would allow the issuance of the subpoenas. In their Motion for the Return of Documents, Colkitt and Medical Leasing Associates argue that because the subpoenas constituted *ex parte* discovery and required temporary non-disclosure of the discovery to third parties (including non-disclosure to Colkitt), the subpoenas intentionally avoided giving Colkitt and Medical Leasing Associates notice and an opportunity to object to the *ex parte* discovery, thereby violating procedural due process as protected by the Fourteenth Amendment of the United States Constitution and Article I, § 8 of the Pennsylvania Constitution. Memorandum of Law In Support of Motion for Return of Documents, pp. 21-25. Colkitt and Medical Leasing Associates' argument with respect to the

[4] In addition, GFL discussed two federal statutes relating to bank records, the Gramm Leach Bliley Financial Services Modernization Act of 1999, 15 U.S.C. §6801, *et seq.*, and the Right to Financial Privacy Act of 1978, 12 U.S.C. §3401, *et seq.*, to persuade the court that no federal statutes barred the issuance of the *ex parte* subpoenas. GFL's Supplemental Memorandum In Support of its *Ex Parte* Motion, pp. 3-7. This court agrees with GFL that these two federal statutes did not prohibit the subpoenas in this case.

Pennsylvania Constitution goes one step further in that they assert that Article I, § 8 of the Pennsylvania Constitution recognizes that an individual has a right of privacy in bank records. Id. at pp. 21-24.

With respect to the federal constitutional argument, the Fourteenth Amendment's protection of procedural due process is triggered where there has been a taking or deprivation of a legally protected liberty or property interest. Abbott v. Latshaw, 164 F.3d 141, 146 (3d Cir. (Pa.) 1998), citing Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Colkitt and Medical Leasing Associates argue that the subpoenas compelling the production of bank records constitutes a taking of their property, or alternatively, a deprivation of their liberty interest, triggering Fourteenth Amendment protection. Memorandum of Law In Support of Motion for Return of Documents, p. 23. They fail, however, to cite to any caselaw that supports this assertion.

Colkitt and Medical Leasing Associates also invoke the Pennsylvania Constitution, specifically Article I, § 8, as well as Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979), *cert. denied*, 444 U.S. 1032 (1980), which interprets Article I, § 8. Pennsylvania courts have interpreted the Pennsylvania Constitution's protections relating to a depositor's bank records to be broader than those of the United States Constitution. Commonwealth v. Duncan, 752 A.2d 404, 409 (Pa. Super.) (citations omitted), *allocatur granted*, 563 Pa. 516, 762 A.2d 1082 (Pa. 2000). Colkitt and Medical Leasing Associates rely on Commonwealth v. DeJohn, *infra*, in which our Supreme Court held that bank customers have a legitimate expectation of privacy in bank records pertaining to their accounts pursuant to Article I, § 8 of the Pennsylvania

Constitution.[5] DeJohn, 486 Pa. at 49, 403 A.2d at 1291. In that case, a defendant who had been convicted of third degree murder appealed the lower court's evidentiary ruling admitting a bank record which the police had obtained through the District Attorney's subpoena directed to bank officials. The subpoenas requested all information and records relating to accounts of the defendant and her husband, the victim. Significantly, at the time that the District Attorney issued the bank record subpoenas, no legal proceedings had been commenced against the defendant, and no judge or District Justice ever reviewed or issued the subpoenas. DeJohn, 486 Pa. at 40, 403 A.2d at 1287. The Court concluded that because the subpoenas were issued without court process, "the records seized . . . were taken pursuant to an invalid subpoena, and appellant had a legitimate expectation of privacy in those records." Id. The Court cautioned, however, that "a bank could always be compelled to turn over customer's records when served with a valid search warrant or some other type of valid legal process, such as a lawful subpoena." DeJohn, 486 Pa. at 48, 403 A.2d at 1291.

Just as in DeJohn, Colkitt and Medical Leasing Associates assert that the subpoenas issued by this court violated Article I, § 8 of the Pennsylvania Constitution because they were invalid. Specifically, they argue that the subpoenas's invalidity stems from the failure to give the depositors notice and an opportunity to be heard why the bank records should not be produced. Memorandum of Law In Support of Motion for Return of Documents, p. 24. To support this

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[5] In DeJohn, the Pennsylvania Supreme Court specifically rejected the analysis in U.S. v. Miller, 425 U.S. 435 (1976), which it characterized as holding that under the Fourth Amendment, a bank depositor lacked standing to challenge the seizure of bank records pertaining to that depositor. DeJohn, 486 Pa. at 41, 403 A.2d at 1287. The DeJohn Court explained: "As we believe that Miller establishes a dangerous precedent, with great potential for abuse, we decline to follow that case when construing the state constitutional protection against unreasonable searches and seizures." Id., 486 Pa. at 44, 403 A.2d at 1289.

argument, Colkitt and Medical Leasing Associates rely on Gulf Mortgage and Realty Investments v. Alten, 286 Pa. Super. 253, 256, 428 A.2d 978, 980 (1981), in which our Superior Court held that a writ of attachment of property held by a bank violated procedural due process because the seizure of property occurred without prior notice or a hearing.

This court declines, however, to reach the federal and state constitutional issues raised, because upon review of the entire record, the motion for return of documents can be resolved on different grounds. The Pennsylvania Supreme Court has consistently "followed the general rule that we will not decide a constitutional question unless absolutely necessary for a resolution of the controversy." Misitis v. Steel City Piping Co., 441 Pa. 339, 341, 272 A.2d 883, 884 (1971); See also Lattanzio v. Unemployment Compensation Bd. of Review, 461 Pa. 392, 395, 336 A.2d 595, 597 (1975). Consequently, if a case raises both constitutional and nonconstitutional issues, the constitutional issue should not be reached if the case may properly be decided on the nonconstitutional grounds. P.J.S. v. Pa. State Ethics Comm'n, 555 Pa. 149, 153, 723 A.2d 174, 176 (1999); Clapper v. Clapper, 396 Pa. Super. 49, 53 n.5, 578 A.2d 17, 19 n.5 (1990); In re P.A.B., 391 Pa. Super. 79, 84-85, 570 A.2d 522, 525 (1990); Johnson v. Commonwealth of Pa., Dep't of Transp., 805 A.2d 644, 648 n.5 (Pa. Commw. 2002); Roman Catholic Archdiocese of Philadelphia v. Commonwealth of Pa., Pa. Human Relations Comm'n, 119 Pa. Commw. 445, 453, 548 A.2d 328, 331 (1988). In the instant case, the failure of GFL's counsel to meet the strict disclosure requirements under Rule 3.3(d) of the Pennsylvania Rules of Professional Conduct for *ex parte* proceedings is dispositive as to Colkitt and Medical Leasing Associates' Motion for Return of Documents.

By petitioning this court for *ex parte* relief, GFL assumed the obligation to uphold Rule 3.3(d) which states: "In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Pennsylvania Rules of Professional Conduct, Rule 3.3(d). The Comment to Rule 3.3(d) elaborates on the duty of candor imposed in *ex parte* proceedings:

> [I]n an *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Pennsylvania Rules of Professional Conduct, Comment to Rule 3.3.

This court reminded counsel for GFL of the extraordinary obligations of Rule 3.3(d) during the *ex parte* hearing on August 30, 2001, when this court told GFL's counsel:

> You're asking for an *ex parte* order and that's something that courts don't issue lightly. Obviously when there's an *ex parte* request, you're duty bound to represent both sides under the Rules of Professional Conduct. It's that one exception where you have to speak against your own interests if there's a single material fact that should or would have been disclosed by opposing counsel. So you have the unenviable task today of living up to that ethical requirement and that means that you essentially have to argue both sides. So first and foremost, I need to hear you speak as though you were representing the other side. And then second, you need to tell me what evidence, if any, of fraud on the part of the judgment debtor or of efforts that disclose an intention to frustrate, avoid, satisfaction of the judgment against the judgment debtor.

Transcript of 8/30/01 Hearing, pp. 7-8.

GFL presented facts and argument to support its *Ex Parte Motion* in its original motion and in the affidavits of Martin S. Kenney and James R. McGunn, during the hearing on August 30, 2001, in its supplemental memorandum of law and in Kenney's supplemental affidavit, and during the hearings on September 27, 2001, and October 22, 2001. Throughout these briefs and hearings, GFL relied on what it termed "four strands of fact." This Opinion focuses next on each of those "four strands of fact" as presented by GFL, as well as the arguments by Colkitt and Medical Leasing Associates as to why those facts were "half-truths" which resulted in allegedly invalid subpoenas.

First, GFL argued that Colkitt previously had demonstrated his purposeful avoidance of creditors when he failed to retake the witness stand for cross-examination in an involuntary bankruptcy hearing regarding the appointment of a trustee for a public company called EquiMed, Inc. ("EquiMed"), which Colkitt controlled. Kenney Affidavit, 9/17/01, ¶¶ 13-19. In that case, the petitioning creditors sought an interim trustee to prevent loss of assets during the bankruptcy proceedings. Kenney stated in his affidavit that the Honorable Chief Bankruptcy Judge Paul Mannes held Colkitt in contempt of court for his refusal to submit to cross-examination of the petitioning creditors. Id.

Colkitt and Medical Leasing Associates argue that this "first strand of fact" relating to the EquiMed bankruptcy hearing should not be construed as Colkitt's avoidance of creditors or his non-disclosure of EquiMed's assets. They argue that Kenney has admitted that Judge Mannes never made a finding that Colkitt transferred or disposed of any assets to defraud creditors. Proposed Findings of Fact and Conclusions of Law of Colkitt and Medical Leasing Associates, ¶ 63; Transcript of 6/10/02 Hearing, pp. 10-11; Transcript of 5/16/02 Hearing, p. 165. They also

argue that Judge Mannes never found that EquiMed made a shareholder loan to defraud creditors. Transcript of 6/10/02 Hearing, p. 11. They point out that GFL did not disclose the absence of such findings to this court. Colkitt and Medical Leasing Associates further argue that GFL failed to disclose that Judge Mannes never took any action against Colkitt for contempt for failing to retake the witness stand in the EquiMed bankruptcy hearing, despite the fact that this information was available to GFL at the time that it submitted Kenney's Supplemental Affidavit. Proposed Findings of Fact and Conclusions of Law of Colkitt and Medical Leasing Associates, ¶ 64; Transcript of 6/10/02 Hearing, pp. 15-16.

Colkitt and Medical Leasing Associates also assert that GFL failed to disclose that the EquiMed bankruptcy hearing addressed not just an emergency motion for appointment of a trustee to prevent loss of EquiMed's assets, but also a motion to dismiss based on improper venue. Proposed Findings of Fact and Conclusions of Law of Colkitt and Medical Leasing Associates, ¶ 62. According to Colkitt and Medical Leasing Associates, "Colkitt's purpose in testifying at the hearing was to resolve a motion to dismiss on grounds of improper venue." Id. at ¶¶ 58, 62. They argue that GFL's failure to disclose this fact was meant to imply that Colkitt was testifying solely about loss of EquiMed's assets, and that this court was not given the full picture of what actually happened at the EquiMed bankruptcy hearing to evaluate whether it indicated that Colkitt had hidden assets in the past and might be likely to do so again. In fact, Colkitt and Medical Leasing Associates assert that Colkitt was cooperative and forthcoming in the bankruptcy proceedings as evidenced by his document production in response to the Trustee's discovery requests, his seven day deposition taken by counsel for the Trustee, and his participation in nine days of voluntary mediation which ultimately resulted in settlement of the

Trustee's claims against Colkitt and entities he controlled. Memorandum of Law In Support of Motion for Return of Documents, pp. 32-34.

Finally, Colkitt and Medical Leasing Associates argue that Kenney admitted that he had no "firsthand personal knowledge" of the events in his Supplemental Affidavit, and that therefore, he could not credibly draw any conclusions from Colkitt's actions in the EquiMed bankruptcy proceedings. Transcript of 6/10/02 Hearing, pp. 4-5.

The second "strand of fact" that GFL relies on for its *Ex Parte* Motion is that in a 1998 *qui tam* action based on the False Claims Act for alleged fraudulent Medicare billing, the United States government filed a motion for a temporary restraining order and preliminary injunction to freeze the assets of eighty-one defendants, one of whom was Colkitt. Kenney Affidavit, 9/17/01, ¶¶ 20-28. Kenney stated that on March 12, 1999, Judge Alexander Harvey II of the United States District Court for the District of Maryland granted the temporary restraining order and held, in part, that Colkitt and all of the other defendants could not transfer any funds to "any site outside of or within the United States for purposes of concealing assets or to avoid collection of any judgment which may be rendered." Id. at ¶ 23. On appeal, the Fourth Circuit Court of Appeals affirmed Judge Harvey's temporary restraining order. The case was ultimately settled, but GFL argues that this second "strand of fact" indicates Colkitt's propensity to hide assets from creditors.

Colkitt and Medical Leasing Associates argue that GFL's representations to this court about Judge Harvey's findings in the False Claims Act case were misleading. As an example, Colkitt and Medical Leasing Associates point to GFL's counsel's argument at an *ex parte* hearing

before this court on August 30, 2001, during which Peter S. Russ, Esquire of Buchanan Ingersoll, P.C., stated:

> That in that case [the False Claims Act case] the Court entered a temporary restraining order prejudgment; rather extraordinary relief prohibiting Dr. Colkitt and his associates from making transfers *after it found that during the pendency of that action Dr. Colkitt was shifting assets offshore*.... So that is, I believe, a firm example of addressing a Court's finding.

Transcript of 8/30/01 Hearing, pp. 17-18 (emphasis added). At the hearing before this court on May 16, 2002, Mr. Russ testified that he had previously made that argument to the court based on the fact that Colkitt had changed the domicile of EquiMed to the Isle of Nevis and because of the allegations made by counsel for the United States in the False Claims Act case[6], as well as the entry of the temporary restraining order against the defendants in that case. Transcript of 5/16/02 Hearing, pp. 35-36. Colkitt and Medical Leasing Associates assert that Mr. Russ's representation that Judge Harvey had made a finding that Colkitt was shifting assets offshore was false and could not have been concluded from the information he relied on. Memorandum of Law In Support of Motion for Return of Documents, p. 41.

Colkitt and Medical Leasing Associates also argue that GFL failed to reveal to this court that the 1999 temporary restraining order imposed by Judge Harvey was vacated on September 8, 2000 when the case settled, and the settlement agreement "retained a restriction prohibiting transfer by Dr. Colkitt of his own assets without court approval." Id. at 35-38. Colkitt and Medical Leasing Associates argue that had this court known about the settlement agreement's

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[6] Colkitt and Medical Leasing Associates point out that GFL's investigator, Mr. Kenney, admitted that he never asked counsel for the United States in the False Claims Act case what evidence it had regarding offshore transfers made by Colkitt, if any. Transcript of 6/10/02 Hearing, pp. 22-24.

restriction, it might have decided that GFL's fear that Colkitt might transfer assets would have already been addressed. Id. at 37-38. They also argue that if this court was persuaded that the temporary restraining order indicated Colkitt's potential propensity to hide assets, then the court should have been made aware by GFL that the temporary restraining order was, in fact, vacated. Id. at 35-36. Furthermore, Colkitt and Medical Leasing Associates assert that GFL failed to reveal that the Trustee in the EquiMed bankruptcy, apart from the United States government, had asked Judge Harvey in the False Claims Act case to enter an additional temporary restraining order against transfers involving Colkitt's assets and to appoint a receiver to control Colkitt's assets, but that Judge Harvey denied that request. Memorandum of Law In Support of Motion for Return of Documents, p. 36; Colkitt Exhibits for May 16, 2002 Hearing, Ex. J, pp. 19-20.[7]

The third "strand of fact" that GFL relies on for its *Ex Parte* Motion is that Colkitt demonstrated his ability to evade judgment creditors in an appraisal and entire fairness action called ONTI, Inc. v. Integra Bank, No. 14514 (Chancery Court of Delaware, New Castle County, 1999). Kenney Affidavit, 9/17/02, ¶¶ 29-33. In that case, the Chancery Court found that the defendants Colkitt, Jerome Derdel, Raymond Caravan, OncoTech, Inc. ("OTI") (a company which was substantially owned by Colkitt), EquiMed, Inc., EquiVision, Inc. and ten cancer treatment facilities had dealt unfairly with the minority shareholders of OTI regarding the amount of consideration given to those minority shareholders in cash-out mergers of OTI. Kenney Affidavit, 9/17/02, Ex. 5. The Chancery Court gave the minority shareholders an option to elect a $24,195,000 judgment to be entered either against Colkitt and two other directors of OTI, or

[7] In fact, Judge Harvey characterized the Trustee's presentation of the allegedly questionable transfers of Colkitt's assets as "very skimpy." Colkitt Exhibits for May 16, 2002 Hearing, Ex. J, p. 21.

against EquiMed, a public company which was the successor of OTI and which was also controlled and substantially owned by Colkitt. Id. at ¶ 31. Kenney stated that the minority shareholders elected to have the court enter judgment against EquiMed. After pursuing post-judgment discovery to locate EquiMed's assets, including a motion to compel which the Court granted, the minority shareholders sought to place EquiMed into involuntary bankruptcy (discussed previously in GFL's "first strand of fact") because they felt that Colkitt was hiding assets. Id. at ¶¶ 31-33, and Ex. 13.

Colkitt and Medical Leasing Associates assert that the Chancery Court's findings in the ONTI action fail to support GFL's assertion that Colkitt was attempting to defraud creditors. They argue that the plaintiffs in the ONTI action elected to have the Chancery Court enter judgment against EquiMed, rather than against Colkitt and two other directors individually, and thus, Kenney's statement that Colkitt was individually liable for $24,195,000 is false. Memorandum of Law In Support of Motion for Return of Documents, p. 38; Kenney Affidavit, 9/17/01, ¶ 29. Colkitt and Medical Leasing Associates also argue that despite Kenney's implications in his Supplemental Affidavit, the Chancery Court never made any finding that Colkitt had transferred assets to defraud creditors, and Kenney admitted the absence of any such finding upon cross-examination. Transcript of 6/10/02 Hearing, pp. 34-35.

The fourth "strand of fact" that GFL relies on for its *Ex Parte* Motion is information contained in five letters from David Neufeld, Esquire to his client Colkitt, which were retrieved by Mike Byrd, a private investigator hired by GFL, outside of Colkitt's Florida home in forty-three pounds of trash. Kenney Affidavit, 9/17/01, ¶ 34, and Ex. 15. The letters were dated between 1997 and 1999, and addressed the logistics of establishing trusts offshore. Id. at 36-37.

Kenney asserted in his Supplemental Affidavit that this correspondence "shows that Dr. Colkitt has established at least five offshore trusts as well as a number of offshore companies in the Cook Islands in the South Pacific, and the Island of Nevis and the Cayman Islands in the Caribbean." Id. at 35. Kenney further asserted that:

> [s]ophisticated debtors are drawn to settle trusts, establish companies and place value in jurisdictions such as the Cook Islands, Nevis and the Cayman Islands . . . due to a degrading of the law of trusts, fraudulent transfers, the principles of the conflict of laws governing choice of law in the settlement of trusts, and the statute of limitations affecting the right of a creditor to seek the avoidance of a conveyance of value into a trust.

Id. at ¶ 40. Thus, according to Kenney, these letters show that Colkitt created trusts offshore for the express purpose of avoiding payment to creditors. Transcript of 6/10/02 Hearing, p. 46.

Colkitt and Medical Leasing Associates oppose GFL's conclusions on multiple levels. First, they contend that the five letters were privileged because they constitute correspondence from attorney to client, and Colkitt never waived the attorney-client privilege. Memorandum of Law In Support of Motion for Return of Documents, pp. 39-40, n.24 and n.25. In addition, they assert that Mr. Byrd illegally trespassed on Colkitt's private property to retrieve the letters from Colkitt's trash, and that therefore, the letters were obtained as a result of GFL's investigators' unlawful trespass. Id.

Colkitt and Medical Leasing Associates further contend that the letters do not reveal that Colkitt or anyone on his behalf transferred assets to offshore accounts. Id. at 40, 42.[8] In fact,

[8] Colkitt and Medical Leasing Associates also assert that no evidence of an asset transfer to offshore accounts has yet been revealed through discovery authorized by Judge Wetzel of the Supreme Court of New York. Memorandum of Law In Support of Motion for Return of Documents, p. 42.

despite the allegations in his Supplemental Affidavit, Kenney testified that he did not have any evidence that Colkitt had transferred any assets to offshore trusts in Nevis, Cook Islands or Cayman Islands for any of the three years during which the trusts existed, other than the fees and nominal amounts to establish the trusts. Transcript of 9/17/02 Hearing, p. 46. Thus, when counsel for GFL, Mr. Russ, stated to this court that: "[w]e are virtually certain that the judgment debtor [Colkitt] will take actions to transfer assets offshore," GFL had no evidence that any assets were transferred offshore. Transcript of 8/30/01 Hearing, p. 7. Similarly, Colkitt and Medical Leasing Associates argue that when Mr. Russ described the temporary restraining order entered in the False Claims Act case (discussed herein as the second "strand of fact") as "extraordinary relief prohibiting Dr. Colkitt and his associates from making transfers after it found that during the pendency of that action Dr. Colkitt was shifting assets offshore," Mr. Russ had no basis in making that representation because there was no evidence that Colkitt transferred assets offshore and, the Court in that case made no such finding. Memorandum of Law In Support of Motion for Return of Documents, p. 41.

Upon consideration of these "four strands of fact," and Colkitt and Medical Leasing Associates' assertions, this court finds GFL's presentation of the facts *ex parte* did not constitute a full presentation of all of the material facts. For example, with regard to the EquiMed bankruptcy, after GFL emphasized that Judge Mannes held Colkitt in contempt for failing to retake the witness stand, GFL failed to disclose that Judge Mannes never took any action against Colkitt for contempt, and failed to disclose any evidence of Colkitt's cooperation in the proceedings. In addition, the affidavits of Kenney that GFL relied upon are not credible to this court because Kenney testified that he had no firsthand personal knowledge of events discussed

in his Supplemental Affidavit. Transcript of 6/10/02 Hearing, pp. 4-5. By way of another example, GFL asserted that Colkitt was shifting his assets offshore and supported that assertion with evidence of a temporary restraining order issued by Judge Harvey against eighty-one defendants in the False Claims Act litigation, but GFL failed to disclose that Judge Harvey never made an actual finding that Colkitt had, in fact, hidden assets offshore, or that Judge Harvey denied the Trustee's request for a temporary restraining order to freeze Colkitt's assets. Transcript of 8/30/01 Hearing, pp. 17-18. Moreover, no evidence was presented that Colkitt made any such transfers to offshore accounts.

Rule 3.3 of the Professional Rules of Conduct required GFL's counsel to present not only the facts that supported the issuance of the subpoenas, but also the material facts that representatives of Colkitt and Medical Leasing Associates would have advised the court had they been apprised of the *Ex Parte* Motion. Now having the benefit of both sides' facts and arguments, this court is persuaded that it would not have issued the requested subpoenas pursuant to 42 Pa.C.S. §5326(a) had it been aware of all the material facts. The "four strands of fact," as presented by GFL *ex parte*, are simply not sufficiently compelling now that Colkitt and Medical Leasing Associates have presented their evidence. In many instances, the material facts presented by GFL are refuted entirely by Colkitt and Medical Leasing Associates. Thus, this court finds that the Motion for Return of Documents should be granted, and GFL is prohibited from using the information it discovered as a result of the production of documents pursuant to the *ex parte* subpoenas issued by this court.

In its Motion for Return of Documents, Colkitt and Medical Leasing Associates also seek sanctions against GFL and Buchanan Ingersoll, P.C. pursuant to Rule 4019(h), in the form of

payment in an amount equal to fifty percent of reasonable costs, including attorney's fees, that Colkitt and Medical Leasing Associates incurred as a result of the *ex parte* discovery requested by GFL. See Proposed Order attached to Memorandum of Law In Support of Motion for Return of Documents. Colkitt and Medical Leasing Associates assert that GFL and its counsel intentionally acted in bad faith in bringing its *Ex Parte* Motion and purposefully misrepresented facts to this court (including the four "strands of fact" previously discussed herein) to obtain the *ex parte* subpoenas. Memorandum of Law In Support of Motion for Return of Documents, pp. 42-43.

The rule at issue, Rule 4019(h), provides:

> If the filing of a motion or making of an application under this chapter is for the purpose of delay or in bad faith, the court may impose on the party making the motion or application the reasonable costs, including attorney's fees, actually incurred by the opposing party by reason of such delay or bad faith.

Pa. R. Civ. P. 4019(h). To determine whether sanctions are warranted and if so, what sanction is appropriate, a trial court must consider the following factors: "(1) the nature and severity of the discovery violation; (2) the defaulting party's willfulness or bad faith; (3) prejudice to the opposing party; (4) the ability to cure the prejudice; and (5) the importance of [any] precluded evidence in light of the failure to comply [with discovery rules]." Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp., 797 A.2d 269, 287 (Pa. Super. 2002). As our Superior Court has stated, "[a]s a general rule, although sanctions under Rule 4019 lie largely within the discretion of the court, sanction should not be imposed absent willful disregard or disobedience of an order of court or an obligation expressly stated in the rules." Jerry Pitell Co., Inc. v. Penn State Construction, Inc., 277 Pa. Super. 575, 578-59, 419 A.2d 1299, 1301 (1980).

GFL and its counsel oppose the imposition of sanctions and argue that the decision to bring the *Ex Parte* Motion to this court was "based upon sound legal reasoning, process and authority." Memorandum of Law In Opposition to Motion for Return of Documents, p. 17. GFL and its counsel explain that they sought the subpoenas in this court because they believed that the Pennsylvania rules would permit statewide discovery, allowing GFL to seek all of the subpoenas from a single court. Id. at 16. GFL and its counsel contend that had they attempted to obtain the subpoenas in federal court, the Federal Rules of Civil Procedure would require GFL to seek relief from three courts -- the federal district courts in the Western District of Pennsylvania, the Middle District of Pennsylvania and the Eastern District of Pennsylvania.[9] Id. at 16. Therefore, GFL and its counsel argue that the filing of the *Ex Parte* Motion was a sound strategical decision and cannot be deemed to have been made in bad faith. In addition, GFL and its counsel assert that their representations to this court in connection with the *Ex Parte* Motion were never made in bad faith. Id. at 23.

This court is persuaded that GFL and its counsel brought its *Ex Parte* Motion to this court in an attempt to enforce its $21 million judgment against Colkitt in what they hoped would be the most expeditious and inexpensive way as possible. Based on all of GFL's representations at the multiple hearings before this court and in its memoranda of law, this court does not find that the filing of the *Ex Parte* Motion in this court rises to a sufficient level of bad faith to warrant sanctions. In addition, although the representations made by GFL and its counsel to this court were deficient with regard to facts that supported Colkitt and Medical Leasing Associates'

[9] GFL explains that three of the banks subject to the subpoenas were located in the Western District, two in the Middle District and one in the Eastern District. Memorandum of Law In Opposition to the Motion for Return of Documents, p. 16, n.10.

arguments, this court is satisfied that GFL and its counsel were advocating their arguments zealously, but not in the type of willful bad faith contemplated by Pa. R. Civ. P. 4019(h). Thus, this court denies Colkitt's and Medical Leasing Associates' request for monetary sanctions. In doing so, this court nevertheless finds that the conduct of GFL's counsel in this matter warrants censure and disapproval. Certainly, in the context of Rule 3.3(d) of the Pennsylvania Rules of Professional Conduct, GFL's counsel fell woefully short of the *ex parte* candor requirements.

Petition for Contempt

Colkitt and Medical Leasing Associates have also filed a Petition for Contempt against GFL for alleged willful and intentional violations of this court's Order dated April 11, 2002. That Order directed that pending resolution of the Motion for Return of Documents, GFL and its attorneys were precluded from using all records produced pursuant to the subpoenas duces tecum that were authorized by the September 27, 2002 Order. In the Petition for Contempt, Colkitt and Medical Leasing Associates contend that GFL has, in fact, used information contained within documents obtained by the *ex parte* subpoenas. Petition for Contempt, ¶ 9.

To support a finding of civil contempt, Colkitt and Medical Leasing Associates would have to show by a preponderance of the evidence that GFL had notice of the April 11, 2002 Order, the Order was sufficiently definite to put GFL on notice of what it would be violating, GFL volitionally committed an act in violation of the Order, and GFL acted with wrongful intent. Lachat v. Hinchliffe, 769 A.2d 481, 489 (Pa. Super. 2001); Marian Shop, Inc. v. Baird, 448 Pa. Super. 52, 55-56, 670 A.2d 671, 673 (1996) (citation omitted).

Specifically, Colkitt and Medical Leasing Associates allege that GFL disclosed bank account information in two affidavits by Martin S. Kenney, one dated June 13, 2002, filed in

GFL Advantage Fund, Ltd. v. Douglas R. Colkitt, et al., No. 123668/01 (N.Y. Sup. Ct., New York County, 2001) (this action was removed to federal district court, see the following citation), and the other dated July 17, 2002, filed in GFL Advantage Fund, Ltd. v. Douglas R. Colkitt, et al., 02-CV-479 (S.D. N.Y. 2002). Petition for Contempt, ¶¶ 9-17, and Exs. B, C, D, E. Apparently, GFL took the bank account information from documents obtained by subpoenas issued to S&T Bank, Community Banks, S.A., and County National Bank. Id.

GFL does not dispute the allegation that it violated the April 11, 2002 Order, but disputes that its violation was willful. Upon the inquiry of counsel for Colkitt and Medical Leasing Associates regarding the source of the bank account information used in Kenney's affidavits, GFL's counsel responded that "[t]he references to the embargoed documents in the Kenney Affidavits of June 13 and July 17, 2002, and other New York papers, was unauthorized by GFL," and the references to any embargoed documents were "inadvertent and without conscious disregard for the temporary embargo." Petition for Contempt, Ex. G. In addition, Eugene S. Becker, Esquire, of the firm Kenney, Becker[10] submitted an affidavit to this court stating that "Kenney, Becker annexed, inadvertently" the documents subject to this court's April 11, 2002 Order to its filings in GFL Advantage Fund, Ltd. v. Douglas R. Colkitt, et al., No. 123668/01 (N.Y. Sup. Ct., New York County, 2001). Answer to Petition for Contempt, Ex. C. Mr. Becker described in his affidavit the efforts made to withdraw the bank account information subject to the April 11, 2002 Order, including withdrawing certain papers and refiling replacement documents. Id. at ¶¶ 4-8.

[10] Mr. Kenney, an affiant and witness for GFL, testified in a deposition in another matter that he owns a minority interest in the firm Kenney, Becker. Opposition to Motion to Substitute Affidavits, Ex. A., p. 240.

Based on the affidavit of Mr. Becker and the absence of any evidence revealing GFL's willful intent to violate this court's April 11, 2002 Order, the Petition for Contempt is denied. As the Order issued contemporaneously with this Opinion reflects, however, if there are any other documents containing information used in violation of the April 11, 2002 Order that still exist as part of a public record, this court orders that GFL take the necessary steps to withdraw those documents. Certainly, given the extraordinary nature of the *ex parte* proceeding and this court's embargo Order on the documents thereby obtained, the inadvertent release of documents borders on the reckless.

Petition for the Issuance of a Commission

As described previously in this Opinion, Colkitt and Medical Leasing Associates filed a Petition for the Issuance of a Commission directing the Notary Public of the State of Florida to compel the testimony of Louis Guinart at a deposition and the production of documents at that deposition. According to Colkitt and Medical Leasing Associates' Petition, Mr. Guinart is the Director of Customer Service of the Property Appraiser's Office of Sarasota County, Florida, and would be able to testify regarding the legality of the methods used by GFL's investigators in obtaining documents found in Colkitt's trash outside his Florida home. Colkitt and Medical Leasing Associates' Petition for the Issuance of a Commission, ¶¶ 5-6. The testimony presented at the multiple hearings before this court, and the facts and argument presented by both sides in their memoranda of law and exhibits, constitute a sufficient basis for the court to make its ruling on the Motion for Return of Documents, and this court would make such a ruling, even assuming, *arguendo,* that the documents retrieved from Colkitt's trash were obtained by a

trespass on Colkitt's property. Therefore, a deposition of Mr. Guinart is unnecessary and the Petition for the Issuance of a Commission is denied.

Motion to Withdraw Previously Submitted Affidavits and Substitute New Affidavits Nunc Pro Tunc

Finally, GFL urges this court to permit the substitution, *nunc pro tunc*, of three new affidavits for the following three previously submitted affidavits: Affidavit of James R. McGunn, sworn as of August 10, 2001; Affidavit of Martin S. Kenney, sworn as of August 23, 2001; and Supplemental Affidavit of Martin S. Kenney, sworn as of September 17, 2001. Motion to Substitute Affidavits, p. 2. A court's ruling *nunc pro tunc* is "an entry made now, as of then, to have the effect as if the event had occurred on the former date. Its office is to supply an omission in the record caused through possible inadvertence or mistake." Petrocelli Construction v. Epstein, 4 Pa.D.&C.4th 292, 297 (Pa.Com.Pl., Bucks County, 1989), citing In re Jurkowitz Estate, 359 Pa. 570, 59 A.2d 895 (1948).

In its Motion, GFL states that the new proposed affidavits are "identical" to the previously submitted affidavits and differ only in that they contain an "initial statement by the affiant regarding the fee" agreement between GFL and Interclaim, the company for which the affiants, Kenney and McGunn, worked as investigators and for which Kenney was the President and Chief Executive Officer. Id. at ¶ 5. At the time that the affidavits were previously sworn and submitted, Interclaim "had a compensation arrangement with GFL which provided, in pertinent part, that Interclaim would receive a monthly flat fee, would be reimbursed for its reasonable and necessary out-of-pocket expenditures and [would] also be entitled to a success fee." Id. at ¶ 3. At a hearing before this court, Kenney testified that Interclaim and GFL agreed on a "cost-plus-

success fee contract with a success fee . . . [of] 20 percent of the net sums that might be recovered from the judgment." Transcript of 5/16/02 Hearing, pp. 150-51.[11] Apparently, GFL and Interclaim no longer have a success fee as part of their fee agreement, and although GFL admits that the issue of the success fee was not raised in this court, GFL has submitted its Motion to Substitute Affidavits to "address[] the potential issue." Id. at 5.

Colkitt and Medical Leasing Associates contend that the substitution of new affidavits would prejudice them because the existing affidavits reveal that GFL concealed the fee arrangement between Interclaim and GFL, and that arrangement points to the financial interest of Interclaim and the affiants who are employees and/or officers of Interclaim. Opposition to Motion to Substitute Affidavits, p. 7. Colkitt and Medical Leasing Associates imply, therefore, that the existence of the success fee at the time of the previously submitted affidavits impacts the credibility of Kenney and McGunn, and those affidavits should remain part of the record for this court to consider.

There is no evidence that the previously submitted affidavits were filed inadvertently or that the omission of the fee agreement information was by mistake. In fact, GFL admits that the "prior affidavits were true when signed," and "that none of the statements or information set forth in their prior Affidavits were impacted in any way by the prior compensation arrangement." Motion to Substitute Affidavits, ¶ 5. Based on the absence of mistake or inadvertence by GFL in filing the previously submitted affidavits, based on the lack of caselaw supporting GFL's motion,

[11] Kenney confirmed this fee arrangement at a deposition in another case, and further testified that GFL paid Interclaim $1.1 million. Opposition to Motion to Substitute Affidavits, Ex. A.

and based on the possible prejudicial effect of the requested substitution, this court denies the Motion to Substitute Affidavits.[12]

Conclusion

For the reasons discussed above, and as set forth in an Order issued contemporaneously with this Opinion, this court grants Colkitt and Medical Leasing Associates' Motion for Return of Documents, but denies their request for sanctions, denies their Petition for Contempt, denies their Petition for Issuance of a Commission, and denies GFL's Motion to Substitute Affidavits.

BY THE COURT:

JOHN W. HERRON, J.

Dated: January 6, 2003

[12] Colkitt and Medical Leasing Associates further assert that the payment to Kenney and McGunn was illegal pursuant to Belfonte v. Miller, 212 Pa. Super. 508, 511, 243 A.2d 150, 152 (1968). Opposition to the Motion to Withdraw, p. 5. They also assert that the compensation to Kenney and McGunn violated Rule 3.4 of the Pennsylvania Rules of Professional Conduct which provides: "[A] lawyer shall not . . . pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case . . . ." Id. at 6. Because there is no motion pending relating to whether the compensation paid to Kenney and McGunn was legal, or whether the compensation violated any of the Pennsylvania Rules of Professional Conduct, this court declines to rule on those issues. Furthermore, although Colkitt and Medical Leasing Associates suggest in their Opposition to the Motion to Substitute Affidavits that the three existing affidavits must be stricken from the record, no motion to strike is pending, and therefore, this court declines to strike the three existing affidavits. Id. at 8.