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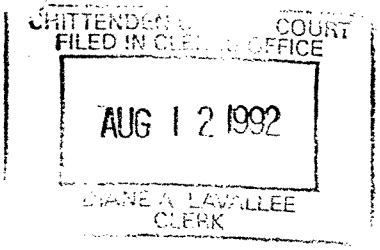

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

STATE OF VERMONT, Plaintiff, v. GENE ROSENBERG and PAUL COHEN d/b/a GENE ROSENBERG ASSOCIATES, Defendants.	)	CHITTENDEN SUPERIOR COURT DOCKET NO. S2368-91 CnC

OPINION AND ORDER

This matter is before the court on defendants' motion for a protective order. This action arises from a consumer fraud complaint filed on behalf of the State of Vermont by the Attorney General's office. In the conduct of their business activities in Vermont, the defendants are alleged to have violated the Consumer Fraud Act, 9 V.S.A. § 2451 et seq., and the Federal Trade Commission's Guides Against Deceptive Pricing, 16 C.F.R. 233. The defendants are in the business of organizing, promoting and otherwise completing furniture store liquidation sales. The State has alleged that the defendants, while conducting close out sales for Whitcomb's Furniture Store in East Barre and Agel-Corman Furniture Company in South Burlington, they advertised drastic reductions in furniture prices offered to the public, but first raised the base prices well above the goods existing retail price making the reductions meaningless and deceptive.

The defendants rely on V.R.C.P. 26(c) to support the motion for a protective

order. The defendants request an order of this court prohibiting the disclosure of information obtained by the State in discovery to non-parties, either in or out of Vermont, and limit the use of this information to the litigation in this matter only.

The Attorney General conducted a civil investigation pursuant to 9 V.S.A. § 2460 and obtained depositions of the defendants' employees in October of 1990. Section 2460(a) forbids the disclosure of information obtained by civil investigative demand unless ordered by the court for good cause shown. The defendants assert that "much of the same information" found in the employees' depositions is now sought by the plaintiff through discovery. Therefore, the defendants conclude that there is no policy reason to allow the circumvention of the ban on disclosure in § 2460 by "bootstrapping" the information through a discovery procedure.

The civil investigative authority in § 2460 provides disclosure protection to the party being investigated for policy reasons that are apparent from the statutory framework. Unlike the procedures in discovery, the party being investigated pursuant to § 2460 has no reciprocal right of access to information held by the State via the Attorney General. The legislative design clearly seeks to avoid a civil investigation and public smear campaign by disclosure of information obtained under the color of law. The non-disclosure mandate of § 2460, however, is not absolute. A court may order, for good cause shown, the disclosure of information obtained through civil investigative demand. 9 V.S.A. § 2460(a).

It is not difficult to imagine circumstances where consumers are being bilked by

someone under investigation and the only way to prevent further harm to consumers is to disclose information that was obtained by a § 2460 investigation. Therefore, we reject the defendants' argument that there is no policy reason to distinguish ordinary discovery from civil investigative demand under § 2460. Once an action is filed in Superior Court by the State, our civil rules apply and discovery is available to all parties to the litigation. The fact that the State may now request through discovery that which was previously obtained under § 2460 is not sufficient alone to merit a protective order prohibiting disclosure. This is so, because prior to the institution of civil litigation the legislature felt that a party being investigated should have some protection from the one sided investigative powers of the State that is imposed by the statute. 9 V.S.A. § 2460(a).

Discovery actions are unfettered by the restrictions on civil investigative demand and protective orders may be issued against public disclosure of information obtained in discovery upon a sufficient showing by the defendants. V.R.C.P. 26(c). We recognize that there is no constitutional or common law right to examine discovery materials, regardless of whether or not they are filed with the court. Herald Assoc. v. Judicial Conduct Board, 149 Vt. 233, 239 (1988), citing Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). The question in this matter, however, is not whether a non-party has the right to access discovery materials as in Herald Assoc.; rather, the issue is whether or not a party may disclose the information to a non-party.

In Cipollone v. Ligget Group, Inc., 113 F.R.D. 86 (1986), cited by both the

plaintiff and the defendants as persuasive authority, the court held that under Rule 26(c) a party seeking a protective order prohibiting disclosure must show that public disclosure will; 1) cause financial and other embarrassment to be suffered; 2) compromise fairness at trial; 3) violate an estoppel predicated on prior agreement by the opposing party not to disclose; 4) hamper discovery; or 5) constitute an abuse of the discovery process. Id. at 89. In defendants original memoranda in support of the motion for a protective order there is no recitation of facts or circumstances that would give rise to a good cause showing to support such an order. This memoranda is replete with an accurate recitation of the law of discovery regarding protective orders, but is of no use to the court in determining cause for the order which is sought. The same holds true for defendants' reply memorandum in response to plaintiff's memorandum in opposition.

Discovery requests are uniformly held to be improper if they are sought for purposes of gathering information to be used in proceedings other than the pending action. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978). In the instant matter, however, the defendants do not seek a protective order to prevent the discovery being requested by the State or challenge its use in the pending litigation. We hold that an assertion that discovered materials may be used in another proceeding is not sufficient to support a protective order of what otherwise is properly discoverable information. If the purpose of the discovery were primarily the use of that information in other proceedings, then a protective order would be appropriate, denying access to

that information in the first instance. Id. In the instant matter, however, the dissemination of discovered materials is not the purpose of the discovery; rather it is incidental to it.

Rule 26(c) clearly places the burden on the moving party to establish "good cause" for a protective order. The defendants have not provided the court with such a showing upon which we may base such an order. Rather, the defendants depend on the notion in Seattle Times that discovery information is not public information. If a non-party were trying to obtain the discovery information at issue in this case, then we could without "good cause" prevent public access to that information. Otherwise, if the discovery request is proper, a party in possession of discovery information may disclose that information at their choosing, unless there be "good cause" shown why that information should not be disclosed. V.R.C.P. 26(c).

ORDER

ACCORDINGLY, the defendant's motion for a protective order is DENIED.

Dated at Burlington, Vermont, this 12th day of Aug., 1992.

Alden T. Bryan, Presiding Judge