SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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In the Matter of the Application of the

PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Petitioner,

For an order pursuant to C.P.L.R. § 2308(b) to compel compliance with a subpoena issued by the Attorney General

-against-

PRICEWATERHOUSECOOPERS LLP and EXXON MOBIL CORPORATION,

Respondents.

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Index No. 451962/16

DECISION & ORDER

Motion Seq. No. 001

OSTRAGER, J:

Presently before the Court is a petition by the Office of the New York Attorney General ("NYAG") seeking an order pursuant to CPLR section 2308(b) compelling respondent PricewaterhouseCoopers LLP ("PWC") to comply with a *subpoena duces tecum* issued by the NYAG on August 19, 2016 (the "Subpoena") and compelling respondent Exxon Mobil Corporation ("Exxon") to allow PWC to produce responsive documents without withholding some based on a purported accountant-client privilege. The Subpoena, attached as Exhibit A to the Affirmation of Katherine C. Milgram, Chief of the Investor Protection Bureau of the Office of the Attorney General, was issued in connection with the Attorney General's investigation of Exxon's representations about the impact of climate change on its business, including on its assets, reserves, and operations.

A highly publicized subpoena was originally issued to Exxon on November 4, 2015. Concurrent with additional publicity, including an interview of Attorney General Schneiderman in the New York Times, the NYAG issued its investigative subpoena to PWC on August 19, 2016. Both subpoenas relate to potential Martin Act violations by Exxon in connection with its allegedly misleading public disclosures relating to climate change. All parties agree that this Court is the proper forum in which to resolve the NYAG's application.

It is undisputed that Exxon has produced at least one million documents to the NYAG pursuant to the subpoena issued to Exxon. The question raised by the instant petition is whether the production of PWC documents would violate Texas Occupations Code Section 901.457, which is captioned "Accountant-Client Privilege." The answer to this question turns, in the first instance, on whether New York law applies to an investigative subpoena issued by the NYAG with respect to a New York investigation involving companies that do business in New York. If, as the NYAG claims, New York law applies, counsel agree that there is no accountant-client privilege as New York law does not recognize any such privilege. If, as Exxon claims, Texas law applies to the Subpoena, there is an issue as to whether Texas Occupations Code Section 901.457 would operate to preclude production of non-attorney client communications on the grounds of an accountant-client privilege. Significantly, PWC takes no position on the applicability of the Texas Occupations Code Section 901.457.

The short answer to the latter issue is that Texas Occupations Code Section 901.457 does not preclude production of the requested documents. It is therefore unnecessary to resolve the choice of law issue, although as set forth *infra*, New York law is applicable to the NYAG's petition.

The precursor statute to Texas Occupations Code Section 901.457 was originally enacted in 1979. As originally enacted, the statute appears to have created a limited accountant-client privilege subject to several carve outs, although no Texas case has specifically recognized an accountant-client privilege. The statute was subsequently amended multiple times, first in 1989 and, thereafter in 1999, 2001, and again in 2013. Each succeeding amendment to the statute modified in some respect the carve outs to any arguable accountant-client privilege.

The case law and legislative history relating to the intent and proper interpretation of Texas Occupations Code Section 901.457 and its predecessors is sparse and not dispositive of this case. In all events, all of the limited case law addressing the statute predates the 2013 version of the statute, except for one federal case that mentions the state law but applies federal law. This Court finds that the statute has a plain meaning. Specifically, subdivision (b) of the statute provides in relevant part:

> This section does not prohibit a license holder [PWC] from disclosing information that is required to be disclosed:
>
> (1) by the professional standards for reporting on the examination of a financial statement;
>
> (2) under a summons or subpoena under the provisions of the Internal Revenue Code of 1986 and its subsequent amendments, the Securities Act of 1933 *(15 U.S.C. Section 77a et seq.)* and its subsequent amendments, the Securities Exchange Act of 1934 *(15 U.S.C. Section 78a et seq.)* and its subsequent amendments, or The Securities Act *(Article 581-1 et seq., Vernon's Texas Civil Statutes);*
>
> (3) under a court order signed by a judge if the order:
>
> (A) is addressed to the license holder;
>
> (B) mentions the client by name; and
>
> (C) requests specific information concerning the client;
>
> (4) in an investigation or proceeding conducted by the board;
>
> (5) in an ethical investigation conducted by a professional organization of certified public accountants;

(6) in the course of a peer review under Section 901.159 or in accordance with the requirements of the Public Company Accounting Oversight Board or its successor; or

(7) in the course of a practice review by another certified public accountant or certified public accountancy firm for a potential acquisition or merger of one firm with another, if both firms enter into a nondisclosure agreement with regard to all client information shared between the firms.

This Court rejects Exxon's assertion that subsections (b)(2) and (b)(3) must be read together and that because the Subpoena was not issued pursuant to one of the federal laws specified in (b)(2), the NYAG may not seek a court order compelling production pursuant to (b)(3). As a matter of pure statutory construction, this interpretation of the statute is flawed because there is no textural support for the proposition that the carve out in (b)(3) is tethered to the carve out in (b)(2) while the carve outs in (b)(4), (b)(5), (b)(6), and (b)(7) are not. Consequently, the carve out in (b)(3) would be satisfied by an order from this Court compelling compliance by Exxon and PWC of the investigative subpoenas issued by the NYAG inasmuch as those subpoenas request specific information concerning Exxon. *Cf. In re Arnold*, 2012 WL 6085320 (Tex. App., Nov. 30, 2012) (holding that an order denying a motion to quash a deposition notice functioned as a court order, thus vitiating any confidentiality obligation under the statute).

For the reasons stated above, it is not necessary to resolve the choice of law issue. If there were an applicable accountant-client privilege under Texas law, it would be nevertheless unavailing because New York law applies to the NYAG's application. New York does not recognize an accountant-client privilege, and controlling authority holds that: "The law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding is applied when deciding privilege issues[.]" *JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 A.D.3d 18, 25 (1st Dep't 2012); *see also G-I Holdings, Inc. v Baron & Budd*, No. 01 Civ. 0216 (RWS), 2005 U.S. Dist. LEXIS 14128, at 7 (S.D.N.Y. July 13, 2005) ("With

respect to the law of evidentiary privileges, New York courts generally apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding itself."); *Fine v Facet Aerospace Products Co.*, 133 F.R.D. 439, 443 (S.D.N.Y. 1990 ("New York courts apply the privilege law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege issues."); *People v Greenberg*, 50 AD3d 195, 198 (1st Dep't 2008) ("New York courts routinely apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege issues.") (internal quotation marks omitted).

Accordingly, it is hereby

ORDERED that the motion by the Attorney General of the State of New York to compel compliance with the investigative *subpoena duces tecum* issued on August 19, 2016 is, in all respects, granted. As stated in open court, compliance with the Subpoena shall occur in accordance with any schedule to which the parties agree, as long as that schedule is not unnecessarily protracted. Counsel shall appear for a conference on Thursday, December 15, 2016 at 9:30 a.m. in Room 341.

This corrected opinion supersedes the opinion dated October 25, 2016.

Dated: October 26, 2016

BARRY R. OSTRAGER J.S.C.
JSC