**IN THE SUPERIOR COURT**
**OF THE**
**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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| JUAN M. SAN NICOLAS,<br><br>Plaintiff,<br><br>vs.<br><br>SAIPAN LAU LAU DEVELOPMENT, INC., SHIMIZU CORPORATION AND TOKIO MARINE & FIRE INSURANCE CO.<br><br>Defendants. | **CIVIL ACTION NO. 97-1107A**<br><br>**ORDER GRANTING DEFENDANTS' MOTION TO ISSUE PROTECTIVE ORDER AND QUASH PLAINTIFF'S DOCUMENT SUBPOENAS** |

## I. INTRODUCTION

This matter came before the court on October 22, 1999, on defendants' Saipan Lau Lau Dev. Inc. and Shimizu Corp.'s ("Movants") motion to issue protective order and quash Plaintiff's document subpoenas. Randall Todd Thompson, Esq. appeared on behalf of Movants and Theodore R. Mitchell, Esq. appeared on behalf of Plaintiff. The court, having heard the arguments of counsel and reviewed all the evidence presented, now renders its written decision. **[p. 2]**

## II. FACTS

On November 6, 1995, Plaintiff sustained injuries in a fall at tee number five at the East Course of the Lao Lao Bay Golf Resort. Exactly two years later, Plaintiff filed a complaint against the defendants alleging that his injuries resulted from the negligent design, construction and management of the Lao Lao Bay Golf Resort. Plaintiff demands $2.5 million in compensatory damages and an additional $2.5 million in punitive damages against the defendants.

The parties have conducted discovery for the past two years, which at the time of the hearing was scheduled to be completed by October 25, 1999.[1] The jury trial is scheduled to begin on December 20, 1999.

[1] The discovery deadline was extended to November 19, 1999.

**FOR PUBLICATION**

On September 29, 1999, Plaintiff issued two separate subpoenas under Com. R. Civ. P. 45 to Movants ordering the production of certain documents. Plaintiff commanded defendant Saipan Lau Lau Dev. Inc. to produce various documents specified in a 45-item list and defendant Shimizu Corp. to turn over documents specified on a 38-item list. The documents range from financial statements to board resolutions and minutes. On October 6, 1999, Movants filed an objection to Saipan Lau Lau subpoena and a motion to issue a protective order and quash the subpoenas. On October 8, 1999, Movants filed an objection to the Shimizu subpoena.

During the hearing on the said motion, Movants counsel placed on Plaintiff's table two piles of documents which were listed in the subpoenas. Movants stated that they furnished the documents as if Plaintiff filed a request under Rule 34. Movants, however, did not withdraw the motion for protective order and to quash the subpoenas.

## III. ISSUE

May a party to litigation issue a subpoena pursuant to Com. R. Civ. P. 45 commanding the opposing party to produce documents during discovery? **[p. 3]**

## IV. ANALYSIS

Movants assert that a party seeking to compel production of documents from another party must comply with Rule 34 rather than issue a subpoena under Rule 45. In their reply brief, Movants urge an *in pari materia* reading of Rules 34 and 45. Plaintiff asserts, however, that the subpoenas are appropriate under Rule 45 because the rule applies to both parties and non-parties. Plaintiff contends that a plain meaning construction of Rule 45 does not support a reading of Rule 45 as applying exclusively to non-parties.[2]

Under Rule 34, a party may request from another party documents and tangible items within the scope of Rule 26, which governs discovery process, that are in the possession, custody or control

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[2] Plaintiff also asserts that said motion should be denied because it was filed about a day late. Untimely filings of motions to quash are not automatic grounds for dismissal. *Celenex Corp. v. E.I. duPont de Nemours & Co.*, 58 F.R.D. 606, 609-610 (D.Del 1973) (holding that where the volume of documents sought is great, the time for production is brief and counsel are attempting to define the scope of production, no waiver of objections is to be found).

of the party upon whom the request is served. This provision is addressed only to parties to litigation. Rule 34(c) specifically states that non-parties may be compelled to produce documents and items as provided in Rule 45.

Rule 45, which govems subpoenas, does not specifically state that it applies only to non-parties. The rule states in pertinent part: "[Every subpoena shall] command *each person* directed . . . to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person . . . ." (emphasis added). COM. R. CIV. P. 45(a)(1)(C).

The close relation and tension between the rules is noted in 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2452 (2d ed. 1994). The commentator states that the apparent conflict between Rules 34 and 45 is not a new one:

> Prior to 1970, there were some differences between Rule 45 and the procedure for the pretrial production of documents in Rule 34 that tempted litigants to **[p. 4]** seek to avoid the restrictions on the use of Rule 34 by resorting to Rule 45. This stemmed from the fact that, until 1970, the inspection of documents and things under Rule 34 could be had only on court order, after a motion and a showing of good cause. A subpoena duces tecum, on the other hand, could be issued without a court order . . . .

*Id*.

The federal courts, however, reined in the attempts to circumvent Rule 34 and held that the discovery rules constituted "an integrated mechanism and must be read *in pari materia.*" *Id*. (citing, among other cases, *Hickman v. Taylor*, 329 U.S. 495, 505 (1947); *Boeing Airplane Co. v. Coggeshall* 280 F.2d 654 (D.C. Cir. 1960); *McLean v. Prudential S.S. Co.*, 36 F.R.D. 421 (D. Va. 1965)). The *in pari materia* rule of statutory construction requires that statutes "which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." *Kimes v. Bechtold*, 342 S.E.2d 147, 150 (W.Va. 1986) (quoting *State ex rel. Fetters v. Hott*, 318 S.E.2d 446 (1984).

This particular problem between the two rules was largely resolved with the enactment of the 1970 amendments when Rule 26 was made the governing authority by which the scope of discovery would be determined.

Nonetheless, tension between the two rules still persists to the present day as this case

illustrates. The statement of the court in *Cooney v. Sun Shipbuilding & Drydock Company*, 288 F.Supp. 708, 717 (E.D. Pa. 1968), that Rule 34 applies only to parties and Rule 45 applies to both parties and non-parties is frequently cited. *See Continental Coatings Corp. v. Metco, Inc.*, 50 F.R.D. 382, 384 (N.D. Ill. 1970); *Badman v. Stark*, 139 F.R.D. 601, 603 (M.D. Pa. 1991); *McAleese v. Owens*, 1991 WL 329930 at *3 (W.D. Pa. 1991).[3]

In recent years, the federal district court in Massachusetts has held that when discovery of documents is being sought from a party to the litigation, the production of such documents is accomplished not under Rule 45 but under Rule 34. "[Rule 45] governs discovery of documents in **[p. 5]** the possession, custody and/or control of non-parties. Discovery of documents from parties is governed by Rule 34." *Contardo v. Merrill Lynch, Pierce, Fenner and Smith* 119 F.R.D. 622, 624 (D.Mass. 1988).

*Hasbro, Inc. v. Serfino*, 168 F.R.D. 99 (D. Mass. 1996), presents a similar factual situation to the instant case and issued a similar holding to *Contardo*. In *Hasbro*, the defendant sought to subpoena documents under Fed. R. Civ. P. 45 from the plaintiff relating costs of a home by the plaintiff's chief executive officer. The court held that "while the language of Rule 45, since amended, may still not be crystal clear, it is apparent to this Court that *discovery* of documents from a party, as distinct from a non-party, is not accomplished pursuant to Rule 45." *Id*. at 100 (emphasis in original). The court concluded that Rule 34 governs the discovery of documents in the possession or control of the parties themselves. *Hasbro* pointed to the advisory notes to the 1991 amendment which "presume the rule's exclusive applicability to non-parties with respect to discovery." *Id.*

The CNMI Supreme Court has turned to interpretations of federal rules, after which our own rules of civil procedure are patterned, to guide its decisions. *See Mafnas v. Commonwealth*, 2 N.M.I. 248, 264 n. 12 (1991); *Ada v. Sadhwani's Inc.*, 3 N.M.I. 303, 311 n. 3 (1992); *Rogolofoi v. Guerrero*, 2 N.M.I. 468, 479 n. 6 (1992). The reasoning in *Hasbro* is persuasive that Rule 34, not Rule 45, governs the discovery of documents from a party to the litigation. To hold otherwise would leave open a backdoor to Rule 45 that circumvents the procedures set forth in Rule 34 for the

[3] In each of these cases, a party litigant sought to compel the production of documents from a non-party.

discovery of documents from party litigants.[4] Plaintiff should have filed a Rule 34 request to produce the documents listed in the subpoenas. Even though Plaintiff's counsel may have admitted during oral arguments to being "outfoxed" by opposing counsel in timely obtaining the documents sought in the subpoenas, resorting to Rule 45 is not a permitted recourse. **[p. 6]**

## V. CONCLUSION

Based on the reasons stated above, defendants Saipan Lau Lau Dev. Inc. and Shimizu Corp.'s motion to issue a protective order and quash the document subpoenas is hereby **GRANTED**. However, with the discovery deadline approaching, the document subpoenas will be treated as if Plaintiff filed them pursuant to Rule 34.

SO ORDERED this OCT 29 1999.

/s/ John A. Manglona
JOHN A. MANGLONA, Associate Judge

[4] This order would also be consistent with the *in pari materia* reading of the rules urged by the Movants. The CNMI Supreme Court in *Tudela v. Marianas Pub. Land Corp.*, 1 N.M.I. 181, 185 (1991) noted that in rule interpretation "we approach rules as though they had been drafted by the legislature and give words their ordinary meaning, reading the language as a whole, and seeking to give effect to all of it."