

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JEREMIAH FRANCIS MANNING,)	
)	
Petitioner,)	
)	
v.)	Docket No. 22609-17.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case was previously calendared for trial on November 26, 2018, in New York, New York. On November 15, 2018, this case was continued for trial, and jurisdiction was retained by the undersigned.

On February 11, 2019, petitioner filed four documents, each with a cover sheet titled “Petitioner’s Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent”.¹ The documents are more specifically titled on the first pages as follows: (1) Application for Order to Take Deposition to Perpetuate Evidence (Docket Entry Index No. 0031); (2) Petitioner’s Supplemental Application to Take Deposition to Perpetuate Evidence - Marino (Docket Entry Index No. 0030); (3) Petitioner’s Notice of Motion for Rule 81 Deposition to Perpetuate Evidence - Marino (Docket Entry Index No. 0032); and (4) Petitioner’s Notice of Deposition of Jason Marino, C.P.A. (Docket Entry Index No. 0033).²

The Application for Order to Take Deposition to Perpetuate Evidence (Docket Entry Index No. 0031) consists of pages printed from the Appendix to the Tax Court Rules of Practice and Procedure upon which petitioner has handwritten

¹Two of the documents filed by petitioner include additional language in the title on each of those cover sheets.

²All Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect at all relevant times.

additional information. In this document petitioner indicates that he “desire[s] to take the testimony of Jason Marino on 2/28 at 10:00 a.m.” at a specified location. Attached to this document are certificates of service indicating that petitioner served the document on respondent as well as Kendall Layne, Esq.

Petitioner’s Supplemental Application to Take Deposition to Perpetuate Evidence - Marino (Docket Entry Index No. 0030) requests that the Court grant his application to take the deposition of Jason Marino pursuant to Rules 58 and 81. Petitioner states in this document that “Mr. Marino lives and works near San Jose, CA” and is therefore “beyond the subpoena power of the Court”.

Petitioner’s Notice of Motion for Rule 81 Deposition to Perpetuate Evidence - Marino (Docket Entry Index No. 0032) requests the Court to deem valid the “Substituted Service of a Subpoena ad testificandum and duces tecum and notice of deposition to Deponent Jason MARINO * * * upon Deponent Jason MARINO’s counsel Kendall A. Layne and Alex Graft of Lewis Brisbois LLP”.

Petitioner’s Notice of Deposition of Jason Marino, C.P.A. (Docket Entry Index No. 0033) states that pursuant to Rule 74(b)(2) “Petitioner shall take the deposition of Mr. Jason Marino”. The notice of deposition further states that “[t]he deposition will be taken for the purposes of discovery, for use at trial in this matter, and for any other purpose permitted under the Federal Rules of Civil Procedure, U.S. Tax Court and applicable federal/state law.” The notice of deposition also includes a copy of a subpoena issued to Mr. Marino stating that he is to appear for a deposition on February 28, 2019, at 10 a.m. at a specified location. The subpoena’s return on service is incomplete, but the notice of deposition indicates that it was served on respondent as well as Kendall Layne, Esq.

On February 13, 2019, petitioner filed a First Amendment to Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent (Docket Entry Index No. 0034). In this document petitioner represents that, in fact, Mr. Marino “was personally served with the subpoena and notice of deposition”. The first amendment includes a copy of the subpoena with the return on service complete.

Discussion

Rule 70 governs discovery, and paragraph (b) thereof provides that the scope of discovery is “any matter not privileged and which is relevant to the subject matter involved in the pending case.” The paragraph further provides: “It is not ground for an objection that the information or response sought will be

inadmissible at the trial, if that information or response appears reasonably calculated to lead to discovery of admissible evidence.” The Court promotes and prefers informal discovery under Rule 70. “The discovery procedures should be used only after the parties have made reasonable informal efforts to obtain needed information voluntarily.” Branerton Corp. v. Commissioner, 61 T.C. 691, 692 (1974).

Rule 74 governs depositions for discovery purposes. Under Rule 74(b), if all parties consent, they shall set forth their consent and the intent to depose in a stipulation, containing the information required in Rule 81(d). Rule 74(c) addresses depositions without consent of the parties. Within certain time limits, it permits a party to take a deposition for discovery purposes of, among others, a nonparty witness. See Rule 74(c)(2). Because the parties have not all consented and have not provided a stipulation as required by Rule 74(b), we will treat the requested deposition as subject to Rule 74(c)(2).

Rule 74(c)(1)(B) provides that the taking of a nonconsensual deposition “is an extraordinary method of discovery” to be used only where the deponent can give testimony that practicably cannot be obtained by other informal or formal discovery methods. Rule 74(c)(2)(A) prescribes that a party desiring to take a nonparty deposition give written notice thereof to every other party and to the nonparty witness to be deposed. Among other requirements, the notice must state the issues in controversy to which the expected testimony of the witness relates and the reason for deposing the witness. Rule 74(c)(2)(B) allows 15 days for a party or the nonparty witness to object to the noticed deposition. The noticing party may then move for an order with respect to any objection and must annex to the motion the notice of deposition, proof of service, and a copy of any responses and objections. “Prior to a motion for such an order, neither the notice nor the responses shall be filed with the Court.” Rule 74(c)(2)(B). If we approve the taking of a notice of deposition under Rule 74, we issue an appropriate order. See Rule 74(e)(4).

Rule 81(a) provides that

[a] party * * * who desires to perpetuate testimony * * * shall file an application pursuant to these Rules for an order of the Court authorizing such party to take a deposition for such purpose. Such depositions shall be taken only where there is a substantial risk that the person or document, electronically stored information, or thing involved will not be available at the trial of the case, and shall relate

only to testimony or document, electronically stored information, or thing which is not privileged and is material to a matter in controversy.

After the filing of an application with the Court, “[i]f the Court approves the taking of a deposition, then it will issue an order which will include in its terms the name of the person to be examined, the time and place of the deposition, and the officer before whom it is to be taken.” Rule 81(b)(2).

Rules 147 and 148 provide the procedures for issuing a Tax Court subpoena. Generally a subpoena commands a person to attend and give testimony, or produce identified documents, at the time and place specified therein, typically at trial. See Rule 147(a) and (b). As relevant herein, Rule 147(d)(1) provides that “[t]he order of the Court approving the taking of a deposition pursuant to Rule 81(b)(2), * * * or the service of a notice of deposition pursuant to Rule 74(b)(2) or (c)(2), constitutes authorization for issuance of subpoenas for the persons named or described therein.” This case is not currently calendared for trial, the Court has not issued an order approving the deposition of Mr. Marino under Rule 81, nor has petitioner followed the procedures found in Rule 74. Thus, petitioner’s service of the subpoena on Mr. Marino and his counsel is premature.

Petitioner’s Application for Order to Take Deposition to Perpetuate Evidence (Docket Entry Index No. 0031); Petitioner’s Supplemental Application to Take Deposition to Perpetuate Evidence - Marino (Docket Entry Index No. 0030); and Petitioner’s Notice of Motion for Rule 81 Deposition to Perpetuate Evidence - Marino (Docket Entry Index No. 0032) appear to request the Court to issue an order granting petitioner’s request to depose Mr. Marino pursuant to Rule 81.

Petitioner’s request is based on the false premise that Mr. Marino is beyond the subpoena power of this Court because he does not live or work within 100 miles of the place of trial in New York, New York. Section 7456(a)(1) provides for the subpoena of witnesses and necessary documents and other evidence by the Tax Court “from any place in the United States” to appear or to be produced at any designated place of hearing. Thus, Mr. Marino may, in fact, be subpoenaed to attend the place of trial in New York, New York. Moreover, petitioner has not alleged, much less demonstrated, that there is a substantial risk that the proposed deponent will not be available at the trial of this case.

Accordingly, petitioner’s request to depose Mr. Marino pursuant to Rule 81 will be denied.

Petitioner's Notice of Deposition of Jason Marino, C.P.A. (Docket Entry Index No. 0033) appears to be a copy of the notice, pursuant to Rule 74(c)(2)(A), that petitioner served on respondent and counsel for Mr. Marino. Petitioner's First Amendment to Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent (Docket Entry Index No. 0034) filed February 13, 2019, represents that Mr. Marino was also personally served with the notice of deposition. These documents, however, have been improperly filed with the Court. Rule 74(c)(2)(B) provides that before a motion for an order granting a request to depose a nonparty witness, "neither the notice nor the responses shall be filed with the Court." Accordingly, we shall strike from the record petitioner's document titled "Petitioner's Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent - This is Exhibit A to Petitioner's Supplemental Application" (Docket Entry Index No. 0033) filed February 11, 2019, and petitioner's document titled "Petitioner's First Amendment to Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent" (Docket Entry Index No. 34) filed February 13, 2019.

Upon due consideration of the foregoing, it is

ORDERED: That petitioner's document titled "Petitioner's Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent - This is Exhibit A to Petitioner's Supplemental Application" (Docket Entry Index No. 0033) filed February 11, 2019, is hereby stricken from the record and shall not be viewable as part of this case. It is further

ORDERED: That petitioner's document titled "Petitioner's First Amendment to Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent" (Docket Entry Index No. 0034) filed February 13, 2019, is hereby stricken from the record and shall not be viewable as part of this case. It is further

ORDERED: That petitioner's document titled "Petitioner's Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent (Docket Entry Index No. 0030) filed February 11, 2019, is denied. It is further

ORDERED: That petitioner's document titled "Petitioner's Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent (Docket Entry Index No. 0031) filed February 11, 2019, is denied. It is further

ORDERED: That petitioner's document titled "Petitioner's Application to Take Deposition of Jason Marino, C.P.A. and Enrolled Agent - This is the Notice

of Motion” (Docket Entry Index No. 0032) filed February 11, 2019, is denied. It is further

ORDERED: That, in addition to regular service, the Clerk of the Court shall serve a copy of this order as follows:

Kendall A. Layne
Alex Graft
Lewis Brisbois LLP
333 Bush Street, Suite 1100
San Francisco, CA 94104

Jason Marino, C.P.A.
RDS Tax Strategies
3190 S. Bascom Avenue, Suite 205
San Jose, CA 95124

(Signed) Michael B. Thornton
Judge

Dated: Washington, D.C.
February 15, 2019