IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

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| THEOPHILUS CALLWOOD, Plaintiff | : | |
| vs. | : | CIVIL NO. 232/1982 |
| ISLAND BLOCK, INC. and PATRICK LaFLUR, Defendants | : | |

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MEMORANDUM OPINION
(February // , 1983)

FEUERZEIG, J.

Should the court apply sanctions to a plaintiff who has indicated that he has filed no income tax returns and who now claims that the Fifth Amendment privilege against self-incrimination protects his refusal to authorize a release of income tax records from the Bureau of Internal Revenue? The court believes not.

I. Defendants' Motion for Sanctions

Plaintiff, Theophilus Callwood, has sued defendants, Island Block, Inc. and Patrick LaFlur, claiming, among other things, that he has suffered and will continue to suffer, lost earnings as a result of injuries caused to his foot due to defendants' negligence. To ascertain an estimate of any income plaintiff may have lost, defendants filed a request for production of plaintiff's income tax returns from 1975 to the present. Plaintiff refused to respond to the request, asserting through his attorney that he had no income tax returns. Defendants then moved, inter alia, to compel production of the income tax returns. The court agreed with the defendants and ordered the plaintiff to produce all the documents requested. In response, the plaintiff submitted an "Answer to Demand for Production," which was signed by him and his attorney but not sworn to, stating, "There are no income tax returns filed by or on behalf of the plaintiff. For that reason, none are produced herewith."

Defendants then moved for sanctions, claiming a right to verify the plaintiff's assertion by requiring him to authorize the release of any of his income tax returns. In opposition, the plaintiff raises equal protection and due process issues, but fails to anchor those claims with citation to authority or a showing of how those issues might apply to this case. He does, however, make a veiled reference to the Fifth Amendment privilege against self-incrimination that merits the court's consideration.

Unless a court orders otherwise, parties may obtain discovery regarding any matter that is not privileged, which is relevant to the subject matter of the pending action. 5 V.I.C. App. IV R. 39 (1982); Fed.R.Civ.P. 26(b). In conformity with the liberal philosophy of the Federal Rules, doubts as to relevance usually are resolved in favor of discovery. Hodge v. Hodge, 14 V.I. 432, 435 (D.V.I. 1977). Here, since the plaintiff has placed his lost income in issue, any record of his earnings before his claimed injuries are relevant. As one court said with respect to this issue, "This matter is too well settled to require substantial argument." Lind v. Canada Dry Corp., 283 F.Supp. 861, 865 (D. Minn. 1968). Even if the information or documents sought were not directly relevant, discovery of information and production of documents relating to a period before the one upon which an action is based is permissible. Paiewonsky v. Paiewonsky, 8 V.I. 62, 66, 50 F.R.D. 379, 380-81 (D.V.I. 1970). Consequently, there can be no dispute that the information defendants seek is properly discoverable if plaintiff has it.

The plaintiff, however, albeit in an unsworn statement, has indicated that he filed no income tax returns. Therefore, if the court were to order him to authorize the release of tax records, he might expose himself to criminal liability for income tax evasion or for failure to file. 1/ At the same time, if his refusal to authorize the release is privileged, the court may not penalize him for exercising that privilege. While Rule 26(b)(1) refers to discovery of "any matter not privileged," what is meant by "privileged" is defined by the Federal Rules of Evidence, 5 V.I.C. App. IV R. 7 (1982); Fed.R.Evid. 501, United States v. Reynolds, 345 U.S. 1, 6 (1953); Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959), which includes the privilege embedded in the United States Constitution against self-incrimination.

The Fifth Amendment establishes the privilege that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Although the Constitution does not specifically state that this privilege is applicable to non-criminal proceedings, the Fifth Amendment has long been held to apply to civil cases. McCarthy v. Arndstein, 266 U.S. 34 (1924).

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1/ Absent a statement to the contrary, the court assumes the plaintiff was required to file income tax returns for the years in question. 33 V.I.C. section 716 (1967).

As Justice Brandeis wrote:

> The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.

Id. at 40. The privilege may be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Maness v. Meyers, 419 U.S. 449, 464 (1975), quoting Kastigar v. United States, 406 U.S. 441, 444 (1972). Clearly, therefore, the privilege may be asserted in response to interrogatories and requests for production of documents. Mitchell v. Roma 265 F.2d 233 (3d Cir. 1959); United States v. Of 47 Bottles More or Less, 26 F.R.D. 4 (D.N.J. 1960), aff'd, 264 F.2d 666 (3d Cir. 1959).

Although there is authority for holding that a plaintiff waives his privilege when he files suit in which the privileged area is an essential element, 2/ the United States Court of Appeals for the Third Circuit has rejected that position. Mitchell v. Roma, 265 F.2d at 637. Moreover, other courts and authorities also have rejected the automatic waiver of the Fifth Amendment privilege, which this court finds to be the most reasonable approach. Campbell v. Gerrans, 592 F.2d 1054 (9th Cir. 1979); Backos v. United States, 82 F.R.D. 743 (E.D. Mich. 1979); 8 C. Wright and A. Miller, Federal Practice and Procedure §2018 (1970).

> A witness is generally entitled to invoke the Fifth Amendment privilege against self-incrimination whenever there is a realistic possibility that his answer to a question can be used in any way to convict him of a crime. It need not be probable that a criminal prosecution will be brought or that the witness's answer will be introduced

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2/ Ginness v. Hackett, 20 Fed.R.Serv. 2d 668 (D.R.I. 1974) (where the defendant-intervenor sought the membership lists of the plaintiff-intervenor, which had alleged injuries to its members, the court allowed the discovery despite the plaintiff's First Amendment claim, but limited the use of the discovered information to that case); Dow Chemical Co. v. Taylor, 20 Fed.R.Serv. 2d 673 (E.D. Mich. 1974) (where plaintiff-intervenor interjected the issue of its members' injuries, the court held "It is elementary that a party must as a matter of course have the right to inquire into the factual basis of allegations contained in opponent's pleading . . . . the party so pleading has chosen to forego its privilege in favor of proving these allegations as part of its case,"); 4 J. Moore and J. Lucas, Moore's Federal Practice 2d, para. 26.60.

> in a later prosecution; the witness need only show a realistic possibility that his answer will be used against him. Moreover, the Fifth Amendment forbids not only the compulsion of testimony that would itself be admissible in a criminal prosecution, but also the compulsion of testimony, whether or not itself admissible, that may aid in the development of other incriminating evidence that can be used at trial. See Hoffman v. United States, 341 U.S. 479, 486 (1951).

The Pillsbury Co. v. Conboy, 51 U.S.L.W. 4061, 4065 n.1 (U.S. Jan. 11, 1983) (Marshall, J., concurring). Another way of stating the applicability of the privilege is whether it is "perfectly clear, from a careful consideration of all the circumstances in the case that a witness is mistaken, and that the answer[s] cannot possibly have such tendency to incriminate." Hoffman at 488.

It is anything but "perfectly clear" that furnishing the requested authorization for release and the concommitant search for income tax returns cannot possibly tend to incriminate the plaintiff, or that there is not a realistic possibility that his answer will be used against him. Accordingly, the court will not impose sanctions for plaintiff's refusal to sign the requested authorization. Were the court to stop here, though, the plaintiff could avoid furnishing either the returns or an authorization to release them, merely upon his unsworn allegation. This would deprive the defendants of the opportunity to test the truth of the plaintiff's claim. Consequently, to strike a balance between the plaintiff's Fifth Amendment privilege to avoid incriminating himself and the defendants' right to discover relevant information with respect to an issue directly raised by the plaintiff, the court will deny the defendants' motion for sanctions on the condition that the plaintiff submit to the court a sealed sworn statement in which he states whether or not he has filed income tax returns since 1975. His sworn statement will be opened by the court for inspection and then will be resealed.[3/]

## II. Defendants' Motion for Clarification and Supplementation of Interrogatories

With respect to defendants' motion for clarification and supplementation of interrogatories, there seems to be some confusion. Plaintiff's initial answers numbered 20(a)-(g) to defendants' interrogatories appear to have been made in response to interrogatories 19(a)-(g). Defendants now simply seek confirmation that the answers were, in fact, made in response to interrogatories 19(a)-(g). In response, plaintiff claims "[d]efendants now seek to countermand the court's order." The court disagrees. Plaintiff can easily clarify any confusion he caused by answering defendants query. If, as it appears, plaintiff did mistakenly answer interrogatories 29(a)-(g) as if they were interrogatories 19(a)-(g), then as defendants suggest, interrogatories 20(f)-(g) need to be answered.

## III. Plaintiff's Motion to Amend the Pretrial Order

Finally, plaintiff's motion to amend the pretrial order will be granted, and the word "accident" will be replaced with the word "incident." To the extent that the plaintiff's motion implies that the defendants committed an intentional tort, however, the court disagrees. No intentional tort was alleged in the complaint and no evidence of such a newly raised theory will be allowed at trial.

HENRY L. FEUERZEIG
Judge of the Territorial Court

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3/ See Kerr v. United States District Court for the Northern District of Calif., 426 U.S. 394, 405 (1976). (In camera review is an appropriate and useful means for dealing with claims of governmental privilege to assure that a balance is struck between the officials' claim of privilege and the plaintiff's asserted need for the documents.)