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Bunkley v. Penske Truck Leasing, Corp. N.Y.A.D. 2
Dept. 1997.

Supreme Court, Appellate Division, Second
Department, New York.

Paul BUNKLEY, Jr., et al., Appellants,
v.

PENSKE TRUCK LEASING, CORP., et al.,
Respondents.

March 17, 1997.

Fine, Olin & Anderman (Carol R. Finocchio, New
York City, of counsel), for appellants.

Clemente, Dickson & Mueller, New York City
(William F. Mueller, of counsel), for respondents.

*399 In a negligence action to recover damages for
personal injuries, etc., the plaintiffs appeal (1) from
an order of the Supreme Court, Queens County
(Lane, J.), dated March 21, 1996, which denied their
motion, *inter alia*, for a protective order and, (2) as
limited by their brief, from so much of an order of the
same court, dated September 4, 1996, as, upon, in
effect, granting reargument, adhered to the prior
determination.

ORDERED that the appeal from the order dated
March 21, 1996, is dismissed, as that order was
superseded by the order dated September 4, 1996,
made upon reargument; and it is further,

ORDERED that the order dated September 4, 1996,
is reversed insofar as appealed from, the plaintiffs'
motion for a protective order is granted, and the order
dated March 21, 1996, is vacated; and it is further,

ORDERED that the plaintiffs are awarded one bill of
costs.

The plaintiffs moved, *inter alia*, for a protective order
and to quash a subpoena for the deposition testimony
of the plaintiffs' infant daughter, a nonparty to the
action. The court erred in denying this relief as the
defendants failed to comply with the requirements of
CPLR 309(a) with regard to the service of the
subpoena. It is undisputed that the process server
did not serve two copies of the subpoena, one on the
infant and one on her parent (*see, Kolodzinski v.*
Ferreiras, 168 A.D.2d 431, 562 N.Y.S.2d 554).
Even if service of the subpoena was proper, the

plaintiffs were entitled to a protective order as the
defendants failed to show that the information sought
from the plaintiffs' daughter could not be obtained
from other sources (*see, Dioguardi v. St. John's*
Riverside Hosp., 144 A.D.2d 333, 533 N.Y.S.2d 915;
CPLR 3101[a][4]; *see also, Brady v. Ottaway*
Newspapers, 63 N.Y.2d 1031, 1032, 484 N.Y.S.2d
798, 473 N.E.2d 1172).

*400 Furthermore, the defendants failed to establish
that special circumstances warranted disclosure from
Paul Bunkley's treating physicians. The defendants'
claim that the medical records provided by the
treating physicians were insufficient to enable them
to prepare for trial was unpersuasive (*see, King v.*
State Farm Mut. Auto. Ins. Co., 198 A.D.2d 748, 604
N.Y.S.2d 302; *Dioguardi v. St. John's Riverside*
Hosp., *supra*; *Ferrer v. Horvath*, 143 A.D.2d 627,
533 N.Y.S.2d 7). Accordingly, the plaintiffs' motion
for a protective order should have been granted.

BRACKEN, J.P., and O'BRIEN, SANTUCCI,
FRIEDMANN and GOLDSTEIN, JJ., concur.

N.Y.A.D. 2 Dept. 1997.

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237 A.D.2d 399, 656 N.Y.S.2d 882, 1997 N.Y. Slip
Op. 02667

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