

Matter of Fernandes

2011 NY Slip Op 30362(U)

January 11, 2011

Surrogate's Court, Nassau County

Docket Number: 353011/A

Judge: Edward W. McCarty

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Administration Proceeding, Estate of

JESSICA FERNANDES,

Deceased.

File No. 353011/A

Dec. No. 26904

-----X
In this contested proceeding for the appointment of an administrator, the decedent Jessica Fernandes died on June 4, 2008 at the age of 12 years. She suffered brain injuries during her birth that left her severely incapacitated, and she died of respiratory failure. She was survived by her mother, Carmen, and her father, Antonio. Carmen filed a petition for her appointment as sole administrator of the estate. Antonio filed a cross-petition seeking his appointment as co-administrator along with his brother-in-law. According to Antonio’s attorney, Antonio and Carmen lived together for a time. Carmen now claims that Antonio abandoned Jessica during her lifetime, and thus should be precluded from sharing in the estate or acting as administrator.

Currently before the court is a motion by cross-petitioner Antonio Fernandes for an order: (1) granting summary judgment in his favor on his claim that Carmen Banos is ineligible to serve as administrator of the estate and striking her objections to Antonio’s cross-petition for letters of administration; (2) compelling further responses to Antonio’s discovery demands; and (3) granting limited letters for the purpose of making this motion. Petitioner Carmen Banos opposes the relief Antonio requests and cross-moves for an order (1) issuing letters of administration to Carmen; (2) denying the relief sought in Antonio’s cross-petition; and (3) imposing sanctions on Antonio and his attorney. Antonio, in turn, opposes the relief requested by Carmen.

By order and judgment dated April 3, 2003 of Supreme Court, Queens County (Polizzi, J.), Jessica was determined to be a person requiring the appointment of a guardian of her person

and property pursuant to Article 81 of the New York Mental Hygiene Law, and Carmen was appointed as her personal needs guardian and as co-guardian, along with Wallace L. Leinhardt, an attorney, of Jessica's property. Pursuant to the order and judgment, the power of the co-guardians extended to the proceeds of an infant's settlement and compromise order dated May 1, 2002 (Polizzi, J.), which authorized the settlement of an action in Supreme Court, Queens County, by Carmen as Jessica's mother and natural guardian and individually against a certain hospital and doctors for a gross amount of \$3,600,000.00, including a cash payment to Jessica of \$390,414.32 and a structured settlement involving two annuities. The April 3, 2003 order and judgment incorporated an earlier order approving the settlement of the underlying action. The April 3, 2003 order and judgment also authorized the co-guardians to establish a supplemental needs trust for Jessica and appointed them as co-trustees of the trust.

In September 2008, Carmen petitioned for letters of administration and for letters of temporary administration. She also requested that Antonio be disqualified pursuant to EPTL 4-1.4, from taking an intestate share of Jessica's estate based upon his alleged failure to provide for and abandonment of Jessica, an infant. Antonio filed objections to Carmen's appointment as administrator on the ground that Carmen engaged in fraud and dishonesty and denied the allegation that he abandoned Jessica. Antonio, along with his brother-in-law Manual L. Gaspar, then filed a cross-petition seeking a decree awarding letters of administration to them. Later, Antonio sought letters of temporary administration. Carmen opposed all of the relief requested by Antonio. The petition alleges that the value of Jessica's property passing by intestacy is \$2,670,000.00, and the cross-petition alleges that it is valued at \$3,500,000.00.

In the course of discovery, the instant motion and cross-motion were made. As a

threshold matter, the issue of whether Antonio abandoned Jessica is not before the court at this time and will be the subject of a hearing after the completion of discovery.

THE MOTION

Antonio's motion for limited letters of administration for the purpose of bringing this motion is denied as limited letters are not needed for this purpose.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In

doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge, Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

In support of his motion for summary judgment, Antonio alleges that Carmen is ineligible pursuant to SCPA 707 to receive letters of administration and temporary letters because she engaged in dishonesty as a co-trustee of the supplemental needs trust in that she failed to obey certain orders of Supreme Court, Queens County, and misappropriated trust property. Specifically, Antonio alleges that Carmen did not pay one-half of the taxes and carrying charges on real property that she was permitted to purchase jointly with the trust since Mr. Leinhardt, the co-trustee, paid all of the expenses from the trust. Carmen admits that Mr. Leinhardt paid all of the expenses from the trust in error and asserts that she will repay the money to the trust from her share of the estate. Apparently, this issue was before Supreme Court, Queens County, in the proceeding to settle the co-guardians’ final account.¹

Antonio also alleges that Carmen is ineligible to serve because she and Mr. Leinhardt wrongfully withdrew \$175,000.00 from the trust. However, Carmen asserts that the money was merely moved from one trust account to another.

Here, there are questions of fact that prevent the court from granting Antonio’s motion for summary judgment on the issue of Carmen’s eligibility to serve as administrator of the estate.

¹This court takes judicial notice of the memorandum decision of Supreme Court, Queens County (Thomas, J.), dated October 27, 2010, made after a hearing in which the court dismissed Antonio’s objections to the co-guardians’ account and approved the account as submitted.

Instead, this issue will have to be decided after a hearing.

Antonio also asks the court for an order compelling Carmen to respond to a demand for discovery and inspection dated April 29, 2009. He asserts that Carmen failed to properly respond to nine of the more than 61 demands.

Disclosure in New York civil actions is guided by the principle of “full disclosure of all matter material and necessary in the prosecution or defense of an action” (CPLR 3101[a]). The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; *see Tower Ins. Co. of N.Y. v Murello*, 68 AD3d 977 [2d Dept 2009]). The Court of Appeals' interpretation of “material and necessary” in *Allen* has been understood “to mean nothing more or less than ‘relevant’ ” (Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:5).

Here, Antonio claims that further responses are required with respect to document requests nos. 3, 4, 7, 10, 17, 25, 31, 59 and 61. They will be addressed in groups.

Document Request 3

“All stock certificates, bonds or other securities in the name(s) of the [sic] Ms. Banos and Jessica Fernandes individually or in conjunction with any other person or persons or entity, or which may be held to witness' account [sic] individually in conjunction with any other person or persons in any corporation, domestic or foreign, or issued by any Federal Government domestic or foreign or by any State, Municipal or any other governmental agency foreign and/or domestic.”

Response

“Petitioners [sic] object to this request because it is overbroad, not limited by time, requests documents that are not relevant nor will lead to discovery of admissible evidence.”

Document Request 4

“All books, records, accounts, monthly statements, statements of transactions, and all other papers and memoranda of stock brokerage accounts in Ms. Banos or Jessica Fernandes (hereinafter “Jessica”) name individually, jointly, in trust, as custodian, as nominee or in conjunction with any other person or persons; concerning all accounts both foreign and/or domestic.”

Response

“Petitioners [sic] object to this request because it is overbroad, not limited by time, requests documents that are not relevant not will lead to discovery of admissible evidence.”

Document Request 10

“Any and all records, documents, papers and memoranda pertaining to monies received and/or presently received by the [sic] Ms. Banos from all sources, including but not limited to salaries, wages, drawings, dividends, bonuses, sick pay, pensions or retirement funds, trusts, annuities, profit sharing, stock options or reimbursed expenses.”

Response

“Petitioners [sic] object to this request because it is overbroad, not limited by time, requests documents that are not relevant nor will lead to discovery of admissible evidence. Notwithstanding the foregoing, Petitioner produces herewith documents responsive to this request.”

Document Request 61

“Copies of all financial statements, loan applications, credit and charge applications and budgets prepared by you or for your benefit.”

Response

“Petitioners [sic] object to this request because it is overbroad, not limited by time, requests documents that are not relevant nor will lead to discovery of admissible evidence.”

In his papers, Antonio asserts that the documents sought in demand nos. 3, 4, 10 and 61 are relevant to determining the correct amount of estate assets, to ascertain whether the trust was pillaged and to determine whether Carmen provided support for Jessica. In his papers, Antonio limited the time period to 2002 to 2010 for certain demands; however, there is no such limitation in the document demand. Carmen states that she produced brokerage and bank account statements for the last year for the supplemental needs trust and that she provided Antonio with an accounting in the proceeding in Supreme Court, Queens County.

“Where, as here, discovery demands are palpably improper in that they are overly broad, lack specificity, or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than try to prune it” (*Bell v Cobble Hill Health Ctr.*, 22 AD3d 620 [2d Dept 2005]). The court finds that document demand nos. 3, 4, 10 and 61 are palpably improper for the reasons set forth by the Second Department, and, accordingly, denies Antonio’s motion to compel a further response with respect to these demands. Although some of the documents requested may be relevant to the issues before the court in these administration proceedings, it is incumbent upon Antonio to tailor the demands accordingly.

Document Request 7

“Copies of all Federal, State and City income tax returns (and amended returns, if any) together with the schedules and worksheets thereof and all other papers, documents and memoranda referring to any adjustments made in connection therewith, together with all 1099, W-2 and k-1 forms filed therewith, together with any and all extension applications and any supporting documentation thereof when taxes were not timely filed.”

Response

“Petitioners [sic] object to this request because it is overbroad, not limited by time, requests documents that are not relevant nor will lead to discovery of admissible evidence.”

Antonio asserts that he needs Carmen’s tax documents to show that she was deducting 50 percent of the expenses from the real property while taking 100 percent of the expenses from the trust and that the documents bear on Carmen’s claim that Antonio abandoned Jessica. “It is well settled that ‘tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources’ ” (*Altidor v State-Wide Ins. Co.*, 22 AD3d 435, 435 [2d Dept 2005]), quoting *Latture v Smith*, 304 AD2d 534, 536 [2003] [additional citations omitted]). Here, Antonio has failed to make such a showing. Moreover, he has “failed to demonstrate the existence of special circumstances warranting disclosure of [Carmen’s] tax returns” (*id.* at 435-436). Further, the demand is overbroad (*see Bell v Cobble Hill Health Ctr.*, 22 AD3d 620 [2d Dept 2005]). Therefore, the motion to compel a further response to demand no. 7 is denied.

Document Request 17

“Copies of all receipts making 777 Platt Place and 1525 Marshall Avenue handicap accessible.”

Response

“Petitioners [sic] object to this request because it is overbroad, not limited by time, requests documents that are not relevant nor will lead to discovery of admissible evidence.”

Antonio claims that these documents are necessary because Carmen received payment for these expenses, presumably from guardianship funds, but that she testified that she never advanced money to pay for these expenses. While the documents may bear on Carmen’s

truthfulness and, hence, her eligibility to serve as administrator, the request as made is overbroad in it is not limited in time (*Bell v Cobble Hill Health Ctr.*, 22 AD3d 620 [2d Dept 2005]).

Therefore, the motion to compel a further response to demand no. 17 is denied.

Document Request 25

“All records relating to disability payments received by Ms. Banos or Jessica including but not limited to application for benefits, voucher and/or statement of amount received for disability benefits.”

Response

“Petitioners [sic] object to this request because it is overbroad, not limited by time, requests documents that are not relevant nor will lead to discovery of admissible evidence.”

Antonio asserts that documents concerning disability payments are relevant to determining whether he abandoned Jessica financially. He contends that disability payments are a form of support and that if disability benefits were received under a policy of insurance which he provided, that fact would be directly relevant on the issue of abandonment. The court agrees that the documents may be relevant; however, the request for all records is overbroad and vague (*see Bell v Cobble Hill Health Ctr.*, 22 AD3d 620 [2d Dept 2005]). Therefore, the motion to compel a further response to demand no. 25 is denied.

Document Request 31

“All records, receipts, bills for vacation, travel both foreign and domestic, business and personal made by the [sic] Ms. Banos.”

Response

“Petitioners [sic] object to this request because it is overbroad, not limited by time, requests documents that are not relevant nor will lead to discovery of admissible evidence.”

Document Request 59

“Certificate of registration for any automobile, motorcycle, boat and airplane owned or used by you.”

Response

“Petitioners [sic] object to this request because it is overbroad, not limited by time, requests documents that are not relevant nor will lead to discovery of admissible evidence.”

With respect to demand nos. 31 and 59, Antonio states that Carmen admits that he loaned her money for certain vacations and that she did not repay him. Antonio claims that these monies may constitute “pre-paid child support.” However, these demands in their current incarnation are palpably improper for all the reasons enunciated in *Bell v Cobble Hill Health Ctr.* (22 AD3d 620 [2d Dept 2005]), and the motion to compel a further response to demand nos. 31 and 59 is denied.

THE CROSS-MOTION

Carmen essentially cross-moves for summary judgment in that she seeks an order granting letters of administration to her and denying the issuance of letters to Antonio based on the record currently before the court. Carmen asserts that Antonio is a citizen and domiciliary of Portugal and, as such, cannot serve as sole administrator pursuant to SCPA 707 (1) (c), cannot read or write in English (SCPA 707 [2]), and, relying on SCPA 707 (1) (e), that the court should not issue letters to Antonio because he has displayed open hostility to Carmen by continuing to file motions based on false allegations.

Antonio asserts that he is a citizen of the United States and his attorney has annexed a copy of a United States passport as an exhibit to his papers in opposition to Carmen’s motion. The court notes that Antonio has petitioned to have letters of administration issue to him and to

his brother-in-law, both of whom list their domicile in the petition as East Meadow, New York. He denies that he has exhibited hostility toward Carmen. Finally, Antonio denies that he cannot speak and understand English and points out that both he and Carmen utilized interpreters during their respective depositions.

As was the case with Antonio's motion for summary judgment, there are issues of fact that require denying Carmen's cross-motion for an order issuing letters of administration to her and dismissing Antonio's cross-petition for letters of administration, and the motion is denied.

Carmen's motion for sanctions against Antonio and his attorney is also denied (22 NYCRR 130).

The court is aware that the issue of who should be appointed as administrator of this estate must be resolved sooner rather than later. In that regard, the court has scheduled a conference on January 27, 2011, at 11:00 a.m., with a member of its law department, to bring discovery to a swift conclusion and to schedule a hearing on the issues raised by the parties.

This is the decision and order of court.

Dated: January 11, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court