

Matter of Cassini

2016 NY Slip Op 32023(U)

July 14, 2016

Surrogate's Court, Nassau County

Docket Number: 343100/G

Judge: Margaret C. Reilly

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

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Accounting by Marianne Nestor Cassini, as the
Executor of the Estate of

DECISION

OLEG CASSINI,

File No. 343100/G

Dec. No. 31912

Deceased.

-----x
PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion, Affirmation in Support & Exhibits	1
Opposing Affidavit to Motion to Preclude	2
Affirmation in further Support of Motion & Exhibits	3

The objectants, John J. Barnosky, Esq. and Alexandre Cassini Belmont, as executors of the Estate of Christine Cassini and as successor administrators of the Estate of Daria Cassini, move for an Order (a) pursuant to CPLR 3126, precluding petitioner, Marianne Nestor Cassini¹ from offering any evidence at the trial in the above-referenced accounting proceeding for the period of March 17, 2006 to December 21, 2010, and (b) granting such further other relief as the Court deems just and proper.

The objectants assert that Marianne Cassini has failed to comply with Court Orders to

¹Oleg Cassini, the decedent, died on March 17, 2006. The decedent was survived by his wife, Marianne Cassini and two daughters from a prior marriage, Christina and Daria Cassini. On August 15, 2007, Marianne Cassini was appointed the executor of Oleg Cassini’s estate. On November 3, 2014, by an Order of this Court pursuant to a stipulation between the parties, Marianne Cassini was removed as the executor. The Public Administrator of Nassau County was appointed to administer the decedent’s estate and the decedent’s businesses, Oleg Cassini, Inc. and Cassini Parfums, Ltd. (*see* Court’s decisions dated June 23, 2015 and August 30, 2015). On July 1, 2016, a Receiver was appointed for the decedent’s businesses, Oleg Cassini, Inc. and Cassini Parfums, Ltd.

produce copies of estate tax returns that she filed as Executor, appraisals and other documents evidencing the monetary value of certain estate assets, and Marianne's personal income tax returns.

In opposition to the objectants' motion, Marianne Cassini sets forth that Farrell Fritz, P.C., attorneys for the objectants, has received unsigned copies of the estate tax returns. Marianne Cassini further indicates that she is willing to produce her personal tax returns from 2006 - 2010, examined *in camera*. Marianne Cassini claims that Farrell Fritz, P.C. has violated confidentiality agreements. Marianne Cassini further posits that certain documents that were lost due to a serious fire in the basement of their Oyster Bay Cove home. She further claims that she was not aware that a property settlement agreement had been made with Oleg Cassini and ex-wife, Gene Tierney.

In reply, Robert M. Harper, Esq., an associate with Farrell Fritz, P.C., submitted an Affirmation in Further Support of the Preclusion Order. Counsel indicates that Marianne Cassini has sought to delay and stall the proceedings over the last six years. Marianne Cassini has failed to comply with at least three of the Court's discovery Orders. The court has previously found that Marianne Cassini willfully failed to comply with her discovery obligations such that CPLR 3126 sanctions were warranted. Counsel posits that the Court rejected Marianne Cassini's argument for an *in camera* review of her personal income tax returns. Counsel points out that Marianne Cassini's reliance on the documents destroyed in the fire is no excuse for her failure to comply with the Court's discovery Order. Counsel further posits that the Court rejected the "fire" argument in a Decision dated October 9, 2015.

Paragraphs 4, 5 and 6 of the objectant, Christina Cassini's Discovery & Inspection Demand, dated November 10, 2011, by Eileen D. Stier of Busell & Stier, PLLC (the objectants' attorney at the time) request tax returns for the Estate of Oleg Cassini. The Demands read in relevant part as

follows:

4. Copies of any Federal and State income tax returns for the Estate of Oleg Cassini for any portion of the period from March, 2006 to present, including any and all supporting schedules, worksheets, and attachments and all other papers, documents and memoranda referring to any adjustment made in connection therewith.

5. Copies of any Federal and State estate (and Generation-Skipping Transfer) tax returns, including any amendments thereof, filed on behalf of the decedent or his estate, including but not limited to any work papers associated with the preparation of the returns; schedules or worksheets attached to the returns; appraisals attached or referenced in the returns; and any other attachments referenced in the returns; and all other papers, documents and memoranda referring to any adjustment made in connection therewith.

6. Copies of any Federal and State corporate or partnership income or other tax returns for the following business entities for any portion of the period from January, 2000, through present, including but not limited to any supporting schedules, attachments and K-1s:

- a. Oleg Cassini, Inc.
- b. Oleg Cassini International Ltd or Inc.
- c. Cassini Parfums, Ltd.
- d. Cassini, Inc.

On June 4, 2013, this Court rendered a Decision on the objectant, Christina Cassini's motion to compel discovery. The June 4, 2013 Decision of the Court read in relevant part as follows:

In this accounting proceeding, respondent Christina Cassini, a daughter and distributee of the decedent, moves for an order pursuant to CPLR 3124 compelling petitioner Marianne Nestor Cassini, the decedent's widow, executor of the estate and residuary legatee, to comply with a document demand dated November 10, 2011 and to compel petitioner to appear for deposition under SCPA 2211. The motion is decided as set forth herein.

The accounting at issue was filed by petitioner, and an application made to judicially settle same, in or about the end of 2010 for the period of March 17, 2006, the date of decedent's death, to December 21, 2010. Respondent served a demand for production of documents dated November 10, 2011 and requested a SCPA 2211 examination. On or about January 6, 2012, petitioner served her responses and objections, consisting of over 50 pages, and not a single document in response to the demand is attached. Many months went by as the parties attempted to resolve their disputes concerning this demand including a request for, and the negotiation and

execution of, a Confidentially Stipulation dated October 17, 2012 and also “SO ORDERED” by the court.

During the pendency of this motion - it was made on January 4, 2013 and submitted for decision on March 27, 2013 - at conferences with the Chief Court Attorney the parties entered into two stipulations both of which were “SO ORDERED” by the court which theoretically should have mooted this motion. The first stipulation entered into on February 13, 2013 provided for the documents to be produced, between February 22, 2013 and March 8, 2013, “subject to objection previously served or redaction” and for the 2211 examination to go forward at the offices of respondent’s counsel on April 5, 2013. The second stipulation dated March 27, 2013 set the 2211 exam at the courthouse on that same date and provided that it would not be videotaped.

With a cover letter dated March 8, 2013, a copy of which was attached to opposition papers, some documents were produced. A list of those documents is attached to the reply papers. On the basis thereof, petitioner urges that the motion is moot. Movant responds that not *all* documents responsive to the demand have been produced and that as apparently privilege had been previously raised, a privilege log has not been forthcoming (CPLR 3122 [b]).

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 words “material and necessary” are “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).

CPLR 3122 provides, in relevant part, that a party served with a notice for discovery and inspection pursuant to CPLR 3120, who objects to such disclosure, must serve a response within twenty days of service of such notice stating with reasonable particularity the reasons for each objection. If the recipient of a CPLR 3120 demand fails to timely serve such a response, the only remaining grounds for objection are that the demand seeks privileged material or is palpably improper (*Briand Parenteau, Inc. v Dean Witter Reynolds, Inc.*, 267 AD2d 576 [3d Dept 1999]).

While there are no objections *per se* to the demand raised in the

opposition to the motion, they were made *en masse* on January 6, 2012. Except for the issue of privilege which will be dealt with by the log, looking at paragraph 6 of the reply affirmation dated March 25, 2013, there is nothing contained therein that is in any way improper and comparing the items therein to the list of documents produced, it readily appears there has not been complete compliance with the demand.

Accordingly, the CPLR 3124 branch of the motion is granted to the extent that petitioner is directed to produce documents responsive to the listing in paragraph 6 of the reply affirmation dated March 25, 2013 and supply movant's counsel with a privilege log, as necessary, both within 20 days following service of a copy of this order with notice of entry.

Of course, a party cannot be compelled to produce documents which do not exist or which are not in her possession (*Euro-Central Corp. v Dalsimer, Inc.*, 22 AD3d 793 [2d Dept 2005]). In an affidavit by the petitioner sworn to May 16, 2013 reference is made to a fire in Oyster Bay Cove in 2008 that "... destroyed many of the documents [sought]." Why this fact was not mentioned in the original opposition is suspect. In any event the executor does not precisely aver that she has produced all the documents in her possession, custody or control. Petitioner is entitled to that. It shall be provided in the same time frame as above"

In August, a second Discovery Demand was served and filed by the objectants.

On September 23, 2013, this Court issued a Decision, on the petitioner, Marianne Cassini's motion to reargue the Court's June 4, 2013 Decision. The September 23, 2013 Decision read in relevant part as follows:

"A motion for leave to reargue is governed by CPLR 2221 and is within the sound discretion of the court (*Delcrete Corp. v Kling*, 67 AD2d 1099, 1100 [4th Dept 1979]; *Rodney v New York Pyrotechnic Products*, 112 AD2d 410, 411 [2d Dept 1985]). A motion for leave to reargue is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion and the movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (CPLR 2221[d][2]; *Schneider v Soloway*, 141 AD2d 813 [2d Dept 1988]).

The underlying motion was to compel documents responsive to a twenty-seven-page demand dated November 10, 2011 which included seventy-three requests. The movants did not denominate specifically which of the seventy-three requests were unresponsive and instead combined the items they believed the executor had not produced in their reply papers. The

court relied on the representations made by the movant and the decision directed the executor to produce documents in reliance thereon. The attorneys for the executor correctly point out that several of the items directed to be produced in the June 4, 2013 decision were not part of the original demand dated November 10, 2011. As such, the motion to reargue is granted. The court adheres to the prior decision with the following exceptions: the request to produce documents concerning the income that Marianne collected as Executor of the estate and the request to produce documents concerning the administration expenses reflected in Marianne's accounting as chargeable to income were not part of the original demand and should not have been part of the court's order to compel. The executor is directed to produce all other documents and privilege logs² as set forth in the prior decision within thirty days of the date of this decision.

Any prospective discovery motions by the parties in this proceeding must specifically refer to the document demand. A boilerplate statement which does not refer to the item requested in the demand will be rejected by the court."

On December 10, 2013, this Court issued a Decision, on the objectant's motion to compel petitioner, Marianne Cassini to produce personal tax returns and certain financial documents "from the period from March 2006 to the present." The December 10, 2013 Decision read in relevant part as follows:

"By response to the demands dated August 2, 2103, Marianne objected to the demands in their entirety and produced no documents. Her opposition to this motion to compel is: the demands violate the "any," "all," "any and all" prohibition, and thus do not specifically identify with reasonable particularity the documents sought; the demands are overly broad and respondent has not met her substantial burden of demonstrating self-dealing which can support such demands.

The following items do not specify the documents sought with reasonable particularity and are thus stricken: [2], [3], [4], [5], [7], [9] and [11].

Items [6], [8] and [10] are indeed overly broad. The court modifies same to add to each "to the extent they address, concern, reflect, or relate to: the US Trust Company account in the amount of \$660,003.00; Cassini, Inc. valued at \$43,536,435.00; and Cassini Parfums, Ltd. valued at

\$1,595,000.00.” Further, there is no basis to require production beyond the end date of the account, December 21, 2010. As modified, the executor is directed to produce documents responsive to these items within 20 days following service of a copy of this order on her counsel.

As in the past, a sworn affidavit is required to be served and filed within the same time frame if she does not have possession, custody of control of any such documents.

As regards to item [1], her personal tax returns, because of the basic element of confidentiality the disclosure of same is disfavored. Upon a strong demonstration, however, that the information contained therein is indispensable and unobtainable from any alternative source, their production can be directed, particularly in a fiduciary conduct setting (*Matter of Zirinsky, supra.*; *Matter of DeSantis*, 38 Misc 3d 1216 (A) [Sur Ct, Richmond County 2013]). Given the history of this estate and Marianne’s claim to personal ownership of most, if not all, of the assets she previously identified as estate assets, the question whether such circumstance squarely fits the labels of self-dealing, divided loyalty, or commingling is quite beside the point. While Marianne has characterized the foregoing as a “mistake,” the circumstances clearly warrant revelation of the manner in which these assets and/or the income from same may have been treated tax-wise. The executor is directed to produce documents responsive to item [1] that cover the period from March 2006 to December 21, 2010 within 20 days following service of a copy of this order on her counsel.”

On October 9, 2015, this Court rendered a Decision on various motions from the parties. The October 9, 2015 Decision of the Court read in relevant part as follows:

As this court has observed on a number of occasions, one of the key issues in this case is the determination of the assets constituting the decedent’s estate. As noted in the March 13, 2014 decision, Marianne filed an inventory of assets in this court listing the Cassini corporations’ stock, certain receivables, various bank accounts and significant items of tangible personalty as assets of the estate. The recitation of the foregoing in the inventory is consistent with personal income tax returns filed by decedent for several tax years prior to his death, as well as a 2005 income tax return for Oleg Cassini filed by Marianne after his death.

On June 17, 2007 Marianne signed as fiduciary the New York State Estate Tax return for this estate attaching and cross-referencing a copy of the IRS 706 return (which is an unsigned copy) declaring under the penalty of perjury that the State return and accompanying schedules and attachments (including the 706) were true, correct and complete. The Federal return lists the corporate shares, slightly over one million dollars in J.P. Morgan and

Deutsche Bank accounts and close to six million dollars in artwork, furniture etc. as owned by decedent at the time of his death. Further, page 13 thereof lists the 19th Street real property in Manhattan as jointly owned by decedent and Marianne.

Down her first path to resolution of the Asset Issue in her favor, Christina argues that Marianne, having declared under the penalty of perjury on the tax returns that the assets belonged to the decedent, is estopped from adopting a contrary position now.

“A quasi-estoppel, also termed an ‘estoppel against inconsistent positions,’ prevents a party from adopting a factual position in a court contrary to the factual position it previously asserted in a quasi-judicial or administrative proceeding” (*Matter of Appleby*, NYLJ, Sept. 26, 2011, at 32 [Sur Ct, New York County], citing *PL Diamond LLC v Becker-Paramount LLC*, 16 Misc 3d 1105 [A] [Sup Ct, New York County 2007]). By this doctrine, courts have extended the underlying principles of estoppel to prevent parties from taking positions in court that are inconsistent with positions they previously took, most commonly on tax returns filed prior to litigation (*Zemel v Horowitz*, 11 Misc 3d 1058 [A] [Sup Ct, New York County 2006]). As our Court of Appeals recognized : "We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; see also *Man Choi Chiu v Chiu*, 125 AD3d 824 [2d Dept 2015]; *Winship v Winship*, 115 AD3d 1328 [4th Dept 2014]; *Foti v Foti*, 114 AD3d 1207 [4th Dept 2014]). A court may treat a currently uncorrected tax return as a binding admission (*Amazon Concrete, Inc. v Maffei*, 2013 NY Slip Op 33856 [U] [Sup Ct, Westchester County 2013]).

Marianne incredulously advances that there “is not truly a contrary position” between the accounting and the tax returns; she was in mourning and grieving and relied on “incorrect” advice of attorneys and accountants; and, this intelligent and accomplished businesswoman was “ignorant” of the complexity of title and ownership questions. To merely recite these arguments is demonstrative of their absurdity.

The court finds that Marianne is estopped from arguing that the assets identified on the inventory or the tax return as belonging to the decedent were, in fact, owned by her or anyone else. The objectants are therefore granted partial summary judgment summary sustaining objections ## 17, 19, 20, 21, 23, 25 and 26 to the accounting.

Even if the court did not find that Marianne should be estopped from taking a position in this litigation contrary to that taken on the tax returns, the objectants are still entitled to prevail on the Asset Issue based on Marianne’s

willful refusal to comply with discovery demands.

CPLR discovery in this and the related Cassini matters has been obstructed by Marianne and her attorneys at nearly every turn. CPLR 3126 contains three subdivisions which collectively provide for a number of penalties or sanctions available to a court to address discovery abuses. Putting aside briefly whether any such penalties or sanctions are warranted here, the relief as phrased by Christina of “striking” the account or the petition is ponderous but no matter. The court is authorized to fashion any appropriate remedy when called for (*Matter of Scaccia*, 66 AD3d 1247 [3d Dept 2009]).

The language of the statute and the case law mandates that a wilful, contumacious or bad faith failure to comply with discovery demands is a predicate for the imposition of CPLR 3126 penalties and the fact that such conduct can be inferred from repeated failures to adequately respond or comply together with unsatisfactory excuses for such failures (*Devito v J & J Towing, Inc.*, 17 AD3d 624 [2d Dept 2005]; *Penafeil v Puretz*, 298 AD2d 446 [2d Dept 2002]). At bar, Christina focuses on June 4, 2013, September 23, 2013 and December 10, 2013 directives by this court and the allegation that Marianne’s non-compliance warrants CPLR 3126 relief, and more directly the failure to produce both personal (2006 to 2010) as well as estate income tax returns and various backup records to prepare the same.

The opposition to this aspect of Christina’s application consists of the following: Marianne and her attorneys parroting that she produced thousands of pages of documents and the fact that she was deposed for over five days; she avers she does not have all the documents but has done her best to locate and produce them; she often relied upon Oyster Bay Cove fire of 2008; the recent offer to produce a copy of the 2010 personal return not to Christina but to the court for an *in camera* review. (There was no such requirement in the orders of the court.)

These claims of compliance and alleged unsuccessful efforts to comply are disingenuous at best. Marianne is deemed to have had control of the subject tax returns as in the possession of her accountants or filed with governmental agencies, copies of which she has or should have or certainly could readily obtain (*Matter of Schaefer*, 2013 Misc LEXIS 1478 (Sur Ct, Nassau County 2013); *Matter of Woolworth Corp. Securities Class Action Litigation*, 166 FRD 311 [SDNY 1996]). Furthermore, the hearing testimony before this court on June 2, 2014 (pp. 202-204) of the estate tax accountant Steven Gordon who prepared the estate tax returns as to the lack of efforts by Marianne to locate documents or indeed avoid compliance and the refusal to identify the accountant(s) who prepared the personal returns leads to the inescapable conclusion that Marianne wilfully, contumaciously and/or in bad faith failed to comply with these discovery demands and the appropriate

remedy is to resolve the Asset Issue in favor of Christina on this ground as well”

The objectants’ attorneys assert in their motion to preclude that Marianne Cassini has yet to produce copies of the signed Federal and New York State estate returns that she filed on behalf of the decedent’s estate, and has failed to produce copies of signed personal income tax returns for the period 2006 to 2010. Marianne Cassini does not refute that she has failed to produce signed personal tax returns or estate tax returns for the years 2006 to 2010.

“In order to invoke the drastic remedy of preclusion, the Court must determine that the offering party’s lack of cooperation with disclosure was willful, deliberate and contumacious.” (*Maillard v Maillard*, 243 AD2d 448 [2d Dept 1997]) An initial Discovery & Inspection Demand was served upon the petitioner, by the objectant, Christine Cassini in November of 2011, over five years ago. Months of conferences and negotiations with the Court were held on the issue of discovery. The conferences resulted in two discovery stipulations, so ordered by the court. The first stipulation, dated February 22, 2013, provided for documents to be produced between February 22, 2013 and March 8, 2013. The second stipulation, dated March 27, 2013 set the SCPA 2211 exam. Three additional Decisions rendered by this Court further addressed the lack of discovery provided by the petitioner. The June 4, 2013 Decision of this Court granted the objectant’s motion to compel. The September 23, 2013 Decision of the Court granted the petitioner’s motion to reargue, while adhering to his prior decision with enumerated exceptions. The Court’s December 10, 2013 Decision on the objectant’s motion to compel denied some of the objectant’s August 2, 2013 Demands, but directed Marianne Cassini to produce her personal tax returns from March 2006 to December 21, 2010 within twenty (20) days of the order.

In a reply affirmation, Robert M. Harper, an associate with Farrell Fritz, P.C., attorneys for the objectants, indicates that the Public Administrator of Nassau County, in less than two months

after the court suspended Marianne Cassini as Executor of the Estate of Oleg Cassini and appointed the Public Administrator, obtained a copy of signed state tax returns (by Marianne Cassini) for the Estate of Oleg Cassini, dated June 17, 2007 and December , 2006.

In the Court's October 9, 2015 Decision, the former Surrogate held:

“ . . . the lack of efforts by Marianne to locate documents or indeed avoid compliance and the refusal to identify the accountant(s) who prepared the personal returns leads to the inescapable conclusion that Marianne wilfully, contumaciously and/or in bad faith failed to comply with these discovery demands and the appropriate remedy is to resolve the Asset Issue in favor of Christina on this ground as well. . . .”

Marianne Cassini, in her opposition, does not indicate that she is not in possession of her personal tax returns. Rather, Marianne Cassini states that she is willing to produce them . . . only that they be examined *in camera*.” The issue of *in camera* has been raised by Marianne Cassini in prior oppositions and rejected by this Court (*see* Decision of this Court, dated October 9, 2015).

In view of the foregoing, the objectants' motion is **GRANTED**, thereby precluding Marianne Cassini from introducing evidence at the trial of this proceeding on any issues derived from the filed tax returns of the Estate of Oleg Cassini or Marianne Cassini's personal tax returns for the years of 2006 to 2010, unless Marianne Cassini provides a copy of signed tax returns for the Estate of Oleg Cassini for the years of 2006 to 2010 and a copy of signed tax returns for Marianne Cassini for the years 2006 to 2010 to the objectants' attorney by July 22, 2016.

The Court shall send a copy of this Order to the petitioner. The objectants are directed to also send a copy of this Order to the petitioner by overnight courier.

Dated: July 14, 2016
Mineola, New York

E N T E R :

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: Kenneth P. Mahon, Esq.
Mahon Mahon Kerins & O'Brien
Attorney for the Public Administrator
254 Nassau Boulevard
Garden City, New York 11530

Robert M. Harper, Esq.
Farrell Fritz, P.C.
Attorney for Objectants
1320 RXR Plaza
Uniondale, New York 11556

Ms. Peggy Nestor
Unrepresented
15 East 63rd Street
New York, New York 10065

Ms. Marianne Nestor Cassini
Unrepresented
135 East 19th Street
New York, New York 10003

Rosalia Baiamonte, Esq.
Gassman Baiamonte Betts, P.C.
*Receiver for Oleg Cassini Inc. and
Cassini Parfums, Ltd.*
666 Old Country Road, Suite 801
Garden City, New York 11530-2019

Elizabeth Donlon, Esq.
Attorney for Guardian/Trustee
99 Tulip Avenue
Floral Park, New York 11001