

Matter of Demetriou (Aliano)
2016 NY Slip Op 32031(U)
June 29, 2016
Surrogate's Court, Nassau County
Docket Number: 359448C
Judge: Margaret C. Reilly
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X
**In the Matter of the Proceeding of
Helen Aliano, as Co-Executor under the Will of**

**DECISION
File No. 359448C
Dec. No. 31582**

FROSSO DEMETRIOU,

Deceased,

**To Discover Property Withheld or to Obtain Information
Pursuant to SCPA 2103 and For Other Relief**

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

In connection with a discovery proceeding, the following papers were considered in the preparation of this decision:

Notice of Motion.....	1
Affirmation in Support.....	2
Affirmation of Good Faith.....	3
Opposition to Motion to Compel.....	4
Reply Affirmation.....	5

I. PROCEDURAL HISTORY

Before the court is a motion for an order: compelling non-party witness James Burdi, Esq., (the former attorney for the co-executor James Demetriou) to answer under oath all of the interrogatories dated September 9, 2015 and served upon James Burdi as a follow-up to his second examination under oath conducted on August 20, 2015, and compelling James Burdi to answer questions he refused to answer during said examination, which were marked for rulings, or in the alternative, requiring James Burdi to personally re-appear for an examination under oath to answer them.

II. BACKGROUND

As reviewed in multiple prior decisions issued by this court, in April 2001, James Burdi drafted and supervised the execution of a will and a power of attorney for Frosso Demetriou (the decedent), in which she nominated her son, James Demetriou, as executor of her will and appointed him as her attorney-in-fact. The decedent nominated her daughter, Helen Aliano, as successor executor and as an alternate agent under the power of attorney. Under the terms of the will, some of decedent's personal property is bequeathed to Helen Aliano; the residue is to be divided equally among decedent's three children: James Demetriou, Helen Aliano, and George Demetriou.

The decedent died eight years later, on March 16, 2009, survived by her three children. James Demetriou retained James Burdi in January 2010 to file a probate petition. The petition was filed by James Burdi on February 11, 2010, showing personal property and the decedent's residence as the estate assets, valued at \$377,000.00.

On March 31, 2010, Helen Aliano filed objections to probate pursuant to SCPA § 707, on the grounds that James Demetriou lacked the qualifications necessary to act as fiduciary. Many of the objections which Helen Aliano raised concerned a series of allegedly improper transfers made during the decedent's lifetime by James Demetriou as her attorney-in-fact; one of the objections pertained to a power of attorney signed by Helen Aliano at the request of James Demetriou after the death of the decedent, based upon James Demetriou's representation that the power was necessary to facilitate the transfer of decedent's property in Cyprus.

In May 2010, James Demetriou filed an application for preliminary letters and amended the schedule of estate assets to reflect a value of \$1,200,000.00. At the same time, James Burdi responded to Helen Aliano's demand for a copy of the power of attorney that she had signed at the request of James Demetriou in connection with the Cyprus property. Along with producing a copy of the power, which copy contained only Helen Aliano's signature, James Burdi wrote that the original power had been destroyed and had never been forwarded to the foreign attorney for the transfer of estate property. However, Helen Aliano obtained a copy of the power of attorney from the foreign attorney, and that copy contained the signatures of Helen Aliano, James Demetriou and George Demetriou, plus the signature of a notary, before whom Helen Aliano had never appeared. Following this, James Burdi withdrew as counsel to James Demetriou.

Helen Aliano objected to the petition for preliminary letters filed by James Demetriou. A settlement was reached between Helen Aliano and James Demetriou, in which it was agreed that they would serve as co-executors. Letters issued to them on November 24, 2010.

Helen Aliano brought a proceeding pursuant to SCPA § 2103 to discover property withheld or to obtain information. James Burdi's examination in the discovery proceeding was conducted on June 23, 2014. James Burdi's attorney took the position that all conversations between James Demetriou and James Burdi are privileged, and counsel invoked attorney-client privilege as the basis for James Burdi's refusal to answer

certain questions posed by Helen Aliano concerning James Burdi's conversations with James Demetriou.

Helen Aliano's counsel filed a motion to compel James Burdi to respond. In Dec. No. 30275, issued on December 24, 2014, this court noted that in a prior decision,¹ the court had determined that Helen Aliano, as a co-executor, was entitled to information regarding the estate assets, legal billing and disbursements, and that attorney-client privilege did not attach to the specified documents which contain this information. The court went on to say that it follows that the privilege will not attach to the conversations that resulted in the notes and documents which the court had ordered James Burdi to produce. On that basis, the court directed James Burdi to answer all questions directly related to the documents produced in accordance with the direction of this court.

The examination of James Burdi continued on August 20, 2015. In connection with an alleged loan made by the decedent to Helen Aliano, which is shown on Schedule A of the accounting filed by James Demetriou, counsel for Helen Aliano questioned James Burdi concerning his conversations with James Demetriou that were reflected in his notes, produced according to court order. When James Burdi was asked whether he and James Demetriou discussed the alleged loans on other dates, James Burdi's attorney objected and James Burdi refused to answer the question. The question was marked for a ruling.

¹Dec. No. 27862, dated February 28, 2012.

James Burdi also refused to answer all questions pertaining to deeds in the Republic of Cyprus that he produced in his May 7, 2010 response to a discovery demand. James Burdi took the position that the Cypriot property was not an estate asset, although the deeds, written in Greek, were not translated. Counsel for Helen Aliano asked James Burdi whether James Demetriou was the source of the information that served as James Burdi's basis for stating that the Cypriot properties were not estate assets, but James Burdi refused to answer. Counsel for Helen Aliano then asked James Burdi about his May 7, 2010 written representation that a power of attorney to sell Cypriot property had been destroyed and had never been sent to the Cypriot attorney handling the sale. As noted above, the representation had been proven to be false when the Cypriot attorney advised Helen Aliano that he had received the power of attorney, and produced a copy, which differed from the copy that James Burdi had produced as part of his May 2010 reply to discovery demands. James Burdi's attorney objected to these questions and he refused to answer.

The parties agreed to submit the disputes for rulings by the court attorney-referee assigned to the proceeding. To avoid James Burdi having to appear again to answer the questions, the parties agreed that in the event that the court determined that James Burdi must answer the questions, James Burdi would be permitted to answer the questions in the form of interrogatories.

By letter dated August 24, 2015, Helen Aliano's counsel sought a ruling on whether James Burdi must answer two questions asked during his examination. Counsel for Helen Aliano wrote, in relevant part:

“Two questions were objected to:

Q1: Were there any conversations between [James Burdi and James Demetriou] regarding the alleged loan made by the decedent to Helen Aliano other than those that occurred on the dates reflected in Mr. Burdi's handwritten notes that have been produced. This was objected to on the narrow ground that if there were any such conversations they occurred on dates other than those taken simultaneously with Mr. Burdi's notes, even though they involved the same subject matter.

Q2: Regarding Mr. Burdi's handwritten fax in which he provided discovery during this proceeding, there was a misrepresentation that a power of attorney Helen signed had been destroyed and was never sent to a Cypriot attorney for the sale of property. This representation was proven false when a copy was obtained from the Cypriot attorney, proving it was neither destroyed nor sent to the Cypriot attorney. This was the reason Mr. Burdi withdrew as counsel.

The question posed was what was the source of the representation Mr. Burdi made that the power of attorney had been destroyed.”

Counsel for James Burdi also wrote to the court, on August 25, 2015, similarly reporting to the court that there were two questions asked at the deposition which James Burdi refused to answer on the grounds of attorney-client privilege:

“The first question posed was:

1. Did Mr. Burdi and Mr. [James] Demetriou have conversations concerning a loan of \$108,000 that Frosso Demetriou allegedly made to Helen Aliano between December 28, 2009 and May 4, 2010?

It is Mr. Burdi's position that he was only required to respond to questions concerning conversations on December 28, 2009 and May 4, 2010 - the dates of the notes he had been required to produce. Since Mr. Burdi was not required to produce any notes from between those dates, any

conversations between Mr. Burdi and Mr. [James] Demetriou should remain privileged.

The second question posed was:

2. What was the source of Mr. Burdi's representation in correspondence dated May 7, 2010 to Ms. Aliano's former attorney, Al Smith, wherein Mr. Burdi stated that a power of attorney signed by Ms. [Helen] Aliano had been destroyed?

The documents that Mr. Burdi was required to produce in accordance with the Court's order of February 28, 2012, did not reflect any reference to the aforementioned power of attorney. Mr. Burdi asserted the attorney-client privilege in response to the question."

By letter dated August 28, 2015, the court directed James Burdi to answer the questions, which could, in accordance with the agreement of the parties, be answered as interrogatories under oath.

The following interrogatories were then prepared by Helen Aliano's counsel and served on James Burdi on September 10, 2015, prior to receipt of the transcript of James Burdi's examination:

"INTERROGATORY NO. 1²

Regarding your handwritten notes, which makes reference to an alleged loan made by the decedent to petitioner, were there any discussions held on the same date the notes were generated regarding any one or more of the following issues?

- (a) whether the alleged loan was to be repaid with interest;
- (b) the general terms of the alleged loan;
- (c) if the loan had to be re-paid in installments or in one lump sum;
- (d) why the money was loaned;
- (e) when the terms of the alleged loan were agreed upon;
- (f) when said alleged loan was to be repaid;
- (g) when the alleged loan occurred; and/or

²The court notes that in quoting the interrogatories, some of the minor spelling, grammatical and numerical errors have been left uncorrected.

(h) who petitioner had communications with regarding any aspect of the terms of the alleged loan.

If the answer to any portion of Interrogatory 1 is yes, please answer Interrogatories 2-14.

INTERROGATORY NO. 2

Was the interest rate discussed? If yes, what was the interest rate to be charged?

INTERROGATORY NO. 3

Were there discussions that the alleged loan was to be repaid at the time of the distribution of the decedent's estate?

INTERROGATORY NO. 4

Were there discussions that the alleged loan was to be repaid from the portion of the decedent's estate that petitioner was entitled to receive and/or was to be paid by petitioner to her two brothers?

INTERROGATORY NO. 5

Were there discussions that the alleged loan was to be repaid prior to the death of the decedent, and, if so, when prior to her death was the alleged loan to be repaid by petitioner?

INTERROGATORY NO. 6

Were there discussions what the purpose of the alleged loan was (in other words why the money was loaned) and, if so, what was the purpose of the loan?

INTERROGATORY NO. 7

Were there discussions that the terms of the alleged loan were agreed upon between petitioner and the decedent, Frosso Demetriou?

INTERROGATORY NO. 8

Were there discussions that the terms of the alleged loan were agreed upon between petitioner and James Demetriou?

INTERROGATORY NO. 9

Were there discussions that the terms of the alleged loan were agreed upon between petitioner and someone other than the decedent and James Demetriou, including but not limited to George Demetriou?

INTERROGATORY NO. 10

Were there discussions when the terms of the alleged loan were agreed upon either between petitioner and James Demetriou and/or between petitioner and the decedent and, if so, what was the month and year the terms were agreed upon?

INTERROGATORY NO. 11

Were there discussions when the alleged loan was made, and, if so, what was the month and year?

INTERROGATORY NO. 12

Were there discussions when the alleged loan had to be repaid either in one lump or in installments, and if in installments, what was the frequency of the installments (weekly, monthly, bi-annually or annually) and the monetary amount of each installment to be paid?

INTERROGATORY NO. 13

At or about the time your notes were generated, did James Demetriou and/or any other person provide to you or did you review from some other source, a promissory note, an I.O.U., and/or other writing signed by petitioner and/or in her handwriting in which she acknowledged a loan had been made to her?

If yes, what was the nature of the document, its date, who provided it and do you have a copy and/or do you know who does?

INTERROGATORY NO. 14

At or about the time your notes were generated, did James Demetriou and/or any other person provide to you and/or did you review from some other source, any document or writing not referred to in Interrogatory No. 13, (including but not limited to a check or bank draft) claimed to represent that a loan had been made to petitioner?

If yes, state with specificity the nature of this document, provide its date, who prepared it, who provided it to you, how you obtained it and do you have a copy and/or do you know who does?

INTERROGATORIES NUMBERED 15-30 ALL REFER TO COMMUNICATIONS/CONVERSATIONS/DISCUSSIONS THAT OCCURRED ON DATES OTHER THAN THOSE REFLECTED IN YOUR NOTES REGARDING AN ALLEGED LOAN THE DECEDENT MADE TO PETITIONER

INTERROGATORY NO. 15

Other than the communications/discussions reflected in any of your notes regarding an alleged loan made by the decedent to petitioner, were there any discussions held at any other time with James Demetriou and/or any other person including but not limited to George Demetriou, regarding the alleged loan?

(If the answer to Interrogatory 15 is yes, please proceed to Interrogatories numbered 16-30).

INTERROGATORY NO. 16

- (a) how many conversations were there?
- (b) what were the dates that they occurred?
- (c) what are the names of the people you had communications/conversations/discussions with?
- (d) what type of communication were they (e-mail, telephone, in person, etc.)?

(e) what were the specific nature of the conversations/communications/discussions regarding the alleged loan?

If there were more than one person, please answer this by stating the name of the person followed by the answers to each of the above in order to avoid confusion as to who these communications were with.

INTERROGATORY NO. 17

Were there any discussions regarding any one or more of the following issues?

- (a) whether the alleged loan was to be repaid with interest;
- (b) the general terms of the alleged loan;
- (c) if the loan had to be repaid in installments or in one lump sum;
- (d) why the money was loaned;
- (e) when the terms of the alleged loans were agreed upon;
- (f) when said alleged loan was to be repaid;
- (g) when the alleged loan occurred; and/or
- (h) who petitioner had communications with regarding any aspect of the alleged loan including but not limited to its terms.

INTERROGATORY NO. 18

Was the interest rate discussed? If yes, what was the interest rate to be charged?

INTERROGATORY NO. 19

Were there discussions that the alleged loan was to be repaid at the time of the distribution of the decedent's estate?

INTERROGATORY NO. 20

Were there discussions that the alleged loan was to be repaid from the portion of the decedent's estate that petitioner was entitled to receive and/or was to be paid by petitioner to her two brothers?

INTERROGATORY NO. 21

Were there discussions that the alleged loan was to be repaid prior to the death of the decedent, and if so, when prior to her death was the alleged loan to be repaid by petitioner?

INTERROGATORY NO. 22

Were there discussions what the purpose of the alleged loan was (in other words, why the money was loaned) and if so, what was the purpose of the loan?

INTERROGATORY NO. 23

Were there discussions that the terms of the alleged loan were agreed upon between petitioner and the decedent, Frosso Demetriou?

INTERROGATORY NO. 24

Were there discussions that the terms of the alleged loan were agreed upon between petitioner and James Demetriou?

INTERROGATORY NO. 25

Were there discussions that the terms of the alleged loan were agreed upon between petitioner and someone other than the decedent and James Demetriou, including but not limited to George Demetriou?

INTERROGATORY NO. 26

Were there discussions when the terms of the alleged loan were agreed upon either between petitioner and James Demetriou and/or between petitioner and the decedent and if so, what was the month and year the terms were agreed upon?

INTERROGATORY NO. 27

Were there discussions when the alleged loan was made, and if so, what was the month and year?

INTERROGATORY NO. 28

Were there discussions when the alleged loan had to be repaid either in one lump or in installments, and if in installments what was the frequency of the installments (weekly, monthly, bi-annually or annually) and the monetary amount of each installment to be paid?

INTERROGATORY NO. 29

At any time in which you were representing James Demetriou, or at any time before or after representing him, did James Demetriou and/or any other person provide to you and/or did you review from any other source, a promissory note, an I.O.U., other writing signed by petitioner and/or in her handwriting even if unsigned, in which she acknowledged that a loan had been made to her?

If yes, what was the nature of the document, its date, who provided it to you, how did you obtain it, and do you have a copy and/or do you know who does?

INTERROGATORY NO. 30

At any time in which you were representing James Demetriou, or at any time before or after representing him, did James Demetriou and/or any other person provide to you and/or did you review from some other source, any document or writing not referred to in Interrogatory No. 29, (including but not limited to a check or bank draft) claimed to represent that a loan had been made to petitioner? If so, state with specificity the nature of this document, provide its date, who prepared it, who provided it to you, how you obtained it and if you have a copy or know who does.

INTERROGATORIES 29-49 PERTAIN TO THE WRITTEN

**REPRESENTATION YOU MADE ON MAY 7 2010 THAT A POWER
OF ATTORNEY HAD BEEN DESTROYED AND NOT SENT TO A
CYPRIOT ATTORNEY**

INTERROGATORY NO. 29

Did you have any conversations/communications/discussions with James Demetriou and/or any other person either prior to, simultaneously with and/or at anytime subsequent to the time you made the May 7, 2019 representation that a power of attorney had been destroyed and not forwarded to a Cypriot attorney regarding its content?

If the answer to Interrogatory 29 is yes, please proceed.

INTERROGATORY NO. 30

What are the names of all the individuals you had conversations/communications/discussing with prior, simultaneously with and/or subsequent to the time you made the representation, excluding conversations you may have had with your attorney?

INTERROGATORY NO. 31

What were the dates (month and year) when these conversations/communications occurred?

(If there is more than one person, please list next to their name the date of the communication in order to avoid confusion.)

INTERROGATORY NO. 32

Were these communications in person, by telephone, by text messages, e-mail, written letter, etc., or some other means?

(If more than one person, please list next to their name how the communication occurred in order to avoid confusion.)

INTERROGATORY NO. 33

What was specifically discussed during these communications/communications?

(If you had conversations with more than one person regarding the representation at any time (prior to, simultaneously with and/or subsequently to the time the representation was made, please list next to their name the nature of the conversation had with that individual in order to avoid confusion).

INTERROGATORY NO. 34

Who was the person and/or persons who provided the information to you that served as the basis for your representation that the power of attorney had been destroyed and never forwarded to the Cypriot attorney?

INTERROGATORY NO. 35

At any time prior to, and/or simultaneously with the time of making your representation, did you request from any person or persons contact

information for the Cypriot attorney, including but not limited to his or her name, telephone number, office address and/or e-mail address?

INTERROGATORY NO. 36

If the answer to Interrogatory No. 35 is yes, who was the person you requested the information from you and what was the nature of the contact information provided to you?

INTERROGATORY NO. 37

If the answer to Interrogatory No. 35 is yes, did you contact the Cypriot attorney either before, simultaneously with or subsequent to your May 7 representation?

If yes, on how many occasions, when did you contact him, by what means (e-mail, telephone, letter, etc) and the nature of the discussion/conversation/communication you had with the Cypriot attorney?

INTERROGATORY NO. 38

Other than taking information, which served as the basis of your representation from another person or persons, did you take any affirmative steps and/or action to independently confirm the accuracy of the information contained in your representation before and/or at the time of making it?

INTERROGATORY NO. 39

If the answer to Interrogatory No. 38 is yes, what specific steps did you take to confirm the accuracy of the information provided to you, providing the dates you took such action?

INTERROGATORY NO. 40

At any time after making your representation, did you learn that the power of attorney had not been destroyed and had in fact been sent to a Cypriot attorney?

INTERROGATORY NO. 41

If the answer to Interrogatory No. 40 is yes, when did you first learn (provide dates), how did you learn (by telephone, e-mail, etc.), what information did you receive, and/or from whom did you receive it? (provide names)

INTERROGATORY NO. 42

Subsequent to the time you made the representation, did you have any conversations/communications/discussions with James Demetriou regarding it and/or the information contained therein?

If yes,

(a) how many communications did you have;

(b) what were the dates they occurred:

(c) what was the manner of the communications (in person, telephone, e-mail, etc.); and

(d) what was the specific nature of the communications/conversations/discussion).

INTERROGATORY NO. 43

If the answer to Interrogatory 42 is yes, did James Demetriou at any time acknowledge to you that the information, which served as the basis for your May 7 representation was not accurate?

If yes, provide how many communications were there to this effect; what was the manner of the communications (telephone, e-mail, in-person, etc) and what was the specific nature of the communications/conversations).

INTERROGATORY NO. 44

If the answer to Interrogatory 42 is yes, did James Demetriou inform you the reason or reasons the information was inaccurate?

If yes, how many communications to this effect were there; what was the manner of the communications (telephone, e-mail, in person, etc.) and what was the reasons given why it was inaccurate).

INTERROGATORY NO. 45

Subsequent to the time you made the representation, did you have any conversations/communications with anyone other than James Demetriou, including but not limited to attorney Alfred Smith and any member or employee of the law firm of Rossi and Crowley regarding the information contained therein?

If yes, state with whom, how many communications there were, the manner of the communications (telephone, e-mail, in person, etc.), the dates they occurred and the specific nature of the communications/conversations and what if any documents you received from him or her).

(If more than one person, please list the name and answers to the above next to their name in order to avoid confusion).

INTERROGATORY NO. 46

Subsequent to the time of your May 7, 2010 representation, what was the date you first informed James Demetriou you were withdrawing as his attorney? (If you are unable to provide a specific date, please state whether it was a week, two weeks, a month etc., after the May 7 representation.)

INTERROGATORY NO. 47

What was the date you formally withdrew as the attorney for James Demetriou?

INTERROGATORY NO. 48

Was the reason you withdrew as the attorney for James Demetriou due in whole or in part to the May 7, 2010 representation?

INTERROGATORY NO. 49

If the answer to Interrogatory 48 is no, what were the reasons you withdrew as his attorney?”

On September 30, 2015, counsel for James Burdi wrote a letter to counsel for Helen Aliano, objecting to the interrogatories served on James Burdi for the following reasons: (1) the interrogatories are beyond the scope of: (a) the questions contemplated when James Burdi was examined; (b) the August 24, 2015 letter sent to the court by Helen Aliano’s counsel, which identified only two questions to which objections had been raised; and (c) the correspondence sent to the court by James Burdi’s counsel on August 25, 2015; (2) the interrogatories contain 51 questions; (3) Helen Aliano never sought permission to ask follow-up questions to the two questions on which the parties sought a ruling; (4) the interrogatories are inappropriate and improper; (5) the interrogatories are being used to ask other questions that could have been, but were not, asked at James Burdi’s deposition. In addition, James Burdi’s counsel wrote to the court on October 1, 2015, presenting her reasons, based upon attorney-client privilege, that James Burdi should not be required to answer the 51 interrogatories served by Helen Aliano’s counsel.

III. RELIEF REQUESTED BY PETITIONER

Helen Aliano asks the court to compel James Burdi to answer under oath all of the interrogatories dated September 9, 2015 served as a follow-up to his second examination under oath conducted on August 20, 2015, and the questions he refused to answer during that examination which were marked for rulings, or, in the alternative, requiring James

Burdi to personally re-appear for an examination under oath to answer the questions, on the grounds that: (1) pursuant to correspondence from the court dated August 28, 2015, James Burdi was directed to answer the two areas of inquiry contained in said interrogatories; (2) James Burdi did not comply with CPLR § 3133, in that he failed to timely serve his answers within 20 days of service or move for a protective order striking interrogatories deemed objectionable; (3) this is the third motion pertaining to obtaining discovery from James Burdi due to his persistent refusal to answer all questions posed, even after being directed to answer; and (4) on January 14, 2016, the court recommended that a formal motion be made to resolve these issues.

IV. OPPOSITION TO THE MOTION TO COMPEL

In her opposition to the motion to compel James Burdi to answer the 51 interrogatories, counsel for James Burdi agrees that her client was directed to “answer all questions related to the documents produced in accordance with this Court’s order”³ and that James Burdi was specifically directed by the court to answer the two questions asked at his August 20, 2015 examination concerning the alleged loan to Helen Aliano and the power of attorney sent to Cypriot counsel. The issue contested by James Burdi’s counsel is whether or not her client must answer the balance of the questions included in the interrogatories. In correspondence to Helen Aliano’s counsel on September 30, 2015, counsel for James Burdi included his sworn answers to the following interrogatories:

³Dec. No. 30275, dated December 24, 2014.

“[W]e have received . . . the deposition transcript of Mr. Burdi dated August 20, 2015, which contains the exact questions that were asked of Mr. Burdi and to which I objected. To ensure that there is no ambiguity and that the exact questions posed to Mr. Burdi are the ones he answers, we are enclosing herewith a document containing the two questions posed and Mr. Burdi’s responses thereto.”

The attached document shows the following questions and responses:

“James Burdi’s Answers to Questions asked at Examination before Trial dated August 20, 2015, to which the parties requested a ruling from the Court.

Pages 138, 11, 12-15:

Q. Subsequent to December 28, ‘09 [sic], any discussions about what - any circumstances surrounding the loan, what was the loan for, anything like that?

Mr. Burdi’s response:

Yes. I made a written request to [James] on April 28, 2010 for documentary proof of the \$108,000 loan, which I never received. My notes from May 4, 2010 indicate that [James] advised me that the source of the loan to Helen Aliano was a Greenpoint Bank CD. I have no recollection of any other discussions regarding the loan.

Page 158, 11, 16-20:

Q. Mr. Burdi, you had previously answered questions at the prior deposition regarding Objectant’s 4, and my question is simply, from whom did you get the information which is the basis of the notes that are Objectant’s 4?

Mr. Burdi’s response:

James Demetriou.”

V. ANALYSIS

By agreement of the parties, interrogatories were served on James Burdi following a court ruling that James Burdi must answer two questions he had refused to answer during his examination. The interrogatories served included the original two questions,

but also included additional questions which Helen Aliano asserts would have been asked at the examination, had James Burdi agreed to answer the initial two questions at that time. After receiving the interrogatories, James Burdi's counsel responded by writing to Helen Aliano's counsel, answering the original two questions but objecting to the other questions posed on the grounds that the interrogatories were beyond the scope contemplated by the parties at the examination, the interrogatories were not limited to the two questions that James Burdi had refused to answer, no permission was sought for asking James Burdi follow-up questions, and the additional questions could have been, but were not, raised at the examination of James Burdi. In addition, James Burdi's counsel wrote to the court to argue that, based upon attorney-client privilege, James Burdi should not be required to answer any questions other than the two which had been asked of James Burdi at the examination.

A. Whether the Response of Counsel for James Burdi Complied with CPLR § 3133

Counsel for Helen Aliano asserts that James Burdi did not move for a protective order striking the interrogatories, or serve his answers to the interrogatories, within 20 days of service, as required by CPLR § 3133. This section provides in relevant part that “[w]ithin twenty days after service of interrogatories, the party upon whom they are served shall serve upon each of the parties a copy of the answer to each interrogatory, except one to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity.” Thus, although counsel for Helen Aliano asserts that the only permitted responses to interrogatories are answers within 20 days or a

motion to strike, CPLR § 3133 clearly permits a party to object to the interrogatories without seeking court intervention. “A party who objects to answering an interrogatory need not move for an order to strike but may instead simply set forth the objection to the interrogatory in the response” (6 Weinstein-Korn-Miller New York Civ Prac ¶3133.01 [2d ed 2015]).

B. Whether the Interrogatories are Beyond the Scope of the Questions
that James Burdi was Directed to Answer

In the court’s earlier ruling, James Burdi was directed to answer the two questions posed at his examination that he had refused to answer on the grounds of attorney-client privilege. Counsel for Helen Aliano asserts, and the court agrees, that had the two questions been answered at the examination, counsel would have had the opportunity to ask follow-up questions that were directly pertinent to the areas of inquiry raised.

The attorney-client privilege “enables one seeking legal advice to communicate with counsel, secure in the knowledge that the contents of the exchange will not be revealed against the client's wishes” (*People v Osorio*, 75 NY2d 80 [1989]), and “that his or her confidences will not later be exposed to his or her legal detriment” (*Priest v Hennessy*, 51 NY2d 62 [1980]). In this estate proceeding, the privilege must be balanced against a fiduciary’s “obligation to disclose the advice of counsel with respect to matters affecting the administration of the estate” which is limited “as to communications occurring after litigation has commenced or is anticipated” (*Matter of Herman*, 1991 NY

Misc LEXIS 869, at *4-5, 1991 WL 11763928 [Sur Ct, Nassau County 1991] [citations omitted]).

Accordingly, the court, having wide discretion to supervise discovery (*see Matter of U.S. Pioneer Execs. Corp.*, 47 NY2d 914, 916 [1979]; *Mattocks v White Motor Corp.*, 258 AD2d 628, 629 [2d Dept 1999]), and to “adjust disclosure requirements to balance justice on both sides” (*Oneto v Hotel Waldorf-Astoria Corp.*, 65 AD2d 520, 521 [1st Dept 1978]), grants that portion of the motion which seeks to compel James Burdi to answer the interrogatories numbered 1 through 30⁴ concerning discussions surrounding an alleged loan, since the court finds that these interrogatories are directly related to the initial question presented, which concerns estate assets.

With respect to the interrogatories numbered 29 through 49 that pertain to the representation made by James Burdi that a power of attorney had been destroyed, the court notes that the interrogatory numbered 34, “Who was the person and/or persons who provided the information to you that served as the basis for your representation that the power of attorney had been destroyed and never forwarded to the Cypriot attorney?” was previously answered by James Burdi in his written response to the interrogatories and need not be answered again. The court grants the motion as to interrogatories numbered 29 through 33, and 35 through 45, except that James Burdi’s responses may exclude all conversations with his own counsel, which must be noted, where applicable, as the reason

⁴Due to errors in numbering the interrogatories, there are interrogatories numbered 29 and 30 which concern the alleged loan, and other interrogatories numbered 29 and 30 which concern the power of attorney.

for refusing to answer all or a portion of an interrogatory. The court denies the motion as to the interrogatories numbered 46 through 49, which relate to the reasons that James Burdi withdrew as counsel to James Demetriou.

VI. CONCLUSION

The court grants that portion of the motion which seeks an order compelling James Burdi to answer under oath the interrogatories numbered 1 through 30 concerning discussions surrounding an alleged loan, dated September 9, 2015, and the interrogatories, numbered 29 through 33, and 35 through 45, concerning the destruction of a power of attorney.

The court denies that portion of the motion which seeks an order compelling James Burdi to answer under oath the interrogatories, numbered 34, and 46 through 49, concerning the destruction of a power of attorney.

This is the Decision and Order of the Court.

Dated: June 29, 2016
Mineola, New York

E N T E R:

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

To: Robert J. Aliano, Esq.
Attorney for Petitioner, Helen Aliano
63 Snowball Drive
Cold Spring Harbor, New York 11724

L'Abbate, Balkan, Colavita & Contini, LLP
Attorneys for James F. Burdi
1001 Franklin Avenue
Garden City, New York 11530