

Matter of Breslin v Breslin
2003 NY Slip Op 30232(U)
February 26, 2003
Supreme Court, New York County
Docket Number: 119149/02
Judge: Sherry Klein Heitler
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

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In the Matter of the Application of
KEVIN BRESLIN, Petitioner, for an Order
for the taking of the deposition of Glickenhau & Co.
by Seth M. Glickenhau, Senior Partner or other
partner or officer, The Offit Investment Fund, Inc., by
Dominic F. Salvia. or other officer or partner;
Mosaic Fund L.P. by Leon Myers, General Partner,
or other partner or officer; Antonia Schulman;
Lowell Schulman; and the Schulman Realty Group by
Douglas A. Ramsay, Senior Partner, or other partner or
officer, Respondents, and the production of documents
by Glickenhau & Co., The Offit Investment Fund, Inc.,
Mosaic Fund, L.P.; Antonia Schulman; Lowell Schulman;
and the Schulman Realty Group, for use in an action
pending in the Commonwealth of Massachusetts entitled
Kevin R. Breslin vs. Barbara Schulman Breslin -
Docket no. 01D0090-D1

Index No. 119149/02

DECISION & ORDER

SCANNED
FEB 26 2003

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SHERRY KLEIN HEITLER, J.:

Ms. Antonio Schulman seeks an order pursuant to CPLR § 3103 vacating a Subpoena and Subpoena Duces Tecum and granting a protective order. In the alternative, she seeks to limit the scope of the Subpoena and Subpoena Duces Tecum. Mr. Kevin Schulman opposes this motion.

Ms. Antonio Schulman (“Ms. Schulman”) is a nonparty witness in a Massachusetts divorce proceeding between her daughter Barbara Schulman Breslin and Kevin Breslin. Ms. Schulman is a resident of New York State. Kevin Breslin is the plaintiff in the divorce action.

Kevin Breslin sought to depose Ms. Schulman in reference to the action in Massachusetts. Since Ms. Schulman is a New York resident, she is not subject to an order of the Massachusetts court compelling a deposition in that state. On June 27, 2002, the Massachusetts Court issued a formal request for this jurisdiction’s approval and assistance in taking the deposition in New York City. The Massachusetts Court requested that any necessary subpoena be issued to Ms. Schulman.

On August 27, 2002, Ms. Schulman was directed by Justice Martin Schoenfeld of this Court to appear for a deposition to give testimony and produce documents in connection with the divorce proceeding pursuant to CPLR § 3102(e). Ms Schulman was simultaneously served with a Subpoena and Subpoena Duces Tecum. The Subpoena directed Ms. Schulman to produce the following documents:

- (A) A current net worth statement listing all income, assets, and liabilities;
- (B) Copies of all Federal, State, and Local income tax returns for the years 1998 through 2001;
- (C) Records of any ownership interest in real estate, whether direct or through some other ownership entity;
- (D) Copies of any trust agreement that provides income or principal; and
- (E) A copy of a current will and current estate plan.

Plaintiff in the divorce action has agreed to accept an affidavit from Ms. Schulman, rather than compel her deposition. However, plaintiff alleges that Ms. Schulman has declined this offer. CPLR § 3102(e) states:

Action pending in another jurisdiction. When under any mandate, writ or commission issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement, it is required to take the testimony of a witness in the state, he may be compelled to appear **and** testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state. The supreme court or a county court shall make any appropriate order in aid of taking such a deposition.

When implementing an order under this section, “disclosure procedures should be liberally construed in favor of eliciting the information sought.” *Jarvis v. Jarvis*, 533 N.Y.S.2d 207, 210 (N.Y. Sup. Ct. 1988). See *Application of Ayliffe*, 166 A.D.2d 223 (1st Dept., 1990) (holding that the courts “will afford the widest possible latitude in the conduct of such examinations”) (quoting *Mutter of Roberts*, 214 A.D. 271 [1st Dept. 1925]).

The factors that this court can consider are clearly articulated in Application *of Ayliffe*. The Appellate Division held that “[t]he court’s inquiry with respect to objections raised by persons required to testify pursuant to CPLR 3102(e) is limited to determining (1) whether the witnesses’ fundamental rights are preserved; (2) whether the scope of inquiry falls within the issues of the pending out-of-state action; and (3) whether the examination is fair.” *Ayliffe*, 166 A.D.2d at 224.

In seeking to quash the Subpoena, Ms. Schulman claims: (1) the information requested is not material to the Massachusetts proceeding; (2) Ms. Schulman is not a party to the divorce action; (3) there is no prima facie showing that there is a financial connection between Ms. Schulman and her daughter; (4) the discovery is unfair and obtrusive; and (5) the discovery violates Ms. Schulman’s right of privacy.

Ms. Schulman’s first three contentions fall under the determination of “whether the scope of inquiry falls within the issues of the pending out-of-state action.” In *Ayliffe*, subpoenas were issued to a New York resident who was a non-party witness for an action pending in California. The court ruled that “the California Superior Court has determined that these appellants have information that is ‘relevant and necessary’ for the trial of the pending California cases, and that it would be in the interest of justice for these appellants to be deposed.” *Ayliffe*, 166 A.D.2d 223 at 224. The court in Application *of Shea Gould Climenko & Casey* inquired as to the proper limit of discovery held in New York state for a Pennsylvania proceeding and stated that:

“[s]ince the trial will be held in Pennsylvania, the admissibility of evidence and rulings in connection therewith. . . will all be determined at trial by the Pennsylvania Court. Under these circumstances the issue should be determined in accordance with the applicable rules of evidence in Pennsylvania. . . . The issue should also be decided upon consideration of the Pennsylvania law applicable to the extent of discovery. The New York law concerning these matters is irrelevant to the conduct and management of the Pennsylvania trial.”

Climenko, 98 MISC.2d 484 (N.Y. Sup. Ct. 1979). The Massachusetts trial court has already determined that Ms Schulman’s information is relevant to the case, even though she is not a party to the divorce action. As said decision has been made by the Massachusetts trial court, it would not be proper for this court to substitute its judgement in this matter.

Ms. Schulman also claims that the discovery is unfair and obtrusive. An inquiry by this court as to fairness is proper under the third factor considered by the *Ayliffe* court. In fact, the *Ayliffe* court directly addressed the issue of fairness, finding that “appellants do not argue that. . . [the] time and place of the depositions would be prejudicial or unfair.” 166 A.D.2d at 224. This court fails to see’ how holding a deposition in a highly accessible law office in the city where Ms. Schulman resides is unfair or obtrusive.

Ms. Schulman’s final contention is that this deposition would violate one of her fundamental rights, the right to privacy. This court is satisfied by the alternate proposal that will allow Ms. Schulman to submit an affidavit disclosing “(1) their approximate current total net worth (plus or minus \$500,000), (2) a general description of their current estate plan and wills, and (3) the date, if any, when the estate plan or wills were last amended.” *Vaughan v. Vaughan*, (memorandum and order only, case unreported. *See* Affirmation in Opposition at Ex. C). This option is clearly less invasive than the list of demands found in the Subpoena and Subpoena Duces Tecum. The choice is Ms. Schulman’s.

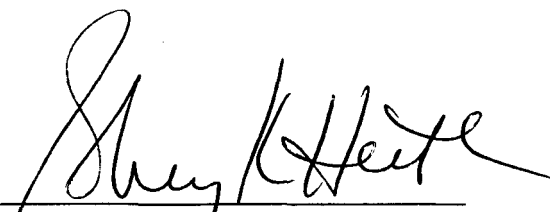
In the alternative, Ms. Schulman has asked this court to limit the scope of discovery to “questions pertaining to her past financial transactions, if any, with either Kevin Breslin and/or Barbara Schulman Breslin” (See Notice of Motion at ¶14). The scope of discovery for a divorce case in Massachusetts is not a matter for the courts of New York. The court in *Climenko* addressed this issue, stating that “[s]ince this Court is merely exercising its functions to assist and implement in this

jurisdiction, the mandate of the Pennsylvania trial court, it firmly believes that the [scope of discovery] should be determined by [that court].” *Application of Shea Gould Climenko & Casey*, 98 MISC.2d 484 (N.Y. Sup. Ct. 1979) at 486. However, this court can find no evidence in the papers provided by counsel that the Massachusetts court has ruled on the scope of the discovery. This court cannot apply Massachusetts law in an attempt to determine the scope of the issue. Even if this court did attempt such an exercise, “the [Massachusetts] court would nevertheless be free to make its own ruling relating to the discovery of the documents This Court could not enforce its decision in the [Massachusetts] trial, and it should not attempt to pre-empt or posture the decision which will’ inevitably be required by the trial judge.” *Id.*

Accordingly, this court denies petitioner’s motion to vacate the subpoena and subpoena duces tecum dated August 19, 2002 and her request for a protective order. Therefore, Antonia Schulman is directed to appear before plaintiffs counsel and submit to a deposition on or before February 28, 2003 and to produce any documents relating to her estate regarding value and/or how and to whom their estates are to be distributed upon death. In the alternative, Antonia Schulman is directed to provide a “Vaughan affidavit” as defined by the Superior Court of Massachusetts, within twenty (20) days of this court’s order.

This shall constitute the decision and order of the court.

DATED: FEBRUARY 10, 2003



SHERRY KLEIN HEITLER
J.S.C.