

Matter of Unterman

2008 NY Slip Op 32705(U)

September 26, 2008

Surrogate's Court, Nassau County

Docket Number: 337203

Judge: John B. Riordan

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SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of

GAIL SHEINKOPF,

Beneficiary of the Estate of, and
Remainderman of the Testamentary Trusts of

File No. 337203

SEYMOUR UNTERMAN,

Deceased,

Dec. No. 495

for a Decree Revoking Letters Testamentary and
Letters of Trusteeship Heretofore Issued to

THOMAS UNTERMAN,

as Executor/Trustee, and Granting Additional Relief.

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This is a proceeding for revocation of letters testamentary and letters of trusteeship. Before the court is the respondent's motion for a protective order and the petitioner's cross-motion to compel discovery and for the issuance of commissions to take depositions outside of New York State.

The decedent, Seymour Unterman, died testate in March 2005, leaving his spouse, Lillian, and their two adult children, the petitioner Gail Sheinkopf and Patricia Leffler, who is a respondent. Lillian died six months later, in September 2005. Respondent, Thomas Unterman, is the decedent's nephew.

The decedent's will provides, in pertinent part, that his residuary estate be divided into two parts, termed in the will as the "nonmarital part" and the "spouse's part," each of which was to be placed into a separate trust. Lillian was the designated income beneficiary of both trusts, and the trustee was accorded the discretion in both trusts to distribute principal to provide for Lillian's

health, support and maintenance. Upon Lillian's death, any accrued or undistributed income from the trusts was to go to Lillian's estate and the trusts' principal was to be distributed equally to the decedent's daughters, Gail and Patricia, in accordance with Article SIXTH of the will.

On May 3, 2005, the will was admitted to probate and letters testamentary and letters of trusteeship issued to Thomas and Lillian. After Lillian's death, the court issued an order revoking the letters testamentary and letters of trusteeship issued to her and amending the letters to continue with Thomas acting as the sole executor and sole trustee of both trusts.

The decedent's residuary estate is primarily comprised of the stock in Supreme Oil Company (Supreme), a Delaware corporation of which the decedent was the founder and sole shareholder. Supreme's value is alleged to be between \$70,000,000 and \$100,000,000.

Gail's petition raises numerous grounds that she alleges warrant Thomas's removal. Included among them are Thomas's alleged: (1) failure to distribute the trusts' assets in disregard of Article SIXTH of the will; (2) conflict of interest between his fiduciary duty as executor and trustee and the position he created for himself days before Lillian's death as chairman of the board of directors of Supreme; (3) retention of Kaye Scholar LLP to represent both himself as trustee and Supreme in transferring sole control to him over all the voting stock of the corporation; (4) manipulating the petitioner into agreeing to a recapitalization of Supreme, which facilitated Thomas's plan to wrest control of the corpus of the trusts from petitioner; (5) plan to continue to operate Supreme rather than distribute the shares of stock to the petitioner and Patricia in conformance with the terms of the decedent's will; and (6) mismanaging and wasting the estate and Supreme by, among other things, (a) employing all three of Patricia's children at exorbitant salaries, (b) appointing Patricia's son, Michael Leffler, as president of Supreme (he formerly was

a manager of the corporation), (c) paying for Patricia's health insurance, car insurance, car payments and other benefits with corporate funds even though she does not work for Supreme, (d) failing to maintain adequate insurance causing unnecessary losses to the corporation, (e) failing to provide the petitioner with information about the operation and finances of the corporation, (f) adding approximately \$2,000,000 to Supreme's payroll by hiring unnecessary employees and (g) permitting Patricia to convert more than \$2,500,000 and millions of dollars in jewelry and other intangibles from the estate. Gail alleges that Thomas's actions demonstrate that he is unfit to continue to serve as executor and trustee. Based on these allegations, Gail seeks an order and decree directing Thomas to distribute the corpus of the trusts; removing him as trustee and compelling him to account. Gail also seeks the appointment of Bradley Shorser as the sole successor executor and sole successor trustee, as nominated in the decedent's will, to wind up the estate and trusts in accordance with Article SIXTH of the will.

The court notes that the file contains a stipulation and order dated November 29, 2007 directing all fact disclosure to be completed by May 15, 2008. On May 23, 2008, a telephone conference was conducted by a court attorney-referee at the request of counsel. The issue addressed was the location where Thomas Unterman's deposition would be conducted. Counsel informed the court attorney-referee that they may request an extension of the discovery cut-off; an application was not made. Nevertheless, in order to move this proceeding along, the court will decide the pending motion and cross-motion.

The court also notes that the parties to the proceeding have not been deposed. Among other things, the November 29, 2007 stipulation and order states that

“Provided that initial document discovery is completed by

then, depositions will begin in January 2008. Petitioner acknowledges that Respondent is entitled to take the first deposition and will therefore propose dates in January that Gail Sheinkopf will be available to be deposed.

Depositions of additional fact witnesses by both parties will be scheduled to take place subsequent to Gail Sheinkopf's deposition. Both parties agree to attempt in good faith to arrange depositions of third parties without service of subpoenas and promptly inform the other side if they are unable to make such arrangements."

The Motion

Thomas now moves for an order pursuant to CPLR 3103(a): (1) limiting Gail to taking three nonparty depositions; (2) quashing the subpoena duces tecum and ad testificandum Gail served on nonparty, J.H. Cohn, LLP and (3) denying Gail's request for production of additional documents from Supreme, a nonparty.

Request to Limit Nonparty Depositions

According to a letter dated May 20, 2008 from Gail's attorney to Thomas's attorney, Gail intends to depose six employees of Supreme: Nicole Acrish, Mildred Moore, James Smith, John Mathis, Dudley Dow and John Matsen, and four former employees: Rich Segal, Safiya Sheppard, Betty Yao and Yovanny Reves. Some of these individuals reside outside of New York State, and Gail has cross-moved, pursuant to CPLR 3108, for an order granting commissions to take their depositions. Gail also seeks a commission to obtain discovery from nonparties, Supreme, Irwin Flax, who is a current employee of Supreme, and Yi Cheng Corp. Supreme's offices are in Englewood, New Jersey. Gail has served a subpoena duces tecum and ad testificandum on J.H. Cohn, LLP, the auditor of Supreme's financial statements.

Thomas seeks a protective order prohibiting Gail from deposing any of these individuals

and entities. Thomas argues that Gail cannot justify taking these depositions until she has taken the depositions of Thomas and Michael and, perhaps, not even then. Thomas asserts that, during a conference call, Gail's counsel did not even know what functions the current and former Supreme employees performed for Supreme, which, according to Thomas, demonstrates Gail's bad faith in pursuing the depositions of these individuals.

Thomas asks the court to limit Gail to taking the depositions of three nonparties, Michael Leffler, Dai Sing Corp. and Fook Wah Trading Corp. As stated, Michael is the president of Supreme. Dai Sing Corp. and Fook Wah Trading Corp. are longstanding customers of Supreme. Gail alleges that Thomas has allowed Michael to embezzle from Supreme by receiving cash payments from these corporations and converting the cash for his personal use. In response to subpoenas duces tecum and ad testificandum served by Gail, Dai Sing Corp. produced documents and Chin Lin, Dai Sing Corp.'s president, was deposed on May 14, 2008 and Fook Wah Trading Corp. produced documents. No one from Fook Wah Trading Corp. has been deposed, and Michael has not been deposed.

Generally, there is full disclosure of all matter "material and necessary" in the prosecution or defense of an action or proceeding (CPLR 3101 [a]). It is well settled that the court has broad discretion over the discovery process to decide whether information sought is "material and necessary" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The words "material and necessary" are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy. The test is one of usefulness and reason (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740 [2000]). Additionally, in the Second Department, "[a] party seeking discovery from a nonparty

witness must show special circumstances . . . The existence of such special circumstances is not established merely upon a showing that the information sought is relevant. Rather, special circumstances are shown by establishing that the information sought cannot be obtained through other sources” (*Tannenbaum v Tenenbaum*, 8 AD3d 360, 360 [2d Dept 2004], citing *Lanzello v Lakritz*, 287 AD2d 601 [2d Dept 2001]; *Murphy v Macarthur Holding B. Inc.*, 269 AD2d 507 [2d Dept 2000]; *Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333, 334 [2d Dept 1988]; see also *Attinello v DeFilippis*, 22 AD3d 514 [2d Dept 2005]).

Protective orders are designed to deny, limit, condition or regulate the “use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts (CPLR 3103 [a]). A motion for a protective order . . . is addressed to the sound discretion of the trial court” (*Boylin v Eagle Tel.*, 130 AD2d 538, 538 [2d Dept 1987] [citations omitted]). The burden is on the moving party to establish the need for a protective order (*Camp v Smith*, 25 NY2d 287, 294 [1969] [citation omitted]; *Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452, 452-453 [2d Dept 1994] [citations omitted]). A motion for a protective order should not be granted when “supported solely by an attorney's affirmation containing only conclusory allegations of hardship” (*id.*).

Although Gail articulates the reasons she seeks the depositions of Nicole Acrish, Mildred Moore, James Smith, John Mathis, Dudley Dow, John Matsen, Rich Segal, Safiya Sheppard, Betty Yao, Yovanny Reves, Irwin Flax and Yi Cheng Corp., the court finds that Gail has not established that the information she seeks to obtain from them cannot be obtained through other sources. Indeed, such a conclusion would be premature where document discovery is ongoing and

the parties have not been deposed. Thus, Thomas' motion for a protective order is granted with respect to those depositions. If, at a later date, Gail finds that she has not been able to garner the information from other sources, the court will reconsider her request upon a proper motion.

Thomas's motion is denied, however, to the extent he seeks an order from the court limiting Gail to taking the depositions of only three nonparties to which Thomas does not object, those being of Michael Leffler, Dai Sing Corp. and Fook Wah Trading Corp..

Thomas's motion for an order quashing the subpoena duces tecum and ad testificandum Gail served on J.H. Cohn, LLP, the auditor of Supreme's financial statements, is denied. In the rider to the subpoena, Gail states that the disclosure sought from J.H. Cohn, LLP is necessary to determine the accuracy of Supreme's consolidated financial statements for the years ending December 31, 2005 and December 31, 2006 and the nine months ending September 20, 2007 (sic). Although Gail does not expressly state that this information is available only from J.H. Cohn, LLP, from the reasons for needing the information Gail articulated in her papers in opposition, the court concludes that the information sought is uniquely within the knowledge of the auditor. Since Thomas has made no showing that the deposition will cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice, as he must to obtain a protective order (CPLR 3103 [a]), the court denies his motion to quash the subpoena.

Gail informs the court that she intends to serve a subpoena for documents and testimony on Lankler & Carragher, LLP, which was hired by Supreme to investigate the veracity of Gail's allegations. Lankler & Carragher, LLP issued a report dated March 13, 2007 addressed to the Special Committee of the Board of Directors of Supreme Oil Company, Inc., care of Thomas as managing partner of Rustic Canyon Partners. The 15-page report discusses the allegations, the

investigation, the documents reviewed, background checks and interviews that were conducted, Supreme's current internal control structure and Lankler & Carragher, LLP's conclusions and recommendations. Gail states her expectation that Thomas will move to quash the subpoena. Gail also lists other nonparty witnesses she is considering deposing.

The court will not consider whether Gail is entitled to discovery from these nonparties until such time as the proper discovery demands are served and a motion to quash or for a protective order is submitted to the court.

Production of Additional Documents from Supreme

Thomas moves to preclude Gail from obtaining additional documents from Supreme, a nonparty to the proceeding. By way of background, Gail has served Thomas with a first request for the production of documents and a first set of interrogatories. The documents demanded are for the time period from January 1, 2004 through the date of the response. Thomas has responded to both demands and, in both cases, has interposed certain objections. According to Thomas, he produced more than 15,800 pages of documents from his and Supreme's files. Thomas states that he has produced all the documents in his and Supreme's possession in response to Gail's request. Thomas also served a response to the demand for interrogatories. Neither demand was served on Supreme. Accordingly, the court denies Thomas's motion for an order denying Gail's request for production of additional documents from Supreme itself.

The Cross-Motion

Pursuant to CPLR 3108, Gail cross-moves for an order issuing commissions with respect to certain of Supreme's current and former employees listed above, as well as to Yi Cheng Corp. For the reasons stated above, Gail's motion for an order issuing commissions with respect to them

is denied without prejudice.

Gail also cross-moves for the issuance of a commission to take the deposition of Supreme. Pursuant to CPLR 3108, a party may take an oral examination outside the state under an open commission where it is demonstrated to be necessary and convenient (*Macker v Sears Roebuck & Co.*, 275 AD2d 308 [2d Dept 2000]). This is so because the service of a subpoena outside of New York is ineffective to compel a witness to appear at a deposition or produce documents (CPLR 3108, CPLR 3113; *Wiseman v American Motors Sales Corp.*, 103 AD2d 230, 235 [2d Dept 1984]; *Matter of Van Gerbig*, NYLJ, September 24, 1996 at 27, col 4 [Sur Ct Westchester County]).

“This disclosure procedure, which must seek evidence ‘material and necessary’ to the underlying proceeding . . . , has been specifically endorsed for use in Surrogate's Court's proceedings” (*Matter of Van Gerbig*, NYLJ, September 24, 1996 at 27, col 4 [Sur Ct Westchester County], citing SCPA 508[2]).

Generally, the party seeking an open commission must not only demonstrate that the information sought is necessary to the investigation of the claim, but also that a voluntary appearance or compliance by the witness is unlikely or that discovery cannot be obtained by stipulation or the cooperation of the witness in New York (*Matter of Van Gerbig*, NYLJ, September 26, 1996 at 27, col 4). Gail's attorneys represent that a good-faith effort was made to resolve the issues raised in the cross-motion, leading the court to conclude that Supreme refused to voluntarily submit to a deposition. Thomas informs the court that he does not object to the subpoena duces tecum and ad testificandum served on Michael Leffler, who Gail served in New York. However, that subpoena is not addressed to Michael in his capacity as Supreme's

president. Based on the allegations contained in the petition and the arguments, the court grants Gail's cross-motion seeking that a commission issue to take the deposition of Supreme.

Gail also cross-moves, pursuant to CPLR 3124 and 3126, for an order compelling Thomas to produce additional documents and to supplement his interrogatory responses. That branch of the motion is granted to the following extent. With respect to the document requests, by October 31, 2008, Thomas shall, in keeping with the time period set forth in the demand, produce copies, to the extent they were not previously produced and over which Thomas has possession, custody or control, of the following documents about which no privilege is asserted :

1. (request no. 1) - Supreme's business plans;
2. (request no. 2) - the requested documents, other than Supreme's tax returns;
3. (request no. 3) - any tax audit documents that relate to when Thomas intends to distribute the estate assets;
4. (request no. 6) - the requested documents;
5. (request no. 20) - the requested documents; and
6. (request no. 22) - the requested documents.

To the extent that Thomas has produced all of the documents in his possession, custody or control, his attorneys shall provide a written response to Gail's attorneys so stating by October 31, 2008. If a privilege is asserted with respect to any of the requested documents, by October 31, 2008, Thomas' attorneys shall provide Gail's attorneys with a privilege log in conformance with CPLR 3122 (b).

By October 31, 2008, Thomas is to supplement his responses to the interrogatories as follows:

1. (interrogatory no. 5) - state whether or not others were involved and, if so, identify those individuals or entities;
2. (interrogatory no. 6) - state any and all of the grounds upon which Thomas concluded that Gail's continued service as a director was not in the best interest of the company or the estate;
3. (interrogatory no. 9) - state whether or not there are any documents other than board meeting minutes that relate to Gail's removal from Supreme's board. If there are additional documents, identify (and, if they have not already been produced, produce them).
4. (interrogatory no. 13) - state whether a copy of the identified log was produced. (If it was not produced, it is to be produced as part of Thomas' document production.)
5. (interrogatory no. 16) - state the status of the Internal Revenue Service audit, the reasons, if known, why it has not been completed and any efforts Thomas has undertaken to bring the audit to a conclusion.

If Thomas asserts that any of the above information is subject to privilege, his attorney shall advise Gail's attorney in writing accordingly by October 31, 2008.

Outstanding Discovery

All document disclosure shall be completed by October 31, 2008.

Only one nonparty deposition has taken place. Neither Gail nor Thomas has been deposed despite the passage of ten months since the November 2007 stipulation and order, with each party placing the blame upon the other. The court directs that the depositions of Gail and Thomas shall take place by November 28, 2008, with Gail being deposed first in accordance with the terms of

the November 2007 stipulation and order. The depositions of Michael Leffler; a representative from Fook Wah Trading Corp.; a representative from J.H. Cohn, LLP; and a representative from Supreme (once a commission is issued) are to be concluded by December 31, 2008. All depositions are to be concluded by December 31, 2008.

A compliance conference with a court attorney-referee is scheduled for January 12, 2009, at 10:00 a.m.

This is the decision and order of the court.

Dated: September 26, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court