Matter of Omanoff
2008 NY Slip Op 33337(U)
November 25, 2008
Surrogate's Court, Nassau County
Docket Number: 300264
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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In the Matter of the Accounting by Julia Omanoff,
as Executor of the Estate of

File No. 300264

MICHAEL OMANOFF,

Dec. Nos. 600 & 767

Deceased.

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Two motions are pending before the court in this accounting proceeding. The first is a motion to quash and for a protective order pursuant to CPLR 2304 and 3103, respectively, jointly made by petitioner, Julia Omanoff, who is the executor of the estate, and by respondent, Dennis Omanoff.[1] The second motion was made by Julia pursuant to CPLR 3124 to compel disclosure. Both motions are opposed by objectant, William Omanoff.

The decedent died on April 24, 1997, survived by his wife, Julia, and by two adult children, Dennis and William. The decedent's last will and testament dated January 24, 1997 was admitted to probate on June 19, 1997, and Julia was appointed the executor of the estate.

In Article Fifth of the will, the decedent established a credit shelter trust for Julia's benefit. According to the terms of the will, during Julia's lifetime, (1) the trustees: (a) were to pay to Julia or apply for her benefit the net income of the trust in installments at least on a quarterly basis; and (b) in their sole and absolute discretion, could pay to Julia or apply for her benefit principal of the trust for her health, support and maintenance, and (2) upon written notice

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[1]According to the attorney who appeared for her, Julia now suffers from advanced dementia and cannot render meaningful testimony in this proceeding. Dennis, in his capacity as Julia's attorney-in-fact, has now filed a notice of appearance for Julia in this proceeding. Dennis has also appeared on his own behalf. For purposes of the motion, the court will continue to refer to Julia when discussing the motions she made.

to the trustees, Julia could withdraw from trust principal an amount or amounts not to exceed, in the aggregate, $5,000 or five percent of the principal market value, whichever was greater, per year. Upon Julia's death, any remaining trust principal was to be divided equally between Dennis and William. In Article Seventeenth of the will, the decedent named Julia, Dennis and William as the co-trustees of the trust. The trust was never funded.

In July 2007, Julia filed a amended and restated account as executor for the period from April 24, 1997 to May 31, 2007. According to the amended and restated account, Julia received $204,406.54 in principal, consisting of $202,902.00 in New York Times class A stock and $1,504.54 from a Fidelity N.Y. municipal money market account, plus a $50,145.78 gain on the stock, for a total of $254,552.32. The account shows distributions to Julia, individually, in that total amount. Citation issued to Dennis and William, and both appeared by counsel. William filed verified objections to the account. Discovery is ongoing.

The Motion to Quash and for a Protective Order

Julia and Dennis have jointly moved pursuant to CPLR 2304 to quash four judicial subpoenas duces tecum dated July 2, 2008, issued by William to Fidelity Investments, Citibank, N.A., HSBC Bank USA, N.A. and BNY Mellon Shareholders Services. The subpoenas duces tecum addressed to Fidelity, Citibank and HSBC seek monthly statements, all cancelled checks and account application documentation for (1) all accounts held jointly by Julia and the decedent; (2) all individual accounts of the decedent; (3) all individual accounts of Julia; (4) all individual accounts of Dennis; (5) all accounts held jointly by Dennis and Julia; and (6) all estate accounts. The subpoena duces tecum addressed to BNY seeks production of "all investor information, including but not limited to stock certification, stock certificate, book of entry, distributions and

change of ownerships for any New York Times Stock owned by Michael Omanoff, Julia Omanoff or Dennis Omanoff." Julia and Dennis also seek a protective order pursuant to CPLR 3103 preventing or limiting any disclosure by Fidelity, Citibank, HSBC and BNY. In the order to show cause, the court ordered that, pending a hearing and determination of the motion, all disclosure required by the subpoenas duces tecum is suspended pursuant to CPLR 3103 (b) and that Fidelity, Citibank, HSBC and BNY and their agents are restrained and enjoined from complying with the subpoenas.

In his opposition papers, William has agreed to amend the subpoenas duces tecum to reflect that the documents requested are for the time period from April 25, 1995 through the present date. William has also agreed to amend the subpoenas by removing the request for documents from Dennis' individual accounts, while reserving the right to seek production of those documents at a later date.[2]

Generally, there is full disclosure of all matter "material and necessary" to 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 the information sought is indeed "material and necessary" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The words "material and necessary" are interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy (*id.*, *see also Andon v 302-304 Mott St. Assoc.*, 94 NY2d

[2]Dennis' attorney argues that Dennis is not a party and should not be required to produce the requested documents. However, Dennis is a party. Julia was required to serve a citation upon him pursuant to SCPA 2210 (7). Dennis was served and appeared in the proceeding. However, since William has agreed to withdraw for the time being his request for documents from Dennis' individual accounts, a determination of whether those documents are properly discoverable by William need not be made at this time.

740, 746 [2000]). 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 cannot be obtained through other sources" (*Tannenbaum v Tenenbaum*, 8 AD3d 360, 360 [2d Dept 2004] [internal and other citations omitted]; *Attinello v DeFilippis*, 22 AD3d 514, 515 [2d Dept 2005]; *Lanzello v Lakritz*, 287 AD2d 601, 601 [2d Dept 2001].

On a motion to quash a subpoena pursuant to CPLR 2304, the standard to be applied is whether the requested information "'is utterly irrelevant to any proper inquiry'" (*Ayubo v Eastman Kodak Co.*, 158 AD2d 641, 642 [2d Dept 1990], quoting *Matter of Dairymen's League Coop. Assn. v Murtagh*, 274 App Div 591, 595 [1st Dept 1948], *affd* 299 NY 634 [1949]). Under CPLR 3103, 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 Telephonics*, 130 AD2d 538, 538 [2d Dept 1987] [internal and external citations omitted]. The burden is on the moving party to establish the need for a protective order (*Koump v Smith*, 25 NY2d 287, 294 [1969]; *Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452, 452-453 [2d Dept 1994]).

Julia purports to have accounted for all assets belonging to the decedent's estate. She admits that, in her individual capacity, she received and used all of the estate assets without having funded the credit shelter trust. William has not been able, and presumably, will not be

able to examine Julia under SCPA 2211 to test the veracity of the information contained in her account since she now allegedly suffers from advanced dementia. Further, William asserts that the documents he received from Julia in response to his request for documents are insufficient to discover what assets Julia should have accounted for and how the assets Julia marshaled were used. Thus, William asserts that it is necessary for him to obtain documents from Fidelity, Citibank, HSBC and BNY.

Because of the deficiencies noted above in the four subpoenas duces tecum in their present form, the motion to quash and for a protective order made by Julia and Dennis is granted. However, William may issue new subpoenas duces tecum to Fidelity, Citibank, HSBC and BNY provided: (1) the requests for documents from all individual accounts of Dennis is stricken as William has agreed to do; and (2) the documents requested from the other accounts as set forth in the subpoenas duces tecum that are the subject of this motion are limited to the time period from April 24, 1995 through the present date, to which William also has agreed. In addition to the above, with respect to BNY, William may issue another subpoena duces tecum provided the documents requested are limited to shares of New York Times stock originally owned by the decedent.

The Motion to Compel

Julia also moves pursuant to CPLR 3124 to compel William to respond to Julia's notice for discovery and inspection dated April 23, 2008. The moving papers show that William produced certain documents under cover of his attorney's letter dated June 17, 2008. After this motion was made, William produced a one-page hand-written document, which his counsel states had been mistakenly withheld on the basis of the attorney-client privilege, and he also sent

a privilege log dated September 2, 2008 to Julia's counsel on which one document is listed, that being a letter and accompanying worksheet dated July 12, 2007 from William to his attorney. The privilege log lists the basis of the privilege as attorney work product; material prepared in preparation of litigation and attorney-client privilege. The court has not seen the letter and worksheet in question; nevertheless, no explanation is offered as to how these documents prepared by the client and not by the attorney constitute attorney work product. However, William's attorney also asserts that the documents are protected by other privileges.

The June 17, 2008 letter from William's attorney to Julia's attorney is dated 55 days after the date (April 23, 2008) of Julia's notice for discovery and inspection. William's objections to producing certain documents appear to be untimely pursuant to CPLR 3122(a), which requires that objection to disclosure must be made within 20 days of service of the notice, plus, of course, five additional days if service of the notice was by mail (CPLR 2103[b][2]) or one additional day if service was by overnight mail (CPLR 2103[b][6]). However, Julia's counsel did not provide the court with proof of service of the notice, making it impossible to determine when the notice was served and by what method of service. Further, the June 17, 2008 letter response states that the documents produced therewith were being re-sent to Julia's counsel, suggesting that the documents had been produced previously.

The motion to compel is denied. William's counsel represents that all documents responsive to the notice for discovery and inspection have been produced with the exception of the two documents listed on the privilege log. In his reply affirmation, Julia's counsel asks the court to bar William from introducing at trial any documents that were improperly withheld. That issue, if it arises, will be decided at the appropriate time upon a proper motion.

Finally, Julia's request for monetary sanctions in connection to the motion to compel is denied.

The parties are directed to complete all discovery by February 27, 2009. A compliance conference will be held on March 11, 2009, at 11:00 a.m.

This is the decision and order of the court.

Dated: November 25, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court