

**Matter of Major**

2009 NY Slip Op 32194(U)

September 25, 2009

Surrogate's Court, Nassau County

Docket Number: 159847/2009

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 Judicial Settlement of the Intermediate Account of the Estate of Ruth Tillman Herbert, One of the Original Co-Trustees, who died on August 11, 2007, James Lynch, Another Original Co-Trustee, and JPMorgan Chase Bank, N.A. (Successor in Interest to JPMorgan Chase Bank, Successor by Merger to The Chase Manhattan Bank, Successor by Merger to State Chemical Bank, Successor by Merger to The Chase Manhattan Bank, N.A., Successor in Interest to The Chase Manhattan Bank), as Co-Trustees of the Trust Under the Last Will and Testament dated July 26, 1972 of

File No. 159847

Dec. No. 436

MARIETTE P. C. MAJOR,

Deceased,

for the Benefit of Mercy Medical Center f/k/a Mercy Hospital (a Public Charity) and Other Public Charities.

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Pending in this accounting proceeding are the following:

- (1) A motion by petitioner JPMorgan Bank, N.A. (JPMorgan), for an order pursuant to SCPA 102 and CPLR 2308 (a), 3124 and 3126: (a) dismissing Mercy Medical Center’s (Mercy) affidavit objecting to the intermediate account; (b) compelling Helen Keller Services for the Blind (Helen Keller Services) to comply with a notice of discovery and inspection to the extent it has not previously complied; (c) directing the enforcement against Corner, Finn, Nicholson & Charles (Corner), a non-party to the proceeding, of a subpoena duces tecum and compelling that firm to comply with the subpoena duces tecum; (d) directing the enforcement against BDO Seidman, LLP (Seidman), a non-party to the proceeding, of a subpoena duces tecum and compelling that firm to comply with the subpoena duces tecum; and (e) directing the enforcement against KPMG LLP (KPMG), a non-party to the proceeding, of a subpoena duces tecum and

compelling that firm to comply with the subpoena duces tecum.

(2) A cross-motion by Seidman for a protective order with respect to the subpoena duces tecum served upon it by JPMorgan.

(3) A cross-motion by KPMG: (a) pursuant to CPLR 2304 to quash, fix conditions or modify the subpoena duces tecum served upon it by JPMorgan; (b) pursuant to CPLR 3103 for a protective order; (c) pursuant to CPLR 3122 (d) for costs and legal fees; and (d) pursuant to 22 NYCRR Part 130-1 for sanctions.

(4) A cross-motion by Helen Keller Services for an order to determine the reasonable commissions for JPMorgan, to adjust the commissions that have been paid to it and to provide a formula for the calculation of reasonable commissions.

An intermediate account for the period December 27, 1972 to April 24, 2007 was filed by the estate of Ruth Tillman Herbert, who was one of the original co-trustees, James Lynch, another original co-trustee, and JPMorgan Chase, as successor in interest to The Chase Manhattan Bank, as co-trustees of the trust under the last will and testament dated July 26, 1972 of Mariette P. C. Major, for the benefit of Mercy Medical Center f/k/a Mercy Hospital, a public charity, and other public charities. The intermediate account shows total principal charges of \$2,252,377.20, total principal credits of \$846,027.77 and principal on hand of \$1,406,349.43, total income charges of \$1,520,383.82, total income credits of \$1,515,745.00 and income on hand of \$4,638.82. Jurisdiction is complete. Objections to the intermediate account were filed by Helen Keller Services and Mercy. The main objection is to trustees' commissions. The petitioners have represented that Ruth, by her estate, and James have agreed to share one commission and JPMorgan seeks a full commission.

Decedent died testate on October 14, 1972. Her will was admitted to probate by decree dated December 27, 1972, and letters of trusteeship issued to James, Ruth and Chase Manhattan Bank (now JPMorgan). Ruth died on August 11, 2007. James and JPMorgan continue to serve as co-trustees of the trust. The trust was created under Article Tenth of the decedent's will; under paragraphs 1-7 thereof, the decedent directed that the residuary estate was to be held in trust for various charitable organizations, including Mercy and Helen Keller Services.<sup>1</sup>

The parties entered into a preliminary conference order on December 17, 2008; it was so ordered that day. According to its terms, document discovery was to be concluded by April 1, 2009, depositions were to be concluded by July 31, 2009, all other disclosure was to be completed by September 30, 2009 and a compliance conference was scheduled for October 15, 2009.

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]).

If a person fails to respond to a discovery demand, other than a notice to admit under

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<sup>1</sup>Helen Keller Services is also known as The Industrial Home for the Blind, and is referred to in the will as such.

CPLR 3123, the party seeking the discovery may move pursuant to CPLR 3124 to compel compliance. A motion to quash a subpoena must be timely made (CPLR 2304).

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 (*Feger v Warwick Animal Shelter*, 59 AD3d 68, 75 [2d Dept 2008]). A motion for a protective order should not granted when “supported solely by an attorney's affirmation containing only conclusory allegations of hardship” (*Boylin v Eagle Tel.*, 130 AD2d 538, 538 [2d Dept 1987]).

#### JPMORGAN'S MOTION WITH RESPECT TO MERCY

JPMorgan moves to dismiss Mercy's affidavit objecting to the intermediate account. JPMorgan served a notice of discovery and inspection on Mercy. A response to the notice was due on March 2, 2009; the due date for the response was adjourned on consent to March 20, 2009. JP Morgan states that Mercy did not provide a response to the notice. JPMorgan asserts that Mercy has waived any objections to the notice since Mercy did not object to the demands within 20 days of its service as required by CPLR 3122 (a), plus additional time depending on the mode of service (*see* CPLR 2103 [b] [2] & [6]).

Mercy opposes the motion. Its counsel states that it has not responded to the demands because they are “frivolous and seek to divert the attention from the purpose” of the preliminary conference order which, according to Mercy's counsel, is to “give the beneficiaries the

opportunity to demand documents from the Trustees regarding the basis for the calculations of their requested commissions.” Mercy asserts that JPMorgan’s demand seeks documents that it sent to the parties.

Mercy’s counsel misapprehends the purpose of a preliminary conference order. Its purpose is to set deadlines so that discovery proceeds in an orderly and timely manner. There was no such limitation ordered or even discussed that discovery was limited to the beneficiaries seeking documents from the co-trustees. Additionally, Mercy’s assertion that the notice is frivolous does not relieve it from complying with the mandates of CPLR 3120. However, the court will not impose, at this juncture, as severe a penalty as dismissing its objections. Therefore, JPMorgan’s motion to dismiss the objections is denied with leave to renew if Mercy does not respond to the notice within 30 days of the date of this decision and order.

#### JPMORGAN’S MOTION WITH RESPECT TO HELEN KELLER SERVICES

JPMorgan seeks an order compelling Helen Keller Services to comply with a notice of discovery and inspection to the extent it has not previously complied. Helen Keller Services opposes the motion.

JPMorgan served a notice of discovery and inspection on Helen Keller Services. The notice contained nine numbered demands for documents. A response to the notice was due on March 2, 2009. Helen Keller Services provided a response dated February 28, 2009 to the demand. Helen Keller Services responded to items 1 through 8 either by providing documents or by stating it did not have any documents responsive to the particular demand. Helen Keller Services represents that it produced approximately 425 pages of documents.

Demand 9 seeks documents

“[t]o the extent not included in the above Demands, any return, accounting, report, financial statement or other similar document prepared by or on behalf of with [Helen Keller Services] or Industrial Home for the Blind and filed with or otherwise submitted to any governmental agency and that describes, includes, or was prepared based upon, in whole or in part, any financial or other information concerning the Major Trust.”

In its response, Helen Keller Services objected to demand 9 by stating that the demand is “vague and ambiguous, requests production of documents which are confidential and non-discoverable, and is unreasonably overbroad, burdensome and a harassment” of Helen Keller Services. Helen Keller Services’ response also stated that it was not disputing the financial information set forth in the intermediate account and stated that it has no other “financial or other information concerning the Major Trust.”

In its papers in opposition to the motion, Helen Keller Services essentially argues that the documents sought in demand 9 are completely irrelevant to the objections it filed to the intermediate account and that it would be an onerous task to produce the documents requested in demand 9. Helen Keller Services argues that the only issue in the accounting proceeding is the quantum of commissions to which JPMorgan is entitled. However, Mercy’s objections are more extensive. In addition to objecting to the amount of JPMorgan’s commissions, Mercy also asserts that the trust was improperly managed and that the co-trustees may have violated their fiduciary duty or benefitted themselves. The documents sought in demand 9 may be relevant to these issues, and, for that reason, JPMorgan’s motion to compel is granted in this regard, to the extent that the documents sought have not already been produced by Helen Keller Services.

JPMORGAN'S MOTION WITH RESPECT TO CORNER

Corner, a nonparty to the proceeding, is the law firm that represents Helen Keller Services. JPMorgan served a subpoena duces tecum on Corner seeking all (1) documents concerning communications to Corner, Helen Keller Services or Industrial Services from JPMorgan, Ruth or James with respect to the trust (demands 1 and 2); (2) documents concerning communications created by Corner, Helen Keller Services or Industrial Services with respect to the trust (demands 3 and 4); (3) documents concerning communications created by Corner, Helen Keller Services or Industrial Services for the Blind with respect to requests to any of the co-trustees to prepare an account; (4) resolutions, declarations or minutes created by Corner, Helen Keller Services or Industrial Services for the Blind and filed with any governmental agency concerning the relationship between Helen Keller Services and Industrial Home for the Blind (demands 5 and 6); and (5) returns, accountings, reports, financial statements or other documents prepared by or on behalf of Helen Keller Services or Industrial Services for the Blind and filed with any governmental agency that were prepared based upon any financial or other information concerning the trust (demands 7 and 8). JPMorgan has moved for an order directing Corner to comply with the subpoena duces tecum. Helen Keller Services opposes the motion.

JPMorgan's attorney timely received a package from Corner containing a response from Corner to the subpoena. Corner responded to all but one demand by stating that it does not have any of the requested documents and, with respect to some of the demands, stating that the requested documents were in the possession of Helen Keller Services. Corner specifically listed in its response the documents it considered responsive to that request. As to demand 8, with respect to Helen Keller Services, Corner stated that it had no responsive documents and also

objected to the demand as vague and ambiguous, unreasonably overbroad, burdensome and harassing, and asserted that, if there were such documents, they would be protected as attorney work product and/or attorney-client communications.

In the court's view, Corner has responded to the subpoena. It notified JPMorgan that it does not maintain the documents requested, and that it had transmitted those documents to Helen Keller Services. Corner then lists pages of specific documents that Corner considers responsive and states that those documents were produced pursuant to the notice of discovery and inspection JPMorgan served upon Helen Keller Services. While Corner objected to the scope of demand 8, it also stated that it does not have any documents responsive to the demand. Accordingly, JPMorgan's motion to compel is denied with respect to Corner.

**JPMORGAN'S MOTION WITH RESPECT TO SEIDMAN  
AND SEIDMAN'S CROSS-MOTION**

JPMorgan has moved for an order compelling Seidman, a nonparty, to respond to the subpoena duces tecum, and Seidman has cross-moved to quash the subpoena, to modify it and for a protective order. The documents demanded in the subpoena are largely the same as those demanded in the subpoena to Helen Keller Services, except that the demands are with respect to Seidman. In papers filed in connection with the motions, Seidman states that it provides certain accounting services to Helen Keller Services. Prior to the return date of the subpoena, Seidman sent a letter authored by a paralegal to JPMorgan's attorney. The letter sets forth Seidman's objections to the demands contained in the subpoena. The objections range from "vague and overbroad" to Seidman's assertions that the subpoena requests confidential information and the production of tax returns that Seidman claims it is prohibited by section 7216 of the Internal

Revenue Code from producing, is otherwise confidential and is otherwise available from the parties to this proceeding. Helen Keller Services has also filed papers in opposition to JPMorgan's motion to compel Seidman to comply with the subpoena and in support of Seidman's cross-motion.

The subpoena itself is facially invalid and unenforceable because it does not provide notice as to why the disclosure is sought as it must (*see Moran v McCarthy, Safrath & Carbone, P.C.*, 31 AD3d 725, 726 [2d Dept 2006]). Further, JPMorgan has failed to establish to the court's satisfaction that there are special circumstances warranting disclosure from Seidman and has also failed to establish that the information is not available from another source, including from Helen Keller Services (*see Moran v McCarthy, Safrath & Carbone, P.C.*, 31 AD3d 725, 726 [2d Dept 2006]; *Tannenbaum v Tenenbaum*, 8 AD3d 360, 360 [2d Dept 2004]).

Accordingly, JPMorgan's motion to compel Seidman to comply with the subpoena is denied, and Seidman's cross-motion for a protective order is granted.

JPMORGAN'S MOTION WITH RESPECT TO KPMG  
AND KPMG'S CROSS-MOTION

JPMorgan has moved to compel KPMG to comply with a subpoena duces tecum, and KPMG has cross-moved to quash, fix conditions or modify the subpoena duces tecum, for a protective order and for costs, legal fees and sanctions. KPMG is a nonparty. KPMG audits the financial statements for Mercy.

The subpoena to KPMG suffers from the same infirmities as does the subpoena JPMorgan served on Seidman. For the reasons stated above in the section concerning the Seidman subpoena, JPMorgan's motion to compel KPMG to comply with the subpoena is

denied, and KPMG's cross-motion for a protective order is granted.

KPMG's cross-motion for costs, legal fees and sanctions is denied.

#### HELEN KELLER SERVICES' CROSS-MOTION

As stated, Helen Keller Services objects to the intermediate account to the extent that Helen Keller Services claims that JPMorgan has taken excessive commissions. Helen Keller Services has cross-moved for an order determining the reasonable commissions for JPMorgan, adjusting the commissions that have been paid to it and providing a formula for the calculation of reasonable commissions. Helen Keller Services also asks the court to direct JPMorgan to provide an explanation of the methodology it used in calculating the commissions set forth in the intermediate account. The court notes that before Helen Keller Services' cross-motion was made, JPMorgan filed an affidavit amending account where it set out in more detail than in the account how its commissions were calculated.

JPMorgan opposes the motion. It argues that this issue is premature and that it has a right to a hearing on this issue.

Helen Keller Services' motion is essentially one for summary judgment. It is asking the court to summarily fix JPMorgan's commissions in accordance with Helen Keller Services' request to limit the commissions. Commissions of corporate trustees are fixed by statute (SCPA 2312) and are reviewable at any time by the court (SCPA 2114 [1]). Helen Keller Services' request is premature. Without a full record, the court cannot ascertain whether JPMorgan is entitled to a full commission or whether its commissions should be reduced. The amount of the commissions will be audited and fixed in the decree after the matter is submitted for decision or after a hearing. Accordingly, Helen Keller Services' cross-motion is denied.

The attorneys for the parties are to appear for the compliance conference, which the court hereby adjourns from October 15, 2009 to November 12, 2009, at 10:00 a.m., to allow Mercy time to comply with the directions contained herein.

This is the decision and order of the court.

Dated: September 25, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court