

**Matter of Omanoff**

2009 NY Slip Op 32195(U)

September 24, 2009

Surrogate's Court, Nassau County

Docket Number: 300264/2009

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 Accounting by Julia Omanoff,  
as Executor of the Estate of

File No. 300264

MICHAEL OMANOFF,

Dec. No. 386

Deceased.

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Pending before the court in this accounting proceeding is a motion brought by order to show cause to quash four subpoenas under CPLR 2304 and for a protective order under CPLR 3103 to prevent or limit disclosure pursuant to the subpoenas by four financial institutions named below. The motion is made by petitioner, Julia Omanoff, who is the executor of the estate, and by respondent, Dennis Omanoff.<sup>1</sup> It is 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 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

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<sup>1</sup>According to the attorney who appeared for her, Julia suffers from advanced dementia. Dennis, in his capacity as Julia’s attorney-in-fact, has filed a notice of appearance for Julia in this proceeding. Dennis has also appeared on his own behalf.

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 an 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. According to the movants, who did not furnish the transcript to the court, Dennis testified at his deposition that (1) the New York Times stock sale proceeds were transferred into a Fidelity account in Julia's name and, thereafter, were transferred into a joint bank account in the names of Julia and Dennis and (2) moneys in excess of the amount of the decedent's accounts were expended on Julia's care.

Julia and Dennis move pursuant to CPLR 2304 to quash four judicial subpoenas duces tecum dated April 21, 2009 issued by William to Wells Fargo, Capital One, Discover Financial Services and Citicards. With respect to certain accounts owned or maintained by Julia and Dennis either jointly or in trust for the time period June 2003 through present, the subpoena duces tecum addressed to Wells Fargo seeks monthly statements and copies of all (1) cancelled checks drafted against the accounts; (2) checks deposited into the accounts; (3) withdrawal, transfer or deposit slips; (4) records of telephone conversations between employees and/or agents of Wells Fargo and the decedent, Julia or Dennis concerning (a) sale or liquidation of securities;

(b) withdrawals from the account; (c) deposits to the accounts; (d) changes in account ownership or beneficiaries; and (e) changes in the account addresses; (5) applications to change the owner, beneficiary or account title; (6) letters, electronic messages, faxes, or any type of recorded communication between agents or employees of Wells Fargo and Dennis Omanoff; (7) applications to change the ownership, beneficiary, or mailing address of the account(s); (8) powers of attorney filed in connection with the account(s); (9) documents utilized to open or close any account(s); (10) documents concerning the withdrawal and/or transfer of funds via wire from the accounts; (11) documents concerning the deposit of funds into the accounts via wire and (12) signature cards. The subpoenas duces tecum to Capital One, Discover Financial Services and Citicards request all statements from June 2003 through the present date for certain credit card accounts maintained by the respective institution owned or managed by Julia, Dennis or Dennis' wife, Elaine Omanoff.

Julia and Dennis also seek a protective order pursuant to CPLR 3103 preventing or limiting any disclosure responsive to the subpoenas by Wells Fargo, Capital One, Discover Financial Services and Citicards. The order to show cause stayed all disclosure required by the subpoenas duces tecum and enjoined the institutions from complying with the subpoenas pending the hearing and determination of this motion.

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 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]).

The movants argue that the discovery sought by these subpoenas *duces tecum* is overly broad, unnecessary and intrusive, especially with respect to the accounts belonging to Dennis and

his wife, Elaine, the latter of whom is not a party to this proceeding and resides in California.

The movants further argue that the information sought is confidential and can be obtained from other sources, *e.g.*, from Dennis and Julia in the form of additional document demands about the expenditures purportedly made from the money that should have been deposited into the trust. In their reply papers, the movants state that all of the Wells Fargo accounts referenced in the subpoenas are in the joint names of Dennis and Elaine, that the Citi Visa account is in Elaine's name only and that the other credit accounts for which information is sought in Dennis' name only, except for the Discover Financial Services Card, which is in Julia's name.

William, on the other hand, asserts that, in order to determine whether the sales proceeds were actually used for Julia's benefit, the information sought is material and necessary since it relates to specific accounts that received the proceeds from the accounts that should have been used to fund the trust. William also asserts that the movants have not provided any documents supporting their claim that the funds from the decedent's accounts were used for Julia's benefit.

The issue in this proceeding is whether the funds from the decedent's accounts were indeed used for Julia's benefit only. The movants admit that Julia, in her individual capacity, received and used all of the estate assets without having funded the credit shelter trust. The problem William has faced is that he is not able to examine Julia under SCPA 2211 to test the veracity of the information contained in her account since she suffers from advanced dementia. Thus, all of the information is being provided by Dennis, who, William asserts, used a portion of the funds for his own benefit.

The movants assert that William can obtain the information he seeks by requesting from the movants additional documentation to substantiate that the claimed expenditures were made

for Julia's benefit, without resorting to subpoenaing bank records that the movants claim to be private and immaterial. The question is why was that information not already produced by the movants given the length of time discovery has been ongoing and amount of motion practice this proceeding has engendered. Presumably, the movants have such documents or they would not have offered that option as a solution to William's discovery quandary. Accordingly, the movants have 30 days from the date of the this decision and order to produce such documents.

The motion to quash and for a protective order is granted as to these particular subpoenas. The subpoena to Wells Fargo is overly broad with respect to the scope of the documents requested. The subpoenas to Capital One, Discover Financial Services and Citicards are overly broad to the extent, among other things, documents are sought from accounts belonging solely to Elaine Omanoff.

The attorneys for all parties are directed to appear for a status conference on November 12, 2009, at 10:00 a.m., to guide the conclusion of discovery in this proceeding.

This is the decision and order of the court.

Dated: September 24, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court