

**Arcara v Levin**

2009 NY Slip Op 32639(U)

September 30, 2009

Supreme Court, New York County

Docket Number: 111261/08

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 15

Index Number : 111261/2008

ARCARA, SANDRA A. MOLEN

vs.

LEVIN, LINDA

SEQUENCE NUMBER : # 001

QUASH SUBPOENA

Justice

INDEX NO. 111261-08

MOTION DATE

MOTION SER. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAGES NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING

FILED  
OCT 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/20/09

WALTER S. TOLUS J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
SANDRA A. MOLEN ARCARA, as Trustee under the  
Andrew William Molen Trust made December 31, 1992  
and as Trustee of the Andrew William Molen Trust  
Agreement made as of January 1, 1994,

Plaintiff,

-against-

LINDA LEVIN, a/k/a LINDA LEVIN CARMINE, as  
Executor under the Last Will and Testament of William  
A. Levin, deceased,

Defendant.  
-----X

WALTER B. TOLUB, J.:

This is a motion by defendant Linda Levin, a/k/a Linda Levin Carmine (Levin Carmine), as Executor under the Last Will and Testament of William A. Levin, deceased, for an order quashing or modifying the third-party subpoenas duces tecum issued by plaintiff Sandra A. Molen Arcara (Arcara), as Trustee under the Andrew William Molen Trust made December 31, 1992 and as Trustee of the Andrew William Molen Trust Agreement made as of January 1, 1994, upon non-parties JP Morgan Chase Bank, N.A. (Chase) and Valley National Bank (Valley National).

The underlying facts, as relevant to this motion, are as follows. William A. Levin (Levin or decedent) died on January 26, 2008, and his daughter, Levin Carmine, was named the personal representative of his estate. Decedent also had a son, Andrew William Molen (Andrew). Andrew's mother is the plaintiff Sandra A. Molen Arcara (Arcara) who brought this action in her representative capacity. Despite the fact that Levin and Arcara never married, Levin acknowledged paternity following Andrew's birth in 1981, and the birth certificate was amended

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NEW YORK

accordingly.

Also relevant and undisputed is the fact that, in the early 1990's, Levin established two irrevocable trusts to benefit Andrew. The first, the Andrew William Molen Trust, was established on December 31, 1992 (1992 Trust), and the Andrew William Molen 1994 Trust Agreement was established on January 1, 1994 (1994 Trust). Arcara and non-party Nathaniel Weisler (Weisler) were named Trustees of the 1992 Trust, and Arcara was named sole trustee of the 1994 Trust. After Weisler resigned as trustee, in or about July 1994, Arcara remained on as the sole trustee of the 1992 Trust.

Approximately seven months after Levin's death, Arcara commenced the instant action seeking both damages and equitable relief. Underlying the complaint is plaintiff's accusation that Levin engaged in a pattern of irregular financial and banking practices involving the Trusts, resulting in a combined loss of \$888,014.00 from the Trusts. Furthermore, that of the \$888,014.00 improperly withdrawn from the two Trusts, approximately \$650,000 was deposited into other accounts held by Levin.

Arcara explains that, although she was the designated trustee of both Trusts, Levin maintained complete control over the two accounts and had all of the Trusts' account records sent to his New York City office. He acted as the de facto trustee from the time of the Trusts' creation until the time of his death in January 2008. Arcara, who was not provided with any of the Trusts' financial records before September 2006, was relegated to the position of nominal trustee. As a result, decedent was able to, and allegedly did, make unauthorized and improper withdrawals from the Trusts by either signing as a trustee, which he was not, or forging, or having his secretary, nonparty Mary Ann Stark (Stark) sign Arcara's signature on Trust account

checks.<sup>1</sup> Accordingly, plaintiff seeks an accounting of the 1992 and 1994 Trusts from their inception through September 30, 2006, and to hold the defendant liable for decedent's breach of his fiduciary duty to the Trusts, with reimbursement to the Trusts of all funds unlawfully withdrawn and/or misappropriated from the Trusts, plus interest.

After the action was commenced and issue was joined, plaintiff sent two subpoenas duces tecum, dated April 2, 2009, to nonparty financial institutions Valley National and Chase. The Valley National subpoena demanded production of:

all account information, including, but not limited to, cancelled checks, statements and records, for the following personal banking accounts held at Valley National bank for the period January, 1992, until the present including:

- Sandra Molen Arcara - Social Security No. . . . / Sandra Molen Arcara Checking Account No. . . .
- Valley National Bank - Andrew Molen 1994 Trust / Money Market No. . . .
- Valley National Bank - Ms. Sandra Arcara & Andrew Molen / NOW Account No. . . .
- . . . .
- Bank Accounts under . . . William Levin - Social Security No.:
- Valley National Bank - William A. Levin / 38 Account - AWML Enterprises, Inc. - Account No. . . .
- Valley National Bank - William A. Levin / 31 Account - Account No. . . .

All OTHER personal banking accounts: held by Valley National Bank in the name of William A. Levin. . . has an interest held at Valley National Bank now in your custody, and all other deeds, evidences and writings which you have in your custody or power, concerning the matter.

Provide the subpoenaed records to: The Law Offices of Hofheimer Gartlir & Gross, LLP, at 530 Fifth Avenue, 9<sup>th</sup> Floor, New York, NY 10036.

The Chase subpoena, which was replaced by an amended judicial subpoena duces tecum dated April 15, 2009, demanded:

all account information, including, but not limited to, cancelled checks, statements and records, for the following personal banking accounts held at J.P. Morgan

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<sup>1</sup>The complaint states, at ¶¶ 12 - 13, that Stark admitted to forging Arcara's name at the direction of her boss, William Levin.

Chase Bank, N.A. for the period January, 1992, until the present including:  
J.P. Morgan Chase Bank, N.A. William A. Levin - Social Security No. Account  
No. . . .

All OTHER personal banking accounts: held by J.P. Morgan Chase Bank,  
N.A. in the name of William A. Levin . . . has an interest held at J.P. Morgan  
Chase Bank, N.A. now in your custody, and all other deeds, evidences and  
writings which you have in your custody or power, concerning the matter.

Provide the subpoenaed records to: The Law Offices of Hofheimer Gartlir  
& Gross, LLP, at 530 Fifth Avenue, 9<sup>th</sup> Floor, New York, NY 10036.

By letter dated April 15, 2009, defense counsel informed plaintiff's counsel that it had  
notified Valley National and Chase that it was objecting to the subpoenas. Specifically, that  
defendant objected to the Chase subpoena in its entirety, and to the Valley National subpoena  
only to the extent that it was demanding records of William Levin's personal accounts.

Defendant requested that plaintiff's counsel modify or withdraw the subpoenas on the grounds of  
relevance, insisting that discovery of decedent's personal accounts would not likely lead to the  
discovery of admissible evidence. By letter dated April 16, 2009, plaintiff denied the request and  
chastised defendant/defense counsel for interfering with the banks' efforts to comply with the  
subpoenas.

The parties' inability to agree on the scope of plaintiff's subpoenas triggered the instant  
motion for an order, pursuant to CPLR 2304, quashing the third-party subpoenas duces tecum,  
and/or for a protective order, pursuant to CPLR 3103 (a) "denying, limiting, conditioning or  
regulating the use of any disclosure device." Calling the subpoenas overly broad, defendant  
asserts that they improperly

seek disclosure of information concerning decedent's personal bank accounts for well  
over a decade; including records that clearing [sic] will have nothing whatsoever to do  
with Ms. Arcara or the trusts, i.e., documents that are neither material nor necessary to the  
prosecution of this action. Ms. Arcara has made no demonstration that the Decedent's  
banking records are relevant or will lead to material evidence . . .

\* \* \*

there would be great prejudice to [Levin Carmine and the estate] should the subpoenas be permitted to stand, as they will grant Ms. Arcara unfettered access to William's personal banking records, which Ms. Arcara may use to harass or unduly embarrass the Decedent's estate and legatees

(Notice of Motion, ¶¶ 14, 15)

The complaint accuses Levin of misappropriating funds from Andrew's Trusts on a piecemeal basis, and diverting them to other accounts owned or controlled by Levin but which did not benefit Andrew. Levin Carmine, as the executor of Levin's estate, is charged with the responsibility of rectifying the situation.

It is well settled that purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. It is equally well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry. Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed

(*Velez v Hunts Point Multi-Serv. Ctr.*, 29 AD3d 104, 112 [1<sup>st</sup> Dept 2006] [internal quotation marks and citations omitted]). Consequently, the burden is on the nonparty recipients of the subpoenas, or as was the case in *Velez*, on the party directly affected by the subpoenas (defendant).

In an effort to persuade the court of the irrelevancy of the subpoenaed documents, defense counsel, who acknowledges plaintiff's entitlement to the Trusts' account records, makes the following arguments. Defense counsel contends that: an examination of the Trusts' account records should suffice for the purpose of the lawsuit; "decedent did not use the bank accounts of the two Trusts as if they were his own funds"; it is apparent from the Trust account schedules that the plaintiff's allegations are incorrect and that "decedent's personal accounts have no

bearing, as they were not conduits for the actions complained of”; Arcara’s demand for nearly 15 years of records from decedent’s personal accounts at the two banks “amounts to nothing more than an intrusive fishing expedition” intended to “harass or duly embarrass the Decedent’s estate and legatees”; and “virtually all of the funds transferred from the trust accounts were paid to accounts for the benefit of her son, Andrew” (Defense Counsel Aff., at ¶¶ 7 - 15). Movant, however, fails to support the above assertions with competent, documentary evidence.

Alternately, defendant attempts to shift the burden to plaintiff to demonstrate the existence of special circumstances in order to obtain, by subpoena, the documents from the nonparty financial institutions. This attempt also fails. Even if the burden did rest with plaintiff (which it does not), it is defendant’s demonstrated unwillingness to produce the subject records in response to plaintiff’s written discovery requests, or to establish that the subpoenaed information can be obtained through another avenue, that establishes such special circumstances (see Plaintiff’s Exhibit H: Defendant’s Responses and Objections to Plaintiff’s First Notice for Discovery and Inspection; see also CPLR 3103 [a]; *Lanzello v Lakritz*, 287 AD2d 601 [2<sup>nd</sup> Dept 2001]; *Schroder v Consolidated Edison Co. of N.Y.*, 249 AD2d 69, 70 [1<sup>st</sup> Dept 1998]).

For the following reasons, defendant’s motion is denied in its entirety.

The complaint accuses decedent of misappropriating funds from Andrew’s Trusts. More specifically, that decedent improperly diverted sums from each Trust, on a piecemeal basis, to other accounts he either owned or controlled, and which did not benefit Andrew. Annexed to plaintiff’s opposition papers is a copy of the December 3, 2008-forensic accounting report that Arcara obtained from the accounting firm of Cordua & Company, P.C. (Cordua) regarding the 1992 and 1994 Trusts (Exhibit D to Plaintiff’s Aff. in Opp.). The Cordua report indicates that, of

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the numerous transfers made in and out of the Trusts, substantially more money was transferred out of the Trusts than was transferred into the Trusts. Furthermore, that despite their examination of the Trusts' bank statements, check registers and check images, the forensic accountants were unable to ascertain the receiving repository or repositories of significant sums transferred out of Andrew's Trusts. No evidence has been produced by either party of a prior accounting of the 1992 or 1994 Trust.

Consequently, the other accounts to which decedent was party, and to which he may have diverted funds from the Trusts, are relevant to this action. Moreover, upon an examination of both the complaint and the subpoenas at issue, this court finds that the demanded documents "may demonstrate a pattern of misconduct by [decedent]" and lend support to plaintiff's prosecution of her causes of action (*Westhoff v Bear Stearns & Co.*, 180 AD2d 543, 543 - 544 [1<sup>st</sup> Dept 1992]).

The animus between the parties is both palpable and understandable. However, plaintiff's attempt to discover how all, not just some, or even most, of the Trusts' assets were used by Levin after he withdrew them from Andrew's Trusts, cannot be prevented by defendant's concerns that Arcara might use the disclosed materials to harass or unduly embarrass the decedent's estate and legatees. There has been no showing that the documents demanded in either the Valley National or the Chase subpoena duces tecum are part of a discovery-based fishing expedition, are "utterly irrelevant" to the parties' dispute, or that it would be unduly burdensome for the financial institutions to produce the subject records from the time the Trusts were established in 1992 and 1994.

Accordingly, it is

ORDERED that the motion to quash or modify the subpoenas duces tecum is denied in its entirety; and it is further

ORDERED that the parties and/or their respective counsel shall appear for a status conference in IA Part 15, Supreme Court New York County, 60 Centre Street, New York, New York on November 6 2009, at 11:00 a.m..

This constitutes the decision and order of the Court.

Dated: 9/30/09

ENTER:

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Hon. Walter B. Tolub, J.S.C.

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