

Arcara v Levin

2009 NY Slip Op 33056(U)

November 20, 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

PRESENT: WALTER B. TOLUB Justice

PART 15

Index Number : 111261/2008
ARCARA, SANDRA A. MOLEN
VS.
LEVIN, LINDA
SEQUENCE NUMBER : 002
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS 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 MEMORANDUM DECISION

FILED

DEC 01 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/24/09

WALTER B. TOLUB 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-

Index No 111261/08

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

Defendant.

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NEW YORK
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-----X
WALTER B. TOLUB, J.:

This is defendant Linda Levin, a/k/a Linda Levin Carmine (Linda), second motion as
Executor under the Last Will and Testament of William A. Levin, deceased, for an order,
pursuant to CPLR 2304 and 3103 (a), quashing and/or modifying a third-party subpoena duces
tecum issued by plaintiff Sandra A. Molen Arcara (Sandra), 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. The subpoena at issue was served upon non-party
Kenneth Schuster, C.P.A. (Schuster) on or about May 18, 2009.

Facts

Decedent William Levin (Willaim), father of Linda, fathered a second child, Andrew
William Molen (Andrew) in 1981 with Sandra, a woman he never married. It is undisputed that
in the early 1990's, Willaim established two irrevocable trusts for the benefit of Andrew (the
Trusts). Willaim also established two revocable trusts on September 19, 1994 (the Revocable
Trusts), purporting to distribute specific trust assets, upon his death, to beneficiaries Sandra

and/or Andrew, and in the event that Sandra and Andrew predeceased Willaim, then to Linda.

Following Willaim's death in January 2008, Sandra commenced the instant action seeking both damages and equitable relief based upon her accusation that Willaim had engaged in a pattern of irregular financial and banking practices involving Andrew's Trusts which resulted in a loss of approximately \$888,014.00 from the Trusts.

By prior motion, motion sequence 001, defendant sought to prevent plaintiff from obtaining certain financial documents and records pertaining to the Trusts from non-parties Valley National Bank (Valley National) and JP Morgan Chase Bank (Chase) by seeking an order quashing or modifying the third-party subpoenas served upon the two banks. Plaintiff opposed the motion on the ground that the subpoenaed documents were essential to her effort to uncover where the assets from Andrew's Trusts were directed after being misappropriated by Willaim. The facts of this matter were set forth at length in this court's previous decision and order, dated September 30, 2009 (the prior order), which denied the motion in its entirety. Familiarity with the prior order is presumed.

Discussion

While that motion was pending, defendant served the instant motion, seeking, once again, an order quashing or modifying a third-party subpoena. The subject subpoena was served upon Sandra and Willaim's former accountant, Mr. Schuster, and requests assorted documents related to the Revocable Trusts, Willaim, Sandra and Andrew. For the reasons akin to those set forth in the prior decision, the defendant's motion is denied.

As stated in the prior order, the complaint accuses Willaim of misappropriating funds from Andrew's Trusts by diverting sums, on a piecemeal basis, over a number of years, to other

accounts he either owned or controlled but which did not benefit Andrew. Sandra, who was the trustee of the two Trusts, claims to have been unaware of Willaim's actions, and a forensic accounting report reveals that substantially more money was transferred out of Andrew's Trusts than was transferred into Andrew's Trusts. In addition, as stated in the prior order, Willaim's former secretary, non-party Mary Ann Stark, had apparently admitted to forging Sandra's name at the direction of her boss, enabling him to remove funds from the Trusts without Sandra's knowledge (Complaint, ¶¶ 12 - 13).

Linda argues now, as she did in motion sequence 001, that the defense is on a fishing expedition, and is inappropriately trying to access documents and materials which are neither relevant nor necessary to the cause of action. In opposition, plaintiff submits an attorney's affirmation and her own sworn affidavit explaining the basis for her requests, including her assertion that Mr. Schuster would list the Aspen house as an "Sandra" property. Plaintiff also submits the sworn affidavit of non-party Joy Crugar (Crugar), Willaim's administrative assistant from 1993 to 2002, which lends evidentiary support to her assertions. Ms. Crugar's affidavit states, in relevant part:

1. As administrative assistant for Mr. Levin, I also took care of the financial affairs of this close personal friend, Sandra Arcara . . . I knew Sandra Arcara and Andrew Molen very well, they were Mr. Levin's second family.

* * *

3. Mr. Levin conducted his financial affairs in an unorthodox and haphazard manner. He would pay expenses from any bank account that happened to have available funds. The financial affairs of Mr. Levin, Ms. Arcara and Andrew Molen were all blended together. Mr. Levin's failure to comply with the appropriate norms for payment of expenses eventually led to his indictment and guilty plea for grand larceny. The only governing principle to which Mr. Levin adhered was dividing the assets and funds between the two families - certain assets and bank accounts were dedicated to his wife and daughter Linda while other assets and bank accounts were dedicated to his second family, Sandra and

Andrew.

4. It was my understanding when I was first employed by Mr. Levin that the house located at 612 West Main Street, Aspen, Colorado . . . was Sandra Arcara's house. . . .

* * *

6. Mr. Levin told me that he had put the West Main Street house into his name for tax reasons. A year or so later, I became aware that Mr. Levin transferred the record ownership of the house to a new trust that he had formed for the benefit of Andrew. This trust had assets for the Sandra/Andrew second family . . . Mr. Levin explained to me that in this way Sandy could have use of the house for the remainder of her life and that Andrew would inherit it

(Aff. in Opp., Exhibit C).

The subpoena served on Mr. Schuster seeks discovery related to the Revocable Trust assets, one of which specifically lists, among other things on Schedule A, "all rights, title and interest in and to certain real property located at 612 Main Street, Aspen, Colorado" (Aff. in Opp., Exhibit B). As pointed out by defendant, the Aspen property/house is the subject of litigation pending in Colorado between the parties. This fact, however, does not render the subpoenaed documents irrelevant to the New York litigation, and defendant has failed to demonstrate otherwise.

It is well settled that the 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

(*Velez v Hunts Point Multi-Serv. Ctr.*, 29 AD3d 104, 112 [1st Dept 2006] [internal citations omitted]).

Ms. Crugar's affidavit raises more questions than it answers about the allegedly indiscriminate and/or inappropriate manner in which Willaim handled assets and finances, causing serious distress and complications for his wife and daughter, Linda, and for his "second

family” Sandra and Andrew.

Contrary to defendant’s assertions, plaintiff’s quest for discovery is neither overly broad nor utterly irrelevant. Upon review of the subpoena duces tecum served upon Mr. Schuster, it is evident that the wording of each of the 28 “requests to produce” was tailored to uncover documents which “may demonstrate a pattern of misconduct by [Levin]” and lend support to plaintiff’s prosecution of her causes of action (*Westhoff v Bear Stearns & Co.*, 180 AD2d 543, 543 - 544 [1st Dept 1992]).

Accordingly, it is

ORDERED that the motion to quash or modify the subpoena duces tecum is denied in its entirety.

Counsel for the parties are directed to contact the Clerk of the Court to schedule a conference in this matter.

This constitutes the decision and order of the Court.

Dated: 11/20/09

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 DEC 01 2009
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ENTER:

 Walter B. Tolub J.S.C.