

Matter of Rice

2010 NY Slip Op 31748(U)

June 30, 2010

Sur Ct, Nassau County

Docket Number: 346077

Judge: John B. Riordan

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Probate Proceeding, Will of

File No. 346077

THOMAS C. RICE,

Dec. No. 26343

Deceased.

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Gloria A. Goodwin, Preliminary Executor of
The Estate of Thomas C. Rice,

Plaintiff,

-against-

Thomas L. Rice and Tom Rice Buick-
Pontiac-GMC Trust, Inc.,

Defendants.

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In the Matter of the Estate of

THOMAS C. RICE,

Proceeding by Thomas L. Rice, Distributee to
Set Aside the Thomas C. Rice Family Trust
Executed by the Decedent dated March 26, 2004 and
a Bargain and Sale Deed dated March 26, 2004
Conveying Decedent’s Residence to the Thomas C.
Rice Family Trust with Respect to Fifty (50%) Percent
of the Proceeds from the Sale of Decedent’s Residence.

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The decedent, Thomas C. Rice, died on November 28, 2005 and was survived by his daughter, Gloria Goodwin, and his son, Thomas L. Rice. A purported will dated March 26, 2004 has been offered by Gloria, who is named as executor under the purported instrument. Preliminary letters testamentary issued to Gloria on September 26, 2007. Objections to the purported will have been filed by Thomas. Thomas has also commenced a proceeding to set aside an inter vivos trust and deed, both dated March 26, 2004, at a time when he claims decedent was

not competent.

In addition to the probate proceeding and the proceeding to set aside the trust and deed, there is another proceeding pending before the court, which was transferred to this court by the Supreme Court of Nassau County. The transferred action is a proceeding commenced by Gloria as preliminary executor against Thomas and Tom Rice Buick-Pontiac-GMC Truck, Inc. Before the court is a motion to quash a judicial subpoena to testify and notice to take deposition dated January 19, 2010, served upon Thomas' attorney, Dominick Minerva, and for a protective order, with respect to the former Supreme Court action. Thomas claims that Gloria seeks testimony which is completely irrelevant to the allegations in the complaint and that the testimony sought will not result in relevant and discoverable information. In fact, he alleges that Gloria's actions appear to be nothing more than a "fishing expedition." He contends that the information can be obtained by other means besides deposing his counsel. Moreover, Thomas asserts that the testimony sought is not crucial to the estate's case and will result in a disadvantage to Thomas by depriving him of his right to be represented by counsel of his choice.

BACKGROUND

The decedent and Thomas operated Tom Rice Buick-Pontiac-GMC Truck, Inc. and entered into partnership agreements with respect to the land and the dealership. Rice Properties came into being as a result of an agreement dated December 3, 1986. Rice Properties owned the real estate on which the car dealership had its business. The decedent had a 75% interest and Thomas had a 25% interest. The decedent granted Thomas a right to purchase his 75% share for \$368,437.50 for one year. For each year thereafter, the purchase price was increased by 10% per year. In the dealership, the roles were reversed. The decedent owned 25% of the stock and

Thomas owned 75% of the stock. A similar arrangement, embodied in a buy-sell agreement, was made for the sale by the decedent to Thomas of his shares in the dealership, for the book value of the shares as of the last day of the last month preceding the notice from Thomas. A third agreement dated December 18, 1986 provided that the decedent would be retained as an independent consultant upon the relinquishment of his interest in Rice Properties, when Tom Rice Buick, Inc. has repaid the capital loan of \$318,750 to the decedent, and the decedent no longer owns shares in the dealership, or if he does own the shares in other than an S-corporation. The payment provided for is \$1,328.75 per month.

By agreement dated January 1, 2002, the decedent and Thomas signed an agreement whereby the decedent assigned his interest in Rice Properties to Thomas for \$368,437.50, the original amount provided for in the partnership agreement. Thomas claims that this sum was all that was required to be paid under the Assignment of Partnership Interest Agreement. According to Thomas, this was motivated by previous distributions made by the decedent to Gloria, including a \$650,000.00 transfer of a CD from Suffolk County National Bank in 2001, the total proceeds from the sale of a Key West, Florida home, the proceeds of sale of a home in Lynbrook, New York, and the conveyance of the \$368,437.50 proceeds from the assignment of the partnership interest in Rice Properties. A certificate for discontinuance for business as partners was signed by the decedent on April 18, 2002.

The complaint alleges five causes of action. The first cause of action is for the sum of \$1,030,502.80 with interest at 9% per annum allegedly due and owing with respect to Rice Properties. The second cause of action alleges that payments were to be made over a five-year period, but that a formal note was never executed and demands the full amount of \$1,030,502.80

with interest at 10% per annum. The third cause of action relates to consulting fees owed the decedent in the amount of \$62,451.25. The fourth cause of action is for damages relating to the sale of the decedent's 25% of the stock of the corporation and is for \$1,000,000 with interest at 10% from January 2, 2002. The fifth cause of action is for loans allegedly made by the decedent to the corporation and seeks damages in the amount of \$738,000.00. Thomas filed an answer denying Gloria's allegations.

According to Thomas, there has been no discovery in the former Supreme Court action other than the combined discovery demands served by Thomas nearly two years ago and Gloria's limited response. Depositions of the parties have not taken place.

Mr. Minerva claims that Gloria's basis for taking his deposition is that he prepared documents with respect to these transactions between the decedent and Thomas whereby decedent sold his interests to Thomas. Mr. Minerva claims that he did not prepare any documents concerning the sale, other than the certificate discontinuing the partnership executed in his office on April 18, 2002. He refers to the services he performed as inconsequential. Mr. Minerva argues that this is simply an attempt by Gloria to remove him as Thomas' attorney on the grounds of a conflict of interest. Mr. Minerva and Thomas contend that the Assignment of Partnership Interest was prepared by James B. Riverbank, a North Carolina attorney, who specializes in representing automobile dealers throughout the United States. In addition, the 1986 documents were prepared by Mr. Riverbank and Edward Sunshine, Esq., who was the accountant for both the decedent and Thomas at the time. The 2002 document was prepared by Joel M. Helman, CPA, the decedent's and Thomas' accountant in 2002. Mr. Minerva further notes that public policy discourages the practice of calling opposing counsel as a witness. Moreover, he argues

that Gloria has failed to establish that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case (*Matter of Cavallo*, 20 Misc 3d 219 [Sur Ct, Richmond County 2008]). Mr. Minerva asserts that the information can be obtained from other sources such as Mr. Riverbank and the decedent's accountants who prepared the documents. Mr. Minerva further claims that Gloria has not affirmatively established that he has any information concerning the sale and her statements are conclusory and based on conjecture. According to Mr. Minerva, his representation of the decedent and Thomas was with respect to "other non-related legal issues" and any testimony with respect to those transactions and representations would be privileged. Lastly, he argues that Gloria has failed to establish that the information is crucial.

Gloria's counsel has submitted an affirmation opposing the motion. He argues that even though Mr. Minerva might not have written the documents at issue, he believes Mr. Minerva gave advice regarding the execution of the documents. Moreover, he argues that the fourth cause of action relates to a separate transaction for \$1 million based on a separate contract involving an automobile dealership. Counsel believes that Mr. Minerva represented both sides in that transaction. Moreover, he claims that Mr. Minerva has failed to articulate what he did do and what documents he was involved in preparing. He further argues that Mr. Minerva must reveal to Gloria all of his representation of the decedent and any attorney-client privilege issues can be waived by Gloria as the fiduciary. Gloria's counsel also asserts that there may not even be any such issues because Mr. Minerva may have represented both sides in the transaction.

Thomas has submitted his own reply affidavit and a reply affirmation from his counsel. According to Thomas, neither Mr. Minerva nor his law firm had anything to do with the

“creation, negotiation or execution of any of the ... 1986 General Partnership Agreement ..., the computation of interest amount alleged to be due pursuant to the 1986 Partnership Agreement ... or the 1986 Buy-Sell Agreement ...” He also states that no attorney at the firm ever discussed the import of these documents with either him or his father. He claims that Mr. Minerva did not represent either side in connection with the preparation or execution of the Buy-Sell Agreement.

Mr. Minerva has also submitted a reply affirmation in further support of the motion. Essentially, he claims that Gloria’s assertions regarding his role in the transaction “are a complete fantasy, and are merely an attempt to confuse the court as to whether your affirmant had (or has) any personal knowledge as to the claims of the Petitioner/Plaintiff in this proceeding, in order your affirmant believes to disqualify him from acting as counsel to the Objectant/Defendant in this matter.” Mr. Minerva asserts that he was not an “active participant,” nor did he have any personal knowledge as to the preparation, negotiation and execution of the 1986 Buy-Sell Agreement or the 1986 Partnership Agreement. Moreover, he states he was not “an active participant” in the sale of the partnership between the decedent and his son.

ANALYSIS

The CPLR “requires the disclosure of all evidence relevant to the case and all information reasonably calculated to lead to relevant evidence” (*see* Siegel, NY Prac § 344, at 525 [3d ed 1999]). The court has the discretion, however, to limit disclosure and issue a protective order to prevent “unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.” (CPLR 3103 [a]; *Byck v Byck*, 294 AD2d 456 [2d Dept 2002]). Courts are reluctant to allow an opposing attorney to be deposed because it is disruptive of the adversarial process (*Matter of Cavallo*, 20 Misc 3d 219 [Sur Ct, Richmond County 2008]). Nevertheless, under certain

circumstances, an attorney's testimony may be necessary because he was so intimately involved in the transaction. In *Matter of Bianco* (23 Misc 3d 1106A [Sur Ct, Nassau County 2009]), this court disqualified an attorney on the basis that it was likely he would be called as a witness because of his active involvement in and personal knowledge of the underlying transaction. Moreover, an estate representative may waive the attorney-client privilege (*Mayorga v Tate*, 302 AD2d 11,14 [2d Dept 2002]).

Here, Gloria as the preliminary executor of her father's estate, could waive the privilege. Accordingly, the issue raised by Mr. Minerva as to privilege is without merit. Nevertheless, Mr. Minerva denies having any role as to the preparation and negotiation of the documents at issue and similarly denies that he gave advice as to the transactions in question. He claims that the only service he performed was to prepare the certificate dissolving the partnership. Accordingly, at this stage of the proceeding, Gloria's accusations regarding Mr. Minerva's involvement are mere conjecture. It appears that the accountants and the North Carolina attorney are the appropriate sources to provide information regarding the transaction. Accordingly, the motion to quash the subpoena and notice to take deposition of Dominick Minerva dated January 19, 2010 is granted. If, however, the aforementioned depositions reveal that Mr. Minerva may have other information regarding the transaction in questions, Gloria may make an application to take Mr. Minerva's deposition.

This constitutes the decision and order of the court.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court