

**Matter of Elmezzi**

2010 NY Slip Op 33602(U)

November 9, 2010

Surrogate's Court, Nassau County

Docket Number: 339363/C

Judge: John B. Riordan

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

-----x

Application of Stephen J. Saft, Lynn Grossman and  
Alfred LaRosa, Executors of the Estate of

File No. 339363/C

THOMAS ELMEZZI,

Dec. No. 26520

Deceased,

For an Order to Discover Property Withheld.

-----x

-----x

Application of Stephen J. Saft, Lynn Grossman and  
Alfred LaRosa, Executors of the Estate of

File No. 339363/E

THOMAS ELMEZZI,

Dec. No. 26521

Deceased,

For an Order to Discover Property Withheld.

-----x

This is a proceeding pursuant to SCPA 2103 to discover and deliver property. The petitioners are Stephen Saft, Lynn Grossman and Alfred LaRosa, co-executors of the estate of Thomas Elmezzi. The respondent is Enrique Molina. In Decision No. 470, dated September 30, 2008, the court addressed jurisdiction and forum issues directing an evidentiary hearing respecting whether there were sufficient minimum contacts to confer personal jurisdiction over Sr. Molina and declining to address the *forum non conveniens* issue pending resolution of the factual issues regarding personal jurisdiction. Following the April 17, 2009 evidentiary hearing, Sr. Molina elected to withdraw his defenses of lack of personal jurisdiction and *forum non conveniens*, requesting that the court rule on the other two defenses addressed in his motion to

dismiss, *i.e.*, statute of frauds and statute of limitations. In Decision No. 371, dated June 25, 2009, the court concluded that the petition adequately set forth a cause of action for monies had and received, imposition of a constructive trust, unjust enrichment, breach of fiduciary duty and an accounting. The motion to dismiss on grounds of statute of frauds and statute of limitations was denied.

The decedent, Thomas Elmezzi, was an employee of Pepsico Corporation for over thirty-five years. He died on October 3, 2005. He was survived by his spouse, Jeanne Elmezzi, who died three days after the decedent. The decedent's will was admitted to probate by this court on January 26, 2006. The will provides for a pour over of the decedent's assets into the Thomas Elmezzi Revocable Trust. The trust, in turn, provides for payments of specific bequests with the remainder to the Thomas and Jeanne Elmezzi Private Foundation.

The petition herein alleges that Sr. Molina possesses property that belongs to the estate. Specifically, the petitioners allege that the decedent and Sr. Molina had a "lifetime business association and friendship" and that the decedent owned stock or equity interest in the following companies: Bebidas Purificadas de Acapulco, S.A.; Inmuebles para la Industria, S.A.; Embotelladora el Sol and REVAMSA; E.M.S.A. Embotelladora Metropolitana, S.A, and its subsidiaries; BEPURA; Grupo Azul; Troika; Industria Refrescos, S.A.; and REFRISA, all of which are Mexican corporations.

The petition further alleges that "in addition to the Mexican Pepsi Bottling Plants, at all times up to and including the day of death of the Decedent, Decedent owned an equity interest held by Molina as Nominee in Pepsi-Gemex, S.A. de C.V., a New York Stock Exchange Company, which through a series of transactions acquired the stock of the Mexican Bottling

Plants.” The petition alleges that the Mexican Bottling Plants were merged into a holding company named Troika which subsequently merged into a corporation which became Pepsi-Gemex, S.A. de C. V. and that the decedent’s equity interest in Troika transferred to the Pepsi-Gemex shares. In 2002, the Pepsi Bottling Company made a cash tender offer of \$1.2 billion to acquire Pepsi-Gemex shares. The petitioners allege that the respondent’s share of the proceeds of that sale amounted to approximately \$480 million and that through the respondent, as nominee, the decedent owned 6% of Pepsi Gemex which amounts to approximately \$72 million.

Petitioner, Stephen Saft, has alleged in an affidavit that the decedent “often stated that he was owed a significant amount of the proceeds” or 15% of “whatever Molina owned.”

In response to the petition, Sr. Molina denied that he was in possession of property belonging to decedent and averred that the decedent “never claimed to me that he owned stock or equity interests in the Mexican Bottling Plants or in any company that ultimately owns these plants” (Affidavit of Enrique Molina in support of the motion to dismiss).

SCPA 2103 provides that a fiduciary may present to the court a petition showing on knowledge or information and belief that property should be paid or delivered and is in the possession or control of a person who withholds it (SCPA2103[1][a]).

Three motions are addressed in this decision. The first motion under consideration was brought by notice of motion dated April 29, 2010. Petitioners/executors seek an order “(i) declaring that the issues to which the requested information are relevant shall be deemed resolved in favor of Petitioners and against respondent; (ii) compelling respondent to produce all documents responsive to Petitioners’ First Document Demand dated September 3, 2009 and full and complete responses to Petitioners’ First Set of Interrogatories dated September 3, 2009, and

additionally pursuant to CPLR 3103 denying [Respondent] Molina access to disclosure that is confidential and private financial and health information ..." (hereafter the "Executors' motion to compel"). Such motion was supported by the affidavit of attorney Jennifer F. Hillman and the numerous exhibits attached thereto.

In opposition to the Executors' motion to compel, Sr. Molina submits the affidavit of attorney Jeffrey A. Miller, sworn to on May 28, 2010, with exhibits.

The second motion was brought by notice of motion dated April 30, 2010. Respondent Molina seeks "an order pursuant to SCPA 102 and CPLR 3124 to compel production of documents by Petitioners..." (hereafter "Molina's motion to compel"). This motion was supported by a the affirmation of attorney Jeffrey A. Miller dated April 30, 2010 with attached exhibits.

The executors further submit the affidavit of Jennifer F. Hillman, sworn to on May 28, 2010 in opposition to Molina's motion to compel and in further support of the Executors' motion to compel.

The third motion was commenced by order to show cause dated May 12, 2010. In this motion the executors seek an order "(i) quashing the subpoena served by respondent on non-party Eisner & Lubin LLP; or alternatively (ii) directing Eisner & Lubin LLP not produce any documents until there is a final decision on the petitioners' pending motion; (iii) directing Eisner & Lubin LLP, after a final decision has been made on the pending motion for a protective order, to produce solely documents responsive to the subpoena that the court determined are responsive and non-confidential in the pending motion; (iv) directing respondent to cease demanding documents from Eisner & Lubin LLP pursuant to the subpoena until there is a final decision on

the pending motion for a protective order...” (hereafter the “motion to quash”). The motion to quash is supported by the May 12, 2010 affidavit of attorney Jennifer F. Hillman with exhibits. The Molina response to the motion to quash is set forth in the opposition affidavit of Jeffrey Miller sworn to on May 18, 2010, submitted with exhibits.

All three motions seek protective orders with respect to disclosure. In particular, issues are raised respecting tax returns, financial information and medical/health information concerning the decedent.

Disclosure in New York civil actions is guided by the principle of “full disclosure of all matter material and necessary in the prosecution or defense of an action” (CPLR 3101[a]). The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; see *Tower Ins. Co. of N.Y. v Murello*, 68 AD3d 977 [2d Dept 2009]). The Court of Appeals' interpretation of “material and necessary” in *Allen* has been understood “to mean nothing more or less than ‘relevant’ ” (Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:5).

Trial courts have “broad power to regulate discovery to prevent abuse” (*Barouh Eaton Allen Corp. v International Bus. Machs. Corp.*, 76 AD2d 873, 874 [2d Dept 1980]). This includes the power to enjoin the dissemination of discovery material to those not directly involved in the case (44A NY Jur 2d Disclosure § 384 [2010], citing, among others, *Seaman v Wyckoff Heights Medical Center, Inc.*, 8 Misc3d 628 [Sup. Ct, Nassau County 2005], *affd in*

*part, appeal dismissed in part*, 25 AD3d 598 [2d Dept 2006], *leave to appeal dismissed*. 7 NY3d 864 [2006], and *affd as modified on other grounds*, 25 AD3d 596 [2d Dept 2006]).

CPLR 3103[a] provides that “[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating 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.” Under CPLR 3103[a], “material confidential in nature ... shall be accorded judicial safeguards where possible” (*McLaughlin v G.D. Searle, Inc.*, 38 AD2d 810, 811 [2d Dept 1972]). Under the proper circumstances the court is empowered to condition the production of specified documents on execution of a confidentiality agreement (*see Yatter v William Morris Agency, Inc.*, 273 AD2d 83 [1st Dept 2000]). A protective order may bar the dissemination of information to anyone other than counsel working on the case (*Liebman & Charme v Lanzoni*, 164 Misc 2d 302 [Civ Ct, New York County 1995]). Generally, the party seeking a protective order bears the burden of demonstrating entitlement to such order (*Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452 [2d Dept 1994]).

Here, the cross motions each seek to compel responses and a protective order. Thus both sides of the coin are before the court. In addition, the Molina motion raises a question about the scope of the executors’ SCPA 2103 discovery proceeding. Sr. Molina argues that such cases are historically divided into an inquiry phase and a turnover phase and the phases are divided by the joinder of issue with the filing of an answer (*Matter of Treibt*, NYLJ, Aug. 8, 1994, at 31, col 2 [Sur Ct, Nassau County]; *Matter of Gregory*, NYLJ, Jan 9, 1991, at 27, col 6 [Sur Ct, Nassau

County]; *Matter of Detweiler*, 121 Misc 2d 453, 455 [Sur Ct, Cattaraugus County 1983]).<sup>1</sup> This case, Sr. Molina argues, is in the turnover phase and the executors are foreclosed from inquiry concerning transactions and occurrences outside the scope of the underlying petition. Since the petition addresses solely the estate's purported interest in the proceeds from Molina's sale of his stake in Pepsi Gemex, inquiry into Molina's ownership of unrelated companies, real estate, airplanes, yachts and hotels is irrelevant and should be foreclosed.

From the executors' point of view, the decedent acted as if he had a 15% ownership stake in all property owned by Molina, repeatedly talked about particular airplanes, yachts and hotels as being "his" and was treated by employees as if he were an owner.

The court considers the question to be one of relevance. No specific allegations concerning property other than the Pepsi Gemex proceeds and the predecessor companies appear in the petition<sup>2</sup> filed commencing this special proceeding and "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (CPLR 3013 [2010]). The pleading should also contain a demand for relief (CPLR 3017[a]). The relief requested in the petition is limited to the Pepsi Gemex proceeds. There is no motion to amend that petition before the court.

---

<sup>1</sup> While these cases draw a distinction between the inquisitorial and trial phases of a discovery proceeding, their primary focus is upon the different evidentiary requirements of the phases.

<sup>2</sup> While the petition contains general language that could be stretched to include companies and assets other than those specified in the petition [see petition ¶¶ 5, 6], the possibility of recovering previously unspecified assets was not raised prior to the service of the executors' CPLR discovery requests.

With respect to the portion of the executors' motion to compel and the protective order request from Sr. Molina, the executors' inquiry into assets other than those relating to the decedent's claim to the proceeds from the sale of the Pepsi Gemex stock is foreclosed as irrelevant and unlikely to lead to disclosure of admissible evidence. The executors' motion is denied in that respect and Molina's motion for a protective order is granted in that respect. This conclusion relates to the executors' document Request Nos. 13, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29. It also relates to the portion of document Request No. 30 concerning prior litigation wherein ownership was at issue concerning any entity in which Molina was a record or beneficial owner.

Respecting the balance of Request No. 30 and Request Nos. 7, 8, 9, 10, 11, 14, 15, 16, 17, 39, 40, 41 and 42, these requests are all appropriate. However, Sr. Molina has indicated that he does not have possession of responsive documents. This representation should be presented in the form of a duly executed affidavit specifically indicating the nature of each inquiry and the facts and circumstances of the search that has been made for responsive documents. The court notes that Sr. Molina is under a continuing obligation to produce responsive documents should any be located.

With respect to the executors' document Request No. 12, the court concludes that the proffer of an affidavit setting forth the net amount that Sr. Molina received in connection with the sale of Pepsi Gemex is insufficient. While such an affidavit would be helpful it is not fully responsive to the request and the court concludes that the taxes paid by Sr. Molina with respect to the sale are relevant to the subject matter of the proceeding. The motion to compel is accordingly granted with respect to Request No. 12.

Sr. Molina seeks financial records, including tax returns, and health care records concerning the decedent while the executors seek a protective order with respect to this requested disclosure. In particular, this subject matter involves Molina's Second Document Request Nos. 2, 3, 4, 5 and 6, Molina's document Request Nos. 25 and 32 and Molina's Second Interrogatory Nos. 5 and 6. These requests and interrogatories address the estate's federal and state tax returns and documents concerning their preparation; decedent's tax returns and related documents; all of decedent's financial statements; all documents concerning financial accountings of the assets of the estate and decedent's trusts, all documents concerning the Thomas Elmezzi Revocable Trust; and the decedent's debtors and the estate's interaction with them prior to March of 2007.

Sr. Molina claims that this requested disclosure is necessary to develop evidence that the decedent did not treat his purported interest in Pepsi Gemex as an asset in any of his tax returns or financial statements. The executors, in addition to claiming confidentiality as a bar or limitation to such disclosure, offer a stipulation to the effect that the decedent's purported interest in the Mexican Bottling Companies, Pepsi Gemex and/or the proceeds from the sale of the Pepsi Gemex stock is not set forth in any of the requested documents. In reply, Molina asserts that such a stipulation does not constitute admissible evidence.

Disclosure of tax returns is disfavored since income tax returns contain confidential and private information (*Walter Karl, Inc. v Wood*, 161 AD2d 704 [2d Dept 1990]; *Briton v Knott Hotels Corp.*, 111 AD2d 704 [2d Dept 1985]). The party seeking to obtain production of income tax returns must make a strong showing of necessity and an inability to obtain the information contained in the income tax returns from any other source (*Samide v Roman Catholic Diocese of Brooklyn*, 5 AD3d 463 [2d Dept 2004]; *Walter Karl, Inc. v Wood*, 161 AD2d 704 [2d Dept 1990]; *Abbene v*

*Griffin*, 208 AD2d 483 [2d Dept 1994]). A lesser showing is required with respect to documents containing financial data.

Sr. Molina argues that the estate tax returns are relevant because if the executors believed decedent owned a share of Pepsi Gemex or any other Molina assets, such assets were required to be identified in the estate tax returns and to the extent that other assets were identified the absence of mention of the Molina holdings is probative. Decedent's tax returns are relevant on the issue of whether the decedent deemed himself a beneficial owner of the stock and dutifully took responsibility for taxable events involving such stock and whether he reported similar transactions unrelated to Sr. Molina. The inclusions and omissions are accordingly probative.

The court agrees with Sr. Molina that these inquiries are both relevant and probative. However that is not the issue before the court. Keeping the tax returns confidential and out of view from third parties is insufficient in terms of the underlying policy. Balancing the policy in favor of confidentiality with Sr. Molina's need to establish the facts of omission and inclusion, the court concludes that the suggested stipulation or an appropriate affidavit by one of the executors setting forth the facts of omission and inclusion in the various tax returns will suffice in lieu of production of the returns. Should the parties be unable to agree on appropriate wording, the court will assist the parties in composing appropriate sworn, written statements on this issue. The stipulation or affidavit shall expressly provide that the executors consent to its admission in evidence for the purpose of establishing the truth of the statements.

With respect to financial statements or other documents identifying decedent's assets, the question appears to be whether the executors must broaden their search for responsive documents beyond those specifically relating to Sr. Molina. Again we confront Sr. Molina's desire to present

evidence of inclusion and omission, both of which are relevant. Here the policy against disclosure is weaker than with respect to tax returns. Nevertheless, the court concludes that whatever documents responsive to Request Nos. 4 and 6 were not produced by petitioners Grossman and LaRosa can be addressed by a stipulation or affidavit addressing the facts of omission and/or inclusion as set forth above with respect to the requested tax returns. Sr. Molina's motion to compel is accordingly conditionally denied with respect to Respondent's Second Request Nos. 4 and 6.

With respect to health records, the decedent's competence is not at issue. The confidentiality of health records and the existence of a doctor-patient privilege are not outweighed by Sr. Molina's desire to attack the credibility of the decedent. While the court does not have before it questions of the admissibility in evidence of decedent's biography and the drafts thereof, those items are plainly hearsay and no exception to the exclusionary rule has been put forward. Further, the court has already ruled that the pending special proceeding is limited to the Mexican Bottling Plants and proceeds from the Pepsi Gemex stock sale. Accordingly, the executors' request for a protective order respecting health records is granted and Molina's motion to compel responses to Molina's Request Nos. 33 and 34 is denied.

Sr. Molina's Request No. 32 is overly broad and the request to compel additional responsive documents is denied without prejudice to Molina's presentation of a more focused, limited request. An affidavit from one of the trustees to the effect that no documents concerning the Thomas Elmezzi Revocable Trust address the Mexican Bottling Plants and proceeds from the Pepsi Gemex stock sale would foreclose this line of inquiry.

With respect to Molina's Request No. 12, the executors shall produce any additional

documents responsive to this request as narrowed in Molina's papers provided that they need not produce any privileged documents. If privilege is claimed, a privilege log shall be provided to Sr. Molina's counsel.

With respect to Molina's Request No. 13, Sr. Molina's offer to narrow the request renders it acceptable given New York's liberal disclosure rules. The request is deemed modified and the executors shall provide such further documents, if any, as are responsive to the request as modified.

With respect to Molina's Request No. 7, to the extent that documents concerning the Pepsi bottling plants in Mexico and/or Pepsi Gemex not previously produced are requested, the motion to compel is granted. With respect to all other material, the motion is denied. If privilege is asserted, a privilege log shall be provided.

With respect to Molina's Request No. 8, it plainly encompasses privileged documents. The motion to compel is denied and the motion for a protective order granted with respect to this request. No privilege log is required.

With respect to Molina's second interrogatory No. 5, the relevance of the executors' efforts to collect debts owed to the decedent at the time of his death is highly questionable. Sr. Molina's statute of limitations defense has been dismissed and the executors' reasons for pursuing or not pursuing one estate asset as opposed to another is not relevant to the subject discovery proceeding. The motion to compel is denied and the motion for a protective order granted with respect to second interrogatory No. 5.

Respecting the motion to quash, for the reasons stated with respect to the executors' requested production of tax returns and financial data, such motion is granted subject to the

presentation of an appropriate stipulation or affidavit.

This is the decision and order of the court.

Dated: November 9 , 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court