

<b>Matter of Jastrzebski</b>
2010 NY Slip Op 33641(U)
December 22, 2010
Surrogate's Court, Nassau County
Docket Number: 339426/E
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 Application of Christopher Jastrzebski,  
Kevin Jastrzebski and Steven Jastrzebski, for a Decree  
Revoking Letters Testamentary Issued to James P. Flynn,  
as Executor of the Estate of

File No.339426/E

Dec. No. 26675

KENNETH JASTRZEBSKI,

Deceased.

-----X  
In the Matter of the Application of Christopher Jastrzebski,  
Kevin Jastrzebski and Steven Jastrzebski, for a Decree  
Revoking Letters Testamentary Issued to James P. Flynn,  
as Executor of the Estate of

File No. 339427/B

Dec. No. 27005

JEAN JASTRZEBSKI,

Deceased.

-----X  
Before the court is a motion for summary judgment filed in connection with petitions for the removal of fiduciaries James P. Flynn and Thomas Flynn in the related estates of Kenneth Jastrzebski and Jean Jastrzebski. For the reasons set forth below, the court declines to entertain those portions of the motion seeking the removal of James in any and all of his fiduciary capacities or seeking relief from James, and denies the balance of the relief, except that the request for an order compelling compliance with discovery demands will be held in abeyance pending the court's review of all of the relevant documents *in camera*.

BACKGROUND

Decedents Kenneth and Jean were a husband and wife who tragically died together in an automobile accident on April 22, 2005. They were survived by their three adult sons, Christopher, Kevin and Steven, movants herein. Both decedents executed wills on November

19, 1986, and both wills provide that in the event that Kenneth or Jean is not survived by a spouse, then Jean's brother, James P. Flynn, shall serve as Executor.

The wills were filed for probate on October 13, 2005 and admitted to probate on March 1, 2006. Letters testamentary in each estate issued to James on March 3, 2006. At the same time, James received letters of trusteeship in Kenneth's estate.

Prior to their deaths, the decedents had also created two inter vivos trusts which are pertinent to this proceeding. The first is the JF Trust, created simultaneously with the execution of decedents' wills, under agreement dated November 19, 1986 between Jean as grantor, and Kenneth and James as co-trustees. Pursuant to the terms of the instrument, Thomas Flynn, also Jean's brother, succeeded Kenneth as a co-trustee upon Kenneth's death. In Article Fifth of Jean's will, she directs her executor to distribute her residuary estate to the trustees of the JF Trust. Article Fifth of Kenneth's will provides that upon the death of Jean, his executor shall distribute Kenneth's residuary estate to his sons, except that if any son is then a beneficiary of a trust fund created under Article First of the JF Trust, then such son's share shall be added to the principal of such trust. The second inter vivos trust is the JFS Trust, subsequently created under agreement dated September 20, 1989 between Jean and Kenneth as grantors, and James and Thomas as co-trustees.

On November 1, 2007, movants filed petitions seeking (1) the revocation of letters testamentary issued to James in each of the two estates; (2) the revocation of letters of trusteeship issued to James in the estate of Kenneth; (3) the appointment of Christopher, Kevin and Steven as co-administrators, c.t.a. of each estate; and (4) a court order directing James to file accounts as

executor of both estates and trustee in the estate of Kenneth. In the petition for revocation of letters filed in connection with Jean's estate, the movants further ask that the court direct (5) James and Thomas to account as co-trustees of the JF Trust and the JFS Trust; (6) James and Thomas to make the distribution to Kevin which movants assert should have been made on March 11, 2007 pursuant to the terms of the JFS Trust; and (7) the removal of James and Thomas as co-trustees of the JF Trust and the JFS Trust.

Movants aver that there was intense hostility between the respondents and decedents (and decedents' sons, movants herein) since 1997, due to disputes over family business interests. According to movants, respondents were not permitted to attend decedents' funerals. Despite this history, prior to their unexpected deaths in 2005, the decedents never revoked their 1986 wills or executed new estate planning documents. In their affirmation in opposition, respondents claim that they hold no animosity toward movants.

The motion for summary judgment presently before the court seeks an order: (a) granting summary judgment removing James as executor of the estates of Jean and Kenneth; (b) granting summary judgment removing James and Thomas as co-trustees of the JF Trust and the JFS Trust due to misconduct including self-dealing, conflict of interest and waste of estate and trust assets, and directing respondents to account as executors and co-trustees; (c) compelling respondents to comply with discovery demands served on September 28, 2009; (d) compelling respondents to make distributions in accordance with Jean's will, Kenneth's will, the JF Trust and the JFS Trust; (e) compelling the distribution of income in accordance with the JF Trust and the JFS Trust; (f) removing respondent's counsel, Witman, Stadtmauer, P.A., on the grounds of

conflict of interest and misconduct and fixing their legal fees, if any; and (g) surcharging the fiduciaries for payment of excessive legal fees and accounting fees and for losses to the estate and trusts resulting from their misconduct, self-dealing and conflict of interest.

Counsel for respondents filed an affirmation in opposition to the motion which asserts that following the filing of the petitions for removal and for accountings, respondents provided informal accountings and interim judicial accountings along with thousands of pages of documents in response to demands for production. Counsel argues that there are numerous disputed, material and relevant factual issues concerning the conduct of James and Thomas which cannot be resolved as a matter of law.

Movants then responded with a reply affirmation arguing that the respondents' opposition to the motion is based upon unsubstantiated and self-serving allegations and contains no documentation to directly refute movants' charges of fiduciary misconduct and self-dealing.

#### SUMMARY JUDGMENT

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v*

*Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge. Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

#### ANALYSIS

The motion before the court presents seven requests for relief in connection with four different entities, namely, the estate of Kenneth, the estate of Jean, the JF Trust, and the JFS Trust. Each of these requests will be addressed separately below.

(a) Remove James as executor of the estates of Jean and Kenneth.

This request for relief has been rendered moot, by the death of James on or about October 14, 2010, and the subsequent issuance of letters of administration, c.t.a., in both estates, to

Christopher, Kevin and Steven.

(b) Remove James and Thomas as co-trustees of the JF Trust and the JFS Trust.

The portion of this relief that relates to James is mooted by his death.

That portion of the motion which seeks to remove Thomas as co-trustee is based upon charges of misconduct including unreasonable delay, self-dealing, conflict of interest and waste of trust assets. In support of these charges, movants refer to various actions taken by respondents, but most of these pertain to James' administration of Jean's estate rather than to actions taken by Thomas in his capacity as trustee. However, one instance of misconduct and self-dealing cited by movants is respondents' withdrawal of \$111,909.62 of principal from the JF Trust, to which the respondents claimed that Darik Enterprises, Inc. (Darik) (owned 42.5% by each of Jean and James, with the balance owned by a non-family member) was entitled, pursuant to a Split Dollar Agreement. Movants argue that the Split Dollar Agreement pertained only to a life insurance policy surrendered in 1998, and not to the policy which paid into the trust. In response, counsel for respondents argues that the terminated insurance policy was replaced by another policy through an IRC §1035 exchange.

Pursuant to EPTL 1-2.7 a trustee is a fiduciary. As a fiduciary, a trustee "owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect" (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989], citing *Meinhard v Salmon*, 249 NY 458 [1928]); *see also Matter of Hubbell's Will*, 302 NY 246, 254 [1951] [trustee bears the unwavering duty of complete loyalty to the beneficiaries of the trust]). A trustee is duty-bound to act in good faith in the administration of a trust, with honesty and undivided loyalty to the beneficiaries and avoid

any circumstances whereby the trustee's personal interest will come in conflict with the interest of the beneficiaries (*Pyle v Pyle*, 137 AD 568 [1st Dept 1910], *affd* 199 NY 538, 92 NE 1099 [1910]). The purpose of this rule is to ensure that the trustee's acts are above suspicion and that the trust receives the trustee's uninfluenced judgment. As Chief Judge Cardozo stated in *Meinhard v Salmon* (249 NY 458, 464 [1928]), "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

The conduct of the trustee, Thomas, as reflected in both the charges made by movants and the response thereto, is the subject of a factual dispute, namely, whether the withdrawal of principal from the JF Trust on behalf of Darik was proper pursuant to a corporate agreement or whether the agreement was limited to an insurance policy that had long ago been surrendered. This dispute cannot be determined in the context of this motion. This portion of the motion is denied.

The present motion also seeks an order compelling the trustees to account, but the record reflects that six intermediate accounts were filed on July 24, 2009 in connection with the trusts created under the JF Trust for the benefit of Christopher, Kevin and Steven, respectively, and the trusts created under the JFS Trust for the benefit of Christopher, Kevin and Steven, respectively. In addition, accounts were filed by James as the executor of both estates. Objections to each of these accounts have been filed on behalf of movants and were being held in abeyance pending the outcome of this motion.

(c) Compel respondents to comply with discovery demands served on September 28, 2009.

This request for relief stems from a discovery schedule established in connection with the intermediate accounts filed by James and Thomas as fiduciaries of the estates and trusts.

Movants' counsel concurs that respondents turned over many documents responsive to movants' demand for discovery and inspection, but that respondents refused to supply retainer agreements and time and billing records for the attorneys and accountants who had rendered services to the estates and trusts, or the retainer agreements between attorneys Witman, Stadtmauer, P.A., and Darik and any related entities. These refusals were made on the grounds of attorney client privilege, as expressed in a letter dated March 26, 2010. Subsequently, counsel for respondents agreed, at a court conference held on July 21, 2010, to provide billing records from Witman, Stadtmauer, P.A., and the records were provided to movants' counsel on September 1, 2010. However, all pertinent information was redacted from the billing records provided by respondents, making it impossible for movants to determine or object to the reasonableness of the fees charged.

Ordinarily if a party objects to a discovery demand, that party is to serve a response which states with reasonable particularity the reasons for each objection. If objection is made to part of an item or category, the part is to be specified (Connors, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR C3122:1). Here, the fiduciaries objected to certain disclosures, by use of redactions, but failed to state the reason for such; providing materials in

redacted form with a brief mention that the documents attached are “redacted” does not constitute as a valid reason for an objection to the disclosure.

When a claim of privilege is presented, it may be advisable to conduct an *in camera* review of documents claimed to be privileged (*Montgomery Group, LLC. v Town of Montgomery*, 29 AD3d 585 [2d Dept 2006]). The court may defer determination of a motion to compel discovery until after an *in camera* inspection of certain materials by the court since it does not affect substantial rights (*Buhler v Sheridan*, 134 AD2d 822 [4th Dept 1987]).

CPLR 3122(b) establishes the requirement under New York law for a privileged document log when a party seeks to claim an attorney-client privilege. The Court of Appeals has recommended that a party seeking to protect documents from disclosure compile a privilege log, specifying the nature of the documents and the basis for the privilege claim, in order to aid the court in its assessment of a privilege claim and enable it to undertake *in camera* review (*Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434 [2003]). Here, the executors failed to provide a privilege log to explain the redactions. Merely responding with boilerplate claims of privilege, without a privilege log as required by CPLR 3122B (b), is insufficient as a matter of law (*Anonymous v High School for Environmental Studies*, 32 AD3d 353 [2006]). Although this court will not mandate that a privilege log be produced, it is unable to fully assess an attorney-client privilege claim without further explanation by the executors as to the redacted material, which may be accomplished through an *in camera* review of said materials.

The attorney-client privilege seeks to insure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his or her confidences will

not later be exposed to his or her legal detriment (*Priest v Hennessy*, 51 NY2d 62 [1980]). The attorney-client privilege has been codified in CPLR 4503(a)(1), which bars disclosure of any confidential communications between a client and his/her attorney.

Because a determination of whether documents are privileged is fact-specific, an *in camera* review of such documents may have to be undertaken before resolving the issue (*Spectrum Systems Intern. Corp. v Chemical Bank*, 78 NY2d 371 [1991]); *Nationwide Ins. Co. v Crisano*, 286 AD2d 670 [2d Dept 2001]). The burden of proving that all the requisites of the privilege are present falls on the person asserting the privilege (*In re Morrell's Estate*, 154 Misc 356 [Sur Ct, Kings County 1935]).

In the experience of this court, it is highly unusual for fiduciaries to assert a claim of privilege concerning billing records, and the extensive redaction of data from the records supplied by respondents in this matter creates a virtual mockery of the notion of disclosure. At the same time, the court is cognizant that the attorney client privilege is “of the oldest among common law evidentiary privileges, fostering the open dialogue between lawyer and client that is deemed essential to effective representation” (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371 [NY1991]) and that the court, too, has not yet seen the redacted data, which may be more sensitive than it appears from the surrounding un-redacted data.

A final determination on the motion for summary judgment to compel production of un-redacted copies of the billing records and production of the requested retainer agreements is held in abeyance pending an *in camera* review of all of the pertinent documents in un-redacted form.

(d) Compel respondents to make distributions in accordance with Jean’s will, Kenneth’s will, the JF Trust and the JFS Trust; and

(e) Compel respondents to distribute income in accordance with the JF Trust and the JFS Trust.

Any request for relief seeking to compel distributions by James as executor of the two estates or as trustee of the two trusts is stayed by his death, until such time as a fiduciary is appointed for his estate and the personal representative is substituted in place of James (CPLR 1015).

In connection with the conduct of Thomas as trustee, movants argue that the trustees failed to properly include all assets in calculating principal distributions, and that distributions of interest have been questionable. In response, counsel for the respondents argues that distributions from the trust have correctly been based upon “then existing principal,” and that Jean’s interest in her retained earnings in Darik Enterprises is payable over 10 years, pursuant to the relevant shareholders’ agreement, which impacts on the distributions payable by the trustees.

The proper computation of distributions from the trusts is an issue of fact rather than an issue of law. As noted above, accountings have been filed by the trustees, and the information contained in the accounts and in the objections thereto will be pertinent to a final computation. This portion of the motion for summary judgment is denied.

(f) Remove respondent’s counsel, Witman, Stadtmauer, P.A., on the grounds of conflict of interest and misconduct and fixing their legal fees, if any.

The removal of respondents’ counsel on grounds of conflict of interest and misconduct and the setting of counsel’s fees are fact-based determinations, not properly decided in the context of this motion for summary judgment. This portion of the motion is denied.

(g) Surcharge the fiduciaries for payment of excessive legal fees and accounting fees and for losses to the estate and trusts resulting from their misconduct, self-dealing and conflict of

interest.

Movants claim that respondents have paid excessive legal and accounting fees and have taken excessive commissions. Moreover, they seek an order surcharging the fiduciaries for these payments and for losses resulting from their conduct. With respect to James, any request for a surcharge is stayed pending appointment and substitution of a fiduciary for his estate (CPLR 1015). As to the request to surcharge Thomas, the court finds that these are fact-based issues which cannot be decided in the context of this motion.

#### CONCLUSION

The court denies as moot those portions of the motion numbered (a) and (b) seeking the removal of James in any and all of his fiduciary capacities, and denies the requests for relief in items (b), (d), (e), (f), and (g) in the motion for summary judgment, which seek: (b) the removal of Thomas as co-trustee; (d) an order compelling distributions of principal; (e) an order compelling distributions of income; (f) the removal of respondents' counsel, and (g) the imposition of a surcharge on the fiduciaries. As to the request for relief in item (c), the court will conduct an *in camera* review of all of the documents requested in un-redacted form and then issue a determination on the motion for summary judgment to compel production of un-redacted copies of the billing records and to compel production of the retainer agreements.

The court notes that the motion for summary judgment and the underlying petitions raise serious concerns regarding the conduct of the fiduciaries. Accordingly, the court will seek to expedite the underlying motions and the accounting proceedings, all of which will appear on the court's calendar for a conference on February 17, 2010 at 2:45 p.m.

Un-redacted copies of the billing records discussed above shall be submitted to the court for *in camera* review within 21 days of the date hereof, along with copies of the retainer agreements for the attorneys and accountants who had rendered services to the estates and trusts, and the retainer agreements between attorneys Witman, Stadtmauer, P.A., and Darik.

Counsel for respondents is directed to promptly advise movants and this court of the appointment, if any, of a fiduciary for the estate of James P. Flynn. Upon such notification, movants shall serve a copy of the motion and this decision on said fiduciary.

This is the decision and order of the court.

Dated: December 22, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court