

Matter of Moles

2010 NY Slip Op 34129(U)

September 14, 2010

Surrogate's Court, New York County

Docket Number: File No. 1057/2009

Judge: Nora S. Anderson

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
Probate Proceeding, Will of

ROBIN MOLES,

File No. 1057/2009

Deceased.
-----X

A N D E R S O N , S .

In this contested probate proceeding, the preliminary executors moved to quash a subpoena issued by the objectant to Emigrant Savings Bank for the personal records of the preliminary executrix. At the call of the calendar, the motion was granted without prejudice to bringing a motion to compel the preliminary executrix to respond to the discovery demands to which she had timely objected.

Decedent died on February 28, 2009, survived by four sisters and two nephews. In the propounded Will, executed on December 27, 2007, decedent's long-time companion and caretaker was named her sole beneficiary and co-executrix. Preliminary letters issued to the companion and to the decedent's attorney.

Objections to probate were filed by a non-distributee nephew (the "nephew"), who received the bulk of decedent's estate under her penultimate 1974 Will.

In support of their motion, the preliminary executors point out that the nephew had previously served a discovery demand on the co-executrix seeking the same records he later sought in the

subpoena to the bank.¹ The co-executrix timely objected on the grounds that the demand was too broad and that her personal bank records are not material or relevant to the issue of the validity of the Will. The preliminary executors argue that the nephew should not be permitted to make an end-run around addressing the co-executrix' objections. Rather, he should be required to move to compel her to respond to his demand as required by CPLR 3124 (see McKinney's CPLR 3122 Practice Commentary, C3122:1).

In further support of their motion, the preliminary executors contend that, in seeking discovery from the bank, a non-party, the nephew failed to show the necessary "special circumstances" for such discovery, i.e., that the documents are material and necessary, and that they cannot be obtained from another source, e.g., the co-executrix. The Court agrees.

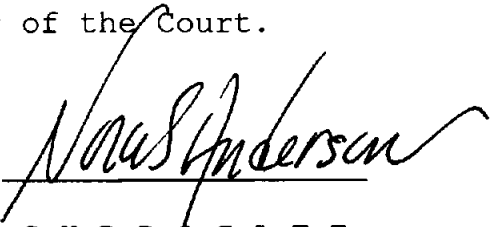
When disclosure is sought from a non-party, the "circumstances or reasons" such disclosure is required or sought must be set forth in the subpoena and in the papers simultaneously served on the other party (CPLR 3101(a)(4); Velez v Hunts Point Multi-Service Center, Inc 29 AD3d 104; Wolf v Wolf, 300 AD2d 540; and De Stefano v MT Health Clubs, 220 AD2d 331). In De Stefano v MT Health Clubs, the Court refused to enforce a subpoena which did not set forth the "circumstances and reasons" for the disclosure as required by the statute (see also, Knitwork

¹ The subpoena requests, without setting forth a time limit, all documents relating to the co-executrix; and all documents relating to any checking account or savings account or other account maintained by, or on behalf of the co-executrix.

Prods. Corp. v Helfat, 234 AD2d 345).

Here the co-executrix timely objected to the nephew's discovery demand (CPLR 3106[b]), and informed the Court in her motion for a protective order that the requirements of 3104(a)(4) had not been met. The nephew should not be permitted to ignore her objections and deprive the co-executrix of an opportunity to defend her position (see, CPLR 3122 and 3124).

This decision constitutes the order of the Court.


S U R R O G A T E

Dated: September 14, 2010