

Matter of Fisher

2011 NY Slip Op 30358(U)

January 6, 2011

Surrogate's Court, Nassau County

Docket Number: 199688/D

Judge: Edward W. McCarty

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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 Barbara Sommer Fisher
and Susan Sommer Schweitzman for a Decree Revoking
Letters of Trusteeship Issued to Jack Sommer and Eugene
Landsberg as Trustees of the Article SIXTH Trust Created
under the Last Will and Testament of

SIGMUND SOMMER,

Deceased,

File No. 199688/D

Dec. No. 26888

and Directing Jack Sommer and Eugene Landsberg to
Account.

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Before the court in this proceeding by petitioners Barbara Sommer Fisher and Susan Sommer Schweitzman for a decree revoking the letters of trusteeship of respondents Jack Sommer and Eugene Landsberg, the co-trustees of the Article SIXTH trust created under the last will and testament of Sigmund Sommer and for the appointment of a corporate trustee, is a motion by the co-trustees for an order vacating the order scheduling a hearing on whether the respondents should be immediately suspended as such and quashing the subpoenas issued to the respondents, or, in the alternative, limiting the scope and adjourning the hearing and issuing a temporary restraining order holding the hearing in abeyance until the court reviews the papers submitted with this motion and rules upon it. The motion is opposed by the petitioners.

The petitioners are the beneficiaries of the trust. In the petition, they allege, among other things, that the respondents failed to diversify the assets of the trust, made imprudent investments, failed to exercise sound business judgment, wasted and misappropriated trust assets, commingled trust expenses with Jack Sommer’s private expenses and exposed the trust to unnecessary liabilities. The respondents deny these allegations.

After issue was joined and discovery was in progress, the petitioners moved by order to show cause for a hearing on whether the respondents should immediately be suspended as co-trustees based on numerous allegations of mismanagement and waste that the petitioners state were discovered when the respondents provided certain trust financial documents that the petitioners contend “incontrovertibly demonstrate[] an astonishing waste” of trust assets. Specifically, the petitioners assert that the documents show that since April 2010: (1) nearly 70 percent of the \$3,181,124.22 received has been expended by the trustees for administrative and personal expenses without any distributions to the beneficiaries; (2) the trustees have paid to themselves \$733,333.48 in commissions; (3) more than \$605,281.45 has been paid from trust assets to eight law firms; and (4) the trustees have paid more than \$283,246.16 in payroll and employee benefits. In their opposition, the respondents offer explanations for these expenditures and dispute the allegations that they have mismanaged or wasted trust assets.

The order to show cause was returnable on September 22, 2010. At the call of calendar on September 22, 2010, respondents’ counsel asked for additional time to serve and file papers in opposition to the motion. The court heard counsel’s request during which time some of the allegations raised in the motion were discussed. Immediately thereafter, counsel conferred with a member of the court’s law department. The court allowed the respondents until September 29, 2010 to submit opposition papers and scheduled a hearing on the issue of suspension for October 29, 2010. The hearing date was later adjourned several times and was ultimately scheduled to occur on November 8, 2010.

By order to show cause dated October 26, 2010, the respondents made the instant motion for the relief set forth above. Respondents’ counsel took issue with the fact that the court had not

had the opportunity to review their papers in opposition to the motion for immediate suspension when it ordered a hearing.

After the motion to vacate the order directing a hearing was fully submitted, it was submitted for decision.

Respondents' request for a temporary restraining order holding the November 8, 2010 hearing in abeyance until the court reviewed the papers submitted with and rules on the application is denied as moot. The hearing date has passed and the court has reviewed the papers. Further, although the hearing will not be rescheduled at this time for the reasons set forth below, the stay of the hearing ordered in the October 26, 2010 order to show cause is hereby vacated.

The court is, of course, aware of the fact that the trustees' petition for judicial settlement of their account is pending. The issues raised in the proceeding to revoke their letters of trusteeship overlap and could be heard in the accounting proceeding. Nevertheless, the allegations raised in the motion for immediate suspension of the respondents as trustees are serious and deserving of the court's attention. For that reason, the court denies the respondents' motion to vacate the order scheduling a hearing on the issue of whether respondents' letters should be suspended.

The respondents also ask the court to quash the subpoenas to have the respondents appear at the court to testify at the hearing. Jack Sommer resides in Las Vegas, Nevada, and Eugene Landsberg, who is 94 years of age resides in Brockton, Massachusetts. The respondents assert that their testimony at the hearing would be superfluous since there are other witnesses who can offer the same information. The court disagrees. Respondents are the trustees and it is their

actions as fiduciaries of the trust that are at issue. The court discerns no reason to quash the subpoena issued to Jack Sommer.

The respondents have annexed to their moving papers a letter from Mr. Landsberg's doctor that states that his medical condition makes it such that he cannot travel more than twenty minutes without a serious risk to his life and health. The petitioners counter that if he is so ill, he should be summarily removed as a trustee.

The court will not quash a subpoena based on an unsworn letter from a physician, nor will the court summarily remove Landsberg as trustee. In a number of decisions granting a protective order for health reasons the medical evidence is "uncontradicted" (*see Button v Guererri*, 298 AD2d 947 [4th Dept 2002]; *Verini v Bochetto*, 49 AD2d 752 [2d Dept 1975]). Here, the petitioners have had no opportunity to challenge the conclusions drawn by Landsberg's doctor. Moreover, the court cannot ascertain whether this conclusion is truly so without further inquiry, and the court may not abdicate its responsibility by unquestioningly accepting a doctor's summary opinion. The opposing party has a right for itself to examine the matter in more detail. Both *Button v Guererri* (298 AD2d 947 [4th Dept 2002]) and *Verini v Bochetto* (49 AD2d 752 [2d Dept 1975]), recognize, by necessary implication, the right of the party seeking the testimony to obtain medical evidence to controvert or contradict the medical evidence offered by the party or witness seeking what is tantamount to a protective order. Accordingly, the respondents are authorized to select a physician of their own choosing to consult with Landsberg's doctor, review his medical records and examine Landsberg if he or she deems it necessary. Since Landsberg himself has placed his medical condition in issue, those records should be produced forthwith (*Hoening v Westphal*, 52 NY2d 605 [1981]).

Finally, the respondents ask the court to limit the scope of the hearing to strike certain allegations they assert are prejudicial or irrelevant. The court will not do so within the context of this motion. If and when certain allegations are raised at the hearing, the court will rule on any proper objections made.

The matter will appear on the court's calendar on January 20, 2011, at 2:30 p.m., for a status conference with a member of the law department.

This is the decision and order of the court.

Dated: January 6, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court