

Matter of Levine
2012 NY Slip Op 33016(U)
December 23, 2012
Sur Ct, Nassau County
Docket Number: 2011-363619/D
Judge: III., 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 Petition of Mark C. Peltz,
Executor of the Estate of

File No. 2011-363619/D

JULES B. LEVINE,

Dec. Nos. 28022
28023

Deceased,

For Discovery Pursuant to SCPA 2103.
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In this miscellaneous proceeding, the petitioner, Mark C. Peltz, the executor of the estate of Jules B. Levine, moves: (1) for an order pursuant to CPLR 3108, 3113 and 3120 for a commission to take the depositions of Mary Ann Lona Sorrentino and Thomas Johnson, non-party witnesses located in Florida, and (2) for an order compelling the respondent, Mary Ann Levine, the decedent's surviving spouse, to permit the petitioner to conduct an examination of the contents of a warehouse in Florida of property which may belong to the estate of the decedent, that was allegedly deposited in the warehouse by the respondent. The motions are decided as set forth herein.

Background

The decedent, Jules B. Levine, died a resident of Nassau County on December 25, 2010, survived by his wife, Mary Ann, and the children of his first marriage, Benjamin J. Levine and Annie R. Krimstock. A will dated October 1, 2010 was admitted to probate on February 23, 2011 and letters testamentary issued that same date to the petitioner, who was named as the executor in the will. The will left the decedent's surviving spouse all of the decedent's automobiles and his boat located in Florida. The will also created a trust for the decedent's surviving spouse and bequeathed to the trust \$7,500,000.00; one half of the proceeds of the sale of the house in Florida owned by the decedent; as well as the house in Long Beach and the apartment in Montauk owned

by the decedent, along with their household furnishings and effects, for the use of the surviving spouse during her lifetime. Upon the death of the surviving spouse, the remaining trust assets were to be divided in half and placed in trusts for the decedent's children.

The petitioner commenced a discovery proceeding seeking to obtain information concerning: (1) the ownership of funds in a Bank of America account titled in the names of the decedent and his surviving spouse, Mary Ann, and (2) personal and household effects removed from the Long Beach house, the Montauk apartment and the Florida house which had been owned by the decedent. The respondent surviving spouse, Mary Ann, interposed an answer to the petition in which she asserts that the proceeds of the joint account at the Bank of America belong to her under the terms of the prenuptial agreement she signed with the decedent and she further asserts that any items she removed from the Long Beach, Montauk and Florida properties belong to her.

Motion for a Commission

The petitioner has brought a motion for a commission to take the depositions of Mary Ann Lona Sorrentino and Thomas Johnson, non-party witnesses located in Florida.

CPLR 3108 provides, in relevant part, that a commission may be issued where necessary or convenient for the taking of a deposition outside of New York. While the petitioner alleges that the testimony of Mary Ann Lona Sorrentino and Thomas Johnson is material and necessary to the resolution of this proceeding, the petitioner has failed to allege that these non-party witnesses will not cooperate with a notice of deposition or will not voluntarily come within the state or that a commission will be necessary in compelling the witnesses to attend the examination. Since Mary Ann Lona Sorrentino is the daughter of the respondent, Mary Ann, and Thomas Johnson is the respondent's son-in-law, it is quite possible that they will refuse to cooperate, but the petitioner has

failed to allege that any effort has been made to secure such cooperation. In the absence of such a showing, the motion for a commission must be denied, without prejudice to renewal upon the requisite showing that the commission is necessary or convenient (*Sorrentino v Fedorczuk*, 85 AD3d 759 [2d Dept 2011]; *Reyes v Riverside Park Community (Stage I), Inc.*, 59 AD3d 219 [1st Dept 2009]).

Motion for Permission to Inspect
The Contents of the Warehouse in Florida

During the petitioner's examination of the respondent in this proceeding, it was disclosed that the respondent had made arrangements for household furnishings from the house in Florida owned by the decedent to be moved to a storage facility. The petitioner seeks the respondent's permission to examine the property placed in storage in order to determine if it belongs to the decedent's estate.

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 words "material and necessary" are "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).

The petitioner has sufficiently established that an inspection of the property being stored at the warehouse in Florida by the respondent is necessary to a resolution of this proceeding. While the respondent claims that the property in storage belongs to her and not to the estate, such an unsubstantiated claim, without more, is insufficient to defeat the petitioner's request for an inspection and inventory of such property. Accordingly, the petitioner's motion to compel the respondent to permit the petitioner to conduct an examination of the property stored in the Florida warehouse by the respondent is granted.

Within fifteen days of the date of this order, the respondent is directed to provide the petitioner with written authorization allowing him to inspect the property being stored by the respondent at the Florida warehouse. The respondent shall execute any documentation required by the warehouse to allow such inspection by the petitioner to take place.

This constitutes the decision and order of the court. No further order need be submitted.

Dated: October 15, 2012

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

