

Matter of the Estate of Klein

2014 NY Slip Op 33325(U)

December 19, 2014

Surrogate's Court, New York County

Docket Number: 2009-2796

Judge: Nora S. Anderson

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New York County Surrogate's Court
DATA ENTRY DEPT.

DEC 19 2014

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

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In the Matter of the Application of
LEONARD LEIBMAN, as Co-Executor
of the Estate of

File No. 2009-2796

ALLEN KLEIN,

Deceased,

for the Turnover of Property.

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A N D E R S O N , S .

In this turnover proceeding, petitioner (co-executor of decedent's will) seeks the return of certain artwork and furnishings from respondent who in turn claims decedent gave them to her as a gift. Respondent filed this motion under CPLR 3101 to compel petitioner to produce decedent's unredacted gift tax returns. Additionally, movant asked petitioner to produce all documents that show decedent's purchase or ownership of the artwork in dispute. For the reasons stated below, the motion is denied.

Decedent was the founder of ABKCO, an entertainment and music publishing company. He and movant, Iris Keitel, lived together for more than 30 years, until his death in 2009. During their cohabitation, decedent and ABKCO purchased (or otherwise acquired) certain artwork that was kept in the apartment. After decedent died, Ms. Keitel removed some of the

artwork to her new apartment. When Ms. Keitel refused to return the artwork to the executor, he commenced this proceeding. Ms. Keitel filed her answer, which included a counterclaim for a declaratory judgment that she is the owner of the artwork because it was a gift from decedent.

The parties began discovery. In response to Ms. Keitel's document demand for all documents related to gifts decedent had given others, the executor (Mr. Leibman) produced many documents, including decedent's gift tax returns. But he redacted the amounts of all gifts made to others (and other potentially confidential information, such as social security numbers). After finding the documents inadequate, Ms. Keitel filed this motion, seeking unredacted copies of the returns and all documents related to decedent's purchase and ownership of the artwork. Mr. Leibman opposed the motion claiming that the redacted portions are irrelevant to whether decedent gave her the artwork as a gift.

The CPLR requires, "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 "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]). The phrase has been construed "to mean nothing more or less than 'relevant.'" (*Matter of Elmezzi*, 2010 NY Slip Op 33602[U] [Sur Ct, Nassau County 2010] citing Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3101:5).

While the disclosure rules are liberal, case law has long recognized an exception regarding the disclosure of tax returns (*Nanbar Realty Corp. v Pater Realty Co.*, 242 AD2d 208, 209-210 [1st Dept 1997]). Due to their confidential and private nature, disclosure is disfavored (*id.*). Consequently, "a party seeking to compel their production must make a strong showing of overriding necessity" (*Matthew Industrial Piping Co., v Mobil Oil Corp.*, 114 AD2d 772; *Matter of Gala*, NYLJ, Jul. 26, 1999 at 23, col 4 [Sur Ct, Westchester County]) and establish that the information they contain is indispensable to the litigation and "unavailable from other sources" (*Briton v. Knott Hotels Corp.*, 111 AD2d 62, 63). Additionally, as held in Nanbar:

"[T]he party seeking to compel production of a tax return must identify the particular information the return will contain and its relevance, explain why other possible sources of the information sought are inaccessible or likely to be unproductive and limit examination of the return to relevant material through redaction of extraneous information."

(See also 6 Weinstein-Korn-Miller, NY Civ Prac P 3101.10).

Thus, where a party seeks the production of tax returns, the court must engage in a two-part analysis. First, the court must determine whether the information sought is relevant. If not, no further analysis is required. Second, if the information is relevant, the court must determine whether it is indispensable to the litigation and unavailable from other sources.

In this case, to the extent the gift tax returns show gifts to Ms. Keitel and information about the artwork, the tax returns are relevant. Beyond that, they are not, and production is unwarranted.

Ms. Keitel has failed to show that the redacted portions of the gift tax returns are relevant to the prosecution or defense of her action. She purports to need the unredacted returns to satisfy her burden of proof on the gift issue, where she must show: (1) donative intent; (2) delivery (either actual or constructive); and (3) acceptance; by clear and convincing evidence (Gruen v Gruen, 68 NY2d 48, 53 [1986]).

Ms. Keitel contends that decedent's unredacted tax returns are necessary to her counterclaim because, "It is highly relevant to know whether Decedent had a practice of making substantial gifts, and to whom, so that they can be measured against the nature and value of the gifts he made" to her. But she fails to explain how that information (decedent's propensity

for gift-giving and the amounts of the gifts to others) is sufficiently related to the issue of whether the artwork was a gift. Comparing the nature and value of the gifts decedent made to others, against the nature and value of the gifts decedent made to Ms. Keitel, does not "sharpen" the issue of whether decedent gifted her the artwork. The comparison would be irrelevant and inconclusive. Because even if she were able to establish, for example, that decedent gifted ninety-nine percent of his estate to others, that fact would be useless in helping her prove decedent gifted anything to her. On this record, there is no correlation between the gifts decedent gave to others and the gifts decedent gave to Ms. Keitel.

Ms. Keitel also asserts that knowledge of the nature and extent of decedent's gifts to others may enable her "to speak with the recipients of Decedent's other gifts to determine the manner in which he made the gifts, and whether they had knowledge of comparable gifts made by Decedent" to her. Yet, there are no facts in the record to suggest that the donees have the information she seeks. The assertion is therefore speculative, and the inquiries would amount to the proverbial "fishing expedition," which is impermissible under the CPLR.

In sum, the redacted information is not "material and necessary," let alone indispensable. Accordingly, the branch of

the motion seeking the production of unredacted gift tax returns is denied.

Ms. Keitel also asks that Mr. Leibman be ordered to produce all documents related to the purchase, ownership, and insurance coverage of the artwork. She claims that Mr. Leibman has failed to produce any documents that show decedent paid for the artwork individually and has only produced checks from an unidentified bank account and invoices that show that some of the artwork was paid for by ABKCO. She contends that she needs to determine whether there are existing documents that show whether decedent, as opposed to ABKCO, paid for and owned the artwork. Because, she alleges, if decedent did not own the artwork in his individual capacity, then the items are not estate assets, and Mr. Leibman lacks standing to seek recovery in this court.

Mr. Leibman claims that he has already conducted an exhaustive search through decedent's and ABKCO's files, produced many documents that show the purchase and ownership of the artwork, and believes he has no other responsive documents in his possession, custody, or control.

The documents related to the purchase, ownership, and insurance coverage of the artwork are relevant. Mr. Leibman asserts that he "cannot be compelled to produce documents he does not have." The court agrees and notes that Mr. Leibman is under a continuing obligation to produce responsive documents,

if he finds more. The branch of the motion seeking the production of all documents related to the purchase, ownership, and insurance coverage of the artwork is therefore denied.

This decision constitutes the order of the court.

Dated: *December 19*, 2014



S U R R O G A T E