

Matter of Margaret C. O'Donoghue Irrevocable Trust
2014 NY Slip Op 33433(U)
December 18, 2014
Surrogate's Court, Nassau County
Docket Number: 2012-0370046/B
Judge: Meryl J. Berkowitz
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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 Accounting by
 Joseph O'Donoghue and Brian O'Donoghue,
 as Co-Trustees of the

File No. 2012-370046/B

Dec. No. 30495

MARGARET C. O'DONOGHUE
 IRREVOCABLE TRUST.

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In connection with a contested accounting proceeding in the Margaret O'Donoghue Irrevocable Trust, under agreement dated March 7, 2008, the petitioning co-trustees, Joseph O'Donoghue and Brian O'Donoghue, have moved for an order pursuant to CPLR 2304 and 3103 quashing an amended subpoena duces tecum served by the objectants, Mary Rose O'Donoghue and Kevin O'Donoghue, on Citibank, N.A., and for a protective order relieving the Citibank, N.A. from the obligation to comply.

BACKGROUND

Margaret C. O'Donoghue died on August 18, 2011, having created the Margaret O'Donoghue Irrevocable Trust, under agreement dated March 7, 2008. Joseph O'Donoghue and Brian O'Donoghue, two of decedent's 14 children, were named as co-trustees. The remaindermen named in the trust, to share in the principal and accumulated income upon the death of Margaret C. O'Donoghue, are the settlor's fourteen adult competent children, namely: Mary O'Donoghue LaRusso (a/k/a Mary O'Donoghue), Joseph O'Donoghue, Peter J. O'Donoghue, Michael O'Donoghue, John P. O'Donoghue, Christine O'Donoghue Kitt, Margaret Ann Willman, Paul O'Donoghue, Regina Todd, Kevin G. O'Donoghue, Therese O'Donoghue Cahill, Brian J. O'Donoghue, Thomas A. O'Donoghue, and James F. O'Donoghue.

On May 16, 2012, Mary Rose O'Donoghue and Kevin O'Donoghue filed a petition to compel the co-trustees to account. On May 17, 2012, an order to show cause was issued, returnable on May 23, 2012. The co-trustees filed their account on October 2, 2012. Waivers of consent were filed by Margaret-Ann Willman, Peter J. O'Donoghue, Michael O'Donoghue, John O'Donoghue, Christine O'Donoghue Kitt, Paul F. O'Donoghue, Therese O'Donoghue Cahill, Thomas O'Donoghue, and James O'Donoghue. Waivers were not filed by Mary O'Donoghue, Regina Todd, or Kevin G. O'Donoghue.

The principal accounting shows principal received in the amount of \$615,689.58 (Schedule A) and realized increases in principal in the amount of \$89,331.50 (Schedule A-1), for total principal charges of \$705,021.08. Deducted from this are realized decreases in principal of \$129,182.36 (Schedule B) and distributions of principal of \$416,761.73 (Schedule E), leaving a principal balance on hand of \$159,076.99. The income accounting shows income collected of \$48,044.54. There are administrative expenses of \$32,011.54 and distributions of income totaling \$36,210.97, leaving an income balance of negative \$20,177.97. The combined accounts total \$138,899.02.

Mary Rose O'Donoghue and Kevin O'Donoghue filed objections to the account. Discovery followed, and the objectants requested certain documents from the co-trustees, including:

The records of Citibank account xxx7314 in the name of Joseph O'Donoghue for the period of March 7, 2008 through June 30, 2012;

The records of Citibank account xxx0980 in the names of Margaret C. O'Donoghue and Joseph O'Donoghue for the period of March 7, 2008 through June 30, 2012; and

The records of Citibank Mastercard account xxx8611 in the name of Margaret C. O'Donoghue for the period of March 7, 2008 through June 30, 2012.

The co-trustees provided some, but not all, of the documents, and entries deemed non-germane by the co-trustees were redacted. The objectants then filed a subpoena duces tecum (the "first subpoena") on Citibank, N.A., seeking unredacted copies of all of the requested documents.

The co-trustees responded by filing a motion with this court on October 22, 2013, for an order pursuant to CPLR 2304 and 3103, to quash the first subpoena and for a protective order (the "first motion to quash") relieving Citibank, N.A. of its obligation to respond.

On May 14, 2014 this court issued Dec. No. 29904. In that decision, the court granted the first motion to quash, finding that the first subpoena did not comply with the notice obligation to Citibank, N.A. required under CPLR 3101 (a) (4).

The objectants served an amended subpoena duces tecum dated May 29, 2014 (the "second subpoena") on Citibank, N.A. again seeking the same documents. In response, on June 25, 2014, the co-trustees filed a motion to quash the second subpoena and for a protective order (the "second motion to quash"). In support of the second motion to quash, the co-trustees filed an affidavit from co-trustee Joseph O'Donoghue and an affirmation from Joseph A. Hyland, Esq., one of the attorneys representing the co-trustees. The co-trustees again seek an order pursuant to CPLR 2304 and 3103, granting their application to quash and vacate the subpoena served on Citibank, N.A. by the objectants, and for a protective order relieving Citibank, N.A. of an obligation to respond to the second subpoena.

AFFIRMATION AND AFFIDAVIT IN SUPPORT OF
SECOND MOTION TO QUASH

Joseph Hyland's affirmation in support of the second motion to quash states that in June 2014 he informed counsel for objectants that all documents requested under the second subpoena had been previously provided to counsel by the co-trustees in response to counsel's prior document demands. While conceding that there were redactions of entries contained in the photocopies of documents sent to counsel for the objectants, Joseph Hyland maintains that these redactions were necessary to prevent disclosure of private financial transactions that were not germane to this proceeding. He further notes that none of these accounts are trust accounts. Although Joseph O'Donoghue concedes that he used his personal account xxx7314 to pay expenses for decedent for which he later sought reimbursement from the trust, he argues that all other activity in this account was private and unrelated to the trust. Affirmant also notes that Joseph O'Donoghue did not produce bank statements for any month which did not include entries for which he sought reimbursement.

Joseph Hyland also argues that the notice requirement of CPLR 3101 (a) (4) has once again not been met because the stated reasons do not reflect that disclosure was already provided, with the exception of the private and redacted entries. He also maintains that there is a "special circumstances" requirement for discovery from a non-party witness, which has not been established.

The court also received an affidavit from Joseph O'Donoghue, in which he reiterates that the redacted statements provided to objectants show all transactions for which he sought reimbursement.

AFFIRMATION IN OPPOSITION TO SECOND MOTION TO QUASH

Counsel for the objectants, in her affirmation in opposition to the second motion to quash, argues that the co-trustees rendered Citibank account xxx7314 in the name of Joseph O'Donoghue relevant to the accounting proceeding by allowing Joseph O'Donoghue to commingle his personal funds at Citibank with the funds of the trust. The alleged commingling consists of payments by Joseph O'Donoghue of trust expenses out of his personal account in the total amount of \$295,000.00 over the course of two and one-half years, for which he sought reimbursement from the trust, and the transfer, by the co-trustees, of significant amounts of funds from the Irrevocable Trust into the personal account of Joseph O'Donoghue. Based upon this conduct, objectants assert that Joseph O'Donoghue engaged in fiduciary transactions in his individual name, using his personal account, rather than in his fiduciary capacity, using trust funds. They argue that this conduct is a violation of EPTL 11-1.6, which requires that all transactions by a fiduciary affecting property received as a fiduciary "shall be in his name as fiduciary." Objectants argue that in order to verify any valid and reimbursable expenses paid by Joseph O'Donoghue out of his personal account, and to confirm that trust funds were not used for the payment of Joseph O'Donoghue's personal expenses, the objectants require the subpoenaed documents, including copies of cancelled checks and records reflecting transfers of funds to other accounts for the entire period covered by the accounting, March 7, 2008 through June 30, 2012. Although some of the documents now subpoenaed were produced by the co-trustees previously, many of the documents produced included redactions and alterations of the banking entries.

Counsel for the objectants also notes that the second motion to quash presents no

arguments against Citibank's production of records pertaining to Citibank account xxx0980 in the names of Margaret C. O'Donoghue and Joseph O'Donoghue, and Citibank Mastercard account xxx8611 in the name of Margaret C. O'Donoghue. To date, these records have only been produced in part. Further, since the co-trustees have refused to produce the balance of the subpoenaed records, including all of the joint account records, or any of the decedent's credit card records, these records cannot be obtained from a source other than Citibank.

ATTORNEY'S AFFIRMATION IN REPLY

Joseph Hyland filed an affirmation in reply to the opposition to the second motion to quash. He argues that objectants failed to show that reimbursements made to Joseph O'Donoghue for expenses related to the care of his mother were not adequately accounted for in the redacted bank statements provided to counsel for the objectants. He further claims that objectants have failed to make any showing that the requested information was not previously provided to them. Counsel argues that paying out expenses for Margaret O'Donoghue and being reimbursed for those payments does not amount to commingling of assets or self-dealing. Counsel then argues that whether the payments were improper is an issue for trial, outside the scope of the underlying second motion to quash the subpoena.

Counsel then advises the court that only \$255,000.00 of the \$295,000.00 was paid to Joseph O'Donoghue. The balance of \$40,000.00 was a payment to respondent Mary O'Donoghue for expenses incurred for the medical care of decedent.

Counsel for Joseph O'Donoghue states that the first payment made by his client for Margaret O'Donoghue occurred in March 2010. Accordingly, he asks that if the court denies the second motion to quash, then the scope of the second subpoena should be limited to March 2010

through June 30, 2012, rather than begin in March 2008.

Joseph Hyland further asks that if the court denies the second motion to quash, that Joseph O'Donoghue's bank records be forwarded to the court for in camera review, rather than be sent to the objectants, and he asks that the court redact all irrelevant entries.

With respect to the joint account and the Mastercard account, counsel claims that the records were already provided to the objectants for the period of March 7, 2008 through June 30, 2012. He asserts that the objectants are seeking duplicate photocopies.

DISCOVERY

New York requires full disclosure of all matter material and necessary in the prosecution or defense of an action (CPLR 3101 [a]). Case law has broadly construed the scope of material that is discoverable, ruling that "the words material and necessary are to be interpreted liberally to require disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay ... the test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 [1968] [internal citations omitted]). The Court of Appeals' interpretation of "material and necessary" has been understood "to mean nothing more or less than 'relevant'" (Connors, Practice Commentaries, McKinney's Cons.Laws of NY, Book 7B, CPLR C3101:5). Discovery of documents is permitted even if they are not admissible in evidence, provided that the production of such documents may lead to disclosure of admissible evidence (*Fell v Presbyterian Hospital in New York at Columbia-Presbyterian Med. Ctr.*, 98 AD2d 624, 625 [1st Dept 1983]).

Courts have broad discretion in supervising discovery and the setting of reasonable terms and conditions therefor (*Matter of U.S. Pioneer Execs. Corp.*, 47 NY2d 914, 916 [1979]);

Mattocks v White Motor Corp., 258 AD2d 628, 629 [2d Dept 1999]). 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 an objection is made to part of an item or category, the part is to be specified (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3122:1).

ANALYSIS

The second subpoena served on Citibank, N.A., by the objectants, seeks unedited and unredacted bank statements issued by Citibank, N.A. in connection with: (1) a co-trustee's personal account, from which he apparently drew funds to pay decedent's expenses and reimburse himself for expenditures on behalf of the decedent and into which he deposited trust funds; (2) a joint bank account, in the names of decedent and a co-trustee; and (3) the decedent's credit card account. While it is impossible to determine with certainty whether all of the information contained in these statements is genuinely germane to the co-trustees' accounting, it certainly appears that the statements might contain relevant information, and that the reimbursements and charges claimed by the co-trustee must be viewed in the context of the complete statements. At the same time, the court is mindful that the statements issued in connection with the individual bank account of Joseph O'Donoghue may contain private information that is not germane to these proceedings. "In deciding the question of whether the information sought is material and necessary, the courts possess a wide discretion" (*Shutt v Pooley*, 43 AD2d 59, 60 [3d Dept 1973]).

Joseph Hyland argues that the second subpoena failed to meet the CPLR 3101 (a) (4) notice requirement because it didn't recite that some disclosure was provided to the objectants.

The court finds no merit in this argument. He further argues that objectants failed to meet the “special circumstances” requirement for discovery from non-parties. Special circumstances are no longer required (CPLR 3101 [a] [4]; *Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]), except with respect to certain types of discovery from expert witnesses (*Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010], citing CPLR 3101 [d] [1] [iii]). While Joseph O’Donoghue argues that he provided all of the information and documents pertaining to the transactions for which he sought reimbursement, the court notes that objectants did not limit their discovery requests to this limited category of documents.

CONCLUSION

The motion to quash is denied, with the following exception:

Citibank, N.A. is directed to produce all of the documents sought under the second subpoena, except that the Citibank, N.A. statements issued in connection with account xxx7314 in the individual name of Joseph O’Donoghue for the period of March 7, 2008 through June 30, 2012 shall be submitted directly to the court for *in camera* review, to determine whether any redactions of entries or other data are permissible. All other documents listed in the second subpoena shall be submitted to counsel for the objectants. All documents are to be produced within 30 days of the date of this decision.

This constitutes the decision and order of the court.

Dated: December 18, 2014

MERYL BERKOWITZ
Acting Judge of the
Surrogate’s Court

