

Matter of Knee
2014 NY Slip Op 33981(U)
October 23, 2014
Surrogate's Court, Richmond County
Docket Number: 2014-106/A,B, & C
Judge: Robert J. Gigante
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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In the Matter of the Estate of

MARIE STARACE KNEE,

2014-106/A,B, & C

Deceased.

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In this probate proceeding, Alan Knee, the surviving spouse of Marie Starace Knee (hereinafter "Decedent"), and the nominated executor of her Will dated October 14, 2004, petitioned to probate said Will on February 7, 2014. Although the Decedent's five children from a prior marriage initially executed waivers of process and consents to this petition, they subsequently moved to withdraw said waivers and consents. That motion was granted, and shortly thereafter, the decedent's son Robert Starace, the nominated alternate executor, filed a cross petition to probate the Decedent's Will.

Inasmuch as both sides seek probate of the Will, the primary contested issue between the surviving spouse and the Decedent's children is who shall serve as the executor of the Decedent's estate. In the many motion papers and court appearances held to date in this matter, the Decedent's children have alleged that Alan Knee is ineligible to serve pursuant to SCPA 707(e) because he wrongfully possesses property of the Decedent's from a safe deposit box she owned with one of her daughters. Further, the Decedent's children allege that Mr. Knee has failed to pursue, marshal and secure various estate assets, some of which may be in jeopardy of being lost. Mr. Knee adamantly denies the allegations and asserts that he is eligible to serve as the executor of the Decedent's estate.

Following the appearance of all attorneys involved in this matter on May 21, 2014, the Court issued an Order outlining an agreed-upon discovery schedule, and noting the desire of all parties that the eligibility hearing not be scheduled until the conclusion of all discovery. Furthermore, Robert Starace withdrew his cross-petition for probate, without prejudice, at that time.

MOTION TO COMPEL DISCOVERY PURSUANT TO CPLR 3124

Decedent's children filed the within motion to compel the following discovery requested in their demands: (1) inventory of a safe deposit box owned by the Decedent and her daughter Marietta Stapleton, as well as an inventory of safe deposit boxes owned by the Decedent and Alan Knee; (2) information relating to real property known as 457 Brighton Street, Staten Island, NY 10307; (3) personal income tax returns of Alan Knee; (4) bank statements for accounts owned by Alan Knee; (5) documents and information relating to any business entity owned by the Petitioner and/or the Decedent; (6) information and documents from any bankruptcy proceedings filed by the Petitioner; and (7) information and documents concerning Papa Real Estate I, LLC, an entity in which the Decedent had a 25% interest, and that owns income-producing property located in Brooklyn, New York.

Article 31 of the CPLR determines the items that are discoverable. Generally, CPLR 3101 directs full disclosure of all evidence that is material and necessary, and which will "assist preparation for trial by sharpening the issues and reducing delay and prolixity" (Allen v Crowell-Collier Publ'g. Co., 21 NY2d 403 [1968]; Matter of Carvel, 168 Misc2d 442 [Sur Ct, Westchester County 1996]). Courts have wide discretion in determining whether the proposed discovery satisfies such standards, generally using

a test of usefulness and reasonableness (Allen, supra; Paliotto v Hartman, 2 AD2d 866 [2d Dept. 1956]). Accordingly, discovery requested should be sufficiently related to the issues at hand, and should satisfy the Court that the information is being sought in good faith for possible use as evidence.

With respect to the demands for an inventory of the safe deposit box owned by Marietta Stapleton and the Decedent, Alan Knee responded that said inventory should be in the possession of Marietta Stapleton. The contents of this box are one of the major contested issues between the Decedent's children and Alan Knee, and it is the Court's understanding that the Decedent's children are attempting to ascertain whether one of the reasons Mr. Knee is ineligible to serve as executor is due to the alleged misappropriation of the contents of this safe deposit box. Accordingly, the Decedent's children have established the relevancy of the requested inventory, and the motion to compel said inventory - or a response as to why such an inventory cannot be provided - is granted.

Further, the Court finds that an inventory of the safe deposit box(es) owned by Alan Knee and the Decedent is also relevant to the within proceeding, as the Decedent's children are also attempting to ascertain whether any of the contents of the safe deposit box(es) belonged to the Decedent and should be administered as part of her estate. Accordingly, the motion to compel said inventory is granted.

As for the property at 457 Brighton Street, Staten Island, New York, pursuant to the terms of the Decedent's Will, Alan Knee was given a life estate in the property, subject to the requirement that he pay taxes, carrying charges, and nominal maintenance costs, and the Decedent's children were given equal remainder interests

in said property. Accordingly, the requests for documents related to foreclosure on the property and any property tax deficiency notices are relevant to Alan Knee's preservation of this significant estate asset and the motion to compel is granted. As for the requests related to rent receipts and lease agreements on the subject property for the years 2005 through 2013, however, the Court denies the motion to compel. Absent a provision in decedent's Will that the rent receipts should go to her children, any rental arrangements that existed either prior to the Decedent's death on October 6, 2013, or subsequent to such date, have no bearing on Mr. Knee's ability to serve as fiduciary or the validity of the Decedent's Will.

The Decedent's children also seek copies of Alan Knee's personal income tax returns, bank statements and copies of any documents relating to any bankruptcy proceedings filed by Mr. Knee. Despite the liberal rules of discovery, the discovery of personal financial records, and particularly tax returns, is generally disfavored. In fact, an individual's income tax returns are not discoverable absent a "strong showing that the information is indispensable to the claim and cannot be obtained from other sources" (Matter of Zirinsky, 26 Misc 3d 625 [Sur Ct Nassau Cty Oct. 16, 2009, quoting Latture v. Smith, 304 AD2d 534 [2d Dept 2003]). However, such disclosure has been permitted by courts where the "high duty of conduct" of a fiduciary is at issue (Matter of DeSantis, 38 Misc3d 1216(A) [Sur Ct Richmond County 2013]; Matter of Zirinsky, 26 Misc3d 625 [Sur Ct Nassau County 2009]). In these cases, the party seeking the discovery established a direct relationship between the information being sought and allegations of self-dealing and divided loyalty against the fiduciary in an accounting proceeding. Here, at the beginning stage of this probate proceeding, Decedent's

children seek tax returns and bank statements from 2005 through 2013, and 1997 through 2014, respectively. The majority of these time periods are well before the Decedent's death and have no bearing on Alan Knee's marshaling of assets or ability to serve as a fiduciary. However, the tax returns and bank statements for the time period surrounding the Decedent's death are directly related to the allegations against Mr. Knee as to the misappropriation of her assets and are therefore relevant. Accordingly, the motion to compel the discovery of Alan Knee's tax return for the year 2013 is granted, as well as is personal bank statements from January 2013 through the present date.

The motion to compel the discovery of Alan Knee's personal bankruptcy records is also granted. The bankruptcy documents are directly related to the allegations of Mr. Knee's ineligibility to serve based upon dishonesty, as the dishonesty contemplated by the statute is taken to mean "dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor" (Matter of Gottlieb, 75 AD3d 99 (1st Dept. 2010)).

Additionally, the Decedent's children seek copies of all documents concerning any business entities owned by Alan Knee and/or the Decedent. To the extent that there are business entities in which the Decedent had an interest, other than Papa Real Estate I, LLC, Alan Knee's marshaling and securing of such assets is relevant to his ability to serve as the executor of the Decedent's estate. Accordingly, the Court grants the motion to compel as to any business entities in which the Decedent had an interest, other than Papa Real Estate I, LLC. The motion to compel is denied insofar as the request relates to any documents pertaining to business entities owned solely by Alan Knee.

Finally, the Decedent's children's motion to compel discovery of documents, copies of communications, etc. regarding Papa Real Estate I, LLC, is denied. On May 21, 2014, counsel for Papa Real Estate I, LLC appeared and represented on the record that since the Decedent's death, rents have been collected, taxes paid, and the proceeds pursuant to the Decedent's twenty-five percent interest in this entity have been segregated in a separate bank account. Counsel for Papa Real Estate further explained that it did not want to release any documentary information until a fiduciary is appointed in the Estate. The Court declined to compel Papa Real Estate to produce documents on that date and will not now require such disclosures to be made until a fiduciary is appointed.

MOTION FOR PROTECTIVE ORDER PURSUANT TO CPLR 3103

Within this motion, the Decedent's children request a protective order, however they essentially respond to the three document demands made by Alan Knee. Insofar as Mr. Knee requests an inventory of the safe deposit box owned by the Decedent and her daughter Marietta Stapleton, the response is that such an inventory cannot be produced because the contents of the box are not under the control, custody or possession of Ms. Stapleton. The Court finds this to constitute a sufficient response to the discovery demand.

Mr. Knee further requests copies of all life insurance policies of the Decedent, as well as joint bank accounts, brokerage accounts, stocks and bonds held by the Decedent and any of her children. The Decedent's children responded that such documents are irrelevant to Mr. Knee's qualifications as a fiduciary. The Court agrees and the motion for a protective order is granted as to these document demands.

APPOINTMENT OF PRELIMINARY EXECUTOR

The Decedent's children have also filed a motion to dismiss Alan Knee's Application for Preliminary Letters Testamentary pursuant to CPLR 3211 § (a)(4), on the grounds that the issue of Mr. Knee's eligibility is pending before this Court in the probate proceeding, and if Mr. Knee is found ineligible to receive letters in the probate proceeding, he is also ineligible to receive Preliminary Letters Testamentary. Further, Decedent's children allege that Alan Knee can seek limited and restricted letters granting him the authority to complete any of the actions for which he claims he must be appointed Preliminary Executor. Subsequent to the September 10, 2014 court appearance, an application for Letters of Administration with Limitations was filed by Robert Starace, with a return date of November 5, 2014.

Since the inception of this proceeding, both sides have traded accusations as to the other's fitness to serve as the fiduciary of this Estate. The one point on which both sides agree, however, is the need for a fiduciary to be in place to protect the Decedent's interest in Papa Real Estate I, LLC, to commence a personal injury and wrongful death action on behalf of the appropriate distributees, to negotiate a worker's compensation claim, and to address the foreclosure proceedings on the Decedent's home.

Recognizing that the primary contested issue in this Estate is who will ultimately serve as its executor, the Court offered an expedited eligibility hearing and facilitated a discovery schedule between the parties. Nonetheless, the discovery schedule was not adhered to, and motion practice ensued. Both sides have brought the eligibility issue to the forefront once again, through their separate applications to be appointed Preliminary Executor and Limited Administrator.

In order for the Decedent's children to prevail on their arguments of Alan Knee's ineligibility due to dishonesty, the dishonesty must rise to the level of a pattern of financial wrongdoing that poses a genuine, serious threat to sound management of the estate (Mater of Flood, 236 NY 408 [1923]; Matter of Mecko, 70 NYS2d 41 [1947]). The present record is insufficient to establish that Alan Knee should be disqualified for dishonesty, without a hearing. However the record and proceedings to date clearly reveals the acrimonious relationship and distrust that exists between the Decedent's children and her surviving spouse.

The Court is well aware of the provisions of SCPA 1412 and the reasons therefor. It is generally in the best interest of the estate and estate beneficiaries that the nominated executor under a will be given preliminary letters testamentary for the purpose of expediting the administration of the estate where there would otherwise be delay (Matter of Scamardella, 169 Misc.2d 55 [Surr. Ct. Richmond Cty. 1996]). Although disharmony between a nominated fiduciary and beneficiaries of an estate alone is not a ground for disqualification, a fiduciary may be disqualified on the ground of being "otherwise unfit for office" where the disharmony rises to the level that it jeopardizes the interests of the beneficiaries and the proper administration of the estate (SCPA 707 [1][e]; Matter of Jurzykowski, 36 AD2d 488 [1st Dept 1971; Matter of Scamardella, *supra*; Matter of Rad, 162 Misc2d 229 [Surr. Ct. New York Cty. 1994]).

Here, the parties' conduct demonstrates that, indeed, the hostility between them has prevented the proper administration of the estate, and has already prolonged the battle as to each other's eligibility. Not only have the parties refused an expedited eligibility hearing, but they have also demonstrated their inability to comply with a standard discovery schedule. The suggestion that both Robert Starace and Alan Knee serve together as co-executors has also been rejected as not being possible.

Meanwhile, statute of limitations issues exist on the lawsuits to be commenced, the foreclosure proceedings must be addressed, and a consensus must be reached as to the Decedent's interest in Papa Real Estate I, LLC. The Decedent's children have expressed their desire to maintain the interest in this entity, whereas Alan Knee has expressed his desire to sell the interest. Until some of these issues are addressed, and the probate proceeding concluded, the Court finds that both Alan Knee and Robert Starace are unfit to serve as a fiduciary of the estate due to the hostility between them (SCPA 707 [1][e]; Matter of Jurzykowski, supra; Matter of Rad, supra). The Court will instead name a temporary administrator not interested in these proceedings, who will be impartial concerning all parties involved (see Scamardella, supra; Matter of Ranney, 78 NYS2d 602 [Sur. Ct. Monroe Cty. 1948]).

Accordingly, the Court hereby denies Alan Knee's Application for Preliminary Letters Testamentary and Robert Starace's petition to be appointed Limited Administrator, and grants Letters of Temporary Administration to the Public Administrator, upon his duly qualifying, without the filing of a bond, pursuant to SCPA 801, and settling upon all parties a decree granting Letters of Temporary Administration to the Public Administrator.

Although the return date of Robert Starace's application for Letters of Limited Administration is hereby vacated as being moot, this matter is restored to the Court's calendar of **November 5, 2014** for control purposes.

This decision constitutes the Order of the Court. All to proceed accordingly.

Dated: October 23, 2014



ROBERT J. GIGANTE, Surrogate