

Peters v Peters

2016 NY Slip Op 31254(U)

July 5, 2016

Supreme Court, New York County

Docket Number: 600456/2004

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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FRANCES PETERS,

Plaintiff,

DECISION/ORDER

-against-

Index No. 600456/2004
Motion Seq. 016

GEORGE PETERS and ANNA PETERS,

Defendants.

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HON. SALIANN SCARPULLA, J.:

Plaintiff Frances C. Peters (“Plaintiff”) moves for an order directing non-party Anderson Kill & Olick, P.C. (“Anderson Kill”) to comply with a subpoena *duces tecum*. Anderson Kill cross-moves for costs and fees that it incurred in responding to the subpoena.

In 2004, Plaintiff commenced this action against her brother George Peters and her mother Anna Peters (together “the defendants”) alleging that they had misappropriated millions of dollars of assets held in an off-shore trust, the Mimosa Trust, established by her aunt Athena Eliades. Plaintiff alleges that the defendants distributed the proceeds from the Mimosa Trust to themselves against her aunt’s instructions that Plaintiff would also be a significant beneficiary of the trust.

According to the complaint, the Mimosa Trust held cash, securities, and the shares of a company Sea Trade Maritime Corporation (“Sea Trade”), which operated a Greek cargo ship named the “MV Athena.” Plaintiff claims that the defendants convinced her aunt to purchase the MV Athena for them to start a shipping company (Sea Trade), the profits of which would be deposited into the Mimosa Trust or other trusts for the benefit of the Plaintiff and other family members.

During discovery, Plaintiff served a subpoena on Anderson Kill, a law firm that represented George Peters and Sea Trade on various matters from 2000 to 2012. Anderson Kill produced documents in response to the subpoena, but objected to certain requests on the grounds that the documents sought were either privileged or irrelevant. In particular, Anderson Kill objected to producing documents concerning the valuation of Sea Trade and the MV Athena.

Plaintiff now moves to compel Anderson Kill to fully respond to the subpoena. Specifically, Plaintiff contends that she is entitled to receive copies of an index that Anderson Kill created in preparing its response to the subpoena; unredacted versions of documents that have been produced; and certain documents relating to Sea Trade and the MV Athena.

In addition, Plaintiff seeks documents withheld by Anderson Kill on the basis of attorney-client privilege. Plaintiff asserts that the privilege does not apply based on the crime-fraud exception. Plaintiff argues that George Peters used Anderson Kill to perpetuate fraud in two ways: (1) Anderson Kill represented George Peters in a federal action in which he falsely stated that he owned shares in Sea Trade; and (2) Sea Trade's bank accounts were improperly used to pay Anderson Kill's invoices.

Discussion

CPLR § 3101(a) requires full disclosure of all evidence material and necessary to the prosecution or defense of an action. "Material and necessary" has been interpreted to mean any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 (1968); *Friel v. Papa*, 87 A.D.3d 1108, 1110 (2d Dep't 2011). A trial court is vested with broad discretion regarding discovery. *148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co.*, 62 A.D.3d 486, 487 (1st Dep't 2009).

Plaintiff's subpoena to Anderson Kill contained eleven broad requests seeking documents, such as those related to any trusts established by Athena Eliades or any trusts that listed George Peters, Anna Peters, or Plaintiff as a beneficiary. In response to the subpoena, Anderson Kill attorney Edward J. Stein states in an affidavit that his firm produced more than 600 documents, and that all responsive, relevant, and non-privileged documents were produced. Stein further states that Anderson Kill represented George Peters and Sea Trade on matters unrelated to this action, and that the firm reviewed 48 of the 155 boxes from its various representations of George Peters and Sea Trade in preparing its response to the subpoena.

Based on the information submitted, I find that Anderson Kill has adequately complied with the subpoena, with the exception of documents relating to valuation of Sea Trade and the MV Athena.¹ Despite Anderson Kill's objection, documents concerning the value of Sea Trade and the MV Athena are relevant to Plaintiff's claims. In the complaint, Plaintiff alleges that the defendants engaged in a fraudulent scheme to convert her share of the Mimosa Trust – a trust that purportedly contained shares of Sea Trade. Plaintiff further claims that the defendants improperly diverted the proceeds from Sea Trade and the MV Athena for themselves, rather than for the benefit of the Plaintiff, the Mimosa Trust, or other family members. Because the value of Sea Trade and the MV Athena are relevant to Plaintiff's alleged share of the Mimosa Trust, I order Anderson Kill to produce documents concerning the valuation of Sea Trade and the MV Athena within 21 days. In order to promote proportionality in discovery, Anderson Kill is required to search for these documents from the Insurance Coverage Matter only.

¹ Plaintiff's request for the Anderson Kill index is denied. It is unnecessary for Anderson Kill to produce the index because the underlying relevant documents have been produced. I further deny Plaintiff's request for unredacted versions of already produced documents based on Anderson Kill's representation that it does not have any unredacted versions of the documents.

Plaintiff contends that the communications between Anderson Kill and George Peters/Sea Trade are not protected by attorney-client privilege under the crime-fraud exception. A party seeking “to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime.” *In re New York City Asbestos Litig.*, 109 A.D.3d 7, 10-11 (1st Dep’t 2013).

Here, Plaintiff’s unsupported allegations that Anderson Kill represented George Peters in an action where he falsely stated that he owned shares in Sea Trade, and/or that Anderson Kill received funds that defendants improperly diverted from Sea Trade are insufficient to establish probable cause that the firm’s communications with George Peters or Sea Trade were in furtherance of any fraud or crime. Other than her unsupported allegations, plaintiff has utterly failed to show that the crime fraud exception applies. However, to the extent that Anderson Kill has withheld any relevant, privileged documents, I direct Anderson Kill to produce a categorical privilege log of those documents within 21 days.

In the cross-motion, Anderson Kill seeks attorney’s fees (\$13,912) and expenses (\$440.87) that it incurred in responding to the subpoena, as well as anticipated future expenses (\$29,475) that it would incur in order to comply with Plaintiff’s motion.

Pursuant to CPLR § 3122(d), the “reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.” As a non-party, Anderson Kill is entitled to recover \$440.87 in expenses and \$1,480 in attorney’s fees incurred for gathering and reviewing documents for production (time index nos. 3058906, 3066435, 3130517, and 3141273). I decline to award attorney’s fees to Anderson Kill with respect to time spent conferring with defendants’ counsel or determining which documents to withhold on the basis of privilege or relevancy.

Finkelman v. Klaus, 17 Misc.3d 1138(A) at *5 (Sup. Ct. Nassau County 2007) (noting that “the responding party does bear the costs associated with withholding documents from production due to relevancy or privilege”).

In accordance with the foregoing, it is

ORDERED that plaintiff Frances C. Peters’ motion to compel is granted to the extent described above, and otherwise denied; and it is further

ORDERED that non-party Anderson Kill P.C.’s cross-motion for costs and fees incurred in connection with plaintiff’s subpoena is granted in the amount of \$1,480 in attorney’s fees and \$440.87 in expenses for a total of \$1,980.87, and otherwise denied; and it is further

ORDERED that plaintiff Frances C. Peters is directed to pay non-party Anderson Kill P.C. for responding to the subpoena in the amount of \$1,980.87 on or before July 29, 2016; and it is further

ORDERED that any motions for summary judgment must be filed and served within 60 days of this decision and order.

This constitutes the decision and order of this Court.

DATE: 7/5/16


SALIANN SCARPULLA, JSC