

Matter of Biondo

2016 NY Slip Op 32595(U)

December 12, 2016

Surrogate's Court, Nassau County

Docket Number: 2015-385244

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Probate Proceeding, Will of

DECISION

SALLY BIONDO,

File No. 2015-385244

Deceased.

Dec. Nos. 31652

31720

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31721

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion to Quash by Jack Biondo, dated February 8, 2016	1
Affirmation in Support	2
Affidavit in Opposition	3
Second Affirmation in Support	4
Notice of Motion by Jack Biondo, dated March 9, 2016	5
Affirmation in Support	6
Notice of Cross-Motion by Salvatore Biondo and Sally Marie Biondo, dated March 21, 2016	7
Affirmation in Support of Cross-Motion and In Opposition to Motion to Quash, dated March 9, 2016	8
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Affidavit of Jack Biondo in Support Confidentially	10
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In this probate proceeding petitioner, the nominated and preliminary executor, Jack Biondo (“Jack”), in February of 2016, moved for an order pursuant to CPLR § 2304 and CPLR § 3103 (a) to quash a series of non-party witness subpoenas duces tecum served by respondents, Salvatore Biondo and Sally Marie Biondo (collectively hereinafter referred to as “Salvatore”) on banks/financial institutions and for a protective order. In a second

separate motion dated March of 2016, Jack sought the same relief or alternatively, a confidentiality order, as regards an additional non-party witness subpoena duces tecum served by Salvatore on Cohn Reznick LLP, an accounting firm. Salvatore opposed Jack's motion and cross-moved for an order pursuant to CPLR § 3124 compelling Jack's compliance with CPLR § 3122 [c] and 22 NYCRR § 207.27 with respect to their demand for documents and for an order pursuant to CPLR § 3126 [3] staying all further proceedings, including the scheduled SCPA § 1404 examinations¹ and any renewal of preliminary letters until document production is complete.²

Decedent died on June 13, 2015 at age 81 survived by her two sons, Jack and Salvatore and four grandchildren, Jack's two children, Michael Biondo and Sally Garbella Biondo (for whom the court has appointed a guardian ad litem) and Salvatore's two children, Michael Biondo and Sally Marie Biondo. A petition has been filed to probate the last will and testament dated April 22, 2015. The proposed will pours over to an inter vivos trust executed the same date. Under the will and the trusts the primary beneficiaries are decedent's two sons, with the grandchildren as remainder beneficiaries. There are prior wills [2011 and 2013] and inter vivos and /or testamentary trusts of the decedent which Jack describes as not differing substantially from the proffered will and attendant trust and the overall estate plan of decedent. Salvatore describes the distinctions as significant.

¹ The scheduled examinations were adjourned without date due the pending disclosure motions.

² Preliminary letters were extended for six months by separate decision and order.

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 phrase “material and necessary” is “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).

Trial courts have “broad power to regulate discovery to prevent abuse” (*Barouh Eaton Allen Corp. v International Bus. Machs. Corp.*, 76 AD2d 873, 874 [2d Dept 1980]). This includes the power to enjoin the dissemination of discovery material to those not directly involved in the case (44A NY Jur 2d Disclosure § 384 [2010], citing, among others, *Seaman v Wyckoff Heights Medical Center, Inc.*, 8 Misc3d 628 [Sup. Ct, Nassau County 2005], *affd in part, appeal dismissed in part*, 25 AD3d 598 [2d Dept 2006], *leave to appeal dismissed*, 7 NY3d 864 [2006], and *affd as modified on other grounds*, 25 AD3d 596 [2d Dept 2006]).

CPLR § 3103[a] provides that “[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such

order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” Under CPLR § 3103[a], “material confidential in nature ... shall be accorded judicial safeguards where possible” (*McLaughlin v G.D. Searle, Inc.*, 38 AD2d 810, 811 [2d Dept 1972]). Under the proper circumstances the court is empowered to condition the production of specified documents on execution of a confidentiality agreement (*see Yatter v William Morris Agency, Inc.*, 273 AD2d 83 [1st Dept 2000]). A protective order may bar the dissemination of information to anyone other than counsel working on the case (*see Liebman & Charme v Lanzoni*, 164 Misc 2d 302 [Civ Ct, New York County 1995]). Generally, the party seeking a protective order bears the burden of demonstrating entitlement to such order (*see Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452 [2d Dept 1994]; *see also Ledonne v Orsid Realty Corp.*, 83 AD3d 598, 599 [1st Dept 2011]).

I. JACK BIONDO’S MOTION TO QUASH DATED FEBRUARY 8, 2016

On January 16, 2016, the respondents, Salvatore, issued five subpoenas to Signature Bank, Bank of America, Capital One Bank, Grassi & Co. and Wells Fargo Advisors. The subpoenas sought, according to Salvatore, a “wide range of financial and other documents pertaining to any personal or corporate accounts held by decedent.” Specifically, the subpoenas sought the following:

“All information, records, correspondence, financial statements, ledgers, signature cards, transaction slips (withdrawal, transfer and deposit), canceled checks (front and back), contents of safety deposit boxes, proof of direct deposit payments, account agreements,

notification of electronic fund transfers, beneficiary designations and Power of Attorney pertaining to any personal or corporate accounts held by the Decedent (either individually, joint or in trust) for the period of April 22, 2012 through and including June 13, 2015.”

The executor, Jack, asserts that the subpoenas are “overbroad and procedurally defective.” The executor further asserts that the subpoenas do not include a Notice, stating the reasons the requested disclosure is sought or required.

“An application to quash a subpoena should be granted ‘[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious’ . . . or where the information sought is ‘utterly irrelevant to any proper inquiry’” (*Kapon v Koch*, 23 NY3d 32 [2014], internal citations omitted). Jack seeks to use the notice requirements of CPLR § 3101[a][4] as a shield to delay or preclude nonparty disclosure. Moreover, the notice requirement “was meant to apprise a stranger to the litigation the ‘circumstances or reasons’ why the requested disclosure was sought or required” (*Kapon v Koch*) and Jack, as a party, may not avail himself of that provision. The respondents’ attorney shall prepare Notices for each of the subpoenas, setting forth the reason such disclosure is necessary; thereby curing any Notice defect.

The court holds the information sought in the subpoenas is not utterly irrelevant. Accordingly, Jack’s motion to quash, dated February 8, 2016 is accordingly **DENIED**.

II. JACK BIONDO’S MOTION TO QUASH DATED MARCH 9, 2016

The second separate motion to quash, or alternatively for a confidentiality order, concerns the additional non-party witness subpoena duces tecum served by Salvatore on

Cohn Reznick LLP. The subpoena seeks the following financials relating to decedent's personal or corporate accounts, or accounts of any corporation or entity she held an interest in whatever form, for the period from April 22, 2012 to the date of death:

“. . . memorandum, notes, records, correspondence, financial statements, brokerage agreements , ledgers, signature cards, transactions slips . . . cancelled checks . . . Federal and State income tax returns, expense reports general ledgers, corporate minutes, invoices for services, time records, valuations, appraisals, inventories, leases, deeds, rent rolls, account agreements, notification of electronic fund transfers and Power of Attorney instruments”

Jack claims that the subpoena is overbroad, outside the scope of an SCPA § 1404 examination [which is limited to possible objections to probate], the failure to provide the requisite foundation for the demand for tax returns, harassing and unnecessary by reason of the fact that Jack has already produced a significant number of the documents called for by the subpoena. In response, Salvatore asserts that the subpoena is proper in that they are entitled to explore the full breath of decedent's mental capacity at execution of the will and trust as evidenced by business activities and otherwise, her business affairs and financial status, transactions between her and Jack, and the potential, given the various powers of attorney given to Jack and suspected questionable transfers to himself, the Bruce J. Leuzzi, Esq. letter to decedent of June of 2013, and the multiple changes by her in her estate planning between April of 2011 and April of 2015, of undue influence or overreaching exerted over decedent as providing a basis for the framing of objections to probate.

The fact that there may be some duplication between the document production by Jack

in response to Salvatore's demands and the documents subpoenaed from Cohn Resnick provides no basis to quash. Decedent was a woman of very substantial means (assets listed in excess of \$86,000,000.00) and diverse real and personal property holdings. In the language of *Kapon* the documents sought from Cohn Resnick while broad in scope are clearly not "utterly irrelevant."

Disclosure of tax returns is disfavored since income tax returns contain confidential and private information (*see Walter Karl, Inc. v Wood*, 161 AD2d 704 [2d Dept 1990]; *Briton v Knott Hotels Corp.*, 111 AD2d 704 [2d Dept 1985]). The party seeking to obtain production of income tax returns must make a strong showing of necessity and an inability to obtain the information contained in the income tax returns from any other source (*see Pugliese v. Mondello*, 57 AD3d 637 [2d Dept 2008]; *Samide v Roman Catholic Diocese of Brooklyn*, 5 AD3d 463 [2d Dept 2004]; *Walter Karl, Inc. v Wood*, 161 AD2d 704 [2d Dept 1990]; *Abbene v Griffin*, 208 AD2d 483 [2d Dept 1994]). As Salvatore is entitled to be on equal footing with Jack respecting estate finances, the requisite foundation has been presented and the tax returns must be produced. The second motion to quash is accordingly **DENIED**.

The court now turns to the alternative relief requested by Jack of the imposition of a confidentiality agreement or order.

Under the appropriate circumstances, confidentiality agreements or orders are standard fare in any context where there are trade secrets, unpublished and otherwise undisclosed

proprietary business procedures or sensitive competitive information involved which would be subject to abuse and unfair advantage if widely disseminated, but are relevant to a lawsuit and the disclosure of which is required (*see Butt v New York Medical College*, 7 AD3d 744 [2nd Dept 2004]; *Jackson v Dow Chemical Co., Inc.*, 214 AD2d 827 [3d Dept 1995]; *Tymko v K-Mart Discount Stores, Inc.*, 75 AD2d 987 [4th Dept 1980]). There is no showing that Salvatore has any interest or reason to disseminate the requested information to third parties or otherwise abuse the process. The viability and success of the businesses is in the joint best interest of Jack and Salvatore regardless of the outcome of the pending proceedings. The confidentiality application is accordingly **DENIED**.

III. RESPONDENTS SALVATORE BIONDO & SALLY MARIE BIONDO'S CROSS MOTION

CPLR § 3122[c] requires that the documents produced pursuant to a subpoena or order to produce documents for inspection shall be produced “as they are kept in the regular course of business” or they can be “organize[d] and label[ed]” to track the categories set out in the demand. Salvatore served a demand dated December 29, 2015 with an 8-page rider. Jack responded on or about February 12, 2016. There is a litigation cover response to the demand of that date and apparently 2,000 plus pages of Bates stamped documents were produced by Jack. Jack claims he has complied with the “regular course of business alternative” in making the production. In a letter dated February 24, 2016, Jack raised the regular course of business issue but nevertheless did categorize the documents but Jack’s 7 categories did not correspond to the 30 odd of categories of the demand.

CPLR § 3122[c] provides that persons shall produce the documents as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request. The court finds that Jack did not produce the documents as they were kept in the regular course of business and the statute does not authorize Jack to create his own categories. The cross motion to organize the materials is granted to the extent that Jack shall supply Salvatore, within twenty days of the date of this Decision, with an index in which Jack shall identify the documents produced in response to each of Salvatore's demand categories (*see Matter of O. Winston Revocable Trust*, 24 Misc 3d 768, 771 [Sur Ct, Westchester County 2009]).

Upon a reading of ¶¶ 95 to 97 of counsel's moving affirmation it appears there may have been some pages missing from the documents produced to date. Jack is directed to serve complete copies of those documents with 10 days from the date hereof.

Salvatore lastly sought to stay the scheduled SCPA §1404 examinations and any renewal of preliminary letters until Jack complied with the document demand. The court has addressed the question of preliminary letters in a separate decision and order. The parties have realistically adjourned the scheduled examinations and no date for resumption has yet been agreed upon. The parties shall agree on appropriate resumption dates of the SCPA 1404 examination.

This matter shall appear on the court's calendar on January 11, 2017 at 10:00 a.m. for a conference in this matter.

This constitutes the decision and order of the court.

Dated: December 12, 2016
Mineola, New York

E N T E R :

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Judge of the Surrogate's Court

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