

Matter of Levine (Peltz)
2017 NY Slip Op 30698(U)
April 7, 2017
Surrogate's Court, Nassau County
Docket Number: 2011-363619/I
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**Accounting by Mark C. Peltz, as the Trustee of the Trust
under Article Third u/w/o**

DECISION

JULES LEVINE,

Deceased,

**File No. 2011-363619/I
Dec. Nos. 31992
31993**

f/b/o Mary Ann Levine.

PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion..	1
Affidavit in Support, with Exhibits.	2
Notice of Cross Motion to Stay.	3
Affirmation in Opposition to Motion, and in Support of Cross Motion, with Exhibits..	4
Reply Affirmation..	5

In this contested accounting proceeding by Mark C. Peltz, as Trustee of the Trust under Article Third of the will of Jules Levine, for the benefit of Mary Anne Levine, the respondent, Mary Ann Levine, moves for an order pursuant to CPLR §3124, compelling (1) the production of certain documents by Mark C. Peltz, the Trustee of the Testamentary Trust, which were identified in the Trustee’s privilege log submitted by counsel for the Trustee and which were allegedly improperly withheld on the ground of privilege; (2) production of the documents requested in demands numbered 21 and 22 seeking communications between the Trustee or his agents and the adult children of the decedent by a prior marriage or their agents relating to the Trust or requiring the production of a privilege log with respect to each

document withheld; and (3) the production of all requested documents that are in the possession of Warshaw Burstein, LLP (hereinafter referred to as “Warshaw”), petitioner’s prior counsel, or the production of a privilege log as to each document withheld.

The trustee cross moves for an order staying SCPA §2211 examinations pending determination of Respondent’s motion.

BACKGROUND

The decedent, Jules B. Levine, died a resident of Nassau County on December 25, 2010, survived by his wife, Mary Ann Levine (respondent), and the children of his first marriage, Benjamin J. Levine and Annie Levine. A will, dated October 1, 2010 was admitted to probate on February 23, 2011, and letters testamentary and letters of trusteeship were issued to the petitioner, Mark C. Peltz. The will left the decedent’s automobiles and his boat to his surviving spouse, Mary Ann Levine. Article I of the will also created a trust for the decedent’s spouse and bequeathed to the trust \$7,500,000.00 and one-half of the proceeds of the sale of the house in Florida owned by the decedent. In addition, Article III of the decedent’s will bequeathed a house in Long Beach and a Montauk apartment owned by the decedent, along with their household furnishings and effects, for the use of the surviving spouse during her lifetime. Upon the death of the surviving spouse, the remaining trust assets are to be divided in half and placed in trusts for the decedent’s children.

The affidavit in support of the motion indicated that Mark C. Peltz, during the lifetime of the decedent, earned substantial fees for accounting services for work performed for the

decedent's business and after decedent's death, he continued to earn such fees from the business which is now controlled by the decedent's son, Benjamin J. Levine.

In this accounting proceeding, Mary Ann Levine sought production of various documents from Mark C. Peltz and his prior attorneys. Mark C. Peltz refused to produce certain documents on the grounds of privilege and submitted a privilege log instead. Additionally, Mary Ann Levine claims that Mark C. Peltz objected to producing documents with respect to communication between him or his counsel and the children or their counsel concerning the Trust.

I. Respondent's Motion

(1) Production of documents by Mark C. Peltz identified in the Trustee's privilege log

Respondent, Mary Ann Levine, asserts that the documents as to which the Trustee, Mark C. Peltz, asserts attorney client privilege are subject to the "fiduciary exception" to the attorney client privilege in that respondent, Mary Ann Levine, is the beneficiary of the Trust and thus the actual client (*see Nama Holdings, LLC v Greenberg Taurig, LLP*, 133 AD3d 46, 52-53 [1st Dept 2015]). Trustee's counsel asserts that, based upon a 2002 amendment to CPLR §4503, the fiduciary exception does not apply to executors or trustees of testamentary trusts. Respondent replies that the Trustee's position is incorrect and the statutory amendment "does not protect or apply the privilege where communications between the fiduciary and his counsel pertain to acts undertaken in the fiduciary's representational capacity such as acts taken by the fiduciary in administering the estate or trust assets and

there is good cause for the disclosure.” Respondent focuses on the statutory language: “the existence of a fiduciary relationship between the personal representative and a beneficiary of the estate *does not by itself* constitute or give rise to any waiver of the privilege”, but hasn’t clearly identified what factor other than the fiduciary relationship Respondent contends creates a waiver of the privilege. Respondent appears to invoke only the fiduciary relationship as the basis for the claimed waiver of attorney/client privilege.

The court finds that the fiduciary exception is no longer available to the beneficiary of a testamentary trust (*see* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C4503:7 [“A 2002 amendment to CPLR 4503 added a new subdivision [2] to paragraph [a] with the purpose of abolishing the ‘fiduciary exception’ to the attorney-client privilege with respect to communications between counsel and the personal representatives of decedents’ estates”]). Respondent’s argument, if accepted, would abrogate the clear purpose and intent of the 2002 amendment. Respondent’s position is not supported by the cases cited (*see Stock v Schnader Harrison Siegel and Lewis*, 142 AD3d 210 [1st Dept 2016]¹ and *Ulico Cas. Co. v Wilson, Elser, Moscowitz, Edelman & Dicker*, 1 AD3d 223 [1st Dept 2003]), as neither case involved an estate proceeding, executor or testamentary trustee. The court further holds that the attorney/client privilege is available to the Trustee in this proceeding pursuant to the express language of CPLR §4503[a][2], and Respondent’s request for production of the documents described in the Trustee’s privilege

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This decision also contains a detailed history and analysis of the fiduciary exception to the attorney/client privilege.

log, to the extent that it is based upon the fiduciary exception, is **DENIED**.

“The party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client ‘for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,’ that the communication is predominantly of a legal character, that the communication was confidential and the privilege was not waived” (*Ambac Assur Corp v Countrywide Home Loans, Inc.*, 27 NY3d 616, 623-624 [2016], citing *Rossi v Blue Shield of Greater NY*, 73 NY2d 588, 593-594 [1989]).

2. Documents Requested in the Privilege Log

Respondent also asserts that communications between counsel for the Trustee and counsel for the children requested in demands numbered 20 and 21 are not privileged “since they are communications between separate parties not represented by the same counsel (*see People v Osorio*, 75 NY2d 80 [1989]); and while the Trustee maintains there is a joint defense agreement that was initially oral and subsequently in writing, no such writing has been produced.²

According to Respondent, the joint defense or common interest privilege is a narrow one (*see American Reinsurance Co. v United States Fidelity and Guaranty Co.*, 40 AD3d 484 [1st Dept 2007]), requiring a showing that the “legal interest the parties have in common are identical” (*Hyatt v State of California*, 105 AD3d 186 [2d Dept 2013]). Respondent

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The existence of such an agreement, whether oral or written, is not determinative of whether or not the common interest exception should be applied.

claims there is a clear difference between the obligations of Mark C. Peltz, as Trustee, and the rights of decedent’s children, as beneficiaries. Respondent asks that “at the very least, a detailed privilege log has to be produced and all communications between their counsel that do not directly relate to the personal property litigation should be produced.”

The Trustee responds that some of these demands “fall within the attorney work product privilege” (*Geffner v Mercy Med. Ctr.*, 125 AD3d 802 [2d Dept 2015]) and the “turnover proceeding” to which they relate “has not been entirely resolved”.³ Some of the documents demanded fall under the attorney client privilege; and the requested documents fall within the “common interest privilege” (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616 [2016]; *Lieberman v Gelstein*, 80 NY2d 429, 437 [1992]).

The common-interest privilege is an exception to the traditional rule that the presence of a third party waives the attorney-client privilege; the privileged communication must be for the purpose of furthering a legal interest common to the client and the third party; and the respective legal interests must be identical as opposed to just similar (*see Hyatt v State of California Franchise Tax Board*, 105 AD3d 186 [1st Dept 2013]).

In *Ambac*, the Court of Appeals held:

“As an exception to the general rule that communications made in the presence of or to a third party are not protected by the attorney-client privilege, our current formulation of the

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This reference is to a discovery proceeding commenced by the Trustee against Respondent, File No. 2011-363619/D, wherein the court granted partial summary judgment to each of the Trustee and Respondent by Decision Nos. 30840, 3041, dated June 30, 2015. The decision is subject to cross appeals.

common interest doctrine is limited to situations where the benefit and necessity of shared communications are at their highest, and the potential for misuse is minimal. Disclosure is privileged between codefendants, coplaintiffs or persons who reasonably believe that they will become colitigants, because such disclosures are deemed necessary to mount a common claim or defense, at a time when parties are most likely to expect discovery requests and their legal interests are sufficiently aligned that “the counsel to each [is] in effect the counsel to all” (*Chahoon*, 62 Va at 841-842).⁴ When two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties’ exchange of privileged information and therefore thwart any desire to coordinate legal strategy. In that situation, the common interest doctrine promotes candor that may otherwise have been inhibited.

The same cannot be said of clients who share a common legal interest in a commercial transaction or other common problem but do not reasonably anticipate litigation . . .”

Here, while the children’s counsel has filed a notice of appearance in the discovery proceeding filed in this court (2011-363619/D) the children were neither petitioners nor respondents. They were the beneficiaries of the residual estate under the will and remaindermen under the Trust. They were neither “codefendants, coplaintiffs [n]or persons who reasonably believe[d] that they [would] become colitigants” as their beneficial interests were being represented by Mark C. Peltz as the Trustee/Executor and they were not necessary parties.⁵

⁴ *Chahoon v The Commonwealth*, 21 Gratt 822 [Va 1871]).

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In the federal context, the term “common interest” typically entails an identical or nearly identical legal interest as opposed to a merely similar interest (*FDIC v Ogden Corp.*, 202 F3d 454, 461 [1st Cir 2000]).

The burden of asserting and proving each element of privilege and a lack of waiver is upon its proponent (*see People v Ossorio*, 75 NY2d 80, 84 [1989]) and the Trustee must prove, to the court's satisfaction that he and the children "share a common legal interest". 'Such showings must be based on competent evidence, usually through affidavits, deposition testimony, or other admissible evidence' (*id.*). As "the waiver inquiry depends heavily on the factual context in which the privilege was allegedly waived, courts should review the particular circumstances of each case to determine whether, and to what extent, waiver occurred (*In re Grand Jury Proceeding*, 219 F3d 175, 188 [2d Cir 2000]). Here, the affirmative of that proposition is supported solely by an attorney affirmation. This is insufficient to carry the Trustee's burden (*see Gipe v Monaco Reps, LLC*, 2013 WL 3389345 [Sup Ct New York County 2013]). No case law supporting the proposition that the admitted fiduciary relationship equals a shared legal interest was presented by the Trustee.

The court concludes that the Trustee has failed to carry his burden to establish that the attorney-client privilege has not been waived with respect to production of the documents requested in demands numbered 21 and 22 seeking communications between the Trustee or his agents and the adult children of the decedent by a prior marriage or their agent relating to the Trust. With respect to such responsive documents as are claimed to be subject to the attorney work product privilege (CPLR 3101[c]), the Trustee may produce a detailed privilege log in respect to such claims. Subject to the foregoing, Respondent's motion to require production of such documents is **GRANTED**.

III. The Warshaw Subpoena.

Respecting the Warshaw subpoena, other than the Warshaw billing records which have been produced, all requested documents are subject to claim of privilege though no privilege log has been produced (CPLR 3122[b]). Respondent's argument for production was based upon application of the fiduciary exception.

The Trustee argues that the requested communications "are patently privileged and immune from discovery under the attorney client privilege" (*Priest v Hennessy*, 51 NY2d 62, 69 [1980]) or the attorney work product privilege (*Geffner v Mercy Med. Ctr.*, 125 AD3d 802 [2d Dept 2015]; CPLR §3101[c]).

The court has already concluded that the fiduciary exception to the attorney/client privilege does not apply to executors or testamentary trustees. Whether the attorney client privilege is properly invoked with respect to each responsive document cannot be determined on this record.

A privilege log is necessary for Respondent to analyze and determine whether to challenge any claim of privilege, as an *in camera* review of certain documents may be necessary. The portion of Respondent's motion demanding production of a privilege log is accordingly **GRANTED** and Warshaw is directed to produce a detailed privilege log within thirty (30) days of the date of this decision and order.

B. The Cross Motion for a Stay of SCPA §2211 Examinations Pending Determination of Respondent's Motion.

Inasmuch as the court has now determined Respondent's motion, the cross motion is **DENIED** as moot.

This matter will appear on the court's calendar for conference on May 18, 2017 at 10:00 a.m. to schedule the SCPA §2211 examination.

This constitutes the decision and order of this court.

Dated: April 7, 2017
Mineola, New York

E N T E R :

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Judge of the Surrogate's Court

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