

Matter of Schulhof
2018 NY Slip Op 30731(U)
April 16, 2018
Surrogate's Court, Nassau County
Docket Number: 2012-369045/B
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Accounting by MICHAEL P. SCHULHOF,
as the Executor of the Estate of**

**HANNELORE SCHULHOF,
a/k/a HANNELORE B. SCHULHOF,**

Deceased.

**DECISION AND ORDER
File No. 2012-369045/B
Dec. No. 34176**

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PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion..	1
Affirmation in Support of Motion with Exhibits.	2
Memorandum of Law in Support of Motion.	3
Affirmation in Opposition to Motion with Exhibits..	4
Reply Affirmation in Further Support of Motion with Exhibits..	5

In this executor’s accounting proceeding, respondents Wendy Silverman, Todd Silverman, Scott Silverman and Lauren Kolker, move the court for an order compelling the petitioner, Michael P. Schulhof, to answer the respondents’ request for production of documents and for such other, further and different relief as may be just and proper. Petitioner opposes the motion.

Hannelore Schulhof, a/k/a Hannalore B. Schulhof, died a resident of Nassau County on February 23, 2012. The decedent’s last will and testament, dated October 31, 2006, was admitted to probate on March 19, 2012 and letters testamentary issued to Michael P. Schulhof, as executor, that same date. Respondent Wendy Silverman is a distributee, specific beneficiary and residuary beneficiary of the decedent’s estate and respondents. Todd Silverman, Scott Silverman and Lauren Kolker are the adult children of Wendy Silverman and beneficiaries of cash bequests of the decedent’s estate.

By decision and order dated July 22, 2016, this court directed the executor to file an interim accounting. On December 28, 2016, the executor filed a petition seeking to settle his intermediate account of the estate for the period from the decedent's death on February 23, 2012 to November 30, 2016.

On May 9, 2017, the respondents served the petitioner with a request for production of documents, which included 163 itemized requests. On June 30, 2017, the petitioner served the respondents with his response to their request for production of documents, as well as the petitioner's first privilege log. In a stipulation dated July 18, 2017, the petitioner agreed to provide additional documents and an index of document discovery produced to date. On August 11, 2017, the petitioner served the respondents with additional documents, the petitioner's amended privilege log and an index of document production. Petitioner has produced a total of 13,362 pages of documents to the respondents.

In moving to compel the petitioner to further respond to their request for production of documents, the respondents assert that the petitioner has only provided documents responsive to 28 of the respondents' 163 demands. However, in the respondents' memorandum of law in support of their motion to compel, the respondents only take issue with the petitioner's responses to the following document requests: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 35, 36, 37, 42, 49, 52, 53, 60, 67, 79, 82, 83, 84, 85, 86, 87, 88, 89, 91, 93, 97, 99, 100, 117, 123, 124, 126, 127, 129 and 130. Respondents take the position that, for the most part, the documents produced by the petitioner do not relate to the demands; that certain of the responses were self-contradictory; and that petitioner's responses are replete with non-germane, boilerplate objections. Specifically, the respondents maintain that the petitioner's claim of attorney-client privilege fails to specify adequate information to assert the privilege and that petitioner's claim of privilege regarding communications with

an accountant is improper. Respondents also further assert that the petitioner's response is deficient for his refusal to provide retainer agreements, bills, statements and evidence of payment regarding fees of attorneys, accountants and appraisers.

Respondents' document requests seek, inter alia, all documents and communications between the decedent and any attorney related to the decedent's will, the Hannelore B. Schulhof Foundation ("Foundation"), the Schulhof Collection LLC ("Collection"), the Schulhof Family Trust ("Trust") and any powers of attorney executed by the decedent (Request No. 1), as well as all documents and communications between petitioner and any attorney and his family and any attorney related to the decedent's will, the Foundation, the Collection, the Trust and any powers of attorney executed by the decedent (Requests No. 7 and No. 8). Respondents also seek all documents and communications between the decedent, petitioner, petitioner's family and any attorney relating to the decedent's financial planning and/or elder planning, including any financial strategies (Requests No. 9, No. 12 and No. 14). Respondents also request documents related to legal services rendered to the decedent and/or the estate, the Foundation, the Collection and the Trust (Requests No. 79 and No. 97).

In opposing the respondents' motion to compel, the petitioner argues that the respondents are not entitled to documents and communications between the decedent and her attorneys, petitioner and his attorneys and petitioner's family members and their attorneys, because they are protected by the attorney-client privilege.

CPLR § 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words, 'material and necessary,' are . . . 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]). However, CPLR § 3101 (b) provides that “[u]pon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.” Further, CPLR § 3101 (c) provides that “[t]he work product of an attorney shall not be obtainable.”

Section 4503 of the Civil Practice Law and Rules codifies the attorney-client privilege in New York. CPLR § 4503 (a) (1) provides, in relevant part, that:

“Unless the client waives the privilege, an attorney or his or her employee or any person who attains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action”

CPLR § 4503 (a) (2) provides, in relevant part, that:

“(A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:

(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and

(ii) 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 for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.”

CPLR § 4503 (a) (2) (B) defines personal representative to include an executor.

CPLR § 4503 (b) provides for a limited exception to the attorney-client privilege in

an action involving the probate, validity or construction of a will or revocable trust.

A party asserting the attorney-client privilege has the burden of demonstrating that the communication being claimed as privileged was a confidential communication predominantly of a legal character 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 and that the privilege was not waived (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616 [2016]). “A communication concerning the fee to be paid has no direct relevance to the legal advice to be given. It is a collateral matter which, unlike communications which relate to the subject matter of the attorney’s professional employment, is not privileged” (*Matter of Priest v Hennessy*, 51 NY2d 62, 69 [1980]).

To the extent that the petitioner has asserted the attorney-client privilege in response to respondents’ document request Nos. 1, 7, 8, 9, 11, 12, 14, 24, 25, 79, 97, 123 and 124, the petitioner must provide any and all non-privileged documents, such as those concerning attorneys’ fees, and must provide respondents’ counsel with a privilege log, fully compliant with CPLR § 3122 (b), for all documents responsive to those requests for which he claims the attorney-client privilege.

To the extent the petitioner has objected to producing communications with an accountant by claiming the attorney-client privilege, “[a] client’s communications with its accountants are not afforded special protections under New York law and are subject to full disclosure (*Delta Fin. Corp. v Morrison*, 13 Misc 3d 441, 445 [Sup Ct, Nassau County 2006]). An exception exists when the accountant is retained for the purpose of assisting an attorney in giving legal advice to a client (*United States v Kovel*, 296 F2d 918 [2d Cir 1961]). However, petitioner has failed to demonstrate that this exception applies to the documents sought by Requests No. 13 and No. 14 and petitioner is directed to provide any and all

documents responsive to these requests.

Petitioner also takes the position that the respondents are not entitled to documents in this accounting proceeding which relate to other proceedings. Specifically, the petitioner maintains that document requests related to the Collection are improper because the Surrogate's Court does not have subject matter jurisdiction over the action relating to the Collection.

On January 19, 2012, the decedent created the Collection and on January 23, 2012, the decedent transferred a significant number of art works which she owned to the Collection. Pursuant to the operating agreement of the Collection, the decedent was the sole member and petitioner was appointed its manager. The respondents allege, upon information and belief, that on or about February 21, 2012, the petitioner, acting as the agent of the decedent and as the trustee of the Trust, executed an amended and restated operating agreement, which changed the members of the Collection, with the decedent owning 95 non-voting common shares and the Trust owning 5 non-voting common shares and 100 governance shares. Respondents assert that significant assets of the estate are under the control of the petitioner as manager of the Collection and therefore certain of respondent's document requests involve the Collection, the Trust and the petitioner's use of the power of attorney of decedent.

By stipulation dated March 1, 2017, petitioner's counsel has already agreed to provide respondents' counsel with an accounting of the Collection and also agreed to advise whether the petitioner conducted any financial transactions as decedent's attorney-in-fact. By stipulation dated April 5, 2017, petitioner agreed to provide an affidavit stating all financial transactions as decedent's attorney-in-fact. By agreeing to produce this information, it appears that petitioner at least tacitly conceded the relevance of the assets of the Collection

and the relevance of his actions as the decedent's attorney-in-fact to this accounting proceeding.

On April 24, 2017, the petitioner, in his individual capacity and as manager of the Collection, commenced a declaratory judgment action in Supreme Court, New York County against respondent Wendy Silverman, Thomas Schulhof, Dean Schulhof, R. Mark Schulhof and Amy Schulhof, seeking judgment declaring that the petitioner has the right to dissolve, wind up and liquidate the Collection; confirming the accounting of the Collection furnished by the petitioner; and finding that the petitioner has not breached his fiduciary duty and has no liability to any of the defendants or the Collection. The petitioner argues that the respondents' requests for documents related to the Collection and to the petitioner's acts as manager of the Collection are an attempt to bypass a proper and orderly discovery procedure in the declaratory judgment action and that such requests are not relevant to the estate accounting.

Respondent Wendy Silverman, who is a defendant in the declaratory judgment action, made a motion in Supreme Court, New York County to stay that action and have it transferred to this court. Respondents' counsel has advised this court that on January 10, 2018, Hon. Eileen Bransten of Supreme Court, New York County ruled from the bench that the declaratory judgment action be transferred to this court on the ground that the Collection is an asset of the estate and that the issues regarding the Collection should be resolved within this accounting proceeding (Reply Affirmation in Further Support of Motion to Compel ¶¶ 5-9).¹

¹ Respondents' counsel avers that he has ordered and is awaiting receipt of a copy of the transcript of the decision of Justice Bransten (Reply Affirmation in Further Support of Motion to Compel ¶ 9).

In light of Justice Bransten's determination, the petitioner's objections to producing the documents requested by the respondents concerning the Collection are no longer viable. Given the apparently interlocking and/or overlapping nature of the relationships among the decedent's estate, the Collection, the Foundation and the Trust, the document requests made by the respondents concerning these entities are relevant to this proceeding (*Matter of Shehan*, 285 AD 785 [4th Dept 1955]; *Matter of Voice*, 35 Misc 2d 225 [Sur Ct, Nassau County 1962]). Moreover, since the power of attorney granted to the petitioner by the decedent appears to have been utilized in creating the relationships among these entities and perhaps transferring assets among them, the respondents' requests with regard to the power of attorney also seek information relevant to this proceeding (*Matter of Dorman*, 175 Misc 2d 479 [Sur Ct, Cattaraugus County 1998]). Petitioner is therefore directed to respond to all such requests.

Finally, the petitioner argues that the time period covered by the respondents' document requests is fatally flawed. The respondents' request for production of documents covers the time period from February 23, 2009 to the date of the petitioner's response. Since the Collection was not created until January 19, 2012, requests for documents prior to that date are not calculated to lead to relevant evidence. Moreover, since the accounting is for the period from the date of the decedent's death on February 23, 2012 up to November 30, 2016, requests for documents after that date are not appropriate. Accordingly, in producing documents as heretofore directed in this order, the time period covered shall be from January 19, 2012 until November 30, 2016.

Respondents' motion to compel is **GRANTED**, to the extent set forth herein. Petitioner must produce responsive documents and a new privilege log, as directed herein, as well as an index of the new documents produced, within thirty (30) days of the date of this

decision and order.

A compliance conference shall be held before the court on **June 11, 2018 at 10:00 a.m.**, at the Nassau County Surrogate's Court.

This constitutes the decision and order of this court.

Dated: April 16, 2018
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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