

Matter of Modell

2018 NY Slip Op 31269(U)

June 19, 2018

Surrogate's Court, New York County

Docket Number: 2001-1730

Judge: Nora S. Anderson

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Petition of
Abby Modell, as Co-Trustee and Income
Beneficiary of the Testamentary Trusts
Established by

New York County Surrogate's Court

Date: June 19, 2018

MICHAEL MODELL,

File No. 2001-1730

Deceased,

for a Decree Revoking Letters of
Trusteeship Issued to Mitchell Modell
and Joel Goldberg and Other Relief.

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In the Matter of the Judicial
Settlement of the First Account of
Proceedings of Mitchell Modell and
Joel Goldberg, as Co-Trustees of the
Testamentary Trust Created under
Article SIXTH of the Last Will and
Testament of

File No. 2001-1730/B

MICHAEL MODELL,

Deceased.

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A N D E R S O N, S .

In the above consolidated proceedings, decedent Michael
Modell's brother, Mitchell Modell, moves to vacate the Note of
Issue filed by decedent's wife, Abby Modell.

The Note of Issue was filed on May 9, 2017, nine days
after the discovery cut-off date of April 30, 2017, set by the
court in a January 5, 2017 order. Prior to the deadline, movant
did not seek an extension of time from the court or otherwise
claim that discovery remained outstanding. The only party who
did so was Abby. On April 5, 2017, three weeks before the
discovery cut-off date, Abby moved to compel movant to produce
documents.

Although the motion was returnable on April 21, 2017, Abby agreed to adjourn it until June 2, 2017 to accommodate movant's request for an additional two weeks to file opposition papers. The parties entered into a stipulation, dated April 13, 2017, which specifically stated that the April 30 date would be "extended only to the extent necessary for the parties to complete discovery regarding the issues identified in the Motion [to Compel] and issues related to the parties' ongoing efforts to exchange privilege logs." The court granted the adjournment on the consent of all parties.

Thereafter, the parties engaged in discussions to resolve the issues set forth in the stipulation. It is undisputed that movant produced some of the documents at issue and agreed to produce others in the future. However, after the parties failed to agree as to the remaining documents, Abby withdrew her motion to compel and notified movant in a May 9, 2017 letter to which she attached copies of the Note of Issue and Certificate of Readiness she was filing with the court. Movant then filed the instant motion pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21(e).

Movant argues that the Note of Issue should be vacated because the proceedings are "not ready for trial and a material fact in the Certificate of Readiness is incorrect." According to movant, he has not obtained all the discovery to which he is entitled. However, unlike Abby, who moved to compel in advance

of the April 30 deadline, movant elected to claim entitlement to outstanding discovery only informally in a letter to Abby's counsel on April 28, 2017, a mere two days before the discovery cut-off date. In the letter, movant claimed that Abby's initial and supplemental responses to movant's demands for expert witness disclosure were inadequate and required supplementation. He also insisted that discovery remained incomplete because the "[t]he facts and other information referenced" in those disclosures had not been produced, despite having been "specifically and repeatedly requested ... since 2011."

Movant offers no acceptable explanation for his untimely efforts to enforce his discovery rights just two days before the discovery deadline. His argument that there was a "mutual understanding" of the parties that the April 30, 2017 deadline would not deprive either party of their right to obtain discovery previously requested after the deadline is disputed by Abby and unsupported by the record. Indeed, the emails movant attaches to his papers as evidence of the "mutual understanding" concern only the discovery that Abby sought in her Motion to Compel. In other words, they support Abby's contention that, as per the terms of the April 13, 2017 stipulation, the only discovery the parties agreed to extend beyond the discovery deadline was that raised by Abby's Motion to Compel.

Also without merit is movant's contention that the need for the discovery now at issue first surfaced only when Abby designated her two experts shortly before the discovery deadline. According to movant, however, he had been "specifically and repeatedly" requesting the discovery at issue for years. Moreover, Abby served her initial response to movant's demand for expert-witness disclosure in early February 2017. Her supplemental response was served on March 24, 2017, more than a month before the discovery cut-off date. If movant wished to challenge the sufficiency of Abby's expert disclosure or to compel the production of documents or information that he believed had been relied upon by her experts, but not disclosed as requested, he had ample time to do so. But even after Abby moved to compel on April 5, 2017, noting the "imminent discovery cut-off date" as a basis for the motion, movant did not follow suit.

Also undermining movant's application is his summary judgment motion filed in these proceedings *after* he made the instant motion. Movant ignores that he sought summary dismissal of Abby's first objection to his accounting, which alleges that movant improperly paid himself, as CEO of Modell's Sporting Goods, Inc., "more than \$33 million in excessive salary and bonuses" In seeking partial summary judgment, movant implicitly declared as unnecessary any further discovery related to this objection. However, a portion of the discovery

movant claims is outstanding appears to be directly related to this objection. His papers leave unanswered the question of how such discovery remains necessary in view of his summary judgment motion.

The court has discretion to grant a motion to vacate a note of issue (see e.g. *Leon v St. Vincent De Paul Residence*, 56 AD3d 265 [1st Dept 2008]; Uniform Rules for Trial Courts [22 NYCRR] § 202.21[e]). Courts have exercised such discretion where a party has indicated on the Certificate of Readiness that discovery was complete, when, in fact, it was not (see e.g. *Savino v LeWittes*, 160 AD2d 176 [1st Dept 1990]). However, this is not such a case. Here, the court directed in early January 2017 that all discovery be completed by April 30, 2017. There is no ambiguity in the court's order, which states: "[a]ll discovery under Article 31 of the CPLR shall be completed by April 30, 2017." It is noted that the court issued the order only after the parties discussed outstanding discovery at a conference and agreed on the time in which necessary discovery could be completed.

Abby acted in accordance with the court's mandate. She moved to compel in advance of the deadline to preserve her discovery rights. The parties' April 13, 2017 stipulation, the basis for the court's adjournment of Abby's Motion to Compel, specifically provided that the April 30, 2017 deadline would be extended only as to the issues raised in Abby's Motion to

Compel and to the parties' ongoing efforts to exchange privilege logs. Movant incurred the risk of the court's rejecting an extension when he elected to raise with Abby, instead of the court, discovery issues that he concedes were not new.

The court is aware that the parties have yet to exchange privilege logs. However, Abby stated in her Certificate of Readiness that such exchange of privilege logs was "neither [in the nature of] discovery requests nor necessary to be completed before a trial is scheduled." The court agrees. If the privilege logs reveal that documents have been improperly withheld, as movant postulates, there is a remedy available to him (see Uniform Rules for Trial Cts [22 NYCRR] § 202.21[d]).

Finally, movant has evinced an indifference to the court's discovery deadline that should not be readily tolerated. He has also failed to offer a compelling basis for further discovery. Movant relies almost entirely on his counsel's informal correspondence of April 28, 2017, which is bare of the kind of specific details that might support a grant of the additional discovery movant claims is necessary. Compounding that deficiency are the motion papers themselves, which do not expand upon the letter in any meaningful way and fail to include as exhibits all of the discovery demands at issue and Abby's purported offending responses. As a result, the court is not even in a position to determine the sufficiency of Abby's

expert disclosure as a whole.

Based upon the foregoing, the court, in its discretion, denies the Motion to Vacate the Note of Issue.

This decision constitutes the order of the court.

Dated: June 19, 2018


SURROGATE