

Matter of Regen
2018 NY Slip Op 32263(U)
September 11, 2018
Surrogate's Court, Nassau County
Docket Number: 2017-888
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, Estate of

DECISION & ORDER

FRANCES REGEN,

File No. 2017-888

Dec. No. 34644

Deceased.

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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

In this contested probate proceeding, the objectant Chester Regen moves for an order:

(1) pursuant to CPLR 3124, compelling the petitioner Karen Regen to provide copies of her written communications with Salem Shor & Saperstein, LLP and to answer Chester Regen's second set of document requests dated February 5, 2018; (2) pursuant to CPLR 3122 (b), compelling Karen Regen to provide notice to Chester Regen for each document being withheld for reasons such as attorney-client privilege: (a) the type of document; (b) the general subject matter of the document; (c) the date of the document; and (d) such other information as is sufficient to identify the document; (3) pursuant to CPLR § 4503 (b), denying Karen Regen's claim of attorney-client privilege; and (4) pursuant to CPLR § 3126 (1), resolving that in arranging for her mother's estate plan, Karen Regen acted to substitute her will for her mother's will, rendering the propounded instrument invalid and/or pursuant to CPLR § 3126 (3), rendering judgment by default against Karen Regen. Petitioner failed to timely oppose the motion.

Frances Regen died a resident of Nassau County on February 9, 2017. She is survived by her daughter Karen Regen and by her son Chester Regen. The decedent's last will and testament, dated April 15, 2016, was submitted for probate by Karen Regen, the petitioner herein. The propounded instrument names Karen Regen as the sole beneficiary and the executor of the decedent's estate and specifies that no provision has been made for Chester Regen. The propounded instrument also includes an in terrorem clause.

Examinations pursuant to SCPA § 1404 have been completed. Chester Regen filed objections to probate on June 21, 2017, alleging undue influence, fraud and lack of testamentary capacity.

On or about February 5, 2018, counsel for the objectant served interrogatories and a second set of document requests upon counsel for the petitioner. The petitioner served a response to said interrogatories on or about May 1, 2018. In response to the objectant's first interrogatory, which asked whether the petitioner had ever contacted the law firm Salem, Shor & Saperstien, LLP, the petitioner responded that she engaged in some written communications with that law firm at the request of, and on behalf of her mother, in September 2015, October 2015 and January 2016, but that she has been advised by her counsel that those communications are protected by the attorney-client privilege. Objectant takes the position that such communications are not privileged because they relate to the making of a will and the petitioner should be compelled to disclose them. Objectant also seeks to compel the petitioner to respond to the objectant's second set of document requests which the petitioner had failed to respond to prior to the making of the instant motion.

In an effort to comply with 22 NYCRR 202.7 (a), the objectant's counsel sent an email to the petitioner's counsel seeking a complete response to the objectant's interrogatories and sent another email to the petitioner's counsel requesting a response to the objectant's second set of document requests.

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.”

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 obtains 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 that:

“In any action involving the probate, validity or construction of a will or, after the grantor’s death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.”

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]). When claiming such a privilege, a party must produce a privilege log fully compliant with CPLR 3122 (b) for all documents for which she claims the attorney-client privilege.

The motion is **GRANTED** to the extent that, within thirty (30) days of the date of this order: (1) the petitioner is directed to produce a privilege log to counsel for the objectant for

each document being withheld for reasons such as attorney-client privilege including: (a) the type of document; (b) the general subject matter of the document; (c) the date of the document; and (d) such other information as is sufficient to identify the document and (2) the petitioner is directed to respond to the objectant's second set of document requests dated February 5, 2018. Counsel for the parties are directed to appear before this court at a conference on October 18, 2018 at 9:30 a.m. to assess the petitioner's compliance with this order and to set a schedule for any and all outstanding discovery. The motion is otherwise **DENIED.**

This constitutes the decision and order of this court.

Dated: September 11, 2018
Mineola, New York

E N T E R:

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

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