Matter of Malitz Family Trust
2018 NY Slip Op 32631(U)
September 11, 2018
Surrogate's Court, Nassau County
Docket Number: 0391098/2018
Judge: Margaret C. Reilly
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of Jeanne Malitz, as Co-Trustee of the

MALITZ FAMILY TRUST,

U/A/D February 23, 2006, between Muriel Malitz, as Grantor, and Jeanne Malitz and Jennifer Alt, as Trustees.

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DECISION & ORDER

File No. 2016-391098/C
Dec. No. 34567

PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

Notice of Motion	1
Affirmation in Support and Exhibits	2
Affirmation and Exhibits	3
Memorandum of Law	4
Affidavit in Opposition	5
Reply Affirmation	6

Before the court in this miscellaneous proceeding is a motion by Allison Angarola (respondent) to compel disclosure pursuant to CPLR 3124 for an order directing: (a) petitioner Jeanne Malitz to turn over any and all of her hard drives(s) and cell phones(s) of which she has possession and/or control to a representative of D4, the forensic analyst of respondent; (b) that petitioner be personally responsible for the costs associated with the forensic analysis; (c) that respondent's legal fees and costs with regard to this proceeding be paid by petitioner; and (d) that all discovery is stayed pending the decision of the court on the motion. The motion is opposed by Jeanne Malitz (petitioner).

The decedent, Muriel Malitz, died on September 7, 2016. She was survived by six children: Jeanne Malitz, Allison Angarola, Jennifer Alt, Michael Malitz, Michelle Donahue

and Christina Malitz. The decedent created the Malitz Family Trust on or about February 23, 2006. The trust was irrevocable and funded with real property located at 100 Ocean Boulevard, Point Lookout, New York. The trustees were Jennifer Alt, a daughter of the decedent, and petitioner. The trust provided that upon the death of the grantor, the property was to be sold and the proceeds divided equally between five of the grantor's six children. The trust further provided that the grantor has the right to alter distribution percentages by a writing delivered to the trustee. On or about February 11, 2015, the decedent executed an amendment to the Malitz Family Trust which altered the distribution percentages. On that same day, by document entitled "Revocation of Trust, Malitz Family Trust," the decedent purportedly revoked the trust. Muriel Malitz, as grantor, and Christina L. Malitz, as beneficiary, signed the document. On or about May 2, 2016, Muriel Malitz conveyed the real property to respondent.

On or about June 21, 2017, petitioner filed a petition in which she sought the following relief: declaring that the trust was not revoked; directing respondent to turn over the property to the trustees; directing the trustees to sell the property; directing that respondent's share of the proceeds of the sale of the property be deducted by the amount necessary to pay off any outstanding mortgage or encumbrance; and restraining respondent from selling, transferring, mortgaging or otherwise further encumbering the property.

On or about October 9, 2017, respondent served a notice for discovery and inspection pursuant to CPLR 3120. She contends that petitioner has failed to comply with the following

requests:

> "5. Any and all documentation evidencing any assets that funded the Trust, other than 100 Ocean Boulevard, Point Lookout, New York. . . ;
>
> 10. Any and all written correspondence or any writing, including emails, to and from Henry Tanck, Esq., regarding any communication between Jeanne Malitz and Henry Tanck, Esq., or any other attorney, with reference to the Trust.
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> 11. Any and all written correspondence or any writing, including emails, to and from Henry Tanck, Esq., Brenda Lynch, Esq., and Patricia Powis, Esq. regarding any communication between Jennifer Alt and Henry Tanck, Esq. or any other attorney with reference to the Trust.
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> 12. Any and all correspondence or any writing, including emails, to and from Petitioner and/or Jennifer Alt, Michelle A. Donahue, Allison Angarola, Christina Malitz and Michael Malitz, with reference to Muriel Malitz, the Trust and/or the Premises."

Respondent argues petitioner consented to the revocation of the trust and to the amendments thereto, as well as, any attendant transfers. Respondent asserts that petitioner acknowledged and accepted the decedent's amendments to the trust and its revocation and that the information "is probably located in emails and texts and the fact that she refuses to give them up would indicate that they are there." Respondent further argues that there is no other way of obtaining the emails and texts other than to have the hard drive and cell phone examined by a forensic analyst. For this reason, respondent seeks an order directing that petitioner's hard dives of three computers, one at her home and two at her place of business,

and all of petitioner's cell phones be delivered to D4, the forensic analyst.

Petitioner, in her affidavit in opposition, states that she undertook a review of her physical and electronic files for any documents that were responsive to the demand and turned over all documents to her attorney. She states that she has nothing else in her possession which is responsive to the demand for discovery and inspection.

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 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]; *see also 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 NY, Book 7B, CPLR C3101:5). These principals apply to computer discovery (*see Mosley v Conte,* 2010 NY Slip Op 32424 [U] [Sup Ct, NY County 2010]). In absence of proof that petitioner intentionally destroyed or withheld evidence, the court should not direct the cloning of computer hard drives (*Melcher v Apollo Med. Fund Mgt. L.L.C.,* 52 AD3d 244 [1st Dept 2008]; *Genger v Genger,* 144 AD3d 581 [1st Dept 2016]; *Matter of Benincaso,* 2012

NY Slip Op 30015[U][Sur Ct, Nassau County 2012]). Here, the proof amounts to little more than counsel's conjecture that because respondent refuses to voluntarily produce her computer hard drives and cell phones for examination, they must contain relevant evidence.

Furthermore, CPLR 3120 provides for the production of documents that are in the possession, custody or control of the party served (CPLR 3120 [1][i]). A party may not be compelled to produce information that does not exist or which she does not possess but the failure to provide the information, however, will preclude the party from offering any proof regarding that information at trial (*see Corriel v Volkswagen of America, Inc.,* 127 AD2d 729 [2d Dept 1987]). The petitioner claims that she is in compliance with the demand. If she attempts to offer proof regarding any information that she has not provided to the respondent at trial, the court will grant a motion to preclude.

For the reasons set forth herein, the motion is **DENIED** in its entirety.

This constitutes the decision and order of the court.

Dated: September 11, 2018
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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