

Matter of Kokotos

2018 NY Slip Op 34593(U)

September 19, 2018

Surrogate's Court, Queens County

Docket Number: File No. 2016-3855/B

Judge: Peter J. Kelly

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

Present: HON. PETER J. KELLY
SURROGATE

SURROGATE'S COURT : QUEENS COUNTY

-----X
In the Matter of the Application of Efthimia Leonardi
as Limited Administrator of the Estate of

GEORGIA KOKOTOS,

File No. 2016-3855/B

Deceased,

Pursuant to SCPA 2103 for the Discovery and
Turnover of Property and Issuance of a Temporary
Restraining Order

-----X
The following papers numbered 1 to 13 read on this motion by Respondents Stefanos Kokotos and Catherine Marakis Kokotos for an order pursuant to CPLR 3103 for a protective order and for an order pursuant to CPLR 2304 quashing non-party subpoenas and cross motion of Petitioner Efthimia Leonardi to compel documents.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits - Certification Memorandum of Law - Affidavit of Service	1 - 6
Cross Motion - Affidavit of Service - Affirmation in Opposition - Exhibits	7 - 10
Reply Affirmation - Exhibits - Affidavit of Service	11 - 13

Upon the foregoing papers, it is ordered that the motion to quash the subpoenas is granted and the cross motion to compel documents is denied.

See accompanying written decision.

The Clerk of the Court is directed to forward a copy of this order and accompanying written decision to all parties who have appeared in this proceeding.

Dated: September 19, 2018



SURROGATE

Present: HON. PETER J. KELLY
SURROGATE

SURROGATE'S COURT : QUEENS COUNTY

-----X
In the Matter of the Application of Efthimia Leonardi
as Limited Administrator of the Estate of

GEORGIA KOKOTOS,

File No. 2016-3855/B

Deceased,

Pursuant to SCPA 2103 for the Discovery and
Turnover of Property and Issuance of a Temporary
Restraining Order

-----X
In this discovery and turnover proceeding commenced under SCPA 2103,
the Respondents move pursuant to CPLR 3103 for a protective order and for an
order pursuant to CPLR 2304 quashing non-party subpoenas served upon Paul
Nagel, John Pittas, Esq., and Isidoros Tsamblakos, Esq. by the petitioner.

Decedent Georgia Kokotos died intestate and was survived by two children,
Stefanos Kokotos, a respondent, and Efthimia Leonardi, the petitioner. It appears
the decedent's primary asset was a two-family home originally held in an LLC for
her benefit. Respondent Stefanos Kokotos has resided in the home with the
decedent since 1979.

The central issue in this proceeding is the validity of the transfer of the
ownership interest in the LLC from Stefanos to his wife Catherine pursuant to a
power of attorney and a statutory gift rider. Petitioner challenges the preparation
and execution of the subject power of attorney and the timing of when the transfer

in controversy occurred. Petitioner alleges that Stefanos, with the help of his attorneys, surreptitiously transferred the decedent's sole ownership interest in the LLC to his wife after the decedent's death. As such, petitioner avers that the documents obtained through the subpoenas will demonstrate that the respondents and their attorneys engaged in a fraudulent scheme to acquire the two-family home to the detriment of the petitioner. Respondents contend that the subpoenas are overbroad, seek privileged material, and that petitioner is already in possession of documents which, on their face, substantiate a valid transfer and gift of the subject property from the decedent to Catherine, decedent's daughter-in-law.

The subpoena duces tecum served on accountant, Paul Nagel (hereinafter "Nagel subpoena") seeks, inter alia, copies of Respondents' tax returns. Petitioner argues that the tax returns will be determinative as to whether the respondent Stefanos Kokotos transferred the decedent's interest in the LLC via power of attorney to his wife Catherine Kokotos during the decedent's lifetime, or, as the petitioner alleges, after the decedent's death. Petitioner also argues that the tax returns will reveal respondents' income generated from the premises, and that these assets belong to the estate.

Respondents seek to quash the Nagel subpoena and move for a protective order. Respondents contend the subpoena is impermissibly overbroad and seek disclosure of privileged and highly confidential information. Respondents further contend that the disclosure of personal income tax returns is inappropriate absent

a showing that they are indispensable to prove a claim or that the information contained therein cannot be obtained by other means.

At first glance, the branch of the motion seeking to quash the Nagel subpoena would appear to be moot, as Paul Nagel has already provided Respondents' tax returns pursuant to the subpoena served upon him prior to the motion herein.

However, because of their confidential and private nature, the party seeking disclosure of tax returns is required to establish that the information sought in the returns is "indispensable to this litigation and unavailable from other sources" (Briton v Knott Hotels Corp., 111 AD 2d 62, 63; see also, Haenel v November & November, 172 AD2d 182). Further, the broad scope of allowable discovery notwithstanding, a person's personal records in litigation are customarily not subject to disclosure (Krauss v Putterman, 50 AD2d 599; see also, In re Glazer, 86 AD2d 982).

Petitioner's allegation that the tax returns would reveal that decedent's ownership interest in the LLC was not transferred until after her death is insufficient, standing alone, to satisfy the heightened standard requiring disclosure of same (Gitlin v Chirinkin, 71 AD3d 728; cf., Has K'Paw Mu v Lyon, 158 AD3d 1084). Apart from a lack of specificity in the subpoena to limit the scope of the returns to redaction of extraneous or sensitive information of relevant portions of tax returns, petitioner failed to demonstrate that the information regarding the

transfer of the LLC cannot be obtained through other means for example, discovery demands, depositions, or public records.

Accordingly, the branch of the motion to quash the subpoena served upon Paul Nagel is granted. Petitioner's counsel is directed to return the improperly obtained subpoenaed tax returns to Paul Nagel within five (5) days of service of this decision and order.

Petitioner has also served subpoenas on two attorneys, John Pittas, Esq. and Isidoros Tsamblakos, Esq. which seek, among other things, any and all types of documents and communications pertaining to the decedent, by and between the respondents and their attorneys. Petitioner avers that such documents will substantiate the petitioner's allegations that the interest in decedent's LLC was fraudulently transferred by the attorneys and Stefanos Kokotos to his wife, Catherine Kokotos.

Respondents contend that the subject subpoenas are defective as they fail to comply with the notice provisions of CPLR §3101[a][4]. That section requires that discovery devices served on non-parties contain a "notice stating the circumstances or reasons such disclosure is sought or required" (see generally, Matter of Ehmer, 272 AD2d 540). The purpose of the above statutory requirement is to provide the non-party served with a subpoena, who presumptively has no knowledge regarding the parties' dispute, the necessary information to determine how to respond to the inquiry (see, Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104, 110).

In the present case, the subpoenas undisputably fail to comply with CPLR 3101[a][4] and, therefore, are facially defective (see, De Stafano v MT Health Clubs, 220 AD2d 331; cf., Bianchi v Galster Mgt. Corp., 131 AD3d 558).

Furthermore, even if the Court were to overlook this technical flaw, it is apparent that the petitioner seeks privileged communications from two attorneys. Respondents aver that both Mr. Pittas and Mr. Tsamblakos have represented them in connection with a number of legal matters and all such communications are protected by attorney-client privilege. Respondents also aver, and petitioner does not dispute, that Mr. Tsamblakos has engaged in settlement negotiations with petitioner's prior counsel after the decedent's death in an unsuccessful attempt to avoid litigation.

CPLR 4503 (a) provides that, unless waived by the client, an attorney shall not disclose a confidential communication made, in the course of professional employment, between the attorney and the client. Subdivision (b) creates an exception in any action involving the probate, validity or construction of a will where the confidential communications concern the preparation, execution or revocation of any will or other relevant instrument. The Court of Appeals has called the attorney-client privilege an obstacle to the ascertainment of the truth, and held that it should be strictly confined within the narrowest possible limits consistent with the logic of its underlying principle (Spectrum Systems Intl. v Chemical Bank, 78 NY2d 371; see also, Bras v Atlas Construction Corp., 153 AD2d 914).

Not all communications to an attorney are privileged. In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a 'confidential communication' made to the attorney for the purpose of obtaining legal advice or services (Matter of Jacqueline F., 47 NY2d 215). The scope of the privilege depends on whether the client had a reasonable expectation of confidentiality under the circumstances. For instance, if the communication is made in the presence of a third party who is neither the agent of the attorney nor of the client, or whose presence is not reasonably necessary for the communication, or if the client intends that the attorney disclose the communication to a third person, the privilege does not attach (People v Osorio, 75 NY2d 80).

In order to find that a communication is privileged, the party asserting the privilege must show that there is an attorney-client relationship and that the information sought to be protected from disclosure was a confidential communication made to the attorney for the purpose of obtaining legal advice or services (Priest v Hennessy, 51 NY2d 62).

In the instant matter, respondents have demonstrated that John Pittas, Esq. and Isidoros Tsamblakos, Esq. rendered legal advice to the respondents with an expectation of confidentiality. As such, the futility of such subpoenas duces tecum served on the two individuals is manifest because the communications between the respondents and their attorneys are explicitly subject to the attorney-client privilege.

Based on the foregoing, the branch of respondents' motion to quash the subpoenas served on the attorneys is granted. Petitioner's cross-motion to compel documents is denied.

Short Form Order signed simultaneously herewith.

Dated: September 19, 2018



SURROGATE