

Matter of Cohen

2019 NY Slip Op 30133(U)

January 16, 2019

Surrogate's Court, New York County

Docket Number: 2016-4394

Judge: Rita M. Mella

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: JANUARY 16, 2019

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Probate Proceeding, Estate of

JEROME M. COHEN,

DECISION

File No.: 2016-4394

Deceased.

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M E L L A, S. :

The court considered the following submissions in determining respondents' motion for reargument and resettlement:

| <u>Document</u> | <u>Date filed</u> |
|---|--------------------|
| 1. Respondents' notice of motion | August 30, 2018 |
| 2. Affirmation of Anne C. Bederka, Esq., in support | August 30, 2018 |
| 3. Respondents' memorandum of law in support | August 30, 2018 |
| 4. Petitioners' memorandum of law in opposition | September 18, 2018 |
| 5. Respondents' reply memorandum of law in support | September 24, 2018 |
| 5. Stipulation amending July 11, 2018 transcript | September 28, 2018 |

The court considered the following submissions in determining respondents' motion for renewal:

| <u>Document</u> | <u>Date filed</u> |
|---|-------------------|
| 1. Respondents' notice of motion | November 5, 2018 |
| 2. Affirmation of Anne C. Bederka, Esq., in support of motion | November 5, 2018 |
| 3. Respondents' memorandum of law in support | November 5, 2018 |
| 4. Affirmation of Stephen P. Younger, Esq., in opposition | November 26, 2018 |
| 5. Petitioners' memorandum of law in opposition | November 26, 2018 |
| 6. Affirmation of Anne C. Bederka, Esq., in further support | November 29, 2018 |
| 7. Respondents' reply memorandum in further support | November 29, 2018 |
| 8. Corrected affirmation of Stephen P. Younger, Esq. | November 29, 2018 |
| 9. Petitioners' corrected memorandum of law | November 29, 2018 |
| 10. Petitioner's Exhibit 2 (revised with final transcript excerpts) | November 29, 2018 |

At the call of the November 30, 2018 calendar, in the probate proceeding in the estate of Jerome M. Cohen, the court partially determined respondents' motion for reargument (*see* CPLR 2221 [d]) and resettlement — which had been on the September 25, 2018 calendar — and fully determined respondents' motion to renew (*see* CPLR 2221 [e]). Both motions concern the

court's July 11, 2018 determination, memorialized in a August 1, 2018 decision, of respondents' discovery motion. This decision disposes of both CPLR 2221 motions in their entirety.

Motion for Reargument and Resettlement

Respondents had moved, pursuant to CPLR 2221 (d), for:

(1) leave to reargue their motion, returnable July 11, 2018, to the extent the August 1, 2018 decision denied their request for an *in camera* inspection of communications, during decedent's lifetime, between petitioners Elizabeth T. Cohen and Michael Steinberg, on the one hand, and their counsel on the other hand, which petitioners argue are subject to the attorney-client privilege and/or represented attorney work product, and, upon reargument,

(2) an order directing petitioners to produce the withheld documents for *in camera* review.

In addition, respondents had sought leave to resettle the portion of the August 1, 2018 order containing a denial — and here the court quotes from respondents' notice of motion — “without leave to renew upon the completion of the SCPA §1404 examinations, Respondents' request to take the SCPA §1404 (4) pre-objection examination of Jack Siegel.”

As the court indicated at the September 25, 2018 calendar, the motion for resettlement is granted to the extent that respondents have leave to resettle the August 1, 2018 order — together with a transcript of the July 11, 2018 proceedings that reflects the corrections made on the record at the September 25, 2018 calendar. The transcript, as so corrected, makes clear that the court's ruling at the July 11, 2018 calendar regarding the requested deposition of Jack Siegel was limited to an SCPA §1404 (4) pre-objection examination of Jack Siegel and, accordingly, would not bear on a request to depose Jack Siegel in the event an objection is filed.

At the call of the November 30, 2018 calendar, the court granted respondents leave to reargue their prior motion regarding an *in camera* review of documents. Upon reargument, however, the court adhered to its August 1, 2018 determination.

The standard applicable to a request for *in camera* review of documents is set forth in *Matter of New York City Asbestos Litigation* (109 AD3d 7, 11 [1st Dept 2013], *lv dismissed*, 22 NY3d 1016 [2013]), as follows:

“To permit *in camera* review of the documents to analyze whether the communications were used in furtherance of . . . wrongful activity, there need only be ‘a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies’ ([*United States v Zolin*, 491 US 554, 572 (1989)] [internal quotation marks and citation omitted]). ‘Once that showing is made, the decision whether to engage in *in camera* review [of the evidence] rests in the sound discretion of the . . . court’ (*id.*).”

As stated by the United States Supreme Court:

“The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the . . . court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply.”

United States v Zolin (491 US 554, 572 [1989]).

The court assumed — without deciding — that respondents had made the requisite showing. Nevertheless, the court, in the exercise of its discretion, declined to review the withheld documents *in camera*, based on: (1) the volume of materials the court had been asked to review, (2) the apparent irrelevance of the materials to respondents’ decision to file or not to file probate objections, and (3) the adequacy of the available evidence as a basis for respondents’ decision to file or not to file probate objections.

Petitioners have offered three instruments for probate: a purported will, dated November 9, 2009, and two purported codicils, dated March 29, 2011 and November 23, 2011, respectively. The two purported codicils govern decedent's general partnership interests in certain "Real Estate Partnerships." In the second purported codicil, decedent designated his son, Michael T. Cohen, one of the two respondents, as successor general partner of each "Real Estate Partnership." Also on November 23, 2011, decedent executed a lifetime succession instrument by which he appointed his son as successor general partner, a position Michael T. Cohen holds to this day.

In their memorandum of law in support of the motion to compel production, respondents articulated their theory of petitioners' alleged wrongdoing, as follows:

"This motion seeks to bring out into the open Petitioners' roles in shaping Decedent's estate plan by requiring them to disclose numerous communications with their counsel concerning its creation. If, in fact, Petitioners are not guilty of misleading and unduly influencing Decedent in the creation of that plan, they should be willing to stand behind their actions and allow Respondents or, at a minimum, this Court, to review them."

That is, respondents allege that petitioners engaged in wrongful activity by retaining counsel for the purpose of "misleading and unduly influencing" decedent in his estate plan.

Petitioners, however, retained counsel for the purpose of obtaining advice about decedent's estate plan in late 2010, after decedent had executed the purported will. Nearly every one of the hundreds of withheld documents pertain to the succession of decedent's general partnership interests, an issue which was resolved, during decedent's lifetime, in favor of respondent Michael T. Cohen. Accordingly, the relevance of the withheld documents to a decision by respondents as to whether to object to probate is far from clear. In addition, the documents already produced — tens of thousands of pages, including communications between

petitioners' counsel and decedent's estate planning counsel — together with the SCPA 1404 (4) depositions should provide a sufficient basis on which respondents can evaluate whether any influence exercised on decedent by petitioners, through the agency of their counsel, was undue.

Motion for Renewal

Respondents moved, pursuant to CPLR 2221 (e), for:

(1) leave to renew their request, denied in an August 1, 2018 decision, for an *in camera* inspection of certain communications, during decedent's lifetime, between Elizabeth T. Cohen and Michael L. Steinberg, on the one hand, and their counsel, on the other hand, on the ground that facts not offered on the prior motion would have changed the court's determination and, upon renewal,

(2) an order compelling petitioners to produce such documents for *in camera* review.

At the call of the November 30, 2018 calendar, the court denied the motion for leave to renew because the allegedly new evidence offered by respondents — a November 28, 2011 e-mail exchange between petitioners' counsel and decedent's estate planning counsel — would not have changed the court's prior determination regarding the requested *in camera* review (*see* CPLR 2221 [e] [2]).

This decision, together with the transcript of the September 25, 2018 and November 30, 2018 proceedings, constitutes the order of the court.

Dated: January 16, 2019


S U R R O G A T E