

Matter of Worrell

2019 NY Slip Op 30767(U)

March 29, 2019

Surrogate's Court, New York County

Docket Number: 2015-2033

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY
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Administration Proceeding, Estate of

JEANINE J. WORRELL, a/k/a
JEANINE WORRELL AND JEANINE
WORRELL BREEDEN,

File No. 2015-2033

Deceased.

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A N D E R S O N, S.

This is a motion by non-party Gerald Migdol to quash a March 30, 2018 subpoena served on him by the temporary administrator in this administration proceeding in the estate of Jeanine Worrell (CPLR § 2304).

Before the merits of the motion are considered, a brief discussion of the procedural history of this estate is necessary. Decedent died on April 25, 2015, survived by her husband, Corwin Breedon. Shortly after decedent's death, Leontine Turner (decedent's mother) sought letters of administration, alleging that Breedon was disqualified as surviving spouse on the grounds of abandonment (EPTL § 5-1.2[a][5]) and failure to support (EPTL § 5-1.2[a][6]), and that the mother was therefore decedent's sole distributee. Breedon then cross-petitioned, disputing the allegations as to disqualification.

While the issue of Breedon's status was being litigated, Turner and Breedon agreed to serve together as temporary fiduciaries. Letters of temporary administration issued to them on July 8, 2015. On May 12, 2017, Breedon died. At the time of his death, Breedon's status remained undetermined. However, because his death divested the court of jurisdiction, the proceeding was stayed

automatically pending the substitution of the fiduciary of Breeden's estate (see CPLR § 1015; CPLR § 1021). Letters of administration issued in Breeden's estate to Sheba Billingslea (the "Breeden Administrator") on January 12, 2018, but neither the Breeden Administrator nor Turner moved for the necessary substitution (see CPLR § 1021). Moreover, notwithstanding the stay, Turner, now the sole temporary administrator, served on movant the subpoena at issue, which is styled as a "subpoena duces tecum," but seeks from movant his testimony as well as documents.

When movant made the instant motion, he gave notice of it only to Turner's counsel, since there was no other person to serve in the absence of the substitution of the Breeden Administrator. Nonetheless, counsel for the Breeden Administrator appeared on the return date to argue in support of the motion. He then filed a notice of appearance and an affidavit in support of the motion. Turner did not object to the Breeden Administrator's failure to seek formal substitution as contemplated by CPLR § 1021. In view of the appearance of the Breeden Administrator's counsel and his active participation in the proceeding thereafter, substitution sua sponte is warranted (see e.g. *Aziz v City of New York*, 130 AD3d 451, 452 [1st Dept 2015][court sua sponte ordered the substitution of fiduciary of deceased party where fiduciary participated in litigation]).

With jurisdiction complete and the stay therefore lifted, we now turn to the merits of the motion. Movant first argues that the

subpoena is untimely because Turner had stipulated with Breeden that all discovery be completed by December 31, 2016, and the subpoena was served more than a year later. Movant claims that the parties had reached an oral agreement concerning discovery at a conference before a member of the Law Department. However, Turner disputes this, and the court's records indicate that the matter was marked for further discovery without a specific discovery cut-off date. As it happened, five months later, the proceeding was stayed by Breeden's death. Turner should not have sought discovery while a stay was in effect, but this misstep does not change the fact that, when Breeden died, discovery had not yet concluded. Now that the Breeden Administrator has been substituted and the stay lifted, discovery can proceed.

With regard to the substance of the subpoena, a motion to quash a subpoena "should be granted '[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious' ... or where the information sought is 'utterly irrelevant' to any proper inquiry" (*Kapon v Koch*, 23 NY3d 32, 38 [2014], quoting *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-32 [1981]). The person or entity who has been subpoenaed bears the burden of establishing that the materials sought are "utterly irrelevant" (see e.g. *Velez v Hunts Point Multi-Service Center, Inc.*, 29 AD3d 104, 112 [1st Dept 2006] [citations omitted]). Here, movant contends that the subpoena should be quashed because it seeks testimony and documents that are unrelated to the issues

before the court. However, this is simply not the case. Movant ignores that, by his own admission, he and Breeden were "close friends" and "business associates for many years." Consequently, movant may have information about Breeden's relationship with decedent that is relevant to the issue of abandonment (EPTL § 5-1.2[a][5]). Moreover, as Breeden's business associate, movant may also have information about Breeden's financial circumstances that is relevant to Turner's claim that he failed to support decedent although he had the wherewithal to do so (EPTL § 5-1.2[a][6]).

Under these circumstances, movant's efforts to avoid being deposed fail. Contrary to his contention, the fact that he also served as Breeden's personal attorney at various points does not preclude his deposition. Such argument is based on surmise that he will be asked questions implicating the attorney-client privilege (see e.g. *Matter of Empire Wine & Spirits LLC v Colon*, 145 AD3d 1157, 1158 [3d Dept 2016][stating that "[a] claim of privilege cannot be asserted until the witness appears before the requisite tribunal and is presented with a question that implicates protected information" citing *Matter of Holmes v Winter*, 22 NY3d 300, 319 [2013] [internal quotation marks and citations omitted]). If, at his deposition, movant's responses would require disclosure of privileged information, the Breeden Administrator can decide whether or not to waive the privilege.

As for that portion of the subpoena seeking documents, movant has established that Turner's inartfully drafted document requests

are either "utterly irrelevant" or too broad to warrant compliance. For example, Turner seeks information concerning the payment of decedent's funeral bill, which has no bearing on the issues before the court. She also requests documents related to transactions movant may have had with Breeden that post-date decedent's death.

Other document requests do seek relevant information concerning Breeden's alleged failure to support decedent (EPTL § 5-1.2[a][6]), but requiring movant to respond would be unduly burdensome even under the broad discovery standard of Article 31 of the CPLR. This is so without regard to the fact that some of the requests would require the production of documents that may well be privileged. One request asks movant to provide copies of all his correspondence with movant from January 1, 2005 (the approximate date of the alleged abandonment) to the present, regardless of subject matter. Another asks movant to produce "[a]ll books, records, agreements, contracts, Federal and NYS income tax returns for all business matters, individually, as a partnership, LLC, PLLC, association or other business entity" in which Breeden and movant had interests from January 1, 2005 through May 12, 2017, the date of Breeden's death.

Discovery requests using the term "all" are often deemed too broad, unless the documents sought are limited to the specific subject matter of the proceeding and can be readily identified (see e.g. *Mendelowitz v Xerox Corp.*, 169 AD2d 300, 303-04 [1st Dept 1991]). Turner fails to request with any precision documents that

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might bear on the specific issues before the court. Indeed, collectively, Turner's document requests ask for virtually every document related to every business transaction movant had with Breeden over a period of more than twelve years. The court is not obliged to modify Turner's document demands to make them acceptable, and the court declines to do so (see *Musey v 425 E. 86 Apts. Corp.*, 154 AD3d 401, 405 [1st Dept 2017] [stating that "[w]hile some information sought from [the non-party] might be useful, it was not the court's obligation to prune the overly broad subpoenas" citing *Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453, 453-454 [1st Dept 1995])).

Based upon the foregoing, the motion to quash is denied to the extent that the subpoena seeks movant's testimony, but granted to the extent that it seeks the production of documents. Movant is directed to appear for deposition within 45 days of the date of this decision, and all discovery shall be completed 30 days thereafter.

Finally, in her opposition papers, Turner raises an issue concerning a potential conflict of interest of movant's counsel. The record shows that, while at another firm, movant's counsel represented Breeden in this proceeding. On this motion, she now represents the non-party movant, who claims to be a creditor of Breeden's estate. The court has the authority to act sua sponte to disqualify counsel if a conflict of interest warrants it (see e.g. *Flushing Savings Bank v FSB Properties, Inc.*, 105 AD2d 829, 830 [2d

Dept 1984])). Here, however, Turner fails to identify a conflict of interest that movant's counsel has with respect to the issues before this court. To the contrary, as creditor and fiduciary of Breeden's estate, respectively, both movant and the Breeden Administrator have a shared interest in establishing Breeden's status as surviving spouse. Indeed, the Breeden Administrator has filed papers in support of the motion. This is not to say that there are no circumstances in which movant's counsel could have a conflict of interest in representing movant. It is only to note that the court is currently aware of no conflict that would warrant precluding the lawyer in question from continuing to appear on movant's behalf.

This decision constitutes the order of the court.

Dated: March 29 2019

NISA
S U R R O G A T E