Matter of Zagor
2020 NY Slip Op 30711(U)
March 5, 2020
Surrogate's Court, New York County
Docket Number: 2014-3130/B
Judge: Nora S. Anderson
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SURROGATE'S COURT, NEW YORK COUNTY
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Proceeding to Determine the Validity
of a Claim against the Estate of

File No. 2014-3130/B

LEWIS ZAGOR,

Deceased.
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A N D E R S O N, S.

Two discovery motions are pending in this proceeding to determine the validity of a claim against the Estate of Lewis Zagor. Decedent died on December 5, 2013, without a will. Letters of administration issued to his widow on September 22, 2014. Petitioners move to compel the administrator to produce outstanding documents. The administrator cross-moves to strike the petition on account of petitioners' refusal to comply with her demand to provide tax returns and other documents.

Background. Petitioners seek to determine the validity of their claim to a portion of a five percent interest in Abraham Kamber and Co. LLC ("the Company"), (a New York Limited Liability Company, formerly a New York Limited Partnership) which interest decedent inherited from his father, Irving Zagor. Petitioners allege that decedent's father entered into a partnership with the Company in 1954, pursuant to which he invested $50,000 in the Company and loaned the Company an additional $50,000, for a total payment of $100,000, in return for which the Company gave Irving a five percent equity interest payable in monthly installments and a note to repay the loan on specified terms.

Petitioners, the daughters and heirs of Albert Rauch, allege that their father furnished Irving with one-third of Irving's aggregate payment of $100,000 to the Company, and that, in return, Irving assigned one-third of his five percent interest in the Company to Albert and his heirs. According to petitioners, although Albert's stake in the investment was not disclosed to the Company, it was reflected in a Participation Agreement (the "Agreement") among Irving, Albert, and a third undisclosed investor.

In the Agreement, attached to the petition, Irving identifies himself as both a limited partner in the Company entitled to five percent of its net income and profits in return for his $50,000 investment, and a creditor of the Company with respect to the $50,000 loan. He also sets out the terms for the Company's repayment of the loan. Irving further acknowledges that Albert Rauch gave him one-third of the total $100,000 he paid to the Company and the third investor gave him and additional one-third, that Irving is holding the investment and the note for his own benefit and that of Albert and the third investor; and that Irving will pay over to Albert and his heirs one-third of any monies he receives on account of this investment and loan.

According to the petition, Albert divided his one-third interest into three further portions, retaining one-third for

himself (*i.e.*, one-ninth of Irving's original investment) and assigning the balance to other investors who had contributed to his one-third share of the investment in the Company. On Albert's death, his one-ninth interest passed to his widow, and, on her death, to petitioners, their two daughters. Thus petitioners each assert a one-eighteenth interest in Irving's original five percent interest in the Company which is now held in decedent's estate.

In accordance with the Agreement, Irving paid Albert his proportionate share of payments he received from the Company starting in 1954 until his death in 1972, and decedent Lewis continued making the payments until his death in 2013. Initially, decedent's widow and administrator acknowledged petitioners' claim to a portion of decedent's receipts from the Company. She now, however, denies the validity of the claim and asserts that Albert's contribution to the Company was strictly a loan, rather than partially an investment as well, which has been more than repaid over the last 60 years, first by Irving and then by decedent.

The parties' inability to resolve certain disputes about discovery led to the instant motions.

Petitioners' motion to compel discovery:

Petitioners' demand consists of 27 requests for documents. The administrator has produced some documents, denied having

others, and objected to some demands. Petitioners argue that the administrator's response is inadequate.

CPLR § 3101(a) mandates disclosure of "all matter material and necessary," *i.e.*, information that is reasonably calculated to lead to admissible evidence (Weinstein-Korn-Miller, NY Civ Prac § 3101.01 2d ed]). Precedent establishes that "the test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Although the statute sets a liberal standard for pretrial discovery, the scope and supervision of disclosure are matters left to the discretion of the Surrogate (*Matter of Am. Comm. for Weizmann Inst. of Science v Dunn*, 10 NY3d 82, 96 [2008]), who must guard the litigants from an intrusive "fishing expedition." Thus, the court must balance the administrator's burdens involved in document production against petitioners' legitimate interest in the matter at issue (*Clarendon Natl. Ins. Co. v Atlantic Risk Mgt., Inc.*, 59 AD3 284 [1st Dept 2009]).

Petitioners' document requests 1, 4-6, and 9-10 seek communications by and between Irving, decedent, and the administrator, on the one side, and petitioners, their father and mother and others, regarding the Company and the interests of the various participants in the loan and investment in the Company. In response, the administrator has simply stated that she has "none." This response is inadequate, as it does not indicate

whether no such documents exist, or whether they exist but are not in the administrator's possession, or whether they are in the possession of others over whom she may exercise control. Her responses thus do not meet the standard of "reasonable particularity" required by CPLR § 3122.

The administrator has not produced documents showing transfer of ownership of portions of decedent's interest in the Company (requests 12-14), bank information showing receipt of payments from the Company (requests 21-23), copies of Form K-1 issued by the Company (request 24), and the name of decedent's accountant (request 25). She asserts that requests 12-14 are overbroad and burdensome, and asserts unspecified privilege with respect to all these requests.

Refusal to produce relevant and material documents based on an unsupported claim of undue burden or a general and unspecified assertion of "privilege" fails to meet CPLR 3122(a)'s requirement of "reasonable particularity." Boilerplate claims of privilege are insufficient as a matter of law (*Anonymous v H.S. for Envtl. Studies*, 32 AD3d 353, 359 [1st Dept 2006]), and may constitute a waiver of any objections to discovery demands (*id*). Further, the administrator's failure to provide a detailed privilege log violates the specific requirements set forth in CPLR 3122(b).

Documents produced by the administrator are relatively meager. For example, in response to requests for documentation

of payments by the Company to the administrator or the estate over the decades-long period in question (requests 18-21), the administrator has proffered only four checks. She has produced no documentation to support any theory that the four checks were mere anomalies.

The administrator's counsel suggests that she lacks information because of the long period of time covered by the transactions at issue and because she was not personally involved in the transactions. But, in view of her role as decedent's fiduciary, much of the requested information would be expected to be within her possession, custody, and control. Indications of decedent's (and his father's) dealings with the Company and with Albert and his heirs over the years would likely have existed among decedent's papers or been maintained by his accountant or other advisors. Indeed, the administrator's role as the personal representative of decedent's estate gives her the authority to obtain these documents if she does not have them in her personal possession as well as the responsibility to obtain them in order to carry out her obligations to marshal decedent's assets, identify and satisfy his debts, make appropriate tax filings, and respond to petitioners' legitimate discovery requests *(Leo v City of New York*, 2011 N.Y. Misc. LEXIS 6738 [Sup Ct, NY County 2011]).

Pursuant to the court's broad discretionary power to manage

discovery (*Saratoga Harness Racing Inc. v Roemer*, 274 AD2 887 [3d Dept 2000]), the administrator is hereby ordered to make a thorough search of decedent's papers for documents responsive to these discovery demands and to ask decedent's accountant(s) and/or other professional advisors to do the same; to provide a sworn statement that she has made such a search and detailing its nature and results; and to produce any responsive documents which are located, all within thirty days of the date of this order. To the extent that any such documents are missing or have been discarded or destroyed, the administrator must provide details of such disposition (*Jackson v New York*, 185 AD2d 768 [1st Dept 1992].

Petitioners also ask the court to order the administrator to provide supplemental information and documents requested during the administrator's examination, as follows: a list of all medications she took on the date of her examination; the last name of the friend who introduced her to decedent; the dates of her previous marriage; a copy of decedent's telephone book; the name of decedent's accountant; and copies of various correspondence referenced in her deposition. Although no objection has been made to such disclosure, nothing has been produced. The information and documents listed above must also be provided to petitioners within 30 days.

Cross-motion to strike the petition or alternatively to compel production of tax returns:

The administrator cross-moves for dismissal of the petition as a sanction for petitioners' failure to provide her with their own and their parents' tax returns over the 60-year period when they allegedly received payments in respect of their interest in the Company. Alternatively, she seeks an order requiring petitioners to produce the tax returns.

Although a court may, in its discretion, strike a pleading as a sanction for failure to comply with discovery demands or orders (CPLR 3126[3]), such a drastic remedy is inconsistent with the courts' preference to reach the merits of a dispute wherever possible (*Caplin v Ranhofer*, 112 AD2d 821 [1st Dept 1985]) and is inappropriate absent a clear showing that the failure to comply with discovery demands is wilful and contumacious (*Michael v St. Lukes-Roosevelt Hosp. Ctr.*, 199 AD2d 195 [1st Dept 1993]; *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213 [1st Dept 2002]).

The administrator has utterly failed to show that petitioners wilfully failed to disclose information "which the court finds ought to have been disclosed..." (CPLR §3126), a prerequisite for the imposition of sanctions. The administrator's claim that petitioners failed to provide tax returns in response to her initial document demand is without merit, since she failed to ask for them in that demand. The administrator's requests for "any and all documents accounting for all monies paid and/or received by Kamber" and "any and all

documents, including, but not limited to, spreadsheets, appraisals, reports and/or accountings articulating Petitioners' Claims" do not, explicitly or implicitly, encompass individual tax returns. Rather, the administrator first requested the tax returns in a letter following petitioners' depositions, and petitioners promptly objected on the grounds that such production was immaterial and unnecessary to the litigation, duplicative, overbroad, unduly burdensome and oppressive because they were confidential. Thus, their conduct in response to the administrator's request, once made, was not egregious.

Turning to the merits of the administrator's request, for reasons of privacy as well as the possibility of misuse, discovery of income tax returns is generally not favored without a strong showing that they contain particular information specifically applicable to the case that is unavailable from other sources *(Panasuk v Viola Park Realty, LLC*, 41 AD3 804, 805 [2d Dept 2007]); *Haenel v November & November*, 172 AD2 182 [1st Dept 1991]). A party seeking tax returns must precisely identify the information sought in the return and how it will bear on the issues at hand; explain why other sources of information are not available; and offer to limit the examination to minimize the intrusion *(Haenel, supra; Matter of Manoogian,* Sur Ct, NY County, 2014 NYLJ LEXIS 1248, NYLJ Feb. 28, 2014 at 22, col 5). The administrator has failed to address any of these requirements and

merely states that she needs 60 years of tax returns in order to establish her defense that Albert's participation in the Company was strictly a loan, rather than an investment. The court will not order the intrusive discovery of 60 years of tax returns - a category of specially protected documents - on so unsupported a demand.

To the extent that the administrator asserts that petitioners have failed to provide her with other requested documents, her motion papers do not sufficiently identify the documents allegedly withheld.

Accordingly, the cross-motion is denied.

This decision constitutes the order of the court.

Dated: March 5, 2020

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