

Matter of Demetriou
2012 NY Slip Op 31896(U)
June 28, 2012
Sur Ct, Nassau County
Docket Number: 338987
Judge: III., Edward W. McCarty
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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Probate Proceeding Pursuant to SCPA 1407,
in the Estate of

File No. 338987

PETER T. DEMETRIOU,

Dec. No. 27957

Deceased.

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In this probate proceeding, the petitioner, Evan DeFrancesco, moves for an order compelling a response to the petitioner’s discovery demands. The motion is decided as set forth herein.

The decedent, Peter T. Demetriou, died on September 11, 2005, survived by his wife, Irene Demetriou, and three adult children: Michael P. Demetriou, Theodore P. Demetriou, and Chrisanthi Demetriou. A petition to probate the decedent’s last will and testament dated January 8, 2003 (hereinafter, “the 2003 Will”) was filed with this court on September 19, 2005. The 2003 Will bequeathed the decedent’s personal property, shares of Rehab Services Corp., and real property in East Hampton to his wife. A unified credit shelter trust was established for the benefit of the decedent’s wife, and upon her death, the property was to be held in trust for the decedent’s three children until they reached the age of thirty. Article Sixth of the 2003 Will provides that the decedent’s interest in Peter Demetriou & Sons, Inc., The Davis Agency, Inc., and New Windsor Insurance Agency, Inc. (hereinafter, “the Corporations”), and real property known as 556 Peninsula Boulevard, Hempstead, New York (hereinafter, “the Hempstead Property”) is to be held in trust for the benefit of Irene Demetriou, but subject to the option of Michael Demetriou to purchase the same. The 2003 Will names the decedent’s friend, Themis Vassiliou, as executor.

The 2003 Will was admitted to probate by decree of this court dated September 21, 2005 and letters testamentary issued to Themis Vassiliou on that same date.

Subsequently, this proceeding was commenced to probate a copy of a later purported last will and testament of the decedent dated August 31, 2005 (hereinafter, “the 2005 Will”), as a lost will and to revoke the earlier will’s probate decree. The petitioner in the 2005 Will probate proceeding is Evan DeFrancesco, the sister of the decedent, who is named as one of the co-executors of the 2005 Will, along with Themis Vassiliou and Peter Cotelidis. The 2005 Will revokes all prior wills and leaves the decedent’s wife only her elective share, with the remainder to the decedent’s mother, Joanna Demetriou. The 2005 Will leaves nothing to the decedent’s children, Theodore P. Demetriou and Chrisanthi Demetriou. The decedent’s son, Michael P. Demetriou, is given the option to purchase the Corporations and the Hempstead Property, but on less favorable terms than those set forth in the 2003 Will.¹ Themis Vassiliou, Irene Demetriou, Michael P. Demetriou, Theodore P. Demetriou, and Chrisanthi Demetriou all object to probate of a copy of the 2005 Will as a lost will.

The objectants previously moved for summary judgment dismissing this proceeding and the petitioner cross moved for summary judgment seeking admission of the 2005 Will to probate and vacating the letters testamentary issued to Themis Vassiliou. By decisions dated June 29,

¹ The 2003 Will provides that the purchase price for the decedent’s shares of stock in the Corporations shall be an amount equal to one times net annual commissions during the calendar year preceding the date on which the option is exercised, less the unpaid principal balance due as of the date of the decedent’s death on any notes payable by any of the Corporations to the decedent’s order, together with accrued and unpaid interest, if any, thereon. The 2005 Will provides that the purchase price for the decedent’s shares of stock in the Corporations shall be an amount equal to one times net annual commissions during the calendar year preceding the date on which the option is exercised. The 2005 Will does not provide for any reduction of the purchase price by the unpaid balance due on any notes.

2006 (Decision Nos. 290 and 490) and order dated April 23, 2007, this court denied both the motion and cross motion for summary judgment, finding that there is an issue of fact as to whether the decedent revoked the 2005 Will. This determination was affirmed on an appeal to the Appellate Division, Second Department (*Matter of Demetriou*, 48 AD3d 463 [2d Dept 2008]). The parties thereafter entered into a pretrial conference order signed by this court on July 25, 2011, which directed that all discovery in this proceeding was to be concluded by all parties no later than January 31, 2012.

On or about November 3, 2008, the petitioner served a subpoena duces tecum on Rivkin Radler LLP (hereinafter, “Rivkin”), counsel for the executor and the objectants, seeking, *inter alia*, “all log-books, sign-in books, computer logs, or any other method utilized by Rivkin, evidencing the dates and/or times Irene Demetriou, Michael Demetriou, Chrisanthi Demetriou, Theodore Demetriou, Peter Cotelidis, Themis Vassiliou, or George Kyriakoudes visited the offices of Rivkin between the period of September 11, 2005 and the present.” Rivkin refuses to produce the documents requested by the petitioner in the November 3, 2008 subpoena, claiming that the request is overly broad, unduly burdensome and costly, and that the information sought is in no way material and necessary to the prosecution or defense of a lost will proceeding.

On or about January 26, 2011, the petitioner served subpoenas to take depositions and to produce documents to Peter Demetriou & Sons, Inc., The Davis Agency, Inc., New Windsor Insurance Agency, Inc., and the Demetriou Group of New Jersey, Inc., c/o Rivkin, seeking, *inter alia*, “[a]ny and all documents and correspondence concerning the Unpaid Principal Balance² for

² As defined in the rider to the subpoenas, “Unpaid Principal Balance” “as referred to in the 2003 Will (Sixth paragraph, subsection D.5), refers to the unpaid principal balance due as of

each of the Corporations.” In response to such request, counsel for the objectants provided the petitioner with copies of a note for \$1,800,000.00 from The Demetriou Group of Manahattan, Inc. payable to The Demetriou Group of New Jersey, Inc. and the Corporations, and an Asset Purchase Agreement by and among The Demetriou Group of Manhattan, Inc. (as purchaser) and the estate of the decedent, The Demetriou Group of New Jersey, Inc. and the Corporations (as sellers), both dated March 10, 2006. Counsel for the objectants later produced documents regarding notes payable to the decedent from New Windsor Insurance Agency, Inc. and Chrisanthi Demetriou, but claims that there are no other documents available responsive to that request.

Subsequent to the deposition of the executor Themis Vassiliou, the petitioner made additional requests, by letter, for production of documents, including: (1) cell phone records of Themis Vassiliou for the period August 15, 2005 through December 31, 2006; (2) documents concerning the identity of the locksmith who was present at the office of the decedent on September 11, 2005; (3) 2005 tax returns for The Demetriou Group of New Jersey, Inc.; (4) documents concerning any notes payable and/or due to the decedent at the date of his death, whether current, satisfied, or in default; (5) documents concerning any letters of credit issued as security for the purchase of the Corporations; (6) documents concerning any distributions made from the estate of the decedent, including payments to attorneys and payments for the executor’s bond; (7) documents concerning a promissory note from Theodore Demetriou to the decedent; (8) documents regarding the identity of the attorneys who were present during any meetings regarding the decision to sell the Corporations and the subsequent valuation of the Corporations;

September 11, 2005, on any notes payable to the order of Peter T. Demetriou, together with accrued and unpaid interest, if any.”

(9) documents regarding the identity of the attorneys present during any meetings regarding the decision to probate the 2003 Will; and (10) documents regarding the identity of any attorneys present during the meetings regarding the decision not to probate the 2005 Will.

In a letter responding to the letter of petitioner's counsel requesting additional documents, objectants' counsel stated that: (1) Mr. Vassiliou and his office staff had searched and were unable to locate the cell phone records requested; (2) no documents regarding the identity of the locksmith could be found by either Mr. Vassiliou or his counsel; (3) no 2005 tax returns for The Demetriou Group of New Jersey, Inc. were in their possession; (4) a note executed by Michael Demetriou (as president of The Demetriou Group of Manhattan, Inc.) had already been provided; (5) there are no letters of credit; (6) the request for documents regarding distributions from the estate of the decedent seeks documents which are not material and necessary in the prosecution of a lost will proceeding; (7) no such promissory note from Theodore Demetriou to the decedent is in their possession; and with regard to the letter requests numbered (8), (9), and (10), requesting documents identifying attorneys, objected to these requests as overly broad, unduly burdensome and costly, as well as immaterial and unnecessary to the prosecution or defense of a lost will proceeding.

The petitioner asserts that the objectants and their counsel have failed to fully comply with the document requests made by the petitioner both by subpoena and by letter, and the petitioner therefore moves to compel a response.³

³ It should be noted that as of June 1, 2011, the provisions of 22 NYCRR 202.7 (a) and (c) were made applicable to all motions relating to disclosure filed in Surrogate's Court, Nassau County, requiring an affirmation of the good faith effort made to resolve the issues raised by the motion. While the petitioner's motion papers fail to include a separate good faith affirmation by

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] [internal quotation marks omitted]; see *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 N.Y., Book 7B, CPLR C3101:5).

In the instant case, in order to allow the probate of a copy of the 2005 Will as a lost will, the petitioner bears the burden of demonstrating that the decedent did not revoke the 2005 Will prior to his death (SCPA 1407). When a will cannot be found after death and the will was in the testator’s possession at the time of death, there is a strong presumption that the will was revoked by the testator (*Matter of Evans*, 264 AD2d 482 [2d Dept 1999]). The petitioner can rebut the presumption, showing “by facts and circumstances, that the will was actually fraudulently destroyed” (*Matter of Philbrook*, 185 AD2d 550, 552 [3d Dept 1992], citing *Collyer v Collyer*, 110 NY 481, 486 [1888]).

The petitioner seeks to meet her burden in this proceeding by demonstrating that the

the movant’s counsel, the affirmations submitted by counsel in support of the motion, along with the copies of the correspondence between counsel for both sides submitted as exhibits to the motion, sufficiently set forth the efforts made to resolve the disclosure disputes raised in the instant motion.

decedent's children, in connection with Vassiliou, were responsible for the destruction or disappearance of the original 2005 Will. In support of this position, the petitioner seeks the production of documents relating to the "Unpaid Principal Balance" to demonstrate that the probate of the 2003 Will was more favorable to the decedent's children, thereby showing that the actions of the decedent's children and Vassiliou on the night of the decedent's death were suspicious in nature, and therefore, explaining the disappearance of the original 2005 Will.

Objectants previously moved this court for a protective order as to discovery sought from a non-party concerning the Corporations, including information relating to the "Unpaid Principal Balance." This court, in a decision and order dated December 16, 2009 (Dec. No. 709), found that production of the financial records of the Corporations is "material and necessary" under the CPLR's broad interpretation for the disclosure of relevant material in a proceeding because the financial documentation sought by the petitioner seemed to be reasonably calculated to further support the petitioner's explanation as to why the original 2005 Will could not be located.

Consistent with this court's previous decision in this proceeding, petitioner's requests for documents herein concerning the "Unpaid Principal Balance" seek records that are "material and necessary" and should therefore be produced. However, the objectants cannot be compelled to produce documents which do not exist or are not in the objectants' possession (*Euro-Central Corp. v Dalsimer, Inc.*, 22 AD3d 793 [2d Dept 2005]). The objectants claim that they have produced all of the documents in their possession, custody, or control which are responsive to the petitioner's requests for documents concerning the "Unpaid Principal Balance" due on notes payable by the Corporations to the decedent (1/26/11 subpoena and letter document requests Nos. 4, 5, and 7). The objectants also claim they that they do not have the cell phone records requested

(letter document request No. 1), or information as to the identity of the locksmith (letter document request No. 2), or the 2005 tax returns (letter document request No. 3). While the objectants cannot be compelled to produce that which they do not have, the objectants should provide an affidavit by an individual with personal knowledge as to the good faith efforts made to conduct a thorough search for these requested documents (*Henderson-Jones v City of New York*, 87 AD3d 498, 505 [1st Dept 2011]; *WMC Mortgage Corp. v Vandermulen*, 32 Misc 3d 1206 [A] [Sup Ct, Suffolk County 2011]). Such affidavit shall be provided to counsel for the petitioner no later than July 31, 2012. However, should additional documents responsive to the petitioner's requests for documents concerning the "Unpaid Principal Balance" be located by the objectants, or their counsel, they are of course under a continuing obligation to produce such documents to the petitioner pursuant to CPLR 3101 (h).

With regard to the petitioner's request for documents regarding distributions from the estate of the decedent, including payments to attorneys and payments for the executor's bond (letter document request No. 6), it should be noted that Paragraph Thirteenth of the 2003 Will provides that no bond shall be required of any executor appointed therein. Accordingly, the petitioner's request for information as to payment for the executor's bond is a nullity. The petitioner has failed to persuade the court that information regarding all distributions made from the decedent's estate has any relevance to the proceeding herein. While such matters may be an appropriate matter for an accounting proceeding, they are irrelevant to a lost will proceeding. Despite the petitioner's protestations to the contrary, information as to such distributions sheds no light on whether the 2005 Will was or was not revoked by the decedent. The terms of the 2003 Will speak for themselves, without reference to whatever distributions may have been made

pursuant to the terms of that will. However, the petitioner claims documents as to the distributions made from the decedent's estate are necessary to determine when the objectants retained Rivkin to probate the 2003 Will. Since no attorney-client privilege attaches to the fact that legal advice was obtained and how such advice was paid for (*Hoopes v Carota*, 74 NY2d 716 [1989]), the petitioner is entitled to discover what payments the executor made to Rivkin on behalf of the estate and when those payments were made. Such information shall be provided to counsel for the petitioner no later than July 31, 2012.

Similarly, the petitioner would be entitled to discover the identity of attorneys whom the objectants sought legal advice from with regard to the sale of the Corporations, the probate of the 2003 Will and the decision not to probate the 2005 Will (11/3/08 subpoena and letter document requests Nos. 8, 9 and 10), as such information in and of itself is not subject to the attorney-client privilege (*Hoopes v Carota*, 74 NY2d 716 [1989]). Nonetheless, as the objectants' counsel notes, such requests, as initially made by the petitioner, are overly broad and unduly burdensome. However, the petitioner's counsel in his reply affirmation in support of the motion advises that the petitioner is only interested in those records for the month preceding and two months following the decedent's death. Accordingly, the objectants need only produce documents indicating the dates on which the objectants met with attorneys from Rivkin for the period from August 11, 2005 through November 11, 2005. Acknowledging the fact that such information may be in storage, or otherwise difficult to access, such documentation shall be provided to counsel no later than August 31, 2012.

In addition to seeking an order compelling the objectants to produce the requested documents, the petitioner also seeks to continue the deposition of the executor for the purpose of

asking him questions with regard to advice he was given by counsel with regard to this matter. Such questions were objected to by the executor's counsel at the last session of the executor's deposition on the ground of attorney-client privilege.

The attorney-client privilege seeks to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his or her confidences will not later be exposed to his or her legal detriment (*Priest v Hennessy*, 51 NY2d 62 [1980]). The attorney-client privilege has been codified under CPLR 4503 (a) (1), which bars disclosure of any confidential communications between a client and his/her attorney. The attorney-client privilege is "of the oldest among common law evidentiary privileges, fostering the open dialogue between lawyer and client that is deemed essential to effective representation" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371 [1991]).

The petitioner argues that the executor waived his attorney-client privilege in this proceeding when, during the course of his deposition, he answered several questions by saying he had acted upon the advice of counsel. While a party may be deemed to have waived the attorney-client privilege when that party intends to prove his claim or defense by use of the privileged materials, such an "at issue" basis for waiver has been narrowly interpreted (*Deutsche Bank Trust Co. Of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56 [1st Dept 2007] and is inapplicable herein. Since the burden of proof in this lost will proceeding rests solely upon the petitioner, neither the executor, nor any of the other objectants, have any need to rely upon their privileged communications with counsel to support a claim or defense in this proceeding and so such communications have not and will not be put in issue herein by the objectants. Accordingly, there is no basis for finding a waiver of the executor's attorney-client privilege. By the petitioner's

strained reasoning, anytime a party during a deposition responds to a question by saying that he spoke to counsel or relied on counsel's advice, that party would have waived his attorney-client privilege. Such an interpretation is untenable. The executor's answers during his deposition that he relied on advice of counsel in this matter do not constitute a waiver of his attorney-client privilege and petitioner's counsel may not inquire of either the executor or his counsel as to the nature of counsel's advice.

This constitutes the decision and order of this court.

Dated: June 28, 2012

EDWARD W. McCARTY III
Judge of the
Surrogate's Court