

Matter of Prestigiacomo
2016 NY Slip Op 32049(U)
July 20, 2016
Surrogate's Court, Nassau County
Docket Number: 2013-375172E
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Application of Julie Topaltzas and
Joseph Prestigiaco, Jr., as Limited Administrators,
to Compel the Discovery and Turnover of Property
Wrongfully Transferred and/or Withheld
from the Estate of**

**DECISION
File No. 2013-375172E
Dec. No. 31546**

JOSEPH PRESTIGIACOMO,

Deceased.

-----X
PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Motion to Quash Subpoenas and for a Protective Order.	1
Attorney’s Affirmation in Support.....	2
Affirmation in Opposition.	3
Attorney’s Affirmation in Reply.....	4

The respondent, Katie Prestigiaco (surviving spouse of Joseph Prestigiaco and the preliminary executor of his estate) moves for an order: (1) pursuant to CPLR §2304 granting her application to quash and vacate multiple subpoenas duces tecum served upon non-party financial organizations and medical providers by two of the children of Joseph Prestigiaco, Julie Topaltzas and Joseph Prestigiaco, Jr., to whom this court issued limited letters of administration; (2) pursuant to CPLR §3103, granting the application of Katie Prestigiaco for a protective order relieving the non-parties served with subpoenas of any obligation to respond to the subpoenas; and (3) staying the

underlying SCPA §2103 discovery proceeding pending the outcome of the probate proceeding.

Joseph Prestigiaco (the decedent) died on April 21, 2013, survived by his wife, Katie Prestigiaco, and by five children: Julie Topaltzas, Joseph Prestigiaco, Jr., Sandra Prestigiaco, Deborah Bernard, and Francesca Flanagan. Two instruments were offered for probate: (1) a will dated November 19, 1998 (the 1998 Will), which was filed by Julie Topaltzas and Joseph Prestigiaco, Jr.; and (2) a will dated November 9, 2012 (the 2012 Will), which was filed by Katie Prestigiaco. The proceeding to probate the 1998 Will has been held in abeyance.¹ On September 5, 2013, preliminary letters testamentary issued to Katie Prestigiaco pursuant to the 2012 Will.

On April 16, 2015, limited letters of administration were issued to Julie Topaltzas and Joseph Prestigiaco, Jr., for the purpose of commencing a discovery proceeding pursuant to SCPA §2103. Shortly after the issuance of the limited letters of administration, Julie Topaltzas and Joseph Prestigiaco, Jr. served multiple subpoenas duces tecum. Katie Prestigiaco filed a motion asking the court to quash the subpoenas or grant a protective order. On October 20, 2015, this court granted the motion to quash on the grounds that pre-trial discovery cannot take place until an SCPA §2103 proceeding has been commenced (Decision No. 31173).

¹ In connection with that probate proceeding, examinations pursuant to SCPA §1404 were scheduled for June 3, 2016.

On December 7, 2015, Julie Topaltzas and Joseph Prestigiacom, Jr. filed a petition pursuant to SCPA §2103, for the discovery and/or turnover of assets belonging to the estate, along with an order for Katie Prestigiacom to attend and be examined.

Subpoenas duces tecum were served on the following non-parties:

- Canale & Tellekamp, CPAs;
- Bank of America, N.A.;
- Merrill Lynch;
- Pierce, Fenner & Smith Incorporated;
- Maddaloni Jewelers;
- Janney Montgomery Scott LLC;
- Citibank, N.A.;
- JPMorgan Chase Bank, N.A.;
- St. Francis Hospital;
- South Nassau Communities Hospital;
- Dr. Gary Friedman;
- Dr. David Grill; and
- Dr. Howard Grill.

The court must weigh the right of the parties who were granted limited letters to conduct a discovery proceeding against the fact that there is a concurrent probate proceeding for the 2012 Will, which may result in the termination of the interests of Julie Topaltzas and Joseph Prestigiacom, Jr. in their father's estate. If the court grants probate to the 2012 Will, the outcome of the discovery proceeding will have no effect on the estate other than the depletion of estate assets in payment of legal fees incurred in connection with the discovery proceeding. Moreover, once the upcoming SCPA §1404 examination in the probate proceeding is completed, it is likely that discovery will be sought in the probate proceeding that will be repetitive of the discovery sought in

connection with the present proceeding, resulting in unnecessary and duplicative expenses.

The court has authority to stay proceedings pending before it (SCPA §102; CPLR §2201). The court can “grant a stay of proceedings in a proper case, upon such terms as may be just” (CPLR §2201). Here, if the decedent’s 2012 Will is admitted to probate, any recovery that Julie Topaltzas and Joseph Prestigiacomio, Jr. might realize from the instant discovery proceeding against Katie Prestigiacomio would then be paid to Katie Prestigiacomio, as the executor of the decedent’s estate. Further, Katie Prestigiacomio is the lifetime beneficiary of a credit shelter bequest under Article Third of the 2012 Will, and the sole residuary beneficiary under Article Fifth. Thus, it appears that if the decedent’s 2012 Will is admitted to probate, the instant discovery proceeding will have done nothing but generate attorneys’ fees.

If, however, the 2012 Will is denied probate, and the 1998 Will is subsequently admitted to probate, then the decedent’s estate will be shared in varying amounts among Katie Prestigiacomio and the decedent’s five children. If neither will is admitted to probate, the decedent’s assets will be divided among Katie Prestigiacomio and the decedent’s children in accordance with EPTL §4-1.1(a)(1). In both of those alternate scenarios, the discovery proceeding against Katie Prestigiacomio becomes important to Julie Topalzas, Joseph Prestigiacomio, Jr., and the decedent’s other children who are not involved in this proceeding, as they would ultimately share in any recovery against Katie.

Accordingly, the court hereby grants the present motion: (1) to quash the subpoenas; (2) for a protective order; and (3) to stay the discovery proceeding pending the outcome of the probate proceeding in connection with the 2012 Will, but directs that if there is no final determination by the court concerning the probate of the 2012 Will within eighteen (18) months of the issuance of this decision, Julie and Joseph may seek, and the court will consider, a lifting of the stay granted by this decision.

Dated: July 20, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: John Newman, Esq.
Attorney for Petitioners
1776 East Jericho Tpke., Suite 2
Huntington, New York 11743

Richard T. Kerins, Esq.
Mahon, Mahon, Kerins & O'Brien, LLC
Attorney for Respondent
254 Nassau Boulevard South
Garden City, New York 11530

Janney Montgomery Scott, LLC
Attn: Barry Falk/Thomas Urban
3300 PGA Blvd., Suite 900
Palm Beach Gardens, Florida 33410

Bank of America, N.A.
709 Old Country Rd.
Dix Hills, New York 11746

Maddeloni Jewelers
1870 East Jericho Tpke.
Huntington, New York 11743

JPMorgan Chase Bank, N.A.
National Subpoena Processing
Mail Code IN 1-4054
7610 West Washington Street
Indianapolis, Indiana 46231

Citibank, N.A.
c/o Legal services Intake Unit
1 Court Square, 31st Floor
Long Island City, New York 11120

Canale & Tellekamp, CPA's
140 South Ocean Avenue, Suite 2
Freeport, New York 11520

Merril Lynch Pierce Fenner & Smith Incorporated
Attn: Megan Jordan
P.O. Box 40239
Jacksonville, Florida 32203

St. Francis Hospital
Attn: Medical Records
100 Port Washington Blvd.
Roslyn, New York 11576

Drs. David Grill and Howard Grill
121 South Ocean Avenue, #1
Freeport, New York 11520

Dr. Gary Friedman
2 Ohio Drive, Suite 201
New Hyde Park, New York 11042

South Nassau Communities Hospital
Attn: Medical Records
1 Healthy Way
Oceanside, New York 11572