Matter of Kotick

2016 NY Slip Op 32792(U)

January 15, 2016

Surrogate's Court, New York County

Docket Number: 2005-1202/E

Judge: Rita M. Mella

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

[* 1]

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

New York County Surrogate's Court
Date: JANUARY 15, 2016

---x

In the Matter of the Judicial Settlement of the First Intermediate Accounting of Robert A. Kotick, as Executor of the Estate of

CHARLES M. KOTICK,

Deceased.

DECISION AND ORDER

File No.: 2005-1202/E

---x

In the Matter of the Judicial Settlement of the First and Final Account of Proceedings of Robert A. Kotick, as Successor Trustee of the Natalia Shvachko 2005 Irrevocable Trust, dated February 23, 2005,

CHARLES M. KOTICK,

Grantor.

File No.: 2005-1202/C

---x

In the Matter of the Judicial Settlement of the First and Final Account of Proceedings of Joel M. Kotick, as Successor Trustee of the Natalia Shvachko 2005 Irrevocable Trust, dated February 23, 2005,

CHARLES M. KOTICK,

Grantor.

File No.: 2005-1202/D

---x

M E L L A, S.:

Papers considered:	Numbered
Corrected Notice of Motion to Compel Production of Documents by the law firms of Lawrence E. Fabian, Teitler & Teitler, LLP, and Aronson Mayefsky & Sloan, LLP, dated September 19, 2014	1
Affidavit of Lawrence M. Rosenstock in Support of Motion to Compel, with Exhibits 1 through 8, sworn to September 19, 2014	2
Affirmation of Lawrence E. Fabian in Opposition to Motion to Compel, with Exhibits 1 and 2, dated October 17, 2014	3
Affirmation of Alan S. Rabinowitz in Opposition to Motion to Compel, with Exhibits 1 and 2, dated October 17, 2014	4

[* 2]

Affirmation of Allan E. Mayefsky in Response to Motion to Compel, with Exhibits A and B, dated October 15, 2014	5
Response to Subpoena Duces Tecum (Objections) by Aronson Mayefsky & Sloan, LLP, dated September 5, 2014	6
Reply Affidavit of Eve Rachel Markewich in Further Support of Motion to Compel, sworn to October 23, 2014	7
Notice of Motion and Amended Notice of Motion for a Protective Order and to Quash the Subpoena Duces Tecum Directed to Fox Rothschild LLP, dated September 3, 2014 and September 12, 2014, respectively	8, 9
Affirmation of Daniel A. Schnapp in Support of Motion for a Protective Order, with Exhibits A through G, dated September 3, 2014	10
Memorandum of Law in Support of Motion for a Protective Order and to Quash the Subpoena Duces Tecum Directed to Fox Rothschild LLP, dated September 3, 2014	11
Affidavit of Lawrence M. Rosenstock in Opposition to Motion for a Protective Order, with Exhibits 1 through 3, sworn to October 20, 2014	12
Notice of Motion for a Protective Order and to Quash the Subpoena ad Testificandum Directed to Damianos Markou, dated September 12, 2014	13
Affirmation of Daniel A. Schnapp in Support of Motion for a Protective Order, with Exhibits A through H, dated September 12, 2014	14
Affidavit of Lawrence M. Rosenstock in Support of Motion for a Protective Order, with Exhibits 1 through 3, sworn to October 20, 2014	15

These are motions in contested accounting proceedings to compel production of documents (CPLR 3124) or for protective orders (CPLR 3103), all involving subpoenas issued by the objectant, Natalia Shvachko, and directed to non-party attorneys. A brief statement of

[* 3]

background is necessary to an understanding of the issues presented.

Charles Kotick (decedent) died in 2005, and his son, Robert Kotick (Bobby),[1] is the executor of his estate. Shortly before his death, the decedent created an inter vivos trust (the Trust) for the benefit of his second wife, Natalia Shvachko (Shvachko). Bobby succeeded decedent's counsel as trustee of the Trust from March 2005 until June 2006, when he resigned and, pursuant to authority granted in the trust instrument, appointed his uncle, Joel Kotick (Joel), as his successor. Joel, who is decedent's twin brother, served as trustee until his resignation in June 2008, whereupon Bobby appointed Joel's longtime friend, Robert Bro (Bro), as the next successor trustee. Bro served until his removal in June 2009. The proceedings underlying these motions are: (1) an accounting by Bobby, as executor of his father's estate; (2) an accounting by Bobby, as former trustee of the Trust; and (3) an accounting by Joel, as the subsequent former trustee of the Trust.

Decedent's first wife was Judith Hans (Hans). Bobby and his sister, Deborah Gruber (Gruber), are children of that marriage. Hans and Gruber are alleged to play a significant part in these proceedings, in addition to Shvachko, Bobby, Joel, and Bro.

All the subpoenas addressed in this decision seek documents that fall into one or more of four main categories, described below in further detail: (1) documents concerning the "Nevada Action," plans to initiate it, and any payments made or "any guarantee of payment" for related legal services; (2) documents concerning the "New York Action," plans to initiate it, its settlement, and any payments made or "any guarantee of payment" for related legal services; (3) documents concerning Shvachko herself; and (4) documents concerning communication about the Trust. Some of the demands also request copies of retainer agreements.

---

[1] First names are used where necessary to avoid confusion.

[* 4]

Objectant's Motions to Compel Production of Documents

1. Subpoena Directed to Lawrence E. Fabian, Esq.

Lawrence E. Fabian is the attorney of record for Hans in an action pending in New York County Supreme Court by Shvachko against Hans and Bobby, claiming damages for malicious prosecution, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Fabian also represented Hans in her suit against Bobby and others for equitable relief and damages in connection with the 1988 separation agreement between Hans and the decedent. Fabian argues that any information he has is protected by attorney-client privilege (CPLR 3101 [b], 4503). He also maintains that the subpoena is overbroad and does not give sufficient notice of the "circumstances or reasons such disclosure is sought or required" as mandated by CPLR 3101 (a) (4) where disclosure is sought from non-parties.

As a preliminary matter, the court rejects Fabian's argument regarding the CPLR 3101 (a) notice. Such notice is intended to "apprise a stranger to the litigation [of] the 'circumstances or reasons' why the requested disclosure was sought or required" (*Kapon v Koch*, 23 NY3d 32, 39 [2014]). Although Hans is not a party to these accounting proceedings, she and her attorneys are not strangers to this litigation, as is evident from the discussion that follows. Further, there is no indication that Fabian asked for elaboration or clarification of the notice, or that he was prejudiced by the alleged insufficiency (*see Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104 [1st Dept 2006]). As limited by the rulings made here, the categories for which discovery is allowed are not overbroad and are sufficiently described to apprise Hans's counsel of the purpose for their request.

Documents Concerning the "Nevada Action"

Shvachko's interest in the Trust was conditioned upon her being married to the decedent

at the time of his death. The "Nevada Action" was an action brought by Gruber to have decedent's Nevada marriage to Shvachko posthumously declared invalid. Had the marriage been invalidated, Gruber's children (decedent's grandchildren) would instead have been the beneficiaries. The action was ultimately resolved in favor of Shvachko, after five years of litigation.

Shvachko's theory is that the Nevada Action was the product of a conspiracy among Joel, Bobby, Bro, Hans, and Gruber to divest Shvachko of her interests in decedent's estate and Trust. Her discovery demands are directed to uncovering evidence of such a scheme.

Shvachko cites a decision in a related proceeding where this court observed, "[T]he record in this and other pending proceedings lend support to Shvachko's claim that Bobby, Gruber, the successor trustee Robert Bro . . . , and Hans are conspiring to utilize all possible means to deprive her of her inheritance" (*Hans v Kotick et al*, NYLJ, Oct. 7, 2009 at 32, col 1 [Sur Ct, NY County]). Their animus toward her, she claims, resulted in the fiduciaries' mismanagement of the Trust, such that Trust investments and distributions were made without proper regard to Shvachko's interests.

CPLR 3101 (a) provides for "full disclosure of all matter material and necessary" in the prosecution or defense of a proceeding. The Court of Appeals has construed the statutory standard liberally, interpreting "material and necessary" to mean "relevant," and allowing discovery of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Pub.Co.*, 21 NY2d 403, 406 [1968]). The scope of permitted discovery is not limited to admissible proof, but includes "documents which may lead to the disclosure of admissible proof" (*Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625 [1st Dept

1983]).

Notwithstanding the breadth of this standard, Bobby's and Joel's alleged campaign to exclude Shvachko as a beneficiary of the Trust is an insufficient basis for demanding documents or testimony related to the Nevada Action. Even if she could establish that Gruber's attempt to invalidate decedent's marriage to Shvachko was engineered by Bobby, Joel, Hans, or Bro--or any of them in concert with another--such would not be probative of issues in these underlying accounting proceedings. The only question here is whether the Trustees fulfilled their fiduciary duties in the management of the Trust and estate, not how they treated Shvachko generally. The Trustees' and executor's fiduciary duty to Shvachko as beneficiary does not extend beyond their administration of the funds with which they are charged.

Shvachko cites *Sankel v Spector* (33 AD3d 167, 172 [1st Dept 2006]) for the indisputable principle that a fiduciary "owes an undivided duty to his beneficiary." But as the context makes clear, the duty does not run to all dealings between fiduciary and beneficiary as individuals. Rather, as the court stated,

> "[A] trustee owes a duty of undivided loyalty *to the trust*, which standard 'does not permit a trustee to create or to occupy a position in which he has interests to serve other than the interest *of the trust estate* . . .' . This inflexible duty of loyalty prohibits a trustee from even placing himself in a position of potential conflict with his or her duty *to the trust* . . . . The purpose sought to be served by this rule is to require a trustee to assume a position where his every act is above suspicion, and *the trust estate*, *and it alone*, can receive, not only his best services, but also his unbiased and uninfluenced judgment' [emphasis added; internal citations omitted]."

(*Id.* at 171-172.)

That is not to say that a beneficiary has no remedy if a fiduciary commits a wrong outside the scope of the fiduciary's management of the fund. The beneficiary may bring a plenary action

for damages, precisely as Shvachko has done, by suing Bobby and Hans in the action pending in the New York County Supreme Court referred to above.

Accordingly, Svachko's motion to compel is denied to the extent her subpoena seeks information concerning the Nevada Action. The information requested does not meet the standard for disclosure as it is not "reasonably calculated to elicit data 'bearing on the controversy. . .' " (*Allen v Crowell-Collier Publishing Company*, 21 NY2d 403, 406 [1968]).

Documents Concerning the "New York Action"

The "New York Action" was a suit by Hans against the Trust and decedent's estate. Hans sought damages from the Trust for the value of property she claims the decedent fraudulently concealed from her when they entered into their separation agreement 17 years earlier. The case was dismissed on Shvachko's motion for summary judgment (*Hans v Kotick*, NYLJ, Oct. 7, 2009 at 32, col 1 [Sur Ct, NY County]). Meanwhile, however, Bro, who was then trustee, had agreed to settle the action with a payment of $1.5 million to Hans from the Trust, a figure that represented approximately half the Trust's value.[2] Shvachko argues that Bro's willingness to strip the Trust of half its assets to settle a meritless lawsuit is further evidence of a campaign by the decedent's family to deprive her of her rightful inheritance.

Discovery regarding the New York Action, including legal fees paid or guaranteed in connection with the action, could have relevance to the pending accounting proceedings for the Trust. Bro's proposed settlement of the lawsuit--the bona fides of which are questionable at best--relates directly to his management of the Trust assets. Further inquiry in this area could lead to evidence that supports Shvachko's objections (including, for example, her allegation that the Trust was not properly funded).

---

[2] Payment of the settlement was not made.

Accordingly, the motion to compel is granted as to any non-privileged documents in Fabian's possession or control responsive to the request concerning the New York Action. Any retainer agreement relating to the New York Action shall also be disclosed. The granting of this motion is conditioned upon Fabian's providing Shvachko with a privilege log in accordance with CPLR 3122(b) within 30 days of service upon him of this decision and order, with notice of entry.

Communications Concerning Shvachko and the Trust

To any extent that communications concerning Shvachko are not privileged or protected under the foregoing rulings, disclosure shall be permitted only as to those communications concerning Shvachko that relate specifically to the administration or management of the Trust or estate. The limited granting of this branch of the motion is conditioned upon Fabian's providing Shvachko with a privilege log in accordance with CPLR 3122 (b) within 30 days of service upon him of this decision and order.

2. Subpoena Directed to Teitler & Teitler, LLP

Teitler & Teitler, LLP represented Judith Hans in the New York Action for approximately eight months. Shvachko's counsel issued a subpoena duces tecum to the firm seeking the same categories of documents it demanded of Lawrence Fabian.

Teitler & Teitler responds that it transmitted any responsive documents it held to successor counsel, without retaining copies, except for material that is exempt from disclosure as attorney work product (CPLR 3101[c]).

Shvachko argues that notes the firm prepared in connection with the New York Action are not shielded because they do not relate to the instant litigation, citing *Fireman's Insurance Company of Newark v Gray* (41 AD2d 863 [3d Dept 1973]) and other decisions. Those cases,

however, concern protections under CPLR 3101 (d) (2), relating to materials prepared in anticipation of litigation and not necessarily by an attorney. The attorney work product exemption claimed by Teitler & Teitler is governed by CPLR 3101 (c), is absolute, and "extends both to the litigation for which it was made and to any subsequent actions" (*Corcoran v Peat, Marwick, Mitchell and Co.*, 151 AD2d 443, 445 [1st Dept 1989], citing *Beasock v Dioguardi Enterprises, Inc.*, 117 AD2d 1016 [4th Dept 1986]).

Accordingly, subject to the production by Teitler & Teitler of a privilege log in accordance with CPLR 3122 (b) within 30 days of service upon it of this decision and order, and in expectation that attorney work product will be asserted as a basis for exemption from disclosure of all documents responsive to the subpoenas in such log, Shvachko's motion to compel documents sought from Teitler & Teitler is denied.

3. Subpoena Directed to Allan E. Mayefsky and Aronson Mayefsky & Sloan, LLP

Allan E. Mayefsky is a member of the law firm of Aronson Mayefsky & Sloan, LLP. Bobby consulted the firm in 2005, but did not retain the firm. The subpoena duces tecum issued to Mayefsky and his firm requests the same documents as those demanded of Fabian and Teitler & Teitler, except that no request is made with respect to the Nevada Action.

Mayefsky acknowledges that his firm has communications to which are attached documents that he implies could be responsive to Shvachko's demand. He states, however, that those documents were furnished for the purpose of obtaining legal advice and are protected by the attorney-client privilege. He also states that any other responsive documents his firm possesses are notes protected as attorney work product. In reply, Shvachko's counsel asserts, "The purpose of [Bobby's] consultation was not to obtain legal advice for himself but, rather, to discuss a scheme whereby Mayefsky's firm--on behalf of Judith Hans--would commence an

action against [Bobby], as fiduciary for Natalia Shvachko" (Reply Affidavit of Eve Rachel Markewich, sworn to October 23, 2014).

If, as Shvachko alleges, Bobby were acting as an agent of Hans when he consulted Mayefsky's firm, Bobby's communications with the firm could be protected from discovery by attorney-client privilege (*see, e.g.*, *Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 64 AD3d 1234, 1236 [4th Dept 2009] ["the attorney-client privilege extends to communications to 'one serving as an agent of either attorney or client' "]; *Delta Fin. Corp. v Morrison*, 15 Misc 3d 308, 316-17 [Sup Ct, Nassau County 2007]). However, if Bobby were consulting this firm for advice on setting aside decedent's separation agreement, with the intent of diminishing the estate and, therefore, the Trust (into which the residuary estate flowed), it is possible that the crime-fraud exception might apply to require disclosure of the documents requested (*Art Capital Group LLC v Rose*, 54 AD3d 276 [1st Dept 2008], citing *Ulico Casualty Co. v Wilson, Eisner, Moskowitz, Edelman & Dicker*, 1 AD3d 223 [1st Dept 2003] [attorney-client privilege may not be invoked to shield communications in furtherance of an alleged breach of fiduciary duty]). It is also possible that the documents would be discoverable under the fiduciary exception to the attorney-client privilege (*Hoopes v Carota*, 74 NY2d 716 [1989] [privilege shielding communications between fiduciary and attorney may be set aside by beneficiary's showing of "good cause"]).[3]

The beneficiary must show probable cause of wrongdoing to invoke the crime-fraud exception to attorney-client privilege (*Matter of New York City Asbestos Litigation*, 109 AD3d 7 [1st Dept 2013]), a burden Shvachko has not met. Nor has she established the "good cause" required to pierce the privilege between an inter vivos trustee and the trustee's counsel. A lesser

---

[3] CPLR 4503 (a) (2), enacted in 2002 and exempting certain fiduciary relationships from application of the "fiduciary exception," is not applicable to trustees of inter vivos trusts.

evidentiary showing, however, is necessary for in camera review of documents: "[T]here need only be 'a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review' " could uncover evidence of wrongdoing (*id.* at 11, quoting *United States v Zolin*, 491 US 554, 572 [1989]).

Shvachko has obtained a copy of a February 2005 memorandum to Mayefsky from an attorney for Hans, discussing the "goal" of bringing an action to set aside Hans's separation agreement with the decedent. The memorandum was copied to Bobby. In light of this evidence and other circumstances of this case, the court determines in its discretion that review by the court of the responsive documents in the possession of Aronson Mayefsky & Sloan is warranted. The firm is directed to deliver the documents to the court for in camera review, together with a privilege log referencing those documents in compliance with CPLR 3122(b), within 20 days of service upon it of a copy of this decision and order, with notice of entry. Determination of the motion to compel these documents is held in abeyance pending the court's review.

Motions to Quash Subpoenas and Motions for Protective Orders

1. The Subpoena Duces Tecum to Fox Rothschild LLP

Fox Rothschild is the law firm that represented Bro as trustee of the Trust in 2008 and 2009. The firm has moved for a protective order, or for an order quashing a subpoena served by Shvachko, primarily on the ground that any information it has is protected by the attorney-client privilege. They also assert that the notice required by CPLR 3101 (a) (4) for subpoenas to non-parties was insufficient.

Although Bro is not a party, he and his attorneys are familiar with this litigation and, for the same reasons as stated above with respect to the subpoena directed to Lawrence E. Fabian, the court rejects the argument that notice required by CPLR 3101(a) (4) was insufficient.

Documents Concerning the "Nevada Action"

For the reasons discussed above, the motion for a protective order is granted to the extent it seeks information concerning the Nevada Action.

Documents Concerning the "New York Action"

Discovery regarding the New York Action, including fees paid or guaranteed relating to the action, could have relevance to the pending accounting proceedings for the Trust, as discussed above. The court denies Fox Rothchild's motion to the extent it seeks to protect all documents relating to the New York Action. However, many of these documents concerning communications between movant and its client, as well as between movant and a former trustee, may be protected by attorney-client privilege. The privilege belongs to the *office* of trustee, not the trustee individually, insofar as the legal advice pertains to the administration of the trust (*Matter of Baugher*, 41 Misc 3d 1209[A] [Sur Ct, Nassau County 2013], *mod on other grounds* 44 Misc 3d 1211[A] [Sur Ct, Nassau County 2014] [a successor trustee may generally assert the attorney-client privilege of its predecessors]). The parties' arguments raise the possibility that the common interest doctrine may also apply here to prevent waiver of the privilege in case of communications that may have been copied to, or made in the presence of, a predecessor trustee or his counsel. Application of the common interest privilege requires a communication otherwise protected by attorney-client privilege, and that the communication is made for the purpose of furthering a common legal interest or strategy (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 124 AD3d 129 [1st Dept 2014]).

To the extent that any privilege is asserted as a basis for withholding disclosure of a document, Fox Rothschild shall produce a privilege log in accordance with CPLR 3122(b) within 30 days of service upon it of this decision and order, with notice of entry.

Communications Regarding Shvachko and the Trust

To the extent that privilege is not claimed for communications concerning Shvachko that are covered by the foregoing rulings, disclosure shall be permitted only as to those communications which specifically relate to the administration or management of the Trust or decedent's estate. Fox Rothschild shall furnish a privilege log in accordance with CPLR 3122(b) for any documents withheld on the basis of privilege, within 30 days of service upon it of this decision and order, with notice of entry.

2. The Subpoena ad Testificandum to Damianos Markou

Shvachko seeks to take the deposition of Damianos Markou, a former partner at Fox Rothschild who was actively involved in the firm's representation of Bro as trustee. Shvachko alleges that Markou may have "information relevant to the . . . accounting proceedings and the conduct of the fiduciaries . . .and the propriety of their conduct toward Natalia Shvachko . . . ."

It is not clear at this juncture whether any non-privileged testimony from Markou would be duplicative of information sought from his former firm, making his deposition unnecessarily burdensome (CPLR 3103 [a]). The court grants Markou's motion for a protective order, without prejudice to issuance of a new subpoena that includes notice of the specific topics to be covered in his examination, after completion of the document discovery from Fox Rothschild.

This decision constitutes the order of the court.

Dated: January 15 , 2016

SURROGATE