

Matter of Palmer

2017 NY Slip Op 30933(U)

April 13, 2017

Surrogate's Court, New York County

Docket Number: 1993-0847/B

Judge: Rita M. Mella

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

New York County Surrogate's Court

APRIL 13, 2017

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In the Matter of the Proceeding to Judicially Settle the First
and Final Account of Constance Hildesley as Successor Trustee
of the Trust under the Will of

DECISION AND ORDER

ARTHUR E. PALMER,

Deceased

File No.: 1993-0847/B

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M E L L A, S.:

Papers Considered

Numbered

Notice of Motion, dated October 29, 2015, by Objectant to Quash Subpoena Served on Putney, Twombly, Hall & Hirson LLP, with Affidavit of Lansing Palmer, dated October 28, 2015, in Support, attaching Exhibits A through C, and with Affidavit of Seth Rubenstein, Esq., of Good Faith, dated October 29, 2015, attaching Exhibits A and B	1, 2, 3
Notice of Motion, dated October 29, 2015, by Objectant to Quash Subpoena Served on Akerman LLP, with Affidavit of Lansing Palmer, dated October 28, 2015, in Support, attaching Exhibits A through C, and with Affidavit of Seth Rubenstein, Esq., of Good Faith, dated October 29, 2015, attaching Exhibits A and B	4, 5, 6
Memorandum of Law, dated October 29, 2015, in Support of Objectant's Motions	7
Notice of Cross-Motion, dated December 7, 2015, by Petitioner in Opposition to Motion to Quash Subpoena to the Putney Firm and for a Protective Order, with Affirmation, dated December 7, 2015, of Neil Carbone, Esq., attaching Exhibits A through Y	8, 9
Notice of Cross-Motion, dated December 7, 2015, by Petitioner in Opposition to Motion to Quash Subpoena to the Akerman Firm and for a Protective Order, with Affirmation, dated December 7, 2015, of Neil Carbone, Esq., attaching Exhibits A through Y	10, 11
Reply Affidavit, dated December 14, 2015, of Lansing Palmer, Esq., in Further Support of Motions to Quash the Subpoenas to the Putney Firm and to the Akerman Firm, attaching Exhibits A through E	12
Sur-Reply Affidavit, dated January 7, 2016, of Lansing Palmer, in Further Support	13
Sur-Reply Memorandum of Law by Objectant, dated January 8, 2016	14
Sur-Sur Reply Affirmation, dated January 19, 2016, of Neil V. Carbone, Esq., attaching Appendix	15

This is a proceeding to settle the final account for a trust, now terminated, established under the will of decedent Arthur Palmer. Its remainder benefits three of his children equally, two of whom oppose each other in this accounting.

Currently before the court is a discovery dispute in which petitioner claims that objectant, her brother, lacks standing to move to quash subpoenas for documents that she served on two non-parties, objectant's current and former law firms, Akerman LLP and Putney, Twombly, Hall & Hirson LLP. The subpoenas primarily seek objectant's correspondence, including emails by or to objectant, regarding the trust and a property in Mount Desert Island, Maine, that was the trust's main asset.

Objectant concedes that he used his law firms' email systems to send and receive personal correspondence regarding the trust during the accounting period at issue, but has moved to quash the subpoenas and for a protective order. He asserts that responsive emails from these firms have already been turned over and the subpoenas served were duplicative, unreasonable and overly burdensome and were served for the purpose of harassing him and his current and former law firms. Petitioner opposed the motions on standing grounds and cross-moved to impose the cost of producing the subpoenaed documents on objectant personally. The non-parties served with the subpoenas have neither moved to quash nor endorsed objectant's position on these motions.

As a former and current partner in the respective firms, objectant has standing to move to quash a subpoena for documents served on them (*AQ Asset Mgt. LLC v Levine*, 111 AD3d 245, 260 [1st Dept 2013], citing *Matter of Shapiro v Chase Manhattan Bank, N.A.*, 53 AD2d 542 [1st Dept 1976]; *Matter of Norkin v Hoey*, 181 AD2d 248, 252 [1st Dept 1992]; cf. *Howlett v Hall*, 55 App Div 614 [1st Dept 1900]).¹

¹The court consequently does not need to reach objectant's argument that a 2013 amendment to the protective order statute, CPLR 3103, resolves the standing issue in his favor (*but see* Sponsor's Mem, Bill Jacket, L 2013, ch 205, at 6), or petitioner's related argument that

The initial procedural issues raised by objectant in support of the motions to quash are meritless. The notice in the subpoenas for the purpose of informing the non-parties as to their “circumstances and reasons” was sufficient in this instance (*see Kapon v Koch*, 23 NY3d 32, 39 [2014]) and the service of the subpoenas on objectant was neither untimely nor resulted in any prejudice to objectant (CPLR 2303[a]; 3120[3]).

Issues regarding the scope and reasonableness of the subpoenas are resolved as follows. Regarding scope, the discovery demanded by the subpoenas shall be confined to the dates of the period accounted for in this proceeding, January 24, 2005 through September 27, 2012. While objectant avers in response to the cross-motions that he has provided relevant, unprivileged documents from the hard copies that he retained from the subpoenaed firms regarding the trust and its property in Maine, he also admits that he cleared out some of these files and disposed of documents in them. The requests from the non-parties are thus not necessarily redundant of what objectant has already provided.

In addition to documents regarding the trust and its property, the subpoenas also sought documents regarding a property adjacent to the property owned by the trust, known as “Art’s Place.” This property was not owned by the trust at issue, and objectant claims that documents, as defined in the subpoenas, regarding it are irrelevant. However, petitioner has met her burden of demonstrating that the property known as “Art’s Place” may be sufficiently similar to one held by the trust such that objectant’s communications regarding it may be relevant to defending against his objections to petitioner’s accounting. Those objections focus on alleged

the standing conferred on a party under CPLR 3103 is irrelevant because subpoenas can be regulated solely by motions to quash under CPLR 2304 (*but cf.* CPLR 3119[e]).

mismanagement, including the failure to sell or distribute in due course the trust's real property in Maine. Since "Art's Place" may be a comparable property – although it apparently was given by decedent's spouse to their grandchildren rather than their children and was not property of the trust at issue here – its management may be relevant to determining petitioner's prudence in administering the trust holding the adjacent property.

As to the burden of producing the documents, it is unclear whether the firms that were subpoenaed maintain indexed electronic records or whether those records are word searchable. If so, the burden will presumably not be onerous in responding to the subpoenas. The request by petitioner in her cross-motions that the cost of this production be borne by objectant is denied. The firms subpoenaed shall provide responsive documents no later than forty-five days after service upon them of this decision and order with notice of its entry.

This decision constitutes the order of the court.

Clerk to notify.

Dated: April 13, 2017



SURROGATE