

Matter of Graffeo (McQuade)
2017 NY Slip Op 32606(U)
November 27, 2017
Surrogate's Court, Nassau County
Docket Number: 2016-391029
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**Proceeding by Lenore McQuade, as a Distributee of the
Estate of**

DECISION & ORDER

**File No. 2016-391029
Dec. No. 33814**

ACCURSIO GRAFFEO a/k/a GUS GRAFFEO,

Deceased,

**to invalidate the purported Accursio Graffeo 2014 Trust, dated
August 11, 2014, and the purported amendments thereto, dated
July 1, 2015 and December 16, 2015, respectively.**

PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion, Affidavit and Exhibits.	1
Affirmation in Support of Cross-Motion and Opposition & Exhibits.	2
Reply Affirmation in Support of Motion.	3
Reply Affidavit in Support of Cross-Motion and Opposition.	4

Before the court is a motion by Robert Kurre, Esq., (“Kurre”) counsel for the petitioner, Lenore McQuade (“petitioner”), and respondent, Diane Young (“respondent Young”), for an order: (1) pursuant to CPLR § 2304 quashing and vacating the subpoena ad testificandum served by respondent, Haydee Reyes-Galecio (“respondent Reyes-Galecio”), upon non-party Kurre; (b) pursuant to CPLR § 3103 granting a protective order relieving non-party Kurre of an obligation to appear for a deposition until such time as the court directs; (c) pursuant to Part 130 of the Rules of the Chief Administrator imposing costs and sanctions on the respondent, Reyes-Galecio, and/or her counsel, Mahon, Mahon, Kerins & O’Brien, LLC, on the basis that the aforesaid subpoena ad testificandum served upon Kurre is frivolous in that it is completely without merit in law and cannot be supported by a

reasonable argument for an extension, modification or reversal of existing law; and it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass the petitioner and her counsel; and (d) granting such other and further relief as the court may deem just and proper.

BACKGROUND

Accursio Graffeo died on August 29, 2016. He was survived by two daughters, the petitioner and respondent Young. Reyes-Galecio, Accursio Graffeo's health aide and housekeeper, is also a respondent (respondent Reyes-Galecio).

On or about September 28, 2016, the petitioner commenced a proceeding by verified petition which seeks an order invalidating a trust and its amendments and directing respondent Reyes-Galecio to return to the decedent's estate any property Reyes-Galecio distributed from the trust and if respondent Reyes-Galecio's sister Irma Gonzalez succeeded to the office of the trustee, directing her to return to the estate any property she distributed from the trust in addition to other requests.

THE MOTIONS

Kurre now moves by Notice of Motion seeking to quash the non-party subpoena the respondent Reyes-Galecio has served on him. Respondent Reyes-Galecio cross-moves and opposes seeking an order directing Kurre to comply with the subpoena *ad testificandum*, arguing that he is a necessary fact witness, therefore his disqualification as counsel is warranted.

The subpoena seeks Kurre's testimony with regard to the following:

“1) All contact verbally and in writing [he] had with the decedent for any and all purposes from January 1, 2014 through August 29, 2016; 2) All non-privileged correspondence and communications concerning the *Accursio Graffeo v. Diane Young*, Nassau County Supreme court matter, including but not limited to: the drafting of settlement documents in the matter, and [his] acceptance of decedent's notarized signature on the aforesaid settlement documents; 3) all conversations verbally and electronically [he] and [his] firm had with Margaret Brovetto, her agents, and representatives and all correspondence [he] and [his] firm had with Margaret Brovetto, her agents and representatives in writing (in any form) concerning decedent's estate plan, decanting of the Trust and amendment(s) thereto and Margaret Brovetto's resignation/declination to serve as successor Trustee under the First Amendment to the *Accursio Graffeo 2014 Trust*, dated July 1, 2015; [4] all contact, both written and verbal, [he has] had with Theresa Graffeo [the decedent's former wife] concerning the subject matter of this action and decedent; [5] any and all other areas which are relevant to the underlying proceeding.”

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]; *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 NY, Book 7B, CPLR C3101:5). “An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry” (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988][internal citations omitted]). “[A]” person served with a notice of a subpoena attendant to disclosure may move either to obtain a protective order (CPLPR 3103), or to quash or modify the subpoena (CPLR 2304)” (*Matter of MacLeman*, 9 Misc3d 1119[A] [Sur Ct, Westchester County]).

Kurre states neither he nor anyone in his firm ever met, spoke with, or had any contact with the decedent (branch 1 of the subpoena). Kurre further states neither he nor anyone in his firm ever spoke with Margaret Brovetto, (the decedent’s long-time friend) about the decedent’s estate planning. In fact the only contact he had with her was after the death of the decedent and states even those conversations were in the “context of asserting [his] clients rights with respect to the decedent’s estate” (branch 3 of the subpoena). Regarding Theresa Graffeo, the decedent’s former wife, Kurre asserts he did not have any contact with her regarding the subject matter of this proceeding and the decedent (branch 4 of the subpoena). His only contact with her came after the death of the decedent. The subpoena also seeks all “non-privileged” correspondence and communications regarding the *Graffeo v Young* Supreme Court action. Kurre represented respondent Young in this litigation and argues that he had no contact with the petitioner regarding this case and did not

discuss the matter with the petitioner (branch 2 of the subpoena).¹

Before addressing the issue of whether the information the subpoena seeks is material and relevant, Kurre contends it is against public policy to call opposing counsel as a witness citing to *Matter of Cavallo*, 20 Misc3d 219 [Sur Ct, Richmond County 2008]. In *Cavallo* the court found that the three prong tests announced in *Shelton v American Motors Corp.*, 805 F2d 1323 [8th Cir 1986] applies. The *Shelton* test provides, “a party must establish that (1) no other means exists to obtain the information than to depose opposing counsel (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case.” *Cavallo* states it is generally discouraged and against public policy to depose opposing counsel, but permits it when the *Shelton* three prong test is met.

In the instant matter, the court finds that branch 1 of the subpoena is vague and therefore not material or relevant. Branch 4 of the subpoena is not material or relevant. Further, Kurre’s contact with the relevant parties in branches 1 and 4 came after the death of the decedent, therefore branches 1 and 4 are quashed.

As to branches 2 and 3, which seek: testimony relating to any non-privileged correspondence and communications concerning the Supreme Court case, *Graffeo v Young*, including but not limited to the drafting of the settlement documents and Kurre’s “acceptance of decedent’s notarized signature” on the settlement documents; and communication with Margaret Brovetto relating to the decedent’s estate planning and her actions, decanting of the

¹ Kurre’s response to branch 2 is not responsive as the request is not limited to his communications with the petitioner.

trust and its amendments and her resignation/declination to serve as successor trustee. While this information may be material and relevant, Respondent Reyes-Galecio has not shown that no other means exists to obtain this information, pursuant to *Shelton* and *Cavallo*, including but not limited to the decedent's own attorney in the Supreme Court case and Margaret Brovetto herself. Therefore branches 2 and 3 of the subpoena are quashed.

Respondent Reyes-Galecio cross-moves seeking an order disqualifying Kurre pursuant to Rule of Professional Conduct 3.7, on the grounds that he is a necessary fact witness. Rule 3.7 states, in pertinent part, "A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact..." A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a right which should not be abridged absent a clear showing that disqualification is warranted (*Aryeh v Aryeh*, 14 AD3d 634 [2d Dept 2005]). While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thereby requiring any restrictions to be carefully scrutinized (*S & S Hotel Ventures, Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987]). The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination (*Aryeh v Aryeh*, 14 AD2d 634, *supra*). Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court (*Olmoz v Town of Fishkill*, 258 AD2d 447 [2d Dept 1999]). Not only is disqualification not warranted pursuant to the Rules of Professional Conduct, disqualification in this instance could lead to further expense,

disadvantage and impinge on a party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a right. Based on the fact that the subpoena has been quashed the cross-motion for disqualification is **DENIED**.

Accordingly, the motion to quash the subpoena is **GRANTED**; and the motion seeking a protective order pursuant to CPLR § 3013 is **DENIED** as moot.

The actions of the respondent Reyes-Galecio do not rise to the level of frivolous and therefore the motion for costs and sanctions is **DENIED**.

The cross-motion is **DENIED** in its entirety.

Any further relief not addressed herein is **DENIED**.

This constitutes the decision and order of the court.

Dated: November 27, 2017
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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