

**Matter of Schaefer**

2013 NY Slip Op 30719(U)

March 29, 2013

Surrogate's Court, Nassau County

Docket Number: 2011-364475

Judge: III., Edward W. McCarty

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

-----XC  
 In the Matter of the Intermediate Accounting of

PATRICIA ANN SCHAEFER,

Trustee,

of the Lakeview Avenue Trust  
 -----X

File No. 2011-364475

Dec. No. 28439

In connection with objections to the intermediate account of Patricia Ann Schaefer, as trustee of the Lakeview Avenue Trust, a motion has been filed to compel the trustee's answers to interrogatories and responses to requests for discovery and production, and for an order for sanctions. For the reasons set forth below, the motion is granted in part and denied in part.

#### BACKGROUND

The Lakeview Avenue Trust, an irrevocable trust, was created on April 24, 2006 between seven siblings, Patricia Ann Schaefer, Walter F. Nolan, Jr., Stephen C. Nolan, Kathleen Nolan Cohn, Michael Patrick Nolan, Gerard George Morr, and Kenneth Morr as Grantors (hereinafter, "Patricia," "Walter," "Stephen," "Kathleen," "Michael," "Gerard," and "Kenneth"), and Patricia as the sole trustee. The trust was designed to utilize trust property for the health, welfare and shelter of Rosemary V. Nolan (hereinafter, "Rosemary"), the mother of the grantors. Upon the death of Rosemary, the trustee was directed to terminate the trust and distribute the assets to the grantors in equal shares. Schedule A appended to the trust agreement lists a "Contract of Sale dated April 17, 2006 for the purchase of the property located at 624 Lakeview Avenue, Rockville Centre, New York," as the property of the trust.

Rosemary died on July 4, 2010; on June 10, 2011 Patricia filed for letters of voluntary administration under SCPA Article 13, for the settlement of estates valued at less than

\$30,000.00. The file reflects that Patricia reported that the estate contained an automobile worth \$2,500.00 and nothing else. Patricia's siblings, the co-grantors of the Lakeview Avenue Trust, requested information from Patricia concerning the decedent's assets and the assets that had been placed in the Lakeview Avenue Trust. Walter filed petitions to compel Patricia to account as Rosemary's voluntary administrator and as Rosemary's attorney-in-fact.

On March 21, 2011, Patricia filed her account as trustee of the Lakeview Avenue Trust for the period April 24, 2006 through December 31, 2010. The account was amended on June 21, 2011 and extended to cover the period through April 30, 2011. Objections to the account were filed by counsel on behalf of Walter, Kathleen, Gerard, Michael and Kenneth (hereinafter, "the objectants"). Objections to the account were separately filed by Stephen, who is self-represented in these proceedings. The accounting lists the contract of sale for the purchase of 624 Lakeview Avenue and the residence at 267 Lakeview Avenue.

Interrogatories and discovery demands were made by the objectants and Stephen. Answers and documents were provided by counsel for the trustee, but counsel for the objectants found them to be inadequate and incomplete, and this motion followed.

#### THE MOTION

Objectants' motion and affirmation in support asks the court to compel the trustee to answer specified interrogatories and to provide the information requested in other interrogatories. In addition, counsel asks that the trustee be directed to produce documents in response to various requests for production, and that the trustee and her counsel be sanctioned for refusing to comply with CPLR 3122 (a) (1), 3133 (a) and (b), and 3101 (a).

## OPPOSITION TO THE MOTION

Counsel for the trustee filed an affirmation in opposition to the motion. Counsel claims that the motion emphasizes form over substance, in that answers to the interrogatories were given to movant's counsel on May 10, 2012, one month late. Movant's counsel indicated that he was not satisfied with the form of the answers provided; trustee's counsel provided revised answers on May 24, 2012. Counsel for movant again expressed dissatisfaction with the answers received from the trustee's counsel, as the document was unsigned. While counsel for the trustee has chosen to characterize his opponent as "apoplectic" over a delay that he claims "is minor in nature," the fact remains that the responses to the discovery demands were late and were repeatedly procedurally defective. To date, the court files do not reflect that a signed and procedurally correct response has been provided by the trustee. In fact, counsel for the trustee asks the court to dismiss all branches of the motion, except that he "agrees to the entry of an order that directs the trustee to produce and serve a single set of Answers to Interrogatories in compliance with both sentences of CPLR 3133 (b)." Counsel for the trustee does not explain why a court order should be necessary. This accounting proceeding has been extremely contentious; the court reminds all counsel that complete and timely compliance with discovery demands is required without the issuance of special orders by the court.

The second opposing argument made by counsel for the trustee is that Kenneth P. Mahon was quoted out of context by the objectants for having said, repeatedly, at a court conference, "motion practice is what we do." Counsel for the trustee maintains that Kenneth P. Mahon was not implying that his firm prefers motion practice to resolution but rather, that objectants' counsel is free to bring a motion if he is dissatisfied with the answers provided by the trustee.

## DISCOVERY

New York requires full disclosure of all matter material and necessary in the prosecution or defense of an action (CPLR 3101 [a]). Case law has broadly construed the scope of material that is discoverable, ruling that "the words material and necessary are to be interpreted liberally to require disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay ... the test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 [1968] [internal citations omitted]). The Court of Appeals' interpretation of "material and necessary" 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). Discovery of documents is permitted even if they are not admissible in evidence, provided that the production of such documents may lead to disclosure of admissible evidence (*Fell v Presbyterian Hospital in New York at Columbia-Presbyterian Med. Ctr.*, 98 AD2d 624, 625 [1st Dept 1983]).

Courts have broad discretion in supervising discovery and the setting of reasonable terms and conditions therefor (*Matter of U.S. Pioneer Execs. Corp.*, 47 NY2d 914, 916 [1979]; *Mattocks v White Motor Corp.*, 258 AD2d 628, 629 [2d Dept 1999]). Ordinarily if a party objects to a discovery demand, that party is to serve a response which states with reasonable particularity the reasons for each objection. If an objection is made to part of an item or category, the part is to be specified (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3122:1).

## ANALYSIS

The discovery demands made by the objectants can be grouped into three categories, each of which will be addressed by the court below.

### Compel the trustee to provide information requested in interrogatories

Objectants have asked the court to compel the trustee to provide the information requested in interrogatories numbered 46, 47, 71, 73, 81, 132, 168, 170, 172, 177, 197 and 198. The papers before the court also reference interrogatories numbered 109, 169 and 171.

Interrogatories 46 and 47 seek written evidence which supports Patricia's claim that her husband, Robert Schaefer (hereinafter, "Robert"), made a down payment of \$27,500.00 for the purchase of the 624 Lakeview Avenue property. Patricia states that she has been unable to find a copy of the check used for the down payment and that she possesses no evidence that the down payment was made by Robert. In addition, in his affirmation in opposition, counsel for the trustee states that objectants' counsel obtained a check for \$25,000.00 written from Patricia's personal account, which check was apparently the one used for the down payment. "[A] party cannot be compelled to produce information that does not exist or which he [or she] does not possess" (*Romeo v City of New York*, 261 AD2d 379, 380 [2d Dept 1999] [internal citations omitted]). Accordingly, objectant's request for written evidence that Robert made a down payment of \$27,500.00 is denied, as the trustee apparently concedes that the down payment was not made by Robert.

Interrogatories 71, 73, and 81 ask (a) whether Patricia or her agent notified decedent's children of a change in plans so that each of the decedent's children would be asked to execute a deed transferring his or her interest in 267 Lakeview Avenue to Patricia, as trustee of the

Lakeview Avenue Trust, instead of selling their respective interests to the buyers, and (b) whether the plan for 267 Lakeview Avenue had ever been for the decedent and her children to transfer the property to Patricia as trustee of the Lakeview Avenue Trust, to enable Patricia to sell the property, rather than to sell it to the buyers, and (c) whether Patricia considered the tax consequences of the different plans. Patricia responded that the legal, tax and accounting aspects of the transfer were handled by her attorney and accountant at that time, and that she doesn't recall discussing the tax consequences. The trustee has answered these three interrogatories.

Interrogatory 109 asks the trustees to provide the calculation of the income tax basis for the sale of 267 Lakeview Avenue. The trustee responded that she does not have the information, but that it would be in possession of the accountant for the trust. The court finds that the information requested is under the trustee's control, which has been defined as "the legal right, authority, or ability to obtain upon demand documents in the possession of another" (*De Vos v Lee*, 2008 WL 2946010 [ED N.Y. 2008]). "Documents in a party's 'control' include those in the physical possession of its accountant" (*Edmonds v Surgical Monitoring Associates, Inc.*, 2008 WL 1924253 [ED Pa 2008]). The motion is granted as to this request.

Interrogatory 132 asks for the source of a transfer of \$18,977.00 from the decedent, shown on Schedule A of the account. Patricia responded that she is unable to answer the question, but fails to provide a reason for her inability. Patricia is directed to answer the question, or to explain with more specificity the reason she is unable to answer it.

Interrogatory 168 requests evidence to substantiate Patricia's claim that checks made payable to Robert as well as to Robert and Patricia were for expenses related to trust purposes. Interrogatory 169 asks for evidence that each of the cash withdrawals was for a trust expense.

Interrogatory 170, 172, and 177 asks Patricia to identify cash withdrawals which she claims were used to pay domestic workers and the amounts of compensation paid, and requests evidence that these cash withdrawals were utilized for payments to domestic workers and were not retained by Patricia or Robert. Patricia responded that checks payable to her and Robert and the withdrawals and amounts are in the body of the trust accounting, and that her personal oral testimony, as well as the testimony of Robert and decedent's sister, serve as evidence that the cash withdrawn from the trust account was used solely for the payment of domestic employees. Interrogatory 171 seeks the names, addresses and dates of employment of the domestic workers paid with trust funds. Patricia responded that she has no information aside from the first name of the domestic employee paid with trust funds and the fact that she was employed from January 2006 to decedent's death. Interrogatory 197 and 198 ask Patricia to identify evidence to substantiate that expenses shown on JPMorgan and credit card statements were expended exclusively for the benefit of decedent and not for the benefit of others. Patricia states that it is set forth in the accounting, and that her credit card bills show purchases on behalf of her mother, for which she was reimbursed. She offers her own testimony and Robert's testimony as additional evidence. As noted above, a party cannot be compelled to produce written evidence which she does not have in her possession or which does not exist (*Romeo v City of New York*, 261 AD2d 379, 380 [2d Dept 1999]), and Patricia has taken the position that she has no written evidence, other than the account itself, to show that these checks, withdrawals, expenditures and reimbursements were for the sole benefit of the decedent. The motion is denied as to these requests.



Compel the trustee to answer interrogatories

Objectants also ask the court to direct the trustee to answer interrogatories numbered 113, 151, 155, 267, 268, and 269.

In interrogatory 113, the objectants ask Patricia to identify when \$25,000.00 was deposited or utilized for decedent's benefit. At the end of the question, there is a sentence fragment, "In the latter case." Patricia responded that the question was confusing at the end and she didn't understand it. This portion of the motion is granted. Patricia is directed to ignore the fragment and respond to the complete sentence contained in this interrogatory.

Interrogatories 151 and 155 seek information as to whether Patricia and Robert deposit their personal funds in interest bearing accounts. Presumably, objectants intend to show that the trustee placed her personal funds in interest bearing accounts but failed to place trust funds into interest bearing accounts. The interrogatories are irrelevant and do not require an answer because a fiduciary has an absolute duty to deposit estate or trust funds in interest bearing accounts. As noted by Surrogate Bennett in an earlier decision issued by this court, "[i]t is the duty of a fiduciary to invest the funds profitably under penalty of personal liability, and the retention of money uninvested beyond a reasonable time places the burden of explanation and justification upon the representative when he accounts" (*Matter of Frey*, 55 Misc 2d 567, 569 [Sur Ct, Nassau County 1967]). Estate funds cannot lie fallow (*see Matter of Welling*, 26 Misc 2d 182, 188 [Sur Ct, New York County 1960], in which a surcharge was imposed upon a fiduciary who failed to invest funds under his control). Accordingly, the investment of the trustee's personal funds has no relevance to her responsibility to invest the trust funds profitably. This portion of the motion is denied.

Interrogatories 267, 268 and 269 concern payments made by Patricia, as trustee, to Robert, in 2009, 2010 and 2011, which Patricia claims were payments of interest. Objectants wish to determine whether Robert reported the payments as interest on his personal income tax returns for those years (or on returns he filed jointly with Patricia), and ask Patricia whether she and Robert filed or intend to file jointly and whether the interest was reported on returns. Since it is Patricia who claims that the payments she made to Robert from the trust were payments of interest, the income tax characterization of the payments made by Patricia to Robert is relevant to the objections to the account. Patricia is directed to answer these interrogatories.

Produce the documents listed in the requests for production

The relief requested by the objectants includes a request that the court compel the trustee to produce the documents listed in the requests for production numbered 1, 2, 15-20, 22-25 and 27.

Request for production 1 seeks materials related to the purchase of 624 Lakeview Avenue, and request for production 2 seeks materials related to the sale of 267 Lakeview Avenue. Patricia states that she attached all responsive documents in her control as Exhibits A and B. Trustee's counsel advises the court in his affirmation that the trustee's prior counsel cannot explain why the requested documents not previously produced cannot be located. Once again, the court acknowledges that the trustee cannot be compelled to produce documents not in existence or in her possession or control, but as to any documents which the trustee asserts are not in existence, the trustee is directed to submit an affidavit stating that the requested documents are not in existence (*Varughese v Ritzel*, 31 Misc 3d 1242 [A] [Civ Ct, New York City 2011]).

Request for production 15 seeks copies of all IRS Forms 1099 received on behalf of the

Lakeview Avenue Trust for 2006-2011. Request for production 16 seeks copies of all IRS Forms 1099 issued by Patricia, as trustee, to Robert, for monies paid to him in 2006-2011, including interest paid by the Lakeview Avenue Trust on promissory notes dated July 1, 2009 and November 11, 2009. Request for production 17 seeks the written calculations of the interest paid to Robert on promissory notes dated July 1, 2009 and November 11, 2009. Request for production 18 seeks the written calculations of the loan's payoff amount of \$77,682.52 paid by the Lakeview Avenue Trust. Request for production 19 seeks all written materials in connection with both of the certificates of deposit purchased with funds from the sale of 267 Lakeview Avenue. Patricia responded that she is not in possession or control of any of the requested documents. The motion is granted with respect to these requests; Patricia is directed to produce the requested documents with regard to requests for production 15, 16 and 19 and to provide same for requests for production 17 or 18 or provide a detailed explanation why no such documents exist.

Request for production 20 seeks unedited HSBC bank statements for Patricia and Robert's account for the period when payments were being made from the trust to Robert on the promissory notes. Patricia takes the position that objectants are not entitled to these documents, and that the edited statements which were provided (as Exhibit F) show that the amounts of \$37,500.00 and \$50,000.00 were withdrawn for loans to the trust. The court finds that these demands are unnecessarily intrusive. "The delicate balance between allowing liberal disclosure and protecting the parties from unnecessary intrusions is left to the sound discretion of the lower courts" (*Sgambelluri v. Recinos*, 192 Misc 2d 777, 779 [Sup Ct, Nassau County 2002], citing *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740 [2000]). This portion of the motion is denied.

Requests for production 22, 23 and 24 concern Patricia's personal credit card account. Request 22 seeks unedited statements for the period when Patricia paid some of the credit card charges from the trust account. Patricia has refused to produce the requested documents, arguing that all of the charges paid from the trust are shown on the edited statements; no claims will be made for the redacted, personal charges. Request 23 seeks substantiation that the charges paid from the trust account were made for decedent's sole benefit. Patricia claims that her testimony and the testimony of Robert and her aunt will substantiate these claims, and that she has no responsive documents. Request 24 seeks year end statements for this credit card account for the years 2006-2010.

Counsel for the objectants argues that the charges claimed must be viewed in the context of the complete statements in order to determine the veracity of the trustee's otherwise undocumented claims that these expenditures were for the decedent's benefit. It is well settled that "[i]n deciding the question of whether the information sought is material and necessary, the courts possess a wide discretion" (*Shutt v Pooley*, 43 AD2d 59, 60 [3d Dept 1973]). The unedited credit card statements and the year end credit card statements shall be produced for *in camera* review to determine whether they contain information that may lead to admissible evidence.

In Request 25, objectants requested copies of all written materials relating to decedent for 2006-2010 concerning her health care plan, prescription plan and explanations of benefits from Medicare and private health insurance. Patricia responded that to the extent these documents are available, they are attached as Exhibit H. The court directs the trustee to submit any responsive documents not previously produced or to file an affidavit stating that the documents are not in

existence.

Request 27 seeks copies of bank correspondence; Patricia states that she is not in possession or control of the documents. Patricia is directed to obtain possession of these documents from her bank and produce them or submit an affidavit reflecting her diligent efforts to obtain these documents.

#### CONCLUSION

The trustee shall produce a set of Answers to Interrogatories that is in proper form and signed.

The trustee shall produce all of the documents as directed above. Counsel for the trustee is again reminded that the court expects timely and complete compliance with discovery demands.

At this time, the court denies that portion of the motion which seeks sanctions of the trustee and her counsel for failure to comply with CPLR 3122 (a) (1), 3133 (a) and (b), and 3101 (a).

This constitutes the decision and order of the court.

Dated: March 29, 2013

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