Matter of Miness Family Trust
2014 NY Slip Op 33432(U)
December 24, 2014
Surrogate's Court, Nassau County
Docket Number: 2012-369167/A
Judge: Edward W. McCarty III

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

----------x

In the Matter of the Account of Proceeding of Francis W. Deegan, as Co-trustee of

THE MINESS FAMILY TRUST
DATED OCTOBER 10, 1988

File No. 2012-369167/A

Dec. Nos. 30240
30552

----------x

In the Matter of the Account of Proceeding of Saul Fenchel, as Co-trustee of

THE MINESS FAMILY TRUST
DATED OCTOBER 10, 1988

File No. 2012-369167/B

Dec. No. 30249

(For the period of October 10, 1988 Through November 12, 2009)

----------x

Before the court in these accounting proceedings are: (i) a motion by petitioner Saul Fenchel to compel compliance with a discovery demand; (ii) a motion by petitioner Francis W. Deegan to compel compliance with his discovery demands; and (iii) a cross-motion by objectants Mark Miness and Stephanie M. Begnal for a protective order denying the application for an order compelling objectants to provide petitioner Deegan with all individual federal and state tax returns filed by Mark Miness and Stephanie M. Begnal for the period October 10,1988 through August 31, 2012, and all forms W-2 received by Mark Miness and Stephanie Begnal from Glen Haven Residential, Glen Haven Sub-Acute and/or Glengariff.

The Miness Family Insurance Trust (hereinafter "the trust") was created under Trust Agreement dated October 10, 1988 by Michael D. Miness, as settlor, and Francis W. Deegan and Saul Fenchel, as trustees. The trust, which is irrevocable, was apparently funded with life

insurance. The express purpose of the trust is to provide for the settlor's spouse and descendants. Pursuant to the terms of the trust, during the settlor's life, yearly withdrawals of defined amounts may be made by each of the settlor's descendants, presumably to allow additions to the trust made to pay life insurance premiums to qualify for the annual gift tax exclusion by virtue of the Crummey power. In addition, the trustees may make discretionary distributions for any one or more of the settlor's descendants for health, support, maintenance and education. The settlor is alive. Mark Miness and Stephanie M. Begnal are the settlor's children.

SAUL FENCHEL'S NOTICE OF MOTION TO COMPEL

On or about May 2, 2013, Saul Fenchel, the resigned trustee, filed a petition for judicial settlement of his account as trustee, together with his accounting for the period October 10, 1988 through November 12, 2009. On or about December 12, 2013, Mark Miness and Stephanie M. Begnal filed objections to the account. On February 14, 2014, Saul Fenchel served a demand for the production of documents upon the objectants. The objectants served a response to the demand on or about March 6, 2014.

Petitioner Saul Fenchel has now moved to compel objectants to comply with the demand and re-serve their response and file affidavits attesting to the fact that they are not in possession, custody or control of documents responsive to the demand. Specifically, Fenchel argues that the response contained no documents, but merely contained objections and in some instances stated that responsive documents would be provided. Fenchel's counsel acknowledges that thereafter objectants' counsel forwarded by letter 471 documents. According to Fenchel's counsel, the documents were not organized in any fashion, nor did they identify the numbered demand they were responsive to from Fenchel's demand. In addition, the response objected to a number of

demands as unduly broad and as not material and necessary but states that the documents were provided in any event. For example, the response to Demand No. 7 is as follows:

> Object on the grounds that it is overly broad, unduly burdensome, vague, ambiguous, and seeks documents and information that are not relevant or material and necessary to any claim or defense in this action and are not reasonably calculated to lead to the discovery of admissible evidence.
>
> Subject to and without waiving these General and Specific Objections, and Reservation of Rights, Respondents will produce responsive, non-privileged documents in their possession, custody or control, if any.

While the objections may be valid, the nature of the response, together with the document production of over 471 items without corresponding the documents produced to the demand, assertions of privilege without a privilege log, and the failure to provide affidavits from the objectants setting forth that the documents are not in their possession, custody or control, makes it virtually impossible to address objectants' objections to the demand.

Accordingly, within thirty (30) days of the date of this decision, objectants are directed to re-serve a proper response corresponding the provided documents to the demand and providing a privilege log and the required affidavits. Until such time, the court will not be able to address the objections raised by the objectants.

FRANCIS W. DEEGAN'S
MOTION TO COMPEL

FIRST DEMAND

The Trustee Francis W. Deegan has moved for an order directing Mark Miness and Stephanie M. Begnal to produce the documents requested in the Notice for Discovery and

Inspection dated February 14, 2014 and Second Notice for Discovery and Inspection dated April 9, 2014.

The objectants' response to trustee Francis W. Deegan's first demand is replete with the same problems as the response to trustee Saul Fenchel's demand. Accordingly, within thirty (30) days of the date of this decision, objectants are directed to re-serve a proper response corresponding the provided documents to the demand and providing a privilege log and the required affidavits. Until such time, the court will not be able to address the objections raised by the objectants other than the issue of a protective order raised in the cross-motion as to demands 1 through 4. Demands 1 through 4 seek the following documents:

> 1. All federal and state individual income tax returns filed by Mr. [Mark] Miness, including all schedules and attachments thereto, and all correspondence pertaining to such returns, which were filed with respect to the Relevant Time Period.
>
> 2. All federal and state individual income tax returns filed by Ms. Begnal, including all schedules and attachments thereto, and all correspondence relating to such returns, which were filed with respect to the Relevant Time Period.
>
> 3. All Forms W-2 received by Mr. [Mark] Miness from Glen Haven Residential, Glen Haven Sub-Acute and/or Glengariff.
>
> 4. All Forms W-2 received by Ms. Begnal from Glen Haven Residential, Glen Haven Sub-Acute and/or Glengariff.

CPLR 3103 (a) provides that "The court may at any time . . . on motion of any party . . . from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." "The court has broad discretion to supervise disclosure to prevent unreasonable

annoyance, expense, embarrassment, disadvantage, or other prejudice" (*Eber Bros. Wine & Liquor Corp. v Ribowsky*, 266 AD2d 499, 500 [2d Dept 1999]).

A party does not have to respond to a discovery demand that is palpably improper. "A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case" *(Saratoga Harness Racing, Inc. v Roemer*, 274 AD2d 887, 889 [3d Dept 2000], *citing Titleserv, Inc. V Zenobio*, 210 AD2d 314, 315-316 [2d Dept 2000]; *see also Spancrete Northeast, Inc. v Elite Associates, Inc.,* 148 AD2d 694, 695 [2d Dept 1989] [items in the demand for discovery and inspection are palpably improper on the ground that the information sought thereunder is not relevant to the issues in the case]; *Handy v Geften Realty*, 129 AD2d 556 [2d Dept 1987] [notice of discovery and inspection found to be improper as the information sought thereunder is not relevant to the issues in the case]).

The party seeking disclosure is required to demonstrate that the discovery sought will likely result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*see Forster v Herbert Slepoy Corp*., 74 AD3d 1139, 1140 [2d Dept 2010]; *Beckles v Kingsbrook Jewish Med. Ctr.*, 36 AD3d 733, 733 [2d Dept 2007]; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421[2d Dept 1989]). Where the "discovery demands are palpably improper in that they are overbroad, lack specificity, or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than to prune it" (*Bell v Cobble Hill Health Ctr., Inc.,* 22 AD3d 620 [2d Dept 2005]).

It is well-settled that in New York, disclosure of tax returns is disfavored due to their

"confidential and private nature" (*Gordon v Grossman*, 183 AD2d 669, 670 [1st Dept 1992]; *see also Altidor v State-Wide Ins. Co.,* 4 Misc 3d 1007(A) [Sup Ct, Kings County 2004], *aff'd* 22 AD3d 435 [2d Dept 2005]; *Manzella v Provident Life and Casualty Co.*, 273 AD2d 923 [4th Dept 2000]; *Briand Parenteau, Inc. v Dean Witter Reynolds*, 267 AD2d 576 [3rd Dept 1999]).

A party will not be required to produce income tax returns in a particular action unless the party seeking such disclosure makes a showing of "overriding necessity" (*Four Aces Jewelry Corp. v Smith*, 256 AD2d 42 [1st Dept 1998]).

In order for the court to allow the discovery of a party's tax records, the party seeking those records must "demonstrate that the information in the returns is not available from other sources" (*Leinoff v 208 West 29th Street Associates*, 243 AD2d 418, 419 [1st Dept 1997]; *see also BRS & W Associates v W.R. Grace & Co.*, 156 AD2d 249 [1st Dept 1989] [requiring the party seeking the tax returns to demonstrate that the information sought cannot be obtained through other means, e.g. deposition or trial testimony). Even if the alternative methods attempted by the parties may seem burdensome compared to the release of the party's tax returns, no discovery is allowed "absent showing an inability to obtain information from other sources" (*Penn York Construction v State of New York*, 92 AD2d 1086, 1087 [3d Dept 1983] [holding that New York was not allowed discovery of the plaintiff's tax records because it did not show that the state's auditors could not develop a sufficient accounting analysis from the records available]).

Moreover, there must be "some showing that the particular information in the tax returns has some specific application to the case" (*Active Fire Sprinkler v American Home*, 203 AD2d 218, 218 [2d Dept 1994]). Specifically, the First Department stated that the party seeking

production of tax returns must establish the information contained in the returns sought "is indispensable to the litigation and unavailable from other sources" (*Nanbar Realty Corp. v Pater Realty Corp.*, 242 AD2d 208, 209 [1st Dept 1997]). The court summed up that "consistent with this authority, the party seeking to compel production of a tax return must identify the particular information the return will contain and its relevance, explain why other possible sources of the information sought are inaccessible or likely to be unproductive and limit examination of the return to relevant material through redaction of extraneous information" *(Nanbar Realty Corp. v Pater Realty Corp.*, 242 AD2d 208, 209 -210 [citing Weinstein-Korn-Miller, NYCiv Prac ¶ 3101.10a).

Objectants have objected to the trustees' taking of a loan in the sum of $400,000.00 against the cash surrender value of the life insurance policy which is an asset of the trust and making an unsecured loan of that $400,000.00 to the settlor. Objectants contend that at his SCPA 2211 examination trustee Deegan indicated that the unsecured loan is uncollectible and thus should be considered worthless. The settlor claims that the loan proceeds were used in connection with a liquidity issue concerning the sale of the Glengariff entities in which objectants had an interest and, therefore, the loan actually benefitted them. Trustee Deegan claims that the information in the tax returns "is necessary to prove that Objectants were involved in the corporate entities which received loan proceeds, derived income therefrom and benefitted by the loans being made to such corporate entities."

In the instant case, however, trustee Deegan has failed to make the required showing that the information cannot be obtained from less intrusive sources (*Lattare v Smith*, 304 AD2d 534 [2d Dept 2003]).

Accordingly, the cross-motion is granted as to demands 1 through 4 of Francis W. Deegan's first demand.

As to the second demand, which contains only two demands, the objectants have complied except that objectants must provide an affidavit as to demand 2 that no documents are in their possession, custody or control responsive to the demand.

The matter is scheduled for a conference on January 29, 2015, at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: December 24, 2014

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