

**Matter of Heldesley as Successor Trustee of the
Trust under the Will of Palmer**

2015 NY Slip Op 32439(U)

September 28, 2015

Surrogates 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

Date: December 28, 2015

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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 March 17, 2015, by Objectant to Compel Discovery, with Affirmation, dated March 17, 2015, of Seth Rubenstein, Esq., attaching Affirmation of Good Faith, dated March 17, 2015, of Seth Rubenstein, Esq., and Exhibits A through Z	1, 2
Memorandum of Law, dated March 17, 2015, in Support of Objectant's Motion	3
Notice of Cross-Motion, dated May 7, 2015, by Petitioner for a Protective Order and to Compel Production by Objectant, with Affidavit, dated April 28, 2015, attaching Exhibits A through X, and the Affidavits, dated April 27, 2015 and November 15, 2013, of Orrin Devinsky, M.D.	4, 5, 6, 7
Memorandum of Law, dated May 7, 2015, by Petitioner in Support of Cross-Motion	8
Reply Affirmation, dated May 27, 2015, of Lansing Palmer, Esq., in Support of Motion to Compel and in Opposition to Cross-Motion, attaching Exhibits A through S	9
Reply Memorandum of Law, dated May 28, 2015, in Support of Objectant's Motion to Compel and in Opposition to Cross-Motion	10
Reply Affirmation, dated June 15, 2015, of Neil V. Carbone, Esq., in Further Support of Cross-Motion, attaching Exhibits Y and Z	11
Sur-Reply Affirmation, dated August 28, 2015, of Seth Rubenstein, Esq., attaching Exhibit A	12
Sur-Sur-Reply Affirmation, dated September 24, 2015, of Neil V. Carbone, Esq., attaching Exhibit AA	13
Objectant's Supplemental Objections and Responses, dated September 24, 2015, to Petitioner's First Notice of Discovery and Inspection	14
Affirmation, dated September 24, 2015, of Lansing R. Palmer, Esq., on Document Production, attaching Exhibits A through F	15
Affirmation, dated November 25, 2015, of Neil V. Carbone, Esq., attaching Exhibits A through H	16
Letter, Dated November 24, 2015, of Seth Rubenstein, Esq.	17
Letter, Dated November 25, 2015, of Neil V. Carbone, Esq.	18

<u>Papers Considered</u> (Continued)	<u>Numbered</u>
Notice of Motion, dated November 3, 2015, by Objectant to Compel Discovery, with Affidavit, dated November 2, 2015, of Lansing Palmer, Esq., attaching Exhibits A through I, and Affirmation of Good Faith, dated November 3, 2015, of Seth Rubenstein, Esq., attaching Exhibits A and B	19, 20, 21
Memorandum of Law, dated November 3, 2015, in Support of Motion to Compel	22
Affirmation, dated December 8, 2015, of Neil V. Carbone, in Opposition to Motion to Compel, attaching Affidavit, dated December 4, 2015, of Constance P. Hildesley and Affidavit, dated December 7, 2015, of C. Hugh Hildesley	23, 24, 25
Notice of Motion, dated October 29, 2015, to Quash Subpoena Served on Putney, Twombly, Hall & Hirson, LLP, with Affidavit, dated October 28, 2015, of Lansing R. Palmer, attaching Exhibits A through C	26, 27
Notice of Motion, dated October 29, 2015, to Quash Subpoena Served on Akerman LLP, with Affidavit, dated October 28, 2015, of Lansing R. Palmer, Esq., attaching Exhibits A through C, and Affirmation of Good Faith, dated October 29, 2015, of Seth Rubenstein, Esq., attaching Exhibits A and B.	28, 29, 30
Memorandum of Law, dated October 29, 2015, in Support of Motions to Quash	31
Notice of Cross-Motion, dated December 7, 2015, in Connection with Subpoena of Putney, Twombly, Hall & Hirson, LLP, with Affirmation, dated December 7, 2015, attaching Exhibits A through Y	32, 33
Notice of Cross-Motion, dated December 7, 2015, in Connection with Subpoena of Akerman, LLP, with Affirmation, dated December 7, 2015, attaching Exhibits A through Y	34, 35
Two Affirmations, dated December 7, 2015, by Neil V. Carbone, Esq., in Support of Cross-Motions and in Opposition to Motions to Quash, One Re: Akerman LLP Subpoena, and One Re: Putney Twombly et al LLP, Both attaching Exhibits A through Y	36, 37
Petitioner's Memorandum of Law, dated December 8, 2015, in Opposition to Objectant's Motion to Compel Emails from AOL Account	38
Objectant's Reply Affidavit, dated December 14, 2015, of Lansing R. Palmer, Esq., in Further Support of Motion to Compel, attaching Exhibit A	39
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At the call of the calendar on December 15, 2015, the court had before it the various motions filed by the parties in this contested accounting proceeding involving the administration of a trust established under the will of the parties' father, decedent Arthur Palmer. The

petitioning successor trustee's account has been objected to by her brother. The objections center on the alleged mismanagement and delayed sale or distribution of the trust's main asset, real property in Mount Desert Island, Maine. The motions were resolved as set forth below.

Striking Objectant's Appearance as *Pro Se* Co-Counsel

The court denied petitioner's motion to strike objectant's appearance as *pro se* co-counsel under the last sentence of CPLR 321(a), which states: "If a party appears by attorney such party may not act in person in the action except by consent of the court." While in general an attorney's appearance on a party's behalf makes the party's appearance *pro se* unnecessary, here objectant is himself an attorney who practices in the field of trusts and estates, and the court consented to objectant's appearance as *pro se* co-counsel.

SCPA 2211 Examination of Petitioner

Petitioner has refused to sit for an oral examination under SCPA 2211 because of a claimed medical condition. Affidavits from petitioner's doctor state that petitioner suffers from a seizure disorder and that the stress of the examination may induce a possible fatal seizure. A portion of objectant's motion before the court sought to compel petitioner's oral examination or in the alternative, an examination by an independent physician. Petitioner countered that objectant had waived his right to an oral examination of petitioner.

A proposed stipulation dated May 19, 2015 signed only by objectant's counsel states that objectant "withdraws his request for her oral deposition," but petitioner's counsel never executed it. Instead, petitioner's counsel proffered a revised stipulation to objectant's counsel, and although it included the waiver, it also included other provisions. By that time, the waiver had been withdrawn by objectant, who contends in his motion to compel that petitioner's medical

condition may not be nearly so serious since, according to him, she has not curbed any other social or professional activity.

Having no mutual assent to all material terms, the May 19, 2015 writing, the court held, is not a binding stipulation in this instance (*see* CPLR 2104; *DeVita v Macy's East, Inc.*, 36 AD3d 751 [2d Dept 2007]; *cf. Forcelli v Gelco Corp.*, 109 AD3d 244 [2d Dept 2013]). The court then required that there be a second examination of petitioner by a physician, unaffiliated with petitioner's own, to better assess whether petitioner should avoid an oral examination under SCPA 2211 or what conditions, if any, should be imposed on such an examination.

Counsel was informed in previous settlement conferences that, were the May writing found to not be binding, they should agree on a second doctor, and they have. Petitioner's examination by this doctor should, absent good cause, take place within 45 days of the service of this order on petitioner, and petitioner shall bear the expense of this examination, as requested by objectant. The report of this doctor, listing all information on which her report is based and attaching copies of all medical reports or charts reviewed for the purposes of petitioner's examination, shall be served on counsel as soon as practicable. If after receiving the report, objectant's counsel still seeks petitioner's oral examination, he may renew his motion to compel.

Access to AOL Account Emails

Objectant indicated in open court that the portion of his motion that sought to compel petitioner's authorization to obtain emails and other electronically stored information from an account at AOL used by petitioner, directly from AOL, was withdrawn.

Objectant's more recently filed motion to compel claimed that any and all emails from or to petitioner's AOL email address, and which related to the trust at issue, must be disclosed by

petitioner because there can be no claim of privilege for this account. Objectant here argued that the AOL email account in question is actually an account created and used by petitioner's spouse. As such, objectant claims that petitioner could have had no reasonable expectation of privacy and thus no claim of attorney-client privilege to communications to and from this account.

Petitioner in opposition, however, met her burden of showing that this email account was hers personally since 2002, well before January 21, 2005, when she became fiduciary of the trust at issue, succeeding objectant as trustee. Although the account was originally set up by petitioner's spouse, when the couple purchased a home computer in 2000, both she and her spouse have provided sworn statements that only petitioner has had the password and access to this AOL account since some time in 2002. Since this was an email account to which petitioner alone was privy, there can be no claim of waiver of privilege or that privilege never attached in the first instance due to a failure to keep or maintain the communications in confidence. The motion to compel any and all emails from this AOL account regardless of petitioner's assertion of privilege was thus denied.

Objectant's Motions to Quash Petitioner's Subpoenas Served on Law Firms Putney, Twombly et al LLP and Akerman LLP and Petitioner's Cross-Motions to Impose the Cost of Document Production on Objectant

The court directed that the parties provide a supplemental briefing limited to the issue of objectant's standing to move to quash subpoenas served on two law firms, one at which objectant was formerly employed, and one at which he is currently employed. Standing had been raised as a defense by petitioner in these motions to quash. As agreed to by the parties, the court directed objectant to file and serve his sur-reply papers on this issue no later than January 8, 2016, and

further directed petitioner to file and serve her sur-sur-reply papers on this issue no later than January 19, 2016.

This decision together with the transcript of the December 15, 2015 proceedings constitute the order of the court.

Dated: December 28, 2015



SURROGATE