

Matter of Neuberger Berman Trust Co., N.A.
2016 NY Slip Op 32277(U)
November 10, 2016
Surrogates's Court, New York County
Docket Number: 1983-0735 D
Judge: Nora S. Anderson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT: NEW YORK COUNTY

-----X
In the Matter of the Application of Neuberger Berman
Trust Co., N.A., as Trustee of a Trust created by

IRMA L. CROLL,

Grantor,

File No. 1983-0735 D

Under Agreement dated November 24, 1970,
for Judicial Settlement of its Account.

-----X
-----X

In the Matter of the Application of Neuberger Berman
Trust Co., N.A., as Trustee of a Trust created by

IRMA L. CROLL,

Grantor,

File No. 1983-0735 E

for the Benefit of Jane C. Wolfe, Seeking Judicial
Settlement of its Account.

-----X
-----X

In the Matter of the Application of Neuberger Berman
Trust Co., N.A., as Executor of the Estate of

IRMA L. CROLL

File No. 1983-0735 F

for Judicial Settlement of its Account.

-----X
-----X

Neuberger Berman Trust Co., N.A.,

Plaintiff,

-against-

File No. 1983-0735 H

Sarah J. Schlesinger, as Executor of the Estate of
Edward S. Schlesinger, and Hofheimer Gartlir &
Gross LLP,

Defendants.

-----X
ANDERSON, S.

In the above-captioned action and proceedings, the law firm of Hofheimer Gartler &

New York County Surrogate's Court
Date: November 10, 2016

Gross, LLP (“HGG”) moves for a protective order staying the examination of a non-party witness. Neuberger Berman Trust Co. N.A. (“NB”) cross-moves to compel HGG to comply with (1) a subpoena duces tecum and (2) this court’s order dated June 19, 2015, directing HGG to produce its client files. NB also seeks an order pursuant to SCPA § 607 and CPLR § 2308 holding HGG in contempt for its alleged failure to comply with either the order or the subpoena .

Three of the above-captioned proceedings (File No. 1983-0735 D,E,F) filed by NB seek judicial settlement of its accounts as executor of decedent’s estate and as trustee of two inter vivos trusts. NB also brought an action for legal malpractice (File No. 1983-0735 H), transferred from Supreme Court, New York County, against defendants HGG and Edward S. Schlesinger (“Schlesinger”), a former partner at HGG.

Background

Decedent Irma Croll died in 2001. In her will, she named NB and Schlesinger as co-executors of her estate; NB and Schlesinger were also co-trustees of her IV trust. HGG served as counsel to NB and Schlesinger in the administration of the estate and the trust.

By letter dated December 9, 2011, counsel for three of the trust beneficiaries informed NB that the Generation Skipping Transfer (“GST”) tax may have been incorrectly calculated on the federal estate tax return filed in 2003, resulting in a tax overpayment. After confirming that the estate had overpaid its taxes by \$2.9 million, NB commenced the Supreme Court action transferred here against HGG and Schlesinger’s estate. While not disputing the tax error, HGG moved to dismiss NB’s malpractice claim as time-barred. Meanwhile, NB petitioned for judicial settlement of its accounts as co-executor and as co-trustee. When Schlesinger died on April 24, 2012, the fiduciary of his estate petitioned for judicial settlement of Schlesinger’s account as co-

trustee.

HGG'S Motion for a Protective Order

In November 2015, NB served a subpoena duces tecum and ad testificandum upon Jerry Persampieri, a certified public accountant who advised HGG in 2012 regarding the GST tax calculation. Mr. Persampieri produced the subpoenaed documents prior to his deposition, which was scheduled for January 22, 2016. However, on January 18, 2016, HGG filed the instant motion seeking to stay Mr. Persampieri's deposition until the court ruled on HGG's motion to dismiss the transferred action, and the beneficiaries completed their examination of NB in the accounting proceedings. On March 22, 2016, HGG's motion for a protective order was denied as moot in light of this court's contemporaneous denial of HGG's motion to dismiss. To the extent that HGG seeks to stay the deposition until after NB's examination in the accounting proceedings, HGG fails to explain why the examination of Mr. Persampieri at this juncture would prejudice any party to those proceedings. NB is entitled to go forward with its examination of Mr. Persampieri on issues relevant to its malpractice claims.

NB's Cross-Motion

NB's cross-motion seeks to compel the production of two categories of documents. The first category consists of HGG's client files. In 2014, NB amended its complaint to add a claim of replevin to recover possession of the files. On June 19, 2015, the court ordered HGG to produce the files (the "2015 order"). NB alleges that HGG did not fully comply with the 2015 order, as demonstrated by the lack of e-mails or other electronically stored information ("ESI") in the files already produced.

The second category consists of documents requested by NB in a subpoena duces tecum served upon HGG pertaining to legal work performed by HGG for the estate and/or the trust,

including documents pertaining to HGG's 2012 inquiry into the accuracy of the GST tax. NB alleges that HGG has failed to comply with the subpoena.

The two categories of documents largely overlap. NB insists that it needs the documents in order to "narrow the issues" and to determine whether HGG and Schlesinger concealed the GST tax error.

HGG asserts that its files did not contain any ESI created prior to August 2005. In response, NB points to deposition testimony of HGG's former information technology partner as evidence that HGG maintained email systems and servers dating back to 2002. However, the partner testified that, although he was able to locate the e-mail archives of Schlesinger and of another HGG attorney who worked on the estate and trust matters, he was unable to access the e-mails themselves.

Second, HGG maintains that it did not search for post-August 2005 ESI because, by that time, it no longer represented NB and Schlesinger as fiduciaries. NB contends that HGG's representation continued until some time in 2012.

Third, HGG argues that it is not required to produce documents created after December 9, 2011, because, on that date, counsel for the beneficiaries first raised concerns over the GST tax, at which point HGG "became the object of a potential malpractice claim." HGG asserts that all documents created after that date constitute work-product prepared in anticipation of litigation. NB counters that HGG cannot reasonably have anticipated litigation simply based on the letter from beneficiaries' counsel, which merely requested an explanation as to how the tax was calculated and noted their inability to "reconcile the numbers." NB asserts that it was not until May 2012, when NB and HGG received another letter from the beneficiaries' counsel pointing to

the incorrect GST calculation and directing NB and HGG to preserve all relevant documents, that HGG had a reasonable basis for anticipating litigation.

In support of its claim that HGG was still acting as its counsel during March and April of 2012, NB submits e-mails between NB and HGG during that time regarding the tax calculation. However, those e-mails merely demonstrate a joint effort to respond to the beneficiaries' inquiry and do not necessarily lead to the conclusion that HGG was still representing NB. After receiving the first letter from beneficiaries' counsel, HGG could have reasonably anticipated that it might be subject to liability on the tax issue. Therefore, the court cannot discount the possibility that an otherwise responsive document generated after December 9, 2011, might be deemed privileged.

The court directs HGG to produce all documents and ESI that are either responsive to the subpoena duces tecum or subject to the court's 2015 order. To the extent that HGG withholds any document on the ground that it is privileged, it must submit a privilege log containing the identifying information set forth in CPLR 3122(b).

HGG is further directed to submit a detailed affidavit describing its efforts to search for any responsive ESI generated after decedent's death in 2001. The affidavit must state whether any such electronic documents exist and, to the extent that they are inaccessible, an explanation as to why that is so. If HGG takes the position that, with respect to a particular time period, it is not possible to determine whether any documents, including ESI, still exist, HGG's affirmation must provide a thorough and accurate explanation for such conclusion.

NB's Cross-Motion for Contempt

Contempt is a "drastic remedy rarely used in the context of ordinary discovery disputes" (*Lopez v New York City Tr. Auth.*, 85 AD3 543 [1st Dept 2011]). In order to prevail on a motion

for civil contempt, the movant must demonstrate by clear and convincing evidence that the party has intentionally engaged in conduct that violated an order containing an unequivocal and explicit mandate (*Bernard-Cadet v Gobin*, 94 AD3d 1030, 1031 [2d Dept 2012]; *Miller v Miller*, 61 AD3d 651 [2d Dept 2009]).

HGG turned over several boxes of documents shortly after the court issued its 2015 order. In response to the subpoena, HGG informed NB that HGG did not have any responsive documents and that, in any event, documents created after December 9, 2011, were attorney work-product. Moreover, after being served with the subpoena, HGG produced a former HGG partner for an examination on the firm's ESI retention policies. It cannot be concluded that HGG's response to either the 2015 order or NB's subpoena rose to the level of contempt. Thus, the motion for contempt is denied, as is NB's request for legal fees and costs.

This decision constitutes the order of the court.


SURROGATE

Dated: *November 10*, 2016