

Matter of DeRossi
2018 NY Slip Op 32264(U)
August 31, 2018
Surrogate's Court, Nassau County
Docket Number: 2012-371663/C
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of a Proceeding to Settle the Accounts
of Kent DeRossi as Executor of the Estate of**

DECISION & ORDER

**File No. 2012-371663/C
Dec. No. 34510**

HENRY DeROSSI,

Deceased.

PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

Motion for protective Order and Exhibits.	1
Affirmation in Opposition (Lefkowitz)	2
Reply Affirmation (Lefkowitz)	3
Reply Affidavit (DeRossi)	4

In this accounting proceeding, the executor (petitioner), seeks a protective order pursuant to CPLR 3103 striking the respondents (objectants’) first demand for discovery and inspection, dated January 15, 2018 in its entirety, on the grounds that the demands therein are overly broad, vexatious, patently burdensome, unduly prolix, oppressive, designated to harass, seek the production of irrelevant information, and are, in most instances, palpably improper.

BACKGROUND

The decedent was survived by a spouse, Margot DeRossi and three children, Kent DeRossi (petitioner), Diane Cooper (objectant), and Barbara DeRossi (objectant). Prior to the decedent’s death, the decedent and his wife were parties to a divorce action. During the pendency of the divorce action, the husband and wife executed a stipulation of settlement

which provided for the division of property. A judgment of divorce, however, was not entered at the time of the decedent's death.

The decedent's last will and testament, dated July 11, 2008, was admitted to probate by a decree of this court dated October 4, 2012. Letters testamentary issued to Kent DeRossi. The last will and testament designates Margot DeRossi as the beneficiary of the residuary estate. The children of the decedent are beneficiaries of the residuary estate in the event Margot DeRossi pre-deceased the testator.

A petition to compel an accounting was filed by Margot DeRossi in December 2016. The executor was directed to petition for the judicial settlement of his accounts by order dated March 23, 2017. Thereafter, the executor petitioned for the judicial settlement of his accounts. Margot DeRossi, Barbara DeRossi and Diane Cooper filed objections to the account.

The subject of the objections is the real property located at 37-40 12th Street, Long Island City, New York. It is undisputed that the real property was purchased, during the decedent's lifetime, by the petitioner from the decedent through the petitioner's wholly owned LLC for \$900,000.00. The purchase was financed by cash and a note secured by mortgage. It was subsequently sold by the petitioner, individually, to a third party.

An objection was filed to the omission of the real property from the account. The objectants, by their attorney's affirmation, assert that the sale of the real property by the decedent to the petitioner, was the product of undue influence.

In addition, the objections allege that the petitioner did not pay the balance of the principal and interest on the note as required and that the failure to pay the balance and principal prejudices the spouse individually and in her capacity as a beneficiary of the estate.

PETITIONER’S MOTION FOR A PROTECTIVE ORDER

CPLR § 3101 provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Disclosure is required “of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*Forman v Henkin*, 30 NY3d 656 [2018]; *Friel v Papa*, 56 AD3d 607 [2d Dept 2008]). The issues framed by the pleadings determine the scope of discovery (*Mavroudis v State Wide Ins. Co.*, 102 AD2d 864 [2d Dept 1984]).

CPLR § 3103 reads in relevant part as follows:

(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom or about 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.

(b) Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

The respondents’ demands are thirteen pages long and include eighty-nine (89) demands. Some demands seek copies of documents filed in the Nassau County Surrogate’s Court, while other demands are over broad, burdensome and seek irrelevant material.

The objections do not state that there was a diversion of assets from bank accounts owned by the decedent or other sources. Nevertheless, demand #38 seeks “copies of documents concerning gifts, thefts or other transfer of funds or other assets from the Decedent to the Petitioner or any member of the Petitioner’s family.” Demand #39 seeks “copies documents concerning gifts, thefts or other transfer of funds or other assets from the decedent to any Respondent or any member of the Respondent’s family.” In addition, these demands require the executor to conclude whether a transfer was a “theft.”

Furthermore, objection #40 seeks documents that “would tend to indicate that the Decedent and the Respondent were not in a confidential relationship.” Objection #41 seeks copies of documents that “would tend to indicate that the Decedent and the Respondent were not in a fiduciary relationship.” Objection #43 seeks documents that “would tend to indicate that the Decedent had the capacity to enter into a contract” for the sale of the Long Island City property. Demands for discovery which require a party to draw legal conclusions of fact or law are improper (*Lakeville Merrick Corp. v Town Bd of Town of Islip*, 23 AD2d 584 [2d Dept 1965]).

In addition, the petitioner asserts a privilege in opposition to the specific demands for business tax returns and other demands which would include personal tax returns. Tax returns are discoverable upon a showing of necessity (*Samide v Roman Catholic Diocese of Brooklyn*, 5 AD3d 463 [2d Dept 2004]). However, in this proceeding, there is insufficient information in the papers submitted to determine whether the standard has been met.

Moreover, the objectants demand, without further limitation, “copies of documents exchanged between the Petitioner and any of the Respondents” (#6); “copies of documents concerning payments from the Decedent’s funds for the benefit of any person other than the Petitioner, the Respondent or any member of their respective families” (#37); “copies of audio and video recordings of the Decedent” (#79); and “copies of audio and video recordings of any Respondent” (#80). These demands (#6, #37, #79 and #80) do not include the words “any and all” but they have the same breadth. They do not specify the documents demanded with reasonable particularity (*Astudillo v St. Francis- Beacon Extended Care Facility, Inc.*, 12 AD3d 469 [2d Dept 2004]) and there is no temporal limitation (*Forman v Henkin*, 30 NY2d 656 [2018]). Moreover, it is not apparent that all communications between family members or all recordings of the decedent or respondent would be relevant to this proceeding.

Many of the demands are palpably improper as they seek information which is irrelevant, overbroad and burdensome (*Merkos L’Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]). Once it is determined that some of the demands are palpably improper, the remedy is to strike the entire demand rather than to prune it (*Stepping Stones Assoc., L.P., v Scialdone*, 148 AD3d 855 [2d Dept 2017]).

Accordingly, the motion for a protective order is **GRANTED** and the “First Demand for Discovery and Inspection” is stricken.

A conference in this matter will be held on October 4, 2018 at 11:00 a.m., at the Nassau County Surrogate's Court, located at 262 Old Country Road, Mineola, New York.

This constitutes the decision and order of the court.

Dated: August 31, 2018
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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