

Matter of Schwartz

2018 NY Slip Op 32629(U)

September 24, 2018

Surrogate's Court, Nassau County

Docket Number: 2015-384840/C

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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DISCOVERY PROCEEDING,

DECISION & ORDER

**In the Matter of the Application of
Harold J. Schwartz, as Executor of the Estate of**

**File No. 2015-384840/C
Dec. Nos. 34732 & 34733**

PAUL CHARLES SCHWARTZ,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion to Quash Subpoena.	1
Notice of Motion for Protective Order	2
Affirmation in Support of Motion to Quash Subpoena.	3
Affirmation Support of Motion for Protective Order	4
Affirmation in Opposition to Motion to Quash Subpoena and Motion for Protective Order.. . . .	5
Reply Affirmation in Further Support of Motion to Quash and for Protective Order.	6
Affidavit of Katharine J. Richards.	7

Before the court in this miscellaneous proceeding are two motions by Harold J. Schwartz (“petitioner”), the executor of the estate of Paul Charles Schwartz (“decedent”). The first motion requests an order pursuant to CPLR § 2304 quashing the subpoena served upon non-party Katharine J. Richards, Esq. The second motion seeks an order pursuant to CPLR § 3103 granting a protective order regarding the deposition of non-party Katharine J. Richards, Esq. Both motions are opposed by Charles Schwartz (“objectant”).

The decedent died on October 17, 2014. He was survived by four children: the petitioner, the objectant, Kenneth Schwartz and Pennie Isabella. The decedent’s will dated January 19, 2001 was admitted to probate and letters testamentary issued to the petitioner on May 16, 2017.

By petition filed on September 21, 2015, the petitioner commenced the instant proceeding pursuant to SCPA § 2103 to recover property allegedly belonging to the estate. The petitioner alleges that objectant transferred property of the decedent to himself with an invalid power of attorney. The objectant filed an answer and discovery ensued.

On or about April 6, 2018, counsel for objectant served a subpoena upon Katharine J. Richards, Esq. The subpoena contains the following statement:

“Pursuant to Civil Practice Law and Rules (“CPLR”) 3101 (a) (4), notice is hereby given that the circumstances or reasons such disclosure is sought is because it is material and necessary to the above-captioned proceeding and cannot be obtained from other sources. Indeed, it concerns the allegations that have been made against Charles Schwartz in the above-captioned proceeding, including but not limited to the validity of a power of attorney instrument that is at issue and certain transactions entered into by the agent acting under such power of attorney.”

Katharine J. Richards, an attorney, met with the petitioner, the objectant, Kenneth Schwartz and Pennie Isabella on August 12, 2014. The purpose of the meeting was to discuss estate and asset protection for the decedent. The consultation was scheduled by Kenneth Schwartz on July 29, 2014 and all four children were present at the consultation. Katharine J. Richards was paid for the consultation but was never retained.

The petitioner now argues that the subpoena seeks testimony and documents that “have no comprehensible potential to lead to any legitimate information that is material or necessary to the underlying action.” The petitioner further argues that the material sought violates the attorney-client privilege under CPLR § 4503.

Disclosure in New York civil actions is guided by the principle of “full disclosure of all matter material and necessary in the prosecution or defense of an action” (CPLR § 3101 [a]). The words “material and necessary” are “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also Tower Ins. Co. of N.Y. v Murello*, 68 AD3d 977 [2d Dept 2009]). The Court of Appeals’ interpretation of “material and necessary” in *Allen* has been understood “to mean nothing more or less than ‘relevant’” (Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3101:5).

CPLR § 3101 (a) (4) provides for disclosure from a non-party. “An application to quash a subpoena should be granted ‘[only] where the futility of the process to uncover anything legitimate is inevitable or obvious’ or where the information sought is ‘utterly irrelevant to any proper inquiry’” (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988] [internal citations omitted]; *accord Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]). The one moving to vacate the subpoena has the burden of establishing that it should be vacated (*Matter of Kapon v Koch*, 23 NY3d 32 [2014]).

A motion to quash a subpoena must be made promptly in the court where the subpoena is returnable (CPLR § 2304). “The court may also at any time or on motion of any party. . . make a protective order denying or limiting. . . the use of any disclosure device. . . [s]uch order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR § 3103 [a]).

In the instant proceeding, the four children of the decedent met with Katharine J. Richards to discuss estate planning and asset protection for the decedent. As the discovery proceeding concerns the use of a power of attorney, any discussions regarding estate planning for the decedent are relevant. The analysis, however, does not end here as the petitioner alleges that the testimony would violate the attorney-client privilege.

“The ‘fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view toward retention of the lawyer, although actual employment does not result’” (*Seeley v Seeley*, 129 AD2d 625, 627 [2d Dept 1987] quoting *Westinghouse Elec. Corp. v Kerr-McGee Corp.*, 580 F2d 1311, 1319 [7th Cir 1978], *cert denied* 439 US 955 [1978]). Communications made during the consultation are subject to the attorney-client privilege (*New York Univ. v Simon*, 130 Misc 2d 1019 [Civ Ct, New York County 1985]).

CPLR § 4503 provides that, unless the client waives the privilege, an attorney shall not disclose or be allowed to disclose communications made between the attorney and the client. Communications made during the course of joint representation fall within the scope of the attorney-client privilege because the clients share a common interest (*Arkin Kaplan Rice LLP v Kaplan*, 107 AD3d 502 [1st Dept 2013]). Here, the attorney affirmation in support of the motion to quash, states that three of the siblings did not waive the attorney-client privilege. However, where an attorney represents joint clients, “[t]he attorney-client privilege may not be raised to prevent disclosure of communications relevant to the common interest of former joint clients in subsequent litigation” (*Matter of McCormick*, 287 AD2d

457, 457 [2d Dept 2001]). When one of the joint clients retains new counsel to represent him or her separately, it becomes clear that the interests diverge (*Id.*).

The petitioner argues that the interests of the four children diverged before the consultation and that there was never any joint representation. The argument is without merit. The four children of the decedent consulted Katharine J. Richards, Esq., with regard to estate planning and asset protection for the decedent. Their common interest was planning for their father's future. Although now there is adverse litigation among the siblings, the attorney-client privilege may not be raised with respect to consultations had with Katharine J. Richards, Esq., on or before August 12, 2014 (*Id.*). The motion pursuant to CPLR § 2304 to quash the subpoena is **DENIED**. The motion for a protective order pursuant to CPLR § 3103 is also **DENIED**.

This constitutes the decision and order of the court.

Dated: September 24, 2018
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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