

Matter of Radio Drama Network, Inc. (Brown)
2022 NY Slip Op 33120(U)
September 15, 2022
Surrogate's Court, New York County
Docket Number: File No. 2010-2056 A
Judge: Nora S. Anderson
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SURROGATE'S COURT: NEW YORK COUNTY

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In the Matter of the Application of Radio Drama
Network, Inc., Seeking Reformation of the
Himan Brown Revocable Trust created by

HIMAN BROWN,

File No. 2010-2056 A

Grantor.
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A N D E R S O N , S .

The above-captioned proceeding was commenced by Radio Drama Network, Inc. ("Radio Drama" or "Petitioner"), a charitable corporation established by Himan Brown ("Grantor") in 1984, seeking to invalidate specific provisions of a revocable trust created by Grantor (the "Revocable Trust") and to be reinstated as the Trust's remainder beneficiary.

This decision addresses one of several pending discovery motions for which an expedited ruling has been requested due to the upcoming deposition of nonparty Matthew Forman ("Forman"). In the motion, Richard Kay ("Kay" or "Respondent") seeks to quash a subpoena ad testificandum and duces tecum dated March 31, 2022, served upon Forman, and further seeks a protective order precluding the discovery sought in the subpoena.¹ For the reasons set forth below, the motion is granted in part and denied in part.

¹ Petitioner served Forman with the subpoena in Miami, Florida, where he resides, and his deposition is scheduled to take place there on September 19, 2022. In addition to moving in this court to quash the subpoena and for a protective order, Kay also moved for the same relief in Florida Circuit Court. The Florida court issued an order on July 11, 2022, denying Kay's motion and directing Forman to appear for his deposition. According to the order, "[i]n the event that [Kay] obtains a ruling from [this court] that affects this order, [he] may seek reconsideration by this court prior to the date of Forman's scheduled deposition." Under these circumstances, Petitioner's argument that Respondent waived his right to seek relief in this court by having moved for the same relief in Florida is without merit.

Background

The facts underlying this proceeding are set forth in a prior decision of this court dated July 15, 2019, and need not be repeated here (*see Matter of Brown*, NYLJ, July 23, 2019, at 22, col 3 [Sur Ct, NY County 2019]; *aff'd as modified* 187 AD3d 526 [1st Dept 2020]). Briefly, Grantor established the Revocable Trust in 2002, when he was 91 years old, naming himself as trustee and naming Kay, his longtime lawyer, as one of two successor co-trustees. Radio Drama was the remainder beneficiary of the bulk of the Revocable Trust's assets. During the several years leading up to his death in 2010, Grantor transferred about \$100 million to the Revocable Trust. In 2003, Grantor executed a restatement of the Revocable Trust which provided that Kay would serve as sole successor trustee and would receive commissions at the executorial rate, resulting in an additional \$1.7 million in commissions to Kay. In 2004, Grantor executed a second restatement which dropped Radio Drama as the remainder beneficiary and named in its place a new trust (the "Charitable Trust"), which would be established upon Grantor's death. Kay is sole trustee of the Charitable Trust with the power to allocate trust assets to charities of his choice. All of the above-mentioned instruments were drafted by Kay or by one of the associates at his law firm.

The parties have been mired in litigation since Grantor's death in 2010. In the instant proceeding, Radio Drama alleges that, by facilitating Grantor's execution of the 2003 and 2004 restatements, Kay inserted "misleading revisions" into the Revocable Trust instrument in order to deceive Grantor into (i) increasing the commissions to which Kay would be entitled, and (ii) changing the remainder beneficiary of the Trust from Radio Drama to the newly-created Charitable Trust, thereby giving Kay more control over Grantor's funds. Radio Drama contends that Kay induced Grantor, who was in his mid-90s, to sign off on the revisions through fraud and

undue influence and by failing to disclose to Grantor their impact on Grantor's testamentary plan.

In its July 2019 decision, this court denied Kay's motion to dismiss Radio Drama's claims against Kay for, *inter alia*, undue influence, unjust enrichment, fraud and fraudulent concealment. Extensive discovery and motion practice ensued, with Radio Drama seeking to discover information regarding the circumstances surrounding Grantor's execution of the 2003 and 2004 restatements. In the subpoena that is the subject of the instant motion, Radio Drama seeks the testimony of Forman, who had been appointed by Kay to serve as a co-trustee of the Charitable Trust and who acted as a paid consultant to the Trust. The subpoena also contains eleven document demands, which broadly fall within the following categories: (i) communications between Forman and Kay concerning "any prospect of employment" or payment to Forman; (ii) documents regarding Foreman's role as either a co-trustee or consultant to the Charitable Trust; (iii) documents relating to any interactions between Forman and Grantor; (iv) communications between Forman and Kay concerning Grantor, including Grantor's "intentions for the Charitable Trust;" (v) documents evidencing Forman's qualifications and experience relating to nonprofit organizations or charitable trusts; (vi) documents regarding the Charitable Trust's grantmaking, by geographic location or charitable purpose, and any connection between Kay or his family to any grant recipient; and (vii) documents concerning Radio Drama and any litigation against Radio Drama. Kay further seeks a protective order precluding Radio Drama from discovering the aforementioned documents.

Discussion

The two primary arguments advanced by Kay in support of his motion are that: (1) the information sought from Forman, whether in the form of testimony or documents, is irrelevant to the core allegation underlying this proceeding, namely whether the 2003 and 2004 restatements to the Revocable Trust were the product of Kay's fraud or undue influence, and (2) the discovery of such information is precluded in any event by the rule set forth in section 207.27 of the Uniform Rules for Surrogate's Court (referred to herein as the "3-2 Rule"), which confines discovery in matters such as this to a period beginning three years before the date of the relevant instrument(s) and ending either two years thereafter or at decedent's date of death, whichever is earlier.

At the outset, the court must address the parties' respective arguments regarding Kay's standing to bring the instant motion. Petitioner argues that Kay lacks standing because he fails to identify "a proprietary interest in the information sought and has moved solely based on relevance and the 3-2 time period." Notwithstanding the conflicting case law cited by the parties, the court finds that Kay, as trustee of the Charitable Trust, has a sufficient interest in the documents and information sought by Petitioner to support a finding that he has the requisite standing (*see generally AQ Asset Mgmt v Levine*, 111 AD3d 245 [1st Dept 2013]; *Matter of Natale*, NYLJ, July 22, 2019, at 24 [Sur Ct, NY County 2019]).

As to the merits of the motion, Kay submits the affidavit of Forman in which he states that he had no awareness of, much less involvement with, either the Revocable Trust or the Charitable Trust until after Grantor's death in 2010. He further states that he "never met, spoke to, or otherwise communicated with" Grantor, and "was not involved in any way with the drafting or execution" of any of Grantor's wills or trust instruments, including the 2003 and

2004 restatements. He affirms that he never discussed with Kay or anyone else the drafting or execution of any such instruments, and he has no documents concerning them. Relying on these statements, Kay argues that Forman cannot possibly have relevant information, much less any information falling within the 3-2 Rule time frame, i.e., between November 20, 1999 (three years *prior* to Grantor's execution of the original Revocable Trust instrument in 2002), and December 1, 2008 (two years *subsequent* to Grantor's execution in 2006 of the final amendment to the Revocable Trust).

Forman's statements in his affidavit, however, are not a substitute for testimony elicited during an examination of him under oath, and do not constitute a basis to quash the subpoena to the extent that it seeks his testimony as to relevant areas of inquiry (*see Matter of Stigliano*, NYLJ, June 25, 1996, at 30, col 6 [Sur Ct, Nassau County 1996]; *Matter of Liebowitz*, NYLJ, Feb. 18, 2016, at 22, col 3 [Sur Ct, NY County 2016]). Accordingly, Respondent's motion to quash the subpoena, to the extent it seeks to bar Forman's examination in its entirety, is denied.

Nor does the 3-2 Rule, in and of itself, provide a basis to grant the motion. The 3-2 Rule is often described as a "pragmatic rule" designed to prevent the costs and burdens of a "runaway inquisition" (*Matter of Das*, 2009 NY Misc LEXIS 2411 [Sur Ct, Nassau County]; *see also Matter of Chin*, NYLJ, April 7, 2017, at 34, col 6 [Sur Ct, NY County 2017]; *Matter of Liebowitz*, NYLJ, Feb. 18, 2016, at 22, col 3). The First Department has noted that, while the rule has been "useful in practice," it was intended to apply to the "average case" and might not apply to those involving "special circumstances" (*Matter of Kaufmann*, 11 AD2d 759 [1st Dept 1960]). The requisite special circumstances allowing for a deviation from the rule have been found to exist where there is "an evidentiary basis for concern as to the possibility of undue influence" (*see Matter of Liebowitz*, NYLJ, Feb. 18, 2016, at 22, col 3) or a factual basis for

allegations of a fraudulent scheme (*see Matter of Sabin*, NYLJ, Jan. 26, 2015, at 27 [Sur Ct, Suffolk County 2015]; *Matter of MacLeman*, 9 Misc 3d 1119[A] [Sur Ct, Westchester County 2005]).

A benefit bestowed upon the attorney drafter of a testamentary instrument inevitably raises a question as to whether such benefit was a function of the drafter's intent rather than that of the testator's (*see Matter of Liebowitz*, NYLJ, Feb. 18, 2016, at 22, col 3, *citing Matter of Putnam*, 257 NY 140 [1931]). In this case, Kay oversaw the drafting of successive trust instruments bestowing upon him ever increasing benefits in the form of increased commissions and increased control over Grantor's substantial assets. Kay stated during his deposition that, prior to Grantor's death, he "more than likely" discarded any notes he had concerning the drafting and execution of the 2003 and 2004 restatements to the Revocable Trust. His statement raises obvious questions, given the 2004 restatement's removal of Radio Drama as a remainder beneficiary, thereby increasing the likelihood that Radio Drama would challenge the restatement's validity. Indeed, three of the four members of Radio Drama's board of directors did just that, by authorizing the commencement of the instant proceeding (Kay, the fourth member of Radio Drama's board, did not join in that decision).

Kay admitted that he initiated the 2003 revision to the Revocable Trust which increased his commissions by \$1.7 million, and he further admitted that he did not disclose to Grantor the dollar amount of this increase. According to the deposition testimony of both Kay and Alan Laufer, Kay's associate at the time, Laufer "strenuously objected" to the provision increasing Kay's commissions. In addition, Kay had Laufer draft two versions of the 2004 restatement, one of which was consistent with Grantor's prior testamentary instruments in that it named Radio Drama as the remainder beneficiary of the Revocable Trust. The second version named the

newly-created Charitable Trust as the Revocable Trust's remainder beneficiary. The Charitable Trust's "primary purpose," according to the trust instrument, is to sponsor or promote programs emphasizing "the centrality of language and the spoken word," language which is strikingly similar to the stated mission of Radio Drama. According to Petitioner, this language likely confused Grantor. In light of the above, the court finds that there is a sufficient evidentiary basis for Petitioner's allegation that Kay may have engaged in a continuing course of conduct aimed at deceiving Grantor into bestowing increasingly valuable benefits upon him, and thus special circumstances exist to warrant expanding the discovery period embodied in the 3-2 Rule.

The court must also consider whether the information sought in the subpoena is relevant under the standard set forth in CPLR 3101(a), which directs that there be full disclosure of all information "material and necessary to the prosecution or defense of an action." Even in cases where the 3-2 Rule does not apply (or in cases where the information sought falls within the 3-2 period), a party is nevertheless precluded from discovering information which is irrelevant and immaterial to the pursuit of its claims or defenses.

Respondent, as the party seeking a protective order, bears the initial burden to show that the discovery sought by Petitioner is irrelevant or that it is "obvious the process will not lead to legitimate discovery" (*see Liberty Petroleum Realty v Gulf Oil*, 164 AD3d 401, 403 [1st Dept 2018]). The areas of inquiry encompassed in document request nos. 1-6 address Kay's conduct and actions subsequent to Grantor's death, such as those relating to the Charitable Trust's grantmaking activities, Kay's hiring of Forman as a consultant to the Trust, Kay's appointing Forman as a co-trustee of the Trust, Forman's compensation and qualifications for these roles, and the terms of Forman's employment. Kay has established to the court's satisfaction that these areas of inquiry have no bearing upon the issues before the court. Petitioner speculates that the

requested information may provide evidence of Kay's intent at the time Grantor executed the respective restatements. However, the court is unconvinced that any of the requested information bears on Kay's intent at that time. Accordingly, the areas of inquiry encompassed in document request nos. 1-6 are precluded from discovery, and Respondent's motion, to the extent it seeks a protective order as to documents or questions regarding these topics at Forman's deposition, is granted.

Kay has not met his burden that the areas of inquiry encompassed in document request nos. 7-11 are irrelevant. These topics concern Forman's communications or interactions with Grantor and Forman's communications with Kay concerning Grantor and/or concerning Radio Drama and/or litigation against Radio Drama. Such documents may, in and of themselves, be relevant to Grantor's state of mind when he executed the 2003 and/or 2004 restatements, or they may lead to the discovery of other relevant evidence. Under these circumstances, and given the dearth of documents and information thus far produced concerning the circumstances of Grantor's execution of the restatements, the court determines that Petitioner is not precluded from obtaining documents responsive to these requests, nor from questioning Forman on these topics or on any of the matters addressed in Forman's affidavit. Accordingly, to the extent that Respondent's motion seeks a protective order as to these topics or documents, the motion is denied. Forman is hereby directed to answer questions and to produce any responsive documents relating to these topics.²

² The court finds Respondent's argument that petitioner lacks standing to seek the information and documents demanded in the subpoena to be unavailing.

Finally, the court has considered Respondent's request that enforcement of the subpoena be stayed pending the court's determination on Respondent's prior motion to quash or for a protective order concerning a subpoena served upon Respondent's law firm and finds it to be without merit. Accordingly, the motion, to the extent it seeks such relief, is denied.

This decision constitutes the decision and order of the court.


SURROGATE

Dated: *September 15, 2022*