

Skolnik v Skolnik

2010 NY Slip Op 33074(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 354257/B

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Wendy Skolnik, as Preliminary Executrix of the Estate
of Ruth Skolnik, Deceased,

Petitioner,

File No. 354257/B

Dec. No. 26593

-against-

LAURI SKOLNIK,

Respondent.

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In this turnover proceeding, the respondent Lauri Skolnik has moved for an order compelling the production of documents. For the reasons that follow, the motion is denied in its entirety.

The decedent Ruth Skolnik died on November 1, 2008. She was survived by her four children, the petitioner, Wendy Skolnik, the respondent, Lauri Skolnik, Peter Skolnik and Edward Skolnik. In the proceeding for probate of the decedent's will dated May 5, 2005, Lauri and Wendy filed opposing petitions. Lauri filed a petition that sought the appointment of both Wendy and Lauri as co-executors pursuant to the terms of the will. Wendy, however, filed a petition seeking to be appointed as the sole executor. The probate proceeding was ultimately concluded when Wendy and Lauri entered into a stipulation of settlement, which provided that Wendy would be appointed as sole executor. In addition, Wendy and Lauri entered into a letter agreement, which provided that Wendy would comply with periodic information requests from Lauri. The agreement also provided as follows:

- “(a) The parties acknowledge that any attorney's fees, disbursements and expenses incurred in connection with any investigation or prosecution of Lauri Skolnik, for any alleged financial mismanagement or misconduct, in her

capacity as attorney-in-fact or otherwise, shall not be paid from and charged against the estate, unless the alleged mismanagement or misconduct is proven and Lauri Skolnik is required to return funds to the estate or to Wendy Skolnik directly.

- (b) This letter agreement is binding upon, and inures to the benefit of the each of the undersigned, and their respective heirs, personal representatives, successors and assigns, and may be executed in counterpart by the parties, each of which when taken together shall constitute one and the same stipulation. In the event of a breach by a party of the terms contained herein, the prevailing party in any enforcement action related thereto shall be entitled to reimbursement of reasonable attorneys' fees and costs incurred in prosecuting such breach, upon entry of a final non-appealable order, judgment or decree by a court of competent jurisdiction."

Wendy commenced a turnover proceeding in January 2010 seeking the turnover and delivery of certain assets allegedly belonging to the estate. The petition seeks the turnover to the estate of money Lauri allegedly received from the decedent either (a) prior to the decedent's death or (b) from non-testamentary assets after decedent's death. Wendy alleges that Lauri is not entitled to money she received prior to the decedent's death because she took such money without the decedent's permission, including forging the decedent's signature on certain checks. The basis for the claim that Lauri is not entitled to non-testamentary assets on which she was a co-tenant or designated beneficiary is that is that Lauri entered into a contract with Wendy and Peter termed a Private Agreement Among Distributees regarding the non-testamentary assets.

Thereafter, Lauri counterclaimed for an order directing Wendy to reimburse Lauri in the amount of \$7,500 for reimbursement of legal fees, plus estate expenses in the amount of \$1,394.32 and filing fees, and to provide an accounting of the fees and expenses incurred by

Wendy in connection with the action against Lauri for alleged misconduct.

Lauri served a Demand for Discovery and Inspection upon Wendy's counsel. Wendy responded to the Demand but did not produce certain requested documents and information.

Accordingly, Lauri brought the instant motion.

According to Lauri's counsel, Wendy refused to produce the following documents:

- (a) Wendy's federal and New York state tax returns for 2008 to present, including all schedules, exhibits and attachments thereto. (Demand No. 1)
- (b) All documents constituting or evidencing communication between Genser Dubow Genser & Cona (Wendy's attorneys) and Peter Skolnik regarding Lauri Skolnik, the stipulation of settlement, the probate proceeding, Lauri Skolnik's petition for probate and letters testamentary and withdrawal of Lauri Skolnik's petition for probate and letters testamentary. (Demand No. 8)
- (c) Copies of all bank statements and canceled checks received by the estate of Ruth Skolnik in the period May 2009 to present. (Demand No. 9)
- (d) Copies of all bank statements and canceled checks received by Wendy Skolnik (individually, not in her capacity as executrix) in the period of May 2009 to present. (Demand No. 10)
- (e) All documents provided by Wendy to Ruth Brayer in connection with the handwriting analysis and preparation of the "Confidential Report of Brayer Handwriting International", annexed as Exhibit 6 of the turnover petition. (Demand No. 19)
- (f) All documents constituting or concerning communications between Genser and Ruth Brayer regarding the handwriting analysis and preparation of the "confidential report of Brayer Handwriting International." (Demand No. 20).
- (g) All documents concerning petitioner's efforts to sell

decedent's house located at 563 Donald Lane, Woodmere, New York (the "house") including listing agreements with real estate brokers, copies of written offers and contracts to purchase the house. (Demand No. 21)

- (h) Copies of Wendy's phone bills, for long distance and local service, for the period of January 2007 to present. (Demand No. 23)
- (i) All documents concerning the funding of the investigation and prosecution of Lauri Skolnik, including copies of Ruth Brayer's and/or Genser's bills to the Estate of Ruth Skolnik and/or Wendy Skolnik, as well as copies of bills of any third parties, and payments by the Estate of Ruth Skolnik and/or Wendy Skolnik to Genser, Ruth Brayer or others. (Demand No. 24)

HANDWRITING EXPERT DOCUMENTS

Concerning the request for documents provided to the handwriting expert and communications between Wendy's attorneys and the handwriting expert (Items 19 and 20), Lauri claims she seeks the production of such documents because allegations have been made that she forged the decedent's signature.

Wendy has refused to provide these documents on the grounds that they are privileged as attorney work product in connection with an investigation in contemplation of litigation. Lauri argues, however, that no attorney-client privilege attaches to the communications because the handwriting expert is not the attorney's client. Also, she claims that the work product doctrine is limited to documents prepared by counsel. In response to Lauri's assertion, Wendy argues that Lauri is incorrect because Wendy never asserted that the documents fell within the attorney/client privilege, but rather that the documents are privileged because they are attorney work product compiled in connection with an investigation in contemplation of litigation. Specifically, Wendy

asserts that the communications between the handwriting expert and her attorneys include strategy, impressions, legal theories and analysis and conclusions regarding the litigation.

Pursuant to CPLR §3101 (d) (2), materials prepared in anticipation of litigation are subject to a conditional privilege. Application of the privilege is dependent upon a showing that the material was prepared solely in anticipation of litigation (*Agovino v Taco Bell* 5083, 225 AD2d 569 [2d Dept 1969]).

Here, the handwriting expert was retained as a consultant to assist in analyzing or preparing the case and “as adjunct to the lawyer’s strategic thought processes, thus qualifying for complete exemption from disclosure” (*Hudson Ins. Co. v M..J. Oppenheim*, 72 AD3d 489 [1st Dept 2010]). Accordingly, Wendy is not required to produce these documents.

**COMMUNICATIONS CONCERNING THE SALE OF
THE DECEDENT’S HOME, TAX RECORDS AND TELEPHONE RECORDS**

Lauri has demanded production of documents concerning the sale of the decedent’s home, Wendy’s tax returns and telephone records. Lauri contends that the production of Wendy’s federal and New York State tax returns is material and necessary because it will demonstrate how Wendy reported the income received by her “from checks written on the Bank of America checking account” and whether Wendy took a deduction for the caring for the decedent.

Wendy argues that Lauri’s argument is flawed because income is not earned on “checks written.” In addition, she argues that whether she took any deductions for caring for the decedent is not material or necessary to the issue in controversy in this turnover proceeding.

The court finds Lauri’s argument regarding the tax returns unavailing and agrees with Wendy that her income tax returns are not relevant to this proceeding.

Lauri also seeks the production of all documents concerning communications between Peter and Genser, Dubow, Genser & Cona, Wendy's attorneys. Wendy asserts that the probate proceeding is concluded and such communications are of no relevance to this turnover proceeding. Wendy also points out that Lauri is not seeking to invalidate the stipulation, but rather seeks specific performance of the obligation thereunder to pay Lauri \$7,500.00.

Lauri argues that there is clear evidence that Peter Skolnik is at the center of this proceeding and that the firm's documents will support her claim. Peter's involvement, however, is irrelevant to this proceeding. Accordingly, the motion is denied as to Demand No. 8.

Demand No. 21 seeks the production of documents relating to the sale of the decedent's house. Wendy also argues that production of these documents is irrelevant and beyond the scope of this proceeding. Lauri argues that these documents are necessary because they show Wendy failed to comply with the letter agreement.

The motion is denied with respect to these documents. This is a turnover proceeding. Wendy's failure to comply with the letter agreement is not an issue in this proceeding, but rather would be the subject of a proceeding to enforce the stipulation and letter agreement or, more properly an accounting proceeding. "A discovery proceeding cannot be used for the purpose of ascertaining and discovering evidence to be used in another action or proceeding" (Warren's Heaton on Surrogate's Court Practice, §64.01 [2]).

As to Demand No. 23 relating to Wendy's telephone records, Lauri argues that such records may demonstrate "regular and systematic" communications between Peter and Wendy thereby showing Peter's involvement in this proceeding.

Wendy argues that the records would only show telephone numbers, not the substance of the conversations. Wendy further argues that even if the records showed “regular and systematic” conversations with Peter, such pattern would be normal between a brother and sister. Wendy concedes that the only part of Lauri’s argument that is relevant to this proceeding is the issue of whether Lauri was forced to sign the 2000 Private Agreement. Such records, however, would only show that telephone calls were made or received not the substance of the conversations. Accordingly, the motion is denied as to Demand No. 23.

Lastly, as to the documents concerning the funding of this proceeding (Demand Nos. 9, 10 and 24), Lauri argues that all such documents are required to prove a breach of the Letter Agreement which prohibited Wendy from charging the estate to investigate or prosecute Lauri for alleged financial mismanagement. The issue of the payment of legal fees is not properly before the court and, thus, the motion is denied as to these documents. If Lauri wishes to determine whether fees are improperly being paid from the estate, the proper procedure is for her to commence a compulsory accounting proceeding.

Accordingly, the motion is denied in its entirety.

The above constitutes the decision and order of the court.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court