

Matter of Rapp

2009 NY Slip Op 33098(U)

December 17, 2009

Surrogate's Court, Nassau County

Docket Number: 332780

Judge: John B. Riordan

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

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In the Matter of the Account of Proceedings of
Gertrude Corcoran,
as Executor and Trustee of the Estate of

File No. 332780

Dec. No. 811

HAROLD W. RAPP, JR.,

Deceased.
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Before the court is a motion to strike objections for failure to comply with discovery demands and a discovery schedule in connection with the first and final account of Gertrude Corcoran for the estate of Harold W. Rapp, Jr., who died on March 18, 2004. The account was initially filed on August 18, 2008, and amended on October 14, 2008. Objections to the account were filed by four charitable residuary legatees, and by Wendy Freed, a legatee of the balance of decedent's tangible personal property and decedent's dogs, together with \$15,000.00 to find suitable sanctuary for the dogs and maintain them, pursuant to paragraphs B and C of Article FIRST of decedent's will. The motion to strike objections pertains only to the objections filed by Freed.

In response to Freed's objections to the account, dated May 8, 2009, counsel for the executor/trustee served the following discovery demands on May 15, 2009: (a) demand for a verified bill of particulars with notice, (b) combined demand for discovery and inspection, and (c) notice of examination before trial. Counsel received no response. The issue of objectant's non-compliance with counsel's discovery demands was addressed at a court conference on July 2, 2009, at which time objectant's counsel agreed that Freed would comply with the discovery demands which had been made. The parties signed a preliminary conference order which provided, among other directions and procedures, that Freed's attorney would provide the bill of

particulars and all of the documentation requested in the demand for discovery and inspection by July 31, 2009, and it was so ordered by the Surrogate on July 14, 2009. On August 5, 2009, counsel for the executor/trustee wrote to objectant's counsel asking again for compliance with the discovery demands. No response was received.

On September 14, 2009, the motion presently before the court was filed. Objectant's attorney responded to the motion by filing an affirmation in opposition to striking objections on October 8, 2009. In his affirmation, counsel for objectant noted that Freed's response to the demand for a bill of particulars and discovery and inspection were served on counsel for the executor/trustee together with the affirmation in opposition. Counsel for objectant argues that there will be no prejudice in denying the motion to strike because counsel for the executor/trustee agreed, during the July 9, 2009 court conference, that he would not charge the estate for any additional legal services rendered. Counsel further argues that the "short delay" is insignificant because the objections filed by the charitable entities have not yet been resolved and will require further litigation.

A reply affirmation by counsel for the executor/trustee was filed on October 16, 2009, noting that Freed's response to the demand for a bill of particulars and discovery and inspection was not served until after the motion to strike the objections had been filed. Moreover, the discovery responses served were "inadequate, specious and contain objections which should have been submitted within thirty days of the receipt of discovery demands ... "

A bill of particulars is not a pleading. The rules relevant herein regarding a bill of particulars and responses thereto may be found in sections 3041, 3042 and 3044 of the CPLR. "The purpose of a bill of particulars is to amplify the pleadings, to limit proof and prevent

surprise at trial” (*Matter of DiChario*, NYLJ, June 25, 2007, at 47, col 5 [Sur Ct, Westchester County] [internal citation omitted]). If a party does not fully and timely comply with a demand for a bill of particulars, CPLR 3042 provides that “the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule” (CPLR 3042 [c]). The penalties delineated in CPLR 3042 (d) include “such relief as is set forth in section thirty-one hundred twenty-six of this chapter.” CPLR 3126 gives the court discretion to make an order striking out pleadings or parts thereof, in response to willful failure “to disclose information which the court finds ought to have been disclosed ...”

Disclosure is governed by Article 31 of the CPLR, and the discovery and production of documents is set forth in CPLR 3120. Where a party fails to respond to a request for information, CPLR 3124 provides that “the party seeking disclosure may move to compel compliance or a response.” The applicable penalties for failure to disclose are those found in CPLR 3126, discussed above.

The law strongly prefers that matters be decided on their merits (*Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]). Striking out pleadings is a drastic remedy which is not lightly ordered by the courts. “The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was willful, contumacious or in bad faith” (*Roman v City of New York*, 38 AD3d 442, 443 [1st Dept 2007]; see *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [1st Dept 2003]). Moreover, in a recent Nassau County decision, the court determined that “[t]he defendant was not entitled to the dismissal of the complaint under CPLR 3126 (3) without first moving to compel [compliance],

accompanied by an affirmation that she made a good faith effort to resolve the discovery dispute” despite the fact that a motion to compel compliance is not expressly required by the CPLR (*Holohan v. Amity Nissan Superstore*, 2008 WL 2489500 [Sup Ct, Nassau County 2008]; see also *Double Fortune Property Investors Corp. v Gordon*, 55 AD3d 406, 407 [1st Dept 2008], in which the court refused to dismiss a complaint without a prior motion to compel compliance with discovery). Further, while sanctions under CPLR 3126 may be imposed at the discretion of the court, a recent Appellate Division, First Department decision reversed a lower court decision which sua sponte struck an answer filed by the defendant on the basis of his failure to comply with discovery, on the grounds that defendant did not have prior notice that a sanction might immediately be forthcoming (*Sidelev v Tsal-Tsalko*, 52 AD3d 398 [1st Dept 2008]).

Movant has not established that objectant’s delay in complying with the discovery demands was willful, contumacious or in bad faith. Consequently, the court must deny that portion of the relief which asks the court to strike the objections filed by Freed. However, the court finds that Freed’s opportunity to object to disclosure, inspection or examination under CPLR 3122 ended twenty days after the executor/trustee served notice of her discovery demands on May 15, 2009. Further, the court rejects objectant’s sophistic argument that there is no prejudice to the parties as a result of delays caused by objectant simply because counsel for the executor/trustee voluntarily reached an agreement with the charitable remaindermen to waive future billing for the legal services he provides to the estate. Future delays caused by the objectant, if any, may result in the imposition of sanctions upon her. Moreover, the court finds that the objectant’s response to item (1) of the demand for a verified bill of particulars is inadequate, and directs objectant to respond in full. As to the combined demand for discovery

and inspection, objectant is directed to provide the executor with new photocopies of all of the documentation, letters and photographs requested, with only credit card and account numbers redacted where necessary; no other information may be redacted. Each document shall be neatly labeled to indicate the demand or demands to which it is responsive. All of the above shall be provided by objectant or her attorney to counsel for the executor/trustee within ten (10) days of service upon objectant or her attorney of a copy of this order. Alternatively, counsel for objectant may make the original documents available for inspection and photocopying by counsel for the executor/trustee at a mutually convenient time within the same ten (10) day period.

This matter is hereby placed on the court's calendar for a pre-trial scheduling conference on January 14, 2010 at 2:30 P.M.

This constitutes the decision and order of the court.

Dated: December 17, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court