

Matter of Rice

2010 NY Slip Op 30739(U)

March 29, 2010

Surrogate's Court, Nassau County

Docket Number: 346077

Judge: John B. Riordan

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

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Probate Proceeding, Will of

File No. 346077

THOMAS C. RICE,

Deceased.

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In this probate proceeding, the objectant moved for (i) an order compelling the petitioner to provide the objectant with copies of the signed deposition transcripts from the SCPA 1404 examinations of Frederick J. Kramer, Esq. and Joanne Albert and to provide information and documentation requested during such examinations and set forth at the end of the deposition transcripts, including, but not limited to, the attorney-draftsman’s file or (ii) an order of preclusion pursuant to CPLR 3126 dismissing the probate petition, revoking preliminary letters testamentary and precluding the introduction of testimony regarding the execution of the purported last will and testament. After the original return date of the motion, a conference was held before a court-attorney/referee and petitioner’s counsel agreed to serve the executed transcripts and the documents requested on or before July 10, 2009. Petitioner’s counsel served the signed transcripts, together with an errata sheet and the documents requested, on July 9, 2009. Objectant then moved for an order striking the errata sheet on the ground that it was untimely served. Petitioner then cross-moved for an order extending the time for service of the errata sheet. For the reasons that follow, the motion to strike the errata sheet is granted.

The decedent, Thomas C. Rice, died on November 28, 2005, a resident of the County of Nassau. The decedent left a purported will dated March 26, 2004. He was survived by his daughter, Gloria Goodwin, the petitioner herein, and his son, Thomas L. Rice, the objectant. The

purported will bequeaths all of the decedent's tangible personal property to the petitioner and nominates her as executor. It further provides that the residuary estate shall pour over to the Thomas C. Rice Family Trust ("the Trust"). The Trust was created by instrument dated March 26, 2004, between the decedent, as grantor, and the petitioner, as trustee. The trust instrument provides that, upon the decedent's death, the trust principal shall be distributed in accordance with the decedent's exercise of a limited power of appointment, or to the extent that he shall fail to exercise such power of appointment, to the petitioner, or if she predeceased the decedent, to her husband, Charles E. Goodwin. Mr. Kramer drafted both the purported will and the trust.

The SCPA 1404 examinations were conducted on October 16, 2008. The objectant contends that as part of the SCPA 1404 examination of Frederick J. Kramer a demand was made for the production of the attorney-draftsman's file as well as other documentation and correspondence. No objection to the demand was made either at the examination or thereafter. At the deposition of Mr. Kramer, objectant's counsel requested additional information and spaces were left in the transcript for the information to be provided. No objection was made to such requests either at the examination or thereafter. On October 31, 2008, the objectant's counsel sent a letter to petitioner's counsel asking him to arrange for the execution of the transcripts of the SCPA 1404 examinations. Objectant's counsel avers that his office spoke to the court reporting company and was advised that the transcripts previously had been sent to petitioner's counsel.

Objectant's counsel argues that, pursuant to CPLR 3116, the deposition transcript is to be submitted to the witness for review and any changes the witness desires to make shall be made at

the end of the deposition with a statement as to the reasons for the change. The witness is to sign the transcript before a notary and return it within sixty days. If the witness fails to do so, the transcript may be used as though fully signed and no changes may be made more than sixty days after the transcript has been submitted to the witness for his review. Counsel also states that his associate wrote to petitioner's counsel again on January 7, 2009 again requesting the executed transcripts. Counsel's office also left at least two messages for petitioner's counsel requesting the documents and signed copies of the transcripts.

After the original return date of the motion, a conference was held before the court and petitioner's counsel agreed to serve the executed transcripts and the documents requested by July 10, 2009. Petitioner's counsel provided the signed transcripts, together with an errata sheet and the documents requested, to the objectant's counsel by the required date. Objectant then moved for an order striking the errata sheet, which was executed on July 7, 2009 and served on July 9, 2009, on the grounds that the errata sheet was untimely served. Objectant's counsel claimed that the errata sheet contained numerous substantive changes that dramatically altered the "substance and tenor" of Mr. Kramer's testimony.

Thereafter, petitioner cross-moved for an order extending the time for service of the signed deposition transcript and errata sheet of Mr. Kramer nunc pro tunc. Petitioner's counsel argues that in order for the 60-day period to run the witness must be provided with the transcript. Counsel contends that, although the transcript was provided to his office, it was misplaced and was not sent to the attorney-draftsman/witness until June 2009. Counsel further argues that it would be disingenuous for the objectant to seek to preclude the errata sheet but use the

documentation referenced in the errata sheet and provided to counsel against the respondent. Moreover, petitioner's counsel contends that the motion to strike should be denied because even if the motion to strike the errata sheet was granted the attorney-draftsman/witness could still testify at trial as to the information provided therein. Thus, he argues that the "most accurate information" should be provided to the court in fairness to the estate and to insure the "integrity of the process." According to petitioner's counsel, pursuant to CPLR 2004, "good cause" to extend the time to sign and deliver the transcript has been met because the attorney-draftsman/witness did not timely receive the transcript for review and signature.

Objectant's counsel has submitted an affirmation in opposition to the cross-motion. Attached as an exhibit to the opposition papers is a letter dated November 17, 2008 from petitioner's counsel to the attorney-draftsman which reads as follows:

"Dear Fred,

I am enclosing a copy of deposition of you and JoAnn with letter from the attorney. Please forward to his office and send me a copy of signature pages and errata sheet pages if any. Best regards."

Objectant's counsel argues that this letter belies petitioner's counsel's claim that the transcript was not sent to the attorney-draftsman until June 2009.

CPLR 3116 (a) provides as follows:

"(a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to

the transcript may be made by the witness more than sixty days after submission to the witness for examination.”

The 60-day period is not a statute of limitations and may be extended upon a showing of good cause (CPLR 2004). As noted by Professor Siegel in the Practice Commentary (*Siegel, Practice Commentaries, McKinney’s Consolidated Laws of NY*, Book 7B, CPLR C3116:1), “[a]ccording to the Advisory Committee, the statutory purpose of imposing the 60-day restriction in the first place is to enable other parties, including the party who took the deposition, ‘to rely upon the deposition as final,’ an aim that would be frustrated by ‘[l]ast minute changes’” (*see also Zamir v Hilton Hotels Corp.*, 304 AD2d 493 [1st Dept 2003]). Courts should be cautious about extending the 60-day period since “[a]n indication from the courts that an extension will be allowed without a strong showing of justification will quickly evolve a dilatory attitude that can undermine the purpose of CPLR 3116(a)’s time limit altogether” (*Siegel, Practice Commentaries, McKinney’s Consolidated Laws of NY*, Book 7B, CPLR C3116:1). Moreover, a “dilatory deponent who can’t justify a delay in returning the deposition is perhaps best left to confront the discomfort of cross-examination should his live testimony at the trial differ in some significant particular from the unaltered deposition” (*Siegel, Practice Commentaries, McKinney’s Consolidated Laws of NY*, Book 7B, CPLR C3116:1).

Here, the transmittal letter shows that the transcripts were sent to the attorney-draftsman on November 17, 2008, despite the petitioner’s counsel’s statements to the contrary. The transmittal letter was, in fact, provided to objectant’s counsel as part of discovery. Accordingly, the purported corrections were not returned to the objectant’s attorney within the 60-day time

period. The motion to strike the purported corrections on the errata sheet is granted and the cross-motion is denied. Objectant's request for the imposition of sanctions is denied.

This constitutes the decision and order of the court.

Dated: March 29, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court