

Matter of Trotta

2010 NY Slip Op 30740(U)

March 31, 2010

Surrogate's Court, Nassau County

Docket Number: 350421

Judge: John B. Riordan

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

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Proceeding by Jacqueline Trotta, Administrator of the
Estate of

File No. 350421

GERALD TROTTA,

Deceased,

Pursuant to SCPA 2103 to Compel Delivery of
Property Withheld.

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In this SCPA 2103 miscellaneous proceeding to compel the delivery of property withheld, the petitioner moves for an order (i) striking the answer of the respondent Thomas J. Trotta, (ii) finding that the issues are deemed resolved in accordance with the claims of the petitioner; and (iii) setting aside and nullifying the purported deeds dated April 18, 2009 to 6-8 Chadwick Street Glen Cove, New York, and 226 Glen Cove Ave., Glen Cove, New York, upon the grounds that Thomas J. Trotta has willfully failed to appear for an examination before trial. For the reasons that follow, the motion is denied.

The petitioner, Jacqueline Trotta, is the administrator of the estate of her husband, Gerald Trotta, who died intestate on January 22, 2008, survived by the petitioner and his two children. Letters of administration issued to the petitioner on March 11, 2008. Petitioner commenced this proceeding against the decedent’s parents, Thomas J. Trotta and Rose Trotta, and the decedent’s brother, Thomas J. Trotta, Jr., under SCPA 2103 to compel the delivery of property withheld.

According to petitioner, on October 19, 1999, Thomas J. Trotta executed and delivered a deed transferring title to the real property located at 6-8 Chadwick Street, Glen Cove, New York (“the Chadwick Street property”), in equal shares, to Thomas J. Trotta, Jr. and Gerald Trotta, as tenants in common. Thomas J. Trotta reserved for himself a special power of appointment to

change the remaindermen during his lifetime. Additionally, Thomas J. Trotta and Rose Trotta executed a deed on October 19, 1999 transferring title to real property located at 226 Glen Cove Ave., Glen Cove, New York, to Gerald Trotta (“the Glen Cove Avenue property”). Thomas J. Trotta and Rose Trotta reserved for themselves a special power of appointment to change the remainderman during their lifetimes. On April 18, 2008, Thomas J. Trotta purportedly executed a deed transferring title to the Chadwick Street property to his other son, Thomas J. Trotta, Jr. In addition, Rosa Trotta and Thomas J. Trotta purportedly executed a second deed on April 18, 2008 transferring the Glen Cove Avenue property to Thomas J. Trotta, Jr.

By order to show cause and petition dated April 7, 2009, this proceeding was commenced against respondents Thomas J. Trotta, Rose Trotta and Thomas J. Trotta, Jr. Respondents served and filed an answer dated April 20, 2009. A preliminary conference was held on April 24, 2009, and an order was issued, which directed Thomas J. Trotta to appear for a deposition on May 6, 2009. On May 5, 2009, the respondents’ then attorney advised petitioner’s attorney that Thomas J. Trotta was not feeling well and could not be deposed. Rose Trotta was examined on May 6, 2009. Thereafter, a conference was held at the court on May 28, 2009. According to petitioner’s counsel, respondents’ counsel again represented that Thomas J. Trotta was not feeling well and could not be deposed. By letter dated July 15, 2009, petitioner’s counsel requested that respondents’ counsel contact his office to reschedule Mr. Trotta’s deposition. No response was ever received. Petitioner’s counsel argues that, given that Thomas J. Trotta is advanced in age, the delay in failing and refusing to produce him for a deposition, is severely prejudicing the petitioner’s rights. Accordingly, petitioner has moved to strike the answer and set aside the deeds upon the grounds that respondent has willfully failed to appear for an examination before

trial.

Respondents' current counsel opposes the motion on the grounds that Thomas J. Trotta is incapable, either physically or mentally, of participating in his own deposition. According to counsel, Mr. Trotta is ninety-two years old and "clearly has some form of dementia or other disability which affects his ability to recall events and articulate them." Counsel states that he met with Dr. Harry Schinder, a physician in the geriatric practice group in Glen Cove who has been treating Thomas J. Trotta for many years. He asked Dr. Schinder to examine Mr. Trotta for the purpose of determining whether Mr. Trotta was physically and mentally capable of participating in a deposition and, if so, under what conditions. Dr. Schinder advised counsel that, in his medical opinion, Mr. Trotta was not capable of participating in a deposition. A letter dated January 8, 2010 by Dr. Schinder is annexed to counsel's opposition papers. Dr. Schinder states as follows:

"Mr. Trotta is a very elderly gentleman with multiple medical issues including atherosclerotic cardiovascular disease, congestive cardiomyopathy, hypertension, and chronic anemia probably secondary to myelodysplasia. He also has demonstrated cognitive impairment consistent with dementia as evidenced by the fact that he did not recognize this physician, he was disoriented as to date and he failed a calculation exercise. He also requires total care in all activities of daily living such as bathing, dressing, and personal hygiene. He is wheelchair-bound and requires total assistance in mobilizing and transferring.

It is my professional opinion that Mr. Trotta is incapable in (sic) participating in a deposition or any other similar activity. Considering his multitude of medical issues, this would put his health in jeopardy; I also feel this would be an exercise in futility due to his severely impaired cognition."

Accordingly, respondents ask that petitioner's motion be denied and that an order be issued directing that Thomas J. Trotta not be required to participate in a deposition in this

proceeding, including a trial, unless he first receives medical clearance from one of his treating geriatric physicians.

Petitioner's counsel has submitted a reply in which he argues that Dr. Schinder's letter does not comply with CPLR §2106 and should not be considered by this court. Counsel notes that the statement is neither subscribed nor affirmed by Dr. Schinder to be true under the penalty of perjury, and, therefore, may not be served or filed in this proceeding. In addition, he argues that the physician's unsworn letter does not advance any justification for Thomas J. Trotta's failure to appear for his deposition dating back to May 6, 2009, the date on which he was required to be deposed as set forth in the preliminary conference order. Petitioner's counsel contends that respondent's continued failure to be produced for a deposition is willful, planned and in blatant violation of this court's order. Petitioner's counsel further states that it is not petitioner's intention to badger or harass the witness, but simply to preserve his testimony. Accordingly, he asks that the court order that the deposition be held at Mr. Trotta's residence and that it be limited in duration to no more than one hour.

The question before the court is the sufficiency of the medical evidence concerning Thomas J. Trotta's ability to be deposed. Where medical evidence is "uncontradicted," a protective order may be granted (*Button v Guererri*, 298 AD2d 947 [4th Dept 2002]; *Verini v Bochetto*, 49 AD2d 752 [2d Dept 1975]). However, here the petitioner has not had the opportunity to challenge the conclusion drawn by Dr. Schinder that Thomas J. Trotta's health would be put in jeopardy if he were deposed. Moreover, at this point, the court cannot ascertain whether this conclusion is correct without further inquiry and the court may not abdicate its responsibility by unquestioningly accepting a doctor's summary opinion. The opposing party has

a right for herself and on behalf of the court to examine the matter in more detail and to obtain medical evidence to controvert or contradict the medical evidence offered by the party or witness seeking to avoid the deposition (*Matter of Martin*, 2 Misc 3d 1008A [Sur Ct, Nassau County 2004]).

Accordingly, the petitioner is authorized to select a physician of her own choosing to consult with Dr. Schinder and review his medical records and examine Mr. Trotta if deemed necessary. Since Mr. Trotta himself has placed his medical condition in issue, those medical records should be produced forthwith (*Hoening v Westphal*, 52 NY2d 605 [1981]).

The court emphasizes that if a deposition is to take place, the two physicians and the attorneys involved should make every effort to come to some agreement on how the deposition is to be conducted including the time, place, persons present, allowance for rest periods for the witness, appointment of a referee to monitor the deposition, and any other accommodations. If there is no satisfactory agreement arrived at as to the mode of the deposition, the petitioner will be given an opportunity to examine Dr. Schinder and eventually a hearing may be required. The motion will be denied pending further order of the court.

This matter will appear on the court's calendar for conference on May 12, 2010, at 9:30 a.m., to keep the court apprised of the progress in deposing Mr. Trotta.

This constitutes the decision and order of the court.

Dated: March 31, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court