

**Matter of Fuld**

2010 NY Slip Op 31010(U)

April 23, 2010

Sur Ct, Nassau County

Docket Number: 357475

Judge: John B. Riordan

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

-----X  
 Probate Proceeding, Will of

DAVID FULD,

File No. 357475

Deceased.

-----X

In connection with a petition for probate, the court has before it respondent's motion to compel discovery pursuant to CPLR 3124 and petitioner's cross motion seeking costs and sanctions and in opposition to the motion to compel discovery. Movant filed a reply to the petitioner's cross motion, and petitioner filed a reply affirmation to movant's reply to the petitioner's cross motion. For the reasons set forth below, the motion and cross motion are denied.

#### BACKGROUND

David Fuld died a resident of Lido Beach on August 24, 2009. His daughter, Cathy Moscovitz (petitioner), filed a purported will dated October 25, 2007 for probate, in which decedent nominated Cathy as executor and bequeathed his entire estate to her. Decedent was also survived by his sons, Fred S. Fuld (movant, who is a self-represented attorney) and Michael J. Fuld. Documents filed with the court reflect the existence of intense and longstanding discord among the members of decedent's family.

#### PROCEDURAL HISTORY

Cathy's petition for probate, filed September 28, 2009 and amended on October 9 and October 21, 2009, was returnable before the court on October 28, 2009. At movant's request, examination of the attesting witnesses pursuant to SCPA 1404 was scheduled for January 8,

2010, and movant was directed by the court to file his objections, if any, within ten days thereafter, no later than January 18, 2010.

Movant served a combined notice for discovery on October 26, 2009, asking for (1) the names and addresses of home health care attendants from 2005 through August 2009; (2) any and all previous wills and trusts; (3) copies of I.R.A. accounts, insurance policies, joint bank or investment accounts or other testamentary substitutes; (4) authorizations permitting movant to examine and copy hospital records; (5) authorizations permitting movant to examine and copy the records of all treating physicians; and (6) authorizations permitting movant to examine and copy the records of all professional medical providers in a home care setting. Petitioner served a response to the discovery demands on November 23, 2009. The response included the names and addresses of five health care attendants; a copy of decedent's will dated May 1, 1995; and a copy of decedent's trust dated April 30, 2004. It also included four medical authorizations.

On December 10, 2009, movant served a second combined notice for discovery in which, in addition to reiterating some of the disclosure previously requested, he asked for (a) the names and contact information of the employers of the home health attendants, (b) the complete file of the attorney-draftsman of the purported will, (c) all brokerage account statements, (d) bank records, (e) check stubs, (f) cancelled checks and pharmacy records, (g) all income and gift tax returns and (h) all financial records evidencing gifts to Phyllis Pawlowski.

On December 19, 2009, Fred filed the motion to compel discovery which is presently before this court. The motion to compel specifically requests all prior wills and other instruments between 1995 and 2004; contact information for a home care aide named Carmen;

and an executed authorization for the medical records of Visiting Nurse Services.

In response to the motion to compel, petitioner's counsel filed a cross motion seeking costs and sanctions and opposing the motion to compel discovery. In the affidavit in support of the cross motion, Cathy maintains that she provided Fred with all of the relevant documents in her possession and the requested medical authorizations. Cathy further noted that (1) the motion to compel discovery was filed before the statutory period to respond to the second notice for discovery had concluded; (2) Fred had been advised by Cathy's counsel, in advance of Fred's filing his second combined notice for discovery and the subsequent motion to compel, that Cathy had provided all of the documentary evidence in her possession; (3) decedent had never utilized Visiting Nurse Services.

On January 6, 2010, two days prior to the scheduled 1404 examination, a conference was held at the court, at which time movant advised the court that he was not prepared to go forward with the 1404 examination scheduled for January 8, 2010. He was advised that the date would not be adjourned. The motion and cross motion were adjourned until January 29, 2010, when they were to be submitted for decision. Movant's opposition to petitioner's cross motion, if any, would be served on petitioner no later than January 19, 2010.

A few hours after the conference on January 6, 2010, Fred advised the court by fax that he was

“not prepared to go forward with the scheduled 1404 examination on the date scheduled [January 8, 2010] and have been advised that I will be forfeiting my opportunity to avail myself of this procedure. I will notify the attorneys for the other Party . . . and will make a decision about whether to file objections in a time period to be afforded me by the court.”

Subsequently, petitioner was advised by the probate clerk that the cross motion had to be noticed and served again, at first for lack of jurisdiction and then to be returnable on the court's calendar day. Petitioner complied, with the motion returnable on February 3, 2010. The matter was then marked for submission on February 17, 2010.

On January 27, 2010, movant served a reply to petitioner's cross motion on petitioner's counsel by mail. In his reply, movant seeks (a) costs of \$1,500.00 for unspecified reasons; (b) sanctions in the amount of \$5,000.00; (c) that the court direct petitioner to comply with the requested disclosure and (d) that after adequate disclosure respondent be provided with an opportunity to conduct a 1404 examination. A copy of the reply, which reached petitioner's counsel on February 1, 2010, was filed with the court on February 2, 2010.

A reply affirmation was filed on behalf of petitioner on February 16, 2010 (a) in response to movant's affidavit in support of reply to petitioner's cross motion and (b) in further support of petitioner's cross motion seeking costs and sanctions. In the reply affirmation, counsel for petitioner argues that movant's reply affidavit is not timely and that it inappropriately seeks new relief.

#### ANALYSIS AND CONCLUSIONS

The motion before the court to compel discovery was brought pursuant to CPLR 3124, which provides that a party "seeking disclosure may move to compel compliance or a response." The statutory period for responding to a notice for disclosure is set by CPLR 3120, which states that the notice "shall specify the time, which shall not be less than twenty days after service of the notice . . ." In fact, both the first and second notices for discovery which movant served on

petitioner provided that “All information or documents responsive hereto should be furnished within thirty (30) days . . .” The first combined notice for discovery was served on petitioner on October 26, 2009, and a response was served on November 23, 2010. Following petitioner’s response, a second combined notice for discovery, which reiterated some of the earlier requests in addition to requesting some new information, was served on petitioner on December 10, 2010. Thus, according to the 30-day time frame specified in the second notice, Cathy had until January 9, 2010 to respond. The motion to compel, filed on December 19, 2009, which was only nine days after service of the notice for discovery, is denied as premature.

The cross motion filed on behalf of petitioner, which seeks costs and sanctions and opposes the motion to compel discovery, is also denied. At the same time, the court notes that although movant is self-represented, he is a practicing attorney who should be mindful of statutory time frames as well as the actual time period for response which he drafted into his notice for discovery. The court will not hesitate to impose sanctions in the future if frivolous motions are filed in connection with this matter.

The court finds that movant’s reply to the cross motion was timely in view of the adjournment of the return date for the cross motion. Nevertheless, the relief requested in movant’s reply is denied, except that, as noted below, the court, on other grounds, has rescheduled the SCPA 1404 examination for a new date.

The court’s review of the entire file has led to a determination that the examination of the attesting witnesses will be allowed to proceed, as the response to the second notice for discovery was incomplete at the previously scheduled date. Generally, courts are liberal about permitting

the examination of witnesses (Turano and Radigan, New York Estate Administration, § 3.05 [b], p. 107 [2009 ed], citing this court's decision in *Matter of Gallo*, NYLJ, May 8, 1985, at 16, col 5 [Sur Ct, Nassau County]). Accordingly, the examination pursuant to SCPA 1404 has been rescheduled for Monday, July 12, 2010, at 9:30 a.m. Barring extreme and unforeseeable circumstances, no further adjournments will be granted. Objections, if any, will be due no later than July 22, 2010.

Finally, the court notes that petitioner, in her supporting affidavit, states that she supplied all of the documents in her possession or accessible to her in connection with movant's request in her November 23, 2009 response. She further argues that "[w]ith respect to the specific requests made by Respondents in their second combined Notice for Discovery, it is respectfully submitted that same cannot be produced for the simple fact that I do not have anything more than what I have already produced in Response to respondents' first demand." Petitioner then explains why she cannot provide (a) the requested information concerning one particular caretaker (Carmen), (b) alleged testamentary instruments, and (c) authorization in connection with the records of Visiting Nurse Services. However, petitioner has not yet responded to the other requests for additional documentation as set forth in second combined notice for discovery, which may or may not be in her possession or accessible by her. The court directs that petitioner has an additional 30 days from the date of this decision to serve a complete response to the second notice for discovery.

This is the decision and order of the court.

Dated: April 23, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court