

Matter of Gilmore

2011 NY Slip Op 30360(U)

January 21, 2011

Surrogate's Court, Nassau County

Docket Number: 346747

Judge: Edward W. McCarty

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

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Motion to Reargue Filed in Connection with the
Probate Proceeding, Will of

File No. 346747

ROY L. GILMORE,
a/k/a ROY GILMORE,

Dec. No. 27015

Deceased.

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This is an application for an order pursuant to CPLR 2221, filed on behalf of the objectant and movant, Andrea Hofler, for leave to reargue this court's decision dated December 6, 2010. The prior decision, number 26752, extended the time to file objections to probate, conditioned upon the respondent paying the sum of \$1,000.00 to petitioner's attorneys. It was based upon the court's finding that the reason for the previous late filing was law office failure. For the reasons set forth below, the motion is granted.

As briefly noted in the prior decision, the instant probate proceeding was originally commenced in 2007, almost four years ago. Decedent left a will dated June 24, 1996 in which he bequeathed his entire estate to his daughter, Angela Manning, who was granted preliminary letters by order of this court dated May 29, 2007. Ms. Manning was one of decedent's 11 children, of whom six were non-marital and five were marital. All of the other adult children except objectant and her brother, Malverick Hofler, defaulted.

Decision number 26752 noted, in part, that following completion of the SCPA 1404 examinations on August 6, 2010, objections were due no later than August 16, 2010, and "no objections were filed with the court [by movant]." The court further noted that movant's objections had been served upon petitioner's counsel and the guardian ad litem by email, without their written consent for service by electronic means, as required by CPLR 2103 (b) (7). The

guardian ad litem appointed to represent the interests of decedent's minor daughter, Christina Gilmore, filed timely objections on August 16, 2010, along with a request for a jury trial.

An affidavit in opposition to the motion to reargue was filed by petitioner's counsel on December 16, 2010. Counsel argues that not only was service on the other parties deficient, but papers are not deemed filed with the court until received by the clerk (*citing Matter of Esteves*, 31 AD3d 1028 [3d Dept 2006]). The objections filed on behalf of movant were not received by the court within the allowable filing period.¹ Petitioner's counsel further asserts that the present motion is part of a pattern of delaying tactics, burdensome and wasteful motion practice, and bad faith demonstrated by objectant's counsel throughout these proceedings. For all of these reasons, petitioner's counsel asks that objectant's motion be denied.

A motion for leave to reargue is governed by CPLR 2221. A motion to reargue is not based on any new facts, but seeks to convince the court that it overlooked or misapprehended the facts or the law on the prior motion (CPLR 2221 [d]). It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Bolos v Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]; *Schneider v Solowey*, 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means in which an unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally

¹Objectant's counsel tacitly concedes that the objections were not timely received by the court, as he states that the objections were mailed, not hand delivered, on the final day of the 10-day filing period.

asserted (*Giovanniello v Carolina Wholesale Off. Machine Co., Inc.*, 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt.*, 20 AD3d 388 [2d Dept 2005]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *Frisenda v X Large Enters.*, 280 AD2d 514 [2d Dept 2001]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). Nevertheless, “[i]t is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision” (*Peak v Northway Travel Trailers*, 260 AD2d 840, 842 [3rd Dept 1999]). “Additionally, even in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate” (*Louis v S&W Realty Corp.*, 16 AD3d 729, 730 [3d Dept. 2005]).

Objectant’s attorney argues that he filed objections by mailing them out August 16, 2010. The objections apparently reached the court on August 17, 2010, at which time they were returned to counsel with a letter noting that they were received by the court after the 10-day filing period. The letter further advised objectant’s counsel that in order to proceed, he must file a Motion to Accept Late Filing of Objections. Counsel then submitted his motion for a late filing, which resulted in decision number 26752, cited above.

The court finds that counsel has indeed raised a fact misapprehended by the court when it decided the prior motion (CPLR 2221 [d] [2]). This court’s prior decision was based, in part, upon the fact that the court file did not contain objections, leading to the incorrect assumption that the objections served by email upon petitioner and the guardian ad litem had never been filed

with the court. In fact, objectant's counsel has shown that her objections were filed with the court, but they were returned by the clerk of the court for having been received one day late. Accordingly, the motion for leave to reargue is granted.

Upon reconsideration, the court reverses its prior determination in which it allowed the late filing of objections on behalf of Ms. Hofler only upon the payment of \$1,000.00 to counsel for petitioner. The court further directs the return of the \$1,000.00 payment to Ms. Hofler's counsel. At the same time, the court rejects the objections to probate which were filed on December 10, 2010, as these objections indicate that they have been filed jointly by Ms. Hofler's attorney and by Malverick Hofler's attorney on behalf of the two siblings. However, both attorneys are surely aware that no objections were filed on behalf of Mr. Hofler within the 10-day time period for filing, which concluded on August 16, 2010, and that no motion was made on Mr. Hofler's behalf to extend the time to file his objections. Thus, it appears that the attorneys have attempted to surreptitiously circumvent the issue of late filing on behalf of Mr. Hofler. Counsel for Ms. Hofler may serve and file appropriately amended objections solely on her behalf not later than January 31, 2011.

The court must express serious concern about the somewhat insouciant practice exhibited by objectant's counsel during these proceedings.² Counsel is strongly advised to timely file

²In addition to the original late filing and non-statutory service upon other parties discussed above, and the recent filing of objections jointly with counsel for a party who did not receive permission for late filing, counsel for objectant previously failed to appear for a court-scheduled deposition, resulting in decision number 469, dated August 18, 2009, in which this court directed counsel to pay \$750.00 to attorney for petitioner and the cost of the court reporter on the day of counsel's default.

future documents, together with proper statutory and timely service upon interested parties, and to fully comply with all court directives. No further extensions will be granted.

A conference in connection with this estate has been scheduled for February 9, 2011 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: January 21, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court