

Matter of Soluri

2012 NY Slip Op 33020(U)

October 26, 2012

Sur Ct, Nassau County

Docket Number: 2010-361817

Judge: III., Edward W. McCarty

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

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 Probate Proceeding, Will of

JANET SOLURI,

File No. 2010-361817

Dec. No. 28109

Deceased.

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In connection with this probate proceeding, the proponent has filed a motion pursuant to CPLR 3126 to strike objections which were filed by paternal cousins of the decedent, Janet Soluri.

BACKGROUND

Janet Soluri died on February 19, 2010, a resident of West Hempstead. She was survived by 17 paternal first cousins.¹ Decedent left a last will and testament dated February 3, 2010, in which she made specific bequests of \$5,000.00 to the West Hempstead Fire Department, \$25,000.00 to Marie Immeline Delva,² and \$20,000.00 to St. Thomas the Apostle Church. Decedent bequeathed her residuary estate to her neighbors, James Young (hereinafter, "James") and Joan Young, and decedent named James as executor of her will. James filed a petition for probate on August 17, 2010, and preliminary letters issued to him on August 25, 2010. On October 19, 2011, James filed a List of Assets-Inventory which reflects estate assets totaling \$1,459,861.00.

Objections dated November 17, 2011 were filed on behalf of 14 of decedent's 17 distributees: (1) Matilda Amendola (hereinafter, "Matilda"); (2) Ralph Bushey (hereinafter,

¹Decedent's seventeen surviving distributees are named in the affidavit of search efforts filed with the court by a representative of International Genealogical Search, Inc. on July 13, 2011.

²Ms. Delva is listed on decedent's estate tax return as her caretaker.

“Ralph”); (3) Rose Dobler (hereinafter, “Rose”); (4) Angelina Boyd (hereinafter, “Angelina”); (5) Muriel Soluri (hereinafter, “Muriel”); (6) Robert Cecilio (hereinafter, “Robert C.”); (7) Mary Razzano (hereinafter, “Mary”); (8) John Buscema (hereinafter, “John”); (9) Richard Cecilio (hereinafter, “Richard”); (10) Aldona McMichael (hereinafter, “Aldona”); (11) Joseph Soluri (hereinafter, “Joseph”); (12) Mary Ann Soluri (hereinafter, “Mary Ann”); (13) Robert Soluri (hereinafter, “Robert S.”); and (14) Thomas Soluri (hereinafter, “Thomas”). All of the objectants are represented by the same attorney.

In a preliminary conference order signed by counsel for the parties, and so ordered by the Surrogate, it was agreed that five objectants: Matilda, Ralph, Rose, Angelina and Muriel, would be deposed on February 24, 2012. Counsel for the proponent of the will served notice to take deposition of these parties, but only Matilda appeared on that date. A second pre-trial order was signed and so ordered on March 1, 2012, in which it was agreed that all discovery would be completed by May 15, 2012. Counsel for the proponent requested the opportunity to depose the remaining objectants, but only Ralph, Rose, Robert C. and Mary appeared for deposition. Counsel for the proponent sent interrogatories to Angelina as she was unable to appear for a deposition due to illness, but counsel for the proponent subsequently rejected Angelina’s responses to the interrogatories as inadequate and improper pursuant to CPLR 3133.

Thus, to date, five of the objectants have appeared for deposition: Matilda, Ralph, Rose, Robert C., and Mary. One objectant, Angelina, received and partially answered interrogatories. The remaining eight objectants, John, Richard, Aldona, Joseph, Mary Ann, Muriel, Robert S. and Thomas, failed to submit to examination. At no time did counsel for these objectants object to their being deposed, nor did counsel assert that any of his clients, other than Angelina, is disabled

or incapacitated.

Following multiple court conferences, in which counsel for the proponent repeatedly attempted to have counsel for the objectants agree to a schedule for deposing the remaining objectants, counsel for the proponent filed the instant motion to strike the objections of eleven of the objectants: Angelina; John; Richard; Aldona; Joseph; Mary Ann; Muriel; Robert S.; Mary; and Rose. Movant did not ask the court to strike the objections of Matilda, Ralph, and Robert C., all of whom were deposed.³

On June 19, 2012, counsel for the objectants filed an affirmation in opposition to petitioner's motion to strike the objections and in further support of the objections. Counsel notes that since movant did not ask the court to strike the objections of Matilda, Ralph, and Robert C., their objections cannot be stricken.

ANALYSIS

Trial courts have been granted broad discretion in connection with the discovery process, and a court has the power strike pleadings when a party refuses to comply with a discovery order.

“While the nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion with the motion court, striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious” (*Maiorino v City of New York*, 39 AD3d 601, 601 [2d Dept 2007] [internal citations and quotation marks omitted]).

Thus, for the proponent's motion to be granted, movant must establish that the conduct of

³The court notes that Rose and Mary also appeared and were deposed, and that Angelina responded to written interrogatories, though the sufficiency of Angelina's responses has been challenged by counsel to the proponent.

the objectants in failing to comply with discovery demands was both willful and contumacious. “The willful and contumacious character of a party's conduct can be inferred from the repeated failures to comply with court-ordered discovery, coupled with inadequate explanations for these defaults” (*Casey v Casey*, 39 AD3d 579, 580 [2d Dept 2007]; *see also ACME ANC Corp. v Read*, 55 AD3d 854 [2d Dept 2008]).

In his first argument in opposition to proponent’s motion, counsel asserts that the motion to strike must be dismissed for failure to comply with 22 NYCRR 202.7, which requires movant to file an affirmation that counsel conferred with opposing counsel “in a good faith effort to resolve the issues raised by the motion.” The court disagrees; the record and the affidavit filed by counsel for the proponent firmly establish her good faith efforts to resolve the discovery issues.

Counsel further asserts, in his second argument, that his clients substantially complied with the discovery demands, rendering CPLR 3126 (3) inapplicable. In support, counsel cites multiple cases in which other courts refused to strike pleadings, but the facts at hand do not support the argument of substantial compliance. Five out of 14 parties appearing for deposition, along with admittedly incomplete interrogatories, can hardly be said to constitute substantial compliance with discovery demands.

With respect to Rose, Mary and Angelina, counsel makes a third argument, namely, that the motion to strike their objections must be denied because Rose and Mary appeared for depositions, and Angela responded to the interrogatories, albeit incompletely. Proponent’s motion is denied with respect to Rose and Mary. The motion is also denied with respect to the objections of Angelina, on condition that within 30 days of service upon Angelina of a copy of

this decision and order, she either submits complete responses to the interrogatories or appears for deposition in New York.

In his fourth argument in opposition to the motion, objectants' counsel asks the court to waive the personal appearance of eight of the objectants: Muriel, John, Richard, Aldona, Joseph, Mary Ann, Robert S. and Thomas and to permit discovery by teleconference or interrogatories in place of depositions. Counsel for the objectants argues that John, Richard and Robert S. should be excused from appearing in New York due to their poor health and physical distance from New York. He further argues that Aldona, Joseph, Mary Ann and Thomas be excused from appearing in New York based upon their advanced age and their physical distance from New York. Lastly, he argues that Muriel be excused from appearing for her deposition on the grounds that it would greatly inconvenience her, as the owner of a retail business in Delaware.

“CPLR 3122 now provides that within 20 days of service of a notice under CPLR 3120 or 3121, if the party to whom the notice is directed objects, a response must be served that states with reasonable particularity the reasons for each objection” (9 Warren's Heaton on Surrogate's Court Practice § 112.06 [7th ed]). No objections to the deposition demands were served within the 20-day time frame permitted by the CPLR. “The provisions with respect to examinations before trial of parties apply to nonresidents as well as to residents. Where a nonresident invokes the jurisdiction of our courts, the granting of the examination rests within the sound discretion of the court to which the application is made” (*Droogas v Droogas*, 1 AD2d 965, 966 [2d Dept 1956]). A nonresident who seeks the assistance of a New York court, “may be required to attend an examination within the state or, in the discretion of the court, to submit to an open commission and pay the expenses incidental thereto including counsel fees” (*see Leftoff v*

Forker, 71 NYS2d 68, 69, 1947 N.Y. Misc. LEXIS 2506 [Sup Ct, Queens County 1947]).

Accordingly, the request to allow interrogatories or teleconferences in place of depositions is denied, with the exception of John, whose request was supported with a signed and dated letter from his physician in which the physician confirmed his patient's present inability to travel. "Facts and circumstances showing hardship justify the denial of a motion to examine a nonresident even though he invokes the jurisdiction of our courts" (*Droogas v Droogas*, 1 AD2d 965, 966 [2d Dept 1956]). Counsel for the proponent may choose to send interrogatories to John or may examine John by teleconference.

As to the objectants Muriel, Richard, Aldona, Joseph, Mary Ann, Robert S. and Thomas, the court denies the motion to strike on condition that each appears for deposition in Nassau County within 60 days of the date of this decision. In the alternative, each of these seven objectants may submit to an open commission within 60 days if said objectant pays all expenses and counsel fees. Counsel for the objectants may submit a proposed order for each such open commission.

Counsel for objectants raises a fifth and final argument in opposition to the motion. He asserts that the objectants must be granted an extension of time in which to complete their discovery because the petitioner intentionally obstructed their discovery in order to disguise the fact that the proffered will is invalid. The court does not find adequate support for this argument in the facts put forth by counsel for the objectants.

CONCLUSION

Of the fourteen objectants, five have been deposed and one has partially responded to interrogatories. One objectant has submitted a physician's letter confirming that he is unable to

travel. Counsel for the objectants has essentially conceded that the reason for the failure of the remaining seven objectants to appear for examination is that it would be difficult, expensive, and/or inconvenient for them to travel to New York. Counsel for the proponent argues that at least some of the objectants have indicated that they do not wish to proceed in objecting to the will, but no objections have been withdrawn. None of the reasons proffered rise to the level of “willful and contumacious” conduct, but these reasons are insufficient to excuse objectants from complying with valid discovery demands.

The court denies the motion to strike the objections of Rose and Mary as they have already appeared for deposition.

The motion to strike the objections of Angelina is denied on condition that she provides full and complete responses to the interrogatories, or appears for deposition, within 30 days of service of a copy of this decision and order upon her.

The motion to strike the objections of John is denied, and counsel for movant is authorized to send interrogatories to John or to arrange for a deposition by teleconference. If interrogatories are mailed to John, he must respond within 45 days of the date the interrogatories are mailed. If a teleconference is requested by counsel for the proponent, John must cooperate in scheduling it within 45 days of the date on which a copy of this decision and order is served upon him. In the alternative, counsel may seek a commission to examine John at his home, at proponent’s expense, within that time period.

The motion to strike the objections of each of Richard, Robert S., Aldona, Joseph, Mary Ann, Thomas and Muriel is denied on condition that within 60 days of service of this decision and order, said objectant (1) appears in Nassau County to be deposed by counsel for the

proponent; or (2) schedules, participates in, and agrees to pay for the expenses and legal fees of an open commission.

The objections of any party who fails to comply with the orders contained herein, absent leave of the court, will be stricken.

Counsel for the objectants is correct in noting that the present motion does not impact upon the objections filed by Matilda, Ralph, and Robert C.

Counsel for all parties are directed to attend a conference on this matter on December 6, 2012 at 3:45 p.m.

This constitutes the decision and order of the court.

Dated: October 26, 2012

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