

Matter of Nelson

2014 NY Slip Op 33063(U)

March 31, 2014

Sur Ct, Nassau County

Docket Number: 29556

Judge: Edward W. McCarty III

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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. 334736

MURRAY NELSON,

Dec. No. 29556

Deceased.
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In this probate proceeding, the objectant Arnold Nelson, decedent's son, has moved for: (i) a protective order precluding the guardian ad litem for Sabrina Nelson from conducting additional discovery, and (ii) an order granting him leave to renew the motion of objectant Elenore Greenberg¹ which resulted in the court's decision and order dated June 28, 2013 (Dec. No. 28664) granting temporary letters of administration to the Public Administrator and, upon such renewal, directing that temporary letters of administration issue to Arnold Nelson. Objectant Elenore Greenberg has cross-moved for an order (i) striking Arnold Nelson's objections on the basis that he has failed to respond to discovery requests and failed to appear for his examination scheduled for December 6, 2013 or, in the alternative, directing Arnold Nelson to appear for an examination; (ii) denying Arnold Nelson a protective order; and (iii) denying Arnold Nelson leave to renew and /or reargue. The guardian ad litem has also cross-moved for an order striking Arnold Nelson's objections.

The decedent, Murray Nelson, died on September 5, 2004. The decedent's wife, Rose Nelson, predeceased him. The decedent left a purported will dated July 28, 2004. The decedent died approximately five weeks after executing the purported will. Under Article FOURTH of the purported will, the decedent's residence located in Greenvale, New York is devised to Marie

¹The court notes that Elenore Greenberg is referred to both as Elenore and Eleanore in papers submitted by her counsel to this court.

Soljour, together with all furniture and furnishings. Under Article FIFTH, the balance of the decedent's tangible personal property is bequeathed to Marie Soljour. The decedent's residuary estate is bequeathed as follows: (i) an amount equal to the lesser of 30% or \$150,000.00 to Marie Soljour; (ii) the lesser of 50% or \$250,000.00 to Arnold Nelson; (iii) the lesser of 10% or \$50,000.00 to Sabrina Nelson, in trust; (iv) the lesser of 4% or \$20,000.00 to Carlene Lefleur; (v) the lesser of 2% or \$10,000.00 to Markery Soljour; (vi) the lesser of 2% or \$10,000.00 to Dominique Soljour; and (vii) the lesser of 2% or \$10,000.00 to Rene Cadet.

A guardian ad litem was appointed for Sabrina Nelson. The guardian ad litem submitted an initial report on the issue of Sabrina Nelson's status in the proceeding. Sabrina Nelson was conceived through in-vitro fertilization. At the time of her birth, the decedent was 89 years of age. The decedent and Ms. Soljour allegedly met with a doctor for the purpose of performing assisted reproductive procedures through in-vitro fertilization process, which is the process of fertilizing an egg outside the body in a laboratory setting. Mrs. Soljour's eggs were ultimately fertilized by the sperm of an anonymous donor, producing Sabrina Nelson. The decedent and Ms. Soljour were never married. The decedent never adopted the ward; however, he is identified as Sabrina's father on her birth certificate. In addition, the decedent signed a consent accepting paternity in the event a child was born through the in-vitro process.

After SCPA 1404 examinations were conducted, Arnold filed objections to the will. Marie Soljour then made a motion for summary judgment which was unopposed and granted. After the court's decision was rendered, Arnold obtained new counsel who advised the court that the decedent had two other children from a prior marriage, a son, Herbert Nelson, who was deceased and survived by three children, and a daughter, Elenore Nelson Greenberg.

Arnold moved to reargue the court's decision granting summary judgment on the basis that he had been served at the incorrect address. A traverse hearing was held, and the court found that Arnold had not been properly served. The motion for reargument was granted and the court vacated its prior decision. Thereafter, based upon the newly revealed information regarding the decedent's additional distributees, the probate proceeding was found to be jurisdictionally defective and petitioner was directed to file an amended petition for probate of the purported will. An amended petition subsequently was filed and citation issued to the interested parties. Thereafter, objections were filed by Elenore Greenberg.

Preliminary letters testamentary were issued to Marie Soljour and were subsequently extended on October 19, 2005, May 30, 2006, May 29, 2007, November 30, 2007 and March 27, 2008. By order to show cause originally returnable on February 20, 2013, Elenore Greenberg moved to have the Public Administrator appointed to protect the assets of the estate asserting that, upon information and belief, Marie Soljour had been using the estate assets without authority and for her own benefit. She also noted that Ms. Soljour's preliminary letters had expired and she had failed to renew them, leaving the estate without a fiduciary.

The application was opposed by Arnold Nelson who is now self-represented and submitted his own affidavit. Essentially, Arnold agreed with Elenore that the estate is in need of a fiduciary to safeguard the assets; however, he requested that the court appoint him instead of the Public Administrator. Arnold asserted that "Marie Soljour has grossly mishandled the assets of the estate throughout the past eight years." Mr. Nelson's papers were replete with allegations of fraudulent and "opprobrious" conduct by Ms. Soljour, however, Mr. Nelson argued that "[t]he appointment of a public administrator could subject the estate to a loss of hundreds of thousands

of additional dollars, a significant and severe degree of irreversible damage equal to or exceeding that which petitioner has already caused.” Furthermore, Arnold argued that he is the decedent’s son and a distributee, who resides on Long Island and is “intimately and uniquely familiar with [his] father’s home.”

By decision dated June 28, 2013 (Dec. No. 28664), temporary letters of administration issued to the Public Administrator upon his duly qualifying, which he thereafter did.

RENEWAL

Arnold Nelson now moves for renewal of Elenore Greenberg’s motion. A movant on a motion to renew must demonstrate a reasonable justification for not placing such additional facts before the court on the original motion (CPLR 2221[e][3]). The Second Department has repeatedly held that the additional evidence offered on a motion to renew must be either newly discovered or have been unavailable to the movant at the time of the prior application (*Winograd v Neiman Marcus Group*, 11 AD3d 455 [2d Dept, 2004]; *Seltzer v City of New York*, 288 AD2d 207 [2d Dept 2001]; *Delvecchio v Bayside Chrysler Plymouth Jeep Eagle*, 271 AD2d 636 [2d Dept 2000]).

According to Arnold, the relief provided by the court was “sua sponte” because Elenore Greenberg did not ask for the issuance of temporary letters of administration to the Public Administrator but rather sought the issuance of letters of administration to the Public Administrator. The court’s decision and order provided as follows:

“Although the movant asks that letters of administration issue to the Public Administrator, the application is more properly a request for the issuance of temporary letters of administration and the court will treat the application as such.”

The court reasoned that under SCPA 901(1), no class of persons is entitled to priority and

directed the issuance of temporary letters of administration to the Public Administrator given that the estate administration had lingered for many years, the petitioner, Marie Soljour, and the guardian ad litem had consented to the appointment of the Public Administrator and the hostility and conflict between Marie Soljour and Arnold Nelson. The court also stated that it has “serious concerns” about Mr. Nelson’s honesty in this proceeding due to his failure to disclose the existence of his father’s children from his first marriage until four years after his father’s death and his failure to appear at court conferences, claiming not to have received communications from the court although such correspondence was addressed to an address which he provided.

Arnold now moves for “renewal” arguing that the court mistakenly concluded that he did not disclose the existence of his father’s children from his first marriage. Arnold contends that renewal is warranted because he could not defend his honesty since the court sua sponte issued temporary letters of administration. Arnold now claims that the court’s conclusion regarding his failure to disclose the existence of Herbert and Elenore “is not supported by anything in the record.” According to Arnold, he disclosed the existence of Elenore Greenberg to his prior counsel on or about December 23, 2004 and he relied on his attorney’s representation that he would bring Ms. Greenberg’s existence “to the attention of all parties at a time of his choosing.” Arnold admits, however, that he did not mention Herbert Nelson, the decedent’s other child, because Herbert predeceased the decedent. In addition, Arnold states that again in July 2005, he “politely asked” his attorney when he intended to bring Elenore’s existence to the attention of all parties. Arnold states that his counsel stated, “I told you I would do it when I’m ready and I told you not to mention it.” Arnold further avers that in September 2005, he again “politely” asked his counsel the same question and counsel gave the same response “but with an unexpected

harsher tone.”

Arnold claims that as the client he deferred to his counsel’s knowledge and that any inference of dishonesty in failing to disclose the existence of the decedent’s other children should be imputed to his prior counsel. Moreover, he states that “nobody asked” him and “[h]ad such information been requested prior to 2008, it would have been freely supplied.” Arnold states that he finds the court’s decision distressing because in fact his “honesty in this proceeding reaches Brady Bunch level.”

As to his failure to appear at court conferences, Arnold claims that the only address he provided for mailing is a post office box in Mt. Sinai, New York. He also acknowledges that an East Islip address appeared “seemingly mimicked courtesy of an error made by Mr. Lutzen [Arnold’s second attorney].” Arnold claims that in 2006 and 2007, he neither received nor knew of any communication from this court or any other party in this proceeding sent to the Mount Sinai address. He also states that he did not receive any “telephone calls, e-mails or faxes from this court or any party advising of court conferences.” Mr. Nelson uses the court’s finding at the traverse hearing on May 20, 2010 in connection with service of the summary judgment motion to argue that he did not receive communications regarding court conferences. Arnold argues that he has “taken great interest in this proceeding since its inception.” He requests that he be e-mailed or receive text messages from the court.

Finally, Arnold argues that letters should have issued to him instead of the Public Administrator because he is the decedent’s son and next of kin and, therefore, is entitled to priority under SCPA 1001. Arnold analogizes the court’s order declining to issue letters to him to the discrimination faced by Rosa Parks. Arnold states as follows:

Analogously, Rosa Parks was convicted of disorderly conduct in 1955 for refusing to relinquish her seat on an Alabama bus to a white passenger. Parks' lawful conviction depended upon segregation laws then in effect, which later changed. Would this court in the present day argue, as was effectively argued in 1955, that no class of black person is entitled to a priority in the selection of a bus seat?

The guardian ad litem and Elenore Greenberg's counsel counter that Arnold Nelson's request for leave to "renew" should be denied as untimely. The court's decision was dated June 28, 2013 and notice of entry and proof of service was completed on July 17, 2013. CPLR 2221 (d) (3) states that a motion for leave to reargue shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. Consequently, they argue that Arnold's motion, although denominated as a motion for renewal, is, in reality, a motion for reargument and, accordingly, it is approximately four months late. They contend that the motion was conveniently and disingenuously filed the day before Arnold's examination was scheduled in order to effectuate a stay of his examination.

The guardian ad litem and Elenore's counsel further argue that even if the court considers Arnold's motion timely, Arnold has failed to reach his burden by demonstrating a mistake of fact or law sufficient to warrant leave to reargue or newly discovered or unavailable evidence warranting leave to renew.

CPLR 2221 (d) (3) applies to motions for leave to reargue. The court agrees that the motion, although couched as a motion for renewal, is, in fact, a motion for reargument since a motion to reargue is not based upon any new facts, but seeks to convince the court that it overlooked or misapprehended the facts or law on the prior motion (CPLR 2221 [d]). Thus the motion is denied as untimely. Nevertheless, even if it were considered timely, the court has the discretion to appoint a temporary administrator in the best interests of the estate. Here, the

appointment of the Public Administrator was warranted under the circumstances where the decedent died approximately ten years ago and the record indicates friction between Arnold and the other purported beneficiaries which would interfere with the proper administration (*Matter of Thompson*, 232 AD2d 219 [1st Dept 1996]). The hostility between Arnold and the others is amply supported by the record.

Even if the court accepted Arnold's sua sponte argument, it is also well settled that the Surrogate may disqualify a person from receiving letters of administration where such friction exists. The court notes that Elenore's counsel in current submissions makes it clear, despite Arnold's claims that Elenore never voiced any opposition to his appointment, that Elenore objected to Arnold's appointment and, in fact, requested the appointment of the Public Administrator and not Arnold.

Accordingly, regardless of whether denominated as a motion for renewal or reargument, this branch of the motion for leave to renew and for the issuance of temporary letters of administration to Arnold Nelson is denied.

PROTECTIVE ORDER

With respect to the branch of the motion for a protective order precluding the guardian ad litem from conducting further discovery, Arnold argues that the guardian ad litem is precluded from conducting further discovery by the doctrine of equal protection because Arnold "is a non-attorney and would be at a distinct disadvantage if deposed by a seasoned practitioner." Moreover, Arnold points out that by decision dated June 22, 2010, this court precluded Arnold from conducting further discovery. Arnold argues "[w]hat is good for the goose is good for the gander" Specifically, Arnold states as follows:

Indeed, the Fourteenth Amendment of the Constitution of the United States mandates that “no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.” *Missouri v Lewis*, 101 US 22, 31 (1880). It is applicable to intentional or arbitrary discrimination generally, *see e.g. Krugman v Board of Assessors*, 141 AD2d 175 (2d Dept 1988) (taxation of real property).

Arnold also argues that the guardian ad litem is barred from further discovery under the doctrine of laches. Arnold states that the guardian ad litem is engaging in “dilatatory fishing expeditions after largely hibernating since his appointment on December 6, 2005.” Additionally, Arnold claims that the guardian ad litem is barred by the doctrines of standing and/or mootness. According to Arnold, since the guardian ad litem’s ward will in all events receive nothing as a residuary legatee, the guardian ad litem’s appointment is moot. Furthermore, since the ward was conceived via in vitro fertilization with sperm from an anonymous donor, Arnold argues that the ward lacks standing. Arnold concludes that the ward is not a person interested and, therefore, the guardian ad litem’s request for further discovery is frivolous.

The guardian ad litem argues that Arnold’s motion for a protective order should be denied because “Arnold Nelson has continuously frustrated and delayed this proceeding from its inception.” The guardian ad litem points out that there can be no dispute that the court’s letter dated October 2, 2013 scheduling a conference for October 9, 2013 was sent to Mr. Nelson, and Mr. Nelson failed to appear at the conference. At the conference, a deposition schedule was agreed upon, and the guardian ad litem stated that he would notice Arnold Nelson’s examination before trial and counsel for Elenore Greenberg agreed to serve the other deposition notices upon Marie Soljour and certain members of her family. On October 10, 2013, the guardian ad litem served a Notice of Examination Before Trial upon Mr. Nelson, which scheduled his examination

for December 6, 2013. He also served Mr. Nelson with two separate document demands, dated November 1, 2013 and November 19, 2013 respectively. The second demand was served because the first, which was served by certified mail, may not have been picked up by Mr. Nelson, according to the postmaster. The second notice, which is identical to the first, was sent by regular mail. Mr. Nelson never responded to either demand. The first document demand had a return date of November 27, 2013. On November 26, 2013, Mr. Nelson telephoned the guardian ad litem advising him that he would not be appearing for his deposition and that he would be making the instant motion. During this conversation, the guardian ad litem inquired of Mr. Nelson as to the status of a response to the document demands. He claimed he never received either demand. As a result, the guardian ad litem e-mailed the document demands to Mr. Nelson.

The guardian ad litem states that Arnold Nelson has blatantly refused to produce any document responsive to the demand or failed to appear for his examination without offering any adequate excuse. Moreover, the guardian ad litem argues that Mr. Nelson's failure to appear for the October 9, 2013 conference is his own fault and being "self-represented" does not entitle him to "any advantage, or excuses for repeatedly failing to participate in court conferences."

The guardian ad litem further points out that Mr. Nelson attended all of the other depositions noticed by Ms. Greenberg's counsel which took place, demonstrating that his failure to appear for his own deposition and move for a protective order is clearly in bad faith.

In addition, the guardian ad litem disputes Arnold Nelson's claim that his ward lacks standing, countering that she is a named beneficiary under the purported will and is entitled to defend against the probate challenge (SCPA 103 [8]). The issue of abatement is a matter to be

resolved in an accounting proceeding and does not affect her standing.

Elenore's counsel also opposes the motion for a protective order and argues that Arnold Nelson has not established that his examination would cause him unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice. Elenore's counsel states that regardless of whether the guardian ad litem may take Arnold's deposition, Elenore, who had no knowledge of this proceeding until the petition was amended, is entitled to take Arnold's deposition.

Arnold counters by stating that he did not receive the court's October 2, 2013 letter setting the conference for October 9th until October 18th . . . He states that the envelope had no postmark and, in any event, the language of the letter implied that an appearance was voluntary. In addition, Arnold states in conclusory fashion that the "discovery demand is improper in its entirety solely for being grossly overbroad." He further states the demands are absurd and palpably improper.

New York requires full disclosure of all matter material and necessary in the prosecution or defense of an action (CPLR 3101 [a]). Disclosure is available from parties to the litigation and from non-parties. Case law has broadly construed the scope of material that is discoverable, ruling that "the words material and necessary are to be interpreted liberally to require disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay . . . the test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 [1968] [internal citations omitted]). Discovery of documents is permitted even if they are not admissible in evidence, provided that the *production* of such documents may lead to disclosure of admissible evidence (*Fell v Presbyterian Hospital*

in *New York at Columbia-Presbyterian Med. Ctr.*, 98 AD2d 624, 625 [1st Dept 1983]). CPLR 3101 (a) requires full disclosure of all matters material and necessary. If a party objects to a discovery demand, that party must serve a response which states with reasonable particularity the reasons for each objection. If an objection is made to part of an item or category, the part is to be specified (Connors, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR C3122:1).

Regarding an entire set of discovery demands which are “palpably improper in that they are overbroad, lack specificity, or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than to prune it” (*Bell v Cobble Hill Health Ctr., Inc.*, 22 AD3d 620, 621 [2d Dept 2005]). Here, the guardian ad litem’s discovery demands are not overbroad, nor do the demands lack specificity or seek irrelevant information.

Under CPLR 3103, protective orders are designed to deny, limit, condition or regulate the “use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103[a]). “A motion for a protective order . . . is addressed to the sound discretion of the trial court . . .” (*Boylen v Eagle Telphonics*, 130 AD2d 538, 538 [2d Dept 1987] [internal and external citations omitted]). The burden is on the moving party to establish the need for a protective order (*Koump v Smith*, 25 NY2d 287, 294 [1969]; *Vivitoria Corp v First Cent. Ins. Co.*, 203 AD2d 452, 452-453 [2d Dept 1994]). Arnold has not met his burden to establish the need for a protective order.

The circumstances of this case do not warrant the striking of the objections at this time. Arnold is directed to respond to the discovery demands within twenty (20) days of the date of this

decision. Arnold's deposition is scheduled for May 30, 2014, at 9:30 a.m., and will continue each day thereafter until completion. The cross-motions of Elenore Greenberg and the guardian ad litem to strike Arnold Nelson's objections are denied without prejudice to a renewal if Arnold fails to comply with this order.

This constitutes the decision and order of the court.

Dated: March 31, 2014

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