

<b>Matter of Sundmacher</b>
2015 NY Slip Op 31236(U)
June 24, 2015
Surrogate's Court, Nassau County
Docket Number: 2013-373827
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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 In the Matter of the Probate of the Last Will and Testament  
 of

HELEN SUNDMACHER,

Deceased.

File No. 2013-373827

Dec. No. 30700

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In this contested probate proceeding, proponent moves for an order granting summary judgment. The propounded instrument is dated December 20, 2010. Decedent was survived by a son Robert Sundmacher. She is also survived by the issue of a deceased sister (Mary Jackonski): Leck Dzie (proponent) and Richard Jackonski. Leck Dzie is the sole beneficiary of the estate and the proponent. Robert Sundmacher and Richard Jackonski are the objectants.

An SCPA 1404 examination was taken of the attorney-draftsman who also supervised the execution of the instrument. The two attesting witnesses, the attorney's wife and a co-worker of the attorney's son, appeared on the date of the examination although no notice issued for their examination. Counsel for objectants declined to examine the witnesses but reserved the right to serve a notice to take their depositions at a later date.

Objectants take the position that they do not have sufficient information to oppose the motion for summary judgment until discovery is complete (CPLR 3212[f]). They state that proponent furnished medical authorizations and the requests have been submitted but the documents have not been received.

A motion for summary judgment is premature where discovery is not complete and factual issues remain unresolved (*Martinez v 305 West 52 Condominium*, 128 AD3d 912 [2d

Dept 2015]). Medical records are relevant to the issues of testamentary capacity, fraud and undue influence. Prior to receipt of the records, the motion for summary judgment is premature (*North Fork Bank v Guo* [Supreme Court, Appellate Term 2002]).

Proponent argues that he has made a prima facie case for due execution and that compliance with the statutory requirements has not been refuted. The burden of proving due execution is on the proponent. The presumption of due execution was raised by the testimony of the attorney (*Matter of Halpern*, 76 AD3d 429 [1st Dept 2010] aff'd 16 NY3d 777 [2011]; *Matter of Moskoff*, 41 AD3d 481 [2d Dept 2007]). In order to make out a prima facie case, the proponent is only required to produce the attesting witnesses for examination. Here, there is no dispute that the witnesses were initially available for examination.

Objectants contend that they now require the testimony of the attesting witnesses to determine whether the proponent was present at the execution. The attorney draftsman testified that he called the proponent that day to come to his office to sign papers, after the execution of the instrument. Objectants challenge the credibility of the attorney and seek examination of the witnesses on the basis that the attorney and the proponent have a long standing attorney-client relationship. The attorney testified that he prepared a deed in which the proponent's father transferred real property to proponent and retained a life estate. Objectants allege that the transfer of the real property from Stanley Kackonski, proponent's father, to proponent was induced by the fraud. The attorney testified that the decedent stated that the reason for the transfer was that the proponent attended to all of his needs. The attorney apparently represents the proponent in an action commenced by Richard Jackonski, in Supreme Court, to set aside the deed. The attorney also represents proponent in connection with the administration of Stanley

Jackonski's estate.

The examination of the attesting witnesses usually takes place at an SCPA 1404 examination. Alternatively, discovery can be conducted after the filing of objections under Article 31 of the Civil Practice Law and Rules. Proponent argues that the objectants have forfeited the right to an examination because of undue delay. Under CPLR 3212 [f], a respondent must establish that additional disclosure might lead to relevant evidence (*Lambert v Bracco*, 18 AD3d 619 [2d Dept 2005]). The relationship between an attorney-draftsman and a beneficiary bears primarily on the issues of fraud and undue influence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). However, it may also be relevant as to the compliance with the statutory requirements where the attorney supervises the execution.

Proponent alleges undue delay in the scheduling of the examination of the attesting witnesses. The examination of the attorney-draftsman was conducted on June 21, 2013, following which objectants had a reasonable opportunity to seek the examination of the attesting witnesses (*Amico v Melville Volunteer Fire Co.*, 39 AD3d 784 [2d Dept 2007]). Nevertheless, it cannot be concluded that the time period for discovery has ended (*HSBC Bank USA, N.A. v Arias*, 112 AD3d 785 [2d Dept 2013]). Proponent cites no established schedule for the completion of discovery (*cf Matter of Dietrich*, 271 AD2d 894 [3d Dept 2000]). The examination of Richard Jackonski, by the proponent, was not taken until October 1, 2014.

Taking all circumstances into consideration, and recognizing the importance of the testimony of attesting witnesses in a contested probate proceeding, the court finds that the motion for summary judgment on the issue of due execution should not be considered, until completion of the examination of the attesting witnesses. Counsel are directed to stipulate to a

schedule for the examinations.

The motion for summary judgment is dismissed without prejudice to renewal at the conclusion of discovery (*Mottley v Walker*, 126 AD3d 955 [2d Dept 2015]). Pre-trial discovery is to be completed before October 21, 2015.

Settle order.

Dated: June 24, 2015

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

