

Matter of Syms

2015 NY Slip Op 31943(U)

October 19, 2015

Surrogate's Court, New York County

Docket Number: 2009-4494

Judge: Nora S. Anderson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

New York County Surrogate's Court
DATA ENTRY DEPT.
OCT 19 2015

SURROGATE'S COURT : NEW YORK COUNTY
-----X

Probate Proceeding, Will of

File No. 2009-4494

SY SYMS,

Deceased.
-----X

A N D E R S O N, .

In this contested probate proceeding in the estate of Sy Syms, proponent seeks dismissal of the objections and objectants cross-move for sanctions and to compel discovery.

Decedent died on November 17, 2009, survived by his wife, four children and four grandchildren (children of a predeceased son and daughter). Under the propounded instrument, dated January 19, 2006, decedent left his estate to a trust that he had established on March 17, 1989 (as amended and restated thereafter). He nominated as executor his daughter Marcy, who is also the trustee of the inter vivos trust. Standard objections (lack of due execution and capacity, fraud and undue influence) were filed by a son (who is not a beneficiary of the trust) and the four grandchildren (who are trust beneficiaries, but only of a modest educational fund established upon decedent's death).

Proponent argues that objectants lack standing and, in any event, that their objections should be dismissed on the merits. However, objectants raise two jurisdictional arguments that must be addressed first. Objectants contend that jurisdiction is incomplete because the Sy Syms Foundation (the "Foundation"), a beneficiary under the inter vivos trust, should have been

"cited." The Foundation is not among those who are statutorily required to be served with process upon the filing of a probate petition (SCPA § 1403[1]). However, as a trust beneficiary, the Foundation was given required notice of the proceeding under SCPA § 1409 (Notice of probate). Moreover, after objections were filed, the Foundation was served with notice of the objections by citation issued pursuant to SCPA § 1411 (Citation upon filing of objections). As a result, jurisdiction is complete as to the Foundation.

Objectants' second jurisdictional argument is equally flawed. According to them, the fact that proponent served her motion to dismiss objections before jurisdiction was completed under SCPA § 1411 requires denial of the motion. Although the motion was premature since it was technically not in conformance with the Uniform Rules for Surrogate's Court (22 NYCRR) § 207.26(c), which provides that all "further pretrial procedures and proceedings shall be stayed until there is compliance with [SCPA § 1411]", none of the parties cited pursuant to such statute appeared. Thus, all parties entitled to notice of the motion have received such notice. Under these circumstances, proponent's filing of the instant motion before the completion of SCPA § 1411 jurisdiction caused no prejudice and does not constitute a ground for denial of the motion.

We now turn to proponent's contention that objectants lack

standing to object to the propounded instrument. Here, each objectant is a distributee whose interest in the estate under the propounded instrument is less than it would be if decedent had died intestate. Consequently, each has standing to object as a person whose interest in the estate "would be adversely affected by the admission of the will to probate" (SCPA § 1410).

Nonetheless, proponent speculates that, because there are at least three other prior wills purportedly executed over the course of almost 20 years, "[i]t is simply not possible that [decedent] died intestate" In other words, proponent would have this court declare that, as a matter of law, the number of prior instruments can be so numerous or their admissibility so questionable that distributees can be stripped of their standing to object to probate under SCPA § 1410. Proponent cites no authority for this proposition, and the court declines to create such a rule, since the validity of those earlier instruments is not before the court. That objectants, if successful in challenging the propounded instrument, may nevertheless have a daunting task ahead is not a consideration for determining standing.

Alternatively, proponent argues that objectants would not be adversely affected by the propounded instrument's admission to probate because the estate is insolvent as a result of considerable administration expenses and legal fees. This

argument is also without merit. Proponent again cites no authority for the proposition that, prior to an accounting proceeding in which the assets and liabilities of the estate are conclusively determined on notice to all interested parties, a distributee can be denied standing to object to probate on proponent's mere speculation that the estate is insolvent.

Whether the distributees may be litigating entitlement to worthless intestate shares is an issue that cannot be determined at this time. Clearly, objectants believe that there is some monetary benefit that can be gained by litigation. Similarly, the court cannot ignore proponent's own efforts to propound the will, which strongly suggest that she perceives that a probate battle will yield some benefit for her as well. For these reasons, to the extent the motion seeks dismissal of the objections on standing grounds, it is denied.

Proponent also seeks dismissal of the objections on the ground that "there is no credible evidence to support" them. Although proponent does not identify this part of her motion as one for summary judgment (CPLR 3212), issue has been joined, *i.e.*, objections have been filed. In addition, she and objectants have submitted evidence that would be appropriately submitted for or in opposition to a motion for summary judgment. Thus, the motion, which seeks dismissal of the objections on the merits will be treated as one for summary judgment.

CPLR 3212(b) requires that a motion for summary judgment "shall be supported ... by a copy of the pleadings," something that proponent has failed to do. Nonetheless, "the court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete'" (*Washington Realty Owners LLC v 260 Washington Street, LLC*, 105 AD3d 675, 675 [1st Dept 2013], citing *Welch v Hauck*, 18 AD3d 1096 [3d Dept 2005]). Here, objectants have supplied copies of the pleadings as part of their opposition papers thus rendering the record complete.

Summary judgment is available only where no material issues of fact exist (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*id.* at 324 [citation omitted]). If such a showing is made, the party opposing summary judgment must then come forward with proof, in admissible form, establishing that there is a genuine issue of material fact or must provide an acceptable excuse for the failure to do so (see e.g. *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Here, even if proponent had made a prima facie showing with

respect to each of the objections (which she has not),¹ any determination on the merits would be premature. The reason is simple. Post-objection discovery has not been concluded.

The Special Referee appointed to supervise pre-objection discovery specifically contemplated in several of her decisions, none of which has been challenged, that discovery would continue after objections were filed. Proponent does not dispute this, but insists that the court should nevertheless evaluate the merits of the objections in the absence of further discovery. The court declines to do so. Objectants' opposition to the motion as well as their cross-motion to compel discovery amply demonstrate that post-objection discovery has not been completed and that the motion is thus premature (see CPLR 3212[f]). Accordingly, to the extent that the motion seeks immediate dismissal of the objections on the merits, it is denied.

We now turn to objectants' cross-motion to compel discovery. To the extent that the court can identify the particular discovery sought, those requests are determined as follows. Objectants first request that the court direct proponent to sign authorizations for more than 20 medical providers and financial institutions. However, they do so without claiming that they

¹ Proponent has made a prima facie case for summary judgment on the issue of lack of capacity. As to the remaining objections, she has offered an insufficient evidentiary basis to meet her initial burden on the motion.

sought the authorizations as part of post-objection discovery and that proponent refused to sign them. Indeed, with one exception, the unsigned authorizations attached to objectants' papers expired before objections were filed and more than a year before the instant cross-motion. Moreover, it is clear that proponent had previously executed at least one of the requested HIPAA authorizations as part of pre-objection discovery because the provider produced his medical records (see Decision/Order of Special Referee dated November 6, 2012).

There can be no dispute that the Special Referee anticipated that HIPAA authorizations for certain medical providers would eventually be needed to complete post-objection discovery (see e.g. Decision/Order of the Special Referee dated November 6, 2012). However, based upon the current record, the court cannot determine which, if any, of the medical (or financial) authorizations sought can be made the proper subject of an order. Thus, the motion is denied without prejudice to objectants' making an appropriate motion in the event that proponent, upon receiving a request to execute new authorizations as part of post-objection discovery, refuses to sign the authorizations.

Objectants also seek production of decedent's tax returns for the years 2003, 2007, 2008 and 2009. Proponent is correct that the Special Referee denied objectants' request to obtain these documents as part of pre-objection discovery, concluding

that objectants had not "offered any rationale for production, never mind made the heightened showing necessary to obtain those returns" (Decision/Order of the Special Referee dated July 26, 2012). However, that determination is not dispositive of whether objectants should be allowed access to tax returns now that pre-objection discovery has concluded. The problem is that objectants again offer absolutely no basis for the court to compel production of the tax returns. Thus, the motion with respect to production of these returns is denied.

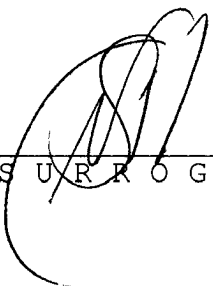
Similarly, objectants' request for electronic discovery is denied. Objectants ignore the outstanding electronic discovery issues specifically identified by the Special Referee for future resolution in her Decision dated October 15, 2012. As a result, the court is not in a position to compel electronic discovery at this time, and the motion to the extent it seeks such discovery, is denied without prejudice.

Finally, objectants request that the court sanction proponent's counsel pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 for her conduct in the probate proceeding generally and on these motions. Whether to award sanctions is a matter squarely within the discretion of the court (see e.g. *W & W Glass LLC v 1113 York Avenue Realty Corp. LLC*, 113 AD3d 563 [1st Dept 2014]). There can be no doubt that the parties have demonstrated a level of

litigiousness rarely seen even in this court. However, objectants offer no basis to sanction proponent's counsel in this proceeding. Although proponent's counsel's conduct in making the instant motion has been found to be misguided, the motion itself does not, in this court's view, provide a basis for sanctions. Indeed, if sanctions were appropriate in the case of every poorly conceived and executed motion, then objectants themselves might be subject to sanctions as well. However, it should be noted that, if sanctions become an issue again, the court will have less tolerance for similarly misguided motion practice and cumulative conduct will be considered in evaluating whether sanctions on any party are appropriate.

This decision constitutes the order of the court.

Dated: October 19, 2015


SURROGATE