

**Matter of Srybnik**

2017 NY Slip Op 30052(U)

January 12, 2017

Surrogate's Court, New York County

Docket Number: 2015-3422

Judge: Rita M. Mella

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

New York County Surrogate's Court

Date: JANUARY 12, 2017

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Probate Proceeding, Will of

DECISION

LOUIS SRYBNIK,

File No.: 2015-3422

Deceased.

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M E L L A, S.:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion for Summary Judgment on petitioner's objection pursuant to SCPA 707(1)(e).....	1
Affidavit of Judd Berstein, Esq., in Support of Motion for Summary Judgment, with Exhibits.....	2
Affidavit of Steven A. Fayer, M.D., with Exhibits.....	3
Affirmation of Marcy R. Harris, Esq., with Exhibits.....	4
Affidavit of Judith Srybnik.....	5
Affirmation of Joseph P. LaSala, Esq., in Opposition to Motion filed by Caroline Srybnik, with Exhibits.....	6
Memorandum of Law in Opposition to Petitioner's Motion for Summary Judgment and other relief.....	7
Affidavit of Robert Arrighi, with Exhibit.....	8
Reply Affidavit of Judd Berstein, Esq., with Exhibits.....	9
Reply Affidavit of Steven A. Fayer, M.D., with Exhibit.....	10
Reply Affidavit of Lisa D. Ravdin, PhD., ABPP, with Exhibits.....	11

In this probate proceeding, petitioner seeks admission of decedent's Will to probate, but objects to letters testamentary issuing to a co-executor nominated under the propounded instrument.

Petitioner ("Caroline") is the surviving spouse of the decedent and has served as the preliminary executor since October 6, 2015. Caroline moves for summary judgment on her objection to the appointment of decedent's surviving brother and lifetime business partner ("Simon") as co-executor for "want of understanding" of his duties as fiduciary (SCPA 707[1][e]) or, in the alternative, seeks an order directing an independent medical evaluation of Simon or an immediate hearing on his eligibility to serve. Caroline's motion is opposed by

Simon and his wife Judith.<sup>1</sup> A brief narrative of the history of this proceeding is warranted.

The decedent died on May 30, 2015, leaving a Will which nominated Caroline and Simon as co-executors. Under Article V(B) of the Will, decedent directs that, “if at any time SIMON and CAROLINE are the Fiduciaries serving hereunder and shall disagree as Executors as to matters pertaining to my estate[,] the determination of SIMON or his successor Fiduciary shall be binding on my estate.”

Caroline, individually and ex parte, petitioned this court for preliminary letters on or about September 9, 2015. In an affirmation filed in support of her application for preliminary letters, Caroline’s counsel alleged that “upon information and belief, Simon Srybnik is ineligible under SCPA 707(1)(e) to serve as a fiduciary. Mr. Srybnik is 99 years old. Upon information and belief, he is infirm and lacks the requisite level of understanding to execute the office of executor.” The court granted Caroline’s application for preliminary letters. Subsequently, Simon sought the revocation of Caroline’s preliminary letters and his own appointment as preliminary executor, but as of the date of this motion, he withdrew his earlier objections to Caroline’s serving as fiduciary in this estate.

An order of this court, dated April 15, 2016, directed the deposition of Caroline and Simon, and limited the scope of both depositions to the issue of Simon’s capacity to serve as co-executor. Simon was deposed on May 12, 2016. The present motion was filed shortly thereafter.

Summary judgment may be granted only when it is clear that no triable issue of fact exists

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<sup>1</sup> By decision of this court dated April 15, 2016, Judith’s motion to intervene was granted and her participation in this probate proceeding was limited to matters concerning the determination of Simon’s capacity to serve as co-executor.

(*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party must make a prima facie showing that he or she is entitled to summary judgment as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

SCPA 707(1)(e) enumerates several grounds for the disqualification of a nominated fiduciary, one of which is disqualification for “want of understanding.” This phrase has been defined as a lack of intelligence sufficient to understand the nature and extent of the fiduciary duties, rather than a lack of information, business experience or legal knowledge (*Matter of Leland*, 219 NY 387 [1916]; *Matter of Britton*, 173 Misc 2d 300 [Sur Ct, Westchester County 1997]). The grounds for disqualification contained in subparagraph (1)(e) contemplate a fiduciary likely to jeopardize estate assets, and in turn, put the interests of beneficiaries at risk (Margaret Valentine Turano, Practice Commentaries, McKinney’s Cons Laws of NY, Book 58A, SCPA 707).

Courts only sparingly interfere with a testator’s choice of fiduciary. A fiduciary’s selection by the testator is entitled to great deference and must be honored unless there exists a ground for disqualification of the person nominated by the testator (*Matter of Leland*, *supra*; *Matter of Singer*, 2 Misc 3d 665 [Sur Ct, NY County 2003]). This is the case even if the instrument nominating the fiduciary has yet to be probated (*Matter of Rattner*, 107 AD3d 600 [1st Dept 2013]; *Matter of Orwasher*, NYLJ, Apr 16, 2014, at 22, col 3 [Sur Ct, NY County 2014] [“The clear thrust of SCPA 1412 [and its provision for issuance of preliminary letters testamentary] is to honor the testator’s presumptive wishes with regard to the appointment of a

fiduciary for the estate”]).

The party alleging that a fiduciary chosen by a testator is ineligible to serve by reason of one of the enumerated conditions found in SCPA 707[1][e] has the burden to prove such ineligibility (*Matter of Rad*, 162 Misc 2d 229 [Sur Ct, NY County 1994]). In support of her motion, Caroline provides excerpts from the transcript of Simon’s deposition (as well as a video recording of such deposition), and an affidavit of Dr. Steven Fayer whose testimony is based upon his review of Simon’s deposition video and transcript as evidence of Simon’s lack of capacity. Upon examination of Simon’s deposition transcript and Dr. Fayer’s opinion of Simon’s performance at his deposition, this court concludes that Caroline has put forth a prima facie showing of entitlement to summary determination resulting in Simon’s disqualification to serve as co-executor.

The parties opposing Caroline’s motion must offer admissible evidence to establish a material issue of fact, and in this case, an issue of fact as to whether Simon has the capacity to serve as fiduciary, requiring a hearing. They offer as evidence the report of Dr. Lisa Ravdin, as ratified by sworn affidavit,<sup>2</sup> as well as an affirmation of counsel highlighting aspects of Simon’s deposition which call into question the conclusions reached by Dr. Fayer.

Mindful of the deference that a testator’s presumptive choice of fiduciary deserves, the court finds that Simon’s competing evidence raises issues of fact that need to be tried. In particular, a hearing is necessary in order to fully develop the record before it can be determined

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<sup>2</sup> The report of Dr. Lisa Ravdin is dated August 10, 2016. In her reply affidavit, dated September 16, 2016, Dr. Ravdin “swears by all of [her] statements in that report” and she reiterates her critique of using a series of questions posed to Simon by opposing counsel at his deposition to reach a conclusion about Simon’s capacity as though a professional test to determine his cognitive abilities had been administered.

whether Simon is capable of understanding his duties as fiduciary and able to perform those duties as preliminary co-executor, and as co-executor, once the propounded instrument is admitted to probate (*see* 2-33 Warren's Heaton on Surrogate's Court Practice § 33.04[2], [3] [2016]). The motion for a summary determination that Simon is not eligible to serve is therefore denied.

Accordingly, the court directs that counsel for the parties appear for a pretrial conference on February 21, 2017 at 11:00 a.m. Thereafter this proceeding will be scheduled for a hearing.

This decision constitutes the order of the court.

Clerk to notify.

Dated: January 12, 2017

  
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