

Matter of Mallin

2017 NY Slip Op 31133(U)

May 17, 2017

Surrogate's Court, Nassau County

Docket Number: 2010-360597

Judge: Margaret C. Reilly

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.

**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

**In the Matter of the Probate of the Last Will
and Testament of**

**DECISION & ORDER
File No. 2010-360597
Dec. No. 32411**

**HANNAH P. MALLIN,
a/k/a HANNAH MALLIN,**

Deceased.

-----X

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion to Quash Subpoena	1
Affirmation in Support of Motion to Quash with Exhibits	2
Memorandum of Law in Support of Motion to Quash.	3
Affirmation in Opposition to Motion to Quash with Exhibits	4
Reply Affirmation in Further Support of Motion to Quash	5

In this contested probate proceeding, presently before the court is a motion by the proponent to quash a subpoena to testify that the objectants’ attorney served on a non-party witness, Dr. Steven Fayer, the decedent’s longtime psychiatrist.

A prior motion by the proponent for summary judgment was granted in part, leaving the issues of testamentary capacity and undue influence to be determined at trial. Dr. Fayer was the decedent’s treating psychiatrist for a period of approximately 15 years before her death in 2010; the will that has been offered for probate was executed on April 29, 2005.

Dr. Fayer was deposed as a fact witness on three prior occasions, though the depositions were limited to four-hour periods to accommodate his schedule. The subpoena seeks to depose Dr. Fayer on two limited grounds, namely, “(a) possible Medicare fraud in

connection with the treatment of [the decedent] Hannah Mallin, and (b) an additional, and new diagnosis for Hannah Mallin of ‘Vascular Dementia, with discrete stepwise deterioration (as opposed to chronic insidious decline such as seen in some types of Alzheimer’s patients).’”

Although the movant disputes the objectants’ characterization of Dr. Fayer as the petitioner’s “foremost fact witness” or “chief fact witness” he concedes that Dr. Fayer “is a key witness given his long-standing, professional relationship with Hannah. . . .”

Subsequent to Dr. Fayer’s last deposition, his June 18, 2015 affidavit was filed in the court wherein he avers that in 2008 the decedent suffered from vascular dementia, a diagnosis not recorded in any of Dr. Fayer’s medical records and one he never mentioned at his previous three depositions where he testified that the decedent suffered from Alzheimer’s type dementia.

Disclosure in New York civil actions is guided by the principle of “full disclosure of all matter material and necessary in the prosecution or defense of an action” (CPLR 3101 [a]). The words “material and necessary” are “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; see *Tower Ins. Co. of N.Y. v Murello*, 68 AD3d 977 [2d Dept 2009]). The Court of Appeals’ interpretation of “material and necessary” in *Allen* has been understood

“to mean nothing more or less than ‘relevant’” (Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3101:5). “An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry” (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988][internal citations omitted]).

In a contested probate proceeding, evidence regarding the testator’s mental capacity clearly meets the “material and necessary” standard articulated above. Although the diagnosis came approximately three years after the execution of the will, the difference in the two types of dementia and the manner of their progression cannot be said to be utterly irrelevant to any proper inquiry regarding the issue of testamentary capacity. Had Dr. Fayer testified regarding this diagnosis at any one of his previous depositions, rather than raising it for the first time in a post-deposition affidavit, the court would be more sympathetic to the inconvenience an additional deposition may present for him. However, that is not the case and the objectants should have the opportunity to depose him about this newly-revealed diagnosis (*See Matter of Rutherford*, 26 Misc3d 1235[A][Sur Ct, Bronx County][deposition of proponent in probate contest reopened to permit limited further examination by objectants regarding post-deposition disclosure]; *see also Matter of Cheng Ching Wang*, 26 Misc3d 1225[A][Sur Ct, Westchester County 2010][petitioner granted permission to reopen deposition of respondents regarding documents produced by respondent post-deposition]).

Furthermore, the fact that the proponent has now identified Dr. Fayer as an expert witness he intends to call at trial does not preclude the objectants from deposing him further as a fact witness regarding this newly-revealed diagnosis (*McCoy v State of New York*, 52 AD3d 1212 [4th Dept 2008]; CPLR 3101[d]). Since all of Dr. Fayer's deposition testimony regarding the decedent's diagnosis was clearly given as a fact witness, it cannot be argued that testimony regarding the diagnosis of vascular dementia would be solely that of an expert.

Unlike the new diagnosis that was revealed for the first time in Dr. Fayer's post-deposition affidavit, there is no justification for the objectants to be given the opportunity to depose Dr. Fayer yet again regarding his billing practices with the decedent. He was deposed previously on that topic and although the objectants now claim his testimony was evasive or inconclusive, they made no application to the court to compel more complete or satisfactory answers in the ensuing five years since the conclusion of Dr. Fayer's deposition testimony and offer no new evidence regarding that testimony or the existence of special circumstances that would justify a departure from the usual rule of practice that precludes a further deposition of the same witness after his or her deposition is concluded (*see Purvin v Grey*, 275 AD 688 [2d Dept 1949][ordinarily more than one examination before trial of any person will not be permitted]; *Matter of World Trade Center Bombing Litigation*, 298 AD2d 72, 79 [1st Dept 2002][special referee did not abuse discretion in finding that defendant was not entitled to depose plaintiff a second time]).

Accordingly, the motion to quash the subpoena is granted in part and denied in part.

The objectants may serve a subpoena to testify on Dr. Fayer limited to the diagnosis of vascular dementia with discrete stepwise deterioration and may not seek to elicit additional testimony regarding his billing practices with the decedent or regarding possible Medicare fraud in the treatment of the decedent.

This proceeding has been pending in this court for an inordinately long period of time. Accordingly, a status conference will take place on July 11, 2017 at 9:30 a.m. to schedule any remaining pretrial discovery.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: May 17, 2017
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: John Wait, Esq.
Fox Rothschild, LLP
100 Park Avenue, 15th Floor
New York, New York 10017

John R. Morken, Esq.
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, New York 11556

Stephen B. Hand, Esq.
Jaspan Schlesinger, LLp
300 Garden City Plaza, 5th Fl.
Garden City, New York 11530

Alan H. Kupferberg, Esq.
Moses & Singer, LLP
The Chrysler Building
405 Lexington Avenue
New York, New York 10174