

Matter of Morse
2017 NY Slip Op 32165(U)
October 13, 2017
Surrogate's Court, New York County
Docket Number: 2013-1381
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Probate Proceeding, Will of

New York County Surrogate's Court

Date: October 13, 2017

SALLY GRANT MORSE,

Deceased.

DECISION and ORDER

File No.: 2013-1381

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M E L L A, S. :

The following papers were considered by the court (CPLR 2219[a]) in deciding this motion to renew (CPLR 2221[e]) and to compel a party to appear for a deposition:

<u>Papers Considered</u>	<u>Numbered</u>
Motion to Renew and to Compel Appearance at Deposition, Affirmation in Support of Michael H. Friedman, Esq., with Exhibits A through W and Memorandum of Law in Support.....	1,2,3
Affirmation of Matthew M. Riordan, Esq., in Opposition to Motion to Renew and Compel, with Exhibits A through O, and Memorandum of Law in Opposition	4,5
Affidavit of Salvatore Barbieri in Opposition to Motion to Compel with Memorandum of Law, with Exhibits A and B	6,7
Reply Affirmation of Michael H. Friedman, Esq., in Further Support of Motion to Renew and to Compel, with Exhibits A through F.....	8
Sur-Reply Memorandum of Law in Further Opposition to Motion to Renew.....	9

This is a contested probate proceeding in the estate of Sally Grant Morse, who died testate on March 27, 2013, at the age of 75, leaving assets valued at \$9.6 million. Under the propounded instrument dated May 25, 2010—which disinherits Nancy Mayer, decedent's sister and sole distributee, and the entire Mayer family—after certain specific bequests, decedent leaves her entire residuary estate to the Art Students League of New York. Ms. Mayer filed objections to the propounded instrument on January 13, 2015.

By decision dated October 16, 2014, this court denied Ms. Mayer's motion for an order:

a) disqualifying Proponent's counsel from representing her; and b) expanding the period of time

about which discovery could be had beyond that established in 22 NYCRR 207.27 (“the 3-2 Rule”). In denying the motion to expand the usual time frame for discovery in probate proceedings, the court held that Ms. Mayer had failed to present facts that would provide the basis for a finding of special circumstances to justify a deviation from the rule.

Objectant now moves to renew her prior motion for an order expanding the discovery time frame and, upon renewal, compelling Proponent and Preliminary Executor, Arlene Harris, to produce her attorney-drafter file for a prior will of decedent executed in 2004, and further compelling Ms. Harris to appear for a continued deposition to answer questions concerning the drafting of the 2004 instrument. The motion also seeks an order compelling Salvatore Barbieri, President of the Board of Control at the Art Students League of New York, to appear for a continued deposition.

After the court issued its October 16, 2014 decision, Ms. Harris, who also drafted the propounded instrument, was deposed pursuant to SCPA 1404. In her motion to renew, Objectant avers that Ms. Harris’s deposition testimony revealed that Ms. Harris did not discuss the provisions of the instrument that has been offered for probate with decedent, but instead used the 2004 instrument as a template. Objectant argues that, because Ms. Harris, in essence, relied on her communications with decedent in 2004 to draft the propounded instrument, it would be inequitable and prejudicial to allow Ms. Harris to hide behind the 3-2 Rule to avoid disclosing those communications.

In opposition, Proponent argues that Objectant has failed to present any new facts to support her motion to renew because Objectant knew, prior to her filing the original motion, that Ms. Harris had drafted the 2004 instrument and that the 2004 instrument had served as a model for the propounded instrument. Proponent further argues that Objectant seeks the disclosure of

documents created beyond the 3-2 Rule period solely in an attempt to learn decedent's reasons for disinheriting the Mayer family, but that finding out the reasons behind the disinheritance of a family member does not provide a basis for expansion of the 3-2 Rule Period.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination. . ." (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]; *see Am. Audio Serv. Bur. Inc. v AT&T Corp.*, 33 AD3d 473, 476 [1st Dept 2006]). Courts have discretion to relax the requirement of demonstrating reasonable justification for failing to present any new facts on the prior motion and to grant such a motion in the interest of justice (*see Matter of Pasanella v Quinn*, 126 AD3d 504, 505 [1st Dept 2015], *citing Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; *Eddine v Federated Dept. Stores, Inc.*, 72 AD3d 487 [1st Dept 2010]; *Poag v Atkins*, 3 Misc 3d 1109[A], 2004 NY Slip Op 50524[U] [Sup Ct, NY County 2004]).

The motion to renew is granted (*see Poag v Atkins, supra, citing Trinidad v Lantigua*, 2 AD3d 163 [1st Dept 2003]). The court is persuaded that the extent to which Ms. Harris relied on the 2004 instrument and on her contemporaneous communications with decedent at the time she drafted that instrument to draft the propounded instrument is a new fact that was not necessarily known to Objectant prior to Ms. Harris's deposition. Upon renewal, for the reasons stated below, the court adheres to its prior determination.

The so called "3-2 Rule," found in 22 NYCRR 207.27, reads, in relevant part:

"In any contested probate proceeding in which objections to probate are made and the proponent or the objectant seeks an examination before trial . . . [e]xcept upon the showing of special circumstances, the examination will be confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period."

This is a “pragmatic rule designed to prevent the costs and burdens of a ‘runaway inquisition’” (*Matter of Yagoda*, 38 Misc 3d 1218[A], 2013 NY Slip Op 50140[U] [Sur Ct, Nassau County 2013], citing *Matter of Nigro*, NYLJ, Oct. 5, 2004, at 20, col 1 [Sur Ct, Nassau County]). The rule’s time frame “is not rigid and may be extended when special circumstances exist” (*id.* at *3).

Courts have found that “special circumstances” existed to justify the expansion of the applicable time frame when evidence on the record raised a concern that the will was the product of undue influence, duress or fraud (*see Matter of Liebowitz*, NYLJ, Feb. 29, 2016, at 23 [Sur Ct, NY County]), such as where the facts supported allegations of scheming or defrauding on the part of beneficiaries or a continuing course of conduct of undue influence or abuse of the testator’s finances (*Matter of Partridge*, 141 Misc 2d 159, 160 [Sur Ct, Rockland County 1988]; *Matter of Buettner*, NYLJ, Aug. 1, 1997, at 21, col 5 [Sur Ct, Westchester County]; *Matter of Bogen*, NYLJ, Nov. 13, 2014, at 22, col 3 [Sur Ct, NY County]).

The new facts provided by Objectant in the present motion—that, in drafting the propounded instrument, Ms. Harris relied on the information provided by decedent in connection with the 2004 will—cannot be said to show a pattern of undue influence or a continuing course of conduct on the part of Proponent or the Art Students League to support a finding of special circumstances here.

Additionally, the court declines Objectant’s invitation to expand “special circumstances” to instances “where the attorney-draft[er] prepares and effectively republishes an instrument by relying on her notes and communications with the testator obtained when she prepared the prior instrument.” Expanding the 3-2 Rule in such a broad fashion would, in effect, create a hard-to-implement exception to the rule in any case in which the drafter of the propounded instrument

had drafted a prior testamentary instrument for the decedent regardless of how long ago the prior instrument was prepared. The difficulty of articulating a precise description of the extent to which the attorney's reliance on prior notes or communications would justify the rule's expansion is just one illustration of the pitfalls of adopting movant's proposal. Moreover, an expansion of "special circumstances" to situations in which only a neutral fact concerning the drafting process is presented—without any suggestion of wrongdoing—would be a radical departure from the narrow interpretation that, for decades now, courts have given to that term, a departure for which no basis has been provided. Finally, such an open-ended expansion of the 3-2 Rule without justification would not be a matter of no harm done, since expansion of discovery in a contested probate proceeding brings discovery closer to a "runaway inquisition," the same ill that the rule was meant to prevent.

Because the court is adhering to its prior determination, Objectant's application for an order directing Ms. Harris to produce her drafter's file for the 2004 instrument and to appear for a continued deposition concerning the drafting of that instrument is denied.

Motion to Compel the Art Students League to Appear for a Continued Deposition

Objectant also moves for an order, pursuant to CPLR 3124, compelling Mr. Barbieri to appear for a continued deposition. While Objectant admits that Mr. Barbieri has appeared for an examination on two occasions, she maintains that those examinations were cut short, the first time because Mr. Barbieri had a family emergency, and the second, because he walked out of the examination on the advice of counsel. Objectant contends that a continued deposition of Mr. Barbieri is necessary because she wants to ask Mr. Barbieri about decedent's "involvement (or lack thereof) with the Art Students League." Objectant points out, in particular, her wish to explore during a continued examination of Mr. Barbieri, "a letter produced by the Art Students

League from it to Ms. Harris, dated February 1, 2006, concerning Ms. Harris'[s] inquiry ostensibly on behalf of an unidentified client."

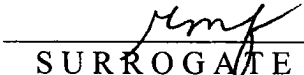
In the exercise of the court's discretion to supervise discovery, the court grants this motion and directs the Art Students League to produce Mr. Barbieri for a continued deposition no later than November 28, 2017.

In order to facilitate the completion of this deposition the court will rule on objections interposed by counsel for the Art Students League and for Proponent during the second deposition of Mr. Barbieri, on September 14, 2016. In particular, counsel objected to questions posed by Objectant's attorney concerning a settlement proposal sent by Objectant to the Art Students League and concerning what Objectant's attorney described as the "opportunity cost of this litigation." The objection to this line of questioning is sustained. The costs to the parties of this litigation are immaterial to the validity of the propounded instrument or to any of the objections that have been interposed to its probate, which are the ultimate issues in this proceeding.

This decision constitutes the order of the court.

Clerk to notify.

Dated: October 13, 2017


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