

Matter of Biondo
2017 NY Slip Op 32435(U)
November 20, 2017
Surrogate's Court, Nassau County
Docket Number: 2015-385244
Judge: Margaret C. Reilly
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**SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Probate Proceeding, Will of

SALLY BIONDO,

Deceased.

DECISION & ORDER

File No. 2015-385244

Dec. No. 33478

Motion for:

1404 Examination of Second Attorney Draftsman

Stay of 1404 Examinations

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PRESENT: HON. MARGARET C. REILLY

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

Order to Show Cause, Affirmations in Support and Exhibits.	1
Notice of Cross Motion.	2
Affidavit in Opposition	3
Affirmation of Counsel in Opposition and Application to Compel SCPA § 1404 Examination.	4
Reply Affirmation.. . . .	5

In this probate proceeding, before the court is a motion brought on by order to show cause by counsel for respondent Salvatore Biondo which seeks: an order pursuant to SCPA § 1404 (4) and (6) compelling the petitioner Jack Biondo to produce the additional attorney drafter Steve Saraisky, Esq. for examination, and for such other and further relief as the court may deem just and proper. The motion is opposed by Jack Biondo. Also before the court is a cross motion by Jack Biondo which seeks: an order permitting the continuation of the proponent's SCPA § 1404 examination to be held at the offices of Robert & Robert, PLLC, 526 RXR Plaza, Uniondale, New York and awarding the

proponent such other and further relief as to the court seems just and proper. The cross motion is opposed by Michael Biondo.¹

The decedent, Sally Biondo, died on June 13, 2015. She was survived by two sons, Jack Biondo and Salvatore Biondo. The decedent's last will and testament dated April 22, 2015 has been offered for probate. Articles II and III of the will bequeath the entire estate to the trustee of the Sally Biondo Revocable Trust Agreement. Article V provides "[t]he gifts in this, my Will, are made on the express condition that none of the beneficiaries shall oppose or contest the validity of this Will in any manner. Any beneficiary who contests the validity of this Will or in any way assists in such an act shall automatically forfeit whatever gift he or she would have been entitled to receive under the terms of this Will." The decedent nominated her son, Jack Biondo, as executor.

The movant represents that examinations pursuant to SCPA § 1404 have taken place of the attesting witnesses and of Samuel Weiner, the attorney drafter. The movant alleges that Mr. Weiner was assisted by another attorney in his firm, Steven Saraisky, in drafting the will. The movant further alleges that Mr. Weiner was unable to answer many of the questions that Mr. Saraisky, if examined, would be able to answer. The movant has attached excerpts of the transcripts of the deposition of Mr. Weiner. Mr. Weiner stated that Mr. Saraisky was involved in the drafting of documents, prepared multiple memorandums and emails regarding the decedent's estate plan, prepared value standards

¹Michael Biondo is the grandson of the decedent, son of Salvatore Biondo, and a beneficiary under a prior will on file in the court.

for her, went over proposed changes to the will with the testator and had numerous conversations with different people regarding the testator's estate plan. The movant now argues that pursuant to SCPA § 1404 (4) and (6) the examination of Steven Saraisky is necessary.

SCPA 1404 § (4) provides that, where a will contains a provision designed to prevent a disposition from taking place in case the will is contested, any party to the proceeding may examine "upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will." SCPA § 1404 (6), in turn, provides that "[u]nless the court directs otherwise for good cause shown, if more than one person shall have been involved in the preparation of the will, the term 'person who prepared the will' shall mean the person so involved to whom the testator's instructions for preparing the will were communicated by the testator."

The movant argues that Steven Saraisky has information of substantial importance or relevance to his client's decision to file objections. The movant further argues that Steven Saraisky is an additional attorney drafter to whom the testator's instructions were communicated. The cross-movant argues that Mr. Saraisky had little or no contact with the testator and that Salvatore Biondo has had ample time, and conducted extensive pre-answer discovery, to determine whether or not he should file objections.

The court has the discretion to decide what constitutes “special circumstances” within the meaning of SCPA § 1404 (4) (*Matter of Walter*, 49 Misc3d 363 [Sur Ct, Erie County 2015]). The courts have found special circumstances and allowed the examination of: (1) an alternate co-executor (*Matter of Marshall*, NYLJ, Jan. 9, 2006 at 33, col 3 [Sur Ct, Suffolk County] [holding “to deny respondent the ability to examine the nominated alternate executor would be intellectually inconsistent with the generally accepted premise of the courts vis a vis in terrorem clauses”]; (2) a business manager of the testator’s where the business manager received a significant bequest under the decedent’s will (*Matter of Liebowitz*, NYLJ, Feb. 29, 2016, at 23 [Sur Ct, New York County]); and (3) the attorney drafter’s associate where the associate’s notes indicated that the testator was confused, not comfortable signing documents and did not remember speaking with the attorney drafter (*Matter of Weintraub*, NYLJ, July 19, 2013, at 32 [Sur Ct, Nassau County]). In the instant proceeding, Mr. Saraisky was apparently intimately involved in the discussions of the testator’s estate plans, changes thereto, and may have information of substantial importance or relevance to Mr. Biondo’s decision to file objections. The motion is therefore **GRANTED**.

Jack Biondo has cross-moved for an order permitting the continuation of the proponent’s SCPA § 1404 examination to be held at the offices of Robert & Robert, PLLC, 526 RXR Plaza, Uniondale, New York. Pursuant to 22 NYCRR § 207.28, “unless the court otherwise directs, all examinations pursuant to SCPA . . . shall be held at the

courthouse.” The reason for this rule is that the original instrument offered for probate is filed with the court and may not be removed (22 NYCRR § 207.8; *Matter of Andretta*, NYLJ, Oct. 28, 2011, at 24, col 6 [Sur Ct, Queens County]). Where special circumstances arise, such as illness, infirmity or other compelling circumstances, the court in its discretion may permit the examination to be held somewhere else (*Matter of Andretta*, NYLJ, Oct. 28, 2011, at 24, col 6 [Sur Ct, Queens County]), but no such compelling circumstances are extant here. Further, the court has on numerous occasions been asked to give rulings during the examination, which would be difficult if the examination took place outside of the courthouse. The cross motion is therefore **DENIED.**

This constitutes the decision and order of the court.

Dated: Mineola, New York
November 20, 2017

E N T E R :

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Judge of the Surrogate’s Court

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