

Matter of Salas

2018 NY Slip Op 34548(U)

April 11, 2018

Surrogate's Court, Richmond County

Docket Number: File No. 2015-174

Judge: Robert J. Gigante

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

-----X
In the Matter of the Estate of

FABIO SALAS,

File No. 2015-174

Deceased.
-----X

In this contested probate proceeding, the parties are involved in a pre-1404 discovery dispute. Paul S. Forster, Esq., counsel for Cynthia Salas (“movant”) filed a motion on November 25, 2015 seeking that the petition for probate dated February 24, 2015 be dismissed pursuant to CPLR 3126(3) and spoliation. On April 26, 2016, an Affidavit in Opposition was filed on behalf of Dana L. Giammanco as nominated executrix (“fiduciary/respondent within motion”) by Simonson & Cohen, LLP. Dana L. Giammanco, individually, is also represented by Daniel M. Ajellio, Esq. Rebecca Salas-Groves, a distributee of the decedent and beneficiary under the purported Last Will and Testament, is represented by Kuhn, O’Toole & Maietta, LLP who have appeared in this matter and advised the court that their client does not take any position in this matter, nor will they be filing any opposing or supporting papers.

Arguments were heard before this court on June 7, 2017, August 16, 2017 and November 15, 2017 on the motion and emergency affirmation and reply filed with this court, and the matter was marked decision reserved.

PROCEDURAL HISTORY

To properly decide this matter, the court finds it necessary to review the course of discovery within the overall timeline of the case. The parties first agreed to a Stipulation of Discovery during the Court's calendar dated June 3, 2015. Discovery and Inspection was to be requested by June 26, 2015, responses were to be submitted by July 17, 2015, and the matter was adjourned to August 12, 2015. Thereafter, the parties appeared and consented to multiple adjournments to allow the fiduciary/respondent within motion more time to respond.

After a number of adjournments, counsel for movant proceeded to file a motion to dismiss pursuant to CPLR 3126 and spoliation. The motion was made returnable February 3, 2016. Since this return date, the fiduciary/respondent within motion argues that they have complied by submitting responses to discovery. In addition, the parties agreed to a second Stipulation of Settlement for Supplemental Discovery. The Stipulation was incorporated via a decision and order of this Court on June 9, 2016. The parties at that time agreed to hold the preclusion motion in abeyance.

Subsequent to the second Stipulation of Discovery, the parties agreed to adjourn the matter from October 5, 2016 through and including March 22, 2017. On April 12, 2017, a conference was held with the court's law department and counsel for the interested parties. The motion was adjourned for oral argument to June 7, 2017.

DISCUSSION

Counsel for movant and counsel for fiduciary/respondent within motion are in disagreement as to whether this motion should continue to be held in abeyance. The Court finds that this motion should move forward after review of all the papers submitted and arguments made.

A. PRECLUSION

The first issue to address is whether the Petition for Probate should be dismissed, pursuant to CPLR 3126(3). CPLR 3126(3) provides that the Court may make an order “striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.” “Parties, where necessary, will be responsible for the failure of their lawyers to provide meaningful responses to discovery” see, *Lucas v Stam*, 147 AD3d 921.

Granting a motion to preclude should be granted only where the conduct of the resisting party is shown to be willful, contumacious, or in bad faith, where a party disobeys a court order and thereby frustrates disclosure, the striking or dismissing of a pleading is within the broad discretion of the court. (*Ranfort v Peck Tours*, 250 AD2d 747 [2d Dept 1998].) The court is not persuaded that such a drastic remedy is warranted. Upon review of all the formal papers submitted and formal arguments made on June 7, 2017, August 16, 2017, and November 15, 2017, counsel for fiduciary/respondent within motion has provided responses to discovery, signed multiple HIPPA forms and medical record authorizations. In addition, fiduciary/respondent within motion has consented to the issuance of so-ordered subpoenas being issued to

physicians and various medical institutions. Further, both counselors for fiduciary/respondent within motion during oral argument have argued that they have provided all the documents that are in their possession.

Discovery is a well worn path under Article 31 of the CPLR Section 3120 allows for discovery and inspection of documents "which are in the possession, custody or control of the party or person served." Fiduciary/respondent within motion's answers makes it clear that the documents are not in her possession.

It should be noted that counsel for movant filed an Emergency Supplemental Affirmation on July 31, 2017 which he argued that fiduciary/respondent within motion withheld the fact that the decedent was receiving hospice care beginning on February 3, 2012. Upon review of the oral argument dated June 7, 2017, Daniel M. Ajello, Esq., did represent that the decedent was receiving hospice care. In addition, Mr. Ajello filed an Affirmation in Opposition to Emergency Supplemental Affirmation on August 9, 2017. Within that affirmation, Exhibit B provided medical records previously submitted in response to Notice for Discovery and Inspection dated March 14, 2016 showing the decedent was receiving hospice care at Staten Island University Hospital and that the decedent was referred there by Dr. Philip Friscia. Further, the fiduciary/respondent within motion has signed a Medical Record Authorization regarding Dr. Philip Friscia on August 8, 2017.

Accordingly, the movant's motion to dismiss pursuant to CPLR 3126(3) is denied with prejudice.

B. SPOILIATION

The second issue to address is whether the fiduciary/respondent in motion's Petition for Probate should be dismissed pursuant to spoliation.

"The determination of sanctions for spoliation of evidence is within the broad discretion of the court (*Dennis v City of New York*, 18 AD3d 599 [2005]; *Barahona v Trustees of Columbia University in City of New York*, 16 AD3d 445 [2005]; *Horace Mann Ins. Co. v E.T. Appliances*, 290 AD2d 418 [2002]). A party seeking a sanction, such as preclusion of evidence or dismissal is required to demonstrate that a litigant intentionally or negligently disposed of crucial evidence before the adversary had an opportunity to inspect it. (*Kirchen v Marino*, 16 AD3d 555 [2005]; *Baglio v St. John's Queens Hosp.*, 303 AD2d 341 [2003]; *Kirkland v New York Housing Authority*, 236 AD2d 170, 173 [1997], and thus deprived the party seeking the sanction of the means to prove his claim or defense. Although the courts are reluctant to dismiss a pleading absent willful or contumacious conduct, it may be warranted as a matter of fundamental fairness (*Friel v Papa*, 36 AD3d 754 [2007]; *Lawson v Aspen Ford, Inc.*, 35 AD3d 628 [2005]. The gravamen of the burden is a showing of prejudice. (*Friel v Papa*, supra at 755; *Favish v Tepler*, 294 AD2d 396 [2002].)" See *In Re Travers*, 2007 NY Misc Lexis 5678.

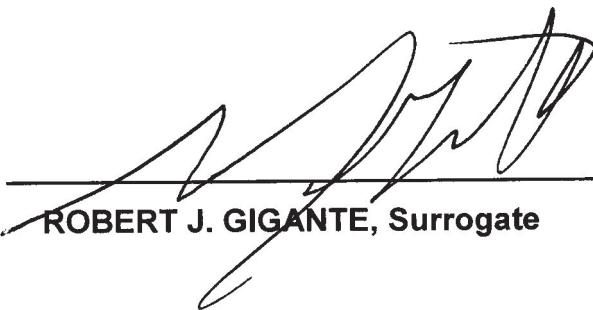
Counselors for the fiduciary/respondent in motion represented that they have provided all that they have in their response to discovery. Further, that fiduciary/respondent in motion has signed multiple authorizations and HIPPA forms that have been requested by movant. In addition, fiduciary/respondent in motion has consented to the issuance of so-ordered subpoenas to Dr. Philip Friscia, VA NY Harbor Healthcare System, Staten Island University Hospital, and Center for Medicare & Medicaid Services. The court denies the movant's motion to dismiss pursuant to

spoliation. Accordingly, based on the foregoing, respondent's motion is denied in its entirety. If authorizations and/or HIPPA forms are required for other documents, the fiduciary/respondent in motion should promptly provide them to the respondent.

The matter is hereby restored to the Court's Calendar of **May 23, 2018 at 11:00 a.m.** The Clerk of the Court is directed to mail a copy of this decision to all attorneys who have appeared in this matter by regular mail.

This decision shall constitute the order of the court.

Dated: April 11, 2018



ROBERT J. GIGANTE, Surrogate