

Matter of John

2018 NY Slip Op 34560(U)

July 23, 2018

Surrogate's Court, Suffolk County

Docket Number: File No. 2012-1583/A

Judge: John M. Czygier, Jr.

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This opinion is uncorrected and not selected for official publication.

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administration. Given the probate petition, this court revoked the letters of administration previously issued to Ms. Vann and held any additional relief in abeyance.

Probate continued and Ms. Vann, along with her brother Dexter John, have filed objections alleging lack of due execution, lack of capacity, and undue influence. The parties have entered into a pre-trial order and an amended pre-trial order and have agreed to a discovery schedule.

Currently, objectants move to compel the deposition of Julian Van Tull, a non-party witness domiciled out of state. Objectants assert that Mr. Van Tull's testimony is critical, as he is believed to have taken decedent to the attorney draftperson's office, had a power of attorney, and diverted decedent's assets. Mr. Van Tull has entered a limited appearance through counsel in order to oppose the motion due to an alleged lack of personal jurisdiction.

Discussion

A subpoena is valid only where the court has jurisdiction over the subpoenaed party (*Cherfas v. Wolf*, 2008 NYLJ LEXIS 1240 [Sup Ct, Kings County] [citing CPLR 308-318; *Keane v. Kamin*, 94 NY2d 263]). Here, Mr. Van Tull is neither a party nor a New York domicilliary and, as such, this court lacks in personam jurisdiction over him absent his consent (*id.* [citing *Sessa v. Board of Assessors of the Town of North Elba*, 46 AD3d 1163 [3d Dep't 2007]]).

Objectants maintain that, by filing the petition to have Ms. Vann's letters of administration revoked and to transfer the Supreme Court action, Mr. Van Tull consented to the court's jurisdiction. Presumably, their assertions are based upon CPLR 320(b). Pursuant thereto, "an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction . . . is asserted" (CPLR 320[b]).

As the statute suggests, one's appearance connotes an appearance in a particular action (see, e.g., *Cherfas, supra* [a voluntary appearance "amounts to complete consent to that court's jurisdiction *in the matter*"] [emphasis added]; *Astor v. Astor*, 5 Misc2d 514 [Sup Ct, New York County]). In fact, critical to any analysis of personal jurisdiction is the presence of reasonable notice of the action (see *Hays v. Hays*, 111 Misc2d 722 [Sup Ct, Nassau County]). While the revocation of Ms. Vann's letters of administration may have been a precursor to the instant probate

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proceeding, it is an insufficient basis upon which to assert jurisdiction. The two matters are separate proceedings, with different subject matter and parties. Mr. Van Tull's appearance in another matter does not confer upon this court jurisdiction to adjudicate any and all claims involving him (*see Astor, supra*), and to compel his deposition in a distinct proceeding in which he is not a party would violate his due process rights.

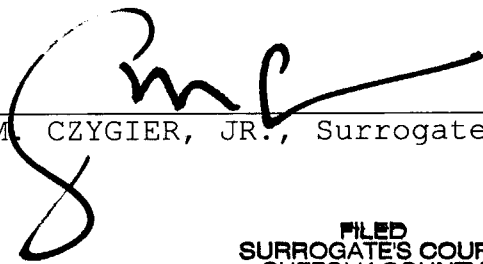
Objectants are not without recourse, and may seek an open commission to depose Mr. Van Tull (CPLR 3108, *see also* SCPA 508[2]; *Matter of Jacobs*, 2013 NY Slip Op 50836[U] [Sur Ct, Nassau County]). Such an application, however, must be based upon more than the affidavit of counsel submitted in support of the instant motion (*Matter of Jacobs, supra* [citing *Matter of Gerib*, 1996 NYLJ LEXIS 2561 [Sur Ct, Westchester County]). Accordingly, objectant's motion is denied.

Conclusion

For the reasons set forth herein, it is

ORDERED that objectant's motion to compel the deposition of Julian Van Tull is denied; and it is further

ORDERED that a conference is scheduled with a member of the court's law department on Wednesday, August 29, 2018 at 9:30 a.m. at the Suffolk County Surrogate's Court, 320 Center Drive, Riverhead, New York.



JOHN M. CZYGIER, JR., Surrogate

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Decision

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