

Matter of Judelson
2019 NY Slip Op 31468(U)
May 24, 2019
Surrogate's Court, New York County
Docket Number: 2018-3904
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: MAY 24, 2019

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In the Matter of the Probate Proceeding, Will of

David N. "Jim" Judelson,
Deceased.

DECISION and ORDER

File No.: 2018-3904

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M E L L A, S.:

The following papers were considered in determining this motion to set a discovery schedule and this cross-motion to expand the period about which discovery may be had:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion, dated February 4, 2019, of Eva Judelson, with Affirmation, dated February 4, 2019, of Harvey E. Corn, Esq., attaching Exhibits	1-2
Notice of Omnibus Cross-Motion, dated March 15, 2019, of Roy Judelson, With Affidavit, dated March 15, 2019, of Roy A. Judelson, and Affirmation, dated March 15, 2019, of Diahn W. McGrath, Esq., attaching Exhibits, And Affidavit, dated March 12, 2019, of Isabel Diaz, and Affidavit, dated February 12, 2019, of Paul Judelson	3-7
Affidavit, dated April 15, 2019, of Gregg M. Weiss, Esq., in Opposition to Cross-Motion	8
Affirmation, dated April 15, 2019, of Frank T. Santoro, Esq., in Opposition to Cross-Motion, attaching Exhibits	9
Affidavit, dated April 11, 2019, of Eva Judelson in Opposition to Cross-Motion	10
Affirmation, dated April 15, 2019, of Harvey E. Corn, Esq., in Opposition to Cross-Motion, attaching Exhibits	11
Affidavit, dated April 23, 2019, of Paul Judelson, attaching one Exhibit	12
Reply Affirmation of Diahn W. McGrath, Esq., attaching one Exhibit	13
Affidavit, dated April 24, 2019, of Roy Judelson, attaching Exhibits	14
Affidavit, dated April 24, 2019, of James Judelson	15

At the call of the calendar on April 26, 2019, two motions were before the court in this pre-objection probate proceeding in the estate of decedent David "Jim" Judelson. The motion by co-preliminary executor Eva Judelson, decedent's surviving spouse, to set an SCPA 1404 discovery schedule was granted as set forth below based on the parties' agreement in a conference following the court calendar.

Also before the court on April 26, 2019, was the cross-motion of decedent's son, Roy

Judelson, who sought to broaden the time period within which discovery pursuant to SCPA 1404 may be had under Uniform Surrogate's Court Rule 207.27. This rule is informally known as the "3/2 Rule," and it confines probate discovery "to a three-year period prior to the date of the propounded instrument [here, the will offered is dated November 16, 2017] and two years thereafter, or to the date of decedent's death [such date of death here being September 17, 2018], whichever is the shorter period" (22 NYCRR 207.27; *see Matter of Manoogian*, NYLJ, Feb. 28, 2014, at 22, col 5 [Sur Ct, NY County 2014]). "Special circumstances" are required to expand discovery beyond that permitted under the 3/2 Rule, which usually center on a continuing course of possible undue influence or fraud (*see, e.g., Matter of Partridge*, 141 Misc 2d 159 [Sur Ct, Rockland County 1988]; *see Matter of Kaufmann*, 11 AD2d 759 [1st Dept 1960]).

The cross-motion focuses on three grounds for extending the time frames of the 3/2 Rule. Specifically, cross-movant first alleges that he needs to look into whether a possibly fraudulent will was offered for probate in Arizona by decedent himself in the estate of decedent's prior spouse, cross-movant's mother, Maria, who died in 2011.¹ Even if cross-movant's allegations regarding Maria's estate proceedings in Arizona were considered to be true, he has not demonstrated any basis for inquiry in this probate proceeding into decedent's own acts or anyone else's regarding Maria's estate in Arizona because he has not alleged any connection between such acts and a possible objection to the 2017 instrument offered for probate here (*see SCPA 1404*[4]). There is thus no basis to have discovery and litigate issues regarding Maria's estate in the context of the probate of this decedent's will (*cf. Matter of Young*, NYLJ, Oct. 27, 2014, at

¹ Cross-movant's counsel affirms that the distribution of Maria's estate in Arizona was "determined to be intestate" because the will offered there was a "pour-over Will into a trust which by the testamentary language was to have been executed at the same time as the Will" but was never found (McGrath Affirm 4, Mar. 15, 2019).

27 [Sur Ct, NY County 2014]).²

Secondly, cross-movant claims that decedent's probate estate should be larger than it is, premised on decedent's having been a director and president of Gulf and Western, a large conglomerate, from which, when decedent left that company in 1983, he received a significant multi-million dollar "exit package." Although the cross-motion seeks discovery from 2011, when Maria died, to the date of decedent's death, rather than discovery commencing in 1983, proof that a testator owned or controlled more assets at some previous time, without some evidence showing a nexus to a possible objection to the propounded instrument, constitutes mere speculation that cannot be the basis for a finding of special circumstances warranting more extensive probate discovery (*see Matter of Gennarelli*, NYLJ, Mar. 14, 2019, at 25, col 5 [Sur Ct, Kings County 2019]).

Finally, the fact that decedent may have changed his testamentary plan after the death of his spouse Maria in 2011 likewise does not constitute a "special circumstance" on which broader discovery is required to ensure that the propounded will is genuine. Moreover, counsel confirms that there are 13 prior wills within the 3/2 period, and the propounded instrument here primarily benefits his spouse and children. There is thus no indication of a testamentary plan benefiting those who might not be considered the natural objects of his bounty, and an estate plan modification after a spouse's death in this instance provides no evidence of an improper design upon decedent's property sufficient to warrant a more expansive inquiry (*see Matter of Bogen*, 2014 NY Slip Op 32844(U) at *9 [Sur Ct, NY County 2014], *citing Matter of Brady*, 273 App

²The fact that the propounded will has a provision for forfeiture of the interest of a beneficiary if the latter "bring[s] a proceeding regarding the estate of my late wife" does not change this analysis (Propounded November 16, 2017 Will at 20).

[* 4]
Div 968 [2d Dept 1948] and *Matter of Carpenter*, 252 App Div 885 [2d Dept 1937]).

To the extent that additional arguments by cross-movant are made regarding the 3/2 Rule, they have no merit, and the court concludes that the time frames of the 3/2 Rule should apply here. That does not end the analysis, because cross-movant also seeks income tax returns of the decedent within the limits of the 3/2 Rule, to which the preliminary executors also object. However, it should be noted that the preliminary executors do not object to providing gift tax returns of the decedent within the 3/2 time period.

To obtain income tax returns, cross-movant must make a “strong showing that the information is indispensable to the claim and cannot be obtained from other sources” (*Manoogian*, NYLJ, Feb. 28, 2014, at 22, col 5, quoting *Latture v Smith*, 304 AD2d 534, 536 [2d Dept 2003], and citing *David Leinoff, Inc. v 208 West 29th Street Assoc.*, 243 AD2d 418 [1st Dept 1997] and *Matter of Gala*, NYLJ, July 26, 1999, at 23, col 4 [Sur Ct, Westchester County]). No such showing, however, has been made by cross-movant at this juncture.

The discovery schedule, as agreed to by the parties, is as follows:


- (1) Any and all SCPA 1404 discovery demands should be made immediately, but in any event, they shall be made no later than May 24, 2019.
- (2) Examinations pursuant to SCPA 1404 should be scheduled as soon as possible, with an understanding that all discovery should conclude no later than September 13, 2019.
- (3) Verified objections, if any, shall be filed and served no later than September 25, 2019.
- (4) Deadlines may be extended on the stipulation of all parties filed before the expiration of a deadline or upon further order of the court.

Accordingly, as set forth above, the motion to set a SCPA 1404 discovery schedule is granted, and the cross-motion is denied. A protective order is issued to the extent that discovery

sought must be within the time limits established by Uniform Surrogate's Court Rule 207.27 and to the further extent that decedent's income tax returns from whatever time period cannot be compelled to be disclosed on the current record; however, proponents have agreed to provide gift tax returns of the decedent within the applicable 3/2 period.

This decision, together with the transcript of the April 26, 2019 proceedings, constitutes the order of the court.

Dated: May 24, 2019



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