

Matter of Roberts

2020 NY Slip Op 34364(U)

October 30, 2020

Surrogate's Court, New York County

Docket Number: 2005-2087

Judge: Nora S. Anderson

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Date: October 30th 2020

SURROGATE'S COURT: NEW YORK COUNTY

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In the Matter of the Probate Proceeding in the
Estate of

File No. 2005-2087

MAE V. ROBERTS,

Deceased.

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ANDERSON, S.

This is a contested proceeding in the estate of Mae V. Roberts for probate of a will dated February 5, 2003, and a codicil dated July 16, 2004. Proponent, the daughter of one of decedent's nieces, moves for summary judgment dismissing objections filed by various relatives of decedent. Proponent also seeks to vacate a 2007 preliminary injunction and seeks sanctions against objectants based upon alleged spoliation of evidence by objectant's counsel. Objectants cross-move to dismiss the probate petition with prejudice pursuant to CPLR 3216 for failure to prosecute.

Background

Decedent died at age 94 on April 16, 2005, survived by three siblings and nine children of post-deceased siblings. Her estate consists primarily of cash, a brownstone in Manhattan, and three parcels of land in Virginia. Between 1999 and July of 2004, decedent executed at least six testamentary instruments, in which she bequeathed an increasingly larger share of her estate to proponent.

In 2006, proponent's petition for preliminary letters was denied for "want of understanding," and temporary letters were awarded to the Public Administrator. In 2009, proponent moved for summary judgment and objectants cross-moved for summary dismissal of the probate petition. Objectants' cross-motion was denied, and proponent's motion was granted in part and denied in part. The court denied proponent's subsequent motion to renew and

reargue her summary judgment motion. The only objections remaining to be tried are lack of due execution and lack of capacity as to the codicil, and undue influence as to both instruments.

In May 2015, the court stayed the probate proceeding, pending substitution of the proper parties following the deaths of two of the objectants and a distributee (CPLR 1015). The stay remained in place for more than four years, until July 29, 2019, when, on the Public Administrator's motion, this court issued an order substituting the personal representatives of the three post-deceased individuals in this proceeding.

Proponent's Motion

The first prong of proponent's present motion again seeks summary admission of the propounded will and codicil to probate. However, the First Department has repeatedly refused to entertain successive motions for summary judgment absent "a showing of newly discovered evidence or other sufficient justification" (*Fleming and Assoc., CPA, PC v Murray & Josephson, CPA, LLC*, 127 AD3d 428 [1st Dept 2015], quoting *Jones v 636 Holding Corp.*, 73 AD3d 409 [1st Dept 2010]; see also *Amill v Lawrence Ruben Co.*, 117 AD3d 409 [1st Dept 2014]). Proponent does not claim to have discovered new evidence since the court ruled on her prior summary judgment motion, nor does she offer any other justification for permitting her to make this duplicative application for relief. Accordingly, her request for summary judgment is denied.

In the second prong of her motion, proponent seeks vacatur of a 2007 preliminary injunction enjoining her from transferring any interest that she or decedent has in any real property arguably owned by decedent's estate. The injunction was issued in a proceeding commenced by the Public Administrator pursuant to SCPA 2103, seeking discovery of information concerning certain properties. Since proponent's motion for vacatur of the

injunction was not filed in the proceeding in which the injunction was issued, this prong of the motion is denied without prejudice to renewal in the proper proceeding.

Finally, proponent moves for sanctions based upon the alleged spoliation by objectants' counsel of relevant documents contained in the probate file of the deceased attorney-draftsman, Arnold Kaplan. Specifically, proponent requests dismissal of "any and all claims by objectants" and legal fees on account of the purported spoliation.

Under New York's common-law doctrine of spoliation, a party who destroys, discards or otherwise loses relevant evidence may be subject to sanctions, and courts have "broad discretion to provide proportionate relief" to the party deprived of relevant evidence (*Ortega v City of NY*, 9 NY3d 69, 76 [2008]). On a motion for sanctions based on spoliation, the movant must establish that: (1) the party with control over potentially relevant evidence had an obligation to preserve it; (2) the evidence was destroyed with a "culpable state of mind"; and (3) the destroyed evidence was relevant to the movant's claim or defense (*Pegasus Aviation I, Inc., v Varig Logistica*, 26 NY 543, 547 [2015]; *Duluc v AC & L Food Corp.*, 119 AD3d 450, 451 [1st Dept 2014]).

According to proponent's papers, on March 20, 2007, proponent's then lawyer sent a letter to objectants' counsel requesting "copies of all documents in your possession which comprise the files of [Mr. Kaplan, the attorney-draftsman]." Objectants' counsel had previously obtained Mr. Kaplan's files by subpoena, but according to certain correspondence submitted by proponent on this motion, the executor of Mr. Kaplan's estate did not retain a copy of these files. Although proponent's recounting of the situation is less than clear, nothing in the record suggests that proponent, whether by counsel or pro se, ever took formal discovery to support her conclusory allegations that objectants' counsel "destroyed" and/or "withheld" documents in Mr. Kaplan's file bearing on the issue of the validity of the propounded instruments.

In an affirmation, objectants' counsel categorically denies the claim of spoliation. He avers that, on August 27, 2007, he arranged for Mr. Kaplan's "entire file," consisting of 841 pages, to be photocopied by an outside copying service and sent via overnight mail to proponent's then lawyer. Objectants' counsel further affirms that proponent's lawyer reimbursed objectants' counsel \$252.09 for the cost of the photocopying. Proponent does not dispute these statements in her reply papers and provides no evidence to support her allegations that objectants' counsel destroyed or withheld any evidence relevant to the instant proceeding. Accordingly, her motion for sanctions is denied.

Objectants' Cross-Motion

Objectants cross-move to dismiss the probate proceeding under CPLR 3216, which provides that the court may dismiss a party's pleading where such party "unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof . . . or unreasonably fails to serve and file a note of issue" Objectants also seek their costs and legal fees associated with proponent's motion and their cross-motion.

Section 209(8) of the Surrogate's Court Procedure Act authorizes the Surrogate to "dismiss any proceeding which the petitioner has neglected to prosecute diligently." Where, as here, a proceeding has been contested, dismissal for failure to prosecute is subject to the prerequisites of CPLR 3216(b), including that one year has elapsed since the joinder of issue and that a written demand has been served on the party against whom relief is sought to resume prosecution and file a note of issue within ninety days (CPLR 3216[b][1]-[3]; *see, e.g., Matter of Weingarten*, NYLJ, Nov. 15, 2018, at 31 [Sur Ct, Bronx County 2018]). Objectants argue that proponent's prolonged failure to cure the jurisdictional issues arising from the deaths of three of the parties to this proceeding, coupled with her failure to file a note of issue and her successive motions for a summary determination, warrants dismissal for failure to prosecute. They contend that the conditions set forth in CPLR 3216(b) have been satisfied, and they attach a copy of a

letter dated January 11, 2017, that their counsel had sent to proponent pursuant to CPLR 3216(b)(3), demanding that she resume prosecution and informing her that “failure to resume prosecution and to serve and file a notice of issue” within ninety days would serve as a basis for a motion to dismiss under CPLR 3216.

It is not necessary to address whether the preconditions to dismissal in CPLR 3216(b) have been satisfied or not. In either case, the court concludes that a dismissal is not warranted under the circumstances here. First, the death of the three parties has created procedural complications and conflicts that would have posed difficult challenges to any petitioner, much less to one who, as here, was pro se. Moreover, since dismissal of the probate proceeding would terminate the judicial inquiry into decedent’s intentions as to how her assets should be distributed, an issue of paramount importance in Surrogate Court proceedings, the court is disinclined to take such an action.

However, the court cannot overlook that proponent’s numerous misguided applications in this proceeding have contributed significantly to the serious delays incurred since objections were filed in 2006. To promote expedition from this point forward, a pretrial conference will be scheduled in short order.

In conclusion, the court denies proponent’s motion in its entirety. The court denies objectants’ cross-motion for dismissal of the probate proceeding and for costs and legal fees associated with the instant applications.

This decision constitutes the order of the court.



SURROGATE

Dated: *October 30,* , 2020