

Estate of Meixsell

2020 NY Slip Op 34493(U)

August 19, 2020

Surrogate's Court, Bronx County

Docket Number: 2017-550

Judge: Nelida Malave-Gonzalez

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, BRONX COUNTY

August 19, 2020

ESTATE OF PAUL MEIXSELL, also
known as PAUL W. MEIXSELL, Deceased

File No.: 2017-550

In this contested probate proceeding, the petitioner, the nominated executor under a testamentary instrument dated May 18, 2015, moves to dismiss the objections filed by the decedent's brother and sole distributee pursuant to CPLR 3126 on the basis that the objectant has failed to submit to an examination before trial, despite appropriate demands therefor. The objectant's counsel in opposition advances that his client resides in Florida, is 91 years old, has been diagnosed with cancer and annexes a diagnosis from his client's oncologist warning that the objectant should not travel to New York given his high-risk of contracting the Covid-19 virus. Instead counsel offers to produce his client be deposed from Florida via video conference. In reply the petitioner argues that the objectant is looking to "manipulate the 'system' to get what he wants, a deposition in Florida." Further, the petitioner recognizes that although the court can order

a deposition in Florida under CPLR 3113(d), it may do so only upon consent of the parties. Thus, he advances, “[q]uite frankly, the Court has not been given the ability by statute or executive order to mandate that a virtual deposition be taken, rather the present state of the law mandates that all parties to the deposition must consent if this method of taking a deposition is utilized.” Of course, the petitioner does not consent to the same.

The decedent died on January 21, 2017 at the age of 91. Under the instrument which was drafted by the petitioner’s counsel, the sole beneficiary is a friend of the decedent, and her husband is the nominated executor.

Disclosure under CPLR article 31 affords a party broad and liberal discovery of matter material and necessary in litigation (CPLR 3101; see, *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]; *New York County DES Litigation v Eli Lilly Company*, 171 AD2d 119 [1st Dept 1991]; *Twenty Four Hours Fuel Corp v Hunter Ambulance Corp.*, 226 AD2d 175 [1st Dept 1996]). Of course, CPLR article 31 disclosure is available in surrogate’s court proceedings (see *Siegel & Connors*, *New York Practice* §343). The court is afforded broad discretion to supervise disclosure and its orders are upheld unless there is an abuse of that discretion (*Daniels v City of New York*, 291 AD2d 260 [1st Dept 2002]). CPLR 3126 permits a court to “make such orders with regard to the failure or refusal [to provide disclosure] as are just.” Dismissal under CPLR 3126 for noncompliance with a disclosure

demand is a drastic sanction and only warranted when the movant has demonstrated a wilful and contumacious failure to comply with the disclosure demand (*Kihl v Pfeffer*, 94 NY2d 118 [1999]).

Extraordinary times call for extraordinary measures. Litigation has been interrupted during the Covid-19 pandemic, but has not ceased in New York. The courts have been, and remain, open. Practitioners have adapted in these trying times by widely availing themselves of technology services including the use of Zoom and Skype for videoconferencing. Indeed, the court itself utilizes Skype for Business videoconferencing for virtual appearances on matters requiring judicial intervention. As such, videoconferencing is a sound alternative to an in-person deposition and is proper under the instant circumstances.

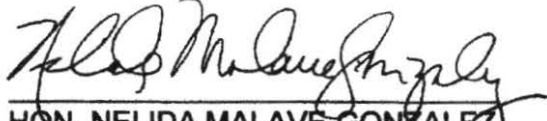
Clearly movant is entitled to the sought-after deposition of the objectant, but compelling the 91 year old objectant to travel to New York for the deposition in this environment strains common sense and decency. Assuming *arguendo* that the objectant failed to offer proper opposition, as argued by the petitioner, the court is guided by current medical opinion that the objectant is at a heightened risk in contracting the Corona virus. Ordering the objectant's deposition in New York would potentially cause him grievous illness and possible death, which the court refuses to do. The petitioner is mistaken that the court cannot compel the video deposition and under these circumstances the court finds a remote video deposition proper (see *Rogovin*

v Rogovin, 3 AD3d 352 [1st Dept 2004]).

Accordingly, the motion is denied. The objectant is directed to submit to a video examination from Florida within 30 days of this decision, which constitutes the order of the court. Insofar as this alternative is made necessary by the objectant, all audiovisual costs to be incurred for the examination shall be borne by the objectant. The parties are directed to cooperate on the mechanics of the examination, i.e., selection of the location and stenographer in New York.

The Chief Clerk shall transmit a copy of this decision and order to respective counsel.

Proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE