

Estate of Bux
2021 NY Slip Op 32652(U)
December 7, 2021
Surrogate's Court, Bronx County
Docket Number: File No.: 2019-2267/A
Judge: Nelida Malave-Gonzalez
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SURROGATE'S COURT, BRONX COUNTY

December 7, 2021

ESTATE OF JOSEPH BUX, Deceased
File No.: 2019-2267/A

In this contested probate proceeding, the proponent, the decedent's son Christopher, filed a motion seeking summary judgment dismissing the objections filed by another son, Joseph, Jr. (the objectant), on the grounds that he failed to comply with the "strict" discovery directed in a "so-ordered" stipulation dated September 29, 2020, and that there are no triable issues of fact. In addition to filing opposition to the proponent's summary judgment motion, the objectant also filed a cross motion seeking to dismiss the probate proceeding because of the proponent's alleged failure to respond to his discovery demands or schedule SCPA 1404 examinations. The objectant also seeks sanctions including counsel fees and disbursements. In the alternative, the objectant asks for a "tight" scheduling order and that the proponent be directed to pay the costs of the SCPA 1404 examinations. After both sons filed replies, the motions were marked "submitted for determination."

The decedent died on October 1, 2019 at age 72. His distributees are the two sons and an estranged spouse for whom a waiver and consent was filed. The decedent's will dated September 17, 2019 was executed less than two weeks prior to the decedent's death from cancer and was attorney supervised with a self-proving affidavit. The decedent's signature on the instrument is shaky. The instrument bequeaths a bread route owned by the decedent and associated equipment, three parcels of realty located in upstate, New York and the entire residuary estate to the proponent and specifically makes no provisions for the objectant and the estranged spouse. On the same date that the will was signed, the decedent executed a durable power of attorney in favor of the proponent and a separate document conferring authority for certain gift transactions. It is not known whether such gifting authority was exercised. He also executed a health care proxy appointing the proponent as agent on September 21, 2019. Preliminary letters testamentary issued to the proponent on November 27, 2019.

The objectant previously filed an administration petition, but no citation issued as the proponent had already filed the probate petition. On December 10, 2019, the return date of citation in the probate proceeding, an attorney appeared on behalf of the objectant and indicated that he intended to file objections to probate and seek discovery pursuant to SCPA 1404. New counsel for the proponent also appeared and advised the court that no discovery demands were served, the SCPA 1404 examinations were not

held and requested that the will be admitted to probate. The objectant's attorney then filed a consent for his former client to proceed pro se and the objectant indicated that he wished to retain new counsel.

Pursuant to decision and order dated August 27, 2020, the probate proceeding was stayed for a period of 30 days to enable the objectant to retain new counsel and a conference was directed. At the conference held on September 29, 2020, the objectant appeared pro se and two attorneys appeared for the proponent. The pro se objectant stipulated to a discovery schedule that was to be binding upon him whether or not he retained counsel or continued to proceed pro se. The stipulation, which was "so-ordered," provided, inter alia, that: the SCPA 1404 examinations were to be held on a virtual platform and completed no more than 90 days therefrom; objections, if any, were to be served and filed no more than ten days after completion of the SCPA 1404 examinations, and that the discovery schedule was to be strictly complied with, with no adjournments or postponements of the directed dates permitted without further order of the court. It additionally provided that failure to adhere to that discovery order might subject a party to sanctions, including inter alia, dismissing the probate petition or filed objections thereto, or the court's refusing to accept objections for filing.

At a compliance conference held on January 4, 2021 with a member of the court's Law Department, at which attorneys for both sons participated, new counsel for the objectant alleged that the SCPA 1404 examinations were not held because, inter alia, the proponent failed to

respond to his discovery demands or produce the attorney-draftsman and attesting witnesses. Counsel explained that he did not file objections because the estate would normally pay for the cost of pre-objection SCPA examinations (SCPA 1404 [5]), and he believed the court-ordered outside filing date to be 10 days after the SCPA 1404 examinations were completed. As the examinations were not yet held and the proponent refused to consent to an extension of time, counsel served and filed objections consisting of two typewritten pages asserting, inter alia, lack of due execution and testamentary capacity, that the instrument was procured by fraud, undue influence, duress and the decedent did not understand its terms. The objections with annexed affidavit of service dated January 4, 2021 were filed with the court on January 5, 2021. Although the proponent asserts that the filing does not comport with the September 29, 2020 discovery order, as a predicate, the court finds that they were timely served and filed.

In support of the summary judgment motion, the proponent states that on December 29, 2019, the objectant appeared with former counsel and indicated that he intended to file objections on the original return date of citation. Many months ensued and despite two court orders, he failed to do so. The proponent avers that the delay was purposeful and caused the estate to incur additional legal fees. It was not until November 5, 2020 that new counsel for the objectant served a document demand and request for HIPPA authorizations pursuant to SCPA 1404. Although the proponent's attorney timely served responses on November 6, 2020, the

objectant's new attorney still failed to schedule and conduct SCPA 1404 examinations or subpoena, if necessary, the drafting attorney and attesting witnesses within the time frame mandated by the September 29, 2020 scheduling order. As the drafting attorney and witnesses are not employed or under the control of the proponent, counsel urges that there is no duty to produce these third party witnesses and the objectant, whether proceeding pro se or represented by two different attorneys, failed to schedule the SCPA 1404 examinations to date. The proponent concludes that the objectant should be precluded from seeking additional discovery and the will should be admitted to probate.

In opposition to the summary judgment motion, the objectant filed a cross motion seeking to compel the proponent to respond to outstanding discovery demands and hold the SCPA 1404 examinations at the estate's expense. His attorney alleges that the proponent's responses to the demands were inadequate, none of the attorney-drafter's documents were produced and he received only minimal financial documents. Among the documents that were produced was a power of attorney executed on the same day as the will in favor of the proponent. Counsel opines that the proponent, as agent utilizing a power of attorney, had a confidential relationship with the decedent that he failed to disclose in the probate petition and has the burden to prove that the decedent was not subject to undue influence at the time of the will's execution.

Counsel continues that the proponent intentionally failed to

produce a copy of a deed dated August 9, 2007 transferring ownership of realty located at 22 Allen Street, Deposit, New York from the decedent to the two sons, as joint tenants with right of survivorship. Despite that title was allegedly transferred to both sons over 13 years before the will was signed, the decedent devised the realty solely to the proponent in the instrument. Counsel avers that this demonstrates a lack of testamentary capacity and that the decedent did not know the nature and consequences of executing a will, the extent of his property and the objects of his bounty.

The objectant's attorney urges that the proponent is obligated to produce the attesting witnesses, made absolutely no effort to do so and does not demonstrate that they are recalcitrant or hostile. He also avers that, as a predicate to such examination, the proponent must be directed to respond to the objectant's document demands (See CPLR § 3120 [1] [i] and SCPA1404). He notes that the proponent, as preliminary executor, has access to the decedent's residence and is able to obtain asset information, tax records which should identify all of the decedent's financial accounts and enable him to obtain the demanded statements. Counsel urges that the proponent's failure to adhere to the September 29, 2020 discovery order, to produce the attorney drafter and two attesting witnesses for examination and provide the requested documents warrant dismissal of the probate petition.

Counsel continues that the decedent's will was executed one week prior to the decedent's death in a nursing home where he was administered OxyContin and Fentanyl, two powerful painkillers, and his

devising property that he no longer possessed clearly demonstrates that the decedent lacked testamentary capacity. Counsel concludes that the summary judgment motion is baseless, it is the proponent who did not comply with multiple discovery orders, and sanctions are appropriate.

In further opposition to summary judgment and in support of the cross-motion, the objectant annexes, inter alia, numerous e-mails requesting that the proponent respond to discovery demands, as well as copies of a deed dated August 9, 2007 transferring title to property in Deposit, New York from the decedent to the two sons and progress notes of staff at the Hebrew Home at Riverdale (the Hebrew Home) from September 1, 2019 to September 26, 2019 concerning the decedent's mental and physical condition.

The proponent's attorney replies that there are no triable issues of fact concerning lack of testamentary capacity and undue influence. Since the execution of the decedent's will was supervised by the attorney-draftsman, a presumption of regularity arises that it was properly executed in all respects especially since the attorney-draftsman also prepared the self-proving affidavit for the two attesting witnesses. She continues that the claims of lack of testamentary capacity due to the decedent's being administered pain medication must also fail. She also notes that although the decedent was terminally ill and confused upon admission to the nursing home, his cognitive facilities quickly improved and he was lucid on the days proximate to the decedent's executing his will. In any case, the affidavits of

the attesting witnesses stating that the decedent was of sound mind and memory and competent to make a will create a presumption of testamentary capacity and constitute prima facie evidence of the facts attested to therein. Counsel continues that the decedent only conveyed a one-half interest in the Deposit, New York property to the sons. As the decedent retained the other half interest, he was aware of the extent of his real estate holdings and continued to manage the property up to shortly before his death. Accordingly, she urges that the objectant fails to submit any evidence to give rise to any material triable issue of fact, and summary judgment is appropriate.

In opposition to the cross motion seeking discovery, the proponent's attorney notes that since objections were filed, the estate is no longer obligated to pay for the examination costs and was never obligated to produce the third party witnesses, as this is contrary to case law (see *Matter of Westover*, 145 Misc 2d 469 [Sur Ct, Fulton County 1989]). The objectant could have easily subpoenaed the attesting witnesses, all of whom are located in New York. Counsel also forwarded the requested HIPAA releases and provided whatever medical records were in her possession. She was under no duty to gather the decedent's records from all sources. Although the objectant had months to serve subpoenas for whatever records he desired, the SCPA 1404 examinations have not been held. Counsel concludes that this dilatory conduct has delayed probate of a valid will and no further discovery should be authorized.

Summary judgment cannot be granted unless it clearly appears that no material issues of fact exist (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]; *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The movants must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs. Inc.*, 46 NY2d 1065 [1979]). When the movants have made out a prima facie case, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined on the motion but must await the trial (see *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

In a contested probate proceeding, summary judgment is appropriate where a petitioner establishes a prima facie case for probate and the objectant fails to raise a triable issue of fact concerning the viability of the will (see *Matter of Sabatelli*, 161 AD3d 872 ; *Matter of Moskowitz*, 116 AD3d 958 [2d Dept 2014]). The proponent of a will has the burden of proving that the propounded instrument was duly executed in conformance with statutory requirements (see EPTL 3.21 [a]; *Matter of Schmidt*, 194 AD3d 723). Where

the will is drafted by an attorney and the drafting attorney supervises the will execution, there is a presumption of regularity that the will was properly executed in all respects (see Matter of Sabitelli, 161 AD3d at 874). Where the propounded will is accompanied by an attestation clause and a self-proving affidavit, a presumption of compliance with the statutory requirements arises (see Matter of Miele, 113 AD3d 858, 860). Additionally, the proponent of a will bears the initial burden of establishing that the decedent understood the nature and consequences of making the will, the nature and extent of his or her property, and the natural objects of his or her bounty (see Matter of Kumstar, 66 NY2d 691, 692; Matter of Falkowsky, (2d Dept. 2021]).

Appended to the objectant's opposition/cross petition as Exhibit "G" are the treatment notes concerning the decedent while he was an inpatient at Hebrew Home in the Bronx. On September 7, 2019 Michael Goldstein, M.D. states that the decedent was admitted on August 29, 2019 after his discharge from Montefiore New Rochelle Hospital, where he was treated for abdominal pain, renal cell carcinoma, post chemotherapy, hypertension, atrial fibrillation, COPD and obstructive sleep apnea. Dr. Goldstein also details a long history of depression, medications and psychotherapy with cancer diagnosis and treatment and that the decedent was sad and scared with significant fluctuation in mental status. "I am in pain, a lot, I can't sleep and I get confused." He also finds that the decedent had mild memory impairment, (he) knew the year, month and Hebrew Home

but very poor attention span. The physician also checks off boxes indicating dementia, confusion, anxiety, and poor sleep and indicated that a drop in blood pressure may be caused by the pain medication which may also contribute to confusion. The physician recommended adjusting pain medications and psychotherapy because poorly controlled pain increases delirium, more so than pain medication.

On September 9, 2019 the decedent was noted by Susan Thomas, a registered staff nurse, to be more alert but appeared weak, observed lying in urine, complaining of pain and that he does not want to be bothered. On September 11, 2019, registered nurse Taylor O'Neill found the decedent alert and responsive. On September 16, 2019 Molly Little MSW, the respondent's care manager, noted that a family meeting was held and it was recommended that the decedent be referred to a hospice facility. Susan Thomas, R.N. notes that the physician ordered OxyContin every 12 hours, same given, and that the respondent continues to resist care and at times resists taking medication, needs assurance, support and reality orientation. The note entry of Resmi Sulekha M.D. for September 16, 2019 indicates that the decedent had on and off mental status and was referred for a psychiatry/psychology consultation. He also noted that the decedent continues to have pain and appears sleepy.

On September 17, 2019, the day the will and power of attorney were executed, Dr. Goldstein notes that aggressive behavioral and mood/anxiety symptoms persist with insomnia and, although the decedent

was oriented as to place and time, his attention, concentration, insight, and judgment were impaired. The decedent also had neuropsych spatial impairment, general anxiety disorder, vascular dementia with depression. A 9:55 p.m. nurse's note entry on that date by Angelique Sewell, R.N. states that "patient alert and oriented, refused his 9 pm medications including Oxycodone. Patient states that medication makes him hallucinate. . . ."

On September 19, 2019 Sidikat Bishi, RN states that the decedent had a sad affect, verbal aggression, resisted care, appeared calm and relaxed body posture. A followup medical note from Resmi Sulekha, M.D. on September 20, 2019 notes depression, admitted from hospital for progressive and pain with decrease in appetite, CT shows diffuse liver lesions, renal mass, lesion on medial left 12th rib, patient has on and off mental status but has lucid moments "where patient can hold conversations." RN Nurse Kondos notes on September 20, 2019 that "decedent had significant weight loss since time of admission, 21 pounds, was placed on palliative care measures, alert and responsive to all stimuli, with severe back pain and upon standing, OxyContin and Oxycodone given with small effect. started OxyContin 10 mg every 12 hours, continued Oxycodone 10 mg every 4 hours. Mental status weaning [sic] on and off."

Given that discovery is incomplete, SCPA 1404 examinations have not been held, and, although a self-proving affidavit is appended to the propounded instrument, the decedent's signatures on the will and other documents signed on that date are illegible, that the notes of the nursing

staff and several treating physicians demonstrate that the decedent was in a very deteriorated physical condition proximate to the date of the will signing on September 17, 2019, with significant weight loss, dementia, lack of appetite, depression, exhibited mood and anxiety symptoms and on and off waning mental status, and that he was administered Oxycodone and OxyContin, which the decedent stated made him hallucinate, significant issues of fact exist concerning testamentary capacity, Additionally, it is premature to assess the objections concerning due execution, fraud and undue influence given the paucity of document production by the proponent and there are no SCPA 1404 transcripts.

The court advised the parties, including the objectant who at the time proceeded pro se, that the September 29, 2020 stipulation was to be “so-ordered” and binding upon both of them in all respects whether they proceeded pro se or by counsel, and it could only be changed by further order of the court. Notwithstanding that the respondent’s objections were served and filed at the twelfth hour, the objectant’s attorney demonstrates multiple unanswered requests to counsel for the proponent seeking production of documents and of the attesting witnesses for examination. Although it is possible that the drafting attorney and attesting witnesses, who are not associated with counsel for the proponent, may refuse to appear for examination absent a judicial subpoena, counsel for the proponent must first indicate specific attempts to secure their testimony because the proponent is in fact responsible for the witnesses’ production (see SCPA 1404; Matter

of Kearney, NYLJ, Oct. 7, 2009 at 33, col 6 [Sur Ct, Kings County 2009]; Matter of Westover, 145 Misc2d at 469). If those attempts are unsuccessful, she is to promptly notify the objectant's attorney, who may subpoena the witnesses upon notice to proponent's counsel, with the costs of production to be paid by the estate. It is also incredible that the proponent, who allegedly had a bread route with the decedent, held a power of attorney and health care proxy and was awarded preliminary letters testamentary, does not possess or cannot obtain the demanded documents.

Accordingly, the proponent's summary judgment motion is denied in all respects, without prejudice to refiling upon completion of the SCPA 1404 examinations and/or demonstration of lack of prosecution by the objectant. The objectant's cross motion seeking compliance with discovery is granted to the extent that the objectant shall serve supplemental discovery demands upon the proponent detailing what production is outstanding on or before December 20, 2021; the proponent shall serve responses including proper authorizations to obtain documents upon showing that same are not in the proponent's custody or control on or before January 20, 2022; the SCPA 1404 examinations are to be completed on or before April 1, 2022; any requests for further production during the examinations are also to be served as written demands for additional production; and, although objections were filed, good cause having been shown, the estate is to pay for the costs of the examinations of two attesting witnesses (see SCPA 1404 [5]). The SCPA examinations are to take place in Courtroom 406 upon

arrangement with the Chief Clerk or at another location or manner upon agreement of the parties. The objectant's request for counsel fees, sanctions and costs is denied at this time, without prejudice to bringing a similar application in the accounting or other appropriate proceeding and establishing facts and citing authority that such request is not governed by the usual rule that the prevailing party cannot obtain counsel fees from the other party.

The Chief Clerk is to mail a copy of this decision, which constitutes the order of the court, to counsel.

Proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE