

Matter of Ingberman
2022 NY Slip Op 32195(U)
July 7, 2022
Surrogate's Court, New York County
Docket Number: File No. 2007-0879/B
Judge: Rita Mella
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New York County Surrogate's Court
DATA ENTRY
Date July 7th 2022

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Proceeding to Settle the Account of Israel Ingberman as
Sole Surviving Executor of the Will of

HELEN INGBERMAN,

Deceased.

-----X

M E L L A, S.:

DECISION
File No.: 2007-0879/B

The court considered the following submissions in determining the instant motion for leave to amend a pleading:

	<u>Date Filed</u>
1. Objectant's notice of motion	November 24, 2021
2. Affirmation of Mary D. Dorman, Esq., in support, with exhibits	November 24, 2021
3. Affirmation of Thomas A. Brown, II, Esq. in opposition, with exhibits	January 26, 2022
4. Petitioner's memorandum of law in opposition	January 26, 2022
5. Objectant's reply memorandum of law	February 18, 2022
6. Mary D. Dorman, Esq.'s, reply affirmation in support, with exhibits	February 18, 2022

On the proverbial eve of trial in the proceeding to settle the account of Israel Ingberman as sole surviving executor of the will of Helen Ingberman, Objectant Francisco Colon, administrator of the estate of Jeanette Ingberman, has moved for an order: (1) permitting him to amend his (second amended) objections — thus enabling him to allege that Schedule A of the account is incomplete — (*see* CPLR 3025 [b]);¹ and (2) compelling Petitioner to produce decedent's financial records, including personal income tax returns of decedent, for the three years prior to decedent's death. The belatedness of the motion warrants a presentation of a focused chronology.

¹ Objectant's proposed amendment reads:

“Objects to Schedule A in that it does not report fully all of the assets owned by the Decedent as of her date of death. The Decedent earned income averaging \$800,000 per year, yet the Account reports that the only financial assets reported as being owned by Decedent on her death amounted to \$24,000.”

Background

Decedent died on September 3, 2006. On March 20, 2007, letters testamentary issued to decedent's two children: Jeanette Ingberman, who died on August 24, 2011, and Petitioner.

On October 10, 2012, Petitioner filed his account as sole surviving executor and a petition for its settlement. Schedule A of the account reflects the following assets: cash or cash equivalents of \$23,954.29; stocks valued at \$7,746; tangibles valued at \$2,500; minority interests in each of four limited liability companies ("LLCs"), collectively valued at \$3,177,000; and a note, receivable from one of the LLCs, with a face amount of \$70,000. Schedule A reflects a total value of \$3,281,200.29

On May 29, 2014, Francisco Colon, as Administrator of the estate of post-deceased residuary beneficiary Jeanette Ingberman, filed objections to the account.

Schedule E of the account reflected a September 1, 2009 distribution of Jeanette Ingberman's share of decedent's interests in the LLCs to Petitioner, individually. On July 15, 2015, this court denied Objectant's motion for summary determination that this distribution was unsupported by any cognizable basis and, accordingly, invalid.

On March 31, 2017, Objectant filed amended objections.

On June 21, 2017, Objectant deposed Petitioner. During the deposition, counsel for Objectant questioned Petitioner regarding the last year or two of decedent's life: decedent's health (decedent had dementia and had an around-the-clock aide), decedent's reliance on Petitioner to handle her financial affairs, the income generated by decedent's interests in LLCs, and decedent's living expenses.²

² Select portions of the June 21, 2017 transcript read, as follows:

By letter dated August 23, 2017, Objectant asked Petitioner to produce decedent's financial records from the last three years of her life. Thereafter, Objectant reiterated that request. All such requests were unavailing.

On November 2, 2017, the court conducted a conference during which Objectant, noting the disparity between the annual income generated by the estate's interests in the LLCs (\$800,000) and the liquid assets in decedent's estate on her date of death (\$35,000) requested decedent's personal income tax returns for the last three years of her life. Again, Petitioner refused to disclose them. At that point — more than four-and-a-half years ago — Objectant's remedy was clear. Objectant could have filed a motion. With the exception of the instant motion, however, no discovery motion was filed.

On April 10, 2018, Objectant filed second amended objections. Of the sixteen specified objections, only one pertained to Schedule A. Objectant alleged that the inclusion on Schedule

“Q: Would it be fair to say that [decedent] relied on you to help her with her affairs the last year of her life, her business affairs?

“A: Yes.

* * *

“Q: I believe your testimony was that your mother earned from these business entities a few hundred thousand a year?

“A: Yes.

* * *

“Q: You testified that her expenses were a few thousand a month.

“A: Yes.”

(Ingberman Dep, June 21, 2017, at 27, ll 4 *et seq*; and 73, ll 2 *et seq* and ll 19 *et seq*)

A of five bank accounts, having a total value of \$23,954.29, was inappropriate, on the basis that, at the time of her death, those accounts were held jointly with Jeanette Ingberman.

On January 8, 2020, this court granted Objectant's motion for partial summary determination on the issue of whether Jeanette Ingberman had made a gift of her share of decedent's interests in the LLCs to Petitioner, individually.

On May 4, 2021, the Appellate Division reversed that decision and denied the motion.

By letter dated May 13, 2021, Objectant's counsel, noting the May 4, 2021 decision, asked the court to schedule a "pre-trial conference in anticipation of scheduling this matter for trial."

During a June 3, 2021 conference call with the court, Petitioner confirmed his agreement that the accounting was ready for trial.

By thus stating that the accounting was ready for trial, counsel implicitly, if not explicitly, represented to the court that discovery was complete.

On June 10, 2021, the court issued a Pretrial Order.

On August 18, 2021, in accordance with a request from counsel, the court issued an Amended Pretrial Order.

On August 23, 2021, Objectant served upon Petitioner a Third Request for Document Production, requesting "all cancelled checks, check registers and bank statements for Helen Ingberman for the three years prior to her date of death" as well as decedent's personal income tax returns for the last three years of her life, which demand Petitioner rejected.

On October 28, 2021, Objectant sent an email to the court, on Petitioner's consent, requesting an adjournment of certain deadlines, explaining that Objectant's counsel was to be out of the country on the date set for the pretrial conference, and that "Petitioner's counsel

wishes to depose Susan Porter, Esq., the Objectant's expert witness, and cannot file his Note of Issue until that deposition has been completed. Ms. Porter is scheduled to be deposed the week of January 17, 2022."

On November 3, 2021, the court issued a Second Amended Pretrial Order, setting a January 26, 2022 deadline for the filing of a note of issue by Petitioner and scheduling a February 9, 2022 pretrial conference.

On November 24, 2021, however, Objectant filed the instant motion. As a result, Petitioner did not file a note of issue.

Instant Motion

Objectant contends the motion is timely.

First, Objectant argues that it was only while preparing for trial "that the need for the within motion became evident." Specifically: "Objectant retained Susan Porter, Esq., an expert in fiduciary accounting, to appear as an expert witness at trial. Ms. Porter requested, among other documents, the bank statements and personal income tax returns of the Decedent as material and necessary for her review of the Account, at which point we explained that we had not been able to get them from Petitioner, despite repeated requests."

That argument lacks consistency: On the one hand, it was only after the court had issued a Pretrial Order that Objectant recognized the relevance of decedent's financial records; on the other hand, Objectant had begun requesting those records years earlier. More straightforward is Objectant's statement: "[S]ight was lost on the non-LLC related discovery items It was during the preparation for the pretrial conference that the issue resurfaced."

Another argument is: “Discovery was stayed from the time Objectant filed his second motion for partial summary judgment on February 14, 2018, and the time this Court rendered its decision granting the motion on January 8, 2020. Thereafter, discovery was further stayed pending Petitioner’s appeal of this Court’s January 8, 2020 decision, which was reversed by the Appellate Court by decision dated May 4, 2021. This Court issued its Pretrial Order on June 10, 2021, and Objectant renewed his earlier discovery demands on August 23, 2021, hardly an inordinate delay.”

Schedule A of Petitioner’s account has remained unchanged since it was filed on October 10, 2012, almost a decade ago. The disparity Objectant notes, in light of decedent’s expenditures, between decedent’s income and assets was patent when Objectant deposed Petitioner, five years ago. Nevertheless, it was only after Objectant (along with Petitioner) had asked the court to issue a pretrial order — and two ensuing amendments — that Objectant sought leave to amend his objections to Schedule A.

Finally, Objectant argues that there had been an understanding that the trial was to be bifurcated. Nothing in the record, however, supports that understanding.

The onus is on Objectant to demonstrate any omission from the account (*see Matter of Rudin*, 34 AD3d 371, 372 [1st Dept 2006]); Objectant’s apparent attempt to shift that burden is unavailing.³

The Court of Appeals has stated:

“As a general rule, ‘leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court’ (*Pink v Ricci*, 100 AD3d 1446, 1448 [4th Dept 2012] [internal quotation marks

³ Objectant argues, for instance: “Petitioner should welcome the opportunity to dispel the issues that have been raised.”

omitted]; see CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]).”

Davis v South Nassau Communities Hosp., 26 NY3d 563, 580 (2015).

More specifically, the Appellate Division has ruled:

“[W]hile leave to amend is, in the absence of prejudice or surprise to the opposing party, generally freely given, in view of appellant’s utter failure to offer a reasonable excuse for its long delay in seeking amendment, the denial of its motion to amend constituted a proper exercise of discretion.”

Inwood Tower Inc. v Fireman’s Fund Ins. Co., 290 AD2d 252, 252-253 (1st Dept 2002).

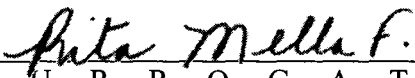
Here, Objectant has failed to offer a reasonable excuse for his protracted delay in seeking leave to amend the objections. Accordingly, his motion for such leave is denied as untimely.

Similarly, Objectant’s motion for additional discovery is denied. For years, Objectant has been aware of Petitioner’s refusal to produce certain financial records of decedent which, Objectant contends, would have enabled him to evaluate the completeness of Schedule A. Yet, he failed to move for an order compelling their production and, instead, represented to the court repeatedly that discovery in the accounting was complete. Objectant has simply failed to provide an excuse for his delay in moving to compel the discovery he asks the court to order now when the case is ready for trial.

This decision constitutes the order of the court.

Clerk to notify.

Dated: July 7, 2022


S U R R O G A T E