

Matter of Klein

2023 NY Slip Op 31660(U)

May 11, 2023

Surrogate's Court, New York County

Docket Number: File No. 2020-4162

Judge: Hilary Gingold

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.

New York County Surrogate's Court
DATA ENTRY
May 11th 2023

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

-----X
In the Matter of a Proceeding for Probate
in the Estate of

GAIL R. KLEIN,

Deceased.

File No. 2020-4162

-----X
G I N G O L D, S .

Nancy Hall Sugg and Michael L. Tanchum as preliminary executors of the will of Gail R. Klein (hereinafter "proponents"), move, seeking an order pursuant to CPLR 3212, granting summary judgment on their probate petition and further, dismissing the objections of Fred Klein (hereinafter "objectant"), as well as seeking an award of costs from objectant for the fees incurred opposing his objections. Objectant, the brother and sole distribute of Gail R. Klein (hereinafter "decedent") opposes the motion.

The following papers numbered through were read:

	<u>Papers Numbered</u>
Notice of Motion – Affidavit - Affirmation – Exhibits	1-4
Memorandum of Law	5
Affidavits of Service	6
Opposition Affidavit - Affirmation – Exhibits	7-9
Memorandum of Law	10
Affidavits of Service	11
Reply Affirmation – Exhibits	12-13

Memorandum of Law	14
Affidavits of Service	15
Petition for Probate – Will	16 - 17
Affidavits of Service	18
Verified Objections to Probate	19

Decedent died on August 24, 2020 and proponents seek to probate her May 17, 1989 will (hereinafter “will”). Pursuant to the will, if probated, decedent’s entire estate will pass to her friend, Nancey C. Hall, one of the two proponents. Article Fifth of the will states that decedent loves her parents Jack Klien and Grace Klien and her brother Fred Charles Klein and his family but they are intentionally being excluded in favor of decedent’s “true family, Nancy C. Hall and Lisabeth Yaffe (who predeceased decedent). The will was drafted by Michael L. Tanchum, Esq. Attorney Tanchum supervised the execution of the will and acted as the notary on the affidavit of witnesses. The will was executed in a law firm and each of the three witnesses worked for the firm.

On February 17, 2022, Michael L. Tanchum and witness Richard Eisenberg were deposed. The other two witnesses, Julie Nolletti and Nicholas Friedman, were deposed on February 22, 2022. On February 25, 2022, objectant filed his objections to the probate of the will alleging that the will was not duly executed, that decedent lack mental capacity to make a will, that the will was not freely made, that the will was procured by fraud, that the will is not the intent or wishes of decedent, and that the will was revoked. On May 24, 2022 proponents filed the instant motion and on June 16, 2022 objectant filed opposition. On July 1, 2022 proponents filed a reply and their motion was marked submitted on September 30, 2022.

Pursuant to CPLR 3212[f] summary judgment may be denied where facts essential to the opposition of the motion are exclusively within the knowledge of control of the movant and the opposing party has not had a reasonable opportunity for disclosure (*see Baron v Freeport*, 143 AD2d 792 [2d Dept 1988]). However, there must be a likelihood that the discovery will lead to admissible evidence germane to the issues (*see Marrone v Miloscio*, 44 NYS3d 502 [2d Dept 2016]).

Proponents filed their motion for summary judgment three months after objections were filed. From the record before the court, objectant failed to make any discovery demands during those three months. Nonetheless, in his opposition to proponents' motion for summary judgment, objectant states that he seeks to depose Nancy Hall, who is one of the proponents.

Nancy Hall cannot avoid being deposed in this matter through her own summary judgment motion (*see Estate of Brown*, NYLJ, May 11, 2020, at 17, col 2 [Sur Ct, Kings County 2020]; *In re Alayof*, NYLJ, June 23, 1999, at 32, col 4 [Sur Ct, Nassau County, 1999]). Moreover, considering the relatively short time between the filing of objections and the making of the instant motion, it cannot be said that objectants' failure to make formal discovery demands should deny them the opportunity to do so now (*see Estate of Noezel*, NYLJ, March 24, 2014, at 40, col 4 [Sur Ct, Nassau County 2014]).

Accordingly, based on the foregoing, it is

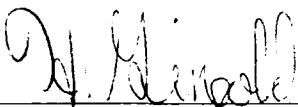
ORDERED that, the branch of proponent's motion seeking summary judgment is denied as premature; and it is further

ORDERED that, the branch of proponent's motion seeking costs is denied as moot; and it is further

ORDERED that, all parties are directed to appear in person in Courtroom 509, Surrogate's Court, New York County, 31 Chambers Street, New York, NY 10007, on Wednesday, May 31, 2023 at 11:00 am to set a discovery schedule.

The Clerk of the Court is directed to email a copy of this decision, which constitutes the order of the Court to counsel to parties at the address below.

Dated: May 11, 2023



SURROGATE

To:

Pillsbury Winthrop Shaw Pitman LLP
David G. Keyko, Esq.
Elizabeth H.W. Fry, Esq.
Avigal Goldglancz, Esq.
David.Keyko@pillsburylaw.com
Elizabeth.Fry@pillsburylaw.com
Avigal.Goldglancz@pillsburylaw.com

Certilman Balin Adler & Hyman, LLP
David I. Lieser, Esq.
Bernard Hyman, Esq.
DLieser@certilmanbalin.com
BHyman@certilmanbalin.com