

Matter of Scott

2023 NY Slip Op 31879(U)

June 1, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2020-506/B

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

JUNE 1, 2023

ESTATE OF ROBERT SCOTT, Deceased
File No.: 2020-506/B

In this contested probate proceeding, the decedent's stepdaughter seeks to probate a testamentary instrument dated December 21, 2019, under which she is the nominated executor and receives one-half of the estate. Objections were filed by the decedent's adult issue, who are not named in the propounded instrument as beneficiaries. The objectants' SCPA 1404 examination of the petitioner was suspended by agreement of the parties so that the objectants could move for an order allowing them to ask the petitioner questions about matters occurring beyond the three-year/two-year limitations of 22 NYCRR 207.27 (the "3/2 Rule"). That motion, which is opposed by the petitioner, is now before the court for decision.

At the outset, it is not clear what areas of inquiry the objectants wish to pursue that would require an expansion of the 3/2 Rule's time constraints. The notice of motion broadly states that the objectants seek "to expand the scope of discovery, including depositions beyond the 3/2 rule." The affirmation submitted in support of the motion by objectants' counsel, Sonya Latimore, Esq., suggests that the objectants request leave to ask questions about (i) an allegedly fraudulent power of attorney which was purportedly executed by the decedent on December 4, 2019, appointing the petitioner as his attorney-in fact and (ii) a certain account belonging to the decedent at the Amalgamated Bank (account number ...4321). According to the concluding paragraph of Ms. Latimore's

memorandum of law, the objectants “simply seek to inquire about circumstances that led to Mr. Scott’s execution of the Power of Attorney which could have bearing on the validity of the Will itself.” Ms. Latimore’s reply affirmation, however, also states that the objectants

...seek information about his [presumably the decedent’s] relationship with petitioner and specific assets of the decedent which were used by the petitioner and information regarding petitioner’s actions after decedent’s death including management of the estate both in her fiduciary role as preliminary executrix and in her individual capacity (Latimore Reply Aff., ¶ 15)

The reply affirmation also seems to request permission to serve a subpoena upon the New York City Police Department to examine an alleged file regarding Gary Henricksen, one of witnesses to the proffered will in this proceeding who died after the instrument’s execution (Latimore Reply Aff., ¶18).

It is not up to the court to decipher or guess what is being requested in the objectants’ motion. Moreover, the court cannot consider matters raised in a reply for the first time (see *Walmart Stores, Inc. v United States Fid. & Guar. Co.*, 11 AD3d 300 [1st Dept 2004]). Accordingly, the court will consider the instant motion only as an application to expand the 3/2 Rule to allow inquiry regarding (i) the execution and use of the allegedly fraudulent power of attorney referenced in the objectants’ moving papers (the “POA”) and (ii) transactions involving the decedent’s account at Amalgamated Bank (the “Account”).

Ordinarily, SCPA 1404 examinations are confined to the three-year period prior to the date of the propounded instrument and the two years thereafter or to the date of decedent’s death, whichever is the shorter period (22 NYCRR §207.27). While the statute refers to examinations before trial, case law has extended the three-year/two-year limitation to include all types of discovery (*Estate of Smidt*, 2022 NYLJ LEXIS 2696 [Sur

Ct, New York County 2023]).

The period of the examination and document production can be expanded upon a showing of special circumstances (*Matter of Chin*, 55 Misc3d 1092 [Sur Ct, Queens County 2017]). The determination of whether to expand the scope of discovery is within the sound discretion of the court (*Matter of Constant*, 128 AD3d 419 [1st Dept 2015]; *Matter of Duzhansky*, 153 AD 3d 819 [2d Dept 2017]).

It has been said that the three-year/two-year limitation is a pragmatic one made for the average case. It is not inflexible and has exceptions where special circumstances exist (*Matter of Kaufman*, 11 AD2d 759 [1st Dept 1960]). While special circumstances could consist of allegations of a scheme to defraud or a continuing course of conduct or undue influence, those special circumstances must also be evidenced by facts, not speculation or unsupported claims (*Matter of Partridge*, 141 Misc2d 159 [Sur Ct, Rockland County 1988]; *Matter of Chambers*, 2001 NYLJ LEXIS 4886 [Sur Ct, Suffolk County 2001]).


In her opposition to the motion, the petitioner argues that there has been no showing of special circumstances which would warrant expanding the scope of the 3/2 Rule. The court agrees that with respect to the POA, the objectants have not demonstrated special circumstances which would warrant the relief requested herein. The POA was ostensibly executed within the three years prior to the decedent's death on January 30, 2020. Although the objectants raise relevant questions regarding the execution and the validity of the POA, there is nothing in the record indicating that the POA was created, signed or used outside of the 3/2 Rule's time parameters. Absent such proof,

the motion to expand the 3/2 Rule relative to the POA is denied, without prejudice.

That part of the motion pertaining to the Account, however, is granted as set forth below. The objectants have made a sufficient showing of special circumstances, including but not limited to a check drawn on the Account that was ostensibly signed by the decedent and dated on February 3, 2020, which warrants inquiry into the petitioner's involvement with Account transactions that have, or may have occurred, after the decedent's death on January 30, 2020. The court finds that such inquiry is relevant to the objectants' claims that the proffered will in this proceeding bears a forged signature and/or was procured by fraud. Accordingly, the objectants may seek document discovery and deposition testimony from the petitioner regarding her involvement with any and all Account transactions occurring after the decedent's death.

This decision constitutes the order of the court. Petitioner's counsel is directed to serve a notice of its entry on objectants' counsel within five days from the date hereof. Counsel for the parties are directed to appear for an off-calendar discovery conference with Court Attorney-Referee John J. Hughes on June 14, 2023, at 2 p.m. or at a mutually agreeable date and time before then.

Proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE