

**Matter of Murray**

2023 NY Slip Op 32283(U)

July 3, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2018-2600/B

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

July 3 , 2023

ESTATE OF: ROBERT MURRAY, Deceased  
File No.: 2018-2600/B

In this contested probate proceeding, the decedent's brother, who was appointed preliminary executor moves by order to show cause, seeking, inter alia: (i) an order pursuant to CPLR 2304 quashing two subpoenas duces tecum, dated November 12, 2019 issued to Citibank N.A. and its subsidiary and (ii) to expedite his petition for preliminary letters testamentary and awarding the same forthwith. The decedent's step-son, who is a 1/3 testamentary beneficiary, filed opposition to the motion to quash the subpoenas issued by his attorney. The petitioner's reply documents in further support of his order to show cause requests additional relief including, inter alia, an order (i) directing decedent's step-son to produce certain discovery obtained from Citibank N.A. pursuant to the alleged improper subpoenas; (ii) precluding the step-son from being questioned in relation to these documents and materials during 1404 examinations and all hearings; and (iii) precluding the introduction of evidence in relation to any of the materials or documents obtained by way of the alleged improper subpoenas.

The decedent died on July 25, 2017 at the age of 77. His distributees are two children, Robert and Michael Murray. The propounded instrument dated March 31, 2016,

nominates the decedent's brother, Peter Murray ("Peter") as executor and the decedent's companion, Arlene Feldman Telesca, as successor executor. The brother, companion and step-son, Nicholas Fazi ("Fazi") are each one-third testamentary beneficiaries. The decedent's sons are not mentioned in the document. On the return of citation, the decedent's sons appeared pro se, and Fazi appeared by counsel and requested SCPA 1404 examinations ("1404s"). An order was signed on November 21, 2019 granting preliminary letters testamentary to Peter, limited pursuant to SCPA 702(1) in relation to any cause of action and SCPA 805(3) with regard to the sale of any real property in which the decedent had an interest. To date 1404s have not been conducted.

In support of the motion, Peter's counsel affirms that he was served with Fazi's Notice of Discovery and discovery demands in relation to 1404's as well as two non-party subpoenas duces tecum ("the subpoenas"), dated November 12, 2019, upon Citibank, N.A. and Citibank Private Wealth Management (together "Citibank") requesting, inter alia: "any and all documents relating to [any accounts held by the [D]ecedent], including but not limited to, account statements. . . 1099s, cancelled checks for any and all transactions, deposit tickets and deposited items, ATM deposit[s]" for the time period of 3/31/2013-7/25/2017. He avers that the subpoenas should be quashed, inter alia, because they are overly broad and were not returnable at the Surrogate Court Offices. He argues that Fazi is seeking private financial information of the decedent, to which he has no entitlement to, as he is not a distributee, has no authority to act on behalf of the estate and did not apply for limited letters of administration or request authorizations from an estate representative to obtain such sensitive information. Counsel urges that these documents are highly sensitive and

federally-protected. He further argues that the only standing conferred to Fazi, as a beneficiary under the will, is that of conducting 1404 examinations and filing objections to the instrument, and should he do so he would lack standing to object to the distribution of estate assets and would not be entitled to the discovery requested herein.

Peter's counsel continues that pursuant to SCPA 1404, pre-objection discovery is limited to documents and information that is material and necessary to determining the validity of, and objections to the probate of the propounded instrument (*Estate of Irene E. Powers*, 2001 NYLJ LEXIS 3842 [Sur Ct, Westchester County 2001]; *Matter of Elyachar*, 2014-1336, NYLJ 120279788918, at 1 (Sur Ct, Westchester County 2015); *Matter of DeWitt*, NYLJ, Feb. 5, 1999, at 27 [Sur Ct, Westchester County 1999]). The valid grounds for contesting a will are limited to undue influence, improper execution, duress, lack of testamentary capacity, fraud and forgery, among a few others (*Matter of Falk*, 47 AD3d at 26 [1<sup>st</sup> Dept 2007]). He contends that the materials sought herein have no bearing on the validity of the will, have no dispositive value on any of the aforementioned bases for potential objections, and are not assets of this estate. He further states that it should be noted that when a propounded instrument is attorney drafted and supervised, as is the case here, there is "a presumption of regularity and validity" (see EPTL 3-2.1; *Matter of Halpern*, 76 AD3d 2010 Slip Op. 4631 [1<sup>st</sup> Dept 2010], *aff'd*, 16 NY3d 777 [2001]; *Matter of Falk*, 47 AD2d at 26; *Matter of Leach*, 3 AD3d 763, 764 [3d Dept 2004]). He urges that the attempt to obtain these sensitive materials is a fishing expedition or, at best, premature as Fazi has not yet filed

objections or conducted 1404 examinations to determine the validity of the will.

Moreover, he argues that to the extent that Fazi seeks to bring assets back into the estate, a turnover proceeding pursuant to SCPA 2103, is the appropriate way to effect the requested discovery. He states that SCPA 2103 was specifically enacted for the purposes of examining witnesses regarding estate assets and/or compelling the turnover thereof, and urges that this is the appropriate method in this instance.

Counsel argues that the subpoenas must be quashed because they are procedurally defective. They were not served pursuant to CPLR 2303 or a substituted service method prescribed in CPLR 308, no affidavits of service were filed with the court or served upon counsel, and no proofs of service were filed with the court showing personal or substituted service upon Citibank headquarters in North Dakota (see CPLR 2303 & 308). Further, even if Fazi can provide proof of proper service the subpoenas are defective on their face as the subpoenas do not comply with CPLR 3101(a)(4), which requires that any disclosure demand served upon a non-party contain a notice stating the circumstances or reasons such disclosure is sought or required. The subpoenas herein do not contain such statement and only set forth the material demanded and the punishment for failing to comply therewith. He urges that this statement is more than a mere procedural hurdle, it is a vital notice because it gives subpoena recipients “sufficient information to challenge the subpoenas on a motion to quash” (*Matter of Kapon v Koch*, 23 NY3d 32 [2014]). In addition to the request to quash the subpoenas, counsel requests that preliminary letters testamentary issue to his client, and for other such relief the court deems just and proper.

Fazi's counsel filed partial opposition to the order to show cause stating that it is unclear whether or not the decedent had capacity to execute his will. Upon information and belief, Peter may have accompanied the decedent to the will execution and may have influenced the decedent to execute the same. She states that the decedent told Fazi he was to be the executor of his estate and he was surprised to hear that Peter was nominated executor. As such, her client is a potential objectant and entitled to discovery (see SCPA 1404). She avers that the first demand for Discovery and Inspection ("demand") was served upon Peter's counsel, Gary Basso, Esq. ("Basso") on April 23, 2019, annexed, and alleges that Peter failed to produce any documents requested. She also submits a copy of correspondence sent to Basso on November 12, 2019 inquiring about the served demands and received no response. Due diligence having revealed an additional account at Citibank counsel served subpoenas on Citibank on November 12, 2019 requesting the production of all applicable account statements for the relevant time period. She continues that all parties were served notice of the subpoenas and provides copies of the subpoenas and affidavits of service. She also argues that there is no requirement that subpoenas be filed with the court.

Counsel avers that as a legatee, Fazi has standing to object to the appointment of a fiduciary named in the will even if his or her interest is not otherwise adversely affected by the instrument. She urges that as a beneficiary to the will and an interested party in the proceeding Fazi has standing to object to portions of the will and to seek 1404s. She states further that a party conducting 1404s is entitled to rights granted under CPLR Article 31 with respect to document discovery (see, e.g., *In re*

*Remini*, NYLJ, Jan. 4, 2008, at 44; 2008 NY Misc. LEXIS 296 [Sur Ct, Richmond County 2008]), limited pursuant to 22 NYCRR 207.27 in relation to examination periods and limited to that which is “material and necessary” (CPLR 3101[a]), a determination left to the discretion of the Surrogate. She states that full discovery, including serving third-party subpoenas, is often conducted prior to examinations. She notes that the discovery demands served remains unanswered and states that all interested parties were served with the subpoena. She reiterates that the requested Citibank documents are necessary and material to the instant matter to understand the amount and type of estate assets and to oppose the appointment of Peter as executor. Moreover, she urges there is indication that Peter may have forced the decedent to change beneficiaries of certain accounts in or around the date of the signing of the will and the information produced by Citibank would have a direct bearing on Peter’s qualifications to receive letters (SCPA 707[e]). She avers that while the alleged change of beneficiaries could be the subject of a turnover proceeding, it is not the exclusive remedy by which Fazi may obtain the requested information. She concludes that Fazi has no opposition to the issuance of preliminary letters testamentary to Peter for the sole purpose of signing HIPPA authorizations for the parties to obtain the decedent’s medical records, which are needed to commence SCPA 1404 examinations. Accordingly, counsel requests that the court deny petitioner’s request to quash the subpoenas and issue preliminary letters testamentary to Peter Murray limited as stated.

In reply and further support of Peter’s motion, counsel notes that Fazi’s attorney informed him that one or more of the subpoenaed entities has at least partially complied with Fazi’s requests for documents and information. As to the outstanding

production concerning the subject subpoenas or portions thereof, his client's position remains the same and urges that the subpoenas should be quashed. He reiterates that the subpoenas are procedurally defective and unenforceable, noting that Fazi's counsel did not dispute the defect. Moreover, the proof of service provided, a [fax] to Citibank is not sufficient to meet the heightened service standards of CPLR 2303 (see also CPLR 308), and for this reason alone the court should grant the motion. He emphasizes the importance of the notice requirement pursuant to CPLR 3101 (a)(4) and the New York State Court of Appeals decision which held it is a vital notice because it gives . . . "sufficient information to challenge the subpoena on a motion to quash" (see *Matter of Kapon v Koch*, 23 NY3d 32 [2014]), noting again such notice was not provided to the subpoena recipients herein.

Counsel urges that the documents and information sought have no bearing on the validity of the will and that Fazi's counsel fails to effectively rebut the longstanding rule that pre-objection discovery is limited to documents and information that is material and necessary to determining the validity of and objections to the probate of, the propounded instrument (*Estate of Irene E. Powers*, 2001 NYLJ 3842 [Sur Ct, Westchester County 2001]; *Matter of Elyachar*, NYLJ 1202729788918 [Sur Ct, Westchester County 2015]; *Matter of DeWitt*, NYLJ, Feb. 5, 1999 at 27 [Sur Ct, Westchester County 1999]). He reiterates that the materials sought herein have no relevance in support of any of the valid grounds for contesting a will as enumerated in the *Matter of Faulk* (47 AD3d at 26 [1<sup>st</sup> Dept 2007]). Accordingly, he urges that the court should disregard Fazi's counsel's allegation that Peter improperly caused decedent to

change beneficiaries on a retirement account, as the assertion is not supported by an affidavit from Fazi, fails to state the basis of counsel's belief of same and is an unsupported attempt to demonstrate that information obtained from the subpoenaed Citibank documents will prove undue influence or fraud by Peter and are relevant to the issue of the validity of the will.

Moreover, Fazi's alleged objections to Peter's appointment as fiduciary is an attempt to broaden the scope of discovery. Counsel urges that Fazi's new assertion of his intent to object to his client's appointment pursuant to SCPA 709 is an attempt to circumvent the fact that he lacks standing to prosecute 1410 objections since he is not a [will beneficiary] or heir-at-law. Moreover, he argues that any attempt to file objections pursuant to SCPA 709 is untimely, noting that such objections must be made prior to letters be granted; preliminary letters testamentary issued to his client on November 21, 2019, and urges that this argument should be disregarded in its entirety. Further, Fazi fails to set forth any legal objections to the appointment of Peter which would support the filing of objections pursuant to SCPA 709 (see SCPA 707 & 709). An intent to pursue SCPA 709 objections, does not entitle him to pre-objection 1404 examinations of Peter or any other parties. Examinations under SCPA 1404 allows for examination of . . . persons. . . for purposes of determining whether the respondent has a valid basis for objecting to the validity of the will. Fazi also fails to offer any legal authority to support that he is entitled to any pre-objection discovery under SCPA 709, or if entitled to discovery, that the scope is broader than that [prescribed by] *Estate of Irene E. Powers, Matter of Elyachar, Matter of Dewitt, supra*.

He requests the court quash the subpoenas and additionally, to the extent

that any materials were already furnished to Fazi or his attorneys in reply to the [improper] subpoenas, the court should further issue an order: i) directing Fazi and his counsel to produce all such materials and correspondence to the undersigned for discovery and inspection; ii) to protect Peter Murray from examination, under SCPA 1404 or otherwise, on issues of the Citibank accounts, or documents and information provided by the Citibank in response to the [improper] subpoenas; and iii) to preclude Fazi from introducing as evidence, any documents or information obtained by way of improper subpoenas.

The instant motion to quash the subpoenas in this matter relates to the scope of pre-objection discovery in relation to SCPA 1404 examinations. There are no objections pursuant to SCPA 709 before the court at this time, and the arguments related to such are not relevant to the instant motion. Accordingly, the court will not consider these arguments in rendering its decision.

The party conducting the 1404 examination is entitled to utilize the provisions of CPLR Article 31 to obtain document discovery. Under Article 31 a party is authorized to serve a subpoena duces tecum upon any person directing the production of designated documents for discovery and inspection, upon notice and without leave of the court (see CPLR 3120 [1] & 3102 [b]). At the same time that the subpoena is served upon a non-party, it must also be served upon all other parties (see CPLR 3120 [1] & [3]). Any disclosure demand served upon a non-party [shall] contain a notice stating the circumstances or reasons such disclosure is sought or required (CPLR 3101[a][4]) and must be served at least 20 days before the return date (CPLR 3120[2]) in a manner pursuant to CPLR 2303 or pursuant to a substituted service method prescribed in

CPLR 308.

Pursuant to SCPA 1404 (4), any party to the proceeding, before or after the filing objections to the probate of the will, may examine any or all attesting witnesses, the person who prepared the will, the nominated executors in the will and the proponents may be examined as to all relevant matters which may be the basis of objections to the probate of the propounded instrument. The scope of discovery in relation to SCPA 1404 examinations encompass any area that might support any permissible objection to probate (see SCPA 1404; *Matter of Ettinger*, 7 Misc 3d 316 [2005]; *In re Estate of Roth*, 7 Misc.3d 1010(A) [Sur Ct, Bronx County 2005]). This liberal disclosure is not only to ascertain the merit of any possible objection, but also because an examining party is not given another opportunity to examine 1404 witnesses without court order, which is lightly granted (see SCPA 1404[4]; *Matter of Ettinger*, 7 Misc 3d 316 [2005]; *In re Estate of Roth*, 7 Misc 3d 1010(A) [Sur Ct, Bronx County 2005]). While the court has “broad discretion” to determine the relevance of discovery, the discovery sought must be relevant to objections that may be asserted (see *Matter of Ettinger*, 7 Misc 3d 316 [2005]; *Matter of Delisle*, 149 AD2d 793 [3d Dept 1989]). Further, the discovery sought must comply with the applicable time limitations; a three-year period prior to the date of the propounded instrument and two years thereafter, or the date of the decedent’s death, whichever is shorter (22 NYCRR 207.27).

In the instant matter, the subpoenas in question were improperly served and facially defective (see CPLR Article 31). Although the subpoenas may be served

without leave of the court, they must be properly served upon all parties (see CPLR 2303 & CPLR 308). A review of the record shows that the subpoenas served upon Citibank was sent via facsimile. There is no "Order of Substituted Service" signed by the court directing such alternate service, nor is there an affidavit of service filed with the court providing proof of service upon all parties. Further, any disclosure demand served upon a non-party [shall] contain a notice stating the circumstances or reasons such disclosure is sought or required (CPLR 3101[a][4]). The notice requirement in CPLR 3101(a)(4) obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, "the circumstances or reasons such disclosure is sought or required." The subpoenaing party must include that information in the notice in the first instance (*Kapon v Koch*, 23 NY3d 32, 39 [2014]). The subpoenas served upon Citibank do not contain the required notice nor is there any indication that the required notice addressing the circumstances or reasons for the disclosure requested was served upon them. While this defect can be cured by reserving the subpoenas with the requisite notice, that was not done in this instance (see *Olson v Glencore, Ltd.*, 70 Misc 3d 1219(A) [ Sup Ct, NY County 2021]; see also *Velez v Hunts Point Mult-Serv. Ctr. Inc.*, 29 AD3d 104 [1<sup>st</sup> Dept 2006]). As required, the notice is not on the face of the subpoena and was not found throughout the document, nor was the required notice served upon the subpoenaed non-party in a separate document, nor is there proof that a copy of the pleadings were served upon the non-party to cure the defect (*Kapon v Koch*, 23 NY3d 32, 39 [2014]). For these reasons, the court would grant the motion to quash the subpoenas.

Under the circumstances, however, given that the requested documents have been produced, at least in part, the court will rule on the scope of discovery, whether or not a protective order should issue as requested by Peter, and whether the documents produced should be precluded from being introduced as evidence at a future trial.

As a beneficiary under the will, Fazi is a party to the proceeding and thereby has standing to conduct 1404 examinations (SCPA 1404). It appears that Fazi wants to explore any transactions that took place between the period of March 31, 2013-July 25,2017, which might support objections alleging either a lack of capacity, undue influence or both. Fazi states that the decedent had a brain tumor and also indicates that the decedent previously intimated to him that he would be the nominated executor in his will. Under these circumstances, the bank records may be relevant in proving such objections (see *In re Estate of Roth*, 7 Misc 3d 1010(A) [Sur Ct, Bronx County 2005]; [holding that information regarding joint accounts of the decedent and spouse and decedent's tax returns are directly related to objections that may be filed and discoverable in connection with 1404 examinations]). Moreover, the period of time for which the documents are requested is within the applicable period for which documents are discoverable (22 NYCRR 207.27).

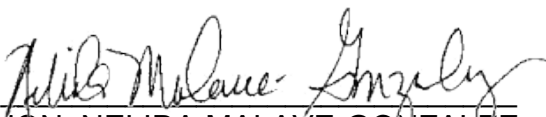
A protective order may be issued to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" (CPLR 3103 [a]). The party seeking the protective order must make a factual showing to be entitled to such relief (*Hartheimer v Clipper*, 288 AD2d 263 [2d Dept 2001]). Essentially, the court must balance the preference for allowing discovery against the other parties' rights to be free

from unreasonable annoyance or other prejudice (see *Matter of Ettinger*, 7 Misc 3d 316 [2005]). Peter argues that the documents requested are private and federally protected. However, the documents requested will only be seen by parties to the action and are allowable after the commencement of a proceeding (see CPLR Article 3120). As such, the court denies the request for a protective order.

Accordingly, the motion is granted in part and denied in part. The motion is denied to the extent that a protective order shall not issue and the court will not preclude the documents from being entered as evidence. The motion is granted to the extent that (i) Citibank having partially complied with the subpoenas, Fazi and his counsel are directed to produce all such materials and correspondence to Peter and his counsel for discovery and inspection; (ii) as to the unanswered subpoenas or portions thereof, the subpoenas are quashed, as they are defective and not properly served; and (iii) preliminary letters testamentary for purposes of signing HIPPA authorizations shall issue to the proponent, Peter Murray.

This decision constitutes the order of the court.

Settle order and proceed accordingly.

  
HON. NELIDA MALAVE-GONZALEZ  
SURROGATE