Matter of Christopher

2016 NY Slip Op 31545(U)

August 15, 2016

Surrogate's Court, New York County

Docket Number: 2013-1310

Judge: Nora S. Anderson

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New York County Surrogate's Court
Date: AUGUST 15, 2016

SURROGATE'S COURT : NEW YORK COUNTY
--X
Probate Proceeding, Estate of

MAURINE CHRISTOPHER, File No. 2013-1310

Deceased.
--X
Petition of John D. Brooks, Jr.,
Distributee of the Estate of

MAURINE CHRISTOPHER, File No. 2013-1310/A,B

Deceased,

for Revocation of Preliminary Letters Testamentary, Dismissal of Petition for Preliminary Letters Testamentary, Appointment of Public Administrator as Temporary Administrator and Compulsory Accounting by Santos Molina.
--X

A N D E R S O N , S .

Pending in this estate are a contested probate proceeding and a proceeding to revoke preliminary letters testamentary. Decedent's brother John D. Brooks, Jr. ("movant"), who is objectant in the probate proceeding and petitioner in the revocation proceeding, seeks, in both proceedings, to disqualify counsel for Santos Molina ("respondent"), proponent of the will and preliminary executor. Specifically, movant seeks to disqualify three lawyers from the law firm of Eaton and Van Winkle, and the firm itself, on the ground that their representation violates the advocate-witness rule. Movant also seeks an order denying all counsel fees to the firm.

The advocate-witness rule, codified as Rule 3.7 of the Rules of Professional Conduct [22 NYCRR 1200.0], provides:

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1. A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
   a. the testimony relates solely to an uncontested issue;
   b. the testimony relates solely to the nature and value of legal services rendered in the matter;
   c. disqualification of the lawyer would work substantial hardship on the client;
   d. the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
   e. the testimony is authorized by the tribunal.
2. A lawyer may not act as advocate before a tribunal in a matter if:
   a. another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
   b. the lawyer is precluded from doing so by Rule 1.7 [Conflicts of Interest: Current Clients] or Rule 1.9 [Duties to Former Clients].

Whether or not to grant a motion to disqualify counsel is within the court's discretion. The foregoing disciplinary rule offers "guidance, not binding authority," for the court (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 440 [1987]). In making its decision, the court must balance the appearance of impropriety or harm to a party if disqualification is denied against the valued right to choose one's own counsel and any unfairness that disqualification, if granted, will cause in the particular case {*id.*; *see also, e.g.*, *Matter of Popkin*, NYLJ, June 4, 2010, at 42 col. 6 [Sur Ct, Suffolk County]). Accordingly, the Rule must not be applied mechanically (*S & S Hotel Ventures Ltd.*, *supra* at 444). Rather, it must be

affirmatively shown that disqualification is necessary because continued representation would taint the proceedings (*id.* at 444-45; *Aryeh v Aryeh*, 14 AD3d 634 [2d Dept 2005]). The party seeking the relief offered by the rule bears the burden of "establishing that such a drastic remedy is warranted" (*O'Donnell, Fox & Gartner, PC v R-2000 Corp.*, 198 AD2d 154 [1st Dept 1993]).

In both pending proceedings, movant alleges that respondent, who befriended decedent some years before her death, wrongfully took control of her assets while she was alive and was named her executor and a major beneficiary through the exercise of undue influence while the testator was in a diminished state. It is undisputed that Eaton & Van Winkle represented decedent for many years, counseled her with respect to estate planning, and drafted the instrument which is at issue here. Movant seeks to disqualify the firm as well as three of its lawyers: Richard Carter and Maura Murphy, both of whom represented decedent during her lifetime, and Steven Wolfe, who is handling the current litigation. With respect to Murphy, movant alleges that she took on the responsibility of protecting decedent from financial predation by respondent and his daughter by being named as Monitor on decedent's power of attorney but failed to carry out that responsibility; Murphy vigorously denies movant's characterization of her role and her conduct. Movant also

alleges that both Carter and Murphy permitted movant's involvement in decedent's will-drafting process, and speculates, without offering any evidence, that they did so in order to cultivate him as a future client. As to Wolfe, movant argues that his testimony about post-death events will be necessary at trial. However, movant does not assert that Wolfe was involved in the preparation or execution of the will, which occurred before he joined the firm.

Although the attorneys dispute the substance of the allegations, they note that the firm is aware that Murphy and Carter could be called as trial witnesses, and for this reason they are not representing respondent before the court. Further, the firm has engaged outside counsel to work with Wolfe on this matter. Thus, respondent argues that movant has shown no basis for disqualifying the individual attorneys or the firm. Further, they note that disqualification will impose a hardship on their client because he will lose the benefit of the firm's institutional knowledge about the decedent and the case.

Given the competing considerations, it is clear that the alleged facts do not mandate disqualification under the advocate-witness rule at this stage of the proceedings. There is no per se rule barring an attorney-drafter from representing a will proponent during the pre-trial stages of litigation (*Matter of Giantasio*, 173 Misc 2d 100 [Sur Ct, Bronx County 1997]), and, in

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any event, respondent's counsel has arranged that neither Murphy nor Carter will sign papers or appear before the court in recognition of the fact that they may eventually be called as trial witnesses. The asserted need to take further pretrial discovery from Murphy is not a sufficient basis for disqualification since the rule on its face applies only to "advocacy before a tribunal" (Rules of Professional Conduct, Rule 3.7[1]) and not to pretrial discovery. As to Wolfe, movant has made an insufficient showing that he will be a necessary witness at trial (*Transcontinental Constr. Svce. v McDonough, Marcus, Cohn & Tretter*, 216 AD2d 19 (1st Dept 1995]). Nor has movant shown that his testimony, or that of any of the other attorneys of the firm, would be adverse to the interests of their client so as to necessitate disqualification of the entire firm (*Daniel Gale Assoc. v George*, 8 AD3d 608 [2d Dept 2004]).

Accordingly, the motion for disqualification is denied without prejudice to renewal should facts emerge which would shift the balance in movant's favor.

Movant also asks the court to deny respondent's attorneys legal fees for any services they have rendered for this estate. His justification for this extraordinary relief is, first, that counsel facilitated bad acts by respondent which were detrimental to the estate and should therefore not be allowed to profit from such alleged misconduct; and, second, that denial of fees is

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justified as a sanction for counsel's having provided a late and disorganized response to movant's document request and for their delay in seeking issuance of a citation pursuant to SCPA 1411 after objections were filed in the probate proceeding.

The request for a blanket denial of fees to respondent's counsel premised on allegations yet to be established is denied as premature. Further, a discovery sanction is unwarranted because movant never requested an adjudication of respondent's counsel's conduct with respect to document discovery. The denial of legal fees unrelated to a discovery dispute would be an extreme sanction even after an adjudication that counsel's conduct in discovery was improper; in the absence of any adjudication of impropriety, there is no basis for any sanction at all. As to the alleged delay caused by respondent's counsel's failure to promptly serve a § 1411 citation in the probate proceeding, both parties seemed to be unaware of the need for this further citation until advised by the court, and movant in any event proceeded with his discovery in the interim. Nor did movant make use of the provision in SCPA § 1411(2) under which he could submit a § 1411 citation for issuance if proponent did not do so. Accordingly, movant's application for denial of legal fees to respondent's counsel is denied.

S U R R O G A T E

Dated: August 15, 2016