

Matter of Smithers
2017 NY Slip Op 31260(U)
May 31, 2017
Surrogate's Court, Nassau County
Docket Number: 2017-990
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

In the Matter of the Probate Proceeding

DECISION

ADELE C. SMITHERS,

File No. 2017-990

Dec. No. 33242

Deceased.

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion	1
Affidavit in Support of Motion with Exhibits.	2
Memorandum of Law in Support of Motion.	3
Memorandum of Law in Support of Motion.	4
Affirmation in Opposition to Motion with Exhibits.	5
Memorandum of Law in Opposition to Motion	3
Reply Memorandum of Law in Further Support of Motion.	3

In this contested probate proceeding, the proponent moves the court for an order:

- (i) striking the notice of appearance and verified objections of Lucille and Joseph Calandra and the notice of appearance of their son, Joseph Calandra, Jr., pursuant to CPLR 3211(a) (1) and (7); (ii) issuing a protective order pursuant to CPLR § 3103 staying the SCPA § 1404 examinations until the threshold issue of standing is determined; (iii) awarding the movant his attorneys’ fees and costs incurred in connection with this motion pursuant to SCPA § 2302; and (iv) granting such other and further relief as the court deems proper. The motion is opposed by the objectants.

The proponent is the decedent’s son and only distributee, Christopher B. Smithers. The objectants Lucille Calandra and Joseph Calandra are, respectively, the decedent’s sister

and brother-in-law; Joseph Calandra, Jr. is their son. Curiously, although the determinative issue on the motion is whether the Calandras have standing to object and engage in pretrial discovery, relief is not sought under CPLR 3211 (a) (3), “the party asserting the cause of action has not legal capacity to sue.”

The propounded instruments are a will dated March 21, 2013 and a codicil dated December 18, 2014 (referred to collectively as the 2013 will), neither of which contain a disposition in favor of the objectants. A prior will, dated August 5, 2009 (the 2009 will), bequeathed one-third of the residuary estate to the objectants in addition to pre-residuary bequests of personal property to Lucille. The original 2009 will was filed with the court by the decedent’s former attorney on November 13, 2012, ostensibly without the knowledge or consent of the decedent and after the decedent had notified the attorney she had retained new counsel and demanded the return of all original documents. The original will was returned to the decedent by overnight delivery, at her direction, addressed to her at her Mill Neck home on July 22, 2013. The objectants have only a photocopy of the 2009 will and rely on it as the basis of their standing argument.

It is undisputed that the 2009 will was not on file with the court at the time the probate proceeding was commenced and it is not on file now. The objectants are not distributees and therefore did not need to be cited in the probate proceeding pursuant to SCPA § 1403 (1) (a). Furthermore, the 2009 will has not been on file in the court since it was returned to the decedent and therefore the objectants were not required to be cited pursuant to SCPA

§ 1403(1) (d). Nor would the objectants be entitled to service of citation under any of the remaining provisions of SCPA § 1403.

However, the fact that the objectants were not entitled to service of citation under SCPA § 1403 does not necessarily preclude them from having standing to object to the admission to probate of the 2013 will. SCPA § 1410, titled “Who may file objections to probate of an alleged will” provides, in pertinent part, “[a]ny person whose interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate may file objections to the probate of the will...”

In Matter of Jones (NYLJ Oct. 27, 1992 at 30, col 6 [Sur Ct, Nassau County]), the objectant was the beneficiary under a prior will and filed objections to the propounded instrument as a person whose interest in the estate would be adversely affected by the admission of the propounded instrument to probate. He was not in possession of the original will but filed a conformed copy of the prior will along with an affidavit of the attorney who drafted it to the effect that although he had no recollection of the execution of the will, he recognized his notary stamp and the name of one of the attesting witnesses as well as a general recollection of the testator.

In denying the proponent’s motion to dismiss the objections, the court noted that the proponent had not even alleged the prior will had been revoked, but merely relied on the fact that the prior will that was produced did not have original signatures and therefore did not constitute a will and could not bestow on the objectant the status of a party entitled to object.

The court went on to hold that “[t]he statute does not require one claiming the right to object, as a legatee named in a prior will, to prove the prior will as though it were to be admitted to probate, in order to establish his status, in the absence of a bona fide issue as to the validity of the prior will...other than the claim of revocation upon the execution of the propounded will” (*id.*[internal citations omitted]). The court went on to hold that since the objectant could, in proper circumstances, have the copy of the prior will admitted to probate pursuant to SCPA § 1407, she had standing to object to the probate of the propounded instrument.

The proponent seeks to distinguish the *Jones* case from the case at bar because in *Jones* the proponent had not even alleged that the prior will was revoked. However, there is no evidence in this case that the proponent ever revoked the prior will except by the execution of the later will. EPTL § 3-4.1 (a) provides that a will may be revoked by another will, or by a writing of the testator executed with the formalities of a will by which the testator clearly intends to revoke the will, or by the physical act of destruction by the testator or another at the testator’s direction. Here, the proponent seems to argue that the decedent’s having withdrawn the earlier will from the court’s files was an effective revocation of the will but offers no support for that proposition nor does it meet any of the statutory criteria for revocation. When the 2013 will was executed, the decedent was not even in possession of the earlier will, it was still on file with the court, so she could not have physically destroyed it and there is no allegation of a writing of revocation other than the 2013 will. If the 2013 will is valid, its execution was the method by which the 2009 will was revoked; if, as the

objectants contend, the decedent lacked the capacity to execute the 2013 will, she also lacked the capacity to revoke the 2009 will (*Matter of Goldsticker*, 192 NY 35, 37 [1908][holding that “as the testator was incompetent to make the dispositive provisions of the will, he was equally incompetent to make its revocatory provisions”]; accord *Matter of Wimpfheimer*, 8 Misc3d 538 [Sur Ct, Bronx County 2005]).

Finally, if the proponent is relying on the presumption of revocation that arises where an original will, known to be in the possession of the testator, cannot be found after death (*Collyer v Collyer*, 110 NY 481, 486 [1888]; *Matter of Fox*, 9 NY2d 400, 411 [1961]; *Matter of Winters*, 84 AD3d 1388 [2d Dept 2011]), that argument too must fail, at least to the extent of the relief sought on the motion. On a motion to dismiss pursuant to CPLR 3211(a)(7) “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail. The complaint must be liberally construed in the light most favorable to the [party moved against] and all allegations must be accepted as true” (*Lee Dodge, Inc. v Sovereign Bank, N.A.*, 148 AD3d 1007, 1008 [2d Dept 2017] [internal quotes and citations omitted]).

Here, it is alleged that the decedent was not competent on the date of the execution of the 2013 will. On this motion, the court must accept that allegation as true. Assuming that she lacked the capacity to execute the 2013 will, she also lacked the capacity to simultaneously revoke the 2009 will. Under proper circumstances, a lost or destroyed will

may be admitted to probate (SCPA § 1407) and evidence of such incapacity may be sufficient to overcome the presumption of revocation that might otherwise arise if it is established that the 2009 will was in the decedent's possession and cannot be located after death (*Matter of Moses*, NYLJ, Oct. 19, 2015 [Sur Ct, New York County]; see also *People ex rel. Bousquet v Katz*, 83 AD2d 533, 537 [1st Dept 1981] [noting that “the law may presume that a condition of mental illness, once present, will continue to exist.”]).

As to the branch of the motion that seeks to dismiss the objections on the basis of documentary evidence (CPLR 3211[a] [1]), the movant fails to identify which document or documents he relies on to support this branch of the motion. To qualify as documentary evidence for purposes of the motion the document must be unambiguous, authentic, and undeniable” (*Attias v Costiera*, 120 AD3d 1281, 1282 [2d Dept 2014]). In any event, the court finds that none of the documents submitted as exhibits to the motion papers utterly refute the objectants' allegations or conclusively establishes the proponent's case as a matter of law, which is the standard to be met to prevail on such a motion (*Lezama v Cedano*, 119 AD3d 479, 480 [2d Dept 2014]).

Accordingly, the motion is **DENIED**. The prayers for the imposition of sanctions sought by each side against the other is also denied as neither side has established that the conduct of the other is frivolous within the meaning of 22 NYCRR § 130-1.1. The SCPA

§ 1404 examinations are directed to commence on June 8, 2017, as previously scheduled.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: May 31, 2017
Mineola, New York

E N T E R :

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: Seward & Kissel, LLP
Att: Mark J. Hyland, Esq.
Michael B. Weitman
Attorneys for Petitioner Christopher B. Smithers
One Battery Park Plaza
New York, NY 10004

Farrell Fritz, P.C.
Att: Frank T. Santoro
Attorneys for Objectants
Lucille Calandra and Joseph Calandra
1320 RXR Plaza
Uniondale, NY 11556

Lisa Barbieri
Assistant Attorney General
Charities Bureau
120 Broadway
New York, NY 10271