

**Matter of Mark**

2017 NY Slip Op 30939(U)

March 20, 2017

Surrogate's Court, New York County

Docket Number: 2014-856

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

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Probate Proceeding, Will of

MARCIA MARK,

Deceased.  
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New York County Surrogate's Court

March 20, 2017

File No. 2014-856

A N D E R S O N, S .

This is a contested probate proceeding in the estate of Marcia Mark. In September 2015, objectants moved to extend the deposition of the attorney-draftsman beyond "the three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period" as set forth in the Uniform Rules for Surrogate's Court (22 NYCRR) § 207.27 (the "3-2 Rule"). In a decision dated January 5, 2016, the court denied the motion "without prejudice to renewal upon a sufficient showing of special circumstances," as specifically required under such rule (*Matter of Mark*, NYLJ, Jan. 8, 2016, at 25, col 5 [Sur Ct, NY County 2016]). Objectants now move to renew the prior motion and, for the first time, seek additional discovery outside the 3-2 Rule.

Decedent died on February 11, 2014, at the age of 88, survived by two daughters and a son. Under the February 9, 2010 instrument offered for probate, decedent made a bequest equal to the largest amount that could pass free of federal estate tax and federal generation skipping tax to proponent (her granddaughter), whom she nominated as executor, and left the balance of her estate to charity. Objectants are decedent's daughters. Decedent's son,

the father of proponent, filed a waiver and consent. Preliminary letters issued to proponent on March 21, 2014, based upon the need to administer estate assets pending an expected probate contest, which has now raged on for three years.

Prior to filing objections, movants made a motion under SCPA § 1404 to compel the deposition of proponent and the production of court files related to a proceeding for guardianship of decedent's person and property that had been commenced some two years before the execution of the propounded instrument, *i.e.*, within the time frame of the 3-2 Rule.<sup>1</sup> The motion as to the deposition of proponent was denied because she was not the proper subject of an SCPA § 1404 examination given that the will lacks an *in terrorem* clause. The motion regarding the court files was denied as well because movants were free to obtain the requested files directly from the court (*Matter of Mark*, NYLJ, March 26, 2015, at 26, col 3 [Sur Ct, NY County 2015]). Thereafter, movants filed standard objections and then the motion to expand the time frame for questioning the attorney-draftsman which resulted in the January 5, 2016 decision.

In early March, movants filed a notice of appeal of the January 5, 2016 decision, but did not seek a stay from the Appellate Division, First Department. In late April, after

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<sup>1</sup> The guardianship proceeding was discontinued by order dated July 29, 2009, based upon a finding that decedent had demonstrated "the ability to manage her own personal affairs ...."

proponent moved to compel them to respond to discovery demands, movants sought a stay of the probate proceeding pending the outcome of the appeal, which they had yet to perfect.<sup>2</sup> In support of a stay, movants argued that their appeal was meritorious, i.e., that the court had erred when it ruled that movants had failed to offer a sufficient basis to expand the 3-2 Rule in connection with the SCPA § 1404 examination of the attorney-draftsman. However, the court, after examining the record again, specifically rejected that argument and denied the motion (*Matter of Mark*, NYLJ, May 27, 2016, at 25, col 3 [Sur Ct, NY County 2016]). The instant motion followed, which, as proponent correctly notes, is the third time movants have argued before this court that the 3-2 Rule should be expanded to permit continued questioning of the attorney-draftsman.

As to that part of the motion that seeks to renew, CPLR 2221(e) provides that such a motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." In addition, the motion "shall contain reasonable justification for the failure to present such facts on the prior motion." Movants, who make no mention of CPLR 2221(e) in their papers, meet none of these

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<sup>2</sup> There is nothing in the record to suggest that, to this day, the appeal has been perfected.

requirements.

Movants offer what they describe as many "new facts" concerning the attorney-draftsman's purported relationship with decedent and involvement with her financial affairs. However, many are not facts at all. Rather, as proponent correctly points out, they are misrepresentations of the record easily debunked by reference to the very documents upon which movants rely. All other "new facts" simply do not establish the "special circumstances" required to support deviation from the 3-2 Rule (see e.g. *Matter of Das*, NYLJ, May 1, 2009, at 31, col 3 [Sur Ct, Nassau County 2009; *Matter of Roma*, Sept. 18, 2006, at 36, col 4 [Sur Ct, Suffolk County 2006])). Also militating against a finding of "special circumstances" is the fact that the propounded instrument does not have an *terrorem* clause, a fact that courts often cite as a consideration when deciding whether to expand the 3-2 Rule (see e.g. *Matter of Giardina*, NYLJ, June 15, 1999, at 34, col 4 [Sur Ct, Nassau County 1999])). In other words, had movants included these "new facts" on their original motion, the outcome would have been the same.

Moreover, even if that were not the case, movants fail to offer a single justification for having omitted the alleged "new facts" from their prior motion. Significantly, movants do not challenge proponent's assertion that the reason for their silence is that movants were in possession of the "new facts" well before

the original motion was filed. Nor can movants save their motion by demonstrating a change in the law that would have affected the outcome. Indeed, all of the additional case law that they cited predates the filing of the original motion. For these reasons, the part of the motion that seeks renewal is denied.

As for the part of the motion that seeks additional discovery outside the confines of the 3-2 Rule, it is also denied. Movants offer absolutely no basis for discovery prior to February 9, 2007, three years before the execution of the propounded instrument. Movants similarly fail to show that "special circumstances" warrant the expanded discovery for the period after February 9, 2012. For example, their argument that such discovery is required to "ascertain the nature and extent of decedent's assets" in order to determine whether she had testamentary capacity two or more years earlier, *i.e.*, when she executed the will, is plainly nonsensical.

Movants' bare allegations of undue influence and fraud are also insufficient to expand the time period for discovery. Even under the circumstances as described by movants, the five-year window for discovery afforded by the 3-2 Rule should be more than sufficient for movants to investigate fully the issues raised by their pleading. "Special circumstances" are intended to be just that, and, without a clear explanation for why expanded discovery is necessary, the court, in its discretion, will not allow it. To

rule otherwise would be a license for objectants to embark on a fishing expedition, an outcome the 3-2 Rule was designed to prevent.

This decision constitutes the order of the court.

*USA*

S U R R O G A T E

Dated: March *20*, 2017