Matter of Quinn
2017 NY Slip Op 31649(U)
June 29, 2017
Surrogate's Court, Nassau County
Docket Number: 2016-390356
Judge: Margaret C. Reilly

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Probate Proceeding Will of

CECILIA A. QUINN,

Deceased.

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DECISION & ORDER

File No. 2016-390356
Dec. Nos. 32989 & 33006

PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion, Affidavit, Affirmation & Exhibits in Support. . . .	1
Notice of Cross-Motion, Affirmation & Exhibits in Support.	2
Reply Affirmation In Support of Cross-Motion.	3
Affidavits of Matthew Quinn, Patricia Quinn Warren and Maureen Quinn	4
Affirmation of Jack Glasser, Esq. In Opposition	5

MOTION

This is a motion in which the movant seeks the following relief: an order pursuant to CPLR §3124 compelling the petitioner to respond to the demand for discovery and inspection and the interrogatory demand[1]; an order pursuant to CPLR §3126 precluding the petitioner from supporting claims and defenses and from producing evidence or items of testimony or from introducing any evidence of the physical, mental or blood condition sought to be determined or from calling any witnesses in support of the claims; an order vacating the order granting preliminary letters testamentary to Maureen Quinn and requiring her to account for any monies received by her or expended by her as fiduciary or as attorney in fact for the

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[1]Although the motion seeks to compel the petitioner to respond to interrogatories, there are no interrogatories attached to the motion and no reference is made in the affidavit and affirmation in support of the motion to interrogatories.

decedent; an order substituting in the place of Maureen Quinn, the objectant Eileen Quinn as successor fiduciary based on the alleged financial misconduct of Maureen Quinn; and an order compelling the petitioner to produce the power of attorney given to her by the decedent. The movant is the attorney for the objectant, Eileen Quinn (hereinafter referred to as objectant). The motion is opposed.

CROSS-MOTION

Also pending is a cross motion which seeks the following: an order pursuant to CPLR § 3126 striking the objections to probate or alternatively precluding the objectant from offering any evidence at trial or in opposition to any motion for summary judgment by the petitioner; an order awarding costs and attorneys' fees pursuant to 22 NYCRR § 130-1.1 (a); and an order staying discovery pending the resolution of the request to strike or preclude. The movant is the attorney for the petitioner, Maureen Quinn (hereinafter referred to as petitioner). The cross-motion is opposed.

BACKGROUND

The decedent, Cecilia Quinn, died on June 17, 2016. She was survived by four children: Maureen Quinn (petitioner, nominated executor); Matthew John Quinn; Eileen Elizabeth Quinn (objectant); and Patricia Ann Quinn Warren. The decedent's last will and testament dated July 26, 2010 has been offered for probate. Pursuant to Article IV of the decedent's will, the decedent gave her tangible personal property and her residence located at 110 Kensington Road, Garden City equally to her children. In Article V of the will, the decedent gave to her trustees, the sum equal to the generation skipping transfer tax exemption to be divided in an equal number of shares so that there shall be set aside one share for each child living or to the living issue of the child who previously died. All the rest, residue and remainder was to be divided equally between the four children. The decedent nominated Maureen Quinn as executor and Eileen Quinn as the successor executor. Eileen Quinn filed objections to the probate of the decedent's will and to the appointment of Maureen Quinn as executor.

INTRODUCTION

Disclosure in New York civil actions is guided by the principle of "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR § 3101 [a]). The words "material and necessary" are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.,* 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; *see Tower Ins. Co. of N.Y. v Murello*, 68 AD3d 977 [2d Dept 2009]). The Court of Appeals' interpretation of "material and necessary" in *Allen* has been understood "to mean nothing more or less than 'relevant'" (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3101:5).

MOVANT'S ARGUMENTS

A. Discovery and Inspection Notices

The attorney for the objectant sent a Demand for Discovery and Inspection dated October 21, 2016 which contained 25 demands for various documents. The objectant also served a second Demand for Discovery and Inspection dated December 19, 2016 in which she demanded the production of bank account statements and savings account statements from January 1, 2011 though and including June 17, 2016 including accounts with Capital One Bank and any other bank with the account holder Maureen Quinn. The objectant now moves to compel the petitioner to respond to the following:

1. Objectant demands an order requiring the production of legible checks, the production of the statement from Capital One Bank dated 9/26/12; the $19,000.00 check, No. 1339; the August - September 2012 statement and the July 25-September 2012 statement. Finally, all checks from all statements in legible fashion that were not provided.

2. Objectant requires an order requiring the production of the redacted pages from the checkbook.

3. Documents to demonstrate exactly where the missing 600K is based on the statement dated 7/1/12 and the source of the funds to replace the windows on the upstate house.

4. Maureen's banking records demanded in the Second Notice of Discovery and Inspection and the Capital One Bank account opened which received the decedent's social security checks.

5. Cancel (sic) checks or statements showing the disposition of the tens of thousands of dollars worth of withdrawals from this account.

6. Evidence in sufficient form to demonstrate the disposition of hundreds of thousands of dollars removed from the Charles Schwab account stipulated on Exhibit G.

7. All financial documents to show the disposition of any funds from the decedent's estate or payment to Maureen Quinn's personal account including savings accounts, checking accounts and investment accounts from 2012 to the date of death in 2016.

8. A true and correct copy of the any power of attorney granted from Cecilia Quinn during her life time.

The first objection alleges, in part, that the checks provided in response to the notice to produce were illegible. Attached as an exhibit to the motion are copies of the checks provided for the Capital One Bank Account. The copies are poorly reproduced and impossible to read. The petitioner is directed to turn over legible copies of the checks in response to discovery demand (*see e.g. Baker v General Mills Fun Group, Inc.,* 101 Misc2d 193,195 [Sup Ct New York County 1979] where court directed defendants to supply a legible copy of an unclear document).

The remaining part of the first objection as well as objections 2 through 8, concern, primarily, the dates of the documents provided. The petitioner alleges that all documents requested have been supplied but only from the time period requested (January 1, 2011) through two years after the date of the propounded will (July 26, 2012). The objectant

alleges that she needs additional discovery beyond July 26, 2012 to show the alleged financial misconduct of the petitioner.

With regard to the production of documents dated after the date of the documents provided, the petitioner argues that those documents are beyond the dates prescribed in 22 NYCRR § 207.27 which provides that "[e]xcept upon the showing of special circumstances, the examination [examination before trial in contested probate proceedings] will be confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of the decedent's death, whichever is the shorter period." The objectant argues that the records are necessary to show that the petitioner stole money from the decedent and is unfit to act as fiduciary. The aforementioned time limitation applies beyond the examination to discovery matters and serves as a pragmatic rule to "prevent the costs and burdens of a 'runaway inquisition'" (*Matter of Po Jun Chin,* 2017 NY Slip Op 27098[U] *4 [Sur Ct, Queens County 2017]). Whether to expand the time limitation rests within the sound discretion of the court (*id).*

In the instant proceeding, the objectant has failed to show special circumstances to expand the time limit beyond the three years prior to the date of the propounded instrument and two years thereafter. Most of the objectant's arguments relate to the alleged misconduct of the petitioner which occurred years after the date of the propounded instrument. For this reason, the motion to compel the petitioner to produce any documents, including the power of attorney, dated beyond the date of two years after the date of the propounded instrument, or July 26, 2012, is denied.

B. Preclusion

The movant seeks pursuant to CPLR § 3126 to preclude the petitioner from supporting her claims and defenses and from producing evidence or items of testimony or from

introducing any evidence of the physical, mental or blood condition sought to be determined or from calling any witnesses in support of her claims. Pursuant to CPLR § 3126 (2) the court may issue an "order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses." The court may also issue an order striking out pleadings or dismissing the action (CPLR § 3126 [3]). "Before a court invokes the drastic remedy of striking a pleading or the alternative remedy of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" (*Harris v City or New York, et al,* 117 AD3d 790, 790 [2d Dept 2014]). There has been no showing that the failure to comply with the discovery was willful and contumacious. The request to preclude the petitioner pursuant to CPLR § 3126 is denied.

C. Vacating Preliminary Letters and Requiring the Petitioner to Account

Surrogates Court Procedure Act §711 provides that a person interested may present to the court a petition praying for a decree suspending, modifying or revoking letters upon a showing of any of the factors set forth in SCPA §711 (1) through (9). The court may make a decree, without process, pursuant to SCPA §719 upon a showing of certain factors (SCPA §719 [1] through [10]). The objectant has neither petitioned the court for the removal of the petitioner as preliminary executor nor shown that the petitioner is ineligible to act pursuant to SCPA §719. Accordingly, the request to have the preliminary letters testamentary revoked is denied. The request to have the objectant appointed successor executor is also denied.

CROSS-MOTION

A. Preclusion

The petitioner cross moved for an order pursuant to CPLR §3126 striking the objections to probate or alternatively precluding the objectant from offering any evidence at trial or in opposition to any motion for summary judgment by the petitioner. As set forth above, "[b]efore a court invokes the drastic remedy of striking a pleading or the alternative remedy of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" (*Harris v City or New York, et al,* 117 AD3d 790, 790 [2d Dept 2014]). There has been no showing that the failure to comply with the discovery was willful and contumacious. The request is denied.

B. Sanctions

The petitioner seeks an order awarding costs and attorneys' fees pursuant to 22 NYCRR § 130-1.1(a). An application to impose sanctions for frivolous conduct is addressed to the sound discretion of the court (22 NYCRR § 130-1.1[a]; *Strunk v New York State Bd. of Elections,*126 AD3d 779, 781 [2d Dept 2015]), and may be awarded where, among other reasons, the conduct complained of is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, or the conduct is undertaken primarily to delay or prolong the resolution of the litigation or to harass or materially injure another, or it asserts material factual statements that are false (22NYCRR § 130-1.1[c][1],[2],[3]). The petitioner has not shown that the objectant's conduct is frivolous. The request is therefore denied.

C. Stay of Proceedings

The petitioner seeks an order staying discovery pending the resolution of the request to strike or preclude. The request is denied.

CONCLUSION

The motion is granted to the extent that the petitioner is directed to turn over legible copies of the checks that were already produced in response to the objectant's first notice of discovery and inspection. As to the other relief requested in the motion, it is denied. The cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: June 29, 2017
Mineola, New York

E N T E R:

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

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