

Matter of Tinker

2018 NY Slip Op 32103(U)

August 20, 2018

Surrogate's Court, Nassau County

Docket Number: 2016-387639/B

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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In the Matter of the Estate of

**LAURICE TINKER,
a/k/a LOURICE TINKER,**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

DECISION & ORDER

**File No. 2016-387639/B
Dec. No. 34284**

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

Order to Show Cause, Affirmation & Exhibits.	1
Affirmation in Opposition	2
Reply Affirmation	3
Sur-Reply Affirmation	4
Notice of Settlement and Proposed Decree	5

Before the court in this probate proceeding is an order to show cause which seeks an order: permitting Heather Canaan to file objections to the last will and testament that has been offered for probate on the grounds that the examinations pursuant to SCPA § 1404 have not been completed; or, in the alternative, permitting Heather Canaan to file late objections and upon objections being filed, that petitioner, Antoine Solounias, be required to submit to a deposition. The movant is Heather Canaan, the potential objectant. The order to show cause is opposed by Antoine Solounias, the nominated co-executor of the will filed for probate.

Laurice Tinker a/k/a Lourice Tinker (“decedent”) died on November 21, 2015. She was survived by one niece, Heather Canaan, the daughter of the decedent’s predeceased brother, Joseph Canaan.

On or about March 10, 2016, Edward Sliwinski and Antoine Solounias, the nominated successor co-executors of the decedent's will, dated November 11, 2005, commenced a proceeding to compel Heather Canaan to produce a 2007 last will and testament of the decedent. An order to attend, dated March 14, 2016, was issued and Heather Canaan was directed to appear on June 6, 2016 to be examined. By stipulation dated October 5, 2016, Heather Canaan was to be examined by November 16, 2016. On the return date, Heather Canaan did not appear. Her attorney stated on the record "[a]t this time Heather Cannen [sic] does not have in her possession or control any originals or copies of a Last Will & Testament of the decedent, Laurice Tinker."

On September 23, 2016, Antoine Solounias filed a petition to probate the decedent's last will and testament dated November 11, 2005. The will provided for the devise of real property located at 124 Stevens Avenue, West Hempstead, New York to Antoine Solounias. The residue was divided as follows: \$50,000.00 to Holy Trinity Orthodox Church; \$25,000.00 to Our Lady of Lebanon Church; 20% to Edward Sliwinski; 20% to Andrei Angarsky and Svetlana Angarsky; 20% to Antoine Solounias and Cynthia Solounias; 20% to William Kirbaway and Susan Kirbaway; and 20% to Heather Canaan Lutowski. The decedent nominated her husband, who predeceased, as executor and Antoine Solounias and Edward Sliwinski as successor co-executors.

Subsequently, a So Ordered stipulation dated January 25, 2017, was entered into by the attorney for the petitioner and the attorney for Heather Canaan, which stated in pertinent part:

“SCPA §1404 Examinations to be held on March 6, 2017 at 10:00 a.m. at the Surrogate’s Court. Objections, if any, to be filed twenty (20) days after completion of 1404 Examinations.”

The examinations took place on April 3, 2017 and the attorney drafter and two attesting witnesses were examined. No objections were filed. A notice of settlement dated May 10, 2017 of the proposed decree, which was noticed to be presented for signature on May 17, 2017, was sent to Heather Canaan’s attorney on May 10, 2017. A decree admitting the will to probate was signed on May 17, 2017.

Section 207.37 (c) (1) of the Uniform Rules for Surrogate’s Court provides that when the settlement of an order is directed by the court, a copy of the proposed order with notice of settlement shall be served on all parties not less than five (5) days before the day of settlement if service is by personal delivery and not less than ten (10) days before the day of settlement if service is by mail. Here, the notice of settlement of the decree was mailed on May 10, 2017 and the decree was noticed for settlement on May 17, 2017, seven days after service (22 NYCRR § 207.37 [c] [1] [ii]). As the required notice was not given, the court vacates the decree.

The analysis, however, does not end here. SCPA § 1410 provides that objections must be filed within ten days after the completion of examinations pursuant to SCPA § 1404, “or within such other time as is fixed by stipulation of the parties or by the court.” The commentaries to this section set forth “[t]he court has discretion to extend the time to file, which courts tend to do liberally because they must be satisfied under SCPA § 1408 that the will is valid” (Margaret Valentine Turano, Practice Commentaries, McKinney’s Cons Laws

of NY, Book 58A, SCPA § 1410 at 386).

Counsel for Heather Canaan argues that the examinations pursuant to SCPA § 1404 were not complete because he did not receive a transcript. Counsel argues that, after he received the transcript, he was going to send out document demands and then file objections. The stipulation was clear that objections should have been filed twenty (20) days after completion of the examination. An additional stipulation should have been entered into if the date to file objections was to be extended after the receipt of the transcript (*see e.g. Matter of Pisacano*, 41 Misc3d 1234 [A] [Sur Ct, Nassau County 2013]). Without an extension, the examinations were complete and objections were due twenty days thereafter.

Heather Canaan's attorney alleges that he never received a copy of the notice of settlement and proposed decree. In support of his argument, he attached affidavits from three paralegals employed in his office who each oversee the mail. Each of the paralegals stated that they never saw the notice of settlement of the proposed decree.

According Heather Canaan's attorney, after the examinations pursuant to SCPA §1404, he "put the file in the file cabinet and awaited receipt of the deposition transcripts as there were multiple demands for documents that were objected to." Thereafter, the attorney stated that his client informed him that she had been served with a petition to vacate the decedent's residence. He went to court, printed out the notice of settlement and proposed decree, and prepared multiple affidavits in support of the instant application.

Heather Canaan argues that the default in filing objections was a result of law office failure and that there is merit to the filing of the objections as there is a later will that revoked

the will on file with the court. In support of the motion, Heather Canaan attached an affidavit from the attorney drafter of a later will; the transcript from the examination of Margaret Senti, one of the alleged witnesses to the later will; and transcripts and/or affidavits from neighbors, acquaintances and persons who knew the decedent.

According to Heather Canaan, the decedent originally promised to give her house to Antoine Solounias. She subsequently allegedly changed her mind and promised to leave her house to Heather Canaan. She further alleges that the decedent executed a will in 2011 which left the house to her. In addition, she alleges that numerous people lived in the decedent's house and had unfettered access to the house. The will could not be located after the decedent's death and alleges that someone with access to the house removed it.

With regard to the execution of the purported 2011 will, the attorney drafter, who was a neighbor of the decedent, remembered preparing a will for the decedent that was executed at her home. He did not charge a fee and does not recall anything about the will "other than the fact that it occurred at Lulu's [the decedent] house, shortly after Richard [the decedent's husband] died [he died at some point in or around 2011]." He further stated that his standard will would have contained a clause that this will revokes all prior wills.

Rose Senti, the alleged witness to the later will, testified in an examination that she was a friend of the decedent and a frequent visitor to her home. She remembers acting as a witness to a will in the summer of 2011, on a weekday, in the afternoon, at the decedent's dining room table, and that she sat next to Nicholas Russo, the attorney drafter. Ms. Senti remembered seeing the decedent sign the will and ask her to act as a witness, but she does

not remember anything else. She further reported that she searched the decedent's home for the will but could not find it.

Edward Sliwinski, in his affidavit in support of the papers filed in opposition to the motion, reports that on the day after the decedent died, he was present with other people at the decedent's house. At that time, a search was conducted for any wills of the decedent. A 2007 will was located which Mr. Sliwinski reviewed and took with him. Mr. Sliwinski reported that he returned to the decedent's house the next day and brought the 2007 will with him which he turned over to Heather Canaan. When he asked Heather Canaan to return it, she denied that he had ever given it to her. Mr. Sliwinski reported that the law firm retained the decedent's 2003 will and when no other will could be located, the 2003 will was filed with the court and offered for probate.

Surrogate's Court has the discretion to allow the filing of late objections as the "court's paramount concern is to admit only valid wills to probate" (*Matter of Orłowski*, 281 AD2d 422, 422 [2d Dept 2001]). "In considering an application for late filing of objections, the court must weight the reasons for the delay, the extent of the delay, the deliberateness of the default, the prejudice that might result from the delay, and the merits of the objections" *Matter of Lieberman*, NYLJ, May 19, 1998, at 25, col 5 [Sur Ct, Nassau County]).

Heather Canaan argues that the will offered for probate is not valid because it was revoked by a later will. EPTL § 3-4.6 (a) provides "[i]f after executing a will the testator executes a later will which revokes or alters the prior one, a revocation of the later will does not, of itself, revive the prior will or any provision thereof." Moreover, a revival of the prior

will may be effected by: the execution of a codicil which incorporates by reference the prior will; a writing declaring the revival of the prior will; or a republication of the prior will (EPTL §3-4.6 [b]). “Thus, if a testator executes a later will that revokes an earlier will, the revocation of the later will, or a presumption of revocation, does not revive the earlier will unless one or more of the terms contained in EPTL § 3-4.6 (b) are met” (*Matter of Barber*, 55 Misc 3d 1212 [A] [Sur Ct, Nassau County 2017]).

The petitioner, in turn, argues that the motion must be denied because the will was already admitted to probate. The petitioner further argues that Heather Canaan is guilty of laches and unclean hands because she waited four months before bringing the present motion. The petitioner argues that he is harmed because he has paid expenses related to the upkeep of the house.

The petitioner is correct in that Heather Canaan should have moved to vacate the decree and not for permission to file late objections. The argument is moot, however, as the court vacated the decree as set forth above. A claim of laches, in turn, “requires a showing that the delay was unreasonable and inexcusable” (75A NY Jur 2d, Limitations and Laches §361). Laches is an “equitable remedy which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party. . . . “Prejudice may be established by a showing of injury, change of position, loss of evidence or some other disadvantage resulting from the delay” (*Skrodelis v Norbergs*, 272 AD2d 316, 316-317 [2d Dept 2000][internal citations omitted]).

In the instant proceeding, there has been no showing of either unreasonable or inexcusable delay or prejudice to the petitioner. Further, the decedent may have executed two wills subsequent to the will offered for probate which may have revoked the proffered will. For these reasons, the motion for permission to file late objections is **GRANTED**. Verified objections must be served and filed within twenty (20) days of the date of this decision and order. The court declines to order the deposition of Antoine Solounias at this time. Any additional examinations and discovery may be addressed at a conference on September 18, 2018 at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: August 20, 2018
Mineola, New York

E N T E R:

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

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