

Matter of O'Neill
2018 NY Slip Op 32626(U)
September 19, 2018
Surrogate's Court, Nassau County
Docket Number: 2017-2919
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 Probate Proceeding of the
Last Will and Testament of**

DECISION & ORDER

**File No. 2017-2919
Dec. No. 34784**

JOHN O’NEILL,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

Notice of Motion to Quash Subpoena and for Protective Order.	1
Affirmation in Opposition to Motion to Quash.	2
Attorney’s Affirmation in Reply.	3
Last Will and Testament.	4
Verified Objections.	5

Before the court in this probate proceeding is a motion by Maureen Regan a/k/a Mary C. Regan (“petitioner”) which seeks an order: pursuant to CPLR § 2304 quashing the subpoena duces tecum served upon non-party NYU/Winthrop University Hospital (formerly known as “Winthrop University Hospital” and sometimes herein called “Winthrop Hospital”); and pursuant to CPLR § 3103 granting the application for a protective order relieving non-party witness, NYU/Winthrop University Hospital, from its obligation to comply with the subpoena duces tecum. The motion is opposed by Geraldine O’Neill Marino (“objectant”).

The decedent, John O’Neill, died on April 12, 2017. He was survived by four children: Mary C. Regan (petitioner); Kevin O’Neill; Geraldine O’Neill Marino (objectant); and Thomas O’Neill. The decedent’s will dated March 9, 2017 has been offered for probate. Article THIRD of the proffered will provides “I give, devise and bequeath, absolutely and

forever, all property, real and personal, owned by me at my death to my daughter, MARY C. REGAN a/k/a 'Maureen'. . . I have in mind but intentionally make no provisions for my other three children, THOMAS O'NEILL, GERALDINE MARINO or KEVIN O'NEILL in this paragraph, for reasons best known to myself." The decedent nominated the petitioner as executor. Thomas O'Neill and Kevin O'Neill filed waivers and consents to the will's admission to probate. Geraldine O'Neill Marino filed verified objections. The objectant alleges that: the decedent lacked testamentary capacity; the will was not duly executed; the will was procured by the undue influence of the petitioner and/or persons acting in concert with her; and the will was procured by fraud and/or constructive fraud perpetrated by the petitioner and/or others acting in concert with her.

The attorney for the objectant served a subpoena duces tecum on Winthrop Hospital to produce "complete and accurate copies of all records in the employee file of the petitioner with Winthrop Hospital, from the commencement of her employment to present date, including but not limited to: her complete personnel file, notes, memoranda, correspondence, infraction records, and disciplinary records." The attorney for the petitioner wrote to the attorney for the objectant and asked him to rescind the subpoena. He also wrote to NYU/Winthrop and set forth his objections to the subpoena. When the subpoena was not rescinded, the petitioner made the instant motion to quash the subpoena and issue a protective order.

The petitioner argues that the subpoena seeks private, confidential and privileged information which is irrelevant to the underlying probate proceeding. The objectant argues that the motion is untimely and the documents are relevant and necessary because

“[o]bjectant has reason to believe that Petitioner was subject to disciplinary action, in her capacity as an employee at Winthrop, for the improper and unauthorized modification of medical records, and that she was the subject of an investigation by Winthrop concerning those allegations.” The objectant further argues that, if the allegations are true, it would have serious implications in the probate proceeding.

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]; *see also 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).

CPLR § 3101 (a) (4) provides for disclosure from a non-party. “An application to quash a subpoena should be granted ‘[only] where the futility of the process to uncover anything legitimate is inevitable or obvious’ or where the information sought is ‘utterly irrelevant to any proper inquiry’” (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988] [internal citations omitted]; *accord Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]). The one moving to vacate the subpoena has the burden of establishing that it should be vacated (*Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]).

A motion to quash a subpoena must be made promptly in the court where the subpoena is returnable (CPLR § 2304). Promptly, in turn, has been interpreted to mean made prior to the return date of the subpoena (*Matter of Santangelo v People*, 38 NY2d 536 [1976]). However, even where, as here, the motion is untimely, if the disclosure sought is palpably improper, the court is not foreclosed from inquiry into the propriety of the information (*Titleserv, Inc. v Zenobio*, 210 AD2d 314 [2d Dept 1994]; *see also Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283 [2d Dept 2011]). The court may also, at any time or on motion of any party, make a protective order denying or limiting the use of any disclosure device (CPLR § 3103 [a]). “Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR § 3103).

The instant proceeding concerns the validity of the decedent’s last will and testament. The petitioner has shown that her employment records are not relevant to the underlying proceeding. The objectant, in turn, has offered nothing to show why the petitioner’s employment records are relevant to the issue of whether the decedent’s will was validly executed. Accordingly, the motion pursuant to CPLR § 2304 to quash the subpoena is **GRANTED**. The motion for a protective order pursuant to CPLR § 3103 is **GRANTED**.

This constitutes the decision and order of the court.

Dated: September 19, 2018
Mineola, New York

E N T E R:

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

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