

Matter of Nurse

2022 NY Slip Op 33458(U)

September 27, 2022

Surrogate's Court, Kings County

Docket Number: File No. 2016-4940/A

Judge: Carol Robinson Edmead

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This opinion is uncorrected and not selected for official publication.

**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS:**

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Probate Proceeding, Estate of

GERALD NURSE,

Deceased.

**DECISION and ORDER
File No.: 2016-4940/A**

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EDMEAD, A. S.

The following papers were considered in determining the instant motion:

Notice of Motion to Preclude and to Dismiss Objections to Probate,
Affirmation of Counsel in Support, with Exhibits 1, 2
Affidavit of Counsel in Opposition, with Exhibits 3
Affirmation of Counsel in Reply, with Exhibits 4

In the instant contested probate proceeding, Alecianeth Lopez (the petitioner) moves for an order of the court pursuant to CPLR 3101(a) and CPLR 3126, precluding the presentation of evidence at trial relating to certain discovery demands and dismissing the remaining objections to the requested relief.

Gerald Nurse (the decedent) died on October 30, 2016, survived by i) three sons, namely Marc Nurse (Marc), LaJuane Nurse (LaJuane), and Gerald Nurse, Jr., ii) two daughters, namely Tracey Nurse (Tracey) and Sonya Nurse (Sonya), and iii) three grandchildren, namely Jasmine Montgomery (Jasmine), Ivy Deleon (Ivy), and Chastity Rodriguez (Chastity), issue of the decedent’s pre-deceased daughter Geraldine Montgomery. On December 14, 2017, the petitioner filed the instant petition seeking to probate a written instrument dated September 28, 2016 (the propounded instrument) which purports to be the decedent’s last will and testament. Pursuant thereto, the petitioner is nominated as the executor of the decedent’s estate and receives the entirety thereof.¹ Verified objections were filed by Marc, LaJuane, Tracey, Sonya, Jasmine, Ivy and Chastity (together, the objectants), pursuant to which they assert, *inter alia*, that the decedent lacked testamentary capacity, the propounded instrument was not duly executed, the decedent’s signature was forged, and the propounded instrument was product of duress or undue influence.

On September 12, 2019, the court issued a decision and order granting partial summary judgment to the petitioner, dismissing the objections to probate of the propounded instrument with the exception of those regarding testamentary capacity and undue influence (the 2019 order). On the same date, the parties executed a written stipulation setting forth a discovery schedule (the 2019 discovery stipulation), which was so-ordered. Pursuant thereto, the parties stipulated that i) responses to discovery demands were to be served by December 5, 2019, ii) depositions of the objectants were to be completed by January 31, 2020, iii) all discovery was to be completed no later than February 12, 2020, and iv) a note of issue was to be filed by March 2, 2020. Further, the 2019 discovery stipulation provided that

¹ The petitioner is the mother of the decedent’s son, Gerald Nurse, Jr., the contingent beneficiary of the decedent’s estate.

“[f]ailure to comply with this order may result in sanctions including the dismissal of this proceeding.”

On March 1, 2021, the petitioner filed the instant motion to preclude the objectants from presenting evidence at trial relating to certain discovery demands which she asserts the objectants have failed to answer, and seeking dismissal of the remainder of the objections to probate. The petitioner asserts that, on September 16, 2019, interrogatories (the discovery demands) were served on the objectants, and that responses either were not forthcoming at all or were insufficient. In particular, she asserts that i) neither LaJuane, Jasmine nor Ivy responded to the demands, and that neither Jasmine nor Ivy appeared for deposition, ii) responses to the demands from Sonya, Chastity and Tracey were received almost two months after the agreed-upon deadline, and were unsigned and undated, iii) that the majority of the responses proffered by Sonya, Chastity and Tracey were identical, and iv) that such responses were evasive, vague and generally uninformative.

The petitioner seeks an order precluding both Jasmine and Ivy from testifying at trial in this proceeding and from providing evidence regarding the decedent’s capacity or susceptibility to undue influence. The petitioner also seeks preclusion of evidence or testimony by any experts, as the objectants failed to respond whether expert witness testimony is anticipated or to identify expected expert witnesses. In support of her motion, the petitioner relies upon copies of i) the propounded instrument, ii) the pleadings herein, iii) the 2019 order, iv) the 2019 discovery stipulation, v) the discovery demands, vi) responses to the discovery demands by Tracey, Chastity, Sonya and Marc, and vii) email correspondence from counsel to the petitioner regarding the deadline for filing a note of issue.

In opposition, counsel for the objectants asserts first that the petitioner’s requested relief seeks dismissal of the remaining objections to probate, essentially a motion for summary judgment, based not on CPLR 3212 but on the remedial provisions of CPLR 3126.² He does not address the failure of Jasmine or Ivy to appear for their depositions, or to answer the discovery demands. Rather, he asserts that the petitioner offers an “incomplete view” of the proof offered by the objectants, including testimony from Chastity regarding her impressions of the decedent’s mental status several months before his death. He asserts that the objectants have submitted affidavits and appeared at depositions to testify regarding their knowledge of the decedent’s capacity. Counsel notes that the petitioner has not specifically alleged that the objectants’ purportedly vague or incomplete responses to the discovery demands are the result of their willful, deliberate or contumacious conduct, and asserts that the note of issue was not filed by the stipulated deadline because discovery remained incomplete. Counsel seeks an extension of time in which to file the note of issue, asserting that discovery was completed on April 23, 2021.

In reply, the petitioner asserts that the objectants cannot refuse to respond fully to the discovery demands, answering only that the requested information is “unknown,” and then proceed to trial with evidence or witnesses that have not been identified. The petitioner seeks, as alternative relief, a conditional order directing the objectants to respond fully to the discovery demands by a date certain, or

² Counsel asserts that the 2019 order found triable issues of fact regarding the decedent’s capacity and the exercise of undue influence, contending that the objectants’ affidavits proffered in response to the 2019 summary judgment motion constitute “irrefutable proof” of the decedent’s close relationship with his children, and that the petitioner proffers “no affirmative proof to establish her prima facie entitlement to summary judgment.” The court notes that the 2019 order was a short-form order that made no such finding.

face dismissal of their objections on the grounds of capacity and undue influence.

Subdivision (a) of CPLR 3101 provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The purpose of litigation is to achieve a just result and not to spring a surprise on one's adversary. That purpose can only be hindered – not served – by failing to make proper disclosure of matters material and necessary to the prosecution or defense of an action, as the case may be." *Cirale v 80 Pine St. Corp.*, 35 N.Y. 2d 113, 116 (1974). Compliance with disclosure "requires both a timely response and one that evinces a good-faith effort to address the request meaningfully." *Kihl v Pfeffer*, 94 N.Y. 2d 118, 123 (1999). Pursuant to CPLR 3126, the court may impose sanctions on a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds out to have been disclosed pursuant to this article." The nature and degree of the sanction is left to the broad discretion of the court. *Zietz v Wetanson*, 67 N.Y. 2d 711 (1986); *Wilson v W. Hempstead Gens. Football Club, Inc.*, 286 A.D.2d 438 (2d Dep't 2001).³

In his opposition to the instant motion, counsel to the objectants notes that the petitioner does not assert that the purported deficiencies in the objectants' responses to the discovery demands was willful or contumacious; however, he does not dispute that both Jasmine and Ivy failed to appear for their depositions and failed as well to proffer responses to the interrogatories. Further, counsel offers no explanation whatsoever for their disregard of the obligations set forth in the 2019 discovery order. Accordingly, the court grants the motion to preclude the testimony from, or other evidence offered by, Jasmine Montgomery and Ivy Deleon.

Further, counsel to the objectants does not address the failure of the other objectants to provide substantive responses to twelve of the twenty-eight interrogatories, with the exception that he asserts that the objectants are not required to disclose the identity of expert witnesses at this point. He asserts that the petitioner is not entitled to preclusion unless she has demonstrated that the information sought is not available through other disclosure devices. Although he references a brief exchange at Chastity's deposition, held two months after the written responses to the discovery demands were stipulated to be provided, he does not set forth any comprehensive catalogue of evidence proffered by the objectants in other formats in support of their assertions. Nonetheless, the petitioner in reply implicitly acknowledges that she has not asserted that the inadequate responses of the remaining objectants is the result of a deliberate attempt to frustrate disclosure, and seeks alternative relief in the form of a conditional order.

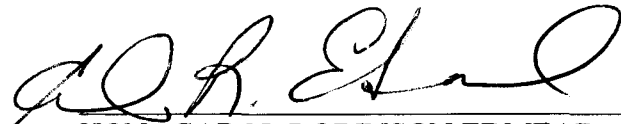
Counsel to the objectant is correct that, pursuant to CPLR 3101(d)(1)(i), a party is not required to respond to a demand for expert witness information at any specific time nor is it mandated that a party be precluded from proffering expert testimony merely because of noncompliance with the statute "unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party." *Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 A.D.3d 710 (2d Dep't 2007). In the instant matter, by counsel's own admission, discovery has been complete for over eighteen months; thus, prompt disclosure of the identity of any expert witnesses is appropriate. In addition, it is clear that, notwithstanding the agreements set forth in the 2019 discovery stipulation, both the petitioner

³ The court notes that, if an order of preclusion is granted, prohibiting the objectants from offering proof in support of their claims regarding lack of testamentary capacity and/or undue influence, summary judgment dismissing those objections is appropriate. *See Matter of Scaccia*, 66 A.D.3d 1247 (3d Dep't 2009).

and the objectants continued with discovery past the date agreed to for filing the note of issue, and continued with discovery into 2021.

Accordingly, the motion for preclusion is granted on a conditional basis, and the objectants are directed to respond in full to interrogatories 2, 6 through 8, 12, and 14 through 19. Responses must be served within thirty (30) days of service upon them of a copy of this decision and order, and failure to do so will result in preclusion of the objectants in giving evidence on these issues at trial. The parties shall file a Note of Issue on or before December 1, 2022.

This constitutes the decision and order of the court.


HON. CAROL ROBINSON EDMED
Acting Surrogate

Date: September 27, 2022
Brooklyn, New York