

Matter of Cannon

2023 NY Slip Op 33289(U)

September 20, 2023

Surrogate's Court, New York County

Docket Number: File No. 2019-3908/B

Judge: Hilary Gingold

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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 NEW YORK

September 20th 2023

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Probate Proceeding, Will of

ELLEN CANNON,

File No. 2019-3908/B

Deceased.

-----X
G I N G O L D , S .

The following papers were read in determining proponent's motion to dismiss objections:

	<u>Papers Numbered</u>
Notice of Motion dated March 13, 2023 – Affirmations – Affidavit	1-4
Affidavit of Service	
Affirmations in Opposition	5-6
Affidavits of Service	
Word Count Certification	
Reply Affirmation	7

In this contested probate proceeding in the estate of Ellen Cannon, proponent moves to dismiss the objections filed by the Public Administrator of the County of New York and the Attorney General of the State of New York.

This is not the first time proponent has sought dismissal of their probate objections. In January 2023, the court denied another motion by proponent seeking the same relief “without prejudice to renewal on proper papers” (*Matter of Cannon*, NYLJ, Jan. 26, 2023 at 21, col. 4 [Sur Ct, NY County]).¹ Among other things, the court found that proponent had failed to specify the grounds for the motion (CPLR 2214[a]) and that counsel's submissions in support of the motion were “mostly incomprehensible.”

¹ While this first motion to dismiss was pending, proponent's counsel attempted to file another motion seeking dismissal of the objections. In a decision and order dated May 19, 2022, the court declined to accept the motion for filing, identifying numerous errors, including that the motion “did not contain a caption of a proceeding currently filed with the court.”

Following this decision, proponent's counsel attempted to renew his motion to dismiss on February 14, 2023 (February Motion). The February Motion was also found procedurally insufficient. The court notified proponent's counsel of the deficiencies in writing, explaining what he needed to do to fix them and instructing him to file an amended notice of motion so that the February Motion could be placed on the court's calendar. Proponent's counsel disregarded the court's instructions, however, and filed an entirely new motion to dismiss on March 1, 2023 (March Motion), creating an administrative headache for the court. Nonetheless, to expedite adjudication of the proceeding, the court placed the March Motion on its April 4, 2023 calendar and then adjourned it, at the request of the objectants, to June 6, 2023. Inexplicably, on May 3, 2023 (May Motion), proponent's counsel filed yet another motion to dismiss the objections, which he made returnable on June 6, 2023 – the same date to which the March Motion had been adjourned. The court did not accept the May Motion for filing and these motion papers were returned to proponent's counsel.

Proponent's serial motion filing notwithstanding, the only motion to dismiss objections before the court is the March Motion. Although never calendared, the February Motion has been rendered moot by the March Motion, which seeks the same relief. As for the March Motion, it fares no better than the first motion to dismiss which the court denied in January 2023. Again, proponent's notice of motion fails to specify the grounds on which she seeks relief (CPLR 2214[a]) and counsel's submissions in support of the motion are plainly insufficient to cure the defect, leaving the court once again to speculate as to the nature of the motion.

Beyond proponent's repeated failure to adhere to the statutory framework for motion practice, there is a more fundamental problem with the March Motion. Proponent's primary argument in support of the motion is that the objectants have failed to provide any evidence to

support their objections. However, proponent's argument misapprehends the parties' evidentiary burden at this stage of the litigation. Objectants have no obligation to lay bare their proof prior to trial unless and until proponent, on a motion for summary judgment (CPLR 3212), tenders admissible evidence sufficient to demonstrate the absence of any material issues of fact (*see Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Artalyan, Inc. v Kitridge Realty Co.*, 79 AD3d 546, 547 [1st Dep't 2010]). To the extent the court can deem the March Motion one for summary judgment because issue has been joined (CPLR 3212[a]), proponent has not even attempted to make the requisite evidentiary showing, instead "pointing to perceived gaps in the proof," which is insufficient (*see e.g. Nestenborg v Standard Intl. Mgt., LLC*, 191 AD3d 579, 579 [1st Dep't 2021]).

Apart from the above infirmities, all of which require denial of the motion, there is yet another reason to deny the March Motion. The court has an independent obligation to determine whether a will is valid (SCPA 1408; *Matter of Halpern*, 76 AD3d 429, 431 [1st Dep't 2010], *aff'd* 16 NY3d 777 [2011]). Here, not only is the propounded instrument highly irregular on its face, but it was not executed under an attorney's supervision, so the presumption of regularity does not apply (*Halpern*, 79 AD3d at 431). Further, discovery has been stayed since January 2021 due to proponent's successive motions to dismiss (*see* CPLR 3214). As a result, the Attorney General and Public Administrator have not had an opportunity to complete discovery, including deposing the proponent and obtaining the decedent's medical and financial records. Under these circumstances, proponent's motion must also be denied as premature (*see* CPLR 3212[f]).

Finally, the court is compelled to address proponent's propensity for repeatedly filing defective motions to dismiss the objections. These motions have needlessly taxed the resources of the court, prolonged this litigation, and generated unnecessary legal fees for the estate and the

parties who have been compelled to respond. The court cautions proponent's counsel that, if such conduct continues, the court will entertain a motion for sanctions.

Based on the foregoing, it is

ORDERED that proponent's motion to dismiss the objections is denied; it is further

ORDERED that all demands for discovery and inspection shall be served by November 15, 2023; it is further

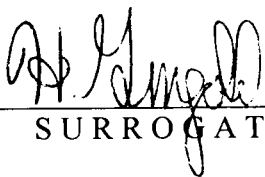
ORDERED that a virtual status conference with a court-attorney/referee will be held on January 24, 2024 at 11:00 a.m. via Microsoft Teams and a link will be sent via email simultaneously with a copy of this order; it is further

ORDERED that there shall be no adjournments of the dates directed herein without stipulation of the parties and court approval; it is further

ORDERED that the failure to conduct and complete any discovery directed herein may constitute a waiver of such discovery.

The Clerk of the Court shall send a copy of this decision, which constitutes the order of the court, to all parties who have appeared.

Dated: September 20th, 2023



SURROGATE