

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

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In the Matter of the Probate Proceeding, Will of

DECISION/ORDER

GORDON V. HASBROUCK a/k/a GORDON VAN

To commence the statutory period for appeals as of right (CPLR 5513[a]), you advised to serve a copy of this Order, with Notice of Entry, upon all parties.

VLIET HASBROUCK

Surrogate File No. 2010-460
Motion Date: May 31, 2011

Deceased.

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ONOFRY, J.

The following papers numbered 1-21 were read and considered on this motion by Petitioner, and nominated Executor, Timothy C. Freehill, for summary judgment, pursuant to CPLR §3212 and EPTL §§3-1.1 and 3-2.1 and SCPA §1408, in which Petitioner seeks admission of the Last Will and Testament of Gordon V. Hasbrouck dated December 30, 2004, to probate, and Objectants opposition thereto in which they seek the denial of Petitioner's motion or, in the alternative, a stay thereof, pursuant to CPLR Rule 3212(f), pending the completion of discovery, together with such other and further relief as to the Court seems just, equitable and proper:

Notice of Motion-Affirmation/Memorandum of Law-Riley - Exhibits A-I.....	1-11
Affirmation in Opposition- Botti.....	12
Affirmation in Opposition-Jedlicka -Memorandum of Law.....	13-14
Affirmation in Opposition-Freehill - Exhibits A-E.....	15-20
Reply Affirmation-Riley.....	21

Upon the foregoing papers, Petitioner's motion for summary judgment is hereby stayed, pursuant to CPLR §3212(f), pending the completion of discovery, as hereinafter ordered.

BACKGROUND AND PROCEDURAL HISTORY

The Court, as a preliminary matter, takes judicial notice of the prior proceedings under this file number as they relate to the pending probate proceeding; a probate proceeding commenced by

nominated Executor Timothy C. Freehill, in which Petitioner seeks the admission of Decedent's Last Will and Testament, dated December 30, 2004 (the "2004 Will") to probate.

The facts, insofar as they are relevant to the pending motion [which is one of two companion motions], reveal that Gordon V. Hasbrouck (the "Decedent") died a resident of the Town of Wallkill, Orange County, New York on April 5, 2010, leaving as his all and only distributees, a nephew, Robert H. Freehill, and two (2) grandnephews, namely: James B. Freehill, III and Joseph G. Freehill.

Decedent also died leaving a purported Last Will and Testament (the "2004 Will") which has now been offered for probate by the nominated executor, Timothy C. Freehill, a grandnephew of the Decedent. Subsequent to the filing of the 2004 Will, distributees [and Objectants] Robert H. Freehill, James B. Freehill, III and Joseph G. Freehill, appeared through counsel for the initial purpose of inquiring into the facts and circumstances surrounding the execution of the Will. Subsequent to the initial appearance, and pursuant to Court Order, SCPA §1404 examinations were conducted; examinations which included the examination of two of the three attesting witnesses [Martha A. Telefus-Gillespie and John M. King] and attorney-draftsman, Richard A. Hoyt, who supervised the signing of the Will.

Thereafter, and on January 28, 2011, Verified Objections to the admission of the 2004 Will were filed in which Objectants asserted, *inter alia*, the following: (1) lack of due execution; (2) undue influence; and (3) fraud. Subsequent to the joinder of issue, and predicated upon the strength of the 1404 examinations and the purported 2004 Will itself, Petitioner now moves for summary judgment, pursuant to CPLR §3212, EPTL §§3-1.1 and 3-1.2, and SCPA §1408, seeking admission of Decedent's Will to probate asserting, *inter alia*, that the 1404 examinations, as well as the Will

itself, establish, *prima facie*, Petitioner's entitlement to the admission of the December 30, 2004 Will to probate, as a matter of law.

Objectants, in opposition, argue that the testimony elicited from the 1404 examinations is, at best, inconclusive and fails to establish Petitioner's *prima facie* entitlement to the admission of the 2004 Will to probate. Moreover, they argue that such a motion is premature in that discovery is in its infancy [both paper discovery, including the retrieval of medical records, and non-party depositions]; discovery, they argue, will establish both the undue influence and fraud perpetrated upon the Decedent. As such, Objectants assert that the summary judgment motion should be stayed, pursuant to CPLR §3212(f), and Article 31 discovery permitted to proceed unabated; discovery that permits the Court to decide the motion with the benefit of a full and complete record.

DISCUSSION/LEGAL ANALYSIS

The Court begins its analysis with the basic premise that discovery should be permitted to proceed "on all matters material and necessary to the prosecution or defense of an action". See, CPLR 3101. It is elementary that relevancy, materiality and necessity are governed by the framed issues derived from the pleadings themselves.

In objecting to the admission of the 2004 Will to probate, Objectants have asserted: (1) lack of due execution; (2) that the Will was "caused or procured by undue influence"; and (3) that the Will was not "freely or voluntarily executed by the Decedent . . . [and was the] . . . product of misrepresentations and/or other untrue statements concerning [Objectants]", i.e. a product of fraud.

Objectants therefore seek a stay of the pending summary judgment motion to afford them an opportunity to complete discovery; a request predicated upon the need to conduct the depositions of

the remaining grandnephews, the grandniece and their mother, Marjorie Fox, who purportedly secured the services of attorney-draftsman Hoyt with whom the Decedent had no prior attorney/client relationship with. Moreover, Objectants assert that the Decedent suffered from visual and hearing impairments, the severity of which can only be illuminated by the production of Decedent's medical records. This, they assert, in light of the inconclusive testimony elicited from the 1404 examinations, and the seven month gap between the initial conference and the ultimate signing [without any intervening face to face conferences] warrants a stay of the pending summary judgment motion; a stay which would allow discovery to proceed to its conclusion and thus allow the Court to ultimately decide the pending motion with the benefit of a full and complete record. The Court agrees.

CPLR 3212(f) provides, in relevant part, for the following:

“Should it appear from affidavits submitted in opposition to the Motion that facts essential to justify opposition may exist but cannot then be stated, the Court may deny the motion *or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such order as may be just.*”

CPLR 3214(b) provides for the following:

“Service of a notice of motion under Rule 3211, 3212 or Section 3213 stays disclosure until determination of the motion *unless the court orders otherwise.*”

Here, the Court has been asked to consider the interplay between CPLR §§3212(f) and 3214(b), in light of the testimony elicited, from the SCPA §1404 examinations. However, in order for Objectants to be afforded the benefits derived from the application of CPLR §3212(f), it is incumbent upon them to demonstrate an evidentiary basis from which the court could reasonably conclude that such discovery may lead to relevant evidence. See, *Groves v. Land's End Housing Co, Inc.*, 80 N.Y.2d 978, 592 N.Y.S.2d 643 [1992]; *Sorbello v. Birchez Associates, LLC*, 876 N.Y.S.2d

789 [3rd Dept. 2009]; *Bailey v. New York City Transit Authority*, 270 A.D.2d 156, 704 N.Y.S.2d 582 [1st Dept. 2000]; *Companion Life Insurance Co. of N.Y. v. Allstate Abstract Corp.*, 35 A.D.3d 519, 829 N.Y.S.2d 536 [2nd Dept. 2006]. In applying such standard, a claimed need for discovery, predicated upon the hope and speculation that evidence “might be uncovered” [in effect a “fishing expedition”], is insufficient to warrant the granting of a stay. *See, e.g., Ruttura & Sons Construction Co., Inc. v. J. Petrocelli Construction, Inc.*, 257 A.D.2d 614, 684 N.Y.S.2d 286 [2d Dept. 1999]; *Greenberg v. McLaughlin*, 242 A.D.2d 603, 662 N.Y.S.2d 100 [2d Dept. 1997]; *Brewster v. Five Towns Healthcare Realty Corp.* 59 A.D.3d 483, 873 N.Y.S.2d 199 [2d Dept. 2009].

Here, a consideration of the record as a whole, in light of the framed issues, warrants the granting of a stay, the completion of discovery and further refinement of the record; a record from which the Court could properly assess whether factual issues persist or whether the 2004 Will is entitled to be summarily admitted to probate. This is particularly so since the establishment of fraud and undue influence are typically “fact driven” and often turn on the factual nuances derived from the relevant testimony. Indeed, even the testimony elicited from attorney-draftsman Hoyt raise significant issues that require further examination and inquiry. Moreover, these issues coupled with Decedent’s alleged medical condition; the severity of which can only be illuminated from the retrieval and examination of his medical records, serve as more than sufficient evidentiary predicate to warrant the granting of a stay and the completion of discovery.

Similarly, Petitioner’s request for partial summary judgment, ostensibly predicated upon Objectants’ failure to contest the issue of Decedent’s capacity, is premature and best left for adjudication after completion and refinement of the record, particularly where the content of the medicals has yet to be revealed and where there has been no demonstrable showing of prejudice

accruing to the Petitioner. Moreover, to the extent prejudice may accrue to Petitioner, such prejudice is significantly ameliorated by the expedited discovery schedule ordered herein and is more than outweighed by basic notions of fundamental fairness affording Objectants an opportunity to properly explore Decedent's medical condition and the issues embraced within their Objections.

FURTHER COURT DIRECTIVES AND SCHEDULING

In conformity with the Court's decision, it is therefore

ORDERED, that Petitioner's motion for summary judgment, pursuant to CPLR §3212, shall be, and is hereby, stayed pursuant to CPLR §3212(f) pending completion of court ordered discovery as hereinafter directed; and it is further

ORDERED, that all paper discovery, including the production of all Decedent's medical records, shall be completed and exchanged [Demands and Responses] no later than December 30, 2011; and it is further

ORDERED, that all further depositions [both party and non-party depositions] shall be completed no later than January 31, 2012; and it is further

ORDERED, that the parties, through respective counsel, are directed to, and shall, appear for a Compliance/Scheduling Conference on Tuesday, February 7th, 2012 at 2:15 p.m. whereupon the Court will establish and finalize the motion schedule.

This constitutes the decision and order of the Court.

Dated: November 7, 2011

ENTER



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