

TRUSTS AND ESTATES UPDATE

Expert Analysis

The Closing Days of 2020

As the year 2020 comes to an end, we stop to remember the trials and tribulations of days past, and look forward both personally and professionally to better times for us all in 2021. With that said, we begin 2021 with some of the more interesting decisions that concluded last year.

Electronic Discovery Authorized. In *In re Meixsell*, NYLJ, Dec. 3, 2020, at 23 (Sur. Ct. Bronx County), the Surrogate's Court, Bronx County, was confronted with a motion, pursuant to CPLR 3126, by the petitioner, the nominated executor under the propounded will, to dismiss the objections to probate filed by the decedent's brother and sole distributee of his estate, as a result of his failure to submit to an examination before trial. In opposition to the motion, the objectant maintained that he was 91 years old, resided in Florida, and had been diagnosed with cancer. Annexed to

By
**Ilene
Sherwyn
Cooper**



his papers was an affidavit from his treating oncologist indicating that the objectant should not travel to New York given his health and high risk of contracting COVID-19. In view thereof, the objectant offered to be deposed in Florida via video conference. The petitioner replied arguing, inter alia, that absent a stipulation of counsel no basis existed for the court's ordering a deposition in Florida pursuant to CPLR 3113(d).

The court observed that the provisions of Article 31 afford it with broad discretion to supervise disclosure and to make such orders with regard to the failure or refusal to provide disclosure as are just. To this extent, the court noted that dismissal pursuant to CPLR 3126 is a drastic measure, particularly during such "extraordinary times" as wrought by the COVID-19

pandemic. Acknowledging that both practitioners and the courts have availed themselves of technology in order to conduct business, the court found that videoconferencing was a sound alternative to an in-person deposition and proper under the circumstances. Indeed, the court opined that while the petitioner was entitled to the objectant's deposition, causing him to travel to New York for this purpose, in view of his medical condition, strained common sense and decency. The court rejected the petitioner's contention that it was not otherwise authorized to direct electronic discovery pursuant to CPLR 3113(d) absent a stipulation, and, under the circumstances, directed the objectant to submit to a video examination from Florida.

Summary Judgment and Sanctions for Spoliation Denied. Before the Surrogate's Court, New York County, in *In re Roberts*, NYLJ, Nov. 4, 2020, at p. 18 (Sur. Ct., New York County), was a motion by the proponent of the decedent's will and codicil for summary judgment dismissing the objections to probate

filed by various relatives of the decedent. Additionally, proponent sought to vacate a 2007 preliminary injunction, and requested sanctions against objectants based upon the alleged spoliation of evidence by objectant's counsel. Objectants cross-moved to dismiss the probate petition with prejudice pursuant to CPLR 3126 for failure to prosecute, as well for costs and legal fees attendant to the motions.

The decedent died at the age of 94 survived by three siblings and nine children of post-deceased siblings. Prior to the filing of the motions sub judice, the Public Administrator was appointed temporary administrator of the estate, and proponent and objectants both moved and cross-moved for summary judgment, respectively. Objectant's cross-motion was denied, and proponent's motion was granted in part and denied in part.

With respect to that part of the proponent's present motion seeking summary judgment, the court noted that the Appellate Division, First Department has repeatedly refused to entertain successive motions for summary relief absent "a showing of newly discovered evidence or other sufficient justification." See *Fleming and Assoc., CPA, PC v. Murray & Josephson, CPA*, 127 A.D.3d 428 (1st Dept. 2015). Inasmuch as the petitioner did not claim to have discovered new evidence since the making of her prior motion for summary judgment, or

offer any justification for permitting her to make a duplicative motion of this sort, her motion for summary judgment was denied.

With respect to proponent's request for vacatur of a 2007 preliminary injunction, the court noted that the injunction had been issued in a proceeding commenced by the Public Administrator pursuant to SCPA 2103 for discovery of information.

Acknowledging that both practitioners and the courts have availed themselves of technology in order to conduct business, the court found that videoconferencing was a sound alternative to an in-person deposition and proper under the circumstances.

In view thereof, the proponent's motion was denied without prejudice to renewal in the proceeding in which it was issued; i.e. the discovery proceeding commenced by the Public Administrator.

Finally, with respect to the proponent's request for sanctions based upon the alleged spoliation by objectant's counsel of relevant documents contained in the probate file of the deceased attorney-draftsperson, the court noted that sanctions for spoliation in New York may be ordered where a party destroys, discards or otherwise loses relevant evidence. To this extent, the moving party must establish that: (1) the

party with control over potentially relevant evidence had an obligation to preserve it; (2) the evidence was destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the movant's claim or defense.

Within this context, the record revealed that objectant's counsel had obtained the attorney-draftsperson's file by subpoena. Thereafter, at the request of the proponent, the file was copied and sent via overnight mail to the proponent's then lawyer, with a bill for copying charges, which was subsequently paid. Proponent did not dispute these statements, nor provide any evidence to support her allegations that objectant's counsel destroyed or withheld any evidence relevant to the proceeding. Accordingly, proponent's motion for sanctions was denied.

As for the objectant's cross-motion, the court concluded that dismissal was not warranted inasmuch as it would undercut the court's principal function and responsibility of determining the decedent's intentions with respect to the disposition of his/her property at death. Accordingly, objectant's cross-motion was denied.

Statute of Limitations Waived; Summary Judgment Denied on the Issue of Fiduciary Duty. In *In re Capozza Irrevocable Trust*, 2020 NYLJ LEXIS 1501 (Sur. Ct. Westchester County), the Surrogate's Court, Westchester County, denied the

trustee's motion for summary judgment dismissing the objections to his account on the basis of the statute of limitations and the doctrine of "prior action pending."

The subject trust was created for the benefit of the grantor's grandson, the objectant, and provided, inter alia, for annual income payments to him, as well as the distribution to him of ½ the principal thereof upon his attaining the age of 25, and the balance upon his attaining the age of 30. The objectant attained the age of 30 on March 29, 2002, at which time the trust terminated pursuant to its terms. During the pendency of the trust, the trustees thereof were the grantor, who was succeeded upon his death, by his wife, and then upon her death, by their son, the objectant's father, who was the petitioner in the pending accounting proceeding.

To the petitioner's knowledge, the only asset of the trust was a Promissory Note payable to the trust by a corporate entity which had been created by the grantor and his spouse. The terms of the Note required payment of interest at 8% per annum on the principal balance, and for its repayment upon the corporation's having sufficient cash with which to pay the principal and interest due.

According to the petitioner, he never had the original Note, was unaware of any interest payments made thereon, and never made any formal demands for repayment of

the Note. A copy of the Note was given by the petitioner to the objectant in 2001, at which time he informed the objectant that he would have nothing further to do with the trust.

In 2010, an action was commenced by the objectant in the Supreme Court against the trustee and the corporation requesting, inter alia, that the petitioner account as successor trustee, and that a constructive trust be imposed on the assets of the corporation sufficient to satisfy the Note. After the service of discovery demands by the defendants, the Supreme Court action remained dormant.

In 2018, the objectant instituted a compulsory accounting in the Surrogate's Court requesting that the trustee be directed to account. In response, the trustee filed his accounting, and objections were filed. Subsequent thereto, the trustee filed the motion, sub judice, requesting dismissal of the objections. Specifically, the trustee alleged that the objections were untimely on the grounds that he openly repudiated his role as trustee in 2001 or 2002, more than six years before the Supreme Court action, when he distributed the copy of the Note to the objectant, and informed him that he would not have anything further to do with the trust. With respect to the second argument, the trustee relied upon the Supreme Court action, which sought the same relief against him as in the pending accounting.

The court rejected the trustee's contention based on the statute of limitations holding that the trustee had waived the defense by failing to raise it in response to the compulsory accounting proceeding. Similarly, the court found that the trustee had waived the affirmative defense of prior action pending, concluding that it should have been raised in a pre-answer motion or answer to the compulsory accounting petition. Moreover, the court determined that triable issues of fact existed as to those objections alleging breach of fiduciary duty by the trustee for failing to attempt to enforce the Note during his stewardship. Nevertheless, the court found that these objections implicated conduct by the corporation, a nonparty to the proceeding. Inasmuch as such conduct was also at issue in the Supreme Court action, to which the corporation and trustee were both parties, the court held the accounting proceeding in abeyance, pending that action's resolution, in order to avoid inconsistent results.