

**SURROGATE'S COURT: KINGS COUNTY**

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Estate of

**BEATRICE WEISELBERG,**  
**Deceased.**

**DECISION AND ORDER**

**File No. 896/B/03**

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**JOHNSON , S.**

The following papers were considered in deciding proponent's motion for summary judgment and objectant's cross-motion to compel further discovery:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits .....	1, 2, 3
Affirmation in Opposition .....	4

**Background**

The decedent died on December 6, 2002. She was 90 years of age and had no close relatives. She executed a will on July 11, 1990 (the "1990 Will"), which, after making a number of pecuniary, tangible and specific bequests, left the residuary estate to the Yeshiva of Brooklyn (the "Yeshiva"). She named Rabbi Manachem Mendal as executor and Rabbi Sholom Mendal as successor executor.

She later executed a will on August 9, 1995 (the "1995 Will"), which modified the pre-residuary bequests and left the residuary estate to Irene Freiderwitzer and Stanley Freiderwitzer, who were named as executors.

At her death, the 1990 Will of the decedent could not be located. On June 9, 2003, the Yeshiva filed petitions to compel Michael Hausman, Esq., the attorney who drafted the 1995 Will, to appear and be examined about

the location of both the 1990 Will and the 1995 Will. On June 26, 2003, Mr. Hausman appeared and filed the original 1995 Will with the Court. The Yeshiva served notices to Irene Freiderwitzer and her then attorney for information concerning the 1990 Will but neither witness had any information about what happened to it.

On October 11, 2005, the Yeshiva filed an action in Supreme Court against Irene and Stanley to deny probate to the 1995 Will and to vacate certain inter-vivos transfers the decedent made to Irene and Stanley, alleging that the execution of the 1995 Will and inter-vivos transfers were the result of undue influence practiced by Irene and Stanley. On January 3, 2008, the Supreme Court transferred the action to this Court.

On June 28, 2010, Rabbi Schlomo Mandel (the “petitioner”) filed his petition to probate a copy of the 1990 Will and to deny probate to the 1995 Will.<sup>1</sup> Irene and Stanley (the “objectants”) filed objections to the petition. They raised that the affirmative defenses that the 1990 Will was expressly revoked by the 1995 Will and that the inability to produce the original 1990 Will led to the presumption that it had been revoked by the decedent, *animo revocandi*.

In November, 2011, the objectants moved for summary judgment dismissing the petition. The motion was denied without prejudice to renewal upon completion of the deposition of Mr. Hausman and Reisel Deutscher, a close friend of the decedent (*Matter of the Estate of*

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<sup>1</sup> Rabbi Manachem Mandel died in the interim.

*Weiselberg*, Sur Ct, Kings County, June 14, 2012, S. Johnson, Index No. 896/03). Those depositions were completed and the objectants renew their motion for summary judgment dismissing the proceeding to probate the 1990 Will.

#### Discussion

Summary judgment may be granted only where it clearly appears that no material issues of fact exist (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]). The movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs. Inc.*, 46 NY2d 1065 [1979]). The papers submitted in the summary judgment application are scrutinized in a light most favorable to the party opposing the motion (see *Robinson v Strong Mem. Hosp.*, 98 AD2d 976 [1983]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 357 [2d Dept 1989]). In the appropriate case, the court may grant summary judgment to a party “other than the moving party.” (CPLR R3212[b]).

The objectants argue that summary judgment should be granted dismissing the petition to probate the 1990 Will because the 1995 Will revoked the 1990 Will and petitioner cannot rebut the presumption that the original 1990 Will was revoked by the decedent. Petitioner replies that the execution of the 1995 Will was procured by objectants’ undue influence so that there was no express revocation, and that the failure to produce the

original 1990 Will was caused by objectants, who cleaned out the decedent's apartment after the decedent entered a nursing home.

However, the failure of objectants to offer the 1995 Will raises a more fundamental issue, namely their standing to contest the earlier will. Objectants are not distributees of the decedent. Therefore, their only standing in this proceeding to probate an earlier will is as executors and beneficiaries of a later will.

Objectants were cited as executors and beneficiaries named in a will on file with the Court (SCPA §1403[d]). In the normal case, the parties interested in the probate of the later will will offer the later will for probate. Probate of the later will makes the issues surrounding the execution or revocation of the earlier will moot. Denial of probate of the later will, on the other hand, limits the class of objectants in the proceeding to probate earlier will to the decedent's distributees.


In the instant case, objectants filed the original 1995 Will in 2003 only upon compunction. Since then, they have avoided offering the 1995 Will for probate. The objectants, as executors named in the 1995 Will and primary beneficiaries of that will have no legal duty to offer the 1995 Will for probate (*Dodd v Anderson*, 197 NY 466 [1910]; *Matter of Billet*, 106 Misc 229 [Sur Ct, Westchester County 1919], *reversed on other grounds* 187 AD 309 [2d Dept 1919]; *Matter of Williams*, 71 Misc 2d 243 [Sur Ct, NY County 1972]; *Matter of Canfield*, 165 Misc 66 [Sur Ct, Kings County 1937]). If they chose not to do so, they are free to forfeit their claims to the decedent's property. But, having decided not to offer the later will for probate, they have no right

But, having decided not to offer the later will for probate, they have no right to participate in the proceeding to probate the earlier will.

Based on the above, objectants' motion for summary judgment dismissing the petition to probate the 1990 Will is denied. Unless objectants file a petition to probate the 1995 Will and cause citation to issue within thirty days of receiving notice of this decision and order, their objections will be dismissed.

The Clerk of the Court is directed to mail a copy of this decision to all parties who have appeared in this proceeding.

This constitutes the decision and order of the Court.

  
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HON. DIANA A. JOHNSON  
Surrogate

Dated: June 27, 2013

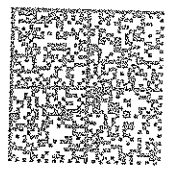
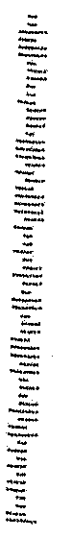
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**SURROGATE'S COURT  
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