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Dead Man's Statute: Use in Summary Judgment Motions

A recent decision emanating from the Surrogate's Court, Nassau County,¹ reaffirms the well-established rule that evidence excludable under the Dead Man's Statute cannot be considered in support of a motion for summary judgment.

That rule, and its counterpart concerning evidence that may be considered in opposition to a summary judgment motion, are not widely understood by general practitioners.

Indeed, the Dead Man's Statute itself can be something of an enigma to those who do not encounter it regularly.

This article will explain the general rules applicable to motions for summary judgment as well as certain exceptions applied by the courts.

Background

Briefly explained, New York's "Dead Man's Statute" (CPLR 4519) makes testimony by an interested witness "concerning a personal transaction or communication between the witness and [a] deceased person or mentally ill person" excludable "[u]pon the trial of an action or the hearing upon the merits of a special proceeding[.]"² Such evidence is, however, freely discoverable, and may be the subject of testimony at an examination before trial. Indeed, unlike the rule in other states, in New York, eliciting such evidence during the discovery process does not act as a waiver of the statute.³

The Dead Man's Statute comes up frequently in litigation concerning trusts and estates. For example, to prevail in a discovery proceeding seeking the return of property to an estate, the recipient of an alleged "gift" from the decedent has the burden of establishing all the legal elements of a gift.⁴ It is often necessary,

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therefore, to offer evidence of transactions and communications with the decedent.

As an interested person, however, the recipient of the alleged gift is incompetent to testify concerning such transactions or communications. To avoid exclusion under the Dead Man's Statute, such evidence generally must consist of testimony from disinterested witnesses. Similarly, beneficiaries under a will are usually incompetent to testify in support of the will or transactions or communications with the decedent.⁵

The question often arises, to what extent may evidence excludable under the Dead Man's Statute be used in support of or in opposition to a motion for summary judgment? On one

hand, the New York statute only applies at trial. As "dictated by the very language" of the statute itself, the statute cannot be asserted—or waived, for that matter—until trial.⁶ On the other hand, a motion for summary judgment is the procedural equivalent of a trial on the merits.⁷

The long-standing rule in New York is that "evidence excludable under the Dead Man's Statute should not be used to support summary judgment[.]"⁸ That general rule was applied recently by the Nassau County Surrogate in *Matter of Penn*.⁹ In that matter, a contested discovery proceeding, the executors of the decedent's estate contended that the respondent—the long-time friend, employee, and paramour of the decedent—was in possession of cash and a cooperative apartment purchased with funds belonging to the estate. After discovery, the respondent moved for summary judgment. Inasmuch as the respondent conceded that the decedent's funds were used to purchase the apartment, she had the burden of establishing all the elements of a gift.

In support of her motion, the respondent offered her own testimony that the decedent intended the apartment to be her sole property and that the decedent made a statement to that effect to a realtor. The court, however, applied the rule that evidence excludable under the Dead Man's Statute cannot be used in support of a summary judgment motion. Inasmuch as the respondent offered no other evidence of the communication with the decedent, such as testimony from the realtor to whom the decedent allegedly made the statement, the court denied the respondent's motion.

Summary Judgment Motion

The issue whether evidence excludable under the Dead Man's Statute may be considered in opposition to a motion for summary judgment has, historically, been the subject of controversy.

