

Dead Man's Statute: Use in Summary Judgment Motions

By Eric W. Penzer

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, 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. Until 1972, there was a split of authority in the appellate divisions on the issue. The Appellate Division, First Department, held that such evidence could be utilized to defeat a summary judgment motion, while the Second and Third Departments took a "contrary though arguably distinguishable view."¹⁰ The Court of Appeals, in *Phillips v. Joseph Kantor & Co.*,¹¹ laid the issue to rest, at least as a general matter. It held that "[e]vidence, otherwise relevant and competent upon a trial or hearing, but subject to exclusion on objection under the Dead Man's Statute, should

not predetermine the result on summary judgment in anticipation of the objection."¹²

Such a rule was mandated, according to the Court, because of the inability to predict with certainty whether evidence otherwise excludable under the Dead Man's Statute might nonetheless be admissible at trial by virtue of a waiver of the statute. Such a waiver could be effectuated intentionally or by inadvertence, such as by "opening the door" to the admission of evidence otherwise excludable under the statute. As the Court noted,

[t]he same New York language which prevents waiver of the statute during discovery proceedings, should also prevent the assertion of the rights under the statute prior to trial. A reason was stated below by Mr. Justice Kupferman in dissent: "[i]t is always possible that the incompetency will be waived at the trial, or the door opened, by design, or by inadvertence." Moreover, Wigmore makes a strong plea for voluntary waiver of the statute by responsible representatives of estates where justice so dictates (2 Wigmore, Evidence, § 578, at p. 698).¹³

While the Court's discussion in *Phillips* focused on the use of excludable evidence to oppose a motion for summary judgment, that discussion could well be regarded as mere dicta. This is because the Court was careful to note that "there is in this case some evidence free from exclusionary objections which suggests a palpable likelihood of establishing plaintiff's prima facie case, without use of the evidence excludable under the Dead Man's Statute."¹⁴

Door Left Open

The Court left the door open for granting summary judgment in a case where the only evidence offered in opposition to the motion would be subject to exclusion under the statute. It stated that, "[a]dmittedly, a trial would seem unnecessary if it were certain, in an absolute rather than a pragmatic sense of the term, that there would be no waiver of the statute and that all the proof would be excludable."¹⁵ The case before it was not such a case, however, and in the Court's view, such a case would be rare indeed: "[t]his is not a case . . . where all the evidence might be excluded, nor does such a case occur often, if ever."¹⁶

On that issue, Chief Judge Stanley H. Fuld, in dissent, expressed his view that summary judgment was properly granted by Special Term because the plaintiff failed to offer "an affidavit from any witness competent to testify at the trial as to the asserted oral state-

ments made by the decedent."¹⁷ The dissenting judge noted that courts have "consistently and, in [his] view, correctly decided"¹⁸ that a motion for summary judgment is properly granted where "the record indicates that the only evidence which (the plaintiff) might introduce at trial would be incompetent and insufficient to defeat judgment for (the defendants)."¹⁹ He noted that a party should not avoid summary judgment based on "the very farfetched claim that, at the trial, the witness' incompetency [may] be waived. . . or the door opened, by design, or by inadvertence."²⁰

That the Court's holding in *Phillips* seemingly rested on the existence of nonexcludable evidence, mandating denial of the motion, at least some uncertainty exists concerning whether excludable evidence alone would suffice to justify the denial of a motion for summary judgment. Indeed, most published Appellate Division cases simply recite the general rule, i.e., that otherwise excludable evidence may be considered in opposition to a motion for summary judgment, but do not make clear whether any non-excludable evidence exists mandating denial of the motion.

Yet the Appellate Division, Third Department, has repeatedly held that summary judgment is appropriate where evidence excludable by the Dead Man's Statute "is proffered as the sole proof in support of the opposing party's claim[.]"²¹ Likewise, the Surrogate's Courts have applied that rule. For example, in *Matter of Kacprzyk*,²² the Suffolk County Surrogate's Court granted summary judgment seeking dismissal of a claimant's objections to the executrix's petition to determine the validity of the claim. According to the court, "the sole evidence preferred [by the claimant] is her own self-serving testimony of oral communications with the decedent, which is insufficient to withstand petitioner's motion for summary judgment."²³

Conclusion

In any case involving a decedent, care must be taken by the practitioner early on in the discovery process to determine whether evidence necessary to establish a claim or defense is excludable under the Dead Man's Statute. This may require seeking out disinterested witnesses to establish material facts that could otherwise be established through testimony of the parties. Should dispositive motion practice ensue, familiarity with the rules stated above is essential to avoid unforeseen pitfalls.

Endnotes

1. *Matter of Penn*, 14 Misc. 3d 1203(A), 2006 WL 3690731, 2006 N.Y. Slip Op. 52394 (U) (Sur. Ct., Nassau County December 13, 2006).
2. *Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307, 313 (1972) (citation omitted).

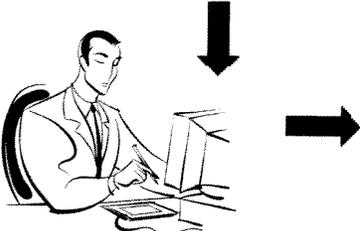
3. See *id.* at 314.
4. See *Matter of Carroll*, 100 A.D.2d 337, 338 (2d Dep't 1984).
5. See *Matter of Sheehan's Will*, 51 A.D.2d 645 (1976).
6. *Phillips*, 31 N.Y.2d at 314.
7. See *Peerless Ins. Co. v. Allied Bldg. Products Corp.*, 15 A.D.3d 373 (2d Dep't 2005).
8. *Id.* at 312.
9. 2006 WL 3690731.
10. See *Phillips*, 31 NY2d at 312 (citations omitted).
11. 31 N.Y.2d 307.
12. *Id.* at 310.
13. *Id.*
14. *Id.* at 309.
15. *Id.* at 314.
16. *Id.*
17. *Id.* at 316 (Fuld, C.J., dissenting).
18. *Id.*
19. *Id.* (quotation marks and citations omitted).
20. *Id.* (quotation marks and citation omitted).
21. *Marszal v. Anderson*, 9 A.D.3d 711, 713 (3d Dep't 2004), quoting *Mantella v. Mantella*, 268 A.D.2d 852, 853 (2000); accord *Matter of Estate of Lockwood*, 234 A.D.2d 782 (3d Dep't 1996).
22. July 12, 2002 N.Y.L.J. 23, col. 4 (Sur. Ct., Suffolk County).
23. *Id.*; see also *Matter of Casessa*, June 22, 2001 N.Y.L.J. 24, col. 1 (Sur. Ct., Kings County) ("In cases where the sole evidence preferred by the opposing interested party is the latter's self-serving testimony of oral communications with the decedent, courts have found such to be insufficient to withstand summary judgment").

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