

**SURROGATE'S COURT : STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

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Probate Proceeding, Estate of

**DECISION and ORDER**

**File No. 2012-1154**

**CAROLE PALMIERI,**

Deceased.

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**WALSH - ACTING SURROGATE.**

In this contested probate proceeding, Rosemary Bellinger ("respondent") moves this court for an order (i) precluding Patricia Palmieri ("petitioner") from offering evidence on the undue influence issue and/or determining that issue in favor of respondent; (ii) suppressing admission and use at the trial of this will contest the tape recordings<sup>1</sup>; (iii) suppressing admission and use at trial of derivative materials from the tape recordings, including copies of all or part of the tape recordings, transcripts thereof, and testimony concerning their contents; and (iv) granting respondent such other and further relief as to the court may seem just and proper. The motion is granted in part, as more fully set forth herein.

Decedent died on May 5, 2012 survived by her two daughters: petitioner (Patricia Palmieri) and respondent (Rosemary Bellinger). By petition dated May 18, 2012,

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<sup>1</sup>Respondent utilizes the term "tape recordings" to refer to those recordings made by respondent that petitioner may seek to offer into evidence, as distinguished from the group of tape recordings originally possessed by respondent, and then taken by John Dadakis, from respondent's residence and then returned in whole or in part, as described herein.

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petitioner seeks admission to probate of decedent's purported last will and testament dated October 29, 2009. Pursuant to the propounded instrument, petitioner is the residuary beneficiary of decedent's estate and respondent is the legatee of a \$100,000.00 bequest. The propounded instrument contains an *in terrorem* clause. The probate petition values decedent's estate at \$500,000.00, consisting of personal property. A prior instrument purportedly executed by decedent in 2007 bequeathed most of her estate in equal shares to petitioner and respondent.

The subject of the instant motion *in limine* is a series of tape recordings made by respondent, which petitioner's husband, John Dadakis ("Dadakis"), admits to having taken from respondent's home and returned to respondent's home, without respondent's knowledge, authority, or consent; and, which tape recordings he copied, several times. This occurred while decedent was alive and in the summer of 2009.

**FACTS**

Respondent testified during her deposition that she recorded a number of telephone conversations that decedent had with other persons including petitioner, and also recorded conversations that she had with decedent during this time, and earlier times. These recordings occurred during the time respondent was living with decedent in decedent's home (Deposition of Rosemary Bellinger pp. 34-35, 62-63, 153-154, 169, 172, hereinafter "Bellinger Dep. p. \_\_\_\_"; [Exhibit G to the affirmation of John F. Lang, dated February 23, 2016, hereinafter "Lang Aff. \_\_\_\_"]).

**A. The Tape Recordings**

Dadakis, who is petitioner's spouse, and partner in the estate planning group at the



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law firm of Holland and Knight, testified during his deposition, that he entered decedent's home, while she was alive and while she and respondent were not present, and removed the tape recordings, and then took them to his and petitioner's home (Deposition of John Dadakis, 7/29/2013, pp, 74, 80-82, 85; [hereinafter "Dadakis Dep., p. \_\_\_\_"], Dadakis Dep., 03/17,2015, pp, 174-175, 177). He took the tape recordings sometime in the summer of 2009 (Dadakis, Dep., *id.*). Dadakis testified that he knew respondent tapes people and he wanted to see what she taped (Dadakis Dep., 07/29/13, p. 74).

It is not disputed that Dadakis took the tape recordings without respondent's knowledge, permission, or authority. Dadakis testified that he made copies of some or all the tape recordings, initially testifying that he first copied them to a machine attached to his computer. He later testified that the tape recordings were put on petitioner's computer, he then saved the files from petitioner's computer to his computer, making the copies using a recording device that was attached to, or in, his or petitioner's computer and listened to the tapes on a tape recorder. He testified that he returned all of the tape recordings to decedent's home without decedent's or respondent's knowledge, and placed some or all of respondent's tape recordings where they were before he took them, again without respondent's knowledge, permission, or authority (Dadakis dep., 07/29/13, pp, 71-72, 73-75, 75-77, 80-82, 88; Dadakis Dep., 03/17/2015, 157, 174-175, 177-180, 188).

Dadakis also testified that he copied the contents of respondent's tape recordings onto the hard drive of a computer used by petitioner. Then he copied some or all of the tapes onto a second computer in the Dadakis family home. However, he testified that the first computer has since been sold or discarded. Dadakis testified that he copied some or

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all of the contents of the tape recordings from his second computer onto the hard drive of a new computer used by Dadakis. At some point before he returned to complete his deposition, Dadakis replaced his third computer with yet another computer (Dadakis dep., 03/17/2015; Dadakis dep., 08/11/2015, p. 188-91, 265-69).

**B. Discovery Timeline.**

On July 18, 2012, respondent served a notice of discovery and inspection upon petitioner which called for, *inter alia*, "all audio tapes and/or video tapes of decedent" (request number 13) . . . and all documents concerning "difficulties disputes . . . and strains on the relationship between . . . c) Rosemary Bellinger and Decedent" (request number 16). Petitioner was defined to include her attorneys, and documents were defined to include copies and sound recordings (Lang Aff., Exh. O). A privilege log was requested in the event a document was not produced on the basis of privilege.

On August 10, 2012, Dadakis sent two flash drives containing copies of what he claims to have possessed of respondent's tape recordings to petitioner's counsel, Magdalen Gaynor ("Ms. Gaynor"), with a cover letter of the same date suggesting that Ms. Gaynor listen to a segment entitled "argument with [decedent]" (Lang Aff., Exh. L). The letter also states: "[a]fter you and Frank [Streng]<sup>2</sup> have reviewed these materials, we should have a meeting to discuss steps to undertake". The court notes that the letter is not designated in any manner to be privileged, nor was it ever identified by petitioner's counsel as a privileged document. There is no assertion in petitioner's responsive papers that Ms.

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<sup>2</sup>Mr. Streng is a partner at the law firm of McCarthy Fingar, LLP, the law firm that is litigation counsel to petitioner in this matter.



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Gaynor ever represented Dadakis. Ms. Gaynor later testified at her deposition in 2015 that she took the flash drives and put one in her safe and gave one to Frank Streng, Esq., a partner at McCarthy Fingar LLP (Lang Aff. Exh. M).<sup>3</sup>

Ten days after Dadakis sends the flash drives to Ms. Gaynor with a cover later stating they are copies of recordings made by respondent, one of which was an “argument with [decedent]”, and on August 20, 2012, Ms. Gaynor served a response to the July 18, 2012 discovery request, and with regard to audio tapes of decedent (request number 13) responded “none”; and, with regard to respondent’s request number 16, did not produce, disclose, or identify the existence of the flash drives given to her by Dadakis (Lang Aff. Exh. P) .

On March 8, 2013 respondent’s counsel wrote a letter to petitioner’s counsel requesting a statement that petitioner does not possess documents in response to requests number 13 and 16, which, as set forth above, called for the production of recordings then in possession of petitioner’s counsel (Lang Reply Affirmation, Exh., C [hereinafter “Lang Reply Aff. \_\_\_”]). By letter dated May 21, 2013, Ms. Gaynor confirms that, as to request number 13, petitioner has “no audio tapes or video tapes” and that, as to request number 16, petitioner has no documents regarding problems, difficulties, disputes, and strains in the relationship between respondent and decedent (Lang Aff., Exh. N).

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<sup>3</sup>Dadakis testified at his deposition on 07/29/2013 that he told Ms. Gaynor about the tapes “in the past few months” (Dadakis Dep., 07./29/2013, p. 83, 84).

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According to petitioner's litigation counsel, Joseph Brophy ("Mr. Brophy"), between July 12, 2013 and July 29, 2013, he "became aware that Dadakis had copied the tapes; provided copies to Ms. Gaynor and that she had given one of the copies to Frank Streng of [his] firm".<sup>4</sup> Mr. Brophy states that he did not listen to the tapes in preparing for Dadakis' deposition (Affirmation of Joseph Brophy, dated March 15, 2016, ¶7, hereinafter "Brophy Aff., \_\_\_"). He further states in his affidavit that he had no paper file upon his first involvement with the case, which was on July 12, 2013, and that all of the documents relating to decedent's estate were at Ms. Gaynor's office, he reviewed many pages of financial and medical records, and that Ms. Gaynor had produced "voluminous documents" in response to the demands (Brophy Aff. ¶ 7).

Dadakis testified that he told petitioner about the tape recordings on or about the commencement of discovery pursuant to SCPA 1404 (Dadakis dep., 07/29/2013, p. 85). Dadakis testified at his deposition on July 29, 2013, that he told Ms. Gaynor "in the past few months" about the tape recordings (Dadakis dep., 07/29/2013, p. 83, 84). Furthermore, at his deposition on July 29, 2013, Dadakis states that he secretly took respondent's tape recordings, copied them, and secretly returned them all without respondent's knowledge, permission, authority or consent (Dadakis dep., July 29, 2013, pp . 71-77, 80-82, 88).

On July 31, 2013, Mr. Brophy produced a copy of one of the flash drives Dadakis

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<sup>4</sup>Joseph Brophy, Esq., is counsel at the law firm of McCarthy Fingar LLP, litigation counsel to petitioner herein.



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gave to Ms. Gaynor, and a copy of the contents of the flash drive in CD format (Brophy Aff. Exh. 2). Inexplicably, a copy of the August 10, 2012 letter from Dadakis to Ms. Gaynor was not produced by Mr. Brophy or Ms. Gaynor at this time.

By letter dated August 5, 2013 to respondent's counsel, Ms. Gaynor states that "[r]ecently<sup>5</sup> an audio tape was delivered to me by John Dadakis containing recordings of conversations of and telephone calls made by Rosemary Bellinger. I understand some of the conversations were between the decedent and Rosemary Bellinger. I did not recognize that this tape would be such as requested in your discovery. It has been delivered. (Lang Aff. Exh. N).

On August 11, 2015 both Dadakis and Ms. Gaynor are deposed at which time Ms. Gaynor testifies that she received two flash drives of the tape recordings, placed one in her safe, and gave the other to Frank Streng, stating that it was not produced prior to the 1404 examinations, testifying, that "[i]t was inadvertent. I had stapled the disk drive, put it the safe and quite frankly forgot all about it, and I apologize for any inconvenience but it was inadvertent." (Lang Aff. Exh., M).

On August 11, 2015, three years after it was authored, Mr. Brophy produced the letter from Dadakis to Ms. Gaynor dated August 10, 2012 (Lang Aff., Exh.L).

**C. Parties' Assertions:**

Respondent asserts, *inter alia*, that petitioner should be precluded from introducing

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<sup>5</sup>Emphasis added. The court notes that pursuant to Dadakis' letter to Gaynor, the flash drives were turned over to Ms. Gaynor approximately a year earlier on August 10, 2012.

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the tape recordings during the trial of this matter because petitioner willfully failed to answer respondent's discovery demands with regard to the tape recordings on numerous occasions; and, the authenticity of the tape recordings cannot be established since Dadakis stole them from respondent, copied them, then purportedly returned the entirety of what he stole, thereby corrupting the chain of custody.

Respondent contends that, despite due demand, neither of the two law firms then representing petitioner produced or disclosed the existence of the copies of the tape recordings in their possession. Respondent notes that Dadakis turned over two flash drives to Ms. Gaynor just ten 10 days before Ms. Gaynor served an answer to respondent's document demand seeking, *inter alia*, all tape recordings concerning decedent and any documents pertaining to difficulties between decedent and respondent. Respondent claims it was only when respondent took Dadakis' deposition in July 2013 that he revealed that he had taken the tape recordings without her permission and copied them.

In addition, respondent seeks an order precluding petitioner from offering the tape recordings into evidence because petitioner cannot establish that the chain of custody is in tact since Dadakis stole them, copied them, and returned them; and, petitioner cannot establish that the tape recordings are the whole of the recordings that existed when Dadakis took them. Respondent claims that it is inexplicable that petitioner is not on any of the group of tape recordings and it is only respondent and decedent's arguments that are on the tapes. In addition, respondent challenges the authenticity of the tape recordings on the basis that respondent testified that she could not authenticate the tapes because



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she did not know where or under what circumstances the tapes were made, whether the tapes accurately represented conversations with decedent, and she also claims to know that certain conversations she taped were missing from the recordings.

Petitioner asserts *inter alia*, that Ms. Gaynor inadvertently failed to turn over the flash drives made by Dadakis containing copies of the tape recordings. Petitioner's litigation counsel states that in the course of his examination, Dadakis stated that he had copied the tape recordings, and litigation counsel promised to turn over the copies, which he did two days later. One was a flash drive, and the other a copy of the contents of the flash drive in CD format. Petitioner's litigation counsel asserts that before post-objection disclosure, litigation counsel for petitioner provided a copy of the list of tapes or sides of tapes made from the flash drive, and a screen shot from the flash drive that Dadakis turned over. He also provided three original tapes found by petitioner in her house.

Petitioner contends that the list of tapes and the transcripts provided match the tapes objectant had in her possession, with the addition of three tapes that petitioner turned over. Petitioner's counsel also claims that he personally compared each and every CD copy of the original tapes that were provided by respondent's counsel to the transcripts of copies from Dadakis and they are the same in every respect. Petitioner's counsel asserts that it is nothing more than conjecture that Dadakis did not return all of the tapes he took and there was no prejudice to respondent because she had the originals the whole time. Finally, petitioner asserts that she may or may not seek to introduce the tapes at a trial of this matter and that the instant motion is merely a motion for summary judgment in

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disguise.

**LEGAL STANDARD**

A party seeking the admission of a tape recorded conversation must present proof of the accuracy or authenticity of the tape by clear and convincing evidence establishing that the offered evidence is genuine and that there has been no tampering with it (*People v. Ely*, 68 NY2d 520, 527, quoting *People v. McGee*, 49 NY2d 48, 59). The evidentiary foundation may be laid in a number of ways, but the party offering the tape must demonstrate that it is a complete and accurate reproduction of the conversation and has not been altered (*People v. Ely*, supra at 527).

Based upon a review of the motion papers the court precludes petitioner from introducing the tape recordings at the trial of this matter because their authenticity cannot be established (*People v. Ely*, 68 NY2d 520, 527, quoting *People v. McGee*, 49 NY2d 48, 59). First, Dadakis' actions in taking the tape recordings without respondent's knowledge or consent, copying them, and then returning them has disrupted the chain of custody of the tape recordings such that their authenticity cannot be established.. Dadakis admits to haven taken the tape recordings without respondent's knowledge or consent, copied them onto one or more computers, and then returned the tape recordings to respondent's home without her knowledge. He also admits having discarded one or more of the computers onto which he copied the tape recordings such that what he took cannot be compared to what he copied or what he returned. The court has before it only Dadakis' testimony that he returned everything that he surreptitiously took.



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Additional facts submitted on the motion demonstrate that petitioner cannot establish that the tape recordings are the complete and accurate reproduction of the conversations petitioner may seek to introduce. Respondent claims that the tape recordings are not the entirety of the recordings she made inasmuch as petitioner's voice is heard nowhere on the recordings, respondent cannot explain the circumstances or time period for any specific recording, and she regularly rerecorded over tapes. Respondent also testified that it is suspect that it is only hers and decedent's conversations appearing on the tape recordings when the assertion is that she regularly tape recorded conversations.

In sum, the facts set forth in the submissions demonstrate that the accuracy and authenticity of the tape recordings cannot be established by clear and convincing evidence, nor can it be established that the offered evidence is genuine and that it has not been tampered with (*People v. Ely* 68 NY2d 520, 527, quoting *People v. McGee*, 49 NY2d 48, 59).

Additionally, even if the tape recordings could be authenticated, the court finds that petitioner's counsel's failure to timely disclose that they were in possession of the tape recordings warrants an order precluding petitioner from using the tape recordings at trial. It is well-settled that pursuant to CPLR 3103(c), if any disclosure has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed (*Matter of Weinberg*, 133 Misc. 2d 950 [Surr Ct. NY Co. 1986]). In addition, CPLR 3126(2) provides that where a party or agent under that party's control willfully fails to disclose

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information which the Court finds ought to have been disclosed pursuant to CPLR Article 31, then the court may make an order “prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental, or blood condition sought to be determined or from using certain witnesses. . .” (NYCPLR 3126[(2)]).

Here, petitioner’s counsel fails to offer a sufficient explanation regarding why she did not disclose the existence of the tape recordings in her August 20, 2012 response to respondent’s notice of discovery and inspection, and in a later letter to respondent’s counsel dated May 21, 2013. On several occasions, respondent’s counsel requested audio recordings and documents regarding disputes between respondent and decedent, and on at least two occasions, petitioner’s counsel responded that no such documents and recordings existed. These responses were served despite the fact that Dadakis, a party petitioner’s counsel does not claim to represent, sent to Ms. Gaynor two flash drives, just ten days before counsel’s first response to respondent’s notice of discovery and inspection, with a cover letter identifying the flash drives as “recordings from Rosemary Bellinger” and that suggested that counsel listen to a segment entitled “[a]rgument with [decedent]...”, and suggested a follow-up meeting. In addition, no sufficient explanation has been given by counsel for petitioner for their failure to produce the August 10, 2012 letter from Dadakis to Ms. Gaynor until August 11, 2015 – three years after it was authored.

The totality of the record leads the court to the conclusion that failure to disclose was not merely inadvertent. The court rejects petitioner’s litigation counsel’s assertion that since no harm has occurred to respondent by virtue of the non-disclosure that the motion



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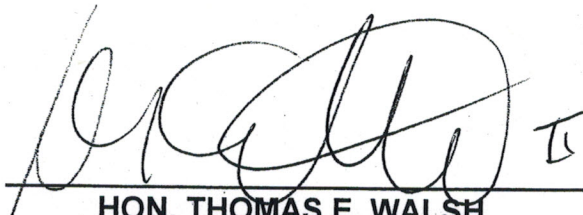
in limine should be denied. The court cannot countenance and will not tolerate even the hint of a failure to timely produce that which ought to have been produced, or the withholding of discovery material (*Matter of Weinberg*, 133 Misc. 2d 950 [Surr Ct. NY Co. 1986]).

Accordingly, the motion *in limine* is granted to the extent that petitioner is precluded from introducing the tape recordings, and all of their derivative materials, including copies of all or part of the tape recordings, transcripts thereof, and testimony concerning their content at a trial of this matter.

**THIS IS THE DECISION AND ORDER OF THE COURT.**

The following papers were read: (i) Notice of Motion in limine, Amended Notice of Motion in limine, affirmation of John F. Lang, sworn to February 23, 2016, with exhibits; (ii) affirmation of Joseph J. Brophy, Esq., dated March 15, 2016, with exhibits; memorandum of law in opposition to motion in limine; affidavit of Patricia Palmieri, sworn to March 11, 2016; affidavit of John D. Dadakis, sworn to March 11, 2016; (iii) affirmation of John F. Lang, dated March 29, 2016, in further support of motion in limine, with exhibits; affirmation of Rosemary Bellinger, sworn to March 28, 2016; reply memorandum of law.

Dated: White Plains, New York  
May 31 2016

  
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**HON. THOMAS E. WALSH**  
**Acting Surrogate – Westchester County**

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