

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D36821
G/ct

____AD3d____

Argued - November 13, 3012

PETER B. SKELOS, J.P.
L. PRISCILLA HALL
LEONARD B. AUSTIN
SYLVIA HINDS-RADIX, JJ.

2011-03467
2011-07007

DECISION & ORDER

In the Matter of Marion Cartwright Willnus, deceased.
Lisa Kyle, et al., appellants; Thomas Maguire, et al.,
respondents.

(File No. 3667/09)

Marisa Falero, Brooklyn, N.Y., for appellants.

George Magriples, Astoria, N.Y., for respondents.

In a proceeding, inter alia, pursuant to SCPA 702 to obtain limited letters of administration for the estate of Marion Cartwright Willnus, the petitioners appeal (1), as limited by their brief, from so much of an order of the Surrogate's Court, Kings County (Lopez Torres, S.), dated March 1, 2011, as granted that branch of the motion of Thomas Maguire and Steven Maguire which was to dismiss the petition pursuant to CPLR 3211(a)(4), and (2) from an order of the same court dated June 17, 2011, which denied their motion for leave to reargue and renew their opposition to that branch of the motion of Thomas Maguire and Steven Maguire which was to dismiss the petition pursuant to CPLR 3211(a)(4).

ORDERED that the appeal from so much of the order dated June 17, 2011, as denied that branch of the petitioners' motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument (*see Matter of Braver v Silberman*, 90 AD3d 654, 656); and it is further,

ORDERED that the order dated March 1, 2011, is affirmed insofar as appealed from; and it is further,

December 19, 2012

Page 1.

MATTER OF WILLNUS, DECEASED

ORDERED that the order dated June 17, 2011, is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the respondents.

Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending (*see Whitney v Whitney*, 57 NY2d 731, 732; *DAIJ, Inc. v Roth*, 85 AD3d 959, 959), and may dismiss an action where there is a substantial identity of the parties and causes of action (*see Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622; *Simonetti v Larson*, 44 AD3d 1028, 1028). It is not necessary that the precise legal theories presented in the first action also be presented in the second action; rather, it is sufficient if the relief sought is “the same or substantially the same” (*Kent Dev. Co. v Liccione*, 37 NY2d 899, 901; *see Cherico, Cherico & Assoc. v Midollo*, 67 AD3d at 622; *Simonetti v Larson*, 44 AD3d at 1029). “The critical element is that both suits arise out of the same subject matter or series of alleged wrongs” (*Cherico, Cherico & Assoc. v Midollo*, 67 AD3d at 622 [internal quotation marks omitted]; *see Kent Dev. Co. v Liccione*, 37 NY2d at 901; *Simonetti v Larson*, 44 AD3d at 1029).

Here, the Surrogate’s Court providently exercised its discretion in granting that branch of the motion of the respondents Thomas Maguire and Steven Maguire (hereinafter together the respondents) which was to dismiss the petition pursuant to CPLR 3211(a)(4). The relief sought by the petitioners in this Surrogate’s Court proceeding and a pending guardianship proceeding they had previously commenced in the Supreme Court was substantially the same, namely, a return of the decedent’s assets to a family trust, of which the petitioners were residuary beneficiaries (*see Simonetti v Larson*, 44 AD3d at 1029). In addition, both proceedings arose out of the same allegations of wrongdoing on the part of the respondents in handling the decedent’s financial affairs, and there was substantial identity of parties in each proceeding.

The Surrogate’s Court properly denied that branch of the petitioners’ motion which was for leave to renew their opposition to that branch of the respondents’ motion which was to dismiss the petition pursuant to CPLR 3211(a)(4), since the new facts offered on the motion would not have changed the prior determination (*see CPLR 2221[e][2]*; *Grossman v New York Life Ins. Co.*, 90 AD3d 990, 992).

The petitioners’ remaining contentions are either not properly before this Court or without merit.

SKELOS, J.P., HALL, AUSTIN and HINDS-RADIX, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court