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| Matter of Gould (Wall) |
| 2016 NY Slip Op 32051(U) |
| June 24, 2016 |
| Surrogate's Court, Nassau County |
| Docket Number: 2013-375927D |
| Judge: Margaret C. Reilly |
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Accounting by Kenneth Gould and Bruce Hagen
as the Trustees of the Inter Vivos Trust dated
February 12, 1992, created by

**DECISION AND ORDER
File No. 2013-375927D
Dec. No. 31695**

GLORIA WALL,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

In connection with a motion for leave to reargue and renew, the following papers were considered in the preparation of this decision:

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| Notice of Motion..... | 1 |
| Memorandum of Law in Support of Motion for Leave to Reargue and Renew. | 2 |
| Affirmation in Opposition to Motion for Leave to Reargue and Renew. | 3 |
| Memorandum of Law in Opposition of Motion for Leave to Reargue and Renew. | 4 |
| Reply Memorandum of Law in Further Support of Motion for Leave to Reargue and Renew..... | 5 |

I. PROCEDURAL HISTORY

In the context of an accounting proceeding, the trustees of a lifetime trust request an order pursuant to CPLR Rules 2221 (d) and (e), granting leave to reargue and renew a motion for partial summary judgment.

II. BACKGROUND

Gloria Wall (the decedent) died on March 8, 2013 at the age of 89, leaving no immediate family members. Her estate was valued at \$4,700,000.00. In connection with an accounting proceeding commenced by Kenneth Gould and Bruce Hagen, as the trustees of a lifetime trust created by the decedent (collectively, the trustees), the objectants to the account, Ronald Wall and Stephanie Wall (collectively, the objectants) moved for partial summary judgment declaring that certain joint bank accounts which

named the trustees in their individual capacities as joint tenants¹ constituted assets of the trust. The objectants contended that the bank accounts should have been reflected on the trustees' account as trust assets, but were not. In Dec. Nos. 31167 and 31168, issued on December 14, 2015, the court found that despite the presumption afforded by Banking Law §675, the subject joint bank accounts were not true joint accounts but rather were convenience accounts. The trustees, in their individual capacities, were directed to return the sums they withdrew from the subject accounts after the decedent's death, either to the estate for eventual distribution to the trust, or directly to the trust. In addition, the court imposed interest on the sums taken at the rate of 3% per annum.

III. RELIEF REQUESTED

The trustees request oral argument and ask the court to grant them leave to reargue and renew the motion for partial summary judgment that was granted by the court to the objectants.

IV. ANALYSIS

Counsel for the trustees argues that the court's conclusion was based upon a misapplication of the law and a misapprehension of the facts, in that the court failed to apply the presumption created under Banking Law § 675 favoring joint accounts, and ignored the threshold question of whether the decedent had a need that would have supported the creation of convenience accounts. Counsel argues that the decedent had no such need and, therefore, the court should have denied the objectants' motion for summary judgment.

¹The decedent's Capitol One Account ending 8597 lists Bruce Hagen as a joint tenant. The decedent's Chase Accounts ending 5965 and 0301 list Kenneth Gould as a joint tenant.

In further support of the motion to reargue and renew, counsel argues that evidence obtained after the submission of the motion for summary judgment, namely, the testimony, in a related proceeding, provided by the decedent's financial advisor concerning the decedent's mental abilities, impacts upon the issue of whether the decedent had any need for convenience accounts.

In their responsive papers, counsel for the objectants argues that the trustees cannot be permitted to raise a new argument now by asserting that there is an implicit threshold requirement that the decedent had a need for convenience accounts. Counsel notes also that the court considered the presumption under Banking Law §675, but reached a finding in favor of the objectants despite that presumption.

In connection with the testimony of the decedent's financial advisor obtained after submission of the motion, the objectants' counsel argues that leave to renew must be based upon new facts, and not on supplemental evidence of a fact previously submitted. Additional testimony regarding the decedent's acumen would not impact upon the court's determination.

A motion for leave to renew must be based upon new facts not presented on the prior motion that would alter the court's earlier determination (CPLR 2221[e]). A movant on a motion to renew must demonstrate a reasonable justification for not placing such alleged additional facts before the court on the original motion (CPLR 2221[e][3]). The Second Department has repeatedly held that the additional evidence offered on a

motion to renew must be either newly discovered or have been unavailable to the movant at the time of the prior application (*see Winograd v Neiman Marcus Group*, 11 AD3d 455 [2d Dept 2004]; *Seltzer v City of New York*, 288 AD2d 207 [2d Dept 2001]; *Delvecchio v Bayside Chrysler Plymouth Jeep Eagle*, 271 AD2d 636 [2d Dept 2000]).

A motion to reargue is not based upon any new facts, but seeks to convince the court that it overlooked or misapprehended the facts or the law on the prior motion, or for some reason mistakenly arrived at its earlier decision (CPLR 2221[d]; *see Bolos v Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]; *Schneider v Solowey*, 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]), nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*see Giovanniello v Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *Frisenda v X Large Enters.*, 280 AD2d 514 [2d Dept 2001]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

Thus, the only issue presently before the court is whether the trustees have presented grounds for leave to reargue or renew the court's previous decision.

The presumption created by Banking Law §675 can be rebutted by circumstantial proof that the creation of a joint account was intended for convenience only (*Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918 [2nd Dept 2009]). Contrary to the assertions made by counsel to the trustees, there is no absolute threshold requirement that a need for convenience accounts be proven before the court can consider multiple other factors in reaching a determination as to the nature of the accounts. An individual's need for convenience accounts is but one factor, among many, that the court may consider, but it does not rise above, nor come before, other considerations.

In this court's prior decision, after explicitly acknowledging the Banking Law presumption that accounts payable to "either or survivor" are true joint bank accounts with rights of survivorship, the court went on to note that the presumption may be rebutted by evidence showing that the accounts were opened (or, in this case, changed to) joint names for purposes of convenience, and not for the purpose of creating a present beneficial interest in the named joint tenant. The court cited its own prior decision in *Matter of Cooper* (6 Misc 3d 1001[A] [Sur Ct, Nassau County [2004]) factors that may be considered in determining whether an account was intended to serve as a convenience account or whether it was intended to be a true joint account:

- Was the decedent was the sole depositor to the account?
- Was the creation of a survivorship interest a significant deviation from the decedent's testamentary plan?

- Was the account used exclusively by the decedent during her lifetime?
- Did the decedent retain the right to withdraw the proceeds?
- What was the conduct of the decedent and the surviving joint tenant in connection with the account?

Based upon each and all of the factors presented, the court concluded that the disputed bank accounts were convenience accounts rather than true joint bank accounts.

In connection with the testimony of the decedent's financial advisor concerning the decedent's mental abilities, the court notes that the level of the decedent's acumen was previously presented in response to the motion for summary judgment, and finds that this testimony does not rise to the level of a new fact that would warrant the granting of a motion for leave to renew.

V. CONCLUSION

The request for oral argument is denied.

The court denies the motion for an order pursuant to CPLR Rules 2221(d) and (e), granting leave to reargue and renew.

This constitutes the decision and order of the court.

Dated: June 24, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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