

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

JOSEPH LUCAUSI and ADRIENNE LICAUSI

Plaintiff

-against-

ANGELINA C. SETTINO, Individually and
as Trustee of the JOSEPHINE LIVORNO
FAMILY IRREVOCABLE TRUST

Defendant

Index No: 15273/06

Motion Date: 2/27/08

Motion Cal. No.: 12

Motion Seq. No.: 2

The following papers numbered 1 to 20 read on this motion by
plaintiffs for summary judgment

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 13
Answering Affidavits-Exhibits.....	14 - 16
Replying Affidavits.....	17 - 20

Upon the foregoing papers it is ordered that this motion is
determined as follows.

This is an action to declare invalid the document dated June
24, 2002 and entitled "Amendment to Irrevocable Trust"
(hereinafter the Amendment) which purports to amend the Josephine
Livorno Family Irrevocable Trust (hereinafter the Trust),
enjoining the defendant, Angela C. Settino, individually and as
the Trustee under the Trust and the Amendment, from selling,
mortgaging or otherwise encumbering or disposing of the real
property which is the subject of the trust and declaring invalid
the Last Will and Testament of Josephine Livorno, dated June 24,
2002, and upon granting the above, directing Angela C. Settino as
trustee to account for the rents profits and income derived from
the property and to direct Angela C. Settino to comply with the
Trust by executing and delivering a deed conveying 50% interest
in the property to the plaintiffs.

The defendant, Angela C. Settino, the trustee is the daughter of Josephine Livorno, the settlor of the Trust. The plaintiffs are the children of Victor Licausi, the deceased son of the settlor, and the niece and nephew of the defendant, Trustee. Plaintiffs now move for summary judgment in their favor on their first cause of action by which they seek a declaration that the purported Amendment of the Trust is ineffective and invalid inasmuch as it was not made in accordance with the procedures set forth in Estates, Powers, and Trusts Law (EPTL) § 7-1.9 and an Order directing the Trustee to comply with the trust and for an accounting.

Even when a trust agreement contains a provision that it is irrevocable, it may be revoked or amended when all parties having a beneficial interest consent to the revocation or amendment (see EPTL § 7-1.9; Elser v. Meyer, 29 AD3d 580 [2006] lv dismissed 7 NY3d 899 [2006]; Warren v. Cropsey, 29 AD2d 290, 295 [3rd Dept., 1968]; Stover v. Garber, 25 AD2d 488 [4th Dept., 1966]). When the terms of a trust set forth the procedure for revocation, such terms must be complied with before the statute is applied (see Matter of Dodge, 25 NY2d 273[1969]; Elser v. Meyer, supra at 581).

In support, plaintiffs submitted the affidavit of Adrienne Licausi and documentary evidence which establish, prima facie, their entitlement to summary judgment by demonstrating that they did not consent to the amendment and that they did not know about a proposed amendment and that there is no provisions in the trust setting forth a procedure for its revocation or amendment. Where, as here, the movants have established their entitlement to summary judgment, those opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986] Winegrad v. New York Univ. Med. Ctr., supra; Zukerman v. City of New York, supra). This the defendants failed to do.

The defendants oppose summary judgment on several grounds. The defendants' opposition based on an alleged defective notarization due to the absence of a "commission" number is rejected. Out of state oaths and affirmations are governed by CPLR 2309(c). The affidavit in this case was notarized in Hawaii by a notary public, and while it does not contain a "commission number", it does contain the jurat and the raised seal of the notary public. "In the absence of a showing to the contrary, the notary is presumed to have acted within his or her jurisdiction and carried out his or her duties as required by law ..."
(Feldman v. Feldman, 280 AD2d 276, 277 [2001]; see Smith v. Allstate Ins. Co., 38 AD3d 522 [2007] citing Sparaco v. Sparaco,

309 AD2d 1029[2003]).

The defendants' objection based on the absence of an affidavit from the co-plaintiff, JOSEPH LUCAUSI is also unavailing inasmuch as plaintiffs are not required to submit such an affidavit to establish entitlement to summary judgment (see Winegrad v. New York Univ. Med. Ctr., supra; Zukerman v City of New York, supra).

Defendants further contend that summary judgment must be denied as there exist issues of fact as to whether the amendment and the Will dated June 24, 2002 were the result of fraud and undue influence. In this regard, the trustee disputes in her affidavit the plaintiffs' claims of having a close relationship with their grandmother, the settlor. The defendants' argument, however, is irrelevant in the determination of this motion.

Plaintiffs' motion is based solely upon their claim that the purported Amendment of the Trust is ineffective and invalid since it was made without the plaintiffs' consent in violation of EPTL § 7-1.9(a). The trustee does not dispute that the plaintiffs have a beneficial interest in the real property under the Trust and that they did not consent to the amendment. It is noted that the trustee does not even claim that she and/or the settlor attempted to obtain the plaintiffs' consent. Under these circumstances, the purported Amendment is ineffective and invalid, as a matter of law (see Matter of Gilbert, 39 NY2d 663, 668 [1976]; Hemingway v. Hemingway Foundation, 193 AD2d 559, 660 [1993]; Warren v. Cropsey, 29 AD2d 290 [3d Dept.1968] [Interpreting former Personal Property Law § 23, now EPTL § 7-1.9[a]) regardless of whether the settlor's wish to change the Trust was truly her own or a product of fraud or undue influence.

The defendants' argument that this court lacks "subject matter" jurisdiction with respect to the Will is without merit. The Supreme Court and the Surrogate's Court have concurrent jurisdiction over the administration of a decedent's estate (see N.Y. Const., art. VI, § 12[f]; Gaentner v. Benkovich, 18 AD3d 424, 427-428 [2005]). However, since it is preferable that litigation involving the property and funds of a decedent's estate and probate of a will be brought in the Surrogate's Court, Supreme Court may, under certain circumstances, decline to exercise jurisdiction over such litigation (see Rosvold v. Rosvold, 29 AD3d 669 [2006]; McCoy v. Bankers Federal Sav. & Loan Ass'n, supra ; Dunham v. Dunham, 40 AD2d 912, 913 [1972]). In this case, the Court elects not to exercise its jurisdiction with respect to the Will. Accordingly, the branch of the plaintiffs' motion to declare the Last Will and Testament of Josephine

Livorno, dated June 24, 2002 invalid is denied without prejudice to bringing an action for such relief in Surrogate' s Court.

Contrary to defendants' claim, however, the question of the validity of the Last Will and Testament of Josephine Livorno, dated June 24, 2002 is irrelevant with respect to disposition of the subject real property. The real property known as 88-19 Rutledge Ave., Glendale, New York 11385 is the property of the Trust and held in the name of Angela C. Settino, as Trustee. Thus, it passes by operation of law under the terms of the "unamended" Josephine Livorno Family Irrevocable Trust, dated October 27, 1997 (see 5 Warren's Heaton, Surrogates' Court §62.02 [1] at 62-6 through 62-7). Josephine Livorno did not own the property at the time of her death and, therefore, it does not become an asset of the decedent's estate subject to probate (see EPTL § 1-2.6; 5 Warren's Heaton, Surrogates' Court §62.02[3][a] at 62-9 through 62-10).

In view of the above, the plaintiffs are granted summary judgment on their first cause of action to the extent that it is

DECLARED that the June 24, 2002 purported Amendment of the Josephine Livorno Family Irrevocable Trust, dated October 27, 1997 is invalid and of no force and effect, and it is

ORDERED that Angela C. Settino, the Trustee shall, forthwith do all that is necessary to carry out the directives in the Trust in accordance with its terms, and it is further

ORDERED that Angela C. Settino shall provide a full accounting with regard to the trust estate.

Dated: March 20, 2008
D# 33

.....
J.S.C.