

Matter of Dubin

2007 NY Slip Op 30166(U)

March 8, 2007

Surrogate's Court, Nassau County

Docket Number: 0335732

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Application of Susan Brooks and Richard Brooks, as
Preliminary Executors of the Estate of

File No. 335732

SYLVIA DUBIN,
Deceased,

Dec. No. 186

To Discover Property Withheld and Belonging
to the Decedent.
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Before the court is a motion which seeks relief in both the pending probate proceeding and the pending SCPA 2103 discovery proceeding. This decision addresses the motion with regard to the discovery proceeding. The relief sought with regard to the probate proceeding will be addressed in a separate decision.

In this SCPA 2103 discovery proceeding, the petitioners are Susan Brooks Ruskin and Richard Brooks, the decedent's niece and nephew and nominated executors of her estate; the respondents are Joan Levine and Melvin Dubin, the decedent's niece and brother. The subject of the discovery proceeding is the proceeds of the sale of certain property in which decedent had an interest, and her capital account.

The petitioners now move the court for an order granting them summary judgment directing that respondents remit to the estate said funds and that respondents have no proprietary interest therein. For the reasons that follow, the motion is granted.

The decedent, Sylvia Dubin, died November 3, 2004. Her three distributees were a sister, Delcy Brooks; a brother, Melvin Dubin; and a niece, Joan Levine, the daughter of Mollie Levine, a predeceased sister.

It is undisputed that decedent had an interest in Garvies Point Realty which was sold in

April 2004. The sum of \$151,388.90 was realized from the sale. Respondent Joan Levine asserts that she is entitled to the sale proceeds because they were deposited into a joint account that was opened pursuant to an account application signed by decedent with Joan Levine's name as one of the joint tenants.

In April 2004, at the direction of Melvin Dubin, the proceeds of the sale of decedent's interest in Garvies Point were deposited in a joint account in Smith Barney. Paragraph 13 of the account agreement dated April 4, 2004, states that account is to be a joint tenancy with rights of survivorship.

When a bank account is opened in the names of two individuals and the signature card used to create the account contains survivorship language, a presumption arises that the account is a true joint account and that the surviving cotenant is entitled to the entire balance in the account on the death of the other cotenant (Banking Law §675; *Kleinberg v Heller*, 38 NY2d 836 [1976]). The presumption can be overcome with evidence that the depositor created the account merely for convenience and not with the intention of conferring a present beneficial interest (*Matter of Friedman*, 104 AD2d 366 [2d Dept. 1984] *affd* 64 NY2d 743 [1984]; *Matter of Fayo*, 7 AD3d 795 [2d Dept 2004]). Where no confidential relationship exists, as here, the burden is on the petitioners to establish by clear and convincing evidence that the account was intended solely for the convenience of the depositor and that she had no present intention to make a gift of any portion of the account to the survivor (*Matter of Mullen*, 218 AD2d 50 [1st Dept. 1996]). The testimony of respondents themselves, Melvin Dubin and Joan Levine, establishes that the account, in fact, was a convenience account. Melvin Dubin testified that he “just arbitrarily selected” Joan to be listed on the account into which the proceeds would be deposited and that Joan was there as a protective device to write checks to persons he thought

should be paid for helping decedent. Further, Joan Levine herself stated that she was added as a signatory to safeguard the account from plundering by members of the Brooks family. As to the opening of the account, Joan Levine presented documents to the decedent and told decedent that her brother (Melvin Dubin) had wanted her to do this. Indeed, after decedent's death, at Mel's direction, Joan Levine wrote checks for various expenses incurred by decedent and for other items related to decedent's care. Under such circumstances, the conduct and statements of the surviving cotenant demonstrate that the account was opened as a matter of convenience (*Matter of Camarda*, 63 AD2d 837 [4th Dept. 1978]). The fact that the Garvies Point stock had been the subject of a specific bequest to Joan Levine in decedent's will does not entitle Joan Levine to the funds in the account (EPTL 3-4.3; *Matter of Powers* 166 AD2d 534 [2d Dept 1990]) . In addition, any funds in decedent's capital account in Garvies Point shall also be remitted to the estate.

Accordingly, that branch of petitioners' motion for summary judgment directing respondents to remit to the estate the sale proceeds of decedent's interest in Garvies Point and decedent's capital account is granted.

The request for sanctions is denied as objectant's objections were not patently meritless within the meaning of 22 NYCRR §130-1.1.

Settle order on five days' notice with five additional days if service is made by mail.

Dated: March 8, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court