

Tumminello v Bolten
2007 NY Slip Op 30234(U)
March 13, 2007
Supreme Court, Richmond County
Docket Number: 0080317
Judge: Joseph J. Maltese
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LAWRENCE TUMMINELLO,

Petitioner

DECISION & ORDER
HON. JOSEPH J. MALTESE

against

FLORENCE BOLTEN,

Respondent

The following items were considered in the review of this motion to render a final accounting & to dismiss

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	2
Order to Show Cause and Affidavits Annexed	1
Answering Affidavits	3
Replying Papers	3
Exhibits	Attached to Papers
Memorandum of Law	4

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In this special proceeding, the petitioner moves, by order to show cause for an order directing Florence Bolten, as Trustee of the "Fred Tumminello Trust" [hereinafter "the trust"] to render a final accounting. The trust was created on March 7, 1996, of which Fred Tumminello was a donor, and the petitioner and respondents the beneficiaries of the trust.

The respondent cross-moves the court for an order pursuant to CPLR §§ 3211(a)(1); 3211(a)(3); and/or 3211(a)(7) dismissing the verified petition based upon documentary evidence for both the petitioner's alleged lack of standing to pursue such a claim and/or failure to state a claim. Additionally, the respondent seeks costs and sanctions against petitioner and/or his counsel, as well as awarding the respondent reasonable attorneys' fees.

According to the trust, attached as an exhibit to the petitioner's papers, Fred Tumminello executed the "Fred Tumminello Trust" on March 7, 1996 wherein the petitioner was named as a 1/3 remainderman in the trust's assets. The respondent, Florence Bolten, was named as a 2/3 remainderman of the trust. Additionally, the respondent was named as Trustee of the trust, accepted the Trust and entered into the performance of her duties.

The trust contained a "No Contest Clause" located in Article IX (1) which states: "If any beneficiary in any manner, directly or indirectly, contests this trust or any of its provisions, any interest in the Trust given to the beneficiary is revoked and shall be disposed of in the same manner as if the beneficiary had predeceased the Settler, without surviving issue."

In September, 2002, Supreme Court Justice Belen, of the Kings County Supreme Court ordered that "the Fred Tumminello Trust dated March 7, 1996 is found to be valid and in full force and effect." This decree by the court was in response to the opposition submitted by Lawrence Tumminello, when Florence Bolten moved the court for the Appointment of a Guardian over the person and property of her father Fred Tumminello.¹ In that proceeding, through his current attorneys, Gravante and Looby, LLP, the petitioner herein submitted a sworn affidavit stating under oath:

"2. I am the son of Fred Tumminello...I submit this affidavit in support of having the will and trust allegedly executed by my father in 1996 null and void...

4. It has always been my father's intent to divide his estate and belongings equally between his children...

Wherefore, it is respectfully request that this Court determine that Fred Tumminello a/k/a Filippo Tumminello, be determined as incompetent to sign a trust and will in 1996, as he was suffering from a mental or medical impairment which impaired his ability to validly execute the aforesaid documents and that these documents be declared null and void and not in effect."

The law firm of Gravante and Looby, LLP, through their attorney Robert E. Polistena, submitted an affirmation in support of Lawrence Tumminello's contestation of the trust and stated:

Robert E. Polistena, an attorney admitted to the practice in the State of New York...That I am of counsel to the law firm of Gravante and Looby, LLP, the attorneys of record for the respondent herein... I make this affirmation in support of Respondent's application to have the Court consider the trust agreement...void for lack of capacity... Wherefore, your affirming respectfully requests that the Court determine that the AIP lacked capacity in 1995 and 1996 when the will, trust agreement and power of attorney were signed."

In New York, it is well settled that *in terrorem* or *no contest* clauses must be construed to carry out the intent of the Testator and / or Settlor (*Matter of Ellis* 252 AD2d 118 [2d Dept 1998]). When faced with construing a living trust, the court must seek to honor the settlor's intent, unless, inter alia, it is against public policy to enforce the same (*Oakes v. Muka* 31 AD3d 834 [3d Dept 2006]).

It is clear to this court that the petitioner herein, when he previously sought to have the trust rendered null and void, violated the *in terrorem* clause of the trust created by his father and therefore, forfeited any legacy that he may have been entitled to thereunder. Accordingly, the

petitioner herein does not have standing to seek a final account of the trust and therefore, this special proceeding must be dismissed. The remainder of the respondent's cross-motion for costs, sanctions, and attorney's fees are denied.

Accordingly, it is hereby:

ORDERED, that the petitioner's order to show cause seeking a final account of the Fred Tumminello Trust is denied; and it is further

ORDERED, that the respondent's cross-motion seeking dismissal of this action pursuant to CPLR § 3211 et. seq. is granted and this special proceeding is dismissed with prejudice; and it is further

ORDERED, that the remainder of the respondent's cross-motion seeking costs, sanctions, and attorney's fees is denied.

ENTER,

DATED: March 13, 2007

Joseph J. Maltese
Justice of the Supreme Court

¹See, *Matter of the Application of Florence Bolten for the Appointment of a Guardian of the person and / or property of Fred Tumminello a/k/a Filippo Tumminello, a person alleged to be Incapacitated*. Kings County Supreme Court Index Number 8096/2002. Justice Ariel E. Belen presided over the special proceeding.