

Matter of Mills

2007 NY Slip Op 31139(U)

May 1, 2007

Surrogate's Court, Nassau County

Docket Number: 0332045/2007

Judge: John B. Riordan

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

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In the Matter of the Application of ROBERT MILLS, a/k/a
ROBERT K. MILLS, Co-Executor of the Estate of

File No. 332045

ROBERT I. MILLS,

Dec. No. 125

Deceased,

for a Decree revoking Letters Testamentary heretofore
issued to Jacqueline Mills, as Co-Executor and granting
additional relief.

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This is an application by order to show cause which seeks the following relief: revocation of letters testamentary; removal of a co-fiduciary; compelling an accounting; granting new letters solely in the name of the petitioner; ordering and directing the respondent to vacate real property; and directing that the respondent be surcharged. The petitioner is Robert Mills and the respondent is his sister, Jacqueline Mills.

This case is well known to the court and is the subject of four prior decisions (Dec. No. 471, dated July 28, 2004; Dec. No. 250, dated June 8, 2005; Dec. No. 632, dated June 28, 2005; and Dec. No. 560, dated July 27, 2006). The decedent, Robert I. Mills, died on June 14, 2001. Approximately three years after his death, the decedent’s son, Robert Mills, petitioned to be appointed administrator of his father’s estate. Jacqueline Mills opposed the application and later filed a will of the decedent’s. The decedent’s will, dated April 26, 1973, provided that if his wife predeceased, then all of his wife’s jewelry was left to Jacqueline and all of his jewelry as well as any automobiles were left to Robert Mills. The rest was to be divided equally between Robert and Jacqueline Mills. Both Robert and Jacqueline Mills were nominated as alternate co-executors. The only valuable asset of the estate is a home located in Rockville Centre, New

York.

On or about August 10, 2005, Robert Mills and Jacqueline Mills entered into a stipulation of settlement in open court. The stipulation provided, in pertinent part, the following:

Jacqueline Mills has the right to purchase her brother's interest in the house for one-half of the agreed upon value and the agreed upon value is to be determined by a certified real estate appraiser initially hired by Mr. Sullivan [Mr. Mill's attorney].

Mr. Sullivan hired an appraiser who valued the property by written appraisal dated August 26, 2005 at \$540,000.

The stipulation further provided:

If Jacqueline Mills is unable to obtain financing within 90 days [of August 10, 2005], the house will be marketed for sale, and the proceeds divided equally between Jacqueline Mills and her brother, Robert Mills...
If Jacqueline Mills cannot obtain financing, she agrees to leave the house on the closing date of the sale to a third party, and consents to the immediate entry of a warrant of eviction or judgment of possession as of the date of closing.

Apparently, after the appraisal was completed, Jacqueline Mills and Robert Mills negotiated a reduction in the agreed upon price and numerous letters were exchanged regarding the transaction. What is not apparent, however, is whether Jacqueline Mills obtained the financing which she was required to do within ninety days of August 10, 2005. If she did not obtain financing, then the appropriate course of action was for Robert Mills to market the house for sale and upon the closing date, an immediate warrant of eviction would issue.

A stipulation of settlement is a contract between the parties (*Gage v Jay Bee*

Photographers, Inc., 222 AD2d 648 [1995]; *Matter of McQuade*, 121 AD2d 780 [1986]). A stipulation made in open court is binding on the parties (CPLR 2104). Open court stipulations are favored by the courts and will not be set aside lightly (*Hallock v State of New York*, 64 NY2d 224 [1984]; *Matter of Stark*, 233 AD2d 450 [1996]; *Matter of Slaughter*, 206 AD2d 537 [1994]; *Matter of Kaplan*, 150 AD2d 687 [1989]; *Matter of Hecht*, 24 AD2d 1001 [1965]). Stipulations are especially favored where the parties have been represented by counsel (*Matter of Stark*, 233 AD2d 450 [1996]; *Heimuller v Amoco Oil Corp.*, 92 AD2d 882 [1983]). Stipulations of settlement which put an end to litigation promote efficient dispute resolution and are essential to the litigation process (*Hallock v State of New York*, 64 NY2d 224 [1984]; *Gage v Jay Bee Photographers, Inc.*, 222 AD2d 648 [1995]; *Matter of Banter*, 209 AD2d 365 [1994]). Moreover, compromise agreements have consistently been approved in matters involving decedents' estates (*Matter of O'Keefe*, 167 Misc 148 [1938]).

In the instant proceeding, the stipulation was entered into on August 10, 2005. Both parties were present and represented by attorneys. The terms of the stipulation were clear and unambiguous, and in accordance with the stipulation, a certified appraiser valued the property at \$540,000. Neither party, however, has moved to enforce or vacate the stipulation. Instead, the petitioner has asked to revoke letters testamentary issued to Jacqueline Mills pursuant to SCPA 711 (2), (3) and (8). The petitioner has further asked to evict Jacqueline Mills from the property so that the house can be marketed and sold which relief is clearly premature as there has been no showing that Jacqueline Mills did not obtain financing within the ninety days as required by the stipulation.

The petitioner alleges that Jacqueline Mills has wasted assets of the estate (SCPA

711[2]) because she has refused to market the house for sale and pay taxes. The petitioner further alleges that Jacqueline Mills has willfully refused or without good cause neglected to obey a lawful order of the court (SCPA 711[3]) and that she does not possess the qualifications required of a fiduciary (SCPA 711 [8]). The basis for the allegations are essentially that the house has yet to be sold in accordance with the terms of the stipulation. However, Jacqueline Mills avers that at all times she was ready, willing and able to consummate the sale.

As the removal of the fiduciary constitutes a “judicial nullification of the testator’s choice” it may only be allowed when “the grounds set forth in the relevant statutes have been clearly established” (*Matter of Duke*, 87 NY2d 465, 473 [1996]). Further, “the rule has long prevailed that ‘courts are required to exercise the power of removal sparingly and to nullify the testator’s choice [of executor] only upon a clear showing of serious misconduct that endangers the safety of the estate...’” (*Matter of Duke*, 87 NY2d 465, 473 [1996] citing *Matter of Israel*, 64 Misc 2d 1035, 1043 [1970] citing *Matter of Braloff*, 3 AD2d 912 [1957], *affd* 4 NY2d 847 [1958]). The petitioner has failed to establish grounds sufficient to grant the requested relief.

The attorneys are directed to appear at a conference on this matter on May 22, 2007, at 10:00 a.m., to guide the litigation of this matter.

This constitutes the decision and order of the court.

Dated: May 1, 2007

JOHN B. RIORDAN
Judge of the
Surrogate’s Court

