

Matter of McGee

2007 NY Slip Op 31761(U)

June 21, 2007

Surrogate's Court, Nassau County

Docket Number: 0326997/2007

Judge: John B. Riordan

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

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In the Matter of the Application of Michael S. McGee, Jr.,
as Executor of the Estate of

File No. 326997

MICHAEL S. McGEE, SR.

Dec. Nos. 341, 345

Deceased,

to Compel Turnover of Property Pursuant to SCPA 2103.
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Before the court in this turnover proceeding is an application by respondent Dorothy McGee to hold Michael S. McGee, Jr., who is the executor of the estate of his father, in contempt of court pursuant to SCPA 607 for his alleged refusal and willful neglect of an order of this court entered on May 8, 2006. Dorothy McGee is the surviving spouse of the decedent from his second marriage. Also before the court is the executor's motion for leave to amend the petition, for partial summary judgment with respect to the new claims the executor seeks to assert, to dismiss Dorothy's counterclaims.

On or about April 16, 2004, the executor commenced a proceeding under SCPA 2103 to compel Dorothy to turn over to the estate the proceeds of certain bank accounts titled at the time of the decedent's death in the names of the decedent and Dorothy and the net proceeds of the sale of real property in Massapequa, New York, which, at the time the decedent died, was titled as "Michael S. McGee Sr. and Dorothy C. McGee, his wife." In her verified answer, Dorothy asserted a counter-claim seeking: (1) \$15,000 as the surviving spouse pursuant to EPTL 5-3.1 (a) (5); (2) \$13,597.49 reimbursement for decedent's funeral expenses; (3) \$161.50 for one-half of the 2001 joint federal income tax liability of decedent and her; (4) \$31,836 for excess withdrawals from certain joint bank accounts maintained by decedent and her at Cross County

Federal Savings Bank; and (5) \$70,000 of funds withdrawn from a joint bank account at Cross County Federal Savings Bank. On December 16, 2003, Dorothy served a notice of election under EPTL 5-1.1-A and a notice of claim on the estate.

On May 8, 2006, the court entered an order with respect to the executor's motion for partial summary judgment and production of documents. The court found that a Cross County Federal Savings Bank account and an Astoria Federal Savings and Loan Association account were convenience accounts in which Dorothy had no interest and that the money in these accounts as of the date of the decedent's death was an estate asset. The court also directed Dorothy to provide authorizations to the executor so he could obtain certain medical and financial records. Dorothy asserts that she has provided the authorizations.

As is relevant to Dorothy's motion for contempt, the order also directed the executor to pay Dorothy, within fifteen days of the date of the order, \$15,000 from the estate in satisfaction of her exempt property rights under EPTL 5-3.1 (a) (5). If the estate did not have sufficient assets to make the payment, the executor's attorney was directed to notify Dorothy within that same time period and to recover from the decedent's grandchildren funds transferred to them by any checks that cleared after the decedent's death, thus constituting incomplete gifts. According to the order, the money recovered was to be delivered to Dorothy to the extent necessary to satisfy her \$15,000 exempt property rights.

THE SURVIVING SPOUSE'S CONTEMPT APPLICATION

Dorothy alleges that the executor has refused and willfully neglected to obey the court's order in that he has refused to pay Dorothy \$10,098.05, which is the balance owed to her from the exempt property amount of \$15,000 minus \$4,901.05, the total date of death balance in the subject Cross County Federal Savings Bank and Astoria Federal Savings and Loan Association

accounts. Dorothy also alleges that the executor refused and willfully neglected to obey the court's order by failing to commence a turnover proceeding to recover funds from any incomplete gifts.

The executor opposes the application. He states that he has commenced a turnover proceeding against Colin McCarty, the only one of decedent's grandchildren whose \$10,000 check cleared after the decedent's death, in partial compliance with the counter-order.

The executor admits that he has not paid Dorothy the money he was ordered to pay to her. He asserts, however, that he has not disobeyed the court's directives. Rather, he claims that Dorothy's exempt property rights were satisfied in full "at the moment of Decedent's death. At that time, up to \$15,000 in proceeds of Decedent's convenience accounts did not constitute assets of the Decedent's estate. By operation of law, that sum vested in and was set off to [the] Surviving Spouse." The executor claims that Dorothy continues to improperly retain \$5,593.05 from the decedent's convenience accounts. Finally, the executor claims that Dorothy has failed to demonstrate that her rights have been prejudiced by the executor's actions.

In support of his position that Dorothy's exempt property rights have been satisfied, the executor refers the court to his motion for partial summary judgment wherein he asserts that Dorothy owes the estate \$5,593.05, plus interest from the date of the decedent's death, by dint of allegedly having taken \$20,593.05 from the decedent's convenience accounts, which he delineates as follows: \$4,901.05 collectively from the Cross County Federal Savings Bank account and Astoria Federal Savings and Loan Association account which the court determined were convenience accounts; \$2,095 collectively from a Cross County checking account and Astoria checking account which the executor now claims were also convenience accounts in which Dorothy had no interest; and \$13,597, which Dorothy used to pay for the decedent's

funeral from the Astoria checking account. The executor claims that the funeral expenses must come out of the exempt property since the estate's assets are insufficient to pay them (EPTL 5-3.1 [a] [5]). The executor states that the total amount in the estate account as of December 31, 2006 was \$3,368.74.

The time for the executor to comply with the court's order has long since passed. An individual may be punished for contempt (SCPA 606, 607) upon a showing that he willfully or neglectfully disobeyed a clear and unequivocal court order, thereby prejudicing the rights of another party to the litigation (*McCain v Dinkins*, 84 NY2d 216, 226 [1994]). Although he attempts to justify his actions, the executor has admitted that he has not paid Dorothy the money that is in the estate account. The court finds that Dorothy's rights have been prejudiced as a result of the executor's willful disobedience of the counter-order in that Dorothy has not had the use of the money to which she is statutorily entitled as the surviving spouse (EPTL 5-3.1 [a] [5]) or the interest income thereon, for approximately one year.

Accordingly, the executor is found to be in contempt of this court. He is given leave to purge himself of such contempt by paying the money in the estate account to Dorothy within twenty days from the date of personal service upon him of a copy of the order to be made herein and by prosecuting the turnover proceeding against Colin McCarty. Service may be made either by personal delivery or by overnight mail delivery. In the event the executor fails to purge himself of contempt as provided herein, a warrant of commitment may issue without further notice to him by the sheriff of any county where the executor may be found, directing that he be returned to this court, at which time it will be determined whether his commitment is appropriate.

THE EXECUTOR'S MOTIONS TO AMEND
THE PETITION AND FOR SUMMARY JUDGMENT

The executor has moved, pursuant to CPLR 3025 (b), for leave to amend his petition to plead that specified checking accounts at Cross County and Astoria Federal are convenience accounts in which Dorothy has no interest and which are, instead, assets of the decedent's estate. The court has already determined that a Cross County Federal savings account and an Astoria Federal savings account were, in fact, convenience accounts. The executor claims that the Cross County checking account and the Astoria Federal checking account are linked to the Cross County Federal and Astoria Federal savings accounts, respectively.

It is well settled that leave to serve an amended answer pursuant to CPLR 3025 should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law or unless prejudice or surprise directly results from delay in serving such amendment (*Matter of Rouson*, 32 AD3d 956, 958 [2d Dept 2006]; *De Gradi v Coney Is. Med. Group, P.C.*, 172 AD2d 582 [2d Dept 1991]; *see also Rogoff v San Juan Racing Ass'n Inc.*, 77 AD2d 831, 832 [1st Dept 1980], *affd* 54 NY2d 883 [1981]). The court has the discretion to allow a party to amend a pleading at any time (*Matter of Goggins*, 231 AD2d 634, 635 [2d Dept 1996]; *Bilhorn v Farlow*, 60 AD2d 755, 755 [4th Dept 1977]). In exercising its discretion, the court will consider (1) how long the amending party was aware of the facts upon which the amendment is predicated and whether a reasonable excuse for the delay has been offered; (2) whether the proposed amendment lacks merit; and (3) whether the proposed amendment would cause prejudice to the other party (*Matter of Goggins*, 231 AD2d 634, 635 [2d Dept 1996]; *see also Wyso v City of New York*, 91 AD2d 661, 661 [2d Dept 1982]).

Citing CPLR 214 (3) and 210 (c), Dorothy opposes the motion on the ground that the statute of limitations for conversion of assets after death is three years from when letters were issued to the executor. Letters testamentary were issued to the executor on June 25, 2003. Thus, the statute of limitations on the new causes of action the executor seeks leave to assert expired on June 25, 2006.

However, the executor asserts that the new causes of action are not time barred because they relate back to the claims asserted in the original petition. In support, the executor relies on CPLR 203 (f), which states,

A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended proceeding.

Dorothy argues that the original pleading did not give notice to her about a claim that the checking accounts were convenience accounts. The court agrees.

The savings account at Astoria Federal is a passbook account. The Astoria Federal checking account has a completely different account number. According to Dorothy's attorney, the checking account was opened on May 30, 2001, while the savings account was opened on August 22, 2001. The executor does not dispute this. There is no evidence in the record that the two accounts are linked or associated with each other. As Dorothy's attorney points out, there also is no evidence of money being transferred between the accounts.

Although the accounts appear on the same monthly statements, the Cross County Federal accounts also bear different account numbers. The account signature card for the savings account shows that it was opened on February 14, 1992; the checking account was opened on

December 16, 1992, according to the account signature card. Again, there is no evidence that moneys were transferred to or from the two accounts.

The fact that the checking accounts happen to be at the same banks as the savings accounts does not provide the requisite notice of the transactions and occurrences to be proved by the amended petition. The court finds that the claims the executor now seeks to assert are time barred and that he has failed to satisfy the requirements of CPLR 203 (f). Further, he has not offered any excuse for the delay in seeking to assert them. Accordingly, the executor's motion for leave to amend the petition is denied, rendering moot his motion for summary judgment with respect to whether the checking accounts are convenience accounts.

THE EXECUTOR'S MOTION TO DISMISS DOROTHY'S
COUNTERCLAIM AND FOR AN ORDER DIRECTING
DOROTHY TO PAY \$5,593.05 TO THE ESTATE

The executor also moves for an order dismissing Dorothy's counterclaim (1) for \$15,000 in exempt property pursuant to EPTL 5-3.1 (a) (5) and (2) to be reimbursed for \$13,597.49 for decedent's funeral expenses that Dorothy paid.

In support of his motion to dismiss Dorothy's counterclaim for the \$15,000, the executor asserts that Dorothy's EPTL 5-3.1 (a) (5) exempt property claim has been satisfied. Although the executor claims that he is not seeking leave to reargue the court's May 8, 2006 order, that is precisely what he is attempting to do. In that regard, this motion does not comport with the requirements of CPLR 2221 (d). The motion is not identified as one to reargue; it is not based on facts or law that the court allegedly overlooked or misapprehended; and the motion was not timely made (CPLR 2221 [d] [1], [2] & [3]).

The executor does not specify under what subsection of CPLR 3211 he moves to dismiss. His assertion is that Dorothy already took \$20,593.05 of estate assets and, therefore, owes

\$5,593.05 to the estate. The executor includes in the \$20,593.05 figure, the date of death balances from the Astoria Federal and Cross County Federal checking accounts, which totaled \$2,095.03. Since the court denied the executor's motion for leave to amend the petition to include claims for the proceeds of these accounts, the \$2,095.03 figure must be deducted, leaving \$18,498.02 in contention.

The court has already determined that Dorothy is entitled to \$15,000. She already received \$4,901.05 from the two savings accounts that the court determined to be convenience accounts. This leaves \$10,098.95 due from the estate to Dorothy. The court finds no grounds on which to dismiss Dorothy's counterclaim under EPTL 5-3.1 (a) (5).

A total of \$13,597.49 was paid for the decedent's funeral from the Astoria Federal checking account. The court has denied the executor's motion for leave to amend the petition to include a claim that the Astoria Federal checking account was a convenience account. Therefore, the executor's assertion that Dorothy converted the proceeds of that account to her own use fails.

The executor correctly asserts that to the extent that estate assets are insufficient to pay funeral expenses, they are paid from the exempt property (EPTL 5-3.1 [a] [5]). According to the executor, at this time, the estate currently does not have the assets to reimburse Dorothy for the money she paid for the decedent's funeral. This is not a reason to dismiss Dorothy's counterclaim for reimbursement. Rather, as the executor concedes, "[a]fter [the executor] has collected all of Decedent's assets and has paid all expenses of administration, it can then be determined if there will be sufficient assets on hand to reimburse [Dorothy] for all or a portion of Decedent's funeral expenses" or whether all or part of the expense will have to be repaid by Dorothy from the \$15,000 to which she is entitled under EPTL 5-3.1 [a] [5].

Accordingly, the executor's motion to dismiss Dorothy's counterclaim for reimbursement of the decedent's funeral expenses is denied.

The court is compelled to point out that the extent of the litigation to date in this estate is wholly disproportionate to the sums involved. The court reminds counsel for both sides that among the factors to be considered by the court in fixing fees for legal services are the size of the estate (*Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966] *affd* 23 NY2d 700 [1968]) and the amounts involved [in the litigation] and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]).

Settle order on notice.

Dated: June 21, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court