

Matter of Zirinsky

2007 NY Slip Op 31967(U)

June 15, 2007

Surrogate's Court, Nassau County

Docket Number: 0206440/2007

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 Testamentary Trusts u/w of

RALPH ZIRINSKY

File No. 206440

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In the Matter of the Testamentary Trusts u/w of

RUTH ZIRINSKY

Dec. No. 117

File No. 329098

Dec. No. 431
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Two applications are submitted for decision. In the first, Linda Zirinsky Gilbert commenced a proceeding by order to show cause seeking a permanent injunction enjoining her brother, Robert Zirinsky, from subleasing, transferring, or encumbering a cooperative apartment in Manhattan. The order to show cause contains a preliminary injunction to this effect. In addition to the permanent injunctive relief demanded in her petition, Ms. Gilbert also seeks the appointment of a receiver with the authority to sell the cooperative apartment.

In the second application, by notice of motion, Robert Zirinsky moves for an order granting the following relief:

(1) pursuant to CPLR 3211, dismissing the petition of Linda Zirinsky Gilbert because it fails to state a cause of action;

(2) pursuant to CPLR 1003, dismissing the petition for failure to join necessary parties;

(3) awarding attorneys' fees and costs; and

(4) vacating the temporary restraining order and preliminary injunction imposed on

Robert Zirinsky by the order to show cause.

The parties agreed to submit these issues to the court on the papers filed.

This litigation involves two intertwined estates, those of Ralph Zirinsky and Ruth Zirinsky. Ralph Zirinsky died on May 7, 1980, and his Will was admitted to probate in this court. Ruth Zirinsky was his surviving spouse. She died a resident of Nassau County on May 29, 2003. Ralph and Ruth Zirinsky were survived by three adult children: Robert Zirinsky, Linda Zirinsky Gilbert, and Jill Zirinsky Hirsch. Although there are pending several contested accountings, this proceeding is new and addresses one relatively minor asset of the trust estates and one small aspect of the many issues raised by those accountings. It would therefore be well to summarize the parties and their relationship.

Ralph Zirinsky, along with members of his extended family, operated a real estate business that had been in existence for several generations. Ralph's will was admitted to probate by this court on August 11, 1980. Under Mr. Zirinsky's will, his residuary estate was divided into two shares (I and II). Share I was to be funded with assets that would qualify for the marital deduction then in effect. Three trusts were established by the Will's Article SECOND, equally funded by Share I. Each of these three Article SECOND trusts was to be administered separately and the net income of each was to be paid to Ruth or applied to her benefit. The trustees were also given the discretion to make principal payments to Ruth. Ralph's Will made Ruth the donee of a general testamentary power of appointment of the remainder of the three Article SECOND trusts. Ralph and Ruth's three children were the takers in default of the exercise of the power of appointment over their respective portions of the Share I, Article SECOND trusts, albeit via continuing trusts for their benefit.

Share II of Ralph's residuary estate was also divided into three equal parts under Article

THIRD, to be held as separate sprinkling trusts for the benefit of Ralph's three children (Robert, Linda, and Jill) and Ruth (who possessed no power of appointment over the remainder of these trusts). The three Article THIRD trusts continue for the lives of Ruth and her three children, with the remainder going to the issue of the three children. The initial co-trustees of these six testamentary trusts were Robert, Ruth, and Richard Zirinsky, the decedent's brother.

Ruth's will was admitted to probate by this court on December 6, 2005, after objections to its probate were dismissed by summary judgment. That decision is now on appeal. Ruth's will exercised her power of appointment, directing the remainder of the three Article SECOND trusts from Ralph's will be disposed of as part of her residuary estate. Article FIFTH of Ruth's will bequeaths the residuary as follows: two-thirds (2/3) in trust for Robert; one-sixth (1/6) for Linda; and one-sixth (1/6) for Jill. The intent and effect of this unequal exercise of the power of appointment, when considered with the equal distribution under Article THIRD of Ralph's will, is to apportion Ralph and Ruth's combined real estate interests so that Robert obtains a 50% effective share, Linda a 25% effective share, and Jill a 25% effective share of the family's real estate interests. Hence, Robert retains the control over these interests. Ruth's exercise of her power of appointment was the source of the objections to Ruth's Will and the appeal that is pending.

As noted above, for several generations the business of the Zirinsky family has been real estate development and management in New York City. When Ralph Zirinsky died in 1980, the gross fair market value of his real estate interests was said to amount to \$1,044,036.00 while the net taxable estate was \$463,302.00. At the time of Ralph's death, Ruth was 48 years old. Robert had recently graduated from law school and had entered the family business. Under Robert's stewardship over the next twenty-five years the value of the family's real estate interests grew

exponentially. There is a dispute, however, as to his administration of the six testamentary trusts under Ralph's will as well as his work as executor of his father's estate. Robert is a co-trustee for those trusts, in fact, the surviving co-trustee after the death of his mother and his uncle, Richard Zirinsky. His sisters have filed objections to his accountings of those trusts.

This proceeding, commenced by Linda Zirinsky Gilbert, concerns one of the minor assets equitably owned by the trusts under the wills of Ralph and Ruth Zirinsky. It is a one-bedroom cooperative apartment known as 301 East 69th Street, New York, New York. The petition of Ms. Gilbert alleges that Robert, as trustee, intends to sublet this apartment to his son for an amount substantially below its fair market value. The petition seeks to enjoin Robert's subletting plan as well as appointing a receiver to sell the apartment on the open market.

In a letter dated December 12, 2006, Robert's attorney wrote to Linda's attorney to inform him that Robert's son wanted to rent the apartment at an amount that would be sufficient to cover the apartment's maintenance charges of \$1,200.00 per month. Before entering into a lease with his son, Robert offered the apartment to his two sisters (Linda Zirinsky Gilbert and Jill Zirinsky Hirsch) to see if they would offer more money for the apartment. It is Robert's position that restrictions on the propriety lease with the cooperative association effectively limits the rental of the apartment to Zirinsky family members and therefore there is no fair market value of the property. Robert has submitted evidence to the effect that the cooperative association has placed strict limitations on the freedom to lease the property to people who are not members of the Zirinsky family. His sisters dispute the extent of these restrictions and the actions Robert took in response to those restrictions. However, for the reasons stated below, it is unnecessary to resolve any issues of fact that may arise from these allegations and responses.

The court notes that the same parties are actively litigating several contested accountings

involving trust assets like the one at issue here. Moreover, the court notes that Article EIGHTH of the will of Ralph Zirinsky gives the fiduciary the power “to invest and reinvest in any real or personal property ...” and “to manage, contract with respect to, lease, improve, develop, and operate such property and any business or venture in which I or my estate may be invested.” In addition, Article EIGHTH of the will of Ruth Zirinsky authorizes and empowers her “executor and/or trustees to retain and continue any investments which [she] may own at the time of [her] death without regard to diversification,” and “to possess, manage, insure ... develop, subdivide, exchange ... control, partition, mortgage or otherwise deal with any and all real property or interests therein; to lease (including sublease), convey, transfer or exchange ... upon any terms and conditions ... any such property or interest therein to any individual or entity.”

As should be clear from the foregoing, Robert’s conduct vis-a-vis the apartment does not rise to the level to justify the court’s review in a proceeding apart from the accountings. In addition, a court should refrain from reviewing the prudence of any single investment other than through an accounting proceeding for obvious reasons of judicial economy and expense to the estate. While this court has repeatedly held that it “cannot substitute its own business judgment for that of the trustee,” (*Matter of Lippold*, 11 Misc 3d 1092A [Sur Ct, Nassau County 2006]), it is more relevant on these applications that the exercise of that business judgment is normally subject to scrutiny in an accounting proceeding. The court agrees with the assessment offered by Robert’s attorney that the very purpose of an accounting is to consolidate within a single proceeding all issues pertaining to a fiduciary’s administration and to avoid, except in the most extreme circumstances, separate proceedings to attack the fiduciary’s exercise of discretion and judgment on an item by item basis. (*see Matter of Vanderbilt*, 109 Misc2d 914 [Sur Ct, Suffolk County 1981]). The law is well settled that a court of equity can render a decision which not only

does justice but which can avoid multiple litigation (*Matter of McCoy*, 100 Misc. 2d 301 [Sur Ct, New York County 1979]). A multiplicity of actions involving the same parties, circumstances, or facts is to be avoided if possible (*Matter of Zalaznick*, 84 Misc. 2d 715 [Sur Ct, Bronx County 1975]). There are no exigent circumstances presented here, either by virtue of the severity of the allegations made or by virtue of the amounts involved, to require a separate litigation or injunctive relief.

Because the court sees no merit to litigating these issues separately from the accounting proceedings currently being litigated, Robert Zirinsky's motion to dismiss this petition is granted. Robert's prayer for costs is denied. The temporary restraining order and preliminary injunction is hereby vacated. Correspondingly, the petition of Linda Zirinsky is dismissed without prejudice to her right to pursue her allegations in the pending accounting proceedings either as presently constituted or as amended and brought down to date. The preliminary injunction now in effect is hereby vacated.

This is the decision and order of the court.

Settle decree.

Dated: June 15, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court