

Celauro v Celauro

2008 NY Slip Op 31826(U)

June 30, 2008

Surrogate's Court, Nassau County

Docket Number: 0342720/2008

Judge: John B. Riordan

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

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GAETANA CELAURO, Individually and as Sole Income
Beneficiary of the SALVATORE F. CELAURO REVOCABLE TRUST and the SALVATORE F. CELAURO IRREVOCABLE LIFE INSURANCE TRUST, File No. 342720

Petitioner,

-against-

Dec. No. 238

WAYNE CELAURO, as Co-Trustee and Contingent
Remainderperson of the SALVATORE F. CELAURO
REVOCABLE TRUST and the SALVATORE F. CELAURO
IRREVOCABLE LIFE INSURANCE TRUST, and DIANE C.
CARTER as Co-Trustee and Contingent Remainderperson of the
SALVATORE F. CELAURO IRREVOCABLE LIFE
INSURANCE TRUST, et al.,

Respondents.

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In a proceeding for removal of certain trustees of two inter vivos trusts, the petitioner, Gaetana Celauro, moves for an order vacating the stipulation of discontinuance dated November 8, 2007 and allowing her to amend the petition to assert a further claim in support of her request that Wayne Celauro and Diane Celauro Carter be removed as trustees. The stipulation of discontinuance provided that it was "with prejudice." The proceeding was originally commenced in the Supreme Court as a CPLR Article 4 special proceeding (index no. 06-002423). In an order entered on June 20, 2006, the Supreme Court, Nassau County, transferred this matter to this court.

The facts can be found in the court's June 29, 2007 decision and order (dec. no. 340). In brief, petitioner, Gaetana Celauro, is the widow of Salvatore F. Celauro, who died testate on July 18, 2004 while a legal resident of Florida, but who maintained another home with Gaetana in Glen Head, New York. They had four children, Nathan Celauro, Salvatore F. Celauro, Jr.,

Wayne Celauro, and Diane Celauro Carter.

In his last will and testament dated October 26, 1992, Salvatore F. Celauro named Gaetana and Wayne the co-executors of his estate. The will was admitted to probate by the Florida courts on December 1, 2004, and letters issued to Gaetana and Wayne.

On May 2, 1991, Salvatore F. Celauro executed an irrevocable life insurance trust (Life Insurance Trust) in an agreement which named Wayne and Diane as trustees. Upon Salvatore F. Celauro's death, this trust was divided into five subtrusts for the benefit of Gaetana, Nathan, Wayne, Diane and Salvatore, Jr.

On October 15, 1992, Salvatore F. Celauro created a revocable trust (Exemption Trust) in an agreement between himself as grantor and himself and Gaetana as trustees. Pursuant to his will, Salvatore F. Celauro's estate is payable to the Exemption Trust. Wayne Celauro is the designated successor trustee and Nathan Celauro is the designated alternate successor trustee. Thus, at Salvatore F. Celauro's death, Wayne and Gaetana were the co-trustees. On July 29, 2004, Gaetana resigned as co-trustee and Nathan, by the terms of the instrument, became co-trustee with Wayne. The income of this trust is payable to Gaetana for her life. Wayne, Diane, Nathan and Salvatore, Jr.'s children are designated remainder beneficiaries.

It appears that these two trusts together own 18.8 percent of the combined shares of two closely-held family corporations, 4C Foods Corp. (4C) and Celauro Sales, Inc. (CSI). The balance of the shares are owned by Salvatore F. Celauro's nephew, John Celauro, and by various other Celauro family members and family trusts. Gaetana individually owns 1.48 percent of the shares of 4C and CSI. John Celauro is the current president of 4C. Nathan had been an

employee of 4C since he graduated from college in 1978 and since 1986 had been sales vice president. He was dismissed in September 2005.

In the removal proceeding, Gaetana sought Wayne's removal as co-trustee of both the Exemption Trust and the Life Insurance Trust and Diane's removal as co-trustee of the Insurance Trust on the grounds that they improvidently managed or injured the trust property committed to their charge or by reason of other misconduct in their office, were unfit for execution of their office (SCPA 711[[2]) and that they violated or threatened to violate their trust (SCPA 711[10]).

After discovery was complete, Gaetana moved for an order granting summary judgment. The court determined that there were triable issues of fact that precluded granting summary judgment and denied Gaetana's motion *in toto*. A hearing was later scheduled for January 2008.

Prior to the hearing, a stipulation of discontinuance with prejudice, dated November 8, 2007, was filed with the court. It was signed by Joseph O. Giaimo, Esq., of Giaimo Associates, LLP, as attorneys for "Plaintiffs" and by an attorney from the firm of Herrick, Feinstein, LLP, as attorneys for "Defendants." The matter was marked settled and taken off the court's trial calendar.

Gaetana now moves for an order vacating the stipulation of discontinuance. Counsel for Wayne and Diane argues that the court lacks jurisdiction to grant the relief sought because such relief may not be sought by motion, but only by a plenary proceeding. On the return date of the motion, the parties agreed to mark the motion as submitted for decision. CPLR 103(c) provides that "[i]f a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution. If the court finds it appropriate, in the interests of

justice, it may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just . . .” Thus, the court will treat Gaetana’s motion papers for vacatur of the stipulation of discontinuance as a petition and to deem this a plenary proceeding.

Gaetana asserts that the stipulation of discontinuance should be vacated because it was executed by her prior attorney, Joseph O. Giaimo, without her authority or consent. Gaetana also asserts that the events that occurred on November 7, 2007, the date she asserts the stipulation of discontinuance was actually signed, were “pre-orchestrated to deprive me of my rights, and my former attorney was a participant in the plan.” Gaetana claims that Mr. Giaimo ran roughshod over her, berated and belittled her, excluded her from meetings with her adversaries, and misled Nathan and her regarding 4C and CSI shareholder meetings and that Mr. Giaimo’s conduct violated her trust and was unethical. It is on that basis that Gaetana asks this court to vacate the stipulation.

Gaetana’s affidavit also details other events as grounds for the vacatur of the stipulation of discontinuance. She states that she and Nathan received a letter on August 29, 2007 from John Celauro’s attorneys advising them that a Fourth Amendment to the 4C and CSI Shareholder’s Agreement had been approved two days earlier, despite the fact that she and Nathan were not made aware of the amendment, which Gaetana claims inures to her detriment, before it was signed by Wayne and Diane as trustees of Gaetana’s trust. Gaetana also details other events that occurred before the subject stipulation of discontinuance was signed. For example, Gaetana states that on October 26, 2007, she and Nathan received notices of special meetings of the shareholders of 4C and CSI. She states that the purpose of the meetings was to amend and restate the certificate of incorporation of these corporations to eliminate the need for

shareholders' meetings, eliminate directors' personal liability, require mandatory indemnity by each corporation and create more than 800,000 shares of non-voting common stock of 4C, which would increase the number of common shares from 129,600 to 936,000, and more than 35,000 shares of non-voting common stock of CSI, which would increase the number of common shares from 5,832 to 42,120. Gaetana asserts that if the amendments were effectuated John could then do whatever he wanted in respect to the corporations.

Gaetana states that on November 7, 2007, she and Nathan went to the offices of Herrick, Feinstein, LLP, for the purpose of questioning these changes and to vote against them, if necessary. Gaetana and Nathan asked Mr. Giaimo to go with them. Gaetana states that she and Nathan were prevented from attending the shareholders' meeting and were subjected to "outrageous treatment" by Wayne and Diane, as well as by Mr. Giaimo. Gaetana then details her assertions that Wayne and Diane took actions during this time period that were in derogation of their fiduciary duty to her. Gaetana also reiterates her assertion that Mr. Giaimo signed and filed the stipulation of discontinuance without her authority.

Gaetana claims that it was only in January of 2008 that she realized why these events occurred when she received a letter dated January 9, 2008 from John Celauro to the shareholders of 4C and CSI advising that CSI's board of directors had decided to liquidate the corporation and distribute the remaining funds to the shareholders. Apparently, Wayne had already signed the consent. Along with the letter, Gaetana received a fifth amendment to the amended and restated CSI shareholders' agreement, which reflected the issuance of the additional shares of common stock authorized in November 2007. Gaetana concludes that John, Wayne and Diane "planned long ago to dissolve CSI in secrecy." She asserts that the trusts' interests in 4C and CSI are in

peril.

Nathan has also submitted an affidavit. In it, he details the events that transpired on November 7, 2007. Nathan states that when he and Gaetana arrived at the offices of Herrick, Feinstein, LLP, Mr. Giaimo told him that he had been speaking with John Celauro and felt that they had made progress with respect to Nathan being rehired by 4C. Mr. Giaimo also told Nathan that 4C and CSI were willing to postpone the shareholders' meetings until after a meeting was held on the topic of Nathan's employment by 4C. Mr. Giaimo went into the meeting without Gaetana and Nathan. When Nathan joined the meeting, he was told that the shareholders' meeting took place earlier. According to Nathan, Daniel Swick, an attorney at Herrick, Feinstein, LLP, told Nathan that Mr. Giaimo said that Nathan did not want to attend the shareholders' meeting. They then discussed the possibility of 4C rehiring Nathan. After about 45 minutes, Nathan asked that Gaetana join them in the discussion because the meeting was moving in the direction of possibly reuniting the family. Soon thereafter, the meeting became heated.

Again, according to Nathan, Mr. Giaimo began insisting that Gaetana and Nathan settle the removal proceeding. Nathan states that Mr. Giaimo began to scream and curse and continued to do so when he and Nathan spoke alone outside the room. Nathan asserts that he told Mr. Giaimo that he did not think that terminating that proceeding was in his or Gaetana's best interests. Mr. Giaimo allegedly replied that he was going to authorize the stipulation of discontinuance and that if they did not like it they could sue him for malpractice. Mr. Giaimo then called his office and had papers faxed to Herrick, Feinstein, LLP. John, Wayne, Sally and Mr. Swick left the floor while Mr. Giaimo, Nathan and Gaetana remained. Wayne states that Mr. Giaimo continued to curse at them, insisted he be allowed to sign the stipulation and did not

explain anything to them. Nathan again said he was not sure it was in their best interests and Mr. Giaimo is alleged to say that he was going to sign it anyway. According to Nathan, he and Gaetana were very confused, did not understand the stipulation or why they were not included in the shareholders' meetings and did not even know if those meetings had occurred. Mr. Giaimo signed the stipulation and handed it to another lawyer at Herrick, Feinstein, LLP, John Oleske. Mr. Giaimo, Nathan and Gaetana then left the building. Nathan asserts that at no time did Gaetana or he authorize Mr. Giaimo to sign the stipulation.

The papers filed on behalf of Wayne and Diane tell a very different story. Mr. Oleske states that, on November 8, 2007, Mr. Swick called him to ask that he join a meeting of Mr. Swick, John Celauro, Gaetana, Nathan and Mr. Giaimo. Mr. Oleske states that he was told the removal proceeding was to be resolved by the filing of a stipulation of discontinuance. Shortly thereafter, Mr. Giaimo called his office and gave instructions that a stipulation should be faxed to Mr. Oleske. When the stipulation arrived, Mr. Oleske gave it to Mr. Swick, who, in turn, presented it to Mr. Giaimo for his signature. Mr. Oleske states that Mr. Giaimo told Nathan and Gaetana that he would not sign it unless they verbally approved this action in the presence of Mr. Oleske and Mr. Swick. According to Mr. Oleske, Gaetana deferred to Nathan, who said for Mr. Giaimo to go ahead and sign it. Mr. Giaimo then signed the stipulation and handed it to Mr. Oleske, who was going to have it filed with this court. Mr. Oleske then received a telephone call from Mr. Swick, who told him not to file the stipulation, but to rejoin the meeting. When Mr. Oleske returned to the room, he witnessed Mr. Giaimo, Gaetana and Nathan arguing. Mr. Giaimo purportedly told Mr. Oleske to stay until the matter was resolved. The conversation continued in a hallway adjacent to the conference room. At this point, Mr. Giaimo told Nathan

the discussion Mr. Giaimo was planning to have with John Celauro about Nathan's possible rehiring by 4C was predicated on the discontinuance of the removal proceeding. Mr. Giaimo stated his strong recommendation that Nathan confirm his assent to filing the stipulation. Mr. Swick told Mr. Oleske not to file the stipulation until Gaetana and Nathan reiterated their approval of Mr. Giaimo's execution of it. Mr. Oleske told this to Gaetana, Nathan and Mr. Giaimo. According to Mr. Oleske, Gaetana again deferred to Nathan, who consented to having the stipulation filed with the court. At that point, Mr. Giaimo, Gaetana and Nathan left the offices of Herrick, Feinstein, LLP.

Diane and Wayne also rely upon Mr. Swick's affidavit. He states that Gaetana and Nathan were not excluded from the shareholders' meeting; they chose not to attend it. Mr. Swick states that John Celauro made it clear to Gaetana and Nathan that John would not discuss rehiring Nathan unless the removal proceeding was discontinued with prejudice and that Mr. Giaimo also explained this to them. Mr. Swick states that Mr. Giaimo told Gaetana and Nathan that he would not sign the stipulation unless they verbally approved this action in the presence of Messrs. Swick and Oleske. Gaetana deferred to Nathan, who said that Mr. Giaimo could sign it. Thereafter, Mr. Giaimo, Gaetana and Nathan had a heated discussion. At Mr. Giaimo's request, Mr. Oleske rejoined the meeting. The argument continued. Mr. Swick left the room. Mr. Oleske later told Mr. Swick that Gaetana again deferred to Nathan, who gave approval to file the stipulation.

Both Mr. Oleske and Mr. Swick state that they did not hear from Gaetana or Nathan from that date until more than three months later after Gaetana moved by order to show cause to vacate the stipulation.

John Celauro has filed an affidavit. He states that Mr. Giaimo told Gaetana and Nathan in John's presence that John was unwilling to discuss the possibility of rehiring Nathan unless the removal proceeding was discontinued. He states that Gaetana and Nathan gave Mr. Giaimo approval to sign the stipulation. He also states that Gaetana deferred to Nathan as to the filing of the stipulation. According to John, Nathan consented. John states that over the following months, 4C and Nathan were unable to come to an agreement about rehiring Nathan. John states that neither Gaetana or Nathan ever stated to him that the stipulation of discontinuance was executed without their consent.

In reply affidavits, Gaetana and Nathan both refute the statements contained in the affidavits of Mr. Oleske, Mr. Swick and John Celauro. In particular, they reassert that they were precluded from attending the shareholders' meeting, that Mr. Giaimo did not explain the stipulation of discontinuance to them, that Mr. Giaimo did not have the authority to sign the stipulation and that Gaetana would not have discontinued the removal proceeding in return for having John consider rehiring Nathan.

“Stipulations of settlement are favored by the courts and not lightly cast aside. . . . Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation” (*Hallock v State of New York*, 64 NY2d 224, 229 [1984] [citations omitted]). Stipulations are especially favored where the parties have been represented by counsel (*Matter of Stark*, 233 AD2d 450, 451[2d Dept 1996] [citation omitted]). Stipulations that 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, 230 [1984]; *Gage v Jay Bee Photographers, Inc.*, 222 AD2d 648, 649

[2d Dept 1995] [citation omitted]). Moreover, compromise agreements have consistently been approved in matters involving decedent's estates (*Matter of O'Keefe*, 167 Misc 148, 150 [Sur Ct, New York County 1938]). "Agreements of compromise in estates made in the absence of bad faith, imposition, fraud or collusion, have consistently received the approval and ratification of our courts and have been given vigorous support by them They have been sanctioned and encouraged, particularly in family controversies, in order to avoid burdensome expense, annoyance and inconvenience of litigation" (*Id.* at 149). As the party seeking to set aside the stipulation, petitioner bore the burden of proving sufficient cause to invalidate the stipulation (*Matter of Rosenhain*, 193 AD2d 903, 904 [3d Dept 1993] [citation omitted]). Here, even accepting all of Gaetana's assertions as true, she has failed to prove that this clear and unambiguous stipulation of discontinuance was the result of fraud, collusion, mistake or accident.

There are cases where courts have vacated a stipulation of discontinuance or of settlement where the complaining party was unaware of its existence or was not present for its execution (*see e.g. Chiseri v Dempsey*, 39 AD2d 601 [2d Dept 1972] [hearing necessary where party not present for execution of stipulation of settlement]; *Katzen v Twin Pines Fuel Corp.*, 16 AD3d 133 [1st Dept 2005] [party did not consent to execution of stipulation of settlement]). Such is not the case here. Gaetana was present with Mr. Giaimo at all relevant times. She has failed to demonstrate that Mr. Giaimo did not have her authority to sign the stipulation or to have it filed with the court. Although she may have had reservations about discontinuing the removal proceeding, she acquiesced to his signing it and, in fact, observed Mr. Giaimo sign the stipulation. Apparently, discussions were then held for a period of time about the possibility of

4C rehiring Nathan, the apparent quid pro quo for discontinuing the removal proceeding with prejudice.

Finally, Gaetana's claim that Mr. Giaino did not explain the ramifications of the stipulation of discontinuance is, even if true, unavailing under these circumstances. A mistaken belief regarding the binding effect and the availability of an appeal and its probable success is not sufficient to vacate a stipulation of settlement (*Matter of Siegel*, 5 Misc 3d 1017(A), *4 (Sur Ct, Nassau County 2004); see *Matter of Rosenhain*, 193 AD2d 903 [3d Dept 1993]).

It was only after the discussions regarding Nathan's rehiring proved fruitless that Gaetana moved to vacate the stipulation of discontinuance, more than three months after it was executed. Thus, the court also finds that Gaetana ratified the stipulation by her delay in seeking to have it vacated (*Hallock v State of New York*, 64 NY2d 224, 232 [1984] [two-month delay]; *Broadmass Assoc. v McDonald's Corp.*, 286 AD2d 409 [2d Dept 2001] [eight-month delay]).

Accordingly, Gaetana's request for an order vacating the stipulation of discontinuance is denied and her request to amend the petition is denied as moot.

Submit decree.

Dated: June 30, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court