

Matter of Brown

2008 NY Slip Op 32710(U)

September 30, 2008

Surrogate's Court, Nassau County

Docket Number: 345972

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 Petition of Simone Levitt
 for Turnover of Assets from the Estate of

File No. 345972

JANET M. BROWN,

Dec. 384

a/k/a JANET M. BURSTEIN,

Deceased.
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This is a reverse discovery proceeding commenced by the petitioner, Simone Levitt, against the respondent, Elaine Edelstein, who is the decedent's sister and the administrator of the decedent's estate. Petitioner seeks to recover possession of tangible property, including, but not limited to, furniture and furnishings, which she alleges belongs to her and is in the possession of the administrator. Submitted for decision are (i) petitioner's motion for an order directing respondent to comply with petitioner's First Notice Demand for Discovery and Inspection ("the Notice") originally returnable September 12, 2007; (ii) petitioner's motion for a default judgment originally returnable March 19, 2008; and (iii) respondent's cross-motion to dismiss the petition originally returnable October 24, 2007.

The decedent, Janet Brown, died on March 16, 2007, a resident of Nassau County. The decedent was survived by one distributee, her sister, Elaine Edelstein, the respondent herein. Temporary letters of administration issued to the Elaine Edelstein on March 23, 2007. Thereafter, letters of administration issued to her on April 11, 2007.

By petition filed with the court on June 11, 2007, petitioner commenced this proceeding pursuant to SCPA 2105 to recover certain items of tangible personal property, including items of furniture, furnishings and works of art, which she claims to own and which are allegedly in the

possession of the respondent. According to petitioner, the decedent lived with petitioner and petitioner's husband for a five-year period from 1989 through 1994. The decedent did not own a home prior to moving in with petitioner and purportedly did not have any furnishings of her own. Upon the death of petitioner's husband in 1994, the decedent purchased a home at 391 Mill River Road, Oyster Bay, New York. The decedent and petitioner then moved into that home together. Since the decedent had no furnishings of her own and petitioner had a house full of furnishings, including paintings, art objects, porcelains and silver, it was understood that petitioner's tangible property would be used to furnish the Mill River Road home.

Petitioner further alleges that in 2000 the decedent purchased an apartment in New York City, which was also furnished with items of petitioner's tangible property and furnishings. On April 2, 2002, petitioner and decedent also purchased an apartment together with the decedent providing the funds for that purchase. The decedent and petitioner never moved into the apartment, and it was sold a year and a half later. In September 2003, petitioner moved out of the Mill River Road residence where she co-habitated with the decedent and obtained her own apartment in New York City. Petitioner alleges that, upon her departure, she took a few items of her furnishings with her but left the bulk of her property at the decedent's residence. Thereafter, in March 2007 when the decedent died, petitioner asked the administrator to return the items, but the administrator refused her request. Accordingly, petitioner commenced this turnover proceeding.

Petitioner has also filed a claim against the estate alleging breach of contract. On April 10, 1996, petitioner and decedent entered into a contract establishing their co-habitation and setting forth certain rights and obligations of the parties. The contract provides that, if petitioner

vacated the decedent's home for any reason or no reason, she would receive support in the sum of \$5,000.00 per month for her lifetime. In addition, the decedent agreed to pay petitioner's health insurance and hospital coverage at the same levels maintained under her Guardian insurance plan. Petitioner has filed a claim in the amount of \$210,000.00 (\$5,000.00 per month for the period September 15, 2003 to March 16, 2007) and an unspecified amount for reimbursement for her health care costs for the same period.

The SCPA 2105 petition was filed with this court on June 11, 2007, and citation issued to the administrator. The citation was returnable on July 11, 2007. On that date, after a conference with a member of the court's law department, the parties entered into a stipulation on the record agreeing to certain dates for the respondent to file an answer and for discovery demands to be made and responded to. The stipulation provided that respondent's answer was to be filed on or before September 5, 2007. To date, no answer has been filed. In addition, pursuant to the stipulation, pre-answer discovery demands were to be made on or before July 15, 2007 and responses were due by August 15, 2007. Petitioner timely served the Notice which consists of eight demands for documents and information and received a response which objects to each and every discovery demand.

Having not received an answer to the petition, petitioner has now moved for a default judgment. Respondent has cross-moved to dismiss the petition under CPLR 3211. Petitioner has also moved to compel respondent to produce the documents identified in the Notice. The court will address petitioner's motion for default first, since if that motion is granted, the other motions will be rendered moot.

PETITIONER'S MOTION FOR DEFAULT

Petitioner points out that, pursuant to the terms of the July 11, 2007 stipulation put on the record in open court, the respondent was required to file an answer on or before September 5, 2007. Respondent argues that instead of filing her answer, she has made a CPLR 3211 pre-answer motion to dismiss which stays the filing of an answer until ten (10) days after service of notice of entry of the order deciding the motion.

Nevertheless, petitioner argues that to avoid a default, the cross-motion to dismiss had to be made prior to the September 5, 2007 deadline for respondent's answer. The cross-motion to dismiss, however, was not served until September 26, 2007. Thus, petitioner contends that the default should be granted since the respondent failed to timely move to dismiss and petitioner has made out a prima facie case of ownership based upon affidavits she has submitted from five individuals who were familiar with petitioner and decedent's relationship and their living arrangement. These five individuals attest to petitioner's claim that most, if not all, of the tangibles located in decedent's home belong to petitioner.

The court agrees with petitioner that the stipulation clearly provided that respondent's time to answer would be extended under September 5, 2007. The court notes, however, that respondent, by agreeing to the extension, did not waive her right to file a pre-answer motion to dismiss. Thus, the question is whether respondent should be found in default because she did not cross-move to dismiss prior to the September 5, 2007 deadline.

"CPLR 3012(d) vests the courts with discretion to relieve any party from a default in appearing or pleading, or to extend the normal time to appear or plead in an action" (New York Civil Practice §3012.18). The court is to exercise the discretion based upon the facts of each

case. In *Bungay v Jay Power Products, Inc.* (243 AD2d 527 [2d Dept 1997]), the Second Department declined to enter a default judgment against the defendant where the delay in service was short and not willful and the plaintiff was not prejudiced the delay. Moreover, in *Ruppert v Ruppert* (192 AD2d 925 [3d Dept 1993]), a divorce proceeding, the defendant demonstrated a reasonable excuse for his default in failing to timely serve his answer where the parties had agreed to extend the time to answer while the attorneys attempted to negotiate a settlement.

The court finds that the delay from September 5, 2007 to September 26, 2007 was short and not willful. Moreover, the short period did not prejudice petitioner. Once the CPLR 3211 cross-motion was made, the filing of an answer was stayed. Accordingly, petitioner's motion for a default is denied.

RESPONDENT'S CPLR 3211 CROSS-MOTION TO DISMISS

Having denied petitioner's motion for default, the court will now consider respondent's CPLR 3211 cross-motion to dismiss the proceeding on the grounds of documentary evidence, release, statute of limitations and failure to state a cause of action. Essentially, respondent contends that (1) petitioner executed a general release on December 5, 2003 and accepted a \$100,000.00 check from the decedent in consideration thereof which bars any claims which petitioner may have against the estate, and (2) the proceeding is time-barred.

On a motion to dismiss pursuant to CPLR 3211, every favorable inference must be afforded to the challenged pleading (*Held v Kaufman*, 91 NY2d 425 [1998]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]). Moreover, "[t]o dismiss a cause of action pursuant to CPLR §3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing prima facie that the time in which

to sue has expired” *Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007] [internal citations omitted]).

With respect to the issue of the statute of limitations, respondent notes that the statute of limitations for a discovery or turnover proceeding is the three-year statute of limitations for actions of replevin and conversion. Respondent claims that in the instant case the cause of action accrued on September 15, 2003 when petitioner vacated the premises and the statute of limitations expired three years thereafter. Thus, according to respondent, this proceeding is time-barred.

The question of when the statute of limitations begins to run requires the court to determine when the cause of action actually accrues. In *Matter of Madris* (NYLJ, Mar. 13, 2000 at 25, col 6 [Sur Ct, New York County], the court addressed the question of whether a demand for the return of the property and a responsive refusal is necessary to establish conversion. The court concluded that if the person in possession acquired the property lawfully, a demand by the true owner is necessary to turn the possession into unlawful possession. The cause of action accrues and starts running if the demand is refused. If the person in possession acquired possession unlawfully, i.e., by an overt act of conversion, the statute begins to run from the date of conversion (*Matter of Esposito*, May 1, 2002, NYLJ at 21, col 2 [Sur Ct, New York County]). Similarly, in *Matter of Rausman* (50 AD3d 909 [2d Dept 2008]), the Second Department held that where possession is originally lawful, a conversion does not occur until the owner makes a demand for the return of the property and the person in possession refuses to return it.

Here, the petitioner vacated the decedent’s home on September 15, 2003. Petitioner states that she left the items in the decedent’s home when she moved out. There was no overt act

of conversion by the decedent at that time. Thus, the decedent's possession of the property was lawful. The possession did not become unlawful until petitioner asked respondent to return the items and respondent refused. Accordingly, the cause of action accrued when the demand was refused. This proceeding, commenced by the filing of the petition on June 11, 2007, is, therefore, timely.

The court notes that respondent has not alleged that petitioner's claim for breach of contract is time-barred. The statute of limitations for an action on a contract is six years (CPLR 213). The breach allegedly occurred on September 15, 2003 when petitioner vacated the decedent's residence. Thus, the statute of limitations has not run on this contract claim.

Respondent also seeks to dismiss the petition on the basis of documentary evidence consisting of a general release executed by petitioner on December 15, 2003, together with a \$100,000.00 check made payable to petitioner, which respondent alleges was given in consideration of the general release.

It is well settled that where "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v 3669 Delaware, Inc.*, 92 NY2d 934, 935 [1998]) and will...be set aside [only] as a result of duress, illegality, fraud, or mutual mistake. (*Gohar v Albany Hous. Auth.*, 288 AD2d 657, 658 [3d Dept 2001]). "To constitute a valid release, there need be only language indicating a present intention to renounce or discharge a claim or obligation" (19A NY Jur Compromise §64 [2d ed.]). Where a release is given as a result of negotiations, there must be a meeting of the minds of the parties (*Muller v Muller*, 165 App Div 928 [2d Dept 1914]), and the terms of the release must conform to the understanding of the parties (*Moses v Carver*, 164 Misc 204 [Sup Ct, Broome County 1937], *affd*

254 App Div 402 [3d Dept 1938]). Moreover, “[t]he meaning and coverage of a general release depends on the controversy being settled and upon the purpose of which the release was actually given ... A release may not be read to cover matters which the parties did not desire or intend to dispose of”(internal citations omitted) (*Lefrak SBN Assocs. v Kennedy Galleries, Inc.*, 203 AD2d 256, 257 [2d Dept 1994] [internal citations omitted]).

The petitioner has submitted an affidavit in opposition to the cross-motion to dismiss. According to the petitioner, the general release has nothing to do with the tangible items of personal property which she claims belong to her. She contends, instead, that the release relates to funds due to her from the sale of an apartment in 2003. According to petitioner, she and the decedent purchased an apartment at 1080 Madison Avenue in the name of Hedges LLC, an entity specifically established to purchase the apartment. They decided to sell the apartment and the \$100,000.00 check represented a portion of petitioner’s share of the proceeds from the sale. Petitioner was not represented by an attorney and thought the release was a “receipt” prepared by the attorney representing the decedent at the closing. Petitioner believed the release was related to the sale of the apartment.

Respondent’s counsel has submitted a reply affirmation which annexes documents showing that upon the 2003 sale of the apartment, both petitioner and decedent received two checks each in the amounts of \$564,000.00 and \$23,107.29, respectively. Counsel argues that these documents refute petitioner’s claim that the \$100,000.00 is traceable to the sale of the apartment.

After being served with counsel’s reply, petitioner asks the court to consider a sur-reply which specifically addresses the \$100,000.00 check. Respondent’s counsel objects to

consideration of a sur-reply on the basis that a copy of the \$100,000.00 check was annexed to the counsel's reply, and there are no new allegations warranting a sur-reply. The court need not decide this issue since the court finds that there are sufficient grounds to deny the cross-motion to dismiss on the basis of the general release even without the allegations raised in the sur-reply. The other papers raise an issue of fact as to the parties' intent with respect to the scope of the general release (*Perritano v Town of Mamaroneck*, 126 AD2d 623 [2d Dept 1987] [papers raised an issue as to whether the release was intended to embrace underlying contract claims]). Here, the scope and validity of the general release "cannot be conclusively determined at this time and must await the development of a proper record" (*Rimberg & Assocs., P.C. v Jamaica Chamber of Commerce, Inc.*, 40 AD3d 1066 [2d Dept 2007]). Accordingly, the cross-motion to dismiss is denied on the grounds of documentary evidence and general release.

The cross-motion is also denied on the grounds of failure to state a cause of action.

**PETITIONER'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS:**

Petitioner's Notice dated July 12, 2007 called for production of the following documents:

(i) a complete inventory of the contents of the house and out buildings at 391 Mill River Road, Oyster Bay; (ii) a complete inventory of the New York Park Avenue apartment; (iii) all appraisals; (iv) all documents evidencing insurance in effect for the Oyster Bay property and New York apartment; (v) a complete inventory of all safe deposit boxes owned by the decedent and a report of all openings after March 15, 2007; (vi) any and all letters and/or cards sent from petitioner to decedent from January 1, 1994 through March 15, 2007; (vii) copies of all health insurance plan documents for the period January 1, 1994 through March 15, 2007; and (viii)

copies of any and all correspondence from decedent to petitioner for the period January 1, 1994 through March 15, 2007.

Respondent has responded to the Notice by denying every item requested on the basis that the demands are overly broad and unduly burdensome. In addition, respondent objects to item seven on the grounds that the documents are privileged and confidential. Respondent argues that the motion for an order compelling respondent to provide the information and documentation identified should be denied because petitioner has not made a good faith attempt to detail any efforts made by her to resolve the discovery issues as required by Section 202.7 of the Uniform Rules of the New York State Trial Courts. Respondent claims that requiring respondent to provide these documents will allow petitioner to go on a fishing expedition designed to expand the list of items which she claims belong to her.

The court disagrees with the respondent as to petitioner's efforts to resolve the discovery issue. This matter has been pending before the court for more than one year. During that time, a number of conferences have been held before members of the court's law department. Thus, the court is well aware of the efforts petitioner's counsel has made to resolve the discovery issue. Although the motion to compel was made immediately after respondent served the response to the notice, it was not submitted until it became apparent that the parties had reached a stalemate. In addition, the documents and information requested to be produced are directly related to petitioner's discovery proceeding and are not overly broad or unduly burdensome. In fact, the requests are limited and well-defined. Moreover, respondent's argument that providing petitioner with an inventory of the contents will allow her to identify other items which she claims belong to her is equally unavailing. Petitioner's counsel has made it clear to respondent's

counsel from the outset that the lists provided by petitioner identifying certain items of furnishings, etc., were not meant to be exhaustive, and that she, in essence, is seeking to recover most, if not all, of the furnishings in the decedent's home. Petitioner will ultimately have the burden of proof that such items identified by her do, in fact, belong to her and not the decedent's estate. Concerning the objection to the demand for health insurance plan documents on the basis of confidentiality and privilege, counsel has failed to adequately set forth the basis for such objection. Petitioner seeks only the health plan documents not actual health records. The documents are relevant to petitioner's claim under the contract.

Accordingly, the motion to compel respondent to provide the items requested in petitioner's Notice is granted. Respondent shall comply within 30 days of the date of this decision. The branch of petitioner's motion which seeks attorneys' fees for bringing the motion is denied. In addition, respondent shall serve and file an answer to the petition within 30 days of the date of this decision.

This matter is scheduled for a conference on November 5, 2008 at 9:30 a.m. to establish a discovery schedule and a date for a hearing.

The constitutes the decision and order of the court.

Dated: September 30, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court