

Matter of Steger

2008 NY Slip Op 33374(U)

November 5, 2008

Surrogate's Court, Nassau County

Docket Number: 330070

Judge: John B. Riordan

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

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Accounting by Mark J. Steger, the Executor of the Estate of

SALLY C. STEGER, a/k/a
SALLY STEGER, a/k/a
SARAH C. STEGER,

File No. 330070
Dec. No. 665

Deceased.

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This is a motion by John C. Steger, the objectant in this contested accounting proceeding, for leave to reargue this court’s Decision No. 170, issued June 25, 2008, which denied John’s motion for summary judgment. Movant had asked the court (1) to set aside transfers made by the decedent during her lifetime; (2) to direct the executor to pay back estate monies which he had used to pay taxes on assets which passed outside of the estate; (3) to deny payment of commissions to the executor; and (4) to prohibit the executor from paying his attorney’s fees from estate assets.

For reasons set forth below, the motion to reargue is denied as to issues (2), (3) and (4), and granted as to issue (1), which pertains to transfers made by decedent during her lifetime.

Background

Sally Steger died on August 19, 2003, leaving a last will and testament dated December 7, 1998. The will divides decedent’s estate equally among her four sons, John, Mark, Kenneth and Gerard. Pursuant to the terms of the will, Mark was appointed executor. On December 21, 2005, Kenneth filed a petition to compel an accounting, and Mark responded by filing an intermediate accounting on April 21, 2006. Objections to the account were filed in November 2006 by John and Kenneth.

On February 1, 2008, John filed a motion for summary judgment. On March 4, 2008, Mark filed a supplemental accounting. Schedule A-2 of the supplemental accounting reflected additional funds which were reimbursed to the estate by Mark individually and by the John C. Steger Trust and the Sally C. Steger Trust for taxes paid from estate funds on assets passing outside of decedent's will. Mark also filed a responsive cross-motion on March 7, 2008 in which he asked the court to deny John's motion for summary judgment and for further relief. The court issued Decision No. 170 denying the motion and the cross-motion. John then filed this motion to reargue.

Reargument

A motion for leave to reargue is governed by CPLR 2221. It must be specifically identified as such (CPLR 2221[(d)]). A motion for leave to reargue is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221 [d][2]).

It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Andrea v E.I. du Pont de Nemours & Co.*, 289 AD2d 1039 [4th Dept 2001]; *Bolos v Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]; *Schneider v Soloway*, 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means in which an unsuccessful party is permitted to argue again the same issues previously decided (*Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). An unsuccessful party may not utilize a motion to reargue as a second opportunity to present new or different arguments from those originally asserted (*Giovaniello v Carolina Wholesale Office*

Machine Co., Inc., 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt.*, 20 AD3d 388 [2d Dept 2005]; *Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v Lord & Taylor Ins. Co.*, 10 AD3d 374 [2d Dept 2004]; *Frislinda v X Large Enterprise*, 280 AD2d 514 [2d Dept 2001]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

Nevertheless, “[i]t is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision” (*Peak v Northway Travel Trailers*, 260 AD2d 840, 842 [3rd Dept 1999]).

“Additionally, even in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate” (*Louis v S&W Realty Corp.*, 16 AD3d 729, 730 [3d Dept. 2005]).

Pre-Death Transfers

On November 17, 2000, decedent granted a power of attorney to two of her sons, Mark and John, in which she empowered each of them to act separately on her behalf. During decedent’s lifetime, Mark, as decedent’s attorney-in-fact, transferred assets from decedent’s individual accounts to an account held jointly, with right of survivorship, by the decedent and Mark. Mark maintains that this was done at the direction of decedent. It is these transfers which John asked the court to set aside.

“It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, her right to judgment. The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial” (*Matter of Kacprzyk*, NYLJ July 19, 2002, col 4 [Surr Ct, Suffolk

Co] [internal citations omitted]). The opposing party must “lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial” (*Tancredi v Mannino*, 75 AD2d 579, 579 [2nd Dept 1980]).

It is John’s position that the transferred funds must be returned to the estate, as Mark has not produced any admissible evidence to prove that decedent directed Mark to transfer the funds from her accounts to an account in which Mark had a joint interest with a right of survivorship. Mark maintains that the transfers to the joint account were, in fact, made at the direction of decedent, and that these transfers constituted valid gifts. There is no dispute that there was (1) delivery of the property and (2) acceptance by the donee, but it is John’s position that Mark cannot prove (3) decedent’s donative intent, which is one of the three elements required to prove a valid inter vivos gift (*Matter of Cooper*, 2004 NY Slip Op 51697U [Surr Ct, Nassau Co 2004]). In *Matter of Cooper*, this court held that a “donee bears the burden of proving the gift by clear and convincing evidence. One who attempts to establish an inter vivos gift has a heavy burden ... The proof must be of great probative force and must clearly establish every element of a gift” (*id.* [internal citations omitted]).

Where a fiduciary relationship exists between the donor and the donee, the standard of proof is even higher. In the present case, Mark made the transfers pursuant to a power-of-attorney. “A power of attorney proffered by a principal is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal” (*Moglia v Moglia*, 144 AD2d 347, 348 [2d Dept 1988]). In *Matter of Clinton*, the Surrogate of New York County stated, as a basic principle, that where a power of attorney was granted it created a relationship which “imposed a duty ... to ‘utilize the power for the benefit of the principal,’ ... If the agent

does not so use the power and takes the principal's property by gift, a presumption of impropriety arises, which can only be overcome with a clear and convincing showing that the principal intended to make the gift" (*Matter of Clinton*, 1 Misc3d 913(A) [Surr Ct, NY Co 2004] [internal citations omitted]).

The sole proof offered by Mark in support of his position, that these transfers were made at decedent's direction, is Mark's own statement, in paragraph (1) of his affidavit dated February 29, 2008, that "for her own reasons, my mother directed me to make these transfers." The bulk of Mark's supporting papers, in the form of affidavits, primarily address decedent's capacity. As counsel for John correctly points out, although decedent's capacity was mentioned in movant's papers, it is not the underlying basis for the motion for summary judgment. Therefore, even if Mark established decedent's competency to make the transfers, he would still need to prove by clear and convincing evidence that decedent intended these transfers as gifts.

Under CPLR 4519, commonly known as the Dead Man's Statute, the testimony of an interested witness about a personal transaction between the witness and the decedent may be excluded at trial (*Philips v Kantor*, 31 NY2d 307 [1972]). However, the Court of Appeals in that case further held that "[e]vidence, otherwise relevant and competent upon a trial or hearing, but subject to exclusion on objection under the Dead Man's Statute, should not predetermine the result on summary judgment in anticipation of the objection" (*id.* at 310). "Generally, evidence consisting of communications between an interested party and a decedent which is excludable at trial as violative of the dead man's statute (*see*, CPLR 4519) may still be utilized by the opposing party to defeat a motion for summary judgment." (*Mantella v Mantella*, 268 AD2d 852, 853 [3rd Dept 2000]). The court in *Mantella v Mantella* noted, however, that "[w]here, as here, such

evidence is proffered as the sole proof in support of the opposing party's claim, it is deemed insufficient" (*id.* at 853, citing *Matter of Lockwood*, 234 AD2d 782 [3rd Dept 1996]). Similarly, the Third Department affirmed an order granting a motion for summary judgment in which the evidence offered in opposition to the motion consisted of the self-serving statement of the opponent. The court concluded that where the sole evidence was a statement made by an individual who is deemed interested under the Dead Man's Statute, the testimony is inadmissible and does not "raise a factual issue sufficient to withstand summary judgment" (*Albany Savings Bank v Seventy-Nine Columbia Street*, 197 AD2d 816, 817 [3rd Dept 1993] [internal citations omitted]).

Mark's sole evidence in support of decedent's donative intent is his own statement that he acted upon the direction of decedent. It is highly unlikely that Mark's statement would be admissible at trial, given that movant repeatedly cites the Dead Man's Statute in his supporting papers, thus indicating his intent to invoke the statute to exclude the statement at trial. The Court of Appeals noted, in *Philips v Kantor*, that only where a court could be certain that all of opponent's proof would be excluded by movant's assertion of the Dead Man's Statute, can a trial be deemed unnecessary (*Philips v Kantor*, 31 NY2d 307, 314 [1972]). In the present case, where the only evidence proffered is opponent's self-serving statement, and movant has unequivocally indicated his intent to exclude this statement by raising the Dead Man's Statute, the court can be certain that a trial on the issue of pre-death transfers is unnecessary. Accordingly, the court grants reargument regarding the pre-death transfers, and upon reargument, grants objectant's motion for summary judgment regarding the pre-death transfers.

Reimbursement of Taxes

John asks to reargue his motion for summary judgment in connection with his request that the court direct Mark to reimburse the estate for taxes paid on property that passed outside of the estate. The court agrees with John, and Mark concedes, that repayment is owed for any estate funds which were used to meet tax obligations for which Mark was obligated personally or as trustee of the John C. Steger Trust or the Sally C. Steger Trust. The amended supplemental account which Mark filed reflects this repayment, thus negating the need for the court to grant summary judgment on this issue.

While John asserts that Mark's use of estate funds to pay taxes on non-probate assets was an "insolent" "misappropriation," John has not yet introduced evidentiary proof to support this, and Mark has not yet been given adequate opportunity to refute this position. Moreover, the date on which repayment was made and the applicable rate of interest until such date still must be determined. These are questions of fact which will be resolved at trial. The motion to reargue is denied as to this issue.

Commissions and Attorney Fees

Until the court addresses the issues remaining in connection with the reimbursement of taxes, it would be premature for the court to grant summary judgment in connection with payment of executor's commissions and attorneys' fees from estate assets. Movant has not demonstrated that any matter of fact or law was overlooked or misapprehended by the court in denying the motion for summary judgment on these two issues. Therefore, the court denies this portion of the motion to reargue.

Conclusion

The objectant's motion is denied as to reimbursement of taxes, commissions and attorney's fees, and the motion is granted as to the issue of pre-death transfers.

Settle order.

Dated: November 5, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court