

Estate of Claydon v Ehring

2008 NY Slip Op 33739(U)

August 12, 2008

Supreme Court, Albany County

Docket Number: 779-08

Judge: Roger D. McDonough

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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ESTATE OF HELEN S. CLAYDON,



Plaintiff,

-against-

DECISION AND ORDER

Index No.: 779-08

RJI No.: 01-08-092704

DANIEL EHRING and JAMI EHRING,

Defendants.

(Supreme Court, Albany County All Purpose Term)

Appearances:

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Roger D. McDonough, J.:

Defendants move to dismiss based on: 1) plaintiff's abandonment of the action; 2) the equitable doctrine of laches for plaintiff's untimely prosecution of the action; and 3) the Court's lack of personal jurisdiction. Defendants also seek the issuance of a *nunc pro tunc* order directing the Albany County Clerk to remove any and all documents, judgments, etc., which plaintiff filed against defendant Daniel Ehring indicating that plaintiff has a money judgment against Daniel Ehring. Plaintiff opposes the motion.

Relevant Factual Background

Helen Claydon passed away in December of 1998. In November of 2002, Albany County Surrogate Court removed defendant Daniel Ehring from his position of executor of the estate, based on his failure to comply with formal Court requests and his failure to file an inventory of assets for the estate. Additionally, in a March 11, 2005, Decision and Order by the Surrogate's Court, *inter alia*, held: 1) that Ehring should be surcharged for tax penalties and interest in the amount of \$144,859.95 for a failure to timely file and pay Federal and New York estate taxes and fiduciary incomes taxes for the 1999-2001 tax years; 2) that Ehring should be surcharged \$213,019.00 for investment losses caused by his negligence in the management of the Estate's assets; and 3) that Ehring would be denied any executor's commissions and/or legal fees. Mr. Ehring did not appeal the March 11, 2005, Decision and Order.

The instant proceeding was brought by the estate to set aside certain real property conveyances made by both Defendants to Defendant Jami Ehring. The basis of the proceeding appears to be plaintiff's theory that the conveyances were improperly made in order to render Mr. Ehring judgment proof.

Abandonment Theory

Surrogate Court's Decision and Order of March 11, 2005, contained the following language: "This constitutes both the decision and order of the Court. Petitioner is directed to bring accounts to date and submit decree for judicial settlement of the same." Defendant Daniel Ehring argues that plaintiff failed to timely accomplish this task and as such that dismissal is required based upon 22 NYCRR 207.37 and CPLR § 2220.

22 NYCRR 207.37 reads, in relevant part, as follows:

Section 207.37. Submission of orders, judgments and decrees for signature

(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for

signature, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.

(b) Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or proceeding unless for good cause shown.

CPLR § 2220 reads, in relevant part, as follows:

Rule 2220. Entry and filing of order; service (a) Entry and filing. An order determining a motion shall be entered and filed in the office of the clerk of the court where the action is triable, and all papers used on the motion and any opinion or memorandum in writing shall be filed with that clerk unless the order dispenses with such filing. When a statute or civil practice rule requires such filing and entry in a county other than that in which the order was made, the party prevailing on the motion shall file the order and the papers used on the motion with the proper clerk after receiving them. If a party fails to file any papers required to be filed under this subdivision, the order may be vacated as irregular, with costs.

Initially, the Court agrees with plaintiff that 22 NYCRR 207.37 has no applicability to the March 11, 2005, Decision and Order. Said Decision and Order clearly was the Court's resolution of a motion by the Estate to have Mr. Ehring surcharged for damages as well as for an order denying Mr. Ehring any commissions and legal fees. The motion was resolved by Surrogate Court in the Decision and Order. The Surrogate Court Decision and Order did not direct the settling or submission of any further Order relative to that motion. As plaintiff points out, the Surrogate Court issued a Decision and Order and "no further action was required to produce an order because this document was the order." Additionally, the judicial settlement language used by the Surrogate Court is clearly a reference to the settlement of the Temporary Administrator's accounts. As such, the Court finds absolutely no merit to Mr. Ehring's reliance upon 22 NYCRR 207.37 as a basis for dismissing the instant proceeding.

Additionally, the Court can discern no violation of CPLR 2220 with regards to the March 11, 2005 Decision and Order. The record reflects that the Decision and Order was entered and filed in the Office of the Clerk of the Surrogate's Court on March 11, 2005. As such, the Court finds absolutely no merit to Mr. Ehring's reliance upon CPLR § 2220 as a basis for dismissing

the instant proceeding.

Laches Theory

The Court also finds no merit to Mr. Ehring's reliance upon laches as a basis for dismissal. To the extent he relies upon 22 NYCRR 202.37 and CPLR § 2220, the Court has already disposed of these arguments. To the extent he relies upon a purported verbal agreement he reached with one of the estate beneficiaries, the Court finds that numerous issues of fact exist. Notably, said estate beneficiary vehemently denies entering any such agreement. The estate beneficiary, in her affidavit, also points out that she was not the executrix of the estate at the time of the purported agreement and therefore could not enter into any valid agreement on behalf of the estate. Based on the foregoing, the Court finds absolutely no merit to Mr. Ehring's reliance upon laches as a basis for dismissal of the instant proceeding.

Lack of Personal Jurisdiction¹

The affidavit of service indicates that service was made personally upon Jami Ehring and was made upon Mr. Ehring by virtue of the suitable age and person (Jami Ehring) method. Jami Ehring has denied that such service was made and provided the Court with a detailed affidavit alleging sufficient particularized shortcomings supporting her denial. Said affidavit is sufficient to rebut the presumption of service created by the affidavit of service. Based on the foregoing, a traverse hearing is necessary in this matter to establish whether service was properly made in this matter.

Based upon the foregoing it is hereby

ORDERED, that Defendants' motion to dismiss is hereby denied, except as to the issue of lack of personal jurisdiction; and it is further

¹ Mr. Ehring has waived his personal jurisdiction argument solely for the purposes of the Court's consideration of those portions of his motion relying upon abandonment and laches.

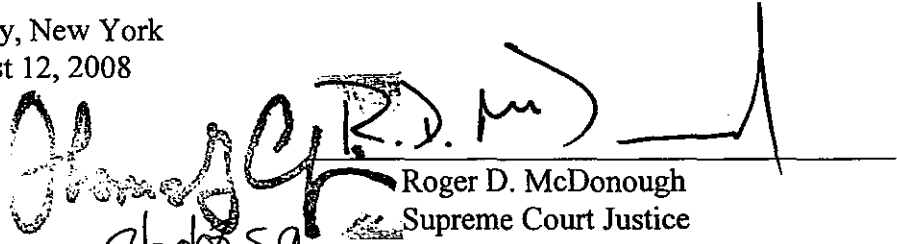
ORDERED, that a traverse hearing will be held in this matter on September 5, 2008 at 9:30 a.m; and it is further

ORDERED, that defendant's request that this Court issue a *nunc pro tunc* order is hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the counsel for Plaintiff who is directed to enter this Decision and Order without notice and to serve all counsel of record with a copy of this Decision and Order with notice of entry.

ENTER.

Dated: Albany, New York
August 12, 2008


Roger D. McDonough
Supreme Court Justice

Papers Considered:

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1. Defendants' Notice of Motion, dated March 27, 2008;
2. Affidavit of Daniel Ehring, sworn to March 27, 2008, w:
3. Affidavit of Jami Ehring, sworn to March 28, 2008;
4. Affirmation of Douglas M. Fisher, Esq., dated May 19, 2008, with annexed exhibits;
5. Affidavit of John Darling, Esq., sworn to May 14, 2008;
6. Affidavit of Linda Lyons, sworn to May 16, 2008;
7. Affidavit of Daniel Ehring, sworn to May 24, 2008, with annexed exhibits.