

Matter of Slater

2009 NY Slip Op 31570(U)

June 30, 2009

Surrogate's Court, Nassau County

Docket Number: 345627/2009

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 Margot Slater
to Enforce a Claim against the Estate of

File No. 345627

ALEXANDER B. SLATER,

Dec. No. 160

Deceased,

Pursuant to SCPA Article 18.
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In a proceeding pursuant to SCPA 1803 to enforce a claim against the estate of Alexander Slater, claimant and the estate separately move for summary judgment.

Decedent Alexander Slater died on February 15, 2007 a resident of Nassau County. At the time of his death, decedent was obligated to make certain support payments to his former wife Margot Slater, the claimant. Claimant and the decedent were married from November 7, 1962 to September 24, 1974. Claimant and decedent entered into a separation agreement dated April 27, 1971 and amended August 28, 1974, which survived and did not merge into the judgment of divorce dated September 24, 1974. The separation agreement, among other things, provided for a support escalator:

“SEPARATION AGREEMENT 13A. Miscellaneous.

A. If by reason of monetary inflation the purchasing power of the dollar is impaired, the Husband’s payments to the Wife for her support and for support of the children hereunder, shall, commencing May 1, 1972, be increased in the same proportion as the rise of consumer prices as reflected in The Consumer Price Index of the United States Bureau of Labor Statistics for the New York area using May 1, 1971 as a base. This clause shall only be operative if the Wife resides in the New York area.”

Claimant and decedent entered into a further agreement dated August 28, 1974, which provided, among other things, that “[c]omputation of future cost of living increases shall ... be governed by the agreement between the parties.”

After acrimonious litigation, the parties entered into a stipulation of settlement dated April 10, 1980. In relevant part, the stipulation stated:

“3. Increases or decreases in weekly support payments due under Article 13A of the Separation Agreement and the Divorce Judgment for the 12 month periods from May 1st to April 30th of each year, beginning May 1st, 1980, shall be calculated [using the] ... Consumer Price Index for the New York area (the CPI) ...

As the May 1st CPI is not announced or published until some time after May 1st, AS [decedent] shall on May 1st of each year after 1979 continue support payments at the rate due the year immediately prior to the May 1st until AS is notified in writing of the CPI for May 1st, and the increased or decreased amount due. AS, however, may proceed with the recomputations and waive any such notice by MS [claimant]. Following such notice after May 1st, AS shall, if the recomputation has been made in accordance with the foregoing formula, make future payments in accordance therewith. In addition, AS shall promptly make a lump payment to MS (or, if there is a decrease in the CPI, make a reduction in the amount of future payments for the 12 month period in question) for the difference, if any, between the sum of the payments made since May 1st of the year using the prior year's rate and the sum of said payments recomputed using the current rate.”

It is undisputed that the decedent did not pay the cost of living increases set forth in the various agreements and that the claimant never provided written notice notifying the decedent of the CPI for the May 1st date.

THE CLAIM

In the verified claim dated July 20, 2007, the claimant sought the amount of \$1,110,801.17 against the estate representing the amount of decedent's support payments that excluded annual New York CPI adjustments. In the verified petition dated January 31, 2008, the claimant, apparently in recognition of statute of limitations consideration, reduced the amount of support arrears due from the estate to \$256,043.74. Claimant seeks statutory interest in the amount of \$71,142.96 and an award of attorney's fees based on the parties' agreement. Claimant also seeks a percentage of income from certain oil leases that she transferred to the decedent based upon the 1974 agreement and an accounting of any such income.

THE ANSWER

The estate admits the various agreements. The estate, however, denies that any monies are due to the claimant under said agreements asserting that the claimant failed to provide any written notice of change in the CPI during the period 1985 through the date of decedent's death or February 15, 2007. The estate asserts that the claimant's failure to notify the decedent in writing of a change in the CPI constitutes an intentional and voluntary waiver. The estate further asserts that the claimant's claim to additional weekly support payments is barred by equitable estoppel, laches, and the applicable statute of limitations.

The estate asserts that claimant failed to make demand for monies allegedly due pursuant to any oil leases from 1985 through the date of decedent's death on February 15, 2007 and asserts the same reasons to deny the claim for monies due under the oil leases as raised with regard to additional support. The estate also asserts that the claimant is neither entitled to statutory interest nor to an award of attorney's fees.

THE MOTIONS

Both the claimant and the estate separately move for summary judgment. Both assert that the facts are undisputed and that the matter may be determined on the merits by summary judgment.

The claimant moves for partial summary judgment seeking support arrears directing the estate (a) "to pay [claimant] (i) support arrears due to her under a separation agreement in the amount of \$256,043.74 that accrued and became payable during the time period from July 20, 2001 through February 15, 2007; and (ii) statutory interest on such arrears in the amount of \$71,142.96; and (b) "to pay all attorney's fees and costs incurred by (claimant) in obtaining

judgment on the ... claim.”

Claimant contends that the aforesaid agreements, when read in their entirety, obligated the decedent to pay the additional support whenever he received notice of the CPI increase, “even if receipt of such notice occurred years later.” Claimant alleges she made sporadic, unsuccessful attempts to obtain cost-of living increases from the decedent in the early to mid 1980s. The decedent made payments of approximately \$749 per week to claimant for some twenty (20) years without any cost-of-living increases until his death on February 15, 2007. Claimant contends that the 1980 stipulation directed only the manner in which the arrears that accrued every May 1st were to be calculated and written notice thereof was not a condition precedent. There is no dispute as to the calculation of the arrears.

The estate contends that the claimant acknowledges that she never sought the CPI increases after 1986, instead waiting until the decedent died to make a claim against his estate. There is no factual dispute concerning the lack of written notice. The estate asserts that no monies are due to claimant as she did not give written notice of the increases as required by the 1980 stipulation. The estate also contends that claimant’s knowing and intentional failure to notify decedent constitutes a waiver. The estate further contends that the claim is barred by the doctrine of equitable estoppel and/or laches.

SUMMARY JUDGMENT

The principles governing summary judgment are well established. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such prima facie

showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Both sides argue that the subject agreements are unambiguous. In *Kass v Kass* (91 NY2d 554, 566-567 [1998]), the Court of Appeals stated:

“Whether an agreement is ambiguous is a question of law for the courts (*see Van Wagner Adv. Corp. v S & M Enters*, 67 NY2d 186, 191). Ambiguity is determined by looking within the four corners of the document, not to outside sources (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162-163). And in deciding whether an agreement is ambiguous courts ‘should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought’ (*Atwater & Co. v Panama R.R. Co.* 246 NY 519, 524).

Where the document makes clear the parties’ over-all intention, courts examining isolated provisions ‘should then choose that construction which will carry out the plain purpose and object of the [agreement]’ (*Williams Press v State of New York*, 37 NY2d 434, 440, quoting *Empire Props. Corp. v Manufacturers Trust Co.*, 288 NY 242, 249).”

Applying these principles, the court determines that the stipulation of settlement which, in effect, modifies the previous agreements, unequivocally manifests an intention that written notice be provided to decedent prior to the obligation that he pay increased support based on the CPI.

The court finds that a plain and sensible reading of the stipulation mandates such conclusion. Thus, contrary to the claimant’s contention, the court finds that the language contained in the stipulation constitutes a condition precedent to claimant’s right to cost-of-living increases.

“A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement raises (*Oppenheimer & Co. v Oppenheimer, Appel. Dixon & Co.*, 86 NY2d 685, 690, 660 N.E.2d 415, 636 NYS2d 734 citing *Calamari and Perillo*, Contracts §11-2 at 438 [3d ed]). It must clearly appear from the agreement itself that the parties intended a provision to operate as a condition precedent (*Kass v Kass*, 235 AD2d 150, 159, 663 NYS 2d 581, *affd* 91 NY2d 554, 696 N.E.2d 174, 673 NYS2d 350). If the language is in any way ambiguous, the law does not favor a construction which creates a condition precedent (see *Kass v Kass*, 236 AD2d at 159). A contractual duty will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition (see *Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 594 N.E.2d 571, 584 NYS2d 290" (*Ashkenazi v Kent South Assocs.* 51 AD3d 611, 611-612 [2d Dept 2008] [internal quotation marks omitted]).

Here, the stipulation clearly shows an intention that written notification of the CPI increase operated as a condition precedent to the payment of cost-of-living increases. Claimant's complaint that had she understood in 1980 that her right to cost-of-living increases depended upon her first giving written notice to the decedent, she never would have signed the 1980 stipulation in the first place, is unavailing. Claimant, who was represented by counsel at the time she executed the 1980 stipulation, is bound by the terms thereof (*Pimpinello v Swift*, 253 NY 159 [1930]).

Further, the court finds that the claimant waived her claim to any increase in the weekly support payments. Waiver is an intentional relinquishment of a known right (see *Nassau Trust Co. v Montrose Concrete Props. Corp.*, 56 NY2d 175, 164 [1982]; *Springside Land Co., LLC v Board of Mgrs. of Springside Condominium I*, 56 AD3d 654 [2d Dept 2008]). Here, knowing of her right to the receipt of cost-of-living increases, the decedent voluntarily chose not to assert her rights for twenty (20) years. Under such circumstances, a finding of waiver is warranted. Contrary to claimant's contention, the inclusion of a "no-waiver" provision in the 1971 separation agreement (requiring a writing to effectuate a waiver) does not preclude a finding of

wavier (see *Robinson v Robinson*, 81 AD2d 1028 [4th Dept 1981]; cf. *Laurence v Rosen*, 228 AD2d 373 [1st Dept 1996]). Claimant, therefore, is neither entitled to interest nor an award of attorney's fees.

As to the claims seeking monies allegedly due from certain oil leases based upon the August 28, 1994 agreement, the estate asserts that it has provided the claimant with all of the information that should be presented in a formal accounting and that there is no evidence that the decedent derived any income from any of the oil leases. The estate contends that there is nothing in the tax returns or other documentary evidence to suggest that decedent earned any income that would be due and owing to the claimant. The claimant does not controvert the estate's assertion concerning the lack of any income derived from the oil leases (see *Zuckerman v City of New York*, 49 NY2d 551 [1980]).

Accordingly, the claimant's motion for partial summary judgment is denied; the estate's motion for summary judgment dismissing the petition in its entirety is granted.

The above constitutes the decision of this court.

Settle decree.

Dated: June 30, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court