

**Matter of Betty C. Tognino**

2010 NY Slip Op 31711(U)

June 30, 2010

Surrogate's Court, Nassau County

Docket Number: 349608/B

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 Application of John Tognino  
for a Determination as to the Construction and Effect  
of Disposition of Property in the Betty C. Tognino  
Living Trust as Referred to in the Last Will and  
Testament of

File No. 349608/B

Dec. No. 26395

BETTY C. TOGNINO,  
Deceased.

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In the Matter of the Application of John Tognino  
Objecting to, Contesting and Challenging the Legality  
and Enforceability of the Two Amendments to the  
Betty C. Tognino Living Trust, as referred to in the  
Last Will an Testament of

BETTY C. TOGNINO,  
Deceased.

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There are two proceedings pending in the court: (1) a construction proceeding and (2) a proceeding to set aside the two amendments to the Betty C. Tognino Revocable Living Trust Agreement dated July 18, 2002. In the construction proceeding, petitioner, John Tognino, moves, pursuant to CPLR 2221, for leave to renew and reargue from the court’s May 26, 2009 order. Respondent Jill A. Stallone-Tognino has also moved, by order to show cause, for an order consenting to transfer an action brought by John in Supreme Court, Bronx County, against Jill, individually, and as trustee, for reimbursement of the decedent’s funeral expenses John claims to have paid. In the proceeding contesting the validity of the trust amendments, the respondents Robert Tognino and Jill A. Stallone-Tognino move pursuant to CPLR 3211 to dismiss the petition or, in the alternative, for summary judgment, pursuant to CPLR 3212, and they object to the request to appoint a guardian ad litem for Robert. All three motions are opposed.

The decedent died on April 30, 2006 survived by her adult sons, Robert and John. On July 18, 2002, the decedent created the trust naming herself as trustee. Robert's wife, Jill, was named as successor trustee upon the decedent's death. Jill testified at her deposition that, on November 23, 2001, Robert was determined to be totally disabled for purposes of receiving governmental benefits and that he currently receives Medicaid benefits. Robert and Jill resided with the decedent at her home in Long Beach, New York, from the mid-1990s to the time the decedent died. John alleges that the Long Beach property is worth between \$850,000.00 and \$1,000,000.00. The home constitutes the corpus of the trust.

The July 18, 2002 trust agreement provides that Betty was free to amend the trust agreement in any manner. Upon Betty's death, the principal and undistributed income was to be paid in equal shares to Robert and John. With respect to Robert's share, the trust agreement establishes a supplemental needs trust by express reference to EPTL 7-1.12. The instrument also contains a no-contest clause, which provides, essentially, that any beneficiary who asserts any statutory election or claim, other than a legally enforceable debt, against the trust, "or directly or indirectly contests, disputes, or calls into question ... the validity of [the] Trust Agreement," forfeits any and all beneficial interests that individual and his heirs have in the trust.

On September 8, 2003, the decedent amended the trust; that amendment was specifically revoked on April 4, 2005 when she executed another amendment, which provides that Robert and Jill may reside in the decedent's home for their natural lifetimes, or until such time as they, or the survivor of them, decide that the home shall be sold. At the time the home is sold, \$150,000.00 of the proceeds is to be paid to John and the balance of trust principal and any accumulated income thereon is to be paid to the supplemental needs trust for Robert.

### THE COURT'S PRIOR DECISIONS AND ORDERS

In the construction proceeding, the respondents moved for partial summary judgment on the petitioner's claim that Robert is not a beneficiary of the trust. The court rendered Dec. No. 849 (dated March 31, 2009) in which it determined that there was no triable issue of fact since, by the trust's clear language, Robert is a beneficiary. The court also determined the petitioner had not triggered the no-contest clause contained in the trust by commencing the construction proceeding. The order from that decision is dated May 26, 2009. Thereafter, the respondents moved for an order dismissing the remainder of the claims contained in the petition, for leave to renew and reargue the motion underlying the court's May 26, 2009 order and for sanctions against the petitioner. On December 23, 2009, the court issued a decision and order (Dec. No. 647) in which it denied the motion for leave to renew and granted the motion for leave to reargue to clarify its holding. Upon hearing reargument, the court adhered to its prior decision. In that respect, the court stated that it was premature to determine that the petitioner violated the no-contest clause of the trust since it was possible that he would prevail on his claims. The court also stated that the amendments to the trust "merely change specific paragraphs of the trust; the provisions of the trust instrument remain, including the no-contest clause." Additionally, the court determined that claims "b" through "l" of the petition were not properly before the court in the construction proceeding. Finally, the court denied the motion for sanctions.

### PETITIONER'S MOTION FOR LEAVE TO RENEW AND REARGUE

In the construction proceeding, the petitioner has moved under CPLR 2221 for an order granting him leave to renew and reargue the motion that resulted in the court's December 23, 2009 decision and order.

A motion to renew must be based on facts not offered on the prior motion that would change the prior determination (CPLR 2221[e][2]). Here, the petitioner has not offered any new facts, and his motion for leave to renew is denied accordingly.

A motion to reargue is not based on any new facts, but seeks to convince the court that it overlooked or misapprehended the facts or the law on the prior motion (CPLR 2221[d]). In that regard, the petitioner seeks to reargue, in petitioner's words:

- “B. declaring that if the Petitioner unsuccessfully challenges the amendments, that he would forfeit his bequest by virtue of the no-contest clause:
- C. interpreting the two amendments to the trust in a vacuum, without giving consideration to the Trustor's intent and deeds executed either simultaneously with the amendments, or at times on or about the dates of the amendments;
- D. declaring that upon the Trustor's death, the Petitioner was entitled to one-half of the principal and undistributed income;
- E. declaring that at the time the house was sold, that the Petitioner would be entitled to \$150,000.00;
- F. dismissing the Petition as set forth in relief paragraphs “b” through “l” without prejudice to assert these claims in a proper proceeding.”

The remainder of the petitioner's affidavit in support of his motion is nothing more than a restatement of the unavailing arguments he made in the underlying motion. There is nothing in his affidavit that convinces the court that it overlooked or misapprehended the facts or the law when it decided the prior motion (CPLR 2221[d][2]). Accordingly, the petitioner's motion for leave to reargue is denied.

JILL'S MOTION FOR CONSENT TO  
TRANSFER THE BRONX ACTION TO THIS COURT

Jill has moved for an order, pursuant to SCPA 501(1)(b), consenting to the transfer for trial in this court of an action pending in Supreme Court, Bronx County, by John against Jill as trustee of the trust (*Tognino v Stallone*, index no. 300796-2010). The basis of the action is John's allegation that Jill has refused to reimburse him for the \$8,200 he paid for the decedent's funeral. John opposes the motion to transfer on the basis that the court dismissed this claim in the construction proceeding. However, the court dismissed that claim, among others, without prejudice to asserting the claim in a proper proceeding. The court's ruling did not foreclose hearing and determining the claim in this court; the court merely determined that the claim for that relief was not properly before the court in a construction proceeding. Certainly, this court can hear and determine a claim for reimbursement of the decedent's funeral expenses made against the trustee of the decedent's living trust if brought in the proper proceeding (SCPA 207, 1809). It is evident that the action should be transferred to this court since the court is familiar with the decedent's estate, the trust and the parties. Accordingly, the motion is granted (SCPA 501[1][b]).

RESPONDENTS' MOTION TO DISMISS OR  
FOR SUMMARY JUDGMENT AND FOR OTHER RELIEF

The petitioner has recently brought a proceeding contesting the legality and enforceability of the two amendments to the trust agreement. The petitioner prays for a decree determining the amendments to the trust are unenforceable and not legally binding based on allegations that they were fraudulently induced and executed due to trickery and deception allegedly practiced on the decedent by Jill and Robert while the decedent was physically and mentally frail due to her

advanced age and the psychiatric disorder from which she suffered. The petitioner also asks that the court appoint a guardian ad litem for Robert, who the petitioner alleges to be incompetent.

The respondents have made a pre-answer motion to dismiss the petition or for summary judgment, and they object to the petitioner's request that the court appoint a guardian ad litem for Robert, who is represented by an attorney. In support, the respondents claim that the petitioner violated the no-contest clause by bringing this proceeding. The respondents also assert that the petitioner waived his right to contest the validity of the amendments to the trust since he consented to the probate of the decedent's last will and testament, which embodies and incorporates the trust and the amendments. Finally, the respondent contend that the petitioner is precluded from asserting that the respondents exercised undue influence over the decedent under the equitable principles of waiver, estoppel, res judicata and unclean hands.

In reviewing a motion to dismiss made pursuant to CPLR 3211, the court must interpret the pleadings in favor of the party against whom the motion is made (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]; *Ozdemir v Caithness Corp.*, 285 AD2d 961 [3d Dept 2001]). The court must determine whether, "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated" (*People v New York City Trans. Auth.*, 59 NY2d 343, 348 [1983]). A petition will not be dismissed where a cause of action may exist if the petitioner is given every benefit of the doubt (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). The standard is not whether the plaintiff has stated a cause of action, but whether the plaintiff has a cause of action (*McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660 [2d Dept 2005]). Thus, a motion to dismiss must be denied if, from the pleadings' four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at

law” (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]).

The elements required to plead a cause of action for fraud are “material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]), and must be pleaded with particularity as required by CPLR 3016(b). Here, the petitioner has failed to plead any of the required elements with sufficient particularity, even allowing for the liberal standard this court must use when deciding a motion to dismiss. The allegations contained in the petition are nothing more than a rudimentary recitation of the elements of fraud. For that reason, the respondents’ motion to dismiss the petition objecting to, contesting and challenging the legality and enforceability of the two amendments to the trust agreement is granted.

This is the decision and order of the court.

Dated: June 30, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court