

Matter of Vescio

2010 NY Slip Op 33059(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 355398

Judge: John B. Riordan

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

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 Proceeding Pursuant to SCPA 2103 by Violetta Butler,
 Preliminary Executor of the Estate of

File No. 355398

ENNIO A. VESCIO,

Dec. Nos. 26595
 26650

Deceased.

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This is a SCPA 2103 proceeding commenced by the preliminary executor Violetta Butler, who is the decedent's sister and also a co-trustee of an irrevocable trust created by the decedent, Ennio Vescio, under agreement dated May 29, 1997. Violetta seeks an order directing the decedent's spouse Lucia Storace Vescio: (i) to return to the estate the sum of \$260,443.37 representing funds deposited by Lucia in a Capital One bank account denominated by her as an estate account; (ii) to return to the estate any documents and records in her possession belonging to the decedent; and (iii) to pay the fees of Violetta's counsel incurred in connection with this proceeding. In addition, Violetta has moved to require the firm of Bee Ready Fishbein Hatter & Donovan, LLP to return to the estate the sum of \$4,358.66, representing a payment on account of legal fees made by Lucia from the Capital One account and to require the firm of Mastroianni & Mastroianni to return to the estate the sum of \$18,874.10, representing a payment on account of legal fees made by Lucia from the Capital One account.

Lucia opposes Violetta's applications and has cross-moved for an order dismissing the SCPA 2103 discovery proceeding on the grounds that the irrevocable trust is a sham and the product of a fraud perpetrated upon her by the decedent and others, including Violetta. Lucia also argues that she is entitled to an evidentiary hearing to determine the rightful owner of the funds before she should be required to turn them over.

The guardian ad litem appointed on behalf of the decedent's three minor children has submitted an affirmation in partial support of the application which supports Violetta's request for the return of the funds by Lucia to the estate, but takes no position on the imposition of attorney's fees upon Lucia.

After the submission of the motions, the court was advised that the documents and records of the decedent have been returned to the estate, and Violetta has withdrawn that branch of the motion.

The decedent, Ennio Vescio, died on October 30, 2008. He was survived by his wife Lucia and by his three minor children. After the decedent's death, Lucia commenced an administration proceeding on behalf of the estate and letters of administration issued to her on April 6, 2009. Thereafter, on June 19, 2009, Violetta offered for probate a purported last will and testament dated October 24, 2008, which disinherits Lucia. Violetta is named as executor under the purported will. As a result, on November 2, 2009, by order of this court, Lucia's letters of administration were modified to the extent that they were limited for the sole purpose of prosecuting a discovery proceeding. She had commenced as administrator against Violetta. In addition, preliminary letters testamentary issued to Violetta on December 2, 2009.

Violetta's attorneys assert that, after preliminary letters issued to Violetta, in an attempt to identify estate assets, they contacted Lucia's attorney to determine whether any assets had been collected by Lucia during her tenure as administrator. They claim that those efforts were rejected by Lucia's counsel and no information was forthcoming. Despite this failure by Lucia and her counsel to provide such information, Violetta discovered that an estate account titled "Estate of Ennio Vescio" had been opened at Capital One Bank in June 2009. The opening statement for

the account annexed to the moving papers shows an initial deposit of \$260,236.53. A subsequent statement shows the following transactions:

Checks

Check No. 106 - \$4,358.66 - dated December 7, 2009.

Check No. 107 - \$18,874.10 - dated December 23, 2009.

Transfers

\$227,426.61 on December 29, 2009

\$10,000.00 on December 29, 2009

Interest Earned: \$206.84

Additional Deposits: \$216.00

Violetta ultimately learned that the payee on check number 106 was the firm of Bee Ready Fishbein Hatter & Donovan, LLP and the payee on check number 107 was the firm of Mastroianni & Mastroianni. The court notes these checks were written after Lucia's letters were restricted and counsel either knew or should have known she did not have the authority to issue these checks.

Lucia opposes the application on the grounds that the facts regarding the source of the funds deposited into the Capital One account demonstrate that the funds rightfully belong to her, not the estate even though she placed the funds in an account entitled in the estate's name. According to Lucia, on or about October 20, 2008, ten days before her husband's death, Violetta came to her home. Her husband Ennio, in typical fashion, gave instructions to his "puppet" Violetta and his children regarding certain gold coins. Ennio told them that he had these gold coins and that they should not be negotiated in order to avoid any possible inquiry by the Internal

Revenue Service. As part of his scheme to defraud the IRS, Ennio stated that he had placed the coins in a safe deposit box at Capital One. He then gave Violetta a key to the box. Ennio told Violetta to go to the bank after his death, remove the gold coins and replace them with worthless coins. The real coins should be hidden in the basement of their home.

On October 31, 2008, the day after Ennio died, Violetta came to Lucia's home and asked the decedent's children to come to the bank with her to remove the coins. When Lucia returned home after conducting some personal business, she found the coins on a box on a table. Lucia's attorneys informed her that the delivery of the coins to her infant children and then leaving the coins in their residence made Lucia, as their sole parent, the constructive owner of the coins under the Internal Revenue Code and the owner of an "estate in possession" as to said coins under EPTL 6-4.1 entitling Lucia to immediate possession of the property. Lucia cashed the coins in and the proceeds were the source of the deposit in the Capital One account opened in the name of the decedent's estate. Lucia also argues that an evidentiary hearing is required to determine ownership before she may be directed to return the funds.

Lucia not only opposes the return of the funds but also cross-moves to dismiss the SCPA 2103 proceeding in its entirety on the grounds that the irrevocable trust should be voided on the basis of fraud. According to Lucia, the decedent, together with Violetta, engaged in a systematic conspiracy to subjugate her economically and render her an "indentured servant." She claims that the trust was the vehicle which the decedent used to cripple her financially, all the while using Violetta as a puppet to carry out his wishes. Lucia states that the trust is a sham meant only to defraud her.

In the instant case, the following is undisputed. First, Lucia received letters of

administration on April 6, 2009. Those letters were modified by order of this court dated November 2, 2009. Preliminary letters testamentary issued to Violetta on December 2, 2009. After the issuance of preliminary letters and the modification of her letters of administration to limited letters, Lucia negotiated two checks and made two transfers reducing the Capital One account balance to zero¹. The Capital One account, opened by Lucia was entitled “Estate of Ennio Vescio.” These undisputed facts alone are sufficient to warrant a finding that the preliminary executor should be the custodian of those funds at the present time. As to Lucia’s claim that rightful ownership of the funds should be determined at an evidentiary hearing, the court agrees with the guardian ad litem that Lucia’s assertion to these funds on the theory that Violetta’s actions somehow converted the gold coins to Lucia’s property would require discovery and possibly a hearing. Nevertheless, at this time, Violetta’s status as preliminary executor requires that she be in possession of these funds, designated by Lucia herself as an estate asset, pending a final determination as to ownership.

Moreover, Lucia’s cross-motion which seeks dismissal of the discovery proceeding on the grounds that the trust constitutes a fraud perpetrated by the decedent, in concert with Violetta and other family members, is entirely misplaced. The SCPA 2103 proceeding is not the proper forum to determine the issue of the validity of the trust. Whether or not Lucia’s arguments are compelling or not, the issue of the validity of the trust has not been squarely put before the court.

¹After the submission of the motion, Violetta’s attorneys submitted a supplemental affirmation concerning Mr. Mastroianni’s alleged efforts in assisting Lucia with the negotiations and transactions in the account after modification of her letters. The court has not considered the supplemental affirmation. Any relief Violetta seeks regarding the allegations in the supplemental affirmation should be raised by separate motion.

Such a request for relief must be the subject of a separate proceeding. Accordingly, the issue of the validity of the trust is irrelevant to the instant issue in the turnover proceeding. If Lucia seeks relief regarding the trust, she must bring it in a procedurally proper manner, with citation issuing to all interested parties.

Accordingly, the court directs the following: (i) Bee Ready Fishbein Hatter & Donovan, LLP is directed to refund to the estate the sum of \$4,358.66; (ii) Mastroianni & Mastroianni is directed to return to the estate the sum of \$18,874.10; (iii) Lucia Storace Vescio is directed to return to the estate the sum of \$237,426.61 (representing the opening balance of \$260,659.37 plus additions less the above payments to the law firms). Said payments shall be made within thirty (30) days of the date of this decision. If the firms of Bee Ready Fishbein Hatter & Donovan, LLP and Mastroianni & Mastroianni believe that they have rendered services to Lucia in her capacity as administrator during the period in which she had full letters of administrator which are properly payable out of the estate, they may make an application to the court for the fixation of such fees after the funds are returned.

The court, being mindful of Lucia's claim to ownership of the funds, directs that the funds be held by Lucia's attorneys in escrow pending a determination on the merits in the SCPA 2103 proceeding.

The branch of the motion seeking the imposition of fees is denied.

The matter is set down for a conference on October 12, 2010 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court