

Matter of Kalikow

2010 NY Slip Op 33642(U)

December 23, 2010

Surrogate's Court, Nassau County

Docket Number: 340361/N

Judge: John B. Riordan

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

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 Application of Edward Kalikow and Laurie K. Platt,
 to compel a Distribution from the Estate of

File No. 340361/N

PEARL KALIKOW,

Dec. No. 26690

Deceased,

Pursuant to EPTL 4-1.1
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In this miscellaneous proceeding, the decedent's children, Edward Kalikow and Laurie Platt, have moved for summary judgment for an order directing the preliminary executors of the estate of Pearl Kalikow to distribute the partnership interests held by the decedent in Hewlett Associates pursuant to EPTL 4-1.1. The motion is opposed by the preliminary executors, Eugene Shalik and James DeVita, who have also moved for summary judgment dismissing the petition. For the reasons that follow, petitioners' motion for summary judgment is denied and respondents' motion for summary judgment is granted.

The decedent, Pearl Kalikow, died on January 4, 2006. Her last will and testament dated July 16, 2003 and two codicils dated September 29, 2004 and April 5, 2005, respectively, were admitted to probate by a decree of this court dated April 28, 2008. Preliminary letters testamentary issued to the nominated executors Eugene Shalik and James DeVita. A proceeding to disqualify the nominated executors (SCPA 709) is pending.

Petitioners are the decedent's children. According to the petitioners, their father, Sidney Kalikow, had built up a large real estate business. In 1970, Sidney created Hewlett Associates L.P. and gifted limited partnership interests in the entity to the decedent and the petitioners through a partnership agreement dated as of September 1, 1970. Petitioners claim that in order to ensure that the interests in Hewlett remained with Sidney's descendants, the 1970 agreement

required any partner to obtain the prior written consent of the other partners before transferring the interest. The partnership agreement was amended in 1980. In connection with the amendment, the decedent was gifted a one percent (1%) general partnership interest in Hewlett Associates and her limited partnership interest was increased from twenty-four and one-half percent (24 ½ %) to fifty percent (50%). Accordingly, the decedent obtained her partnership interest as a gift from Sidney as part of his plan to ensure that the decedent had sufficient income at her disposal during her lifetime while making sure that his real estate business would ultimately be owned by his descendants.

Notwithstanding this, the decedent attempted to transfer her interests in Hewlett by her will, without obtaining the prior written consent of her partners. In Article NINTH of her will, the decedent provided that if, at the time of her death, she owned either a general partnership interest in either Hewlett Associates or stock of Kalikow Management, Inc., such interest or stock would pass to The Sunshine Foundation. The Sunshine Foundation is also the residuary beneficiary under Article ELEVENTH of the will. In addition, in Article TENTH of her will, the decedent gave Edward and Laurie an option to purchase her limited partnership interest in Hewlett Associates at the value finally determined for federal estate tax purposes. Petitioners claim that the preliminary executors attempted to overvalue the decedent's interests in Hewlett in order to increase their commissions and also because Eugene Shalik and Edward Kalikow had a falling out.

Pursuant to the arbitration clause in the partnership agreement, the petitioners demanded arbitration to determine the effect of the transfer restrictions on valuation and the validity of the bequest of the decedent's interest in Hewlett Associates to the Sunshine Foundation. The

arbitrator, Dennis Konner, found that the “the attempted transfer of partnership interests in Hewlett Associates by the Will of Pearl Kalikow without the consent of Edward Kalikow and Laurie Platt is barred by the Certificate.” Thereafter, this court confirmed the arbitrator’s decision by decision dated September 26, 2008 (Dec. No. 429). By decision dated March 31, 2009 (Dec. No. 851), this court determined that Edward and Laurie’s actions in pursuing arbitration did, in fact, trigger the in terrorem clause in the decedent’s will.

Petitioners contend that, since it is established as a matter of law that the decedent’s specific bequest of her Hewlett partnership interest to the Sunshine Foundation under her will failed, her partnership interest must pass outside her will under the laws of intestacy. Petitioners argue that, pursuant to the EPTL 4-1.1, the decedent’s Hewlett interests pass to them. Edward and Laurie contend that even if it is determined that the in terrorem clause precludes them from taking the Hewlett interests in intestacy, the interests pass to their children.

Petitioners’ counsel argues that the respondents Shalik and DeVita are judicially estopped from arguing that the bequest did not fail because of the position they took in the in terrorem clause construction proceeding. Petitioners claim that respondents argued therein that the petitioners triggered the in terrorem clause because, by attempting to invalidate the decedent’s bequests of Hewlett Associates, they “acted to achieve precisely the same results that they would achieve by contesting successfully decedent’s will.” Thus, petitioners’ counsel claims that “[a]t no time in successfully seeking the in terrorem decision did respondents limit in any way their contention that the arbitration decision invalidated the bequest of the decedent’s Hewlett partnership interest ...” In short, they argue respondents cannot now take a position contrary to their prior contention that the bequest failed entirely. In addition, petitioners’ counsel contends

that this court, in the decision finding that petitioners violated the in terrorem clause, found that The Sunshine Foundation cannot inherit any bequest relating to the decedent's partnership interest in Hewlett. Thus, the only issue is the legal effect of the failed bequest.

Petitioners acknowledge that a failed bequest generally passes to the residuary estate. They contend, however, that since the sole residuary beneficiary is also The Sunshine Foundation and there is no alternate residuary beneficiary, the failed bequest of the decedent's partnership interest in Hewlett cannot pass under the will and must pass to them as her distributees by intestacy (EPTL 4-1.1).

Respondents have also moved for summary judgment. According to respondents, petitioners' intestacy claim rests upon three flawed premises: (i) "an incongruous interpretation of a prior arbitration decision concerning Decedent's Hewlett interests"; (ii) "an unfounded rule against perpetuities theory"; and (iii) "a wholly unsupported contention that Respondents are judicially estopped from exercising their power under both the Hewlett Partnership Agreement and Will to sell Hewlett and distribute the proceeds to The Sunshine Foundation, the residuary legatee under the Will."

In addition, the respondents argue that the relief requested by petitioners is barred by other defenses, including (i) lack of standing; (ii) EPTL 1-2.19; (iii) estoppel; (iv) unclean hands; (v) forfeiture; (vi) waiver; (vii) laches; (viii) collateral estoppel and (ix) constructive trust.

First, respondents argue that upon the decedent's death, her partnership interests vested in her fiduciaries pursuant to Section 10(a) of the Partnership Agreement. Section 10(a) provides as follows:

“(a) In the event of the death of a Limited Partner during the term of the Partnership, the business of the Partnership shall not thereby be terminated but shall be continued by the surviving partners in accordance with the provisions of this Agreement. In such event the executors, administrators or personal representatives of the deceased Limited Partner shall have all of the rights of a Limited Partner in the Partnership to the extent of the deceased’s interest therein, subject to the terms and conditions of this Agreement.”

Respondents argue that they possess all rights under the partnership agreement because the agreement clearly provides that partnership does not terminate upon the death of a partner, and a deceased partner’s executors succeed to the deceased partner’s interest. Moreover, the arbitrator’s decision confirmed this by holding that “[t]he executors of the Estate of Pearl Kalikow shall continue to have all of the rights of the limited partner of Hewlett Associates Limited Partnership, including the right to distributions, subject to the rights of the Certificate of Limited Partnership of Hewlett Associates, as amended.” Thus, respondents argue that, as the preliminary executors, they have the right to sell the decedent’s Hewlett partnership interest to anyone, albeit subject to petitioners’ consent, receive distributions and obtain the estate’s share upon liquidation of Hewlett.

In addition, respondents claim that Articles FOURTEENTH and FIFTEENTH of the will empower them to sell decedent’s Hewlett Partnership interest, the proceeds of which will form part of her residuary estate. Article FOURTEENTH gives the fiduciaries the power to sell the decedent’s property, and in Article FIFTEENTH, the decedent states her desire to confer upon her fiduciaries the authority to continue to operate her interests in a business enterprise, including a partnership, and confers upon her fiduciaries additional powers, including the powers to retain or sell such interest.

Concerning petitioners' argument that "[t]he decedent's interest in Hewlett is currently lingering at the estate level with no individual or entity in which to vest," respondents contend that the argument is without merit. The arbitrator's decision that the decedent did not effectively transfer her Hewlett interest since she did not obtain the consent of the other partners does not result in a violation of the rule against perpetuities/suspension of alienation. Respondents argue that the decedent's Hewlett interests are held by her estate, which is precisely what the arbitrator stated in his decision. Here, they argue, there is no unlawful suspension of the power of alienation since the respondents, as fiduciaries of the decedent's estate, are persons in being who can convey title of the decedent's Hewlett interests to a purchaser. Respondents argue that, although the consent of the other partners is required for such a transfer, the other partners are in a fiduciary position and cannot unreasonably withhold consent. To the extent that the other partners do unreasonably withhold consent, the respondents would have a cause of action against them. The obtaining of petitioners consent is simply an "intermediate step" for sale and not an absolute restraint on a partner's ability to transfer the value of her interest to the third party. The consent requirement merely protects the existing partners from having an undesirable partner thrust upon them. Moreover, the Hewlett Partnership Agreement provides that the partnership will terminate in 2015.

The respondents also contend that petitioners lack standing because of their violation of the in terrorem clause. In addition, respondents argue that petitioners' claim that the Hewlett interest passes to them via intestacy is completely contrary to the canons of construction and specifically the presumption against intestacy and the liberal construction in favor of charitable gifts. Moreover, the respondents argue that petitioners' theory is contrary to the decedent's intent

expressed in the in terrorem clause of her will that petitioners would forfeit their bequests (household effects and options) if they challenged the will. In addition, the will makes only nominal bequests to the petitioners and includes an acknowledgment by the decedent that her husband had sufficiently provided for their children and grandchildren. Respondents claim that the nominal bequest of conditional used furnishings - a negative bequest - is not only evidence of the decedent's intent but also prevents petitioners from taking more under intestacy.

In addition, respondents argue that petitioners are estopped from claiming an intestacy because, "in no less than three prior related proceedings, petitioners argued to this court that they had an option to buy the very same asset they now claim is, and was at the time of decedent's death, theirs for free." Petitioners did not raise an objection or allege intestacy in the probate proceeding. Petitioners did not raise the issue in the arbitration and actually engaged in legal effort to discount the option price for which they could purchase decedent's Hewlett interests. In addition, the petitioners argued in the construction proceeding that the in terrorem clause be read narrowly. The never argued that they received Hewlett by way of intestacy because the decedent died without obtaining petitioners' prior written consent. Furthermore, petitioners did not treat Hewlett as passing by intestacy in their estate tax returns or for purposes of their Internal Revenue Code Section 6166 election.

Respondents also argue that petitioners have unclean hands and cannot seek equitable relief. Moreover, respondents claim that petitioners, by pursuing litigation to challenge decedent's bequest of her Hewlett interests to The Sunshine Foundation, have forfeited any interest in the decedent's estate, through intestacy or otherwise. The respondents also argue that

the petitioners waived any claim to the decedent's property when they chose to move to confirm the arbitration award.

With respect to the defense of laches, respondents argue that petitioners unduly delayed bringing the instant proceeding until more than three (3) years after the decedent's death. Respondents assert that the estate will be prejudiced because the preliminary executors have had to expend legal fees to defend all of these proceedings. If petitioners had asserted their alleged intestate share at the outset, litigation could have been avoided and estate assets would have been preserved.

Moreover, respondents argue that petitioners are collaterally estopped from relitigating this issue which was decided by the arbitrator and confirmed by this court. Lastly, they argue that if the court determines that the interests pass by intestacy, a constructive trust should be imposed. The elements of a constructive trust are (1) a confidential or fiduciary relationship; (2) a promise, (3) a transfer in reliance on the promise, and (4) unjust enrichment. The respondents claim that all of the elements are present here. The decedent and petitioners were partners in Hewlett; thus a fiduciary relationship exists. The promise is embodied in the partnership agreement. The transfer in reliance on the promise is the amount the decedent transferred and the unjust enrichment is that petitioners would receive over \$10,000,000.00 in assets via intestacy.

The Attorney General on behalf of The Sunshine Foundation opposes the petitioners' motion for summary judgment and supports respondents' motion adopting the arguments espoused by the respondents.

Here, the arbitrator found that the decedent could not bequeath or “assign” her interest in Hewlett Associates to The Sunshine Foundation without the consent of the petitioners, the other Hewlett partners. Accordingly, the bequest of the interest itself to The Sunshine Foundation failed. Nevertheless, the arbitrator also found that pursuant to the terms of the Partnership Agreement, the estate possesses all of the decedent’s rights in the partnership. The court confirmed the arbitrator’s determination. The court finds petitioners’ theory that because the bequest of the interest itself failed, it passes to them via intestacy unavailing for a number of reasons. First, the court disagrees with petitioners that respondents are judicially estopped from arguing against intestacy by virtue of the position they took in a prior proceeding. The court rejects petitioners’ argument that the respondent’s use of the following language amounts to estoppel: that petitioners “acted to achieve precisely the same results they would achieve by contesting successfully the decedent’s will.” The respondents’ statement refers to the petitioners’ successful challenge in the arbitration of the decedent’s bequest of her Hewlett partnership interests to The Sunshine Foundation. In any event, the question of whether the arbitrator’s decision means that the Hewlett interests pass via intestacy is a matter of law for the court to determine regardless of what statements respondents made in a prior proceeding. Second, petitioners failed to raise the claim that the Hewlett interests passed to them via intestacy at any point after the arbitrator’s decision, not even after the respondents claimed petitioners’ actions violated the in terrorem clause. Clearly, it would have been in petitioners’ interests to assert their intestacy theory in that proceeding.

Third, the decedent’s intent as gleaned from the will, together with application of the basic canons of construction, renders petitioners’ argument unavailing. Clearly, the decedent’s

will makes only nominal provisions for the petitioners and demonstrates an overall intent to favor the charity. Petitioners never objected to the probate of the will, but rather objected solely to the appointment of Shalik and DeVita as fiduciaries. Moreover, there is a presumption against intestacy, which is even stronger in the case of a residuary bequest (*Matter of Nurse*, 35 NY2d 381[1974]). In addition, it has been held that charitable gifts should be construed liberally and given effect whenever possible (*Matter of Carper*, 67 AD2d 333 [4th Dept 1979], *affd* 50 NY2d 974 [1980]). Under petitioners' theory, the in terrorem clause as well as the option language would be rendered meaningless because the Hewlett interest would pass to them via intestacy without cost. "Words are never to be rejected as meaningless or repugnant if by any reasonable construction they may be made consistent and significant" (*Matter of Buechner*, 226 NY 440, 443 [1919]).

With respect to the petitioners' argument that the court must find that the bequest passes via intestacy otherwise the interest would be stuck in a never-ending limbo thereby violating the rule against perpetuities and suspension of alienation, the court disagrees. The decedent's estate holds the interest pursuant to the arbitrator's decision and the partnership agreement. The estate, with the consent of the other partners, can sell the decedent's interest and distribute the proceeds. The estate is, as the arbitrator found, entitled to distributions which can be passed along to the residuary beneficiary. Clearly, the decedent could have directed in her will that her Hewlett interests be sold, with the consent of the partners, and the proceeds of sale distributed to the residuary beneficiary. The arbitrator's decision is of the same effect. If the petitioners had not forfeited the option but had exercised it, the proceeds similarly would have ultimately passed to the residuary beneficiary. Thus, the interest is held by the decedent's estate and does not violate

the rule against perpetuities or the suspension of the power of alienation. Moreover, pursuant to the terms of the partnership agreement, the partnership ends in 2015.

The court finds that (i) the arbitrator's decision found that the partnership interest, which could not be assigned without the consent of the other partners, is held by the decedent's estate with all rights of the decedent in the partnership; (ii) there is no violation of the rule against perpetuities or suspension of the power of alienation; and (iii) regardless of whether or not the respondents are judicially estopped from arguing against intestacy, the issue is for the court to determine as a matter of law. It is not necessary to address the defenses in respondents' papers.

For the foregoing reasons, the decedent's partnership interests in Hewlett Associates do not pass through intestacy pursuant to EPTL 4-1.1. Accordingly, petitioners' motion for summary judgment is denied and respondent's motion for summary judgment dismissing the petition is granted.

Settle decree.

Dated: December 23, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court