

**Matter of Bell v Rosenberg**

2010 NY Slip Op 33645(U)

December 21, 2010

Surrogate's Court, Nassau County

Docket Number: 355957/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 Beverly J. Bell, Esq., as Executor of the  
Estate of

ROBERT B. GARDNER, JR.,

Deceased,

File No. 355957/B

Plaintiff,

Dec. No. 26848

-against-

Marjorie Rosenberg, Big Red, LLC, The Cold Spring Harbor  
Laboratory, Inc., The Hotchkiss School, North Shore-Long  
Island Jewish Health System Foundation, and Andrew M.  
Cuomo, Attorney General of the State of New York,

Defendants,

for Declaratory Relief under CPLR 3001, *et. seq.*, and for  
Additional Relief Pursuant to SCPA 2101.

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Before the court in this proceeding for a declaratory order and for other relief is a pre-answer motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7) by defendants Marjorie Rosenberg, individually, and as a member of Big Red, LLC, and Big Red, LLC. The motion is opposed by Beverly J. Bell, as executor of the estate of Robert B. Gardner, Jr., The Cold Spring Harbor Laboratory, Inc., The Hotchkiss School, and Andrew M. Cuomo, the Attorney General of the State of New York. For the reasons that follow, the motion is denied.

The following facts are from the amended Verified Complaint and Petition. The decedent Robert B. Gardner, Jr., died in April 2009. His last will and testament was admitted to probate and letters testamentary issued to Beverly on May 26, 2009. In his will, the decedent bequeathed \$1,000,000.00 to Marjorie as a specific bequest.

In the course of her duties as fiduciary, Beverly reviewed the decedent's financial records. The records show that from July 2002 through April 2009, the decedent made a series of monetary transfers to Marjorie and/or Big Red. Beverly alleges, on information and belief, that the transfers to Big Red were for Marjorie's benefit. Beverly has identified transfers of \$1,687,626.81 in transfers to Marjorie and \$683,728.44 to Big Red for a total of \$2,371,355.25 in transfers.

Marjorie alleges that all of these transfers were gifts from the decedent to Marjorie or to Big Red. According to Beverly, certain of the checks by which the transfers were made or the check registers show notations that the transfers were "loans" or words of similar meaning and the will contains no debt forgiveness provision. The only gift tax return Beverly has been able to locate is one filed by decedent for the year 2004. The total amount of the transfers to Marjorie bearing an indication that they were loans is \$451,000.00 and the total amount of the transfers to Big Red bearing an indication that they were loans totals \$223,000.00. These amounts total \$674,000.00. Beverly asserts, on information and belief, that if any or all of the transfers are determined to be loans and not gifts, Beverly would be compelled to collect these sums from Marjorie or Big Red or, alternatively, to offset the advanced sums against the \$1,000,000.00 specific bequest to Marjorie contained in the will. To the extent that the transfers are determined to be loans, the value of the decedent's residuary estate will increase, taking into account the difference in the estate and gift tax due and owing, by approximately \$1,037,000.00.

Pursuant to Article Fourth of the will, the decedent left his residuary estate to the charities named in this proceeding, and, to the extent that any or all of the transfers in question are determined to be loans, which are then paid to the estate by Marjorie or Big Red, such additional

funds would be distributable to the charities named in the will. Beverly alleges, on information and belief, that if she pays the \$1,000,000.00 specific bequest to Marjorie and any or all of the transfers are ultimately determined to have been loans and not gifts and, therefore, are deemed part of the decedent's estate but not recovered by the executor, she may be personally liable for surcharge for these amounts. For these reasons, Beverly asks the court for a declaratory judgment as to the nature of these transfers.

In the amended complaint and petition, filed after the action was transferred to this court by Supreme Court, Nassau County, Beverly alleges a second cause of action. She alleges, on information and belief, that if any portion of the transfers are determined to be gifts, there will be federal gift tax owed on such amounts. Based on section 2035 (b) of the Internal Revenue Code, federal gift taxes paid with respect to gifts made within three years of date of death are brought back into the estate for the purpose of computing the federal gross estate, and federal estate taxes may be due and owing as a result, making Marjorie or Big Red liable to the estate for approximately \$128,000.00 in federal and New York State estate taxes. If all of the transfers are determined to be loans, Beverly alleges that Marjorie or Big Red will still be liable to the estate for payment of about \$61,000.00 in federal and state estate taxes attributable to the federal gift taxes paid on the remaining portions of the transfers that are undisputed gifts made within the three years prior to the decedent's death. Beverly alleges, on information and belief, that Marjorie and Big Red dispute their liability to the estate for this amount and that resolution of this issue cannot await a final account.

“Upon a motion to dismiss for failure to state a cause of action, a pleading must be given the benefit of every possible favorable inference to be drawn, and every fact alleged must be

assumed to be true” (*Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1049 [2d Dept 2010] [citations omitted]). “Additionally, ‘a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint’” (*id.*) Therefore, in addition to the allegations asserted in the complaint, the facts alleged in the affidavit submitted in opposition to the motion must also be assumed to be true and considered in determining the motions (*id.*). Under CPLR 3026, pleadings are to be “liberally construed” and defects that do not prejudice a “substantial right of a party” are to be ignored. In essence, “[o]n a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint, the pleading is to be afforded a liberal construction” (*Farber v Breslin*, 47 AD3d 873, 876 [(2d Dept 2008)]).

Marjorie and Big Red move to dismiss the amended complaint on the basis that it fails to state a cause of action (CPLR 3211 [a] [7]). In support of the motion, Marjorie and Big Red assert, with respect to the first cause of action, that the amended complaint fails to allege the terms of any loan transaction, the identity of the individual who made the notations of “loan” or what Beverly means by “words of similar effect.” Further, Marjorie and Big Red allege that there is no basis for Beverly to allege that any of the transfers to Big Red were made for Marjorie’s benefit and the fact that Beverly found only one gift tax return among the decedent’s possessions is not sufficient to state a cause of action upon which relief may be granted. Instead, Marjorie and Big Red claim that Beverly filed a gift tax return on the decedent’s behalf for the years 2002, 2003, 2005, 2006, 2007 and 2008 and intends to file one for 2009. They also claim that the amended complaint contains monetary inconsistencies about the amounts in question that warrant dismissal.

In their opposition papers, Beverly J. Bell, as executor of the estate of Robert B. Gardner, Jr., The Cold Spring Harbor Laboratory, Inc., The Hotchkiss School, and Andrew M. Cuomo, the Attorney General of the State of New York, all assert that the first cause of action is one upon which relief may be granted. Beverly's affidavit in opposition to the motion to dismiss notes that schedules that she prepared as executor, which are annexed as exhibits to her affidavit, identify the decedent's personal bank account, the payee, the check date, the check number, the notation on the check memo or check stub, the endorsement and the date the funds cleared from the decedent's account to the payee's. Beverly's memorandum in opposition to the motion points out the axiom that the law does not presume a gift.

In light of the standard this court is charged with using on a CPLR 3211 (a) (7) motion, the court finds that the first cause of action contained in the amended complaint states a cause of action upon which relief may be granted. Therefore, the motion to dismiss the first cause of action is denied.

Big Red and Marjorie also assert that the second cause of action should be dismissed. In that regard, they again allege that the amended complaint does not allege the amount of the taxable gifts, whether the gifts were made to Marjorie or Big Red, and the amount of the resulting federal estate taxes for which either Marjorie or Big Red would be responsible.

The papers filed in opposition to the motion by the various defendants oppose the dismissal of the second cause of action. Annexed to Beverly's affidavit as an exhibit is a schedule of transfers that supports the allegations made in the second cause of action. The court, using the same standard elucidated above, finds that the allegations contained in the second cause

of action in the amended complaint sufficiently state a cause of action upon which relief can be granted, and, accordingly, denies the motion to dismiss the second cause of action.

This is the decision and order of the court.

Dated: December 21, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court