

Sexter & Warmflash, P.C. v Estate of Gilford
2011 NY Slip Op 30255(U)
February 1, 2011
Sup Ct, New York County
Docket Number: 116468/10
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

SEXTER & WARMFLASH, P.C.,

Plaintiff,

- v -

INDEX NO. : 116468/10

MOTION DATE: 1-28-11

MOTION SEQ. NO.:001

**ESTATE OF MADELINE LEE GILFORD, a/k/a
MADELINE LEE, and DANIEL NEIDEN,
Individually and as the Administrator c.t.a.
Of the Estate of Madeline Lee Gilford,**

Defendants

FILED

FEB 07 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: [] Yes [X] No

Defendant Daniel Neiden ("Neiden") moves, by order to show cause, to remove this action to the Surrogate's Court, New York County pursuant to CPLR 325(e). Plaintiff Sexter & Warmflash, LLC ("the Sexter firm") opposes the motion, which is granted for the reasons below.

In this action, the Sexter firm sues Neiden both individually and in his capacity as Administrator c.t.a. of the Estate of Madline Lee Gilford (hereinafter "the Gilford estate"), for breach of contract, an account stated and fraud. The complaint seeks moneys allegedly due and owing for legal services performed by the Sexter firm for Neiden in connection with his

appointment and duties as the Administrator c.t.a of the Gilford estate.

Neiden argues that this action should be removed to Surrogate's court on the grounds that Surrogate's court already has jurisdiction over Gilford estate and is in the best position to evaluate the services performed by the Sexter firm and the reasonable value of those services. In support of his position, Neiden asserts that section 2110 of the Surrogate's Court Procedure Act expressly authorizes the Surrogate's Court to fix and determine the compensation of an attorney for services rendered to a fiduciary, and that the Surrogate's Court is the best forum to resolve the issues raised by the complaint.

The Sexter firm opposes the motion, asserting that the Surrogate's Court does not have jurisdiction over its fraud claim, that this court has concurrent jurisdiction over the attorneys' fees issues, the Surrogate's court would not decide the attorneys' fees issue unless Neiden made an application for the Surrogate Court to determine the Sexter firm's fees, and that an order from Surrogate's court is necessary before removing this action.

These arguments are unavailing. CPLR 325(e) provides, in relevant part, "[w]here an action pending in supreme court affects the administration of a decedent's estate which is within the jurisdiction of the surrogate's court, the supreme court, upon motion, may remove such action to surrogate's court upon prior order of the surrogate's court." While this provision "does not mandate removal, it is clear that the interests of judicial economy dictate a strong preference for removal where the affairs of the estate are involved. Wherever possible all litigation involving the property and funds of a decedent's estate should be disposed of in Surrogate's Court." Benjamin v. Morgan Guar. Trust Co. of New York, 173 AD2d 373, 374 (1st Dept 1991)(internal citations and quotations omitted).

Moreover, while CPLR 325(e) appears to require the consent of the surrogate's court, any

such requirement "is superceded by the State Constitution empowering the Supreme Court to transfer action over which it has concurrent jurisdiction with the Surrogate's Court to the Surrogate's Court without the Surrogate's Court's consent." Birnbaum v. Central Trust Co., 156 AD2d 309 (1st Dept 1989); see generally, McKinney's Consol. Laws of NY, CPLR Book 7B, CPLR 311-a to 500, C325:6, at 234.

As this action arises out of the Sexter firm's representation of Neiden as an administrator of the Gilford estate before the Surrogate's Court, it should be removed to the Surrogate's Court. See e.g. Lawrence v. Miller, 48 AD3d 1 (1st Dept 2007), aff'd, 11 NY3d 588 (2008)(Supreme Court properly removed plaintiff's action for contract rescission, unjust enrichment and related causes of action against her former attorneys to Surrogate's Court which stemmed from her retention of the attorneys in connection with a litigation against an estates former executer); Rosenman & Colin v. Winston, 205 AD2d 451 (1st Dept 1994)(affirming trial court's grant of motion to transfer action seeking to recover attorneys' fees to Surrogate's Court where extensive litigation occurred in the Surrogate's Court). Moreover, contrary to the Sexter firm's argument, the Surrogate's Court has jurisdiction over the fraud claim that claim also seeks attorney fees for the Sexter's firms representation of Neiden before the Surrogate's Court and therefore pertains to the Gilford estate.

Finally, contrary to the Sexter firm's position, it need not wait for Neiden to commence a proceeding in Surrogate's Court in order to have a determination as to the amount of attorneys' fees due and owing to it. See Surrogate's Court Procedure Act, section 2110 (providing that the "proceeding for compensation shall be instituted by petition of a fiduciary of the state or a person interested or *any attorney who has rendered services*)(emphasis supplied).

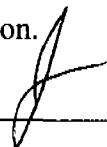
In view of the above, it is

* 4]

ORDERED THAT the motion by Daniel Neiden is granted, and that the above-entitled action now pending in this court, be and is hereby removed from this court to the Surrogate's Court of the County of New York County, for determination in the pending proceeding therein by Daniel Neiden, Administrator c.t.a. of the Estate of Madeline Lee Gilford, deceased, and it is further

ORDERED that the Clerk of this Court, upon filing with him of a certified copy of this order, shall forthwith deliver to the Clerk of the Surrogate's Court of the County of New York County all papers and records in the above-entitled action.

Dated: *February 1, 2011*
January, 2011



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED

FEB 07 2011

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