

Matter of Sosnow

2011 NY Slip Op 30836(U)

March 31, 2011

Sur Ct, Nassau County

Docket Number: 312365

Judge: III., Edward W. McCarty

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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 Petition of Mindy Horowitz and Robert
Beer for a Decree Determining the Validity and Enforceability
of a Claim Against the Estate of

File No. 312365

Dec. No. 27088

MORRIS SOSNOW,

Deceased.

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In this proceeding to determine the validity of a claim (SCPA 1809), petitioners move for summary judgment and respondents cross-move for summary judgment.

This proceeding was commenced by petitioners Mindy Horowitz and Robert Beer against Sheila (Sosnow) Nagler, Ron Horowitz and Seth Lieberman as executors of the estate of Morris Sosnow (respondents).

Morris Sosnow was survived by his wife Kate Sosnow and three children, Bernice Lieberman, Lorraine Sosnow and Sheila Nagler. Decedent's last will and testament dated January 6, 1991 was duly admitted to probate by a decree of this court dated February 15, 2000. Letters testamentary issued to Sheila Sosnow and Seth Lieberman. The net estate is approximately \$130,000,000.

The claim of petitioners is based upon an agreement executed in 1972 between decedent and Morton Beer, former husband of Lorraine Sosnow. Petitioners are the children of Morton Beer and the grandchildren of Morris Sosnow. The agreement provided that Morris Sosnow and Morton Beer would each bequeath a portion of their assets to petitioners, in their last will and testaments. That property was designated as the "donative property" and defined in the agreement.

Article 1(a) of the agreement provides in part:

“ . . . The Donative Property of Beer shall mean one-fourth (1/4th) of his net estate at the time of his death, as the term “net estate” is defined in Section 5-1.1 of the Estates, Powers and Trusts Law of New York, plus “testamentary substitutes” as that term is defined in subparagraph (b)(1) of that Section.”

Article 1(b) of the agreement provides in part:

“ . . . The Donative Property of Sosnow shall mean:

5% of the issued and outstanding shares of the capital stock of THE NATIONAL BIRCHWOOD CORPORATION, a Delaware corporation.

5% of the equity interests held by the partners in BIRCHWOOD ASSOCIATES, a New York partnership.

5% of the equity interests held by the partners in MS ASSOCIATES, a New York partnership.

In ascertaining or identifying Sosnow’s Donative Property, appropriate adjustment shall be made for stock splits, stock dividends or recapitalizations of said corporation hereafter occurring. If hereafter any part of the Donative Property shall be transferred in an exchange, merger, consolidation or reorganization, the assets received therefor shall be deemed substituted in lieu of the property so transferred.

In the event that the Donative Property, or any part thereof, shall have been sold, liquidated or otherwise disposed of during Sosnow’s lifetime (other than a disposition described in the subparagraph immediately preceding, and other than a disposition by way of transfer to or for the benefit of the Beneficiaries, or either of them), there shall be substituted in lieu thereof:

- (i) the net proceeds thereof -- in the event of sale or liquidation; and/or
- (ii) the value thereof as of the date of such disposition -- in the event of other disposition.”

As third-party beneficiaries of the contract, petitioners Mindy Horowitz and Robert Beer, have standing to enforce the contract against the estate (*Simonds v Simonds*, 45 NY2d 233 [1978]; *Matter of Revson*, 86 AD2d 872 [2d Dept 1982]). Petitioners contend that decedent did not provide in his last will and testament for payment of the obligations stated in the agreement. The executors contend that the bequests in the will to claimants are in satisfaction of their claims.

The relevant portions of the decedent's will are as follows.

Article "FOURTH" of the will provides in part: "To each of my grandchildren and great-grandchildren who shall survive me, Two Hundred Fifty Thousand (\$250,000) Dollars."

Article "FIFTH" of the will creates a residuary trust for the testator's spouse, Kate, and upon her death, the residuary estate is divided among the decedent's children, grandchildren and great-grandchildren, in varying percentages. The residuary marital trust was never funded, presumably because Kate died shortly after the decedent.

Article "FIFTH" subdivision (c)(4) provides: "If my grandson, ROBERT BEER, is then living, two (2%) percent shall be distributed to him."

Article "FIFTH" subdivision (c)(5) provides: "To all my grandchildren then living, twenty-four (24%) percent shall be divided equally among them."

During his lifetime, Morris Sosnow assigned part of his interest in Birchwood "entities" leaving him with a 43.5% interest. The estate alleges that the transfer triggered the "substitution clause" in the agreement and permitted Morris Sosnow to bequeath the value (as defined in the agreement) of the interests promised to petitioners. The estate further alleges that inter vivos gifts made by Morris Sosnow reduced the obligation.

Petitioners contend that the obligation of the testator was to make a bequest in kind. The estate's remaining interests in the Birchwood entities have been sold.

The first question to be determined in this proceeding is whether the testator intended the bequests to petitioners, in his last will and testament, to be in satisfaction of his obligations under the agreement. The determination of this issue requires a construction of the last will and testament to determine whether the bequests are in satisfaction of the claim (*see e.g. Sheldon v Sheldon*, 133 NY1 [1892]; *Matter of Herb*, 163 Misc 441 [Sur Ct, New York County 1937]). A determination of this proceeding in petitioners' favor would have a negative impact on their residuary bequests. However, not all of the beneficiaries of the residuary estate have been made parties to this proceeding (SCPA 1420; 1809 [2]). Jurisdiction is therefore incomplete.

It also appears that the executor of the estate of Morton Beer should be made a party to the proceeding, independent of the construction. The estate alleges that Morton Beer breached the 1972 agreement and that Morris Sosnow was therefore relieved of his obligations under the agreement. Complicating this issue is the allegation that additional consideration for the subject agreement was the transfer by Morton Beer of certain business interests pursuant to a separately executed document. The interests of the estate of Morton Beer may be affected by a determination on this issue. The last will and testament of Morton Beer states that he is a domiciliary of New Jersey and letters testamentary presumably issued in that state. If there are no creditors who have an interest in the estate, and the accounts of the executor have been settled, petitioners can represent the estate as the sole beneficiaries.

This proceeding is held in abeyance pending the issuance of supplemental citations.

This constitutes the decision and order of the court.

Proceed accordingly

Dated: March 31, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court