

Matter of Kozon v Kozon
2011 NY Slip Op 32258(U)
August 12, 2011
Sup Ct, Nassau County
Docket Number: 4838/11
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Application of
LORRAINE KOZON,

TRIAL/IAS PART 32
NASSAU COUNTY

Petitioner,

Index No.: 4838/11
Motion Seq. Nos.: 02, 03
Motion Dates: 05/04/11
05/04/11

- against -

JOAN KOZON, individually and as Trustee of the
"Gladys Kozon Revocable Living Trust" under Agreement
dated June 26, 1998,

Respondent.

The following papers have been read on these motions:

	Papers Numbered
<u>Amended Order to Show Cause (Seq. No. 02), Affirmation, Verified Petition and Exhibits</u>	<u>1</u>
<u>Order to Show Cause and Temporary Stay of Proceedings (Seq. No. 03), Affidavit and Exhibits and Memorandum of Law</u>	<u>2</u>
<u>Affirmation in Opposition to Order to Show Cause (Seq. No. 03) and Exhibits and Memorandum of Law</u>	<u>3</u>
<u>Reply Memorandum of Law in Support of Order to Show Cause (Seq. No. 02)</u>	<u>4</u>
<u>Reply Affidavit in Support of Order to Show Cause (Seq. No. 03) and Exhibit</u>	<u>5</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Petitioner moves (Seq. No. 02) for an order directing a judicial accounting by respondent with respect to "Gladys Kozon Revocable Living Trust" under Agreement, dated June 26, 1998, the judicial settlement of said account and final payment and distribution thereunder as the Court shall direct, as well as an award of damages, costs and attorney's fees.

Respondent moves (Seq. No. 03), pursuant to CPLR § 602(a) and (b), for an order removing a matter currently pending in the Surrogate's Court, Nassau County to this Court and consolidating it herewith, for unified discovery and trial. Petitioner opposes this motion.

With respect to respondent's instant motion (Seq. No. 03), upon the papers submitted, respondent, Joan Kozon, has demonstrated her entitlement to an order pursuant to CPLR §602(b) consolidating in this Court: (1) the subject, revocable trust proceeding instituted by the petitioner; with (2) a related, "irrevocable" trust proceeding also commenced by petitioner – respondent's sister – in the Surrogate's Court, Nassau County.

Significantly, the record establishes that subject proceedings involve common questions of law and fact relating to respondent's disposition of certain assets and/or her conduct as trustee of the two, related trusts – both of which were created at the same time by the parties' mother, Gladys Kozon (now deceased), as part of a "common estate" plan. *See* L. Kozon (June 2010) Aff., ¶ 26; Supreme Court Pet., ¶¶ 4-7; Irrevocable Trust Pet., ¶ 5. It bears noting in this respect that, in prior Surrogate's Court litigation, petitioner and her counsel argued that in crafting the provisions of the trusts, the involved parties "obliterated" all distinction between the two instruments – to the extent that both effectively comprised a "single entity" for administration and asset disposition purposes. *See* Farinacci Affirmation, ¶¶ 26-27.

It is settled that a motion for consolidation is addressed to the sound discretion of the trial court, and absent a showing of substantial prejudice by the party opposing the motion, consolidation is proper where there are common questions of law and fact. *See* CPLR § 602(b); *Viafax Corp. v. Citicorp Leasing, Inc.*, 54 A.D.3d 846, 864 N.Y.S.2d 479 (2d Dept. 2008); *Best Price Jewelers.Com, Inc. v. Internet Data Storage & Systems, Inc.*, 51 A.D.3d 839, 857

N.Y.S.2d 731 (2d Dept. 2008); *Kally v. Mount Sinai Hosp.*, 44 A.D.3d 1010, 844 N.Y.S.2d 415 (2d Dept. 2007); *Nigro v. Pickett*, 39 A.D.3d 720, 833 N.Y.S.2d 655 (2d Dept. 2007).

Moreover, Courts favor consolidation (see *Fransen v. Maniscalco*, 256 A.D.2d 305, 681 N.Y.S.2d 310 (2d Dept. 1998)), particularly where, as here, it will avoid unnecessary duplication of trials, save costs and expenses, and prevent an injustice which might result from conflicting decisions predicated upon on the same facts. See *Best Price Jewelers.Com, Inc. v. Internet Data Storage & Systems, Inc.*, *supra*; *Nigro v. Pickett*, *supra*. See also *Mackey v. County of Suffolk*, 67 A.D.3d 973, 888 N.Y.S.2d 774 (2d Dept. 2009); *Plot Realty LLC v. DeSilva*, 45 A.D.3d 312, 847 N.Y.S.2d 1 (1st Dept. 2007); *Padula v. City of New York*, 52 A.D.3d 795, 859 N.Y.S.2d 379 (2d Dept. 2008); *Zupich v. Flushing Hosp. and Medical Center*, 156 A.D.2d 677, 549 N.Y.S.2d 441 (2d Dept. 1989).

In opposition to respondent's showing, petitioner has failed to sustain her responsive burden of establishing material prejudice. *E.g. DeSilva v. Plot Realty, LLC*, 85 A.D.3d 422, 924 N.Y.S.2d 86 (1st Dept. 2011); *Walls v. Prestige Management, Inc.*, 59 A.D.3d 311, 872 N.Y.S.2d 918 (1st Dept. 2009); *Amcan Holdings, Inc. v. Torgys LLP*, 32 A.D.3d 337, 821 N.Y.S.2d 162 (1st Dept. 2006). See generally *Plot Realty LLC v. DeSilva*, *supra*; *Drapaniotis v. 36-08 33rd Street Corp.*, 269 A.D.2d 352, 702 N.Y.S.2d 861 (2d Dept. 2000). The Court notes that proceedings in the pending Surrogate's matter are apparently at an early stage and, moreover, have been stayed pursuant to this Court's temporary restraining order dated April, 2011. See Order to Show Cause, dated April 29, 2011 (1st decretal paragraph at 2-3). In any event, upon the exercise of its broad discretion relating to the supervision of disclosure (*Ravnikar v. Skyline Credit-Ride, Inc.*, 79 A.D.3d 1118, 913 N.Y.S.2d 339 (2d Dept. 2010), the

Court is empowered to minimize any demonstrable prejudice flowing from discovery-related issues. *See generally Alsol Enterprises, Ltd. v. Premier Lincoln-Mercury, Inc.*, 11 A.D.3d 494, 783 N.Y.S.2d 620 (2d Dept. 2004); *Fransen v. Maniscalco*, *supra*; *Collazo v. City of New York*, 213 A.D.2d 270, 624 N.Y.S.2d 130 (1st Dept. 1995); *Zupich v. Flushing Hosp. and Medical Center*, *supra*.

Significantly, petitioner originally commenced a compulsory accounting matter in Surrogate's Court relating to the revocable trust at issue here – a proceeding which she instituted at about the same time she commenced the currently pending, Surrogate's Court “irrevocable” trust matter. However, the revocable trust proceeding was later dismissed by the Surrogate on subject matter jurisdiction grounds, thereby leaving the Supreme Court as the only readily available venue in which a consolidated proceeding can now be prosecuted. *See* Petitioner's Affirmation in Support of Amended Order to Show Cause Exhibit C, Order of Nassau County Surrogate Riordan, dated August 24, 2010. *Cf. Woods v. County of Westchester*, 112 A.D.2d 1037, 492 N.Y.S.2d 829 (2d Dept. 1985). *See also GAM Property Corp. v. Sorrento Lactalis, Inc.*, 41 A.D.3d 645, 838 N.Y.S.2d 633 (2d Dept. 2007); *McCall v. Berman*, 201 A.D.2d 709, 608 N.Y.S.2d 297 (2d Dept. 1994); *Gomez v. Jersey Coast Egg Producers, Inc.*, 186 A.D.2d 629, 588 N.Y.S.2d 589 (2d Dept. 1992)

Lastly, petitioner's reliance upon inapposite, pre-CPLR consolidation and/or removal holdings is unpersuasive (*e.g., Budd v. Schriver*, 22 Misc.2d 206, 203 N.Y.S.2d 291 (Supreme Court, Nassau County 1960), since CPLR § 602(b) permits the Supreme Court – without qualifications relevant here – to consolidate before it, matters pending in “different” courts. *Cf. Dunn v. Braick*, ___ Misc.3d ___, 2006 WL 3821535 (Supreme Court Oneida County, 2006). Further, it is well settled that the Supreme Court and the Surrogate's Court possess concurrent

jurisdiction over, *inter alia*, the administration of a decedent's estate. *See Goodwin v. Rice*, 79 A.D.3d 699, 913 N.Y.S.2d 692 (2d Dept. 2010); *Matter of Kaminester v. Foldes*, 51 A.D.3d 528, 859 N.Y.S.2d 412 (1st Dept. 2008); *Gaentner v. Benkovich*, 18 A.D.3d 424, 795 N.Y.S.2d 246 (2d Dept. 2005). *See also Matter of Chiantella v. Vishnick*, 84 A.D.3d 797, 922 N.Y.S.2d 525 (2d Dept. 2011); *Manning v. Thorne*, 73 A.D.3d 1136, 900 N.Y.S.2d 900 (2d Dept. 2010); N.Y. Const., Art. VI, § 7.

The Court has considered petitioner's remaining contentions and concludes that they are insufficient to defeat the motion to consolidate.

Lastly, and with respect to petitioner's April 7, 2011 Amended Order to Show Cause (Seq. No. 02), the principal relief sought and granted in connection with that prior application was a directive authorizing out-of-state, personal service upon respondent, Joan Kozon, in Rio Rancho, New Mexico, pursuant to CPLR § 308(5). *See Affirmation in Support* ¶¶ 6-7.

Although said Order to Show Cause also contains a demand for the ultimate relief on the petitioner's judicial accounting claim – and also requests a “final” distribution, as well as four million dollars in damages – petitioner's counsel's supporting affirmation contains no substantive discussion of the issues in the case. Nor, in any event, could such relief be summarily granted at this juncture of the proceeding.

Accordingly, it is,

ORDERED that petitioner's motion (Seq. No. 02) for a judgment and a final distribution on her judicial accounting claim is hereby **DENIED**. And it is further

ORDERED that respondent's motion (Seq. No. 03) for an order removing a stated matter pending in the Surrogate's Court, Nassau County, to this Court and consolidating it herewith is hereby **GRANTED**.

Based upon the foregoing, it is hereby directed that:

- 1) the instant Nassau County Supreme Court matter, *In the Matter of the Application of Lorraine Kozon v. Joan Kozon, individually and as Trustee of the "Gladys Kozon Revocable Living Trust" under Agreement dated June 26, 1998*, Index No. 4838/11, is to be jointly tried, in Nassau County Supreme Court, with the Nassau County Surrogate Court matter *Intermediate Accounting by Joan Kozon, as Trustee of the "Gladys Kozon Irrevocable Trust" under Agreement dated June 26, 1998, as amended Gladys Kozon (now deceased), as Grantor and Trustee, and Joan Kozon, as Trustee*, File No. 2010-359592/A;
- 2) upon presentation of a copy of this order, the clerk of the Nassau County Surrogate's Court is to forthwith transfer the file in the matter of *Intermediate Accounting by Joan Kozon, as Trustee of the "Gladys Kozon Irrevocable Trust" under Agreement dated June 26, 1998, as amended Gladys Kozon (now deceased), as Grantor and Trustee, and Joan Kozon, as Trustee*, File No. 2010-359592/A, to the Nassau County Supreme Court, upon the payment of all applicable fees, if any;
- 3) upon transfer of the matter of *Intermediate Accounting by Joan Kozon, as Trustee of the "Gladys Kozon Irrevocable Trust" under Agreement dated June 26, 1998, as amended Gladys Kozon (now deceased), as Grantor and Trustee, and Joan Kozon, as Trustee*, File No. 2010-359592/A, to Nassau County Supreme Court, the clerk of this court is directed to issue a Nassau County Index Number to said matter upon payment of all applicable fees, if any and counsel shall thereafter file an RJJ; and
- 4) all parties shall serve upon any party so demanding copies of disclosure documents heretofore obtained in the other action;

[* 7]

5) all matters of trial practice, including the right to open and close, are reserved to the Justice presiding at the joint trial;

6) all papers shall reflect the joint status of these actions;

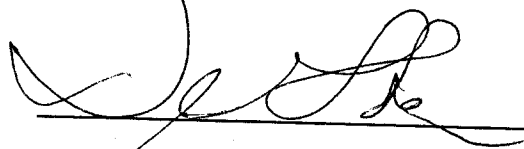
7) upon completion of discovery, the parties shall file separate notes of issues and certificates of readiness; and

8) each party shall be entitled to enter separate judgments and bill of costs and disbursements, in each action respectively, if costs are allowed.

It is further ordered that the parties shall appear for a Preliminary Conference on September 26, 2011, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 12, 2011

ENTERED
AUG 16 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE