

Matter of Jira

2011 NY Slip Op 34355(U)

March 17, 2011

Surrogate's Court, New York County

Docket Number: File No. 2008-3696

Judge: Nora S. Anderson

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

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In the Matter of a Motion to Vacate the Probate Decree in the
Estate of

JAMES JOHN JIRA,

File No. 2008-3696

Deceased.

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A N D E R S O N , S .

New York County Surrogate's Court
DATA ENTRY
Date: 3-17-2011

A narrow factual question raised by an application to vacate a probate decree issued by the other Surrogate of this court was referred to me for an evidentiary hearing in the estate of James J. Jira.¹ The subject of the inquiry was a stipulation, executed during the pendency of the probate proceeding, under which counsel for the sole distributee had withdrawn his motion for an extension of time to file objections. The ultimate fact at issue was whether the distributee's counsel signed the stipulation before or after the phrase "with prejudice" was included in the instrument. The undisputed background of the hearing and my findings as to the disputed facts are as follows.

Procedural Background

Decedent died on September 26, 2008, survived by his father, leaving a handwritten will executed some eight years earlier. But for nominal pecuniary bequests to decedent's father and brother (William Jira, Sr. and Jr., respectively), the instrument left decedent's entire estate to his friend, Randy Palumbo. The latter petitioned for probate. In view of the petition's averment that decedent's elderly father suffered from dementia, the court appointed William Shepard as the father's guardian ad litem. Mr. Shepard filed a notice of appearance on December 18, 2008. On

¹The referral was made in view of the fact that a court attorney on the other Surrogate's staff was among the prospective witnesses.

the return date of the probate citation (January 14, 2009), however, another lawyer, Frank Bruno, also filed a notice of appearance for the father.²

On March 21, 2009, GAL Shepard filed a report in which he expressed concern that the propounded instrument might not have been duly executed and might have been the product of undue influence. Proponent soon thereafter sent notices of 1404 examinations to Mr. Shepard and to Mr. Bruno.³ The depositions of two of the three attesting witnesses took place as scheduled, on April 14, 2009. Neither Mr. Shepard nor Mr. Bruno appeared.

Some six months later, Mr. Bruno filed a motion to extend his time to (inter alia) file objections and to vacate the “petition” [sic] appointing the GAL. On November 10, 2009, the return date of that motion, another lawyer, Jimmy Wagner, appeared for Mr. Bruno’s firm. In colloquy, the court noted that the record suggested troubling irregularities concerning the validity of Mr. Bruno’s retainer by the father. The court then further noted that those questions would warrant an evidentiary hearing unless they were mooted by a withdrawal of the motion. At the end of the calendar, a court attorney conferenced the matter with counsel, including (in addition to GAL Shepard and Mr. Wagner) lawyers Gary Greenberg and Paulina Koryakin, both of whom

²Where a guardian ad litem has been appointed for an allegedly incapacitated person who has not been adjudicated as incapacitated, the ward may appear pro se (*see Matter of Bernstein*, Misc 2d [Sur Ct New York County 1998] or, by logical extension (if competent to contract), retain another lawyer to represent him or her concurrently with the guardian ad litem.

As it happens, Mr. Bruno’s notice and statement of authorization identified his client as “William Jira, Jr.” Indeed, the record contains considerable argument and confusion about the father’s name, counsel for the father (now appearing for the administrator of the father’s estate) having gone so far as to contend that service upon the father as “William Jira, Sr.” rendered the probate proceeding jurisdictionally defective. In this connection it is enough to note that, following the father’s death in March 2010, the administrator himself apparently saw fit to identify his decedent as “William Jira, Sr.”

³It is observed that Mr. Bruno denies having received such notice.

had appeared for proponent. By the time the conference concluded, a one-page, handwritten stipulation providing for the withdrawal of the motion for extension of time to file objections (the “Stipulation”) had been signed by Mr. Wagner, GAL Shepard, and Mr. Greenberg.

Approximately two weeks later, Mr. Shepard and Mr. Greenberg came to an agreement that, in exchange for \$5,000 for the father, Mr. Shepard would withdraw “objections” that he purportedly had filed within the four corners of his GAL report. In a revised GAL report filed on December 30, 2009, Mr. Shepard undertook to withdraw “objections” and to explain the bases for his having done so.

A probate decree issued on March 9, 2010. Decedent’s father died a week thereafter, and William Jira, Jr., as the father’s sole distributee, applied for and received letters of administration for the father’s estate.

On May 9, 2010, William Jira, Jr., as administrator of William Sr.’s estate, moved to vacate the probate decree in the present estate. The motion was filed for the administrator by Jimmy Wagner, on this occasion identifying himself as the representative of a firm other than Frank Bruno’s.

In light of this procedural history, the motion to vacate poses a basic threshold issue. After all, it is undisputed that the motion to extend time to file objections to probate had been withdrawn by the Stipulation. If such withdrawal was “with prejudice” (a proposition expressed in the Stipulation’s terms, but vigorously denied by the administrator), the father (and now the administrator) would have no standing to challenge the probate decree as a prospective objectant. Hence the scheduling of a hearing to determine whether the Stipulation contained that critical phrase when it was signed by the father’s counsel.

The Evidentiary Hearing

Five witnesses were called at the hearing. They included Mr. Wagner; Mr. Shepard; Juliette Sears, the court attorney who had presided over the conference at which the Stipulation was negotiated, drafted, and executed; Ms. Koryakin; and Mr. Greenberg.

Mr. Wagner took the stand in support of movant. On direct, he testified that he had drafted the Stipulation;⁴ that it had not contained the phrase “with prejudice” at the time that he signed it; and that the other lawyers had signed it in his presence. He further testified that at no point during the conference had he seen the phrase “with prejudice” on the face of the instrument. He recalled that when the conference concluded the court attorney had take the fully executed instrument with her to request that it be “So ordered” by the Judge. He stated that he had not seen the instrument thereafter until he checked the court files in March 2010. According to Mr. Wagner, it was only then that he saw the words “with prejudice” among the instrument’s brief terms.

On cross-examination, Mr. Wagner asserted that, after he had signed the Stipulation, Mr. Greenberg, counsel for proponent, asked that the words “without prejudice” be added to the instrument and Mr. Wagner had said “okay” to that proposal.

Mr. Wagner then called Mr. Shepard to the stand. The latter testified that the phrase “with prejudice” (rather than “without prejudice”) had been included in the instrument at Mr.

⁴During his testimony, Mr. Wagner denied that the court attorney had instructed him to withdraw the prior motion, a denial that directly contradicted his statement to such effect in an affirmation submitted on his present motion. The court attorney herself testified that she had indeed directed Mr. Wagner to be the Stipulation’s drafter, but only after he had announced that he wished to withdraw the prior motion. The testimony of the other witnesses confirmed that Mr. Wagner had drafted and signed the Stipulation of his own volition.

Greenberg's instance and that there had been "no arguing about it."

When called to the stand by proponent, Ms. Sears could not recall any discussion, whether positive or negative, about Mr. Greenberg's request that the motion's withdrawal be "with prejudice." She testified, however, that such phrase was added to the instrument after it had been circulated among counsel, whether before or after any of them had signed it.

When called as proponent's next witness, Ms. Koryakin testified that she saw Mr. Wagner sign the instrument after the phrase "with prejudice" had been added. On cross-examination, however, she conceded that she could not be certain on that point.


Finally, Mr. Greenberg took the stand in support of proponent. On direct, he asserted that he had added the phrase "with prejudice" in the draft before it was signed by anyone. On cross-examination, he did not waver as to that.

Findings of Fact and Conclusions of Law

As noted at the outset, the hearing was held to determine a central factual question, *i.e.*, whether the Stipulation had contained the phrase "with prejudice" at the time it was signed by counsel. With the exception of Mr. Wagner and Mr. Greenberg, the witnesses either were unable to describe the event with such specificity or were somewhat equivocal, although all were consistent on the point that a phrase had been requested and added to the instrument, in the presence of all counsel, after its initial drafting by Mr. Wagner. Mr. Wagner for his part spoke with certainty of at least two things: first, that the instrument did not contain the phrase "with prejudice" at the time that he signed it; second, that Mr. Greenberg had asked that the withdrawal of the motion for more time to file objections be "without prejudice." The implausibility of the second proposition is enough to discredit Mr. Wagner's recollection of the

occasion. By contrast, there is nothing to discredit Mr. Greenberg's testimony, and I find, based upon it, that the instrument provided for withdrawal of the motion for an extension of time to file objections with prejudice before the Stipulation was signed by anyone, Mr. Wagner included. Accordingly, Mr. Wagner's client, and now the administrator of the client's estate, is, under basic contract law, bound by the terms of the Stipulation that he signed.

This decision constitutes the order of the court.


SURROGATE

Dated: March 17, 2011