

Matter of Lynch

2012 NY Slip Op 32160(U)

July 24, 2012

Sur Ct, Nassau County

Docket Number: 2010-362129/A

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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The Construction Proceeding of the Will of

File No. 2010-362129/A

KENNETH D. LYNCH,
a/k/a KENNETH LYNCH,

Dec. No. 28010

Deceased.
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In this proceeding, the respondents, Keith Lynch, the executor of the estate of Kenneth Lynch, and Gary Lynch, move for an order pursuant to CPLR 3211 dismissing the petition of Karen Cullin for construction of the will of the decedent on the grounds that it fails to state a cause of action and is barred by *res judicata*, and seek the imposition of costs and sanctions upon Karen Cullin pursuant to 11 NYCRR 130-1.1. The motion is granted, to the extent set forth herein.

Background

The decedent, Kenneth Lynch, died on July 7, 2010, survived by his three children: the respondents, Keith Lynch and Gary Lynch, and the petitioner, Karen Cullin. The last will and testament of the decedent, dated May 5, 2003, was offered for probate by Keith Lynch. The will makes no provision for Karen Cullin and recites that any share of the decedent's estate to which she would be entitled should be disposed of as if she had not survived the decedent. Preliminary letters testamentary issued to Keith Lynch on September 10, 2010.

Karen Cullin filed objections to probate alleging that: (1) on May 5, 2003, the decedent was not of sound mind or memory and was not mentally capable of making a will; (2) that the propounded instrument was not freely or voluntarily made or executed by the decedent, but was procured by duress or undue influence practiced upon the decedent; (3) that the

propounded instrument was not freely or voluntarily made or executed by the decedent, but was procured by fraud practiced upon the decedent; and (4) that the propounded instrument was not duly executed by the decedent.

Keith Lynch moved for summary judgment dismissing Karen Cullin's objections to probate of the propounded instrument; that motion was granted by this court in a decision dated August 5, 2011 (Dec. No. 27462). The will was admitted to probate by decree dated September 9, 2011; letters testamentary issued to Keith Lynch that same date.

Karen Cullin thereafter filed a petition seeking construction of Paragraph Fifth of the decedent's will. The respondents, Keith Lynch and Gary Lynch, move to dismiss the petition for construction of the will for failure to state a cause of action and as being barred by *res judicata*.

Analysis

CPLR 3211 (a) (7) provides that a party may move for judgment dismissing one or more causes of action against him on the ground that the pleading fails to state a cause of action. In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts alleged in the petition to be true, afford the petition a liberal construction, accord the petitioner the benefit of every possible favorable inference, and determine only whether the facts alleged fit any cognizable legal theory (*Henderson v Kingsbrook Jewish Med. Ctr.*, 91 AD3d 720 [2d Dept 2012]).

Even applying this lenient standard to the subject petition for construction of the decedent's will and according the petitioner the benefit of every possible inference, the petition fails to state a cause of action and should be dismissed. A construction of a will or any portion thereof is unnecessary where the language of the will is otherwise clear and unambiguous (*Matter*

of Tomson, 75 Misc 2d 687 [Sur Ct, Erie County 1973]).

Paragraph Fourth of the decedent's will provides that:

“B. I make no provision for my daughter, Karen Cullin. In no event shall she be entitled to receive any part of my estate pursuant to the provisions of this Will or as an intestate distribution. In any and all events, my property shall be disposed of as if my said daughter had not survived me.”

Paragraph Fourth of the decedent's will makes it abundantly clear that the decedent did not want the petitioner to inherit any part of his estate. This intention is reinforced by the language of Paragraph Fifth of the will which provides that:

“A. I give, devise and bequeath all the rest, residue and remainder of my estate, whether the same be real property, personal property, or otherwise, wherever it may be situated, which I may own, possess or be in any other way interested at the time of my death, to my issue, per stirpes, provided that any share of my estate to which my daughter, Karen Cullin, would be entitled under this provision shall be disposed of as if my said daughter had not survived me.”

Karen Cullin's petition alleges that construction of the fifth paragraph of the decedent's will is necessary because “the ordinary and natural meaning of the word issue is children, not grandchildren” and that EPTL 1-2.14, which defines the term per stirpes, does not give the decedent the option of treating her as having predeceased him. However, in making this argument, the petitioner completely ignores the definition of issue contained in EPTL 1-2.10 (a)

(1), which provides that unless a contrary intention is indicated, issue are the descendants in any degree from a common ancestor. Moreover, the definition of per stirpes contained in EPTL 1-2.14 contains no proscription against disinheriting the petitioner by treating her as predeceased.

The best indicator of the decedent's intent is found in the clear and unambiguous language of the will itself (*Matter of Scale*, 38 AD3d 983 [3d Dept 2007]; *Matter of Borrometi*, 238 AD2d 416 [2d Dept 1997]). The language of the decedent's will is clear on its face and the intent of the decedent to disinherit the petitioner may easily be gleaned without recourse to the rules of construction. Accordingly, the petition for construction of the will is dismissed for failure to state a cause of action.

In light of this court's dismissal of the petition for failure to state a cause of action, the court need not reach the respondents' argument that the proceeding should also be dismissed on the ground of *res judicata*. However, the court would note that the court's previous determination granting summary judgment dismissing the petitioner's objections to probate of the will did not pass upon the issues raised by the petitioner's construction proceeding. Accordingly, there would be no *res judicata* effect.

To the extent the papers in support of and in opposition to this motion make reference to the petitioner's claim against the estate based upon a loan she purportedly made to the decedent, such claim is not the subject of this construction proceeding, but is the subject of a separate proceeding to determine the validity of that claim (File No. 2010-362129/B), and is therefore not addressed in this decision.

So much of the respondents' motion as seeks the imposition of costs and sanctions against

the petitioner is denied.

This constitutes the decision and order of the court.

Dated: July 24, 2012

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