

Matter of Luk

2012 NY Slip Op 33018(U)

December 17, 2012

Sur Ct, Nassau County

Docket Number: 2011-365260/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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In the Matter of the Estate of

File No. 2011-365260/A

NANCY LUK,
a/k/a NANCY L. LUK,
NANCY LEE LUK,
NANCY LEE,
LEE LAI CHING,
LEE LAI CHING NANCY,

Dec. No. 28322

Deceased.

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This is an application pursuant to SCPA 1804 to retain estate assets. The petitioner is Dennis Luk, the brother of the decedent. The application is opposed by Chun Ka Luk, Bernice Luk and Albert Luk, the husband and children of the decedent.

The decedent, Nancy Luk, died intestate on April 29, 2011. She was survived by her husband, Chun Ka Luk, and two children, Bernice Luk and Albert Luk. Chun Ka Luk was appointed administrator of his wife's estate on May 27, 2011. The value of the estate is estimated to be approximately sixty-three million dollars (\$63,000,000). The administrator has posted a bond in the amount of \$15,495,000.00.

Prior to her death, the decedent was a defendant in a lawsuit in Supreme Court, New York County. Dennis Luk, the petitioner herein, is a plaintiff in that proceeding. Dennis Luk alleges that he is a shareholder in three different companies which are companies established in 1973 by his parents. Mr. Luk alleges that his sister, also a shareholder in the companies, was responsible for the daily operations and management of the companies as she resided in New York. According to Mr. Luk, various properties that were part of the companies were unlawfully transferred and/or encumbered by the decedent. Mr. Luk asserts that the value of the properties,

many of which are located in New York City, and the lost profits thereon, are in excess of fifty million dollars (\$50,000,000). He is asking the court to order Chun Ka Luk, as administrator of the estate, to reserve the full amount of the estate assets.

The decedent filed an answer to the complaint in the Supreme Court action and alleged that the transfers were valid gifts to her from her parents. Specifically, the decedent alleged that her parents overtly expressed their intent to give all of their ownership interests in the companies to the decedent by oral statements and by their subsequent conduct in placing control of the companies with the decedent.

Upon the application of a person holding a contingent or unliquidated claim, the court may fix an amount to be reserved by the fiduciary (SCPA 1804[1]). The court, in considering the application, shall examine the following factors: the merits of the case; whether the claimant will be able to pursue estate assets if no reserve is established; the percentage of estate assets for which reservation is sought; the needs of the beneficiaries and any other facts the court deems probative (*Matter of Biel*, 103 AD2d 287, 294 [2d Dept 1984]). The court must also consider how long the assets should be restrained and the length of time which has passed between the accrual of the cause of action and the commencement of the lawsuit and the diligence with which the cause of action has been prosecuted and the position of the case on the trial calendar (*id*). In determining the amount and duration of the retention, a Surrogate has extensive discretion “based upon a thoughtful evaluation of all pertinent criteria” (*id*).

The underlying proceeding was commenced in 2003 in the Supreme Court, New York County. Motions were made and decided over the years, the defendant died and a compliance conference order was issued which directed that the note of issue be filed by July 20, 2012.

There is also a discovery proceeding pending in both Surrogate's Court, Queens County, and Surrogate's Court, Nassau County, commenced by the ancillary administrators of the decedent's parents.

The respondents argue in opposition to this application the following: the petitioner lacks standing; there are adequate protections in place in that a notice of pendency has been filed with regard to the properties; the petitioner has failed to show a likelihood of success on the merits; and the court lacks jurisdiction to order the reservation of assets located outside of the United States.

In a proceeding to reserve assets, a claimant may file an affidavit which shows the facts upon which the contingent or unliquidated claim is based (SCPA 1804[1]). A claimant, in turn, is someone who asserts a right or demand to any right to payment or to an equitable remedy, even if contingent or provisional (Black's Law Dictionary, 240-241 [7th ed]). Clearly, the petitioner is a claimant within the meaning of SCPA 1804.

In making a determination regarding the reservation of assets, the court must consider a number of factors. First, the court must consider the merits of the claim. In the instant proceeding, the decedent claimed title to the companies as the recipient of a gift from her parents. The burden is upon the estate to prove every element of a gift (*Matter of Kaminsky*, 17 AD2d 690 [3d Dept 1962]), including intent on the part of the donor to give, delivery of the property and acceptance (*Matter of Szabo*, 10 NY2d 94, 97 [1961]). The donor must divest him or herself of all title and right thereto to the property; there must be a change in dominion and ownership (*id*). The question of whether a gift was made, in the experience of this court, is often difficult. The burden upon the donee to prove a gift, when the donors are both deceased, is great.

In light of the ambiguity set forth regarding the alleged transfer of the companies, the fact that the companies were family owned and shares were originally issued to family members, the omission of documents from the parents and/or family members regarding the transfer of the properties, leads this court to conclude that there is merit to the underlying proceeding.

The court must secondly consider the difficulty in pursuing estate assets if no reserve is ordered. In this proceeding, the two children of the decedent have renounced and disclaimed their interest in their mother's estate. As such, the estate assets will all go to the respondent.

Third, the court must consider the percentage of the estate for which reservation is sought. The petitioner has asked that the entire sixty-three million dollars be reserved. The petitioner, however, is only seeking damages in the amount of fifty-one million dollars. Clearly, the petitioner would only be entitled to reserve the amount that he is claiming and not more.

Fourth, the court must consider the needs of the beneficiaries. There has been nothing filed to show that there are any outstanding needs of any beneficiaries.

Although the respondent argues that the notice of pendency obviates the need for the reservation of estate assets, the court disagrees. The purpose of a lis pendens is to provide constructive notice so that any person who records a conveyance or encumbrance after the filing becomes bound by all of the proceedings taken in the action (75A NY Jur, Lis Pendens §1). As such, the lis pendens only provides the protection of notice and does not provide for funds to satisfy a judgment.

Finally, the respondent argues that the court lacks jurisdiction to order the reservation of assets located in Hong Kong. As these assets are apparently still in Hong Kong and are part of estate assets belonging to the decedent's parents, the court does not need to address this issue.

The court can only order the reservation of assets that belong to the estate of Nancy Luk and are in the possession of the fiduciary.

Considering all of the factors as set forth above, the court, in its discretion, directs the fiduciary to hold \$51,000,000.00 in reserve. The assets are reserved, however, after considering the factors outlined in *Matter of Biel* (103 AD2d 287, 294 [2d Dept 1984]), for a period of one year from the date of this order.

The remaining contentions of the respondent are without merit.

This constitutes the decision and order of the court.

Dated: December 17, 2012

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