

Matter of Hong v Hong
2013 NY Slip Op 32164(U)
July 24, 2013
Supreme Court, Queens County
Docket Number: 2540/13
Judge: Timothy Dufficy
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Short Form Order**NEW YORK SUPREME COURT - QUEENS COUNTY****PRESENT: HON. TIMOTHY J. DUFFICY****PART 35****Justice**

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In The matter of the Application of

**WILLIAM HONG, on behalf of
WILLIAM HONG and SHAU YING HONG,
under Power of Attorney,**

Plaintiffs,**Index No.: 2540/13****Mot. Date: 5/3/13****-against-****Mot. Cal. No. 45****Mot. Seq. 1****PETER HONG,****Defendant.**

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The following papers numbered 1 to 23 read on this special proceeding by petitioners William Hong on behalf of himself and on behalf of Shau Ying Hong pursuant to a power of attorney for an order directing respondent Peter Hong (1) to formally account to petitioners in connection with the account activities of the Oppenheimer account or any prior or successor accounts containing the assets of Shau Ying Hong; (2) directing restitution of all assets, real, personal and mixed of Shau Ying Hong under the control of respondent, and deem said assets to be held in constructive trust for the benefit of the children of Shau Ying Hong; (3) granting petitioners' counsel leave to create a trust for all of the assets, real, personal and mixed of Shau Ying Hong that were improperly invested, applied or withdrawn by respondent; (4) directing respondent to assign William Hong as new trustee and Jimmy Hong, as alternative trustee, to manage the assets of Shau Ying Hong, including but not limited to the Oppenheimer account and/ or the newly formed trust account; and (5) directing respondent Peter Hong to transfer ownership of a cooperative apartment to the trust account. Respondent Peter Hong cross moves for an order (1) dismissing the petition on the grounds that the petition and supporting affidavit of William Hong are not verified in conformity with CPLR 2309 (c) , and unsupported by the required proof; (2) and in the alternative, for an order converting this special proceeding to an action pursuant to CPLR 103(b) and (c); (3) declaring that the power of attorney dated January 19, 2013 is invalid on the grounds of lack of capacity, or that it was procured by duress, fraud or undue influence; (4) denying the requests for an accounting and a constructive trust as a matter of law; (5) dismissing the petition on the grounds of statute of limitations: (6) that the petitioner

failed to join necessary and indispensable parties, pursuant to CPLR 1001(a) and 3211 (10); and ordering that the record of this action be permanently expunged from respondent's professional U4 record.

	<u>Papers Numbered</u>
Notice of Petition-Petition-Affirmation-Affidavit-Exhibits	1-6
Notice of Cross Motion-Affidavits-Exhibits.....	7-11
Reply Affidavit-Exhibits.....	12-16
Affirmation in Opposition to Cross-Motions-Exhibits.....	17-23
Memorandum of Law.....	
Memorandum of Law.....	
Reply Memorandum of Law.....	

Upon the foregoing papers the motion and cross motion are determined as follows:

This is an inter-family dispute. Shau Ying Hong and her husband Ah Tung Hong, now deceased, emigrated to the United States from China in 1956. The Hong's four children Peter, Jimmy, William, and Judy are all adults. William resides in Delaware, and Peter resides in Queens County. Mrs. Hong is now 89 year old. Her native language is Shanghainese, a Wu Chinese dialect, and she speaks English. Jimmy and Judy are not parties to this proceeding.

Petitioner William Hong, individually and on behalf of his mother Shau Ying Hong commenced this special proceeding against, respondent Peter Hong on February 7, 2013. The court's record's establish that petitioners served the respondent with copy of the notice of petition, petition, and supporting papers on February 11, 2013, pursuant to CPLR 308(a). Respondent served his cross motion to dismiss the petition on March 11, 2013.

The petition, dated February 5, 2013, alleges that in 1998, Mrs. Hong held approximately \$400,000.00 in a savings account certificate of deposit; that Peter, a financial advisor working as an agent for Oppenheimer Funds and employed by American Portfolios Financial Services, Inc., persuaded Mrs. Hong to transfer all of her assets to his control as a financial advisor; that Mrs. Hong entrusted Peter to create a trust account to manage her assets with the understanding that upon her death her assets would be distributed equally to William, Peter, Jimmy and Judy; that in 1998 Peter established a brokerage account with Oppenheimer Funds naming Peter, William and Judy as tenant in common account holders, in violation of their mother's instructions; that in 2000, Mrs. Hong became suspicious of the

Oppenheimer account and requested statements from Peter, and that he subsequently produced statements from January 2009 to March 2009, reflecting a balance of approximately \$275,000.00. It is alleged that the principal balance decreased from approximately \$400,000.00 to \$275,000.00 without explanation; that “upon inquiry” Oppenheimer informed William that Peter had been withdrawing income generated by the assets in said account; that Peter has misappropriated funds from the account in violation of his fiduciary duties to Mrs. Hong and William, and their siblings; that Peter violated his fiduciary duty to Mrs. Hong by creating the tenant in common account instead of a trust account for all four siblings with Mrs. Hong as settlor; and that in March 2009 William demanded that Peter provide an accounting with respect to the Oppenheimer account and to reimburse all funds withdrawn from said account, and that no accounting was forthcoming. It is further alleged that Peter persuaded his mother to transfer title and ownership of her cooperative apartment to himself without an equal conveyance to his siblings in accordance with his mother’s express desires, and that Mrs. Hong intended that all four of her children have equal shares in the cooperative apartment upon her death.

Petitioners seek an order directing Peter to formally account for his activity in connection with the Oppenheimer account or any other prior or successor account containing the assets of Mrs. Hong; an order directing the restitution of all assets, real, personal and mixed of Mrs. Hong under Peter’s control and that such assets be deemed to be held in constructive trust for the benefit of Mrs. Hong; granting petitioners’ counsel leave to create a trust for all such assets of Mrs. Hong that were improperly invested, applied or withdrawn by Peter; directing Peter to assign to William as new trustee and Jimmy as alternative trustee to manage the assets of Mrs. Hong; and directing Peter to transfer ownership of the cooperative apartment to the trust account.

Proper procedure requires that these claims be prosecuted in a plenary action and not in a special proceeding. Therefore, that branch of the cross motion which seeks to convert the petition to a plenary action is granted. The petition shall be referred to herein as the complaint and the parties shall be referred to as plaintiffs and defendant, and the caption shall be amended accordingly.

To the extent that counsel for plaintiffs, in his memorandum of law, requests that the court treat the cross motion as a motion for summary judgment, and grant relief in plaintiffs’

favor on the claim for an accounting, pursuant to CPLR 3211(c), this request is denied.

The complaint herein is executed by counsel for petitioners, but is not verified by counsel. Accompanying the complaint is a verification, dated February 6, 2013, and an affidavit, dated February 6, 2013, executed by William Hong in Delaware. No certificates of conformity are included in the papers accompanying the complaint.

CPLR 2309(c) provides that “[a]n oath or affirmation taken without the state will be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation”. The submission of document that is signed and sworn to before a notary outside of New York State which is not accompanied by a certification in accordance with CPLR 2309(c), is not a fatal defect, where the defendant has not been prejudiced (*see Matos v Salem Truck Leasing*, 103 AD3d 916 [2013]; *Matter of Recovery of Judgment, LLC v Warren*, 91 AD3d 656, 657 [2d Dept 2012]), *leave to appeal dismissed* 19 NY3d 834 [2012]; *Rivers v Birnbaum*, 102 AD3d 26, 44[2d Dept 2012]; *Bey v Neuman*, 100 AD3d 581, 582 [2d Dept 2012]; *Matter of Recovery of Judgment, LLC v Warren*, 91 AD3d 656, 657 [2d Dept 2012]; *Betz v Daniel Conti, Inc.*, 69 AD3d 545 [2d Dept 2010]; *see also* CPLR 2001).

William Hong has submitted affidavits that were executed and sworn to before a notary in Delaware, and has not submitted a certificate of conformity as compliance with CPLR 2309(c). Defendant, however, has not established that he has suffered actual prejudice due to lack of a certificate of conformity.

CPLR 3022 provides that “[a] defectively verified pleading shall be treated as an unverified pleading. Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do.” This defect is waived unless the adverse party exercises due diligence in giving notice. (CPLR §3022; *Matter Of Miller v Bd. Of Assessors*, 91 NY2d 82 [1997]; *Matter of Morse v Brozzo*, 94 AD3d 1184 [3rd Dept 2012]; *SLG Graybar, LLC v Hannaway Law Offices*, 182 Misc 2d 217, 219 [Civil Ct., NY Co. 1999]).

Although the Court of Appeals has declined to identify the period of time in which “due diligence” must be exercised, (*Matter of Miller, supra*, 91 NY2d at 86), some courts

have held that a notice that the petition will be treated as a nullity must be given within 24 hours (*Lentlie v Egan*, 94 AD2d 839, 840 [3d Dept 1983]; *O'Neil v Kasler*, 53 AD3d 310 [4th Dept 1976]; *Jewel of Asia, Inc. v Unique Affairs*, 18 Misc 3d 1110[A] [Justice Ct., Town of Ossining 2007]), while other courts have made the determination based on the circumstances of the case(see *Theodoridis v American Transit Ins. Co.*, 210 AD2d 397, 397 [2d Dept 1994]); *Price v State of NY*, 2003 NY Slip Op 51086[U], 2003 NY Misc. LEXIS 893 (Court of Claims, 2003) .

Defendant Peter Hong did not notify plaintiffs' counsel of his objections to the verification and lack of a certificate of conformity until he served the within cross motion, approximately one month after he was served with process. Defendant, thus, waived his objection to the lack of verification of the complaint, as he failed to raise his objections with the requisite "due diligence". In addition, as no substantial right has been prejudiced, the defect shall be disregarded (CPLR 3022; see *Matter of Miller v Board of Assessors*, 91 NY2d at 87 ; *Matter of Engels v Town of Parishville, Records Assessor Officer*, 86 AD3d 889, 889 [2011]; *SLG Graybar v Hannaway Law Offs.*, 182 Misc 2d at 219-221; Siegel, NY Prac § 235 [5th ed]).

The court further notes that plaintiffs' counsel, in opposition to the cross motion, has submitted an attorney's verification, pursuant to CPLR 3020(d), thereby curing the asserted verification defect. Contrary to defendant's assertions said verification is not defective. Mrs. Hong only appears in this action through her agent, William Hong, and therefore she is not an appropriate person to verify, despite the fact that she resides within the county. As William Hong does not reside within Queens County, his attorney may verify the pleading, in accordance with CPLR 3020(d).

That branch of respondent's cross motion which seeks to dismiss the complaint on the grounds of defective verification and the failure to submit a certificate of conformity, therefore, is denied.

Defendant asserts that the power of attorney is invalid as Mrs. Hong lacked the capacity to execute it on January 19, 2013, and that it was procured by manipulation, fraud and deceit. A power of attorney is valid when the principal signs and initials the short form durable power of attorney form, in conformity with General Obligations Law §§5-1501B and 5-1513, her signature is duly acknowledged by a notary, and the principal has the capacity

to execute the power of attorney. General Obligations Law §5-1501 (2)(c) defines “capacity” as the “ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in the power of attorney, or the authority of any person to act as agent under a power of attorney.”

The competence of a contracting party “is presumed and the party asserting incapacity bears the burden of proving incompetence” (*Feiden v Feiden*, 151 AD2d 889, 890 [3d Dept 1989]). The fact that a contracting party is suffering from a neurological disease, impairment, or disorder such as Alzheimer's disease, dementia, or organic brain syndrome is insufficient to prove that the party lacked the capacity to enter into the contract. Rather, it must be demonstrated that, because of the affliction, the individual was incompetent at the time of the challenged transaction (*see Matter of Lee*, 294 AD2d 366, 367 [2d Dept 2002]; *Gala v Magarinos*, 245 AD2d 336 [2d Dept 1997]; *see also Matter of Mildred M.J.*, 43 AD3d 1391 [4th Dept 2007]). An individual is only deemed to be incompetent to authorize a transaction if his or her mind was so affected as to render him or her wholly and absolutely incompetent to comprehend and understand the nature of the transaction (*see Whitehead v Town House Equities, Ltd.*, 8 AD3d 367, 369 [2d Dept 2004]; *Gala v Magarinos*, 245 AD2d at 336; *Matter of Mildred M.J.*, 43 AD3d at 1391; *Feiden v Feiden*, 151 AD2d at 890).

Shau Ying Hong executed and initialed a statutory short form durable power of attorney, appointing her son William Hong as her agent, on January 19, 2013, and it was notarized by counsel for the plaintiffs, James Siegel. Said execution occurred at a lunch at a restaurant attended by Mrs. Hong, her son William, James Siegel and Larry Leung, an attorney who is also “of counsel” to Siegel’s law firm. The within action was commenced 19 days later and Shau Ying Hong is described in the complaint as being 89 years old and in “feeble health”. Mr. Siegel in an affirmation submitted in support of the complaint, states that Mrs. Hong’s “age and feeble health condition hinders her participation in this Petition [complaint]”.

Defendant Peter Hong asserts that at the time the power of attorney was executed on January 19, 2013, Mrs. Hong had been diagnosed as having advanced Alzheimer’s disease. He states in his affidavit that his mother Shau Ying Hong was diagnosed with early Alzheimer’s disease in 2006 by her primary care doctor; that she currently suffers from advanced dementia and Alzheimer’s disease; that this diagnosis was confirmed as recently

as January 4, 2013 by a Board certified geriatrician; and that his brother William has been aware of this diagnosis for some time.

Peter Hong further states that upon receipt of the pleadings, which included a copy of the power of attorney, he spoke with his mother and that she did not recall signing the power of attorney, or any other papers, on January 19, 2013. He stated that when he showed her the power of attorney, she told him that William told her he wanted to take her out to lunch; that there was another man at the restaurant who she thought was William's friend; and that she thought William asked her to sign something and did so because William asked her.

Defendant has submitted a copy of his mother's undated health care proxy, appointing his sister Judy Chin-Bock as her health care agent, and himself as the alternative agent; signed progress notes from Mrs. Hong's primary care physician, Dr. George Lum dated November 15, 2012, which includes in an assessment of "Alzheimer's disease" and refers to medications previously taken to treat Alzheimer's disease. Defendant has also submitted a copy of a letter, dated March 6, 2013, from Dr. Gisele Wolf-Klein, director of Geriatric Education at Long Island Jewish Medical Center, who stated, among other things, that she had examined Mrs. Hong on January 4, 2013, and that Mrs. Hong's score of 8 out of 30 on a MMSE (mini mental state exam) supported the diagnosis of severe Alzheimer's disease. Dr. Wolf-Klein stated that Mrs. Hong had first been diagnosed by Dr. Lum in 2006 with advanced dementia, Alzheimer's disease; that she was treated with medications; and that her memory loss had worsened over the last six months and that she now needed assistance in all activities of daily living, including dressing, bathing and toileting.

Judy Chin-Bock, a non-party, states in her affidavit that for the past ten years she assumed primary responsibility for her mother's medical needs and accompanies her on all medical appointments; that Dr. Lum has treated her mother since 1994, and that at present she has medical visits every three months; that her mother was diagnosed with early Alzheimer's disease by Dr. Lum in 2006, and that she was previously prescribed certain medications; that she has reported and discussed her mother's diagnosis with all of her brothers, and periodically provide them with updates as to her condition; that after Dr. Lum discussed the health care proxy with her mother on November 15, 2012, Mrs. Hong executed the health care proxy; that her mother's short term and long term memory are extremely poor

at this stage and has deteriorated rapidly in the past six months and that she needs help in all activities of daily living. Ms. Chin-Bock states that prior to her mother breaking her hip on February 4, 2013, she attended adult day care Monday through Friday from 9:00 AM to 2:00 PM, and is then supervised by someone from Visiting Nurse Service from approximately 2:30 PM to 7:30 PM on weekdays, and from 10:00 AM to 6PM on weekends. She states that since August 2012, she and Peter have paid two individuals to stay with their mother overnight in her apartment on a rotating basis, from 7:00 PM to 9:00AM, as her mother cannot be left alone.

William Hong, in his opposing affidavit, does not assert that his mother had the capacity to execute the power of attorney on January 19, 2013. Rather, he states that his mother has never been adjudicated incompetent, or have a guardian appointed for her. He states that he did not understand what was said by his mother at the January 19, 2013 luncheon, as Mr. Siegel spoke to her exclusively in Mandarin and Mr. Leung spoke to her exclusively in Cantonese. He states, in essence, that his mother behaved appropriately throughout the lunch; that Siegel showed her a paper with Chinese characters on it; and that she signed the papers produced by Mr. Siegel.

Mr. Leung, states that he is “of counsel” to Mr. Siegel’s law firm; that he was the last to arrive at the January 19, 2013 luncheon; that he has a rudimentary knowledge of Mandarin, and does not speak that language; that Mrs. Hong ate her food and offered him food; and that he spoke with Mrs. Hong in Cantonese. He stated that Mrs. Hong informed him that she was originally from Shanghai and that she spoke a Shanghai dialect; that Siegel produced a paper with Chinese characters typed on it; that Leung had enlarged the Chinese characters in his own handwriting; that Siegel produced the power of attorney and discussed it with Mrs. Hong in Mandarin; that Mrs. Hong and William Hong executed the power of attorney and that Siegel then notarized their signatures.

Jimmy Hong, a non-party, in an affidavit submitted in further support of the cross motion, states his mother has very poor vision; that several years ago she was diagnosed with a tumor behind one eye necessitating the removal of the eye and that she wears a glass eye; and that she has cataracts in her “good” eye, and that she would have difficulty reading standard sized print. Jimmy Hong further states that although plaintiffs seek an order imposing a constructive trust, and naming him as an alternative trustee to manage the subject

assets, including the Oppenheimer account, he does not wish to be appointed a trustee and does not want to be named in the within action.

The court finds that the evidence presented herein raises an issue as to whether Shau Ying Hong had the capacity to execute the power of attorney on January 19, 2013, as defined by General Obligations Law §5-1501(2)(c). A hearing shall be held in this part on September 9, 2013 at 10 A.M. on the issue of Shau Ying Hong's capacity at the time she executed the power of attorney (see Matter of Mildred M.G., 43 AD3d 1391,1392 [4th Dept. 2007]). Both sides must appear on that date and time and be prepared to offer medical testimony. The remainder of defendant's cross motion shall be held in abeyance pending the outcome of said hearing.

Dated: July 24, 2013

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TIMOTHY J. DUFFICY, J.S.C.