

Weisberg

2014 NY Slip Op 30883(U)

April 8, 2014

Surr Ct, New York County

Docket Number: 2012-3470

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

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Administration Proceeding,
Estate of

File No. 2012-3470

CHAIM WEISBERG,

Deceased.

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A N D E R S O N , S .

Competing petitions for administration are pending in the estate of Chaim Weisberg, who died intestate on August 29, 2012, at the age of 46. A petition filed by decedent's sister, Chana Weisberg Berkowitz ("Berkowitz"), as designee of decedent's mother, claims that decedent was unmarried at the time of his death and that his mother is his sole distributee. A cross-petition filed by Jannah Geaney ("Geaney" or "movant") claims that she was legally married to decedent and is therefore his sole distributee. Geaney moves for a summary determination that she is decedent's surviving spouse, a threshold issue for entitlement to letters of administration (SCPA § 1001).

Geaney alleges two separate grounds for her motion: first, that this court is bound by a judicial finding in Family Court that she and decedent were married; and second, that she and decedent were married in an Islamic marriage ceremony on June 21, 2008, which as a matter of law constitutes a legal marriage under New York law. Berkowitz opposes the motion.

As is well-established, the court may grant summary judgment only where it is clear that no material question of fact exists

(*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]); where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied (*Miceli v Purex Corp.*, 84 AD2d 562 [2d Dept 1981]; *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). Movant has the initial burden of making a prima facie case of entitlement to summary judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and, if that is established, the burden shifts to the party opposing summary judgment to lay bare its proofs to demonstrate that there is a material factual question requiring resolution by trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1990]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067-68 [1979]; *Wider v Heritage Maintenance, Inc.*, 14 Misc 3d 963 [Sup Ct NY County 2007]). Mere speculation, conclusory assertions or expressions of hope, however, are insufficient to create a bona fide issue of fact (*Zuckerman v City of New York*, *supra*, at 562).

Prior Family Court proceeding. According to movant, the Honorable Susan Larabee of Family Court, New York County, on February 17, 2012, ruled that she and decedent were married, which is binding on this court. However, the "finding" was made in the context of a family offense proceeding in which movant and decedent sought an order of protection against each other.

Unquestionably, Family Court is endowed with jurisdiction to hear

and determine such applications irrespective of whether the parties are married or not (Family Court Act §§ 812[1][b] and [e]). However, the determination by the Family Court that the parties were married was not a finding on the merits, but rather an administrative action made for the purpose of reassignment of the family offense petition to a referee. The Family Court considered a letter presented by movant's counsel from the president of the Islamic Council of America, Inc., Madina Masjid, stating that the parties had been married in an Islamic ceremony on June 21, 2008. Decedent was not present in the court, and his attorney offered no evidence to the contrary. The Judge by written order referred the matter to a referee for further proceedings. The parties thereafter reconciled and no final determination of the family offense proceedings was rendered.

Two doctrines bind a court to the prior rulings of other courts: *res judicata*, which prevents a second action between the parties on the same claim or cause of action, and *collateral estoppel*, which prevents a party in a prior action from contesting an adverse determination of an issue that was actually litigated (Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 5011.08).¹ Although the doctrines vary in some respects, both require a final determination on the merits, after the parties have had a

¹Other doctrines which have a preclusive effect, such as law of the case or judicial estoppel, have no applicability here.

full and fair opportunity to contest the claim or issue (*id.*). However, neither doctrine applies in this case. The parties did not raise the same cause of action in Family Court as is raised here, nor did they seek determination of their marital status as a necessary element of the relief sought. For an issue to have been preclusively determined, "the issue must have been material to the first action or proceeding and essential to the decision rendered therein" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; see also, e.g., *Church v N.Y. State Thruway Auth.*, 16 AD3d 808 [3d Dept 2005]). The Family Court's inquiry into whether the parties were or were not married was purely incidental to the family offense proceeding, made solely for the purpose of an administrative determination as to the proper assignment of the matter. The decision in Family Court was thus neither a final determination on the merits nor a determination of an issue material to the family offense proceeding after a full and fair opportunity to be heard; as a merely incidental ruling it has no preclusive effect (*Loomis v Loomis*, 288 NY 222 [1942]; *Tcholakian v Tcholakian*, 29 AD2d 848 [1st Dept. 1968]).

Occurrence and validity of marriage. In support of her claim that she is decedent's surviving spouse, movant presents her own purported affidavit. The document, however, lacks a jurat indicating that it was sworn to before a notary public. Thus it is not in admissible form (*Friends of Animals, Inc. V*

Associated Fur Mfrs., Inc., 46 NY2d 1065 [1979]), and is not considered here. An affidavit by the current imam of the Islamic Council of America, Inc., is similarly rejected by the court insofar as it concerns the 2008 marriage ceremony, as it is based solely on information and belief, the source of which is not stated (*South Bay Center, Inc. v Butler, Herrick & Marshall*, 43 Misc. 2d 269 [Sup Ct, Nassau County, 1964]).

Reviewing the admissible evidence submitted, the court finds that it is sufficient to establish that movant and decedent participated in an Islamic marriage ceremony on June 21, 2008, but insufficient to determine as a matter of law that the ceremony constituted a valid marriage under New York law.

The admissible evidence in support of the occurrence of the marriage ceremony consists of the following. Movant presents the affidavit of Mohammed Nasir Uddin, who states that he has served since 2006 as President of the Islamic Council of America, Inc. (Madina Masjid), the second largest mosque in New York City, located at 401 East 11th Street; that on June 21, 2008, he met with Chaim Weisberg and Jannah Geaney at the mosque, where decedent converted to Islam; and that the couple was married by Imam Yousuf Abdul Majid. The affiant states that he, along with others, personally witnessed the marriage ceremony. Movant also submits the transcript of a Family Court hearing on March 23, 2012, before Judge Gloria Sosa-Lintner, where the parties

withdrew their family offense petitions and stated that they wanted to reconcile.² When asked by the Judge if they were married, decedent answered "Well, we are married, yes. Not legally, but we are married.... Religiously married and if the State of New York considers that married so we are legally married." Although this does not prove the existence of a valid marriage between the parties under New York law, it does tend to establish movant's claim that she and decedent participated in the above-described ceremony. In addition, the affidavit of Sadek Ziad, a long-time tenant of decedent's family, states that decedent sought him out in June 2008 for assistance in arranging his marriage to Geaney in an Islamic ceremony without the knowledge of his family; and that Ziad took decedent to the mosque he attended, namely, the Islamic Council of America, Inc. (Madina Masjid), where he introduced decedent to Imam Majid and was present when the imam explained the Islamic wedding ceremony to decedent. Further supporting movant's position that she and decedent considered themselves married is evidence in the form of the affidavit of a nurse who tended to decedent in the hospital, stating that decedent acknowledged movant as his wife. In addition, it is undisputed that decedent's own attorney (whose law firm currently represents Berkowitz) prepared and signed a

²The full transcript of the proceeding, including the certification page, is attached to movant's cross-petition for administration.

divorce complaint for decedent which identified the parties as husband and wife and stated that "[t]o the best of Plaintiff's knowledge, the Plaintiff [i.e., decedent] and Defendant [i.e., movant] were married to each other on June 21, 2008, in City of New York and State of New York, County of New York." It is noted, however, that the divorce complaint was not signed by decedent and was never filed.

Berkowitz does not create an issue of fact to dispute the occurrence of the marriage ceremony between the parties. Indeed, she acknowledges that neither she nor any family member has any personal knowledge of the event, and she avers that she did not even learn of it until informed by decedent in January 2012 that it occurred. Her allegation that any such ceremony would have been occasioned by fraud or trickery, or by decedent's belief that it had no binding effect, is mere speculation which does not create an issue of fact. No issue of fact as to the occurrence of the marriage ceremony is created by evidence that decedent came from an Orthodox Jewish family and retained an interest in and practiced the Jewish religion after the ceremony, nor by evidence that decedent and movant did not reveal to decedent's family that the ceremony had occurred. Berkowitz's attorney's affirmation that the divorce complaint was intended merely to create the illusion of a marriage in order to settle financial affairs between decedent and movant when their relationship was

ending is no more useful on this motion; it does not contradict movant's evidence of the ceremony that occurred at a specific place on a specific date. The same can be said of decedent's reference to movant as his "ex-girl friend," rather than his wife, in papers related to his family offense petition, dated within a few days of the divorce complaint, which is of a piece with his statement before Judge Sosa-Lintner a few weeks later that "we are married, yes. Not legally, but ... [r]eligiously married..."

Although Berkowitz asks for an opportunity to conduct discovery on, *inter alia*, the issue as to whether the marriage ceremony occurred, she does not identify any sources of discovery which would reasonably lead to such evidence (*Ruttura & Sons Constr. Co. v J. Petrocelli Constr.*, 257 AD2d 614 [2d Dept 1999]). The court thus finds that there is no material fact in dispute regarding the occurrence of a marriage ceremony between decedent and movant on June 21, 2008.

The occurrence of the marriage ceremony does not, however, settle the question of whether it constituted a valid marriage under New York law. A religious marriage in New York is valid if conducted in accord with the requirements of New York's Domestic Relations Law. In relevant part, this requires that the couple participate in a religious marriage ceremony, before a member of the clergy authorized to perform such a ceremony and at least one

other witness, in which they solemnly declare that they take each other as husband and wife (DRL §§ 11, 12).³

Movant's proof is deficient in two respects. First, she produces no evidence as to the qualifications of Imam Majid to officiate at a marriage. The person officiating must be a "clergyman or minister" of a bona fide religion (DRL § 11[1]), defined as "a duly authorized pastor, rector, priest, rabbi, and a person having authority from, or in accordance with, the rules and regulations of the governing ecclesiastical body of the denomination or order, if any, to which the church belongs, or otherwise from the church or synagogue to preside over and direct the spiritual affairs of the church or synagogue" (Religious Corporations Law § 2). The authority of clergy can be created by formal religious training or certification (see, e.g., *Persad v Balram*, 187 Misc 2d 711, 714 [Sup Ct, Queens County 2001], where the marriage officiant was a certified Hindu priest) or by customary practice (see, e.g. *Matter of Silverstein*, 190 Misc 745 [Sur Ct, Bronx County 1947]) where the officiant, while accepted by the 25-member congregation as a rabbi, had no official connection to any existing religious movement). Religious bona

³Since marriage is a civil contract, the parties to a religious marriage, like all marriages, must be capable of consent (DRL § 10). Although Berkowitz makes allegations that both decedent and Geaney suffered from some mental problems, she does not allege such lack of capacity on the part of either as would void *ab initio* an otherwise valid marriage.

fides are liberally determined (see, e.g., *Oswald v Oswald*, 107 AD3d 45 [3 Dept. 2013], rejecting earlier cases finding that officiants appointed by the Universal Life Church were not bona fide clergy). In this case, however, the record is completely silent as to the source of the imam's religious authority.

Second, the record does not contain a description of the ceremony sufficient to establish that the parties solemnized the marriage. DRL § 12 is explicit that while "[n]o particular form or ceremony is required ... the parties must solemnly declare in the presence of a clergyman ... and the attending witness or witnesses that they take each other as husband and wife." This solemnization is an essential element of a valid marriage (see, e.g., *Persad v Balram*, 187 Misc 2d 711 [Sup. Ct Queens County 2001]). In the absence of these two elements, movant has failed to make out a prima facie case that the marriage ceremony in which she participated constituted a valid marriage under the law of New York.⁴

In reaching this conclusion, the court rejects Berkowitz's efforts to show that the marriage ceremony was invalid as a matter of Islamic law. Matters of religious doctrine and

⁴The court notes that, despite Berkowitz's arguments to the contrary, neither the absence of a marriage license (DRL §§ 17, 25; *Matter of Farraj*, 72 AD3d 1082 [2d Dept 2010]) nor the failure of the officiant to register as a person authorized to conduct marriages pursuant to DRL § 11-b (*Shamsee v. Shamsee*, 51 AD2d 1028 [2d Dept 1976]), invalidates an otherwise valid marriage.

practice are outside the bounds of civil judicial review. The United States Constitution prohibits the courts from resolving "controversies over religious doctrine and practice" (*Presbyterian Church in U.S. v Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 US 440, 449 [1969]; see also, *Park Slope Jewish Ctr. v Congregation B'nai Jacob*, 90 NY2d 517, 521 [1997]; *Avitzur v. Avitzur*, 58 NY2d 108, 114-15 [1983]). Although courts may apply "a neutral law of general applicability" to disputes concerning religious questions or organizations without offending the Establishment Clause of the First Amendment (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510, 522 [2006]), they cannot violate the doctrine of church autonomy which prohibits judicial involvement with internal church governance, a determination of ecclesiastical questions, or inquiries or analysis of religious doctrine and practice (*Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007]; *Kelley v Garuda*, 36 AD3d 593, 595 [2d Dept 2007]). Accordingly, the court will not consider, in respect to this motion or any further proceedings in this estate, any evidence (such as the affidavit of an alleged expert in Islamic law offered by Berkowitz) that the purported marriage between movant and decedent violated Islamic religious law.

For the reasons stated here, the motion for summary judgment to determine that movant is decedent's wife is denied except to

the extent that it is determined that decedent and movant participated in a marriage ceremony on June 21, 2008. A conference will be scheduled to set a discovery and trial schedule on all remaining issues.

USA

S U R R O G A T E

Dated: April 8, 2014