

Matter of Lukele

2014 NY Slip Op 31777(U)

July 10, 2014

Sur Ct, NY County

Docket Number: 2008-4153/C

Judge: Nora S. Anderson

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New York County Surrogate's Court
DATA ENTRY DEPT.
JUL 10 2014

SURROGATE'S COURT : NEW YORK COUNTY
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Proceeding by Modupi Tsotetsi as
Administrator of the Estate of

File No. ~~2008-4153/C~~

ANDREW LUKELE,

Deceased,

to Discovery Property Withheld.
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A N D E R S O N , S.

This is a motion by respondent Celeste Wenegieme ("Wenegieme") to dismiss a discovery proceeding (SCPA § 2103) in the estate of Andrew Lukele. The proceeding was brought by Modupi Tsotetsi, as administrator d.b.n., against Wenegieme, Tina Iyalla a/k/a Alleyne Sylvester ("Sylvester"), Bayview Loan Servicing LLC as successor to Interbay Funding LLC, and JPMorgan Chase, seeking information about real property located at 215 West 134th Street, New York, NY, including any rental income, and any withdrawals from a bank account in decedent's name at JPMorgan Chase. The fiduciary alleges, on information and belief, that decedent, while a resident in a nursing home and of diminished mental capacity, sold real property (owned by his solely-owned corporation) to respondent Sylvester, who then in effect made a gift of it to her daughter, respondent Wenegieme, who thereafter, acting together, have collected rents for the property. Petitioner further alleges that respondent Bayview Loan Servicing, LLC provided funds for the purchase of the property and holds a mortgage on it. In addition, petitioner seeks information about certain cash withdrawals allegedly made

by someone other than decedent from decedent's bank account at JPMorgan Chase. The court issued an order to attend directed to all respondents, and examinations have not been conducted because discovery has been stayed during the pendency of this motion pursuant to CPLR 3214.

Respondent Wenegieme, pro se, made the instant pre-answer motion to dismiss the petition on grounds she describes as lack of legal standing, lack of merit and lack of proof that the administrator was properly appointed. Although the motion is made without reference to specific provisions of CPLR 3211, movant's affidavit in support of the motion sets out, in substance, her position that Sylvester acquired the real estate from decedent in a bona fide purchase for fair value. She argues that since the property was sold before decedent's death it never became an asset of his estate and the court thus lacks jurisdiction to hear this dispute. In support of her motion, Wenegieme attaches voluminous closing documents which reflect a January 18, 2005 sale of the property by decedent to Sylvester. She also asserts that she has initiated a lawsuit in New York County Supreme Court against the administrator d.b.n. and his attorney for damages on account of statements they made to the tenants of the real property regarding the illegitimacy of Sylvester's ownership.

Dismissal of this proceeding requesting an inquisition under SCPA § 2103 is inappropriate if a basis for the order to

attend can reasonably be inferred from the language of the petition (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582 [2005]; *Residence on Madison Condo. v W.T. Gallagher & Assocs., Inc.*, 271 AD2d 209 [1st Dept 2005]).

A discovery proceeding brought under SCPA 2103 is

"an information-gathering vehicle for a fiduciary attempting to garner information as to potential estate assets. The proceeding can be used for any type of property (even assets that were transferred prior to a decedent's death, SCPA 2103 [1][a]), for any information gathering purpose, even against a non-party to the estate."

Matter of Hendershot, 16 Misc 3d 1125(A) (Sur Ct, Monroe County 2007). The broad purpose of the statute allows the fiduciary to perform his or her duty to identify and marshal estate assets (*Matter of Granowitz*, 150 AD2d 446 [2d Dept 1989]; *Matter of Laflin*, 128 Misc 2d 348 [Sur Ct, Nassau Cty, 1985]). The nature of the proceeding dictates that the petition need only set forth enough information to justify an inquiry ((*Matter of Granowitz*, *supra*; *Matter of Valentin*, NYLJ, Aug. 1, 2005 at 44, col 4 [Sur Ct, Suffolk Cty]; *Matter of Rosenkrantz*, 5 Misc 2d 308 [Sur Ct, Kings Cty 1956])).

The court finds that the record here justifies the requested discovery. Petitioner's allegation that at the time decedent sold the real estate to Sylvester he was "a full time resident at a nursing care facility and with visible symptoms of diminished mental capacity" is sufficient to warrant an inquiry by the fiduciary into the bona fides of the sale; i.e., whether or not

it was unconscionable, and whether or not decedent was subject to undue influence or duress or was incompetent to enter into the transaction. The closing documents for the transaction submitted by respondent do not "establish conclusively that [petitioner] has no [claim or] cause of action" (*Matter of Lawrence*, 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; see also, e.g., *Crane v BPC Mgmt. Corp.*, 90 AD3d 692 [2d Dept 2011]). Indeed, the documents themselves raise questions that invite such an inquiry. For example, it appears that the property was sold for less than the original contract price, and that some of the sales proceeds were paid to respondent Wenegieme, the purchaser's daughter, rather than to the seller. As to the fiduciary's standing, he is clearly entitled to inquire into the matter to satisfy himself as to whether the transaction was proper or not.


Movant also alleges that the appointment of the fiduciary was not supported by an appropriate authorization, and that he thus lacks capacity to bring this proceeding. The court record indicates that letters of administration d.b.n. were issued to Modupi Tsotetsi upon the order of a Surrogate of this court on December 7, 2011, and that they have not been revoked. As a duly appointed fiduciary, Mr. Tsotetsi clearly has authority to bring this proceeding (SCPA §§ 103[21]; 2103).

Finally, respondent references a pending action in another court as a possible ground for dismissal. The pendency of

another action between the same parties for the same cause of action is a permissive ground for dismissal, as it is designed to avoid the harassment and annoyance of a party's having to litigate the same issues in two separate forums (*National Fire Ins. Co. v Hughes*, 189 NY 84 [1907]). However, the pending action must have been initiated before the action for which dismissal is sought. The pending action referenced by movant is one which she initiated *after* this litigation commenced, and it raises claims of defamation and slander against the fiduciary and his attorney which are not raised here. More to the point, the pleadings in the other pending action do not seek the relief sought here, *i.e.*, information gathering about the circumstances of the sale of an asset by decedent and, ultimately, a possible request for turnover of that asset. The other action thus does not provide a basis for dismissal of this proceeding (*Zabel v. Karasik*, 184 AD2d 436 [1st Dept. 1992]).

Accordingly, the motion to dismiss is denied. Petitioner may proceed with examinations pursuant to the order to attend which was previously signed in this matter.

This decision constitutes the order of the court.



S U R R O G A T E

Dated: July 10, 2014