

Matter of Martin
2016 NY Slip Op 30164(U)
January 4, 2016
Surrogates Court, New York County
Docket Number: 1984-5187/G
Judge: Troy K. Webber
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SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Application of
Michael and Roberta Martin as
Successor Co-Trustees of the Trust
under Article EIGHTH AND NINTH of
the Last Will and Testament of

New York County Surrogate's Court

Date: JANUARY 21, 2016

File No. 1984-5187/G

LOUIS BERKOWITZ,

Deceased,

to Enforce a Settlement Agreement
(CPLR § 2104)

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W E B B E R, S.

Cross-motions for summary judgment are pending in this proceeding by Michael and Roberta Martin, successor co-trustees of a trust established under the will of Louis Berkowitz, to enforce a purported settlement agreement. According to the petition, Stuart Martin, a remainder beneficiary, agreed that, in exchange for \$800,000, he would settle all issues in petitioners' accounting proceeding in this court and in a partition action he had commenced in Pennsylvania (Pike County Court of Common Pleas) against petitioner Michael Martin (in his individual capacity) and two others as owners of certain real property located in Pennsylvania (the "Silver Springs Property").

Procedural Background

The undisputed facts are as follow: Louis Berkowitz died on October 30, 1984. By his will, which was admitted to probate in this court, he established a trust under Articles EIGHTH and NINTH for the life income and discretionary principal benefit of

his daughter Ruth Martin with remainder to her two children, Stuart and Michael. After the original trustees either died or resigned, Michael and his wife Roberta were appointed successor co-trustees on June 30, 2008. Ruth died on January 3, 2011, which terminated the trust in favor of Michael and Stuart.

After Ruth's death, Stuart brought proceedings to compel a partial distribution of his share of the trust remainder and to compel an accounting for the trust. Petitioners were ordered 1) to distribute \$500,000 to Stuart, 2) to transfer to Stuart his share of the trust's one-half interest in the Silver Springs Property and 3) to account within 30 days (see *Matter of Berkowitz*, NYLJ, Apr. 10, 2012, at 22, col 4 [Sur Ct, New York County 2012]). On May 7, 2012, petitioners distributed the trust's interest in the Silver Springs Property not only to Stuart but also to Michael (in his individual capacity). Thereafter they sought judicial settlement of their final account for the trust for the period from the date of their appointment, through December 31, 2011.

In the accounting proceeding, Stuart demanded SCPA § 2211 examinations. By that time, Stuart had also commenced the partition action seeking to force a sale of the Silver Springs Property (the "Pennsylvania Action"). In the fall of 2013, after jurisdiction had been completed in the accounting, counsel for petitioners and Stuart exchanged a series of letters discussing a

global settlement of both the accounting and the Pennsylvania Action. Although the record indicates that Michael and the other defendants in the Pennsylvania Action had filed an answer and counterclaims, it appears that only petitioners and Stuart were part of these discussions.

In the first letter, dated October 1, 2013, petitioners proposed to pay Stuart a total of \$655,850 to resolve all outstanding issues in both matters. The settlement amount was calculated as follows: \$415,000 for Stuart's undivided 25% interest in the Silver Springs Property, \$68,938 for his share of improper commissions that petitioners had paid themselves during the accounting period, and \$171,912 for Stuart's 50% interest in the trust's remaining assets held in an account at HSBC.

A week later, Stuart made a counter-proposal in which he stated that he would agree to accept \$868,000 to settle. That amount included the sums in petitioners' settlement proposal, plus 1) \$71,000 in interest on the improper commissions, 2) \$65,000 for purported excess legal fees paid to petitioners' counsel with trust funds, and 3) \$76,000 for Stuart's share of a distribution in 2010 from decedent's estate to the trust, for which petitioners had not accounted, but which was allegedly in the possession of Michael.

On October 16, 2013, petitioners agreed to increase their settlement proposal by almost \$40,000 to \$693,954, an amount that

did not include, among other things, Stuart's share of trust funds omitted from the accounting (\$76,000). Six days later, Stuart responded that he would agree to accept \$825,200 as part of a global settlement calculated as follows: 1) \$415,000 for his 25% interest in the Silver Springs Property, 2) \$68,938 for his share of the commissions at issue, 3) \$171,912,00 for his 50% interest in the HSBC trust account, 4) \$28,104 in interest on the improper commissions, 5) \$65,246 for purported excess legal fees paid to petitioners' counsel and 6) \$76,000 for Stuart's share of the trust funds omitted from the accounting.

Petitioners concede that they did not respond to Stuart's proposal by his stated October 25 deadline and so made a "new offer" on November 12, 2013. On that day they proposed to pay Stuart \$768,042 in settlement of both matters. That amount included \$415,000 for Stuart's 25% interest in the Silver Springs Property plus a \$30,000 purported benefit to Stuart as a result of Michael's waiving a claim for reimbursement of expenses on the Silver Spring's Property. In addition, Stuart would receive the following: 1) \$150,000 for his 50% interest in the HSBC trust account (\$170,000 less a \$20,000 hold back), 2) \$68,938 for the commissions at issue, 3) \$28,104 in interest on those commissions and 4) \$76,000 for Stuart's share of the trust funds omitted from the accounting.

As with petitioners' previous settlement proposals, this

proposal was made "without prejudice" and "for settlement purposes only." Further, although the offer included a breakdown of the \$768,042 total, it did not include any details for effectuating the settlement, such as the timing of the substantial payment to Stuart or the timing and manner in which Stuart's 25% interest in the Silver Springs Property would be transferred to Michael. Nor did the proposal set forth the scope of releases in the Pennsylvania Action and the accounting proceeding, since, among other things, there were other parties to the Pennsylvania Action and petitioners' accounting proceeding covered only the period through December 31, 2011.

The same day, Stuart's New York counsel sent a letter stating: "Our client will accept \$800,000 without any hold backs in full satisfaction of his interest in the Trust and Silver Spring[s]." The letter did not include a breakdown of the \$800,000. Thus, there was no indication as to what portion of the settlement was related to the Pennsylvania Action and what portion was related to the accounting proceeding. Moreover, other than the amount of the settlement, no other material terms were recited. The next day, petitioners accepted in writing Stuart's offer to settle for \$800,000, indicating "[s]ettlement documents to follow."

A week later, counsel for Stuart sent an email to petitioners' counsel asking when she could expect "settlement

papers to review" and asking to see the most recent trust account statement "to confirm the balance." The next day, November 21, 2013, petitioners' counsel sent a draft "Global Settlement Agreement and Release" as well as a "Stipulation of Discontinuance with Prejudice," noting that the instruments had not yet been reviewed by petitioners themselves. Several days later, counsel for Stuart asked that the settlement documents be sent to her in a different format and, again, requested a current trust account statement. That same day, November 25, 2013, petitioners' counsel sent the draft settlement agreement as requested and forwarded a copy of the most recent trust account statement in their possession.

The next day, Stuart's counsel requested back-up documentation for approximately \$80,000 in withdrawals from the trust account for the period January 1 through July 31, 2013. In an email that same day, petitioners' counsel refused to provide the documentation, contending that the matter was "now settled on the terms set forth in [Stuart's] November 12th [2013] offer and our November 13th acceptance." Stuart's counsel responded, stating that there would be no settlement if Stuart could not "confirm that [petitioners] did not misappropriate additional funds from the Trust in 2013."

Stuart's counsel followed up with yet another email the next day (November 27, 2013), advising petitioners that she had also

learned of an additional \$60,000 withdrawal from the trust in April 2012, allegedly for the Silver Springs Property. Since such withdrawal had been made after petitioners had received notice of the court's order directing petitioners to transfer to Stuart his share of the property, Stuart's counsel maintained that the withdrawal constituted another misappropriation of trust funds and indicated that his client was not willing to settle. Petitioners immediately declared that they intended to enforce the settlement.

Shortly thereafter, petitioners commenced the instant proceeding to enforce the purported settlement agreement as against Stuart only, *i.e.*, not the other defendants in the Pennsylvania Action. However, in addition to Stuart and the other parties to the accounting proceeding, petitioners also cited these defendants (the other owners of the Silver Springs Property), neither of whom appeared. Eventually, Stuart moved for summary judgment seeking dismissal of the petition. Michael and Roberta then cross-moved for summary judgment asking the court to enforce the settlement agreement as against Stuart.

Discussion

Stuart contends that the Surrogate's Court lacks subject matter jurisdiction over the proceeding because the Pennsylvania Action is a dispute between living persons, *i.e.*, Stuart, Michael

and the other owners of the Silver Springs Property.¹ Stuart further argues that, even if the court does have jurisdiction, his November 12, 2013 letter and petitioners' November 13, 2013 letter do not constitute an enforceable settlement agreement under CPLR 2104 because, among other things, the letters did not include all material terms and the other owners of the Silver Springs Property were not parties to the purported agreement. Petitioners, for their part, assert that the court does have subject matter jurisdiction over this proceeding and that collectively the above correspondence contains all necessary terms and therefore constitutes an enforceable settlement agreement.

The threshold issue is whether the court has subject matter jurisdiction to determine the validity of the purported settlement agreement. It is well settled that the Surrogate's Court has limited subject matter jurisdiction and possesses only those powers conferred upon it by statute (see *Matter of Wallace*, 239 AD2d 14 [3d Dept 1998]; *Matter of Lainez*, 79 AD2d 78 [2d Dept 1981], *affd* 55 NY2d 657 [1981]; see also SCPA § 201). Although this court's jurisdiction is certainly broad where the

¹ Stuart also argues that the court does not have personal jurisdiction over the other owners of the Silver Springs Property, who are non-domiciliaries. However, the defense of lack of personal jurisdiction is waivable (CPLR 3211[e]) and, in any event, Stuart does not have standing to assert such an argument (see e.g. *Home Savings of America F.A. v Fotios Gkanios*, 233 AD2d 422 [2d Dept 1996]).

controversy relates to the affairs of decedents or where the proceeding pertains to the administration of an estate (see e.g. *Matter of Piccione*, 57 NY2d 278 [1982]), the Surrogate's Court's subject matter jurisdiction does not extend "to independent matters involving controversies between living persons" (*Matter of Lainez*, 79 AD2d at 80, *supra* [citations omitted]).

Clearly, this court has subject matter jurisdiction to determine the validity of a settlement agreement concerning matters over which it also has subject matter jurisdiction (see e.g. *Matter of Albright*, 309 NY 126 [1955]). Thus, as to the trustees' accounting, there can be no dispute that it is within the court's subject matter jurisdiction (see SPCA § 201; SCPA Article 22 [Accountings]). However, the same cannot be said for the Pennsylvania Action. Petitioners, as trustees, are not parties to that action. Nor do they contend that the trust has retained an interest in the property and that, therefore, the relief sought would in any way affect the trust. Indeed, the purported settlement that petitioners seek to enforce would require Stuart to execute a deed transferring his 25% ownership interest in the Silver Springs Property to Michael individually. Thus, the Pennsylvania Action is a classic example of a dispute among living persons over which the court would not have subject matter jurisdiction (see *Matter of Lainez*, 79 AD2d 78, *supra*).

Petitioners argue nonetheless that the court has jurisdiction

to enforce a settlement of the Pennsylvania Action since the ownership interests of Stuart and Michael in the Silver Springs Property were derived from the trust. This argument is without merit. Such argument, taken to its logical conclusion, would confer subject matter jurisdiction to this court over litigation involving any asset that originated in a New York estate or trust, even where, as here, the estate or trust would in no way be affected by the outcome of such dispute.

It should be noted that petitioners cite no relevant authority for the proposition that the court would have subject matter jurisdiction to enforce a settlement of a proceeding/action involving what is clearly a dispute between living persons. Petitioners' reliance on *Matter of Albright* (309 NY 126, *supra*) in support of their position is entirely misplaced. *Albright* involved a dispute over the validity of the settlement of a widow's elective share, a matter squarely within the subject matter jurisdiction of the Surrogate's Court.

Also cited by petitioners is *Matter of Johnson* (142 Misc 2d 388 [Sur Ct, New York County 1988], *aff'd* 145 AD2d 388 [1st Dept 1988]). There, decedent's widow, who was also co-executor under a will admitted to probate in this court, brought a proceeding on the estate's behalf in Florida against decedent's estate planning attorneys seeking, among other things, damages for legal malpractice. The other co-executor and the law firm whose conduct

was at issue obtained from this court an injunction restraining the co-executor from proceeding with the Florida action.

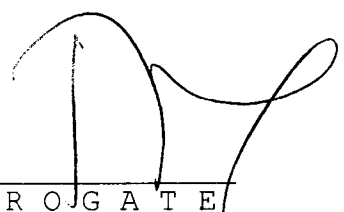
In issuing the injunction, the court did not exercise jurisdiction over the Florida action, as petitioners contend, but rather *enjoined the conduct of a fiduciary duly appointed by this court*. The Surrogate noted that the widow's complaint in Florida proposed to raise certain issues that had already been resolved in the accounting and probate proceedings. Thus, unlike here, the court was acting "to safeguard the finality of its orders and decrees, and insure the orderly administration of the estate" (*id.* at 392).

Based upon the foregoing, the court finds that it lacks subject matter jurisdiction to adjudicate the validity of the purported settlement as it relates to any issue in the Pennsylvania Action. Such a conclusion would not necessarily defeat the petition here, but for the fact that petitioners themselves have cast the settlement of the accounting proceeding and the Pennsylvania Action as inextricably intertwined, *i.e.*, part of a global settlement. Petitioners have failed to allege any basis for enforcement of a settlement in relation solely to the accounting or, for alternative relief. As such, the court cannot adjudicate the merits of the present proceeding without

acting beyond its jurisdictional mandate.² Accordingly, the court is constrained to dismiss the petition.

This decision constitutes the order of the court.

Dated: January 21, 2016



S U R R O G A T E

² Michael commenced this proceeding in his capacity as trustee only. Thus, technically, he does not have standing to seek enforcement of the agreement to the extent it involves the Silver Springs Property as his only interest in that property is as an individual and not trustee.