Matter of Branch
2016 NY Slip Op 31863(U)
October 6, 2016
Surrogate's Court, New York County
Docket Number: 2013-2385/D
Judge: Rita M. Mella

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Petition of Gerald J. Duerr for a Determination that a Revocable Trust Agreement Dated November 6, 2012 by

SANDRA S. BRANCH,

Grantor,

Is Invalid and Ineffective.

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DECISION

File No.: 2013-2385/D

M E L L A, S.:

The following papers were considered in deciding this motion for summary judgment:

PAPERS	NUMBERED
N.Y.S. Attorney General's Amended Notice of Motion for Summary Judgment and Affirmation of Lisa Barbieri, Esq., in Support of Motion with Exhibits 1-13	1,2
Additional Affirmation of Lisa Barbieri, Esq., in Support of Motion, with Exhibit A	3
Affirmation of Paul A. Ast., Esq., and Memorandum of Law in Opposition	4,5
Affirmation of Lisa Barbieri, Esq., and Memorandum of Law in Reply	6,7

The successor trustee of a revocable trust executed in 2006 by Sandra S. Branch has commenced this proceeding in which he challenges the effectiveness and validity of a trust provided for by the terms of an instrument executed by Branch in 2012. In the alternative, petitioner seeks a determination that the 2012 instrument does not in any event revoke the 2006 Trust.

Presently before the court is a motion for summary judgment by the Attorney General of the State of New York, who has appeared in the proceeding on behalf of charitable beneficiaries under the 2006 Trust instrument. The affirmation in support of the motion asks the court to determine the first issue raised by the petition, *i.e.*, whether the 2012 instrument failed, for lack

of funding, to establish an effective trust. The opposition and reply papers, however, address the second and alternative relief sought in the petition, that is, whether the 2006 Trust was effectively revoked by the 2012 instrument creating a new trust.[1] Because the latter issue has been briefed by the parties, this decision determines it (*Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381-382 [1st Dept 2006] [court in its discretion may consider claim offered for first time in responsive papers where offering party's adversary has responded to newly presented claim]).

Background

On October 17, 2006, Branch executed a purported will ("2006 Will") and the 2006 Trust by agreement between Branch as grantor and as trustee. Branch transferred title to her condominium apartment, by far her most valuable asset, to the 2006 Trust within days of its execution. The 2006 Trust provides that, upon Branch's death, the successor trustee is to distribute specific cash gifts to her niece, nephew, and four grandnieces and to distribute the remainder "consistent with [Branch's] philanthropic goals." The 2006 Will pours over all of Branch's estate into the 2006 Trust. In the 2006 Trust instrument, Branch reserved to herself "the right by a written and acknowledged instrument delivered to [her] trustees, to (a) revoke the trust in whole or in part or (b) to amend this indenture." The instrument further provides:

> "Any *amendment* will be effective upon its execution by me in the presence of a notary in a form suitable for recording deeds in the State of New York. . . . I retain the right to appoint any or all of the trust estate to myself, my estate, my creditors or the creditors of my estate by reference to this trust in a will executed on or after the date hereof" (emphasis added).

Six years after executing the 2006 Will and 2006 Trust, on November 6, 2012, Branch

[1]The opposition and reply papers also address whether the 2006 Trust was effectively revoked by the 2012 Will, but, as will be discussed later, that issue is not raised by the parties' pleadings.

allegedly executed a new will ("2012 Will") and the 2012 instrument which purportedly created a new trust ("2012 Trust") by agreement between Branch as "Donor" and as trustee. Under the 2012 Will, specific bequests are made to several individuals (although excluding her niece and nephew), Branch's interest in her condominium apartment is given to a friend, Bonnie Diaz, the respondent herein, and the residuary goes to two charities, one of which is operated by Diaz. There are no provisions in the 2012 Will for any part of the estate to pour over into a trust. The 2012 Trust's provisions disposing of the trust remainder are identical to the dispositive provisions of the 2012 Will. Diaz is nominated as the executor of the 2012 Will and successor trustee of the 2012 Trust.

Approximately four months after allegedly executing the 2012 instruments, Branch died. The 2012 Will was offered for probate by Diaz, who received preliminary letters testamentary. Gerald J. Duerr, the nominated executor of the 2006 Will and successor trustee of the 2006 Trust, filed objections to the probate, alleging that the testator lacked capacity to execute the 2012 Will and was subjected to undue influence and fraud. The Attorney General filed similar objections.

In this proceeding, and in opposition to the instant motion by the Attorney General for a summary determination, Diaz argues that the 2012 Will and/or the 2012 Trust effectively revoked the 2006 Trust, by virtue of their being written and acknowledged instruments executed by Branch that make inconsistent dispositions with respect to the assets owned by the 2006 Trust, in particular, the condominium apartment, title to which was never transferred to the 2012 Trust. In his reply papers, the Attorney General questions the precedential value of the authority upon which Diaz relies and argues that amendments and revocations of trust instruments are governed, since 1997 in New York, by the provisions of EPTL 7-1.16 and 7-1.17, and that the requirements

of those statutes were not complied with here.

Discussion

The Attorney General is correct that, in New York, determinations concerning the scope of authority and the procedure to amend or revoke a trust are governed by the terms of the trust indenture and state law (*see Matter of Goetz*, NYLJ, Aug 2, 2005, at 1, col 1 [Sur Ct, Westchester County]). The statutory provisions addressed by the parties on the instant application, EPTL 7-1.16 and 7-1.17, were enacted in 1997, along with several other sections relating to lifetime trusts (L 1997, ch 139). Prompted by the increased use of lifetime trusts in estate planning, the Legislature recognized that "[s]ome degree of formality helps the parties involved realize the serious nature of the instrument being executed and reduces substantially the potential for foul play" (Senate Introducer Mem in Support, Bill Jacket, 1997 Senate Bill 4223; *Fasano v DiGiacomo*, 49 AD3d 683 [2d Dept 2008]).

Pursuant to EPTL 7-1.17, "[a]ny amendment or revocation authorized by the trust shall be in writing and executed by the person authorized to amend or revoke, and except as otherwise provided in the governing instrument, shall be acknowledged or witnessed in the same manner required [to execute the trust]" (EPTL 7-1.17[b]). In addition, EPTL 7-1.16 provides that a creator of a revocable lifetime trust may revoke or amend such trust "by an express direction in [his or her] will which specifically refers to such . . . trust or a particular provision thereof."

Since the enactment of these sections, case law has consistently held that the terms of the trust instrument must be strictly observed in order to validly amend or revoke a trust (*Matter of Stuart*, 107 AD3d 811, 813 [2d Dept 2013] [amendment ineffective because not made in compliance with terms in subject trust for making such amendment]; *Matter of Rice v Novello*,

25 AD3d 992, 993 [3d Dept 2006] [revocable trust instrument's unambiguous requirement that decedent act for himself in order to amend trust rendered amendment by his agent ineffective]; *Matter of Goetz*, *supra*; *Matter of Perosi v LiGreci*, 98 AD3d 230, 235 [2d Dept 2012]; *Matter of Abrams*, NYLJ, Sept 1, 1999, at 32, col 5 [Sur Ct, New York County] [where trust instrument required that notice of amendment be given, fact that instrument of amendment never left settlor's hand rendered amendment ineffective]). Only where such terms are absent, ambiguous, or vague would the court proceed to construe or interpret the method by which amendment or revocation may be effected (*see, e.g.*, *Matter of Stuart*, 107 AD3d at 812).

Here, the 2006 Trust instrument requires that amendment or revocation be accomplished by delivering to the trustee a written and acknowledged instrument revoking or amending such Trust. It is undisputed that the 2012 Trust instrument does not expressly revoke or amend the 2006 Trust. In fact, it makes no mention of the 2006 Trust.[2]

There is no merit to Diaz's argument that the 2012 Trust (and the identical provisions in the 2012 Will), by disposing of the condominium apartment in a manner inconsistent to the disposition of assets in the 2006 Trust, effectively revoked or amended the latter by implication.

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[2] The parties address at length in their motion papers the effect of the 2012 Will on the 2006 Trust and disposition of the apartment. No relief, however, is requested with respect to the 2012 Will in this petition, and the court will not entertain those arguments, except to note that, similar to the 2012 Trust, the 2012 Will makes no mention of the 2006 Trust, and thus could not be considered an instrument that revokes the 2006 Trust. Additionally, the 2012 Will could not validly amend or revoke the 2006 Trust because it does not contain an "express direction . . . which specifically refers" to the 2006 Trust or a particular provision thereof as required by EPTL 7-1.16. Nor, for a similar reason, could the 2012 Will dispose of assets in the 2006 Trust, under which Branch retained the right "to appoint any or all of the trust estate to . . . [her] estate . . . by reference to this trust in a [subsequently executed] will . . . " — as no such reference is found in the 2012 Will (*see Matter of Goetz*, *supra* [compliance with the method set forth in the trust instrument for amendment is required for an amendment to be effective]).

As previously discussed, the express terms of the 2006 Trust instrument require that any amendment or revocation be effected by a written and acknowledged "instrument" delivered to the trustee (*see generally Matter of Pozarny*, 177 Misc 2d 752, 763 [Sur Ct, Erie County 1998] ["A trust agreement is typically and properly amended by a separate written instrument, signed, dated, and acknowledged by the settlor, which, by its terms, revokes a clearly defined section of the original and sets forth new language to be substituted therefor."]). The case law cited by Diaz for the proposition that evidence of a different intent by the grantor as to the disposition of assets as expressed in a later instrument effectuates a revocation of an earlier trust (*see, e.g.*, *Lambdin v Dantzebecker*, 169 Md 240, 181 A 353, 357 [Ct App Md 1935] [where original revocable trust instrument was silent as to manner of revocation, subsequent declaration of trust containing provisions inconsistent with those contained in original revoked it to extent later declaration was inconsistent]; *Eredics v Chase Manhattan Bank*, 100 NY2d 106 [2003] [determining title to certain Totten trust accounts, which are governed by Part 5 of Article 7 of the Estates, Powers and Trusts Law]; *Merchants Nat'l Bank of Mobile v Cowley*, 265 Ala 125, 89 So 2d 616 [Sup Ct Ala 1956]) either predates the 1997 enactment of EPTL 7-1.16 and 7-1.17 or is not controlling with respect to inter vivos trusts in New York.[3] Here, the 2012 Trust provisions at best reflect Branch's intent to transfer the apartment's title to the 2012 Trust so that it could be disposed of pursuant to those provisions, but such intent, unaccompanied by the act of actually transferring the title, lacks any legal significance.

[3] Further belying Diaz's argument that the 2012 Trust implicitly amended or revoked the 2006 Trust by virtue of making an inconsistent disposition of the condominium apartment is the fact that the terms of the 2006 Trust do no expressly dispose of the apartment, and thus there is no express inconsistency between the two instruments.

Accordingly, the Attorney General's motion for summary judgment is granted to the extent that the court holds that the 2006 Trust was not amended or revoked by the 2012 Trust (*see Matter of Hunt*, NYLJ, Apr 12, 2002, at 1, col 3 [Sur Ct, Queens County] [trust instrument not an amendment of prior trust where it contained no language indicating that it was an amendment of any prior trust]). The other question raised by this motion, whether the 2012 Trust was never funded and is thus invalid, is not decided because it is of no moment for present purposes. The validity of the 2012 Trust has no bearing on whether the instrument creating it properly revoked or amended the 2006 Trust, which is the issue addressed and determined by this decision.

The court notes that whether the apartment is owned by the 2006 Trust at this time is not an issue before the court in this proceeding. Absent pleadings requesting that determination, the court is not free to grant such relief on this record.

This decision constitutes the order of the court. Clerk to notify.

Dated: October 6, 2016

SURROGATE