Matter of Gold
2016 NY Slip Op 32037(U)
July 1, 2016
Surrogate's Court, Nassau County
Docket Number: 2011-367745C
Judge: Margaret C. Reilly
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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In the Matter of the Estate of

GRACE K. GOLD,

Deceased.

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DECISION

File No. 2011-367745C
Dec. Nos. 31341

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion to Dismiss Amended Petition with Exhibits 1
Affidavit of Cheryl Gold in Support of Motion 2
Memorandum of Law in Support of Motion 3
Affidavit of Kenneth Gold in Opposition to Motion 4
Memorandum of Law in Opposition to Motion 5
Reply Affirmation in Support of Motion 6
Reply Memorandum of Law in Support of Motion 7

In this proceeding commenced by Kenneth Gold for the issuance to him of limited letters of administration and an order directing an accounting, the respondents, his sisters Cheryl Gold and Amy Kaufman, have moved the court for an order (1) pursuant to CPLR 3211(a)(7), dismissing the amended petition for failure to state a cause of action; (2) pursuant to CPLR 3211(c), treating the motion as one for summary judgment and dismissing the amended petition; and (3) pursuant to 22 NYCRR §130-1.1, awarding costs against the petitioner and imposing sanctions on the petitioner's attorney. The motion is opposed.

Factual History And Related Proceedings

The decedent, Grace K. Gold, died November 8, 2011, survived by her husband Eugene P. Gold and her three children: Kenneth Gold, Cheryl Gold, and Amy Kaufman. The

decedent's will dated February 4, 2011 was admitted to probate on December 6, 2011 on the filed waivers and consents of Kenneth, Cheryl and Amy and letters testamentary issued on that date to Eugene, the nominated executor. The petition valued the probate estate in excess of $10 million. Article THIRD of the will creates a GST-exempt trust for the lifetime benefit of Eugene. Article FOURTH of the will creates a residuary trust, also for the lifetime benefit of Eugene. Eugene was also granted a testamentary limited power of appointment over the remainder of the two trusts to be exercised only if favor of one or more of Grace's descendants or, if the power was not effectively exercised, the remainder would be payable to Kenneth, Cheryl and Amy, per stirpes. On April 19, 2011, approximately two months after the execution of the will, Grace created a lifetime trust, the Eugene P. Gold Trust, also for the lifetime benefit of Eugene. Eugene was also granted a testamentary limited power of appointment over the remainder of the lifetime trust to be exercised only in favor of one or more of Grace's descendants. The takers in default of the exercise of the power of appointment are Grace's three children, per stirpes.

Eugene P. Gold died November 8, 2013. The petition for the probate of his will was filed in this court on November 19, 2013. After extensive delays and at least 3 days of examination of the attorney-drafter, the probate proceeding for the Estate of Eugene P. Gold remains open. Eugene's will purports to exercise his power of appointment over the remainder of the Eugene P. Gold Trust by directing that it be distributed equally to Amy and Cheryl, to the exclusion of Kenneth. Eugene's will also purports to exercise his power of

appointment over the Article FOURTH residuary trust in Grace's will by directing that $2 million be paid to each of Amy and Cheryl, with the balance to be distributed equally to Kenneth, Cheryl, and Amy.

Although Kenneth was bequeathed all of Eugene's shares in two corporate businesses, he contends the shares are of little value and Eugene's will, particularly the exercise of the powers of appointment over Grace's lifetime trust and the testamentary trusts under her will, leaves a disproportionate share of the family wealth to his two sisters. However, Article EIGHTEENTH of Eugene's will contains a no-contest clause, so an unsuccessful probate contest by Kenneth would result in his having forfeited his interest in Eugene's estate and any remainder interests in the Grace trusts. To date he has not filed objections in the proceeding to probate Eugene's will.

Kenneth contends there was a conspiracy among Eugene, Cheryl, Amy and the attorney-drafter of both Grace and Kenneth's wills to take control of Grace's assets and arrange for the distribution of those assets to his detriment and that the conspirators knew that Eugene had already intended to exercise the powers of appointment primarily in favor of Cheryl and Amy when Kenneth executed his waiver and consent in November 2011 to the probate of Grace's will. In June 2014, two and one-half years after Grace's will was admitted to probate and only after the death of Eugene, Kenneth commenced a proceeding to vacate the decree admitting Grace's will to probate, rescinding his waiver and consent, and permitting him to obtain discovery and file objections to the probate of Grace's will. By

decision dated July 31, 2014, and the order entered thereon on August 14, 2014, the court granted the motion of Cheryl and Amy dismissing Kenneth's petition to vacate.[1] Kenneth's motion for leave to renew from that order was denied in a decision and order of the court.

As indicated above, the petition now before the court is Kenneth's petition for the issuance to him of limited letters of administration in Grace's estate. His petition alleges that on information and belief Grace lacked the mental capacity to execute the Eugene P. Gold Trust on the date it was executed and that Cheryl, as the trustee of that trust and successor co-executor of Grace's estate is not likely to commence a proceeding against herself to vacate the lifetime trust. The amended petition posits that Grace's lack of capacity made her more susceptible to undue influence and adds that Grace lacked the mental capacity to enter into a settlement with IRS on June 27, 2011, resulting in her failure to assert an innocent spouse defense. The amended petition also asserts that the liability to IRS was solely Eugene's and that none of Grace's funds should have been used in the settlement with IRS.[2] The amended petition also seeks to compel an accounting of Cheryl in Grace's estate as the fiduciary of the deceased fiduciary (Eugene) (SCPA §2207) and an accounting by Cheryl and

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[1] After Eugene's death, Cheryl and Amy petitioned for successor letters testamentary in Grace's estate. Although Kenneth was also a nominated successor executor, the court's decision of July 31, 2014 and the decree entered thereon on August 6, 2014, determined that Kenneth had impliedly renounced his right to serve as successor executor. Successor letters testamentary issued to Cheryl and Amy on August 6, 2014. Cheryl is the sole nominated executor in Eugene's will; Amy is the nominated alternate or successor and Kenneth is nominated as alternate or successor in the event that neither Cheryl nor Amy are available to serve.

[2] Cheryl's affidavit in support of the motion to dismiss alleges that none of Grace's funds were used to pay any sums due pursuant to the IRS FBAR Agreement and that Kenneth and his attorney had evidence of this fact in their possession prior to the filing of Kenneth's petition for limited letters.

Amy as successor co-executors of Grace's estate.

The Motion

As indicated above, the respondents Cheryl and Amy now move the court for an order pursuant to CPLR 3211(a)(7) dismissing the amended petition for failure to state a cause of action, pursuant to CPLR 3211(c) treating the motion as one for summary judgment and dismissing the amended petition, and pursuant to 22 NYCRR §130-1.1 awarding costs against the petitioner and imposing sanctions on the petitioner's attorney.

Treating The Motion As One For Summary Judgment

"On a motion to dismiss under to CPLR 3211(a)(7), the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference" (*Simkin v Blank,* 19 NY3d 46, 52 [2012]). Thus, on a motion to dismiss (as opposed to a motion for summary judgment), the case is not in a posture to be decided as a matter of law on the parties' affidavits and where a viable cause of action has been plead, the motion should be denied (*Miglino v Bally Total Fitness of Greater NY, Inc.,* 20 NY3d 342, 351 [2013]). However, this is not so where the parties have charted a course for summary judgment by, e.g., submitting affidavits and evidence in support of and in opposition to the motion.[3] Where the parties have charted a course for summary judgment and no triable issue of fact exists, it is proper for the court to

[3] The court notes that in addition to the affidavits and evidence Kenneth submitted, in opposition to the motion, he has also submitted a document entitled "Petitioner's Memorandum Of Law In Opposition To Motion For Summary Judgment."

determine the branch of motion for summary judgment, even without giving formal notice pursuant to CPLR 3211(c) of its intention to do so (*Sgambelluri v Ironman,* 78 AD3d 924, 925 [2d Dept 2010]; *Cook v Schapiro,* 58 AD3d 664, 665 [2d Dept 2009]). The court also notes that except for a single line in Kenneth's memorandum of law in opposition to the motion, there is no suggestion that discovery is needed to oppose the motion for summary judgment. Even if there were such a suggestion or claim "[a] grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Transit Authority,* 270 AD2d 156, 157 [1st Dept 2000]) and no such evidentiary basis has been offered here. Thus, the court may determine whether or not a triable issue of fact exists regarding Grace's capacity to execute the Eugene P. Gold Trust and the IRS settlement agreement, which is the basis for the petition for the issuance of limited letters of administration.

The Nature Of The Relief Sought

Although not raised by the parties in their submissions, the court notes that the issue of Grace's competence to execute the documents under consideration may have been more properly determined in the anticipated proceeding to set aside the trust instrument, rather than in this proceeding for limited letters for the purpose of bringing that proceeding. However, "the court is empowered in any proceeding, whether or not specifically provided for, to exercise any of the jurisdiction granted to it by this act or other provisions of law,

notwithstanding that the jurisdiction sought to be exercised in the proceeding is or may be exercised in or incidental to a different proceeding" (SCPA §202). In other words, "the court, under its general equitable powers, may directly grant any relief it could grant incidental to another statutory proceeding" (*Matter of Garofalo,* 141 AD2d 899, 901 [3d Dept 1988]; *accord, Matter of Lewis,* 9 Misc3d 1113[A][Sur Ct, Nassau County 2005]). The court therefore has the power to consider and determine Grace's mental competence in this proceeding for the issuance of limited letters of administration.

Grace's Capacity To Execute The Eugene P. Gold Trust And IRS FBAR Agreement

In a proceeding to set aside a lifetime trust, the burden of proof is on the party seeking to invalidate the trust as to all issues, including the issue of mental capacity (*Matter of McHale,* 37 Misc3d 1204[a][Sur Ct, Erie County 2012]; *Matter of Aronoff*, 171 Misc2d 172, 177 [Sur Ct, New York County 1996]). "A trustee has no obligation to demonstrate that the grantor was competent when the trust instrument was executed; the burden on that issue is borne by [the party seeking to set aside the trust]" (*Matter of DelGatto,* 98 AD3d 975, 977 [2d Dept 2012]). A person is presumed to be competent and the burden is on the person alleging incapacity to establish that at the time the instrument was executed, the settlor lacked the requisite capacity to execute the document (*Matter of Engstrom* [*Leonard B. Harmon 2003 Trust*], 47 Misc3d 1212[A][Sur Ct, Suffolk County 2014]). "The law is clear that in order to set aside a contract or transfer of property on the grounds of lack of mental capacity, it is essential that the party did not understand the nature of the transaction at the time of the

conveyance as a result of his or her mental disability" (*Preshaz v Przyziazniuk,* 51 AD3d 752, 752 [2d Dept 2008], *quoting Lopresto v Brizzolara,* 91 AD2d 952, 955-956 [1st Dept 1983]). And the presumption of capacity obtains "even if the party suffers from a condition affecting cognitive function, and the party asserting incapacity bears the burden of proof" (*Pruden v Bruce,* 129 AD3d 506, 507 [1st Dept 2015][internal quotation marks omitted]).

Thus, on the motion for summary judgment, movants' prima facie case is established by the presumption of capacity[4] and the burden is clearly on Kenneth to establish by the use of "direct proof that [Grace] was not lucid, alert or oriented at the time of the transaction" in order to overcome the presumption of competency (*Feiden v Feiden,* 151 AD2d 889, 891 [3d Dept 1989]). Other than Kenneth's own self-serving affidavit in opposition to the motion, he has offered no cogent, admissible, evidence to raise a triable issue of fact that Grace lacked the capacity to execute the trust instrument nor that she was subject to undue influence. The bulk of the exhibits attached to Kenneth's affidavit are photocopies of hospital records, prescription plans, invoices for home health aides, and bills for services by the attorney-drafter. The hospital records are not properly certified and are not in admissible form and may not even be considered by the court on the motion (CPLR 4518[c]; *Lozusko v Miller*, 72 AD3d 908, [2d Dept 2010]; *Bleszcz v Hiscock*, 69 AD3d 890, 891[2d Dept 2010]). The copies of the prescriptions issued and the invoices for home health aides indicate

[4] The court notes that the movants' case is also buttressed by several affidavits of non-parties close to Grace, including the attorney-drafter, the only surviving non-party who was present when the trust instrument was executed, all attesting to Grace's mental competence throughout 2011.

that Grace was taking medication and had assistance at home, neither of which is surprising given that she was suffering from pancreatic cancer, but neither of which provides any direct evidence that Grace was not competent to execute either the trust instrument on April 19, 2011, or the extent it is even relevant, the IRS FBAR Agreement on June 27, 2011. Nor is there any hint that undue influence was exercised upon her by any party.

Accordingly, the motion to dismiss the amended petition for the issuance of limited letters of administration is granted. The grant of summary judgment as to the prayer for an order compelling accountings is without prejudice to renewal at a later date.

This decision constitutes the order of the court.

Settle decree.

Dated: July 1, 2016
Mineola, New York

E N T E R:

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HON. MARGARET C. REILLY
Judge of the Surrogate' Court

cc: McLaughlin & Stern, LLP
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