

Matter of Knee

2016 NY Slip Op 32938(U)

October 21, 2016

Surrogate's Court, Richmond County

Docket Number: 2014-106/H

Judge: Robert J. Gigante

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

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In the Matter of the Estate of

File Nos. 2014-106/H
2014-106/J

MARIE STARACE KNEE,
a/k/a Marie Starace,

Deceased.

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In these pending proceedings, a conference was held, pursuant to a decision dated June 27, 2016, on July 15, 2016, regarding: (1) Petition for Turnover (2014-106/H) and (2) Declaratory Judgment (2014-106/J).

The petition for turnover proceeding pursuant to SCPA 2103 was filed in this Court by Counsel, for Salvatore Starace as Administrator C.T.A. of the Estate of Marie Starace Knee ("Petitioner") against Papa Real Estate I, LLC, Joseph Priolo, Pasqual Priolo and Vincent Priolo ("Respondents").

The declaratory judgment proceeding was originally filed via Summons and Verified Complaint in Richmond County Supreme Court, by Counsel for Papa Real Estate, LLC ("Plaintiff") against the individual beneficiaries including Alan Knee, Robert Starace, Salvatore Starace, Vanessa Chiusano, Marietta Stapleton, Laura Talavera and Salvatore Starace as Administrator C.T.A. ("Defendants"). This matter was subsequently transferred from Richmond County Supreme Court to Surrogate's Court of Richmond County.

Multiple motions were made prior to the transfer by both parties, in each proceeding seeking the first in time rule, a removal or a stay from the respective courts. Those portions of the motions are now moot as both proceedings are now part of the Surrogate's Court.

The Court will first address the issues presented in the Petition for Turnover proceeding and then address the issues in the Declaratory Judgment proceeding.

PETITION FOR TURNOVER

Previously, the court did not grant requests for discovery from Papa Real Estate, LLC because a fiduciary had yet to be appointed. On August 31, 2015, via decision and decree, the Petitioner was appointed Administrator C.T.A with limited and restricted letters. Within the decision and decree, the Petitioner was granted the authority for the collection and administration of the assets of the Estate. Petitioner now seeks to move forward with discovery under SCPA 2103.

The remaining issue before the court is whether the Respondent's motion to dismiss the turnover proceeding pursuant to CPLR 3211 (a) (4) should be granted.

Under CPLR 3211 (a) (4):

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: there is another action pending between the same parties for the same cause of action in a court of any state or the United States...."

The Court finds that the two proceedings before it are not actions between the same parties.

The parties differ in both proceedings. In the Petition for Turnover, the parties are the Petitioner and Respondents. While, in the Declaratory Judgment, The Plaintiff also known as the Respondents in the Petition for Turnover, lists the Defendants, who are Alan Knee, spouse of the decedent and individual beneficiaries who are children of the decedent.

Assuming arguendo, that the parties listed are the same, it must also be determined whether or not the two proceedings pending are for the same cause of action. Each of the proceedings may relate to the decedent's interest in Papa Real Estate I, LLC. However, each of the proceedings are different causes of action and seek different forms of relief.

The petition for turnover seeks further discovery and an Order from the Court for rental income to be turned over to the Estate from Papa Real Estate I, LLC.

The declaratory judgment proceeding seeks a valuation of the interest and a buyout of the interest. Further, Plaintiff's prayer for relief in the summons dated December 7, 2015 seeks "Upon the buyout of the twenty-five (25) percent interest of Marie Starace Knee, extinguishing all of Defendants' rights, title, possession, claims or interests in or to PAPA REAL ESTATE."

Based on the different causes of actions and forms of relief requested, the court finds the causes of actions clearly differ from one another. One action seeks discovery while the other seeks to completely resolve the decedent's interest in Papa Real Estate by way of a buyout. Further, both actions are now in Surrogate's Court of Richmond County. Therefore, respondent's motion to dismiss is denied without costs.

In addition, Petitioner's cross motion seeking costs is denied. There are no other issues to discuss in Petitioner's cross-motion as they were addressed previously as being moot.

DECLARATORY JUDGMENT

This proceeding was transferred by the Richmond County Supreme Court. The first issue before this Court is a motion to dismiss under CPLR 3211 (a) (7) as against Alan Knee, Salvatore Starace, individually, Robert Starace, Vanessa Chiusano, Marietta Stapleton and Laura Talavera. It should be noted that Salvatore Starace was listed individually and as Administrator C.T.A. in this proceeding.

An answer and cross-motion in support was filed by counsel for Marietta Stapleton, Laura Talavera and Vanessa Chiusano to be dismissed from this action as improper parties and under CPLR 3211 (a) (7).

No papers were filed by counsel for Alan Knee and/or Robert Starace in this proceeding. It should be noted Alan Knee, spouse

of the decedent, was disqualified from serving as Executor of the decedent's estate via decision by this Court on July 1, 2015.

CPLR 3211 (a) (7) provides for dismissal for failure to state a cause of action upon which relief may be granted. On a motion to dismiss for failure to state a claim pursuant to CPLR 3211 (a) (7), "the court must accept the facts as alleged in the pleading as true, accord the petitioner the benefit of every possible favorable inference and determine only whether the facts as alleged fit with any cognizable legal theory." Leon v Martinez 84 NY2d 83,87-88 (1994). Respondent on the motion may submit affidavits, but they will most never warrant dismissal under CPLR 3211 unless they establish conclusively that petitioner has no claim or cause of action." Matter of Modell NYLJ, July 23, 2014 at 22, col.3; quoting Matter of Lawrence, 11 NY3d 588 [2008].

Here in this proceeding, counsel for Salvatore Starace individually and as Administrator C.T.A. is seeking a motion to dismiss under CPLR 3211 (a) (7) to dismiss against the individual beneficiaries and not dismissing against Salvatore Starace as Administrator C.T.A. Further, counsel for Marietta Stapleton, Laura Talavera and Vanessa Chiusano, are seeking to dismiss the cause of action against them as individuals.

The Court does not have to review the merits of the cause of action here. Instead, the Court is determining whether the Plaintiff has a claim against the individual beneficiaries. The

Court agrees that the Administrator C.T.A. is the proper party to seek a declaratory judgment from, and not the individual beneficiaries. The Plaintiff is seeking to buyout the interest of the Estate of the decedent. Salvatore Starace as Administrator C.T.A has authority to collect and administer the assets of the Estate. The decedent's interest in Papa Real Estate I, LLC is clearly an asset of the estate. This asset of the estate has to be distributed by the Administrator C.T.A upon completion of these proceedings.

Alan Knee was removed as a fiduciary of the Estate. Further, Alan Knee, Salvatore Starace, individually, Robert Starace, Vanessa Chiusano, Marietta Stapleton and Laura Talavera are distributees of the decedent and do not serve as fiduciaries of the Estate. In addition, the individual beneficiaries are not members of Papa Real Estate I, LLC. Their interest in the estate is as beneficiaries pursuant to the Will of the decedent.

Accordingly, the Court grants the motion to dismiss pursuant to CPLR 3211 (a)(7) as against Alan Knee, Salvatore Starace, individually, Robert Starace, Vanessa Chiusano, Marietta Stapleton and Laura Talavera. This cause of action will continue as against Salvatore Starace, Administrator C.T.A of the estate. The Court denies the portion of Petitioner and Respondents' motions that seek costs, expenses and fees pursuant to 22 NYCRR § 130-1.1.

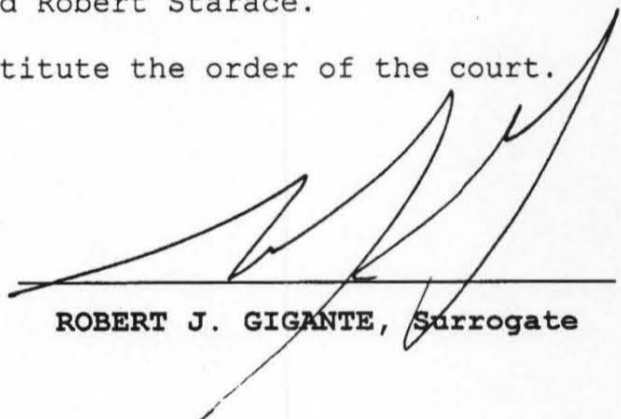
CONCLUSION

It is too early to proceed with a declaratory judgment. There is further discovery that must be completed pursuant to the Petition for Turnover. The Petition for Turnover will continue and the Declaratory Judgment will be held in abeyance until the Petition for Turnover is completed.

Both of the proceedings are restored to the court calendar for **11:00 a.m. on November 23, 2016** for a conference with a member of the Court's Law Department to set a discovery schedule. A copy of this decision/order shall be sent via regular mail to the Maclean Law Firm, PLLC, Angiuli & Gentile, LLP, Richard Rosenzweig, Esq, Alan Knee and Robert Starace.

This decision shall constitute the order of the court.

Dated: October 21, 2016



A handwritten signature in black ink, appearing to read 'Robert J. Gigante', is written over a horizontal line. The signature is stylized and somewhat cursive.

ROBERT J. GIGANTE, Surrogate