

Matter of Alibayof
2017 NY Slip Op 30935(U)
March 13, 2017
Surrogate's Court, New York County
Docket Number: 2013-1908/E
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

March 13, 2017

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Probate Proceeding, Will of

MICHAL ALIBAYOF,

File No. 2013-1908/E

Deceased.
-----X

A N D E R S O N , S .

In this contested probate proceeding in the estate of Michal Alibayof, proponent moves to strike the SCPA § 1404 discovery demand made by respondent Ronny Alibayof on the ground of lack of standing.

Decedent died in Israel on February 14, 2012, at the age of 43, survived by two children of her marriage to Ronny. Proponent alleges that decedent, at the time of her death, had been legally divorced from Ronny under Israeli law since September 4, 2011. Ronny disputes this, claiming that what decedent received was a "Get," a divorce under religious law only.

What is not in dispute is that in April 2010, Ronny and decedent executed a separation agreement (the "Separation Agreement") in New York, which includes the following language:

"3.0 Except as provided hereafter, each party shall have the unrestricted right to dispose of their respective properties by Will or otherwise, in such manner as he or she may desire, and with the same effect as if their marriage had never taken place, and neither will in any way interfere with, or raise objection to, the probate of the Will of the other.

3.1 Each party ... releases and relinquishes any and all claims and rights that he or she may have had, now has, or hereafter may acquire to share in any capacity or to any extent whatsoever in the estate of the other party upon the latter's death whether by statutory

allowance, distribution in intestacy, or election to take against the other party's will, or to act as Executor of the other party's Will, or to act as Executor or Administrator of the other party's estate...."

What is also not in dispute is that in May 2013, Ronny, claiming to be decedent's husband and making no mention of the Separation Agreement or the Get, petitioned for probate of decedent's 2006 will of which he is the primary beneficiary and nominated executor. Thereafter, movant and decedent's two sisters offered for probate a later 2011 instrument which nominated them as fiduciaries. Under that instrument, decedent established two trusts, one for the benefit of each of her children. Decedent's only mention of Ronny, whom she described as her "ex-husband," is in connection with the guardianship of their children in the event she predeceased. Movant received preliminary letters over Ronny's objection on May 9, 2014.¹

Ronny was cited in the proceeding to probate the 2011 instrument because, among other things, the petition asked the court to dismiss his earlier-filed petition regarding the 2006 instrument. Ronny appeared and requested document discovery under SCPA § 1404. The instant motion followed with the support of the guardian ad litem for decedent's minor child.

The purpose of SCPA § 1404 discovery is to obtain information that might provide a basis to object to probate (SCPA

¹ The other two nominated executors did not seek preliminary letters.

§ 1404[4]; see e.g. *Matter of Elyachar*, 48 Misc 3d 852 [Sur Ct, Westchester County 2015]; *Matter of Roth*, 7 Misc 3d 1010[A], 2005 Slip Op 50521[U] [Sur Ct, Bronx County 2005]). Lack of standing to file probate objections therefore forecloses any such discovery (see e.g. *Matter of Peckolick*, 167 Misc 2d 597 [Sur Ct, NY County 1996]; *Matter of Wallis*, NYLJ, July 9, 2008, at 32, col 2 [Sur Ct, NY County 2008]). The class of potential probate objectants is governed by SCPA § 1410, which provides that only those whose

"interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate may file objections ... except that one whose only financial interest would be in the commissions to which he would have been entitled if his appointment as fiduciary were not revoked by a later instrument shall not be entitled to file objections to the probate of such instrument unless authorized by the court for good cause shown."

Courts have held that an "interest" within the meaning of the foregoing provision must be pecuniary (see e.g. *Matter of Hall*, 12 AD3d 511 [2d Dept 2004]; *Matter of Silverman*, 91 Misc 2d 125 [Sur Ct, NY County 1977]).

At the outset, the court must determine if the Settlement Agreement affects Ronny's right to pursue SCPA § 1404 discovery. Movant claims that Ronny waived his right to file probate objections and therefore his right to take discovery prior thereto in paragraphs 3.0 and 3.1 of the Settlement Agreement. Ronny, however, contends that those paragraphs are not

"sufficiently specific" to constitute a waiver because they do not include an unequivocal renunciation of his interests as a beneficiary under the 2006 will. In support, he cites *Matter of Maruccia* (54 NY2d 196 [1981]), in which the court held the following:

[W]e hold that in order for a separation agreement to have the effect of revoking a prior devise or bequest pursuant to EPTL 3-4.3, the agreement must contain a provision whereby the spouse explicitly renounces any testamentary disposition in his or her favor made prior to the date of the separation agreement or employ language which clearly and unequivocally manifests an intent on the part of the spouses that they are no longer beneficiaries under each other's wills."

(*id.* at 205). At issue in that case was whether under EPTL § 3-4.3 the terms of a separation agreement that decedent and his second wife had executed revoked prior testamentary dispositions in favor of the second wife. The statute provides that a "wholly inconsistent" act by the testator does in fact revoke the prior testamentary disposition. The court upheld the wife's status as a beneficiary and nominated executor, finding that even though the agreement contained broad waiver language relating to the wife's statutory rights, it did not contain a provision whereby the second wife "renounced the *voluntary* bequests made to her by decedent" (54 NY2d at 205, *supra* [emphasis in original]).

Here, as in *Matter of Maruccia*, Ronny did not specifically

renounce the bequests made to him in the 2006 will.²

However, unlike in that case, Ronny unequivocally forfeited his right to "interfere with" or "object to" the probate of any will executed by decedent. As a result, whether or not paragraph 3.0 and 3.1 would effect a revocation of all provisions of the 2006 instrument benefiting Ronny under EPTL § 3-4.1 is irrelevant. Even if Ronny remains a beneficiary under that instrument (a proposition that assumes that he was not divorced from decedent),³ he still unequivocally gave up his right to object to the 2011 instrument. This state of affairs leaves him a beneficiary of an earlier instrument with no ability to challenge a later one, *i.e.*, without a basis to pursue SCPA § 1404 discovery here.

A basic rule of contract interpretation is that "courts should 'avoid an interpretation that would leave contractual clauses meaningless'" (*Welcome Realty v Arnold*, 26 Misc 3d 16, 18 [Sup Ct, App Term, 1st Dept 2009], *quoting Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.*, 63 NY2d 396 [1984]). If the court were to interpret the Separation Agreement as Ronny contends, paragraph 3.0 would serve no purpose. Ronny would be free to object to probate of the 2011 will notwithstanding that

² Ronny did specifically give up his right to act as fiduciary.

³ Under EPTL § 5-1.4, the bequests to Ronny and the provision nominating him as fiduciary would be automatically revoked by divorce.

he unequivocally agreed that he would not have the right to do so. The court declines to give the Separation Agreement such an interpretation.

Also without merit is Ronny's argument that movant should be precluded from relying on the Separation Agreement because decedent breached it by failing to pay certain fixed expenses related to the marital home. Ronny offers absolutely no proof of a breach. The cases cited by Ronny are readily distinguishable and none would prevent decedent's estate from enforcing the Separation Agreement here.

Based upon the foregoing, proponent's motion to strike Ronny's discovery demands based upon the language in the Settlement Agreement is granted. Thus, the court need not reach the issue of whether decedent and Ronny were, in fact, divorced within the meaning of EPTL § 5-1.4 (Revocatory effect of divorce ... on disposition, appointment, provision or nomination regarding a former spouse).

This decision constitutes the order of the court.



S U R R O G A T E

Dated: March 13, 2017