

Matter of Tong

2017 NY Slip Op 31502(U)

July 14, 2017

Surrogate's Court, New York County

Docket Number: 2014-450/B

Judge: Rita M. Mella

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

New York County Surrogate's Court
July 14, 2017

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In the Matter of the Petition of Teddy Tong, Limited
Administrator of the Estate of

SYLVIA MAO TONG,

DECISION and ORDER
File No.: 2014-450/B

Deceased,

For Turnover, Pursuant to SCPA 2103.
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M E L L A, S.:

The following papers were considered in resolving the motion to dismiss in this proceeding:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion to Dismiss, Affidavit of Eugene Tong in Support of Motion to Dismiss, with Exhibits, and Memorandum of Law by in Support of Motion to Dismiss, with Exhibits, filed December 15, 2015.....	1,2,3
Affidavit of Teddy Tong in Opposition to Motion to Dismiss, with Exhibits, and Memorandum of Law in Opposition to Motion to Dismiss, filed January 13, 2017.....	4,5
Reply Affidavit of Eugene Tong, with Exhibits, and Reply Memorandum of Law in Further Support of Motion to Dismiss, filed January 30, 2017.....	6,7

This is a proceeding commenced by Teddy Tong ("Teddy"), in his capacity as Limited Administrator of the estate of his mother, seeking turnover of assets allegedly belonging to decedent's estate from his brother Eugene Tong ("Eugene") and the imposition of a constructive trust. Eugene moves to dismiss the amended petition on the grounds that this court lacks subject matter jurisdiction, documentary evidence bars these claims, and the petition fails to state a cause of action (CPLR 3211 [a][2], [1] and [7]).

Decedent died intestate on January 22, 2014, as a result of injuries she sustained from a

fall approximately one month earlier. Two weeks before sustaining her fall, decedent had made substantial changes to her two accounts: (1) she changed the beneficiary designations for her Charles Schwab individual retirement account (the "IRA account") from Teddy, Eugene, and a charity to Eugene alone; and (2) she transferred all the assets in her Charles Schwab brokerage account (the "brokerage account"), for which she had designated a charity as 100% beneficiary, to an account in Eugene's name alone.

Teddy seeks to compel Eugene to turn over the proceeds of the two accounts to him as Limited Administrator of the estate, asserting that the changes made to decedent's accounts shortly before her death were the result of: undue influence exerted on decedent by Eugene who allegedly obtained a Power of Attorney and "used his confidential relationship as [decedent's] son and primary care taker;" and fraud by Eugene, who may have forged decedent's signature on bank forms.

On a CPLR 3211 motion to dismiss, the court "accept[s] the facts as alleged in the [petition] as true, accord[s] [petitioners] the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]); however, allegations "consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" on a motion pursuant to CPLR 3211 (a) (7) (*Roberts v Pollack*, 92 AD2d 440, 444 [1st Dept 1983]). A motion to dismiss based on documentary evidence (CPLR 3211 [a][1]) is warranted only if the documentary evidence "utterly refutes [petitioner]'s factual allegations" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326

[2002]) and “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d at 88).

The documentary evidence on which Eugene relies to seek dismissal of turnover of the funds pursuant to CPLR 3211 (a) (1) consists of: (1) the IRA Beneficiary Designation Form dated July 17, 2013, naming Teddy, Eugene, and a charity as beneficiaries, and (2) the Schwab Designated Beneficiary Plan Application for the brokerage account, dated December 22, 2011, listing the same charity as the sole beneficiary. Each form bears decedent’s signature and the authenticity of these forms is not being disputed by Teddy.¹ Eugene argues that these documents establish that decedent’s estate was never a beneficiary of either account. This showing, according to Eugene, also establishes that this court lacks subject matter jurisdiction over the dispute, which is essentially between living persons—that is, Eugene on one hand, and the previously designated beneficiaries on the other—and has no bearing on decedent’s affairs or estate administration (CPLR 3211 [a][2]). Alternatively, Eugene argues that dismissal is warranted for failure to state a claim for the turnover of non-testamentary assets or the imposition of a constructive trust on assets that do not belong to the estate (CPLR 3211 [a][7]).

The Surrogate’s Court has subject matter jurisdiction in law and equity over matters relating to the affairs of decedents and administration of estates (NY Const art VI, § 12 [d], [e]; SCPA 201). For the court to decline jurisdiction, it must be “abundantly clear that the matter in controversy in no way affects the affairs of a decedent or the administration of his estate” (*Matter of Piccione*, 57 NY2d 278, 288 [1982], *rearg denied* 58 NY2d 824 [1983], citing *Matter of*

¹ Teddy’s forgery claim relates only to bank forms executed in December 2013.

Young, 80 Misc 2d 937, 939 [Sur Ct, New York County 1975] [internal quotation marks omitted]).

Consistent with these principles, it is well settled that the Surrogate's Court has no jurisdiction over matters involving controversies between living persons (*Matter of Lainez*, 79 AD2d 78 [2d Dept 1981], *affd* 55 NY2d 657 [1981]; *Matter of Deans*, 68 AD3d 767 [2d Dept 2009]). A typical dispute between living persons is one involving designated beneficiaries of a decedent's non-testamentary assets, because resolving such a dispute has no impact on the administration of the estate, which has no interest in the subject asset whatsoever (*see Matter of Tillinger*, NYLJ, Mar. 9, 2010, at 36, col 5 [Sur Ct, Bronx County] [dismissing petition for turnover of decedent's annuity payments to estate where competing claims were between living persons]; *Matter of McMath*, NYLJ, Dec. 12, 1994, at 28, col 6 [Sur Ct, Queens County] [dismissing dispute over entitlement to decedent's life insurance policy of which estate was never beneficiary]; *see also Traiman v United States Life Ins. Co. in City of N.Y.*, 139 AD3d 713 [2d Dept 2016] [upholding Supreme Court's denial of transfer to Surrogate's Court of dispute involving change of beneficiary designation of life insurance policy from three children to one]).

The IRA Account

According to the concededly valid beneficiary designation decedent had executed before December 2013, pursuant to EPTL 13-3.2 and 13-4.9, the proceeds of the IRA account were never to be paid to her estate upon decedent's death. If the subsequent beneficiary designation was invalidated due to fraud or undue influence, the proceeds would not be paid to Teddy in his capacity as the Limited Administrator of the estate, but to beneficiaries designated in the July 17,

2013 form, i.e., the charity, Eugene, and Teddy, individually. The dispute with respect to decedent's IRA account before the court is therefore one between living persons and its resolution has no impact on the decedent's affairs.

The authority Teddy relies to oppose the motion is easily distinguishable. If the disputed transfers or transactions in each of the cited cases were invalidated, the assets would have been payable to the estate (*see Matter of Boatwright*, 114 AD3d 856 [2d Dept 2014] [agent under power of attorney transferred decedent's assets to account held in trust for agent]; *Matter of Gargani*, 43 Misc 3d 1211 [A] [funds in Totten trust accounts transferred to account in decedent's sole name thereby benefiting the residuary beneficiary under decedent's will]; *Matter of Knox*, NYLJ, Jan. 8, 2013, at 23, col 3 [Sur Ct, Bronx County] [annuity payable to estate if beneficiary designation invalidated]; *Matter of Price*, NYLJ, Feb. 28, 2014, at 25, col 6 [Sur Ct, Suffolk County] [account in decedent's name alone before respondent added as joint owner and beneficiary]).

Additionally, as Teddy has failed to show the estate's entitlement to the proceeds of the IRA account, the allegations here fail to state a claim for the relief sought and the motion to dismiss pursuant to CPLR 3211(a)(7) must be granted (*see Matter of Brennan*, NYLJ, Apr. 23, 2015, at 30, col 4 [Sur Ct, Suffolk County 2015] [discovery petition regarding decedent's payable-on-death account failed to state a claim where resolution of to whom assets were payable had no impact on estate]).

The Brokerage Account

Eugene is correct that the proceeds of the brokerage account are non-testamentary assets. Decedent's transfer of the funds from her brokerage account to Eugene under the circumstances present here, however, and the resulting divestiture of her legal title to the funds and enrichment of Eugene may give rise to a claim for constructive trust in favor of decedent's estate (*see Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386 [1919] [constructive trust is an equitable remedy available "[when] property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest"]).

A constructive trust may be imposed upon a finding of: (1) a confidential relationship, (2) a promise, (3) a transfer in reliance on the promise, and (4) unjust enrichment as a result of a breach of the promise (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). The doctrine is an equitable remedy used to prevent unjust enrichment (*Simonds v Simonds*, 45 NY2d 233 [1978]). It has been evoked "whenever necessary to satisfy the demands of justice" (*Latham v Father Divine*, 299 NY 22, 27 [1949]).

The elements of transfer and unjust enrichment are easily established by the allegations here. The existence of a confidential relationship has been found in a variety of circumstances (*Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010] ["coventurers in a quasi-banking enterprise"]; *Forbes v Clarks*, 194 AD2d 393 [1st Dept 1993] [people who were "undoubtedly close"]; *Raihofer v First Phoenix Assoc.*, NYLJ, Apr. 19, 2012, at 26, col 4 [Sur Ct, NY County 2012] [close friends and business partners]), but is not essential (*Simonds*, 45 NY2d at 241,

referencing *Latham*, 299 NY at 26-27). In any event, “the existence of a confidential relationship is usually a matter of fact which cannot be determined on a motion to dismiss” (*Raihofer, supra*).

Teddy alleges that Eugene had a confidential relationship with decedent as her son and primary caretaker.² Although Eugene contends that his relationship with decedent was only a close one “as a dutiful son for decades,” not a confidential one, for pleading purposes, the allegations that decedent relied on Eugene for preparing the bank forms to effect the change of beneficiary designation and transfer of funds and that Eugene went with decedent to the Schwab office when the new documents were executed in December 2013, are adequate to establish the element of confidential relationship to the extent required at this stage in the litigation (*see Latham*, 299 NY at 26-27). Of course, whether Teddy will ultimately establish this and the other requirements for imposition of a constructive trust is not part of the calculus in determining whether his claim should survive this motion to dismiss (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Finally, with respect to the requirement of a promise, it may be “implied or inferred from the very transaction itself” (*Sharp*, 40 NY2d at 122). Indeed, “[t]hough a promise in words [may be] lacking, the whole transaction, it might be found, [is] ‘instinct with an obligation’ imperfectly expressed” (*Sinclair v Purdy*, 235 NY 245, 258 [1923], quoting *Wood v Duff-Gordon*, 222 NY 88, 91 [1917]). In the seminal case of *Sharp v Kosmalski*, plaintiff’s transfer of all of his property—his farm, which was his abode and means of livelihood—to defendant was determined

² Teddy also alleges that Eugene used a Power of Attorney to cause the transfer of the proceeds in the brokerage account. There is no support on the record for Teddy’s allegation that a Power of Attorney had been executed by decedent designating Eugene her agent.

to be “*inconceivable* . . . without at least *tacit* consent upon the part of the defendant that she would permit [plaintiff] to continue to live on and operate the farm” (40 NY2d at 122 [emphasis added]).

Taking Teddy’s allegations as true and providing him the benefit of every possible inference, the court finds that an implied promise can be inferred here. Teddy alleges that decedent kept her money (at least \$500,000) in her brokerage account and frequently transferred money from this account to her checking account to pay for her daily expenses and that, therefore the transfer of these funds to Eugene was made in reliance on an implied promise that Eugene would make these funds available to decedent as needed.³

As averred by Teddy, a check in the sum of \$30,000 payable to the charity was signed by decedent and dated December 17, 2013, two weeks after the transfer of substantially all her assets to Eugene. The check bounced because of lack of funds; and, after decedent died, Eugene sent the charity a check in the amount of \$30,000 from his personal account. These facts provide support for the implied promise alleged by Teddy, as bolstered by the undisputed allegations that the charity at issue is one for which decedent had a longstanding history of making significant donations, extending back decades, and is the one and same charity that was previously the beneficiary of the majority of the assets in decedent’s IRA and brokerage accounts.

In addition, similar to the facts in *Sharp v Kosmalski*, the transfer divested decedent of all her non-retirement assets, on which she had previously depended for her daily living expenses.

³A minimal balance was maintained by decedent in her checking account. Decedent transferred money from her brokerage account to this checking account to pay for her living expenses.

Under these circumstances, a promise to induce decedent to transfer all of her assets to Eugene, which resulted in Eugene's unjust enrichment, may be implied. Accordingly, the court finds that Teddy has adequately stated a constructive trust claim.

Conclusion

Accordingly, Teddy's claim for turnover of decedent's IRA account to him as Limited Administrator of the estate is dismissed for lack of subject matter jurisdiction and failure to state a claim (CPLR 3211 [a][2] and [7]). Dismissal of the claim for a constructive trust as to the brokerage account is denied.

This decision constitutes the order of the court.

Clerk to notify.

Dated: July 14, 2017



SURROGATE