

Matter of Cohen (Keller)
2017 NY Slip Op 31825(U)
August 31, 2017
Surrogate's Court, New York County
Docket Number: 2015-3847/C
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

August 31, 2017

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In the Matter of the Petition of Donald B. Cohen and Gary
E. Reska, Preliminary Executors, for an Order Directing
the Turnover of Property in the Estate of

DECISION and ORDER

AVONNE EYRE KELLER,

File No.: 2015-3847/C

Deceased.

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M E L L A, S.:

The court considered the following submissions in deciding the motion and cross-motion
in this proceeding:

Papers Considered:

Numbered

Notice of Motion and Affidavit in Support, with Exhibits A through F, filed June 15, 2017.....	1,2
Notice of Cross-Motion and Affidavit in Support of Cross-Motion, with Exhibits A through N and 1 through 9, filed July 14, 2017.....	3,4
Petitioners' Memorandum of Law in Opposition to Respondent's Motion, filed July 14, 2017.....	5
Affidavit and Affirmation in Opposition to Cross-Motion and in Further Support of Motion, with Exhibits A through C, filed July 25, 2017.....	6,7
Respondent's Affidavit Concerning Bank and Stock Accounts, filed July 28, 2017.....	8
Respondent's Supplemental Affidavit and Counsel's Affirmation Regarding Respondent's 2016 Tax Return, filed August 16, 2017.....	9,10
Respondent's Amended Affidavit, filed August 25, 2017.....	11

Petitioners, the nominated fiduciaries under a December 23, 2008 instrument offered for probate as the will of decedent Avonne Eyre Keller, were appointed by this court as preliminary executors with their authority limited to commencing a proceeding seeking discovery of decedent's assets. In this proceeding, Petitioners seek turnover from Respondent Mohammad Bhuiyan ("Bhuiyan"), the voluntary administrator of decedent's estate and the decedent's caregiver, of funds in accounts held jointly in decedent's and Bhuiyan's names or in any account into which such funds have been transferred. The petition lists three financial institutions at which Petitioners allege that such accounts are currently held.

At the time that the petition was filed with the court, Petitioners requested that process issue to Respondent by Order to Show Cause (“OSC”), and the proposed OSC contained a temporary restraining order enjoining Bhuiyan and the three financial institutions from transferring or disposing of funds or assets in any such account. Prior to issuing the restraint contained in the proposed OSC, the court held a telephone conference with counsel for all parties on Wednesday June 1, 2016, during which the court directed Bhuiyan to disclose to the court and Petitioners information about accounts held jointly in decedent’s and Bhuiyan’s names, as described in the petition, including information about the type of account and the balance for each of those accounts. The court informed counsel that it would use this information to determine whether to issue a temporary restraining order—as requested in the proposed OSC—and the nature and extent of any such restraint.

By letter dated Friday June 3, 2016, Bhuiyan’s counsel informed the court that Bhuiyan had three accounts with funds or assets that were originally owned by decedent: a Morgan Stanley Smith Barney LLC (“MSSB”) brokerage account with an approximate balance of \$3.2 million; a savings and checking account at JPMorgan Chase with an approximate balance of \$50,000; and a estate account also at Chase with a balance of \$26,000. Counsel claimed that the first two accounts were held in the names of decedent and Bhuiyan jointly with right of survivorship. Based on the information provided by Bhuiyan’s counsel during the conference call and in his letter, as well as the allegations contained in the petition, the court issued a temporary restraining order (“TRO”) enjoining Bhuiyan from withdrawing or transferring the assets held in the MSSB account, except that Bhuiyan was allowed to withdraw up to \$352,707.43 from that

account.¹ The TRO also enjoined MSSB, as custodian of these assets, from releasing any funds in excess of \$352,707.43. After hearing from the parties on the return date of the OSC, by order dated August 24, 2016, the court issued a preliminary injunction with the same terms as the TRO.

The Fidelity Investments Account

Through Bhuiyan's testimony at a deposition in a separate proceeding, Petitioners recently learned that, after decedent's death, Bhuiyan had withdrawn more than \$1.8 million from an account owned by decedent which had not been disclosed to this court previously. In papers filed recently in this court, Bhuiyan acknowledged the existence of a checking account held in decedent's name in trust for Bhuiyan at Chase ("the 0806 account"), which had a balance of \$1,861,283.81 at the time of decedent's death on September 23, 2015. Bhuiyan further explained that: six days after decedent's death, he closed the 0806 account and transferred the funds to his personal checking account at Chase; he then transferred \$800,000 from his account to the MSSB account; and he later transferred \$1 million to a third party who eventually used these funds to open an investment account with Fidelity Investments ("the Fidelity Account"). It is undisputed that, on June 2, 2016 and June 3, 2016, one and two days, respectively, after the court's conference call with the parties in which the court directed his counsel to identify any account controlled by him holding funds or assets of decedent's, Bhuiyan transferred \$1 million from his checking account to the third party. Yet, in his June 3, 2016 letter to the court, Bhuiyan's counsel failed to disclose the existence of the 0806 account, the \$1.8 million balance

¹Bhuiyan's counsel, by letter dated June 8, 2016, informed the court that this amount represented the value of decedent's IRA account held at MSSB, of which Bhuiyan was the named beneficiary.

held in that account, that Bhuiyan had closed it and transferred the funds to his personal checking account, or that, on the same day that counsel sent his letter to the court, Bhuiyan had completed a transfer of \$1 million of those funds to a third party.

Two motions are currently before the court in this contested turnover proceeding: 1) Bhuiyan's motion to modify the preliminary injunction's restraint on MSSB to the extent of permitting it to release \$300,000 to be used to pay his income tax for 2016 and estimated taxes for 2017;² and 2) Petitioners' cross-motion for an order, among other things, directing Bhuiyan to pay into court (or to the New York City Commissioner of Finance) \$1 million, representing the funds transferred by Bhuiyan to a third party and used to open the Fidelity Account.

After hearing arguments on the motion and the cross-motion on July 26, 2017, on the record, and by Decision and Order issued the same day, the court directed Bhuiyan to provide an affidavit, no later than July 28, 2017, which included "a list of every account that was held in decedent's name either individually or jointly with Mr. Bhuiyan" and to provide identifying information and the balance for each account at the time of decedent's death.

Bhuiyan's affidavit, as amended on August 24, 2017, reveals that decedent had cash and securities in six accounts held at two financial institutions, Chase and MSSB, with a combined value at the time of her death of approximately \$5 million. Based upon the information provided to the court, as of August 24, 2017, the court estimates the value of assets owned by decedent at the time of her death and presently under the control of Bhuiyan to be \$4.9 million, representing a loss of \$100,000. These figures, however, do not tell the whole story. While decedent's

²Bhuiyan avers that he owes individual income tax as a result of capital gains on stocks sold from the MSSB account.

investment account at MSSB has appreciated in value substantially, a significant portion of the assets held in decedent's other accounts has been spent or lost by Bhuiyan. The court estimates, based on Bhuiyan's disclosure, that in excess of \$500,000 has been lost or spent by Bhuiyan since decedent's death less than two years ago.³ Of special concern to the court is the Fidelity Account which, according to Bhuiyan's July 28, 2017 affidavit, had assets valued at \$814,000 as of July 24, 2017. Bhuiyan states in his August 24, 2017 affidavit that the value of the assets of that account as of that day is only \$749,445.

This court has the authority, pursuant to SCPA 209 (4), to determine decedents' interest in any property claimed to constitute a part of their estates and to determine the rights of persons claiming interests in such property and, in doing so, may grant injunctive relief (*Matter of Kiejliches*, 292 AD2d 530, 531 [2d Dept 2002]; *Matter of Langfur*, 198 AD2d 355 [2d Dept 1993]). In light of the information that has been provided to the court in Bhuiyan's July 28, 2017 and August 24, 2017 affidavits, including evidence of the rapid dissipation of assets owned by decedent and Bhuiyan's acknowledgment that he lacks funds to pay his rent or other living expenses at this time, the court is convinced that, if Bhuiyan is not enjoined from disposing of additional assets, any decree of this court directing turnover of those assets to Petitioners may be

³Examples of the dissipation of these assets include the \$96,511.93 that Bhuiyan states that he spent since June of 2016 on "taxes, rent, charity, legal fees and other living expenses," the \$50,000 loss sustained by an online ChoiceTrade account that Bhuiyan opened in November of 2016 "[i]n order to learn how to invest the funds," the \$54,283 held in decedent's 0806 account which is unaccounted for in Bhuiyan's affidavits but which his counsel informed the court had been spent to cover Bhuiyan's living expenses, and Bhuiyan's decision to "lend" a friend \$1,000,000 from the funds previously held in the 0806 account for the purpose of opening a supermarket business "in the hope that he would profit." When the friend abandoned the supermarket venture, Bhuiyan purportedly lent him \$1,000,000 anyway, allowing the friend to retain \$5,000 for his personal expenses and to invest the balance through the Fidelity Account.

rendered ineffectual (*Roca v Byrne*, 17 NYS 891 [Sup Ct, Gen Term, 1st Dept 1892] [injunction preventing bank from turning over funds to defendant granted since defendant's insolvency may render plaintiffs remediless, as a practical matter, even if technically successful]; see *Pando v Fernandez*, 124 AD2d 495 [1st Dept 1986]; see also *Zonghetti v Jeromack*, 150 AD2d 561 [2d Dept 1989]). On the record before the court at this time, Petitioners have also established a clear right to relief⁴ and that the equities tip in their favor in this turnover proceeding, and thus measures to prevent further dissipation of assets are warranted (*Berichi v Allan Sloan, P.C.*, 121 AD2d 884 [1st Dept 1986]; *Matter of Kiejliches*, 292 AD2d at 532 [Surrogate properly restrained respondent from accessing her joint account with decedent to ensure that potential estate funds were preserved for benefit of estate beneficiaries]). The court, therefore, enjoins Bhuiyan from transferring or disposing or causing the transfer or disposition of the assets in the Fidelity Account.⁵

In furtherance of its effort to preserve, pending adjudication of this turnover proceeding, as much of decedent's assets as possible for the benefit of the prevailing party, the court finds it necessary to place the management and investment authority for the MSSB account jointly in the parties. Commencing immediately, Petitioners will be co-managers of that account. Accordingly, Bhuiyan is directed to instruct MSSB to recognize Petitioners' authority as co-managers as well as their authority to invest and reinvest the assets of the MSSB account without

⁴As the Appellate Division has made clear, "Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced" (*Republic of Lebanon v Sotheby's*, 167 AD2d 142, 145 [1st Dept 1990]).

⁵Bhuiyan informed the court in his August 24, 2017 Amended Affidavit that his name has been added as an account holder to the Fidelity Account.

delay.⁶ Thereafter, the parties' investment and management authority in connection with this account shall be exercisable only jointly. The court is mindful that its direction in this regard, as is usually the case where injunctive relief is imposed, may cause hardship to the parties. The court has narrowed, however, the scope of the injunctive relief granted here, and concludes that this limited impingement on the parties' rights is necessary since, at this juncture, it is impossible to determine which of these two parties will prevail in this litigation.

In view of the foregoing, Bhuiyan's motion to modify the Preliminary Injunction imposed by this court on August 24, 2016 is denied. Petitioners' cross-motion for an order directing Bhuiyan to pay \$1,000,000 to the Commissioner of Finance is also denied but the court directs Petitioners to join as parties to this turnover proceeding the named co-owner of the Fidelity Account as well as Fidelity Investments. Process on these parties is to be effected by service of an order issued by the court today. The order of the court also directs the parties to this proceeding, the named co-owner of the Fidelity Account, and Fidelity Investments to show cause why the assets of that account should not be transferred to the MSSB account. The balance of the cross-motion is denied. The court has issued an order imposing strict deadlines in connection with the discovery process. The trial of this matter will be scheduled shortly after discovery is completed and any dispositive motion is determined.

Accordingly, it is

ORDERED that Respondent Mohammad Bhuiyan is enjoined from withdrawing,

⁶There are three accounts held by Bhuiyan with decedent's assets at MSSB: a "Dividend" account, a "Non-Dividend" account, and a Traditional IRA account. These accounts have been linked under account number ending in 593. Petitioners will be co-managers of all three accounts.

transferring, encumbering or otherwise disposing of the assets held in the Fidelity Investments account number [REDACTED] 1971; and it is further

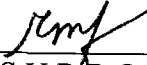
ORDERED that Respondent Mohammad Bhuiyan is directed to instruct Morgan Stanley Smith Barney LLC to recognize the co-management, investment and reinvestment authority granted to Petitioners Donald B. Cohen and Gary E. Reska herein in connection with Morgan Stanley Smith Barney LLC account or accounts ending in 593, and Respondent Mohammad Bhuiyan is further directed to execute any documents necessary to comply with this direction immediately; and it is further

ORDERED that Respondent Mohammad Bhuiyan is enjoined from exercising any management and investment authority in connection with Morgan Stanley Smith Barney LLC account or accounts ending in 593 unless such authority is exercised jointly with Petitioners Donald B. Cohen and Gary E. Reska; and it is further

ORDERED that the management and investment authority of Petitioners Donald B. Cohen and Gary E. Reska in connection with Morgan Stanley Smith Barney LLC account or accounts ending in 593 shall be exercised only jointly with Respondent Mohammad Bhuiyan.

Clerk to notify the parties of this decision and order.

Dated: August 31, 2017



SURROGATE