Matter of Levien (Johnson)
2018 NY Slip Op 30054(U)
January 12, 2018
Surrogate's Court, New York County
Docket Number: 1983-3059/G
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
Date: January 12, 2018

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In the Matter of the Application by Parvin Johnson, Jr., Kenneth Ives, Harlan Levien and Stephen Levien, Pursuant to SCPA Sections 606 and 607, and Judiciary Law Section 753, for an Order Directing Philip Levien Barry Levien and Kenneth Levien, as Trustees of the Trust Established Under Article SEVENTH of the Will of

ARNOLD LEVIEN,

Deceased,

To Show Cause Why They Should Not Be Punished For Contempt.

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DECISION and ORDER
File No.: 1983-3059/G

M E L L A, S.:

Papers Considered	Numbered
Notice of Motion, dated June 21, 2017, for Admission of Ellen Yarrell, Esq., Pro Hac Vice, attaching Exhibit A - Consent of Parties	1
Affirmation, dated June 21, 2017, of William R. Fried, Esq., in Support of Motion for Admission Pro Hac Vice, Attaching Exhibit A	2
Notion of Unopposed Motion, dated June 26, 2017, for Admission of John Kinchen, Esq., Pro Hac Vice, with Affirmation, dated June 26, 2017, of Anne C. Lefever, Esq., in Support and with Affidavit, dated June 23, 2017, of John Kinchen, Esq., in Support	3-5
Order to Show Cause, dated April 17, 2017, for Contempt and Sanctions	6
Affidavit, dated April 9, 2017, of Anne C. Lefever, Esq., in Support of Contempt, Attaching Exhibits 1 through 15	7
Petitioners' Memorandum of Law, dated June 30, 2017, in Support	8
Affirmation, dated June 30, 2017, of Samuel J. Bazian, Esq., in Opposition to Order to Show Cause, Attaching Exhibits A through H	9
Memorandum of Law, dated June 30, 2017, in Opposition	10

Three motions were before the court on July 26, 2017, in this proceeding which seeks to punish for contempt the trustees of a trust created under Article SEVENTH of the Will of decedent Arnold Levien (the Trust). The court granted the two motions to admit pro hac vice two Texas attorneys, Ellen A. Yarell, Esq., and John Kinchen, Esq., who are litigating a related proceeding involving the same parties in that state (22 NYCRR 520.11). The third motion

sought to enforce a decision and order of this court dated January 12, 2017 by contempt against the trustees and is resolved as follows.

This contempt motion, commenced by order to show cause, represents the third time this court has been asked to decide whether the trustees of the Trust are in violation of the decision and order of this court dated April 15, 2014. This is also the second time the trustees face punishment for contempt for pursuing certain relief in Texas against Stephen Levien and Harlan Levien and the two individuals, Kenneth Ives and Parvin Johnson, Jr., whom Stephen and Harlan, respectively, had adopted. As two of decedent's biological grandchildren, Stephen and Harlan were beneficiaries of the Trust before it terminated. Both suffer from muscular dystrophy, and in accountings and other proceedings against the trustees in this court, they had sought certain distributions from the Trust before its then-imminent termination.

Those matters settled pursuant to a July 20, 2012 agreement among the trustees and Stephen and Harlan, filed in this court. After that settlement, which did not mention adoptions, Stephen and Harlan completed the respective adoptions of Ives and Johnson in Texas, who then claimed entitlement to share in the remainder as decedent's great-grandchildren, to whom the Trust remainder was payable.

The trustees responded by commencing a proceeding in this court in which they asked for a ruling that would deny Ives and Johnson any claim to a share in the Trust remainder. However, in a decision and order dated April 15, 2014, this court ruled that, because decedent's will did not exclude adoptees as possible beneficiaries of his Trust, Ives and Johnson could not be excluded under the terms of the will, and because the settlement, which had been negotiated at arms-length by the parties' counsel, neither expressly nor impliedly restricted the right of Stephen and Harlan

to adopt, the trustees had not stated a viable claim for its breach. Moreover, the court further ruled that during the parties' negotiation of the settlement, Stephen and Harlan had not assumed any duty to disclose their plans to adopt, the trustees themselves having been in a position to make whatever inquiries could be material to their interests.

By decision dated March 6, 2015, this court enjoined the trustees "from seeking any relief in Texas regarding the July 20, 2012 stipulation of settlement or who benefits from decedent's Article SEVENTH trust," while it reserved for the litigation in Texas the question of "whether the Texas orders of adoption at issue can be vacated or voided based on any theory pled, cognizable, and proved in Texas."[1] This March 2015 decision found fault with the Trustees' pleading that requested a finding from the Texas court that "no benefit will inure to [Ives and Johnson] under the [decedent's] will."

Subsequently, the trustees twice amended their pleading in Texas but continued to seek a determination there that "no benefit will inure to [Ives and Johnson] under [decedent's] will," and, by decision dated January 12, 2017 in the current proceeding for contempt, this court directed the trustees to again amend their petition "to avoid seeking a final determination of the identity of the trust's remainder beneficiaries or relief concerning the July 20, 2012 stipulation of settlement" in Texas. The court reiterated in that decision its deference to Texas on the question of the validity of the adoptions, observing that

> "the trustees may seek to challenge the validity of the adoptions on any facts or any claims in Texas, and they may allege any facts regarding the settlement and the trust, and further allege claims based on those facts, so long as those claims

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[1]This court had also recognized, in its April 15, 2014 decision, that the Texas adoption orders were entitled to full faith and credit and that any challenge to those orders would have to be litigated in the courts that had issued them.

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> seek relief regarding the validity of the adoptions and do not seek relief that would purport to be a final determination of issues regarding the trust or the settlement."

The January 2017 decision denied the request to hold the trustees in contempt but allowed Petitioners to seek to enforce that decision through contempt as well as sanctions by a later motion if the trustees failed to amend their pleading as directed.

In now their Fifth Amended Petition, filed in February 2017 in Texas, the trustees claim that in the July 20, 2012 stipulation of settlement Stephen and Harlan relinquished their rights under the Trust and request "enforcement of [Stephen's and Harlan's] relinquishment of any future benefit under the [T]rust. Since relinquishment is established excluding them from acquiring any pecuniary interest, then [Ives and Johnson] are also precluded from benefiting from the Trust" (Fifth Amended Petition to Void Adult Adoptions, at 19-20); they also assert that "no trust funds are forthcoming to [Ives and Johnson] because [Stephen and Harlan] relinquished their inheritance, promised not to pursue any further benefit from the Trust, and the Trustees and Remainder [beneficiaries] relied on that promise" (*id.* at 20). In that pleading, the trustees further ask the Texas court "to issue a judgment declaring that [Ives and Johnson] have no legal right, status or legal relation as adopted children . . . for purposes of a stake or claim as beneficiaries under Article Seven of the Last Will" of the decedent (*id.* at 23).

Thus, the trustees continue to flout the rulings of this court. To the extent these claims are made and this relief is sought, the trustees are in contempt of this court's January 12, 2017 decision and order. That order put the trustees on notice that a continued pursuit of this relief in Texas would violate this court's March 6, 2015 injunction.

This court therefore concludes that the trustees have violated the restraint imposed upon them by this court's past rulings, a restraint confirmed by the court's most recent prior decision and order. As indicated by the foregoing discussion, they have done so by continuing to ask the Texas court to adjudicate issues already decided by, or necessarily reserved to, this court, *i.e.*, they have taken litigative steps in Texas calculated to defeat, impair, impede, or prejudice Petitioners' rights or remedies.

Enforcement of this contempt ruling is stayed until January 30, 2018. If by that date, the Trustees have failed to file in this court, and serve, an attorney affidavit attesting to and annexing a revised petition to the Texas court seeking only vacatur of the adoption orders, or voiding of the adoptions, a warrant of commitment may issue for the Trustees without further notice. The Trustees are also fined jointly and severally in the amount of $250 and shall be liable for all costs and expenses necessarily or reasonably incurred by petitioners in the present proceeding, including attorneys' fees and disbursements (as supported by an affirmation of petitioners' counsel, to be filed and served as soon as possible, which may be the subject of a supplemental order setting the amounts to be paid by the Trustees in this regard) (*Bennett Bros., Inc. v Floyd Bennett Farmers Market Corp.*, 16 AD2d 897 [1st Dept 1962]). The amounts shall be paid to petitioners (*Smith v Smith*,11 NYS2d 1015, 1019 [Sup Ct, Onondaga Cty 1938]).

The court must also emphasize that the trustees continue to violate this court's March 5, 2015 anti-suit injunction (which was based on the court's decision and order dated April 15, 2014) by seeking damages against petitioners in Texas for a fraud that the trustees claim Stephen and Harlan perpetrated against them, during negotiations for the July 2012 settlement, by not disclosing their plans to adopt Ives and Johnson. Their claims seeking damages for fraud or

related torts are duplicative of those made by the trustees in New York and were subject to this court's injunction. Its pursuit in Texas would result in a waste of judicial resources and the expenditures of unnecessary legal fees and costs, and could lead to conflicting results (*IRB-Brasil Resseguros S.A. v Portobello Int'l Ltd.*, 59 AD3d 366 [1st Dept 2009]). If there can be any doubt that this court enjoined claims for damages based on the failure of Stephen and Harlan to disclose the contemplated adoptions or for breach of the settlement itself, the court now emphasizes here that the trustees are enjoined from seeking damages on such grounds in Texas.[2]

Thus, in the revised petition to be filed by the trustees in Texas in accordance with this decision and order, the trustees may not seek damages—actual, special, consequential or exemplary— against Petitioners for fraud, conspiracy or tortious interference based on Stephen's and Harlan's alleged failure to disclose their intention to adopt Ives and Johnson. That petition may seek, however, in addition to vacatur of the adoptions, legal fees or costs if such relief is unrelated to the determination of the identity of the remainder beneficiaries under the Trust or to damages regarding the settlement agreement or its negotiation in New York.

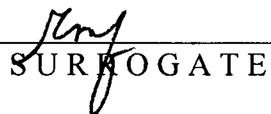
[2]As to whether the trustees are in contempt of this court's orders, the trustees' request for damages in Texas based on their theories that Stephen and Harlan contractually relinquished their rights in the Trust or failed in some duty to disclose their intent to adopt (at least at this juncture) should be distinguished from the Trustees' request in their Fifth Amended Petition in Texas for declaratory relief confirming such theory. In an excess of caution, the court does not find the trustees' pursuit of their damages claims in Texas contemptuous in the current ruling. As this court noted during oral argument in this proceeding on July 26, 2017, the question of whether such damages claims in Texas were duplicative of the claims that were dismissed here required further analysis of this court's anti-suit injunction of March 6, 2015. However, the court has now confirmed that damages sought in Texas for fraud or related torts regarding the July 2012 settlement in New York are within the prohibitions of the injunction.

In light of the above ruling, the court declines, in the exercise of discretion, to impose sanctions under Rule 130-1.1 (22 NYCRR 130-1.1).

This decision constitutes the order of the court.

Clerk to notify.

Dated: January 12, 2018



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