

Matter of Dinshaw (Phadnis)
2018 NY Slip Op 30075(U)
January 17, 2018
Surrogate's Court, New York County
Docket Number: 1970-1950/A
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

JANUARY 17, 2018

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Petition of Pankaj Phadnis and Laurence J. Lebowitz, Esq., :
for Letters of Administration C.T.A. in the Estate of :
:
EDULJI FRAMOZ DINSHAW, :
:
Deceased. :
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DECISION
File No.: 1970-1950/A

M E L L A, S.:

The court considered the following submissions in determining the motion to dismiss the petition:

- | | <u>Date Filed</u> |
|--|--------------------------|
| 1. Notice of Nusli N. Wadia's Motion to Dismiss | May 16, 2017 |
| 2. Affidavit of Nusli N. Wadia in Support | May 16, 2017 |
| 4. Memorandum of Law in Support | May 16, 2017 |
| 5. Affidavit of Dr. Pankaj K. Phadnis in Opposition | June 29, 2017 |
| 6. Memorandum of Law in Opposition | June 29, 2017 |
| 7. Reply Affidavit of Nusli N. Wadia | July 14, 2017 |
| 8. Reply Memorandum of Law | July 14, 2017 |
| 9. Sur-Reply Affidavit of Dr. Pankaj K. Phadnis
in further opposition | As of September 29, 2017 |

The court considered the following submissions in determining petitioners' motion for leave to file a sur-reply affidavit of Dr. Pankaj K. Phadnis in further opposition to the motion to dismiss:

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|--|-----------------|
| 1. Notice of Petitioners' Motion | August 14, 2017 |
| 2. Affirmation of Laurence J. Lebowitz, Esq., in Support | August 14, 2017 |
| 2. Affirmation of Matthew D. Dunn. Esq., in Opposition | August 29, 2017 |

Dr. Pankaj K. Phadnis, an alleged creditor of the estate of Edulji Framoz Dinshaw, and his designee, Laurence J. Lebowitz, Esq. — Phadnis being a non-domiciliary alien (*see* SCPA 707 [1] [c]) — have petitioned for letters of administration c.t.a. in the estate of Edulji Framoz Dinshaw. Decedent died on March 14, 1970, more than 47 years ago.

Nusli N. Wadia, who was appointed "administrator" of the decedent's Indian estate by the Bombay High Court, India, has moved to dismiss the petition (*see* CPLR 3211 [a] [2], [3], [7] or

[8], or, in the alternative, CPLR 327).

Petitioners have moved for leave to file a sur-reply affidavit of Phadnis in further opposition to the motion to dismiss.

Background

Decedent died a New York domiciliary. This court probated his will on March 31, 1970.

Under Article FOURTH of his will, decedent created a trust of “any real or personal property physically located in the Republic of India,” for the primary benefit of his sister, Bachoo Woronzow, with the trust remainder to be divided equally between The Salvation Army, New York, New York, and The American Society for the Prevention of Cruelty to Animals, New York, New York.

Under Article FIFTH of his will, decedent left the residuary to his sister.

In Article EIGHTH, decedent named his sister, Woronzow, as executor. Article EIGHTH reads:

“Should any executor be unable for whatever reason to exercise her or his functions in a jurisdiction outside the United States of America, I hereby authorize her or him by written instrument, duly acknowledged, to designate an individual or a bank to act on her or his behalf in respect to property located in such foreign jurisdiction.”

Woronzow petitioned for, and was granted, letters testamentary by this court. Although decedent nominated Alexis C. Coudert and Jehangir B. Dubash as co-trustees, Woronzow did not seek the issuance of letters of trusteeship.

On December 1, 1972, in the words of Wadia, Woronzow “executed a Power of Attorney nominating me . . . as Administrator of the Dinshaw Indian Estate. On December 21, 1972, I was appointed by Order of the Bombay High Court as the sole Administrator of the Dinshaw Indian

Estate, and Letters of Administration vested in me I have served as sole Administrator of the Dinshaw Indian Estate since that date.” The document to which Wadia refers as the “Power of Attorney” was executed by Woronzow in her capacity as executor.

On December 15, 2000, Wadia as such “administrator” sought a determination from the Bombay High Court as to the validity of the bequest of the remainder of the trust under Article FOURTH to United States charities.

In September 2001, Woronzow — again, in Wadia’s words — “while retaining a life interest, sold all of her remaining interest in the Dinshaw Indian Estate to me and certain other Indian entities . . . , contingent upon the Indian Court’s determination that all interest in the Dinshaw Indian Estate vested in [Woronzow], as residuary beneficiary under the Will.”¹

On October 22, 2001, the Bombay High Court issued its ruling. It determined that “the bequest of the immovable property of Edulji Framroz Dinshaw (deceased) physically located in India contained in the fourth clause of his will . . . fails and/or is invalid,” and that Woronzow, “as the residuary legatee under the Fifth Clause of the Will . . . is solely and absolutely entitled to the immovable property of Edulji Framroze [sic] Dinshaw (deceased) physically located in India.”

In January 2002, The Salvation Army and The American Society for the Prevention of Cruelty to Animals appealed the decision, but Wadia negotiated a settlement with them and, on July 29, 2003, the charities withdrew their appeal.

On August 12, 2003, Woronzow died. According to Wadia: “[Woronzow]’s Indian

¹ According to Phadnis, Woronzow sold her interests under decedent’s will to Wadia, alone.

estate was fully administered and closed.”

On November 20, 2003, the Bombay High Court ordered that Wadia “be and he is authorised and permitted to continue to act as administrator of the estate of the abovenamed [sic] deceased Edulji Framroze [sic] Dinshaw in India.” Why there was a continued need for Wadia to serve as “administrator” of the decedent’s Indian estate is unclear.

On June 30, 2006, Wadia, in his words, appointed co-petitioner Phadnis “to serve as my agent to assist me with a variety of business matters relating to real property of the Dinshaw Indian Estate.” On January 2, 2009, Wadia revoked such agency.

Essential Dispute²

Phadnis contends that: (1) he was not compensated for the two-and-a-half year period, which ended eight years ago, during which he served as the agent to Wadia, the estate fiduciary appointed by a court in India,³ and (2) accordingly, he is a creditor of the estate of the decedent

² The court notes Phadnis’s articulated motivation for filing the instant petition. Phadnis avers:

“My Petition is driven by three (3) considerations. First and foremost, I wish to be paid for the work I did on behalf of the Estate; Second, as a result of the information I discovered while working for the Estate, restoration of the Decedent’s testamentary intent to have the Charities be the ultimate beneficiaries of his Estate; and Third, to rectify the wrongs perpetrated against the Indian public.”

³ Counsel for petitioners affirms:

“30. Between June 20, 2006 [sic] and January 2, 2009[,] Dr. Phadnis acted as Wadia’s agent in various matters pursuant to Powers of Attorney executed by Wadia. . . .

“31. Phadnis’s job was to oversee and increase the revenues generated from the real estate development contracts between the trust and Ivory and Ferani.

“32. Phadnis was to be compensated by receiving one (1) percent of any increase in revenue he obtained.

and, therefore, entitled to petition for a fiduciary appointment by this court.

Wadia argues that the scope of Phadnis's employment during such period, as an employee of The Bombay Dyeing and Manufacturing Company, Ltd. ("BDMC"), which, according to Wadia, is "owned by the Wadia Group,"⁴ and/or as a consultant to Wadia as Chairman of the Wadia Group, encompassed Phadnis's assisting Wadia with the administration of decedent's Indian estate. Wadia avers: "Phadnis was paid in full by the Wadia Group for his services as an employee and as a consultant; he accepted all such payments and never challenged the amount of his compensation."

Phadnis's Motion for Leave to File a Sur-Reply to Wadia's Motion to Dismiss

Wadia appended to his reply affidavit, filed on July 14, 2017, letters and emails regarding the scope of Phadnis's employment (including compensation) with BDMC and as a consultant to Wadia as Chairman of the Wadia Group.

Petitioners argued: "[T]he mere fact that Wadia submitted and relied upon these documents for the first time in his reply Affidavit is a sufficient basis for the Court to allow Dr.

"33. By virtue of his creative use of zoning and 'air rights' rules and regulations[,] he increased revenues from \$2.5 billion rupees to a potential of \$15 billion rupees during the 3 year period he served as Wadia's agent.

"34. By virtue of the foregoing[,] Phadnis increased revenues by a potential \$12.5 billion rupees. One percent of that amount is 125 million rupees[,] which converts to approximately \$1.8 million."

⁴ By contrast, Phadnis avers: "[I]t is worth noting that Wadia's assertion that BDMC is owned by the Wadia Group is incorrect. There is no entity called the Wadia Group owning any shares of the company."

Phadnis to submit a response.”⁵

On the record, on September 29, 2017, the court granted petitioners’ motion for leave to file a sur-reply affidavit in further opposition to the motion to dismiss the petition (*see* CPLR 2214 [c] and 22 NYCRR 207.7 [e]). The affidavit of Phadnis, sworn to on August 4, 2017 — Exhibit A to the affirmation of Lebowitz in support of the motion — is deemed filed as of that date.

Wadia’s Motion to Dismiss

Wadia alleges six grounds for dismissing the petition: (1) petitioners lack standing (*see* CPLR 3211 [a] [3]); (2) any claim for compensation for the period ending January 2, 2009 would be barred by the statute of limitations, under New York law and under Indian law (*see* CPLR 3211 [a] [5]); (3) the petition fails to state a basis for relief (*see* CPLR 3211 [a] [7]); (4) the court lacks subject matter jurisdiction (*see* CPLR 3211 [a] [2]); (5) the court lacks jurisdiction over Wadia (*see* CPLR 3211 [a] [8]); and (6) New York is a *forum non conveniens* (*see* CPLR 327 [a]).

Disposition

The motion of Nusli Wadia to dismiss the petition of Pankaj Phadnis and Laurence J.

⁵ The proposed sur-reply contains allegations which do not square with Phadnis’s previous allegation as to compensation. The proposed sur-reply reads:

“Wadia could not and did not make me work for his personal benefit. I agreed to do so only in return for compensation. Rajesh Batra, a close business associate of Wadia, made me agree that compensation would be in the form of a house in Mumbai and funding for the post graduate education of my daughters. In financial terms[,] this was same [sic] in value as 1% of additional revenues I generated for the Estate.”

Lebowitz, Esq., for letters of administration c.t.a. in the estate of Edulji Framoz Dinshaw — who died almost half a century ago — is granted.

Petitioners premise their standing to petition for letters of administration c.t.a. on Phadnis's status as an alleged creditor of the decedent's estate (*see* SCPA 1418 [1] and SCPA 1402 [1] [b]). The alleged debt, however, arose from work performed by Phadnis, at the request of Wadia in his capacity as "administrator" of decedent's Indian estate, involving the management of real property located in India.


Consideration of what otherwise would be threshold questions, including whether Phadnis is a "creditor" of the estate within the context of SCPA 1418 (1) and SCPA 1402 (1) (b) and, if so, whether the court should entertain jurisdiction (*see Matter of Williams*, 71 Misc 2d 243, 245-246 [Sur Ct, NY County 1972] ["An ancillary representative is an officer of the jurisdiction in which he is appointed. He is accountable only to the court where appointed, and he cannot be required to account for his administration by the courts of any other jurisdiction. The title of an ancillary representative extends only to property which is within the jurisdiction of his appointment, and he has no authority over assets elsewhere"]; *Matter of Serrano*, NYLJ, Apr. 2, 1999, at 34, col 3 [Sur Ct, Westchester County] ["the court declines to entertain jurisdiction over matters involving the administration of the ancillary estate, particularly . . . the payment of . . . administration expenses by the ancillary executor which should remain the province of the Arizona court that appointed the ancillary executor"]) need not detain the court at this time. Even assuming, for the sake of argument, that Phadnis is a creditor of the estate — and that the court has jurisdiction over the dispute between Phadnis and Wadia — the court would find that, "in the interest of substantial justice" (CPLR 327 [a]), the dispute over the alleged debt

should be adjudicated in a court in India, the forum in which Wadia was appointed as fiduciary, in which Wadia as such fiduciary retained the services of Phadnis in late June 2006, in which the work was performed, and in which Phadnis and Wadia reside (*see Islamic Republic of Iran v Phalavi*, 62 NY2d 474, 479 [1984], cert denied 469 US 1108 [1985] [“Among the factors to be considered are . . . the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction” [internal citations omitted]).

The court observes that, even if there were a need for the appointment of an administrator c.t.a. in this estate, Daniel McSwiggan, Esq., as executor of Woronzow’s will, would have priority over a creditor (*see* SCPA 1418 [1] [b]).

This decision, together with a transcript of the September 29, 2017 proceedings, constitutes the order of the court.

Dated: January 17, 2018


S U R R O G A T E