

Matter of Liu
2018 NY Slip Op 30665(U)
April 12, 2018
Surrogate's Court, New York County
Docket Number: 2015-1496/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

APRIL 12, 2018

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Proceeding by May M. Liu, as Administrator of the
Estate of

MICKY LIU,
Deceased,

DECISION and ORDER

File No.: 2015-1496/C

for the Turnover of Certain Funds Pursuant to SCPA 2103.
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M E L L A , S.:

The following papers were considered in deciding the motion to dismiss and the cross-motion:

PAPERS

NUMBERED

Notice of Motion for Summary Judgment and Affirmation in Support, with Exhibits A-P.....	1, 2
Notice of Cross-Motion of May M. Liu for permission to Amend her SCPA 2103 Petition and Affirmation in Support and in Opposition to the Motion for Summary Judgment, with Exhibits.....	3, 4
Reply Affirmation of William A. Simon, Esq., with Exhibits.....	5
Affirmation of Steven Holihan, Esq., in Reply to Cross-Motion and Affidavit of May Liu, with Exhibits.....	6, 7

May M. Liu, as administrator of the estate of her brother, Micky Liu, has commenced a proceeding pursuant to SCPA 2103, seeking the turnover of funds from Veronica Beckham. Beckham moves to dismiss the petition alleging that Liu lacks standing to commence this proceeding and that the court lacks subject matter jurisdiction. Liu has cross-moved for an order permitting her to amend her petition to add allegations of facts that she asserts give her standing in this proceeding.

Decedent died intestate on March 15, 2015, at the age of 50. Just months before his death, decedent changed the beneficiary designations on three investment accounts, and one life

insurance policy (the “four accounts”) replacing the previous designee, Eva Enrigue (decedent’s former girlfriend), with Beckham, whom decedent had met a few months earlier. The four accounts included: (1) a TIAA-CREF Annuity Contract (“annuity”), (2) a Fidelity 401(K) Retirement Account (“401K”), (3) a TD Ameritrade Individual Retirement Account (“IRA”), and (4) a Prudential Group Life Insurance policy (“life insurance”).

Decedent met Beckham in July of 2014, and the following month, she moved in with decedent in his Manhattan apartment. She moved to Florida 35 days later. In October 2014, decedent changed the beneficiary designations for the annuity and the 401K, naming Beckham as beneficiary. After visiting Beckham in Florida in January of 2015, decedent further designated Beckham as the beneficiary of his life insurance and IRA. Decedent, who had been in poor health, died intestate a little more than two months later, survived by his parents as his sole distributees. The parents designated decedent’s sister, Liu, to serve as the administrator of his estate.

After receiving letters of administration, Liu petitioned for an order directing Beckham to turn over the proceeds of the four accounts, alleging that the beneficiary designations were procured by undue influence. Liu argues that Beckham “preyed upon Micky Liu’s vulnerability by exerting influence over him in the form of moral coercion.”

Beckham now moves for a summary determination dismissing the petition¹ on the ground that Liu lacks standing to challenge the beneficiary designations of these non-testamentary assets

¹ Beckham, previously proceeding *pro se*, had filed a pre-answer motion to dismiss the turnover proceeding and to remove Liu as administrator based on documentary evidence. This motion was denied by a decision of this court dated July 13, 2016 (*Matter of Liu*, NYLJ, July 19, 2016, at 22, col 4 [Sur Ct, NY County]). Beckham then retained counsel and filed an amended verified answer to the petition, in which she challenges standing.

(CPLR 3211 [a][3]) and that the court, consequently, lacks subject matter jurisdiction, this being a dispute between living people (CPLR 3211 [a] [2]). Beckham maintains that the estate has no interest in these accounts since, if the court were to find the beneficiary designations invalid, the proceeds of the accounts would be payable to Enrigue, the prior designated beneficiary, and not to the estate.

Liu opposes the motion to dismiss on the ground that the prior beneficiary designation was, in essence, revoked by the designations naming Beckham as beneficiary. Liu analogizes a beneficiary designation for a non-testamentary asset to a will: once revoked by a later instrument, it is not revived by the invalidation of that later one. But the precedent that Liu cites as support for her analogy is inapposite (*Hornak v Hornak*, 101 Misc 2d 335 [Sup Ct, Nassau County 1979] [where enrollee in group life insurance plan expressly waived coverage, automatic enrollment of enrollee did not per se revive beneficiary designation canceled by the waiver]). Furthermore, Liu's contention that a change of beneficiary designation effectively revokes any prior beneficiary designation, is contrary to this court's conclusion in *Matter of Tong* (NYLJ, July 19, 2017, at 27, col 6, 2017 NY Misc LEXIS 2707, at *4 [Sur Ct, NY County 2017] [where a beneficiary designation for a non-testamentary asset is invalidated due to fraud or undue influence, the proceeds would be payable to earlier-designated beneficiaries, rather than to the estate]).

Liu cross-moves for permission to amend her petition for the purpose of establishing her standing to petition for this relief. Liu seeks to add an averment that there are claims against the estate which render the estate insolvent. Liu also seeks to add a reference to an assignment of

Enrigue's interests under the accounts and life insurance policy to the estate.² The assignment instrument was executed approximately three months after Liu was served with the instant motion to dismiss.

Permission to amend a pleading should be "freely given" (CPLR 3025 [b]) and whether to allow the amendment is in the court's discretion (*Edenwald Contracting Co v N.Y.*, 60 NY2d 957 [1983]; *Murray v City of New York*, 43 NY2d 400 [1977]).

Liu's proposed amendments to the pleading are intended to establish that she has standing to petition for turnover of the four accounts. However, a motion to amend should not be granted if it is unavailing. It is therefore necessary to assess whether the averments that Liu would add to her pleading would give her standing to seek turnover from Beckham (*Ancrum v St. Barnabas Hospital*, 301 AD2d 474, 475 [1st Dept 2003]).

First, Liu argues that an administrator has a right to recover assets from non-testamentary accounts where an estate is otherwise insolvent (*citing Matter of Granwell*, 20 NY2d 91 [1967]). Accordingly, Liu proposes to amend her petition by inserting the following averment:

"34. That were Beckham permitted to receive the accounts in question, the estate would be left insolvent and creditors would not be paid."

In this connection, it is first noted that section 3212 (b) (1) of the New York Insurance Law protects the participants and beneficiaries of life insurance policies against creditors, with the following provisions:

"If a policy of insurance has been or shall be effected by any person on his own life in favor of a third person beneficiary, or made payable otherwise

² Liu also seeks to amend the petition to include a statement that decedent maintained the power to change the beneficiary designations at any time during his lifetime, although she does not refer to this in her arguments in support of standing.

to a third person, such third person shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person effecting the insurance.”

Moreover, 13-3.2 of the EPTL protects the participants and beneficiaries of pension, retirement, death benefits, and annuities, in addition to insurance policies, from estate creditors:

“If a person is entitled to receive (1) payment in money, securities or other property under a pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust or (2) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract or a policy of life, group life, industrial life or accident and health insurance, or if a contract made by such an insurer relating to the payment of proceeds or avails of such insurance designates a payee or beneficiary to receive such payment upon the death of the person making the designation or another, the rights of persons so entitled or designated and the ownership of money, securities or other property thereby received shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy.”

(EPTL 13-3.2[a]; *see also Matter of Gallet*, 196 Misc 2d 303 [Sur Ct, NY County 2003]).

It appears that Liu’s proposed amendment presumes that the beneficiary designations of the accounts and life insurance are not shielded from creditors claims despite these statutory provisions.

EPTL 13-3.2(b) does carve out an exception to the protection against creditors, where proceeds were the result of a fraudulent conveyance, as defined under article 10 of the Debtor and Creditor law. Liu refers to *Matter of Bleier* (75 Misc 2d 436 [Sur Ct, NY County 1973]) to suggest that the funding of an account in an otherwise insolvent estate could be retrieved to satisfy creditors, but that case is distinguishable since it involved a mutual fund that was not otherwise protected by EPTL 13-3.2. In any event, Liu offers no authority for the proposition that a beneficiary designation for non-testamentary assets such as the ones involved here, is a

conveyance. Indeed there is reason to come to the contrary conclusion (*Conlew, Inc. v Nash*, 247 App Div 710 [1st Dept 1936], *aff'd* 272 NY 595 [1936]; *see Matter of King*, 196 Misc 2d 250 [Sur Ct, Broome County 2003]). Therefore, since the four accounts are statutorily protected from creditors, the insolvency of the estate, without a showing of a fraudulent conveyance, does not cause the estate to have an interest which would confer standing in the instant proceeding.

Liu next requests that her petition be amended to reflect that she, as administrator of the estate, has obtained an assignment of Enrigue's interests in the four accounts:

“35. That on June 10, 2017, May Liu as Administrator of the Estate of Micky Liu did secure an assignment of Interest in the Four Accounts from the prior beneficiary of the Four Accounts, Eva Enrigue.”

Liu argues that the estate, as assignee, has standing to prosecute the turnover proceeding, and thus the motion to dismiss should be denied. This, of course, is only true if the accounts are assignable, as Beckham points out.

The annuity, 401K and IRA are governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq.*, which provides regulations and protections to participants and beneficiaries of employee benefit plans.³ ERISA includes a non-alienation provision (29 USC 1056[d][1]) prohibiting participants and beneficiaries from assigning their interests to third parties (*see Matter of King, supra*). Therefore, since these accounts are not assignable, the instrument of assignment from Enrigue is a nullity and does not confer standing on Lui as to the three accounts. As to those accounts, the motion for summary judgment must be

³ A “participant” is defined under ERISA as “any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit . . .” (29 USC 1002[7]). A “beneficiary” is defined under ERISA as “a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder” (29 USC 1002[8]).

granted.

The policy governing the life insurance at issue here, however, does not include such non-alienation language, and it is not subject to ERISA provisions. Therefore, there is nothing to preclude the court from recognizing an assignment of Enrigue's interest under the beneficiary designation of the life insurance. In other words, just as Enrigue had standing to challenge the change in beneficiary designation in favor of Beckham, Liu can assert that she has obtained the same standing as Enrigue's assignee.

Beckham rejects the idea that the amended petition and the assignment, made at such a late stage in these proceedings, are sufficient to cure Liu's lack of standing. She argues that there must be standing at the commencement of the proceeding, and the absence of such standing at the outset is not curable by an amendment to the petition.

The court agrees that here the defect is not curable. It is undisputed that Liu lacked standing at the commencement of this proceeding. At that point, only Enrigue could have sought turnover of the proceeds of the life insurance on the theory that the form designating Beckham as beneficiary was invalid. But Enrigue could not have sought such relief in this court. The jurisdiction of Surrogate's Court extends to matters relating to the affairs of decedents and the administration of estates (NY Const art VI, § 12 [d][e]; SCPA 201). It is well settled that the Surrogate's Court does not have subject matter jurisdiction over controversies between living persons (*Matter of Lainez*, 79 AD2d 78 [2d Dept 1981], *aff'd* 55 NY2d 657 [1981]). In *Matter of Tong* (2017 NY Misc LEXIS 2707, at *4 [Sur Ct, NY County 2017]), this court held that "[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.”

Decedent’s estate having had no interest in this controversy at the time of the filing of the petition, the court lacked subject matter jurisdiction to entertain it, a defect that is not curable by amendment.

The motion for summary determination dismissing the petition is granted. As to turnover of the proceeds of the life insurance, such dismissal is without prejudice (*Springwell Navigation Corp. v Sanluis Corporacion, S.A.*, 81 AD3d 557 [1st Dep 2011]). The cross-motion for leave to amend the turnover petition is denied.

This decision constitutes the order of the court.

Clerk to notify.

Dated: April 12, 2018



SURROGATE