

Matter of Ryder

2018 NY Slip Op 31385(U)

June 27, 2018

Surrogate's Court, Nassau County

Docket Number: 2010-363412/A

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Proceeding by Roger Ryder, as Executor of the Estate of

DECISION

LOUISE L. RYDER,

File No. 2010-363412/A

Deceased,

Dec. No. 34460

pursuant to SCPA § 2103 to discover property withheld.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion to Reargue.	1
Affirmation in Support of Motion to Reargue with Exhibit.	2
Prior Motion for Summary Judgment with Exhibits.	3
Court’s February 2, 2018 Decision on Prior Motion.	4

The petitioner, Roger Ryder, the executor of the estate of Louise L. Ryder, moves for an order, pursuant to CPLR 2221, granting leave to reargue the order of this court dated February 2, 2018, and, upon reargument, vacating the order of this court dated February 2, 2018, and, pursuant to CPLR 3212, for summary judgment, granting that portion of the petitioner’s SCPA § 2103 verified petition, directing the respondent, Gary Ryder, to turn over to the estate the sum of \$40,000.00; and adjourning the court’s directive to petitioner to file the note of issue and appear for a pre-trial conference on March 28, 2018, until after the court’s adjudication of the petitioner’s pending motion to preclude and the completion of discovery. There is no opposition to the motion.

The decedent, Louise L. Ryder, died a resident of Nassau County on September 23, 2010, survived by her four adult sons: Roger T. Ryder, Gary A. Ryder, Craig M. Ryder and Theodore Ryder, Jr. The decedent's last will and testament, dated June 24, 2010, was admitted to probate on January 21, 2011 and letters testamentary issued to Roger Ryder, as executor, that same date. The decedent's will made several specific bequests and divided the residuary equally among her four sons, except that any financial distribution to be made to Gary Ryder pursuant to the will "shall be reduced by the total amount due to my estate, as an existing debt, for his use of my Chase Bank Visa credit card...from on or about July 28, 2005 to on or about September 6, 2009."

Roger Ryder, as executor of the decedent's estate, commenced this proceeding pursuant to SCPA § 2103 to discover property allegedly withheld by Gary Ryder. The petition alleges that the property consists of funds loaned by the decedent to Gary Ryder, which were never repaid, and other funds that were "siphoned from the decedent through the improper use of the decedent's Chase Credit Card." With regard to the loan, the petition alleges that on November 12, 2008, the decedent issued a check in the amount of \$40,000.00 as a loan to Gary Ryder and that on January 10, 2009, Gary Ryder, as trustee, issued a check from the account of the Louise L. Ryder Trust to repay the loan, which check was rejected due to insufficient funds.

Respondent Gary Ryder made a pre-answer motion to dismiss this discovery proceeding. By decision and order dated September 28, 2015 (Decision No. 31056), this court found that the petitioner had alleged facts establishing the potential existence of a loan

between the decedent and the respondent and denied the respondent's motion to dismiss that claim. However, by that same decision and order, the court granted so much of the respondent's motion as sought to dismiss the petitioner's claim for the return of \$60,821.00, representing charges allegedly made by the respondent on the decedent's Chase Bank Visa card, finding that the claim is more properly the subject of an accounting proceeding.¹

Thereafter, the respondent failed to serve a timely answer to the petition. Respondent moved to vacate his default in answering the petition and the petitioner cross-moved for summary judgment. In moving to vacate his default, the respondent claimed he had a defense to the petition, asserting that ten monthly deposits of \$4,000.00 noted on the decedent's bank statements from March 2009 to December 2009 represented his repayment of the \$40,000.00 loan. In opposition to the respondent's motion to vacate his default and in support of petitioner's cross motion for summary judgment, the petitioner submitted the affirmation of the petitioner's counsel, as well as the affidavit of the petitioner and the affidavit of Theodore Ryder, Jr., accompanied by bank statements, deposit slips and checks, which the petitioner argued refuted the respondent's defense. By decision and order dated March 6, 2017 (Decision No. 32596), this court granted the respondent's motion to relieve his default, but denied the petitioner's motion for summary judgment because issue had not yet been joined. The court further observed that "[e]ven if a motion for summary judgment had been procedurally correct, petitioner has not established that he is entitled to the same. The

¹ Petitioner filed a petition for judicial settlement of his account on May 18, 2016 (File No. 2010-363412/B).

conflicting affidavits as to the source of deposits alleged by respondent to be re-payment of the loan, raise issues of credibility to be determined at trial.” In making this observation, the court made no reference to the banking records submitted as exhibits to the petitioner’s cross motion.

On May 17, 2017, the respondent filed a verified answer to the petition. In his answer, the respondent admits that the decedent loaned him \$40,000.00, but he alleges that he paid back the loan, with interest, as verbally agreed between the decedent and himself.

Petitioner then moved for summary judgment granting that portion of his SCPA §2103 petition directing the respondent to turn over to the estate the sum of \$40,000.00. In moving for summary judgment, petitioner took the position that there is no genuine issue of fact to be tried because the respondent admitted the \$40,000.00 loan from the decedent and because the petitioner’s evidentiary proofs refute the respondent’s uncorroborated claims of repayment. The motion for summary judgment was supported by the affirmation of the petitioner’s counsel, as well as the affidavit of the petitioner and the affidavit of Theodore Ryder, Jr., accompanied by the same bank statements, deposit slips and checks submitted on the petitioner’s previous cross motion for summary judgment. Petitioner contended that the affidavits and bank records demonstrate that the respondent’s reliance on the decedent’s bank statements showing ten \$4,000.00 deposits as proof that he repaid the loan is erroneous because the source of the monthly deposits were actually payments from a real estate investment, which were initially deposited into a trust account by the decedent and then withdrawn from the trust account and deposited into her own account.

In opposing the petitioner's motion for summary judgment, the respondent took several contradictory positions. Despite the fact that his verified answer admits the loan and states that he paid back the loan with interest as verbally agreed between the decedent and himself, in his affidavit in opposition, the respondent seemed to argue that there is no evidence that the decedent had intent to collect the debt or expected to be repaid. In response to the petitioner's documentary evidence, the respondent contends that it is either coincidental or suspicious that the decedent received payments from another source in the exact amount of his repayments.

By decision and order dated February 2, 2018 (Decision No. 33789), this court denied the petitioner's motion for summary judgment and directed the petitioner to file a note of issue. Petitioner now seeks leave to reargue that order so that this court may vacate it and grant him summary judgment.²

CPLR 2221(d) provides, in relevant part, that a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior

² Petitioner also seeks an adjournment of this court's directive to file the note of issue and appear for a pre-trial conference until after the court's adjudication of his motion to preclude and the completion of discovery. By decision and order dated March 5, 2018 (Decision No. 33907), this court granted the petitioner's motion to preclude in the accounting proceeding to the extent that the respondent is precluded from offering proofs or objections with respect to any items sought in the petitioner's demand for a verified bill of particulars which the respondent failed to provide and upon which the respondent bears the burden of proof, but the court denied that portion of the motion that sought to strike the respondent's verified objections in their entirety and sought costs, without prejudice to renew. Respondent has filed a motion to reargue this Court's decision on that motion in the accounting proceeding, which is now sub judice. The next court conference in this matter is scheduled for July 31, 2018.

motion.

In its decision and order dated February 2, 2018 denying the petitioner's motion for summary judgment, it appears that the court mistakenly assumed that the banking records relied upon by the petitioner in support of his motion had not been submitted on his previous cross motion for summary judgment, which had been denied on procedural grounds, and these records have not been previously scrutinized by this court. Reargument of the petitioner's motion for summary judgment is therefore granted so that these records may be fully considered, along with the affirmation and affidavits in support of the motion.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Consequently, it is incumbent upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (CPLR 3212 [b]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). If the moving party meets his or her burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial, however, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Petitioner has demonstrated his entitlement to summary judgment by establishing that a loan was made by the decedent to the respondent and by refuting the respondent's claim

that the loan was repaid. Respondent has failed to offer any evidence sufficient to create a triable issue of fact. Respondent has admitted that there was a \$40,000.00 loan made to him by the decedent, which he claimed to have repaid in ten \$4,000.00 installments. In support of that claim, he submitted copies of the decedent's bank statements, which showed monthly deposits of \$4,000.00 into her bank account. However, the affidavits of the petitioner and Theodore Ryder, coupled with the copies of the checks, deposit slips and bank account statements annexed thereto, demonstrate that the respondent was not the source of the monthly \$4,000.00 deposits that he claims were loan payments. In response, the respondent fails to offer any evidentiary proof, but merely speculates that further discovery may aid in his defense. Such conjecture is insufficient to defeat the petitioner's proof.

Accordingly, petitioner's motion for leave to reargue this court's decision and order dated February 2, 2018 is **GRANTED** and upon reargument, the petitioner's motion for summary judgment is **GRANTED**.

Settle decree on notice.

Dated: June 27, 2018
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: Mary Calabrese, Esq.
Law Offices of Richard Handler
Attorneys for Roger Ryder, Executor
50 Broadway
P.O. Box 427
Amityville, New York 11701

Thomas C. Haberlack, Esq.
Scherer & Associates, PLLC
Attorneys for Craig M. Ryder
600 Old Country Road, Suite 328
Garden City, New York 11530

Gary Ryder, Pro Se
1984 Lilac Drive
Westbury, New York 11590

Charles W. Marino
Attorney for Gary Ryder
2314 Poe Court
Seaford, New York 11783