

Zebrowitz v Zebrowitz
2018 NY Slip Op 31657(U)
June 15, 2018
Surrogate's Court, Nassau County
Docket Number: 2014-378784/C
Judge: Margaret C. Reilly
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**SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

-----x
Lisa Zebrowitz,

Plaintiff,

-against-

Leslie Zebrowitz,

Defendant.

DECISION & ORDER

File No. 2014-378784/C

Dec. Nos. 34056

34057

34058

In the Matter of the Estate of

AARON ZEBROWITZ,

Deceased.

-----x
Lisa Zebrowitz,

Plaintiff,

-against-

Leslie Zebrowitz,

Defendant.

File No. 2014-378785/E

Dec. Nos. 34059

34060

34061

In the Matter of the Estate of

ESTHER ZEBROWITZ,

Deceased.

-----x
PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion to Add Necessary Party	1
Affirmation in Support and Exhibits	2
Amended Notice of Motion to Add Necessary Party	3
Notice of Cross Motion for Summary Judgment	4
Affirmation in Opposition and in Support of Cross Motion.	5
Notice of Cross Motion for Summary Judgment.	6
Affirmation in Opposition to Defendant's Cross Motion and in Support of Plaintiff's Cross Motion.	7
Amended Notice of Cross Motion.	8
Memorandum of Law	9
Affidavit in Opposition to Cross-Motion for Summary Judgment by Respondent and in Support of Motion to Amend and the Cross-Motion for Summary Judgment by Petitioner and Exhibits.	10
Reply in further Support of Motion for Summary Judgment and in Opposition to Cross Motion.	11

Before the court in these two related miscellaneous proceedings are the following motions and cross motions. The first motion by Lisa Zebrowitz seeks an order pursuant to CPLR § 1001 directing that Caleb McArthur and Loren McArthur be joined, as necessary parties in the above entitled actions as party defendants, upon the ground that the absence of them would present complete relief from being accorded between the parties and directing that an amended citation and amended verified complaint be served upon Leslie Zebrowitz, Caleb McArthur and Loren McArthur. The motion is opposed by Leslie Zebrowitz.

In addition, Leslie Zebrowitz brought a cross motion seeking an order: granting summary judgment pursuant to CPLR 3212 of the Civil Law Procedures; dismissing the complaint/petition in its entirety. Lisa Zebrowitz cross moves for an order granting partial summary judgment as to liability pursuant to Rule §3212 of the Civil Practice Law and Rules; and pursuant to CPLR § 3212 (c), ordering an immediate trial on the issue of damages together with such other and further relief as the court deems just and proper. The cross motions are opposed.

Aaron Zebrowitz died on May 10, 2013. He was survived by his wife, Esther Zebrowitz, and three children: Leslie Zebrowitz, Sylvia Warren and Lisa Zebrowitz Rodolitz a/k/a Lisa Zebro a/k/a Lisa Migliaccio. Esther Zebrowitz died on March 27, 2015.

Aaron Zebrowitz and Esther Zebrowitz were each the grantors of their own separate inter vivos trust agreements, dated November 3, 1997 which were amended and restated by trust agreements dated March 23, 2009 (the Aaron Trust and the Esther Trust). Upon Aaron Zebrowitz's death, the trust property in the Aaron Trust was split into two shares, Share A and Share B. Share A was a credit shelter trust with the mandatory distribution of net income to Esther Zebrowitz during her lifetime and discretionary principal distributions, if authorized

by an independent trustee. Share B was paid to the Esther Trust. Upon the death of Esther Zebrowitz, the property of both trusts was further divided into three separate trusts for the benefit of their three children. By decision dated November 9, 2017 and November 28, 2017, this court granted motions to construe the trusts to require the appointment of Lisa Zebrowitz Rodolitz, Gary Rodolitz and Leslie Zebrowitz as co-trustees of both trusts. Accounting proceedings are pending regarding both the Esther Trust and the Aaron Trust.

Leslie Zebrowitz filed a renunciation and disclaimer dated December 10, 2013 of any interest in the Aaron Trust. She also filed a renunciation and disclaimer dated June 17, 2015 of any interest in the Esther Trust. Both trusts provide that upon the death of Leslie Zebrowitz, the trust shall be payable to her issue. Loren McArthur and Caleb McArthur are the children of Leslie Zebrowitz.

By summons and complaint dated August 27, 2015, Lisa Zebrowitz, individually, commenced a proceeding in Supreme Court, Nassau County, against her sister, Leslie Zebrowitz. Lisa Zebrowitz alleged that, from December 1987 through August 1988, Aaron and Esther Zebrowitz transferred \$60,000.00 to Leslie Zebrowitz. She further alleged that the transfer of funds was an advancement of Leslie Zebrowitz's inheritance. Lisa Zebrowitz claimed that Leslie Zebrowitz acknowledged the payments and represented that she intended to pay it back or reduce the amount from her parents' estates to offset the transfers. Lisa Zebrowitz's complaint seeks the imposition of a constructive trust upon Leslie Zebrowitz's share of the two trusts. She also alleged that Leslie Zebrowitz, as co-trustee, owed a fiduciary duty with respect to the two trusts and that she abrogated her obligation to repay the trusts and breached her fiduciary duty to Lisa Zebrowitz.

By decision of Hon. Roy S. Mahon, Justice of the Supreme Court, Nassau County, dated March 15, 2016, the court granted Leslie Zebrowitz's application for an order pursuant to CPLR § 325 (e) removing the matter to Surrogate's Court. A motion for reargument was denied by decision and order of Hon. Roy S. Mahon dated May 12, 2016.

The proposed amended complaint adds the following: it names both Loren McArthur and Caleb McArthur as defendants; it provides that Leslie Zebrowitz claims to have renounced her interests in the estates/trusts (paragraph 27); it provides that Caleb McArthur and Loren McArthur are named as defendants in the event they should claim an interest in the estates/trusts by virtue of the purported renunciation of Leslie Zebrowitz; and it explains that Caleb McArthur and Loren McArthur are children of Leslie Zebrowitz.

CPLR § 1001 (a) provides, with regard to parties who should be joined, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." These rules "serve an important policy interest in guaranteeing that absent parties at risk of prejudice will not be 'embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard'" (*Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 458 [2005] *citing First Natl. Bank of Amsterdam v Shuler*, 153 NY 163, 170 [1897]). The court may on its own motion or at any stage of the litigation determine that there is nonjoinder of a necessary party (*Solomon v Solomon*, 136 AD2d 697 [2d Dept 1988]).

In the instant proceeding, it is clear that Caleb McArthur and Loren McArthur would be inequitably affected by a judgment against their interest in both trusts. Lisa Zebrowitz's

motion pursuant to CPLR § 1001 is **GRANTED**. The motion to serve an amended complaint and citation is **GRANTED**. The trustees should also be made parties to the proceeding. As not all of the necessary parties are before the court, the cross motions for summary judgment are **DENIED** without prejudice to renew (*Armstrong v Caliber One Indem. Co.*, 5 AD3d 413 [2d Dept. 2004]).

This constitutes the decision and order of the court.

Dated: June 15, 2018
Mineola, New York

E N T E R:

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

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