

Matter of Schwartz

2018 NY Slip Op 32898(U)

October 26, 2018

Surrogate's Court, Nassau County

Docket Number: 2015-384840/K

Judge: Margaret C. Reilly

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

**In the Matter of the Application of
Harold J. Schwartz, as Executor of the Estate of**

PAUL CHARLES SCHWARTZ,

Deceased,

**to Compel Dorothy Grogan to Pay Her
Apportioned Share of Estate Tax Payment Pursuant
to EPTL 2-1.8.**

DECISION & ORDER

**File No. 2015-384840/K
Dec. No. 34728**

**In the Matter of the Application of
Harold J. Schwartz, as Executor of the Estate of**

PAUL CHARLES SCHWARTZ,

Deceased,

**to Compel Charles Schwartz to Pay His
Apportioned Share of Estate Tax Payment Pursuant
to EPTL 2-1.8.**

**File No. 2015-384840/J
Dec. No. 34729**

PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

In Connection with the Petition to Compel Dorothy Grogan (Dec. No. 34728):

Motion to Renew and Reargue Filed by Harold J. Schwartz	1
Affirmation in Support	2
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In Connection with the Petition to Compel Charles Schwartz (Dec. No. 34729):

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In connection with two parallel discovery proceedings brought by Harold J. Schwartz (the petitioner), as the executor of the estate of Paul Charles Schwartz (the decedent), and in

response to a decision and order issued by this court on April 13, 2018¹ (the April 2018 decision), the petitioner has filed two motions. The motions seek leave to renew and reargue the part of the April 2018 decision that directs consolidation of: (A)(1) the petition to compel Dorothy Grogan to pay her apportioned share of estate tax pursuant to EPTL 2-1.8², and (2) the petition to compel Charles Schwartz (the respondent) to pay his apportioned share of estate tax pursuant to EPTL 2-1.8³; with (B) the accounting proceeding filed by the petitioner under File No. 2015-384840/L. Opposition to both motions was filed by the respondent.

BACKGROUND

The decedent died on October 17, 2014, survived by his four children: the petitioner; the respondent; Kenneth Schwartz; and Pennie Isabella (collectively, the decedent's children). On May 16, 2017, the decedent's last will and testament, dated January 19, 2001, was admitted to probate and letters testamentary issued to the petitioner. Article TENTH of the will contains a tax apportionment clause directing that all estate taxes payable on any property constituting the decedent's taxable estate, whether passing under or outside the will, be paid out of the probate estate as an administration expense.

On July 12, 2017, the petitioner, in his capacity as the executor, filed a proceeding against Dorothy Grogan, the decedent's former companion, and a proceeding against the respondent, asking the court to compel each of them to pay a purported respective apportioned share of the estate tax due on non-testamentary assets. The petitions were amended on September 14, 2017. According to the petitioner, Dorothy Grogan is required

¹ Dec. Nos. 33994, 33995, and 34220.

² File No. 2015-384840/K; Dec. No. 34728.

³ File No. 2015-384840/J; Dec. No. 34729.

to pay \$18,270.00 toward the estate tax, based upon her receipt of 1.58% of the decedent's life insurance and annuity policy benefits, and the respondent is required to pay \$325,000.00, as paid by each of the other three of the decedent's children toward the estate tax, based upon the respondent's receipt of almost 25% of the decedent's life insurance and annuity policy benefits. The petitioner asserts that the decedent's estate lacks sufficient funds to pay federal or state estate taxes.

Subsequently, on December 7, 2017, in response to the respondent's petition to compel an accounting, the executor filed a petition for judicial settlement of his first intermediate account for the period from October 17, 2014 to November 10, 2017.⁴ The accounting was subsequently amended twice.

In the decision and order dated April 13, 2018, the court denied the respondent's motion to dismiss the petition filed by the petitioner seeking payment by the respondent of a proportionate share of estate taxes. The court noted that based upon the will, there can be no determination of an apportionment of the taxes to be paid by the estate beneficiaries until it is determined that the estate lacks sufficient assets to pay the taxes. On that basis, the court directed that the issues raised in the respective apportionment proceedings against Dorothy Grogan and the respondent should be addressed within the context of the accounting proceeding. The court then stated that each of the two proceedings to compel payment of a share of the taxes would be consolidated with the executor's accounting proceeding. As a result, all of the issues that were raised in the two petitions to compel payment would be addressed within the framework of the accounting proceeding.

⁴

File No. 2015-384840/L.

On July 27, 2018, which was the return date of the supplemental citation issued in connection with the accounting proceeding, the decedent's children signed a stipulation in which they agreed that the petitioner's petition for judicial settlement of his first intermediate account would be withdrawn without prejudice to file a voluntary petition to settle the petitioner's account on or before December 31, 2018.

LEAVE TO RENEW AND REARGUE

Motions for Leave

The petitioner is seeking leave to renew and reargue that portion of the April 2018 decision that directs the consolidation of the miscellaneous petitions to compel the payment of taxes with the petitioner's accounting proceeding. In support of his motions for leave to renew and reargue, the petitioner argues that the court should not have searched the record by looking to the accounting proceeding to reach its conclusion but should have only considered the papers that were filed in the proceeding to compel payment. The petitioner further maintains that the court should grant him leave to reargue on the basis of the court's misinterpretation of EPTL 2-1.8 (g), which requires the Surrogate to apportion taxes once the value of the assets and the taxes due are known. Moreover, the petitioner asserts that the estate should not be required to wait for a final accounting to resolve this matter.

Affirmation in Opposition

In his affirmation in opposition to the motion to renew and reargue,⁵ the respondent asserts that: (1) the petitioner has not raised a valid basis for leave to reargue the April 2018

⁵ The heading on the affirmation in opposition filed by the respondent indicates that the affirmation was filed in connection with both motions. No other opposition to the motion to renew and reargue was filed by Dorothy Grogan.

decision but rather, seeks reargument of issues previously determined by the court; and (2) the petitioner has not raised a valid basis for leave to renew the April 2018 decision, as his motion lacks new facts and a justification for his failure to present these facts in his earlier petitions. The respondent notes that the issue of the accounting was previously raised in the respondent's motion to dismiss, so that in referencing the accounting proceeding in the April 2018 decision, the court did not have to look beyond the papers filed in connection with the proceedings to compel the payment of taxes. In the event that the court grants the motion to renew or reargue, the respondent asks the court to adhere to the findings contained in the April 2018 decision. According to the respondent, relief under EPTL 2-1.8 is not mandatory, as argued by the petitioner, but may be granted at the discretion of the court, as EPTL 2-1.8 (g) authorizes the Surrogate's Court "to make such preliminary, intermediate or final decrees or orders in the proceeding as [the Surrogate] shall deem advisable, tentatively or finally apportioning the tax." Finally, the respondent claims that the petitioner failed to timely serve his motion papers.

Affirmation in Further Support

In the petitioner's reply affirmation in further support of the motions to renew and reargue, he insists that once the estate taxes are fixed, EPTL 2-1.8 (g) requires the court to determine the respondent's tax liability. He maintains that renewal or reargument of the relevant portion of the April 2018 decision is warranted because the court improperly applied EPTL 2-1.8 (g) and improperly strayed into the overall record by referencing the accounting proceeding. Finally, the petitioner insists that his motions were timely filed.

ANALYSIS

Motion to Renew and Reargue

A motion for leave to renew must be based upon new facts. The movant must introduce facts that were not presented on the prior motion which would alter the court's earlier determination (CPLR 2221 [e]). A movant on a motion to renew must demonstrate a reasonable justification for not placing such alleged additional facts before the court on the original motion (CPLR 2221 [e] [3]). The Second Department has repeatedly held that the additional evidence offered on a motion to renew must be either newly discovered or have been unavailable to the movant at the time of the prior application (*see Winograd v Neiman Marcus Group*, 11 AD3d 455 [2d Dept 2004]; *Seltzer v City of New York*, 288 AD2d 207 [2d Dept 2001]; *Delvecchio v Bayside Chrysler Plymouth Jeep Eagle*, 271 AD2d 636 [2d Dept 2000]).

A motion to reargue is based upon a mistake by the court. It is not based upon any new facts, but instead seeks to convince the court that it "overlooked or misapprehended the facts or the law on the prior motion, or for some reason mistakenly arrived at its earlier decision" (CPLR 2221 [d]; *see Bolos v Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]; *Schneider v Solowey*, 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (*McGill v Goldman*, 261 AD 593 [2d Dept 1999], citing *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]), nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*see Giovanniello v Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737 [2d Dept

2006]; *Gellert & Rodner v Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]).

In reaching its decision, the court recognized, but did not rely on the substance of, the accounting proceeding. In any event, this court may take judicial notice of its own records (*Sam & Mary Hous. Corp. v Jo/Sal Mkt Corp.*, 100 AD2d 901 [2d Dept 1984], *affd* 64 NY2d 1107 [1985]; *Matter of Lane v Lane*, 68 AD3d 995 [2d Dept 2009]). The April 2018 decision also recognized that where the will includes a tax apportionment clause but the estate has insufficient assets for the payment of estate taxes, EPTL 2-1.8 (g) may be applied. This section governs the apportionment of estate tax among the persons interested in the gross taxable estate, unless: (A) the testator has directed otherwise (*Matter of Davidson*, 55 AD2d 1012 [4th Dept 1977]), typically by including a tax apportionment clause in the will; or (B) the residuary estate is insufficient to pay the estate taxes (*Matter of Wesey*, 15 Misc 3d 1147[A], *2 [Sur Ct, Nassau County 2007], citing *Matter of Hamilton*, 69 Misc 2d 246 [Sur Ct, Orange County 1972]).

“As a rule, where the fund indicated in the will of a decedent as the source of all tax payments, is either nonexistent or insufficient to pay estate taxes in full, the statutory rule of apportionment becomes operative, and the tax is required to be equitably allocated against all persons interested in the estate in proportion to their respective benefits” (*Matter of Collia*, 123 Misc 2d 1014, 1018 [Sur Ct, Suffolk County 1984]).

In the April 2018 decision, this court recognized that the “apportionment of estate taxes is contingent upon whether the estate has sufficient assets to pay [estate] taxes” and, on that basis, determined that the issues raised in the petitions to compel payment of taxes should be addressed in the accounting proceeding, which will provide the petitioner with an opportunity to demonstrate that the estate lacks sufficient assets for the payment of the taxes.

In consolidating the two petitions to compel with the petitioner's accounting proceeding, the court cited SCPA 501 (2) (a), which provides that the court may direct that proceedings be consolidated when a common question of fact is found in both proceedings.

CONCLUSION

For the above reasons, the motions for leave to renew and reargue that portion of the April 2018 decision that consolidated the miscellaneous proceeding and the accounting proceeding are **DENIED**.⁶

This constitutes the decision and order of the court.

Dated: October 26, 2018
Mineola, New York

E N T E R:

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

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⁶ The court acknowledges that, subsequent to the issuance of the April decision, the parties agreed that the accounting petition would be withdrawn, but without prejudice to the petitioner to file a voluntary petition to settle the petitioner's accounting as executor on or before December 31, 2018.

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