

**Matter of Van Zwielen**

2018 NY Slip Op 34551(U)

December 3, 2018

Surrogate's Court, Suffolk County

Docket Number: File No. 2017-778/B

Judge: John M. Czygier

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT : SUFFOLK COUNTY

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Probate Proceeding, Will of

FILED  
SURROGATE'S COURT  
SUFFOLK COUNTY

DECISION

DEC 03 2018

) By: HON. JOHN M. CZYGIER, JR.

) MICHAEL CIPOLLINO  
) CHIEF CLERK

) WILLIAM H VAN ZWIENEN,

) Surrogate

) Dated: DEC 03 2018

) File #: 2017-778/B

) Deceased.  
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In this miscellaneous proceeding to recover the possession of real property, the court has before it a motion brought by respondent, Yan Ping Xu ("respondent") seeking reargument of this court's October 10, 2018 decision and order (the "October Decision") and granting respondent a stay. Petitioner, Raymond E. Van Zwienen ("petitioner") opposes. For the reasons that follow, objectant's motion is denied.

Background

The court assumes familiarity with the procedural history of this case, which is more fully delineated in this court's numerous prior orders. As is relevant here, decedent, William H. Van Zwienen ("decedent") died on September 29, 2016, survived by his spouse, respondent herein, and his four children, including petitioner herein.

Decedent's last will and testament, dated October 17, 2014, bequeathed his tangible personal property to respondent and his four children equally, and the residue to the William H. Van Zwienen Revocable Trust (the "Trust"). As provided under the most recent trust amendment, respondent was given a six-month period to live in decedent's residence, 12 Mallar Avenue, Bay Shore, New York (the "subject property") following decedent's death, after which the trustee is directed to sell the property and divide the proceeds equally amongst respondent and decedent's four children.

Following a contested probate proceeding, this court granted probate of the propounded instrument and issued letters testamentary to petitioner. Pursuant to his authority thereto, and as successor trustee of the Trust, petitioner then commenced the instant proceeding on December 22, 2017, seeking to recover

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possession of the subject property and a judgment against respondent for her use and occupancy of the premises. By decision and order dated February 16, 2018, this court determined that respondent had defaulted in this matter, granted petitioner's application, and directed respondent to vacate the subject property within ten (10) days of being served with a copy of the order.

Respondent subsequently moved to vacate her default and filed an order to show cause seeking to restrain enforcement of the February 16, 2018 decision and order. The court signed the order to show cause and heard oral argument on March 14, 2018. On April 5, 2018, the court rendered a decision and order (the "April Order") denying respondent's motion to vacate and again directing respondent to vacate the subject premises within ten (10) days of being served with a copy of the order. Respondent filed her appeal of that decision on May 8, 2018.

On July 2, 2018, during the pendency of her appeal, respondent moved this court for a statutory stay pursuant to CPLR 5519(a)(6). By decision and order dated August 16, 2018 (the "August Order"), the undersigned granted respondent's motion for a stay conditioned upon the filing of an undertaking in the amount of \$2,400 per month, payable to petitioner, during the pendency of her appeal from the April Order.

To date, respondent has not filed said undertaking. She has, however, filed a motion to renew and reargue the August Order, which is returnable on January 15, 2019. Respondent also submitted an order to show cause seeking a restraining order and stay of the proceedings. By decision and order dated October 10, 2018 (the "October Order"), this court returned respondent's order to show cause without signature. The court therein reiterated the holding of the August Order, noting that respondent's motion to renew and reargue the August Order was also pending. As such, the court declined to entertain the order to show cause, as it was again requesting the same relief.

Currently pending is respondent's motion to reargue the October Order, in which she seeks an order "staying the undertaking" and restraining her eviction (see Notice of Motion). Petitioner opposes.

#### Applicable Law and Discussion

CPLR 2221(d)(2) requires that a motion to reargue be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Its purpose is to

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convince the court that it was wrong, "not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v. Roche*, 68 AD2d 558 [1st Dep't 1979]; see also *Richardson v. Lindenbaum & Young*, 14 Misc3d 1223[A] [Sup Ct, Kings County]).

As best the court can discern, respondent asserts that the court erred in finding that the relief was duplicative and in rejecting her order to show cause because the relief requested within the order to show cause is different from that requested within her motion to renew and reargue the August Order (see Aff. in Support ¶¶ 6-7). The difference, she claims, is that the motion to renew and reargue the August Order seeks to stay "the undertaking matter and issue a restraining order" during the pendency of her motion (Reply Aff. ¶ 2) while the order to show cause sought a stay of enforcement pending her appeal. Respondent has failed to attach a copy of her proposed order to show cause and documents in support, and the October Order makes clear that respondent's entire submission was returned to her (see October Order). As such, the court cannot compare the proposed order to show cause with the motion to renew and reargue the August Order.

Nonetheless, respondent's argument is one of semantics. To "stay" the undertaking and issue a restraining order is to effectively stay enforcement. Though couched slightly differently, each submission seeks an unconditional stay for a period of time. Both petitioner and respondent have previously presented their arguments at length, many of which respondent repeats in the instant motion, and this court has ruled on the matter of a stay. As such, the October Order appropriately declined to entertain respondent's duplicative relief.

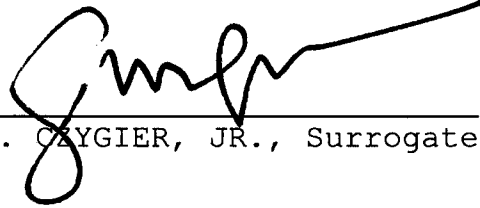
Respondent's further assertion that the October Order contradicts the court's practice is equally unavailing (see Aff. in Support ¶ 8). In making this assertion, respondent's argument abruptly stops, and her affidavit in support begins on page "1" and continues on page "3." In any event, respondent appears to suggest that, by signing an order to show cause once in this matter, that it is the court's practice to necessarily sign orders to show cause and grant temporary restraining orders. Of course, the procedural posture when this court signed an order to show cause earlier this year differs drastically from that seven (7) months later. While the court found a temporary restraining order to be appropriate in March of 2018, by the time of the October Order, respondent had presented her arguments regarding a stay and undertaking, and the court had already ruled on the matter. Accordingly, respondent has failed to demonstrate that this court overlooked or misapprehended

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any matters of law or fact in the October Order and her motion is denied.

Conclusion

For the foregoing reasons, respondent's motion is denied.



JOHN M. CZYGIER, JR., Surrogate

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