

Matter of 805 Nimes Place LLC (Bollenbach)

2018 NY Slip Op 34563(U)

July 27, 2018

Surrogate's Court, Suffolk County

Docket Number: File No. 2016-4036/I

Judge: John M. Czygier, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT : SUFFOLK COUNTY

Proceeding to Determine the Validity and)
Amount of the Claims of 805 Nimes Place)
LLC Against the Estate of)

RECEIVED
SURROGATE'S COURT
SUFFOLK COUNTY

DECISION/ORDER

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

JUL 27 2018

MICHAEL CIPOLLINO
CHIEF CLERK

Surrogate
.....

STEPHEN F. BOLLENBACH a/k/a)
STEPHEN BOLLENBACH,)

Dated: JUL 27 2018

Deceased.)

File #: 2016-4036/I
.....

Before the court are dispositive motions and motions for a protective order filed by certain parties to these proceedings. The motions will be determined in separate decisions of even date.

Counsel for petitioner in captioned matter, has moved for summary judgment in the instant proceeding to determine the validity and amount of its claims against the estate, arguing that petitioner is owed a debt of \$3,964,716.00 by virtue of a 2010 Separation Agreement incorporated into the Bollenbachs' California Judgment for Dissolution of Marriage, as well as 2011 and 2016 limited liability company agreements of 805 Nimes.

Background and Arguments

Captioned decedent died on October 8, 2016, survived by his spouse ("Kimberly") and two adult children ("Chris and Keat"). After the devise of certain residences and their contents to Kimberly, the decedent's last will and testament leaves the residue of the estate to a living trust, which was executed on the same day as the decedent's last will and testament. In broad terms, the trust leaves the grantor/decedent's real estate holdings, plus a cash sum in excess of \$13,000,000, to his wife, Kimberly. Any funds remaining in the trust are to be held in further trust for the benefit of the grantor/decedent's issue, *per stirpes*. Kimberly received letters testamentary as executor of decedent's estate on June 30, 2017. She is also the successor trustee to the grantor/decedent of the living trust.

As heretofore indicated, the decedent and his former spouse ("Barbara") entered into a Separation Agreement, which was incorporated into their 2010 Judgment of Divorce, wherein it was

Estate of Stephen Bollenbach a/k/a Stephen F. Bollenbach, Deceased

agreed that the decedent, in addition to maintaining assets in his revocable trust for the benefit of his sons, Chris and Keat, such that they would inherit at least sixty-five percent (65%) of the decedent's estate (Article VII of the Agreement/2010 Judgment), agreed to a division of assets reflected therein as community property with his then wife Barbara.

According to the pleadings, the decedent, his ex-wife Barbara and their sons were all members of the Nimes LLC. Barbara and Stephen Bollenbach entered into a Separation Agreement, which provided, *inter alia*, that each would contribute \$7,800,000.00 to 805 Nimes (Article II.D.3, 2010 Agreement/Judgment). As indicated, their Separation Agreement was incorporated into their 2010 Judgment of Divorce. In January, 2011, the \$7,800,000.00 capital contribution commitment was reduced to \$4,050,000.00. A Second Amended LLC Agreement in March, 2016 acknowledged this obligation. It is alleged that Barbara Bollenbach satisfied her obligation, but the decedent did not, nor has his estate.

In her answer to the petition, respondent fiduciary denies liability for the payment(s) and asserts six (6) affirmative defenses including failure to state a cause of action, unclean hands, statute of limitations, laches, estoppel, and CPLR 3013.

As she has in other dispositive motions premised upon the 2010 Agreement/Judgment, respondent fiduciary maintains that Chris and Keat Bollenbach have not been forthcoming with the necessary discovery to address the claims filed against the estate; and that they were acting in concert with their mother Barbara to delay the estate's administration. She alleges that, by pursuing this claim on behalf of 805 Nimes, Chris and Keat have violated the *in terrorem* clauses in the decedent's will and trust.

Respondent fiduciary's counsel argues that petitioner did not follow the procedures outlined in the Second Amended LLC Agreement for making a demand for payment and that the sum sought (\$4,200,313.00) exceeds the sum allegedly owed (\$4,050,000.00). It is also argued that the estate may have claims for an offset and/or damages in connection with a sale of LLC assets made without the decedent's or his fiduciary's knowledge. In short, respondent argues that petitioner has failed to make a *prima facie* case entitling petitioner to summary judgment.

In reply, petitioner's counsel refers to the 15,000 documents produced in response to previous demands for documentation,

Estate of Stephen Bollenbach a/k/a Stephen F. Bollenbach, Deceased presumably in connection with a proceeding previously brought by the fiduciary, pursuant to SCPA 2103 (File #2016-4036/C), and that no further demands have been made since those documents were supplied.

Discussion

With respect to the affirmative defenses asserted by the respondent fiduciary, the defense of failure to state a cause of action must be dismissed, as the cause of action is clearly delineated by reference to the terms of the 2010 Agreement/Judgment (CPLR 3211(a)(7)). Likewise, for the same reason(s), the alleged violation of CPLR 3013 is also unavailing to respondent fiduciary. Respondent also asserts that Article VII is unenforceable as a matter of law and that there has been a violation of the *in terrorem* clauses in both instruments.

The doctrine of full faith and credit dictates that a state judgment shall have the same credit, validity and effect in every other sister state's courts, with certain limited exceptions (*Matter of Cassini*, 2009 NYLJ LEXIS 3330*3, *aff'd* 95 AD3d 1311; citing Article IV §1 of the U.S. Constitution and *Underwriters Nat'l Assur. Co. v. North Carolina Life & Acc. & Health Ins. Guar. Assn.*, 455 US 691). Therefore, a valid California judgment must be deemed valid and enforceable in a sister state, as long as the California court had jurisdiction over the parties and the subject matter, and the judgment is not in contravention of state statutes or public policy (*Matter of Cassini*, *supra* *4; citing *Nevada v. Hall*, 440 US 410, 421; *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 US 493, 502). In the case before the court, the decedent and Barbara Bollenbach's 2010 Agreement merged into the 2010 Judgment of Divorce, which was apparently never modified, vacated or reversed. It is, therefore, entitled to full faith and credit in New York.

Therefore, the court dismisses the affirmative defense which asserts that Article VII is unenforceable as a matter of law.

Respondent fiduciary has also included an affirmative defense premised upon a finding that there has been a violation of the *in terrorem* clauses in this decedent's will and the Stephen Bollenbach Trust. While the relevance of the *in terrorem* clauses to this specific proceeding is questionable, the court refers counsel to its companion decision concerning the proceeding to enforce Chris and Keat Bollenbach's claims (File #2016-4036/E/F/G/H) of even

Estate of Stephen Bollenbach a/k/a Stephen F. Bollenbach, Deceased date, which held, for the reasons stated therein that the fiduciary's arguments concerning the *in terrorem* clause(s) are unavailing.

The defense of statute of limitations is unavailing and respondent fiduciary does not address its application in the papers filed in opposition hereto. Accordingly, the defense that this proceeding is barred by the statute of limitations is dismissed.

Upon review of the supporting papers, this court must agree with respondent fiduciary that this application is premature and requires additional discovery in order to proceed to resolution. Simply arguing that the fiduciary must have all the information necessary to determine the extent of petitioner's interest herein is insufficient.

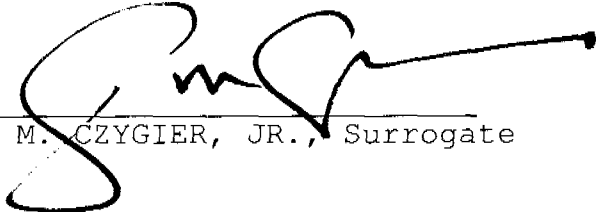
Finally, the pending accounting proceedings will be beneficial to the ultimate resolution of these matters by the court, given the numerous competing interests and substantial tax liability.

Conclusion

Accordingly, for the reasons set forth herein, petitioner's motion for partial summary judgment is granted solely to the extent outlined herein.

Counsel for the parties herein shall appear for a conference at the Surrogate's Court, 210 Center Drive, Riverhead, NY, (Courtroom #5, 4th Floor) on **AUGUST 30**, 2018 at 9:30a.m. for the purpose of addressing outstanding discovery and the remaining issues in this contested matter.

The foregoing decision constitutes the order of this court.



JOHN M. CZYGIER, JR., Surrogate

Estate of Stephen Bollenbach a/k/a Stephen F. Bollenbach, Deceased

Kasowitz Benson Torres, LLP
By: David Ross, Esq.
Attorneys for 805 Nimes Place, LLC
1633 Broadway
New York, NY 10019

Schulte Roth & Zabel, LLP
By: Robert M. Abrahams, Esq.
Attorneys for Kimberly Haynes,
as Fiduciary
919 Third Avenue
New York, NY 10022

McNulty-Spiess, P.C.
Trial Counsel for Kimberly Haynes,
as Fiduciary
214 Roanoke Avenue
P.O. Box 757
Riverhead, NY 11901-0601

McCoyd Parkas & Ronan, LLP
By: Bill P. Parkas, Esq.
Attorneys for Chris and Keat Bollenbach
1100 Franklin Avenue, The Penthouse
Garden City, NY 11530

Ruskin Moscou & Faltischek, P.C.
By: John Farinacci, Esq.
Attorneys for Kimberly Haynes,
as Beneficiary
1425 RXR Plaza
Uniondale, NY 11556

Novick & Associates, P.C.
By: Donald Novick, Esq.
Attorneys for Barbara Bollenbach
202 East Main Street, Suite 208
Huntington, NY 11743