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| <b>Matter of JPMorgan Chase Bank, N.A. (Talbot)</b>  |
| 2020 NY Slip Op 30503(U)   |
| February 21, 2020  |
| Surrogate's Court, New York County   |
| Docket Number: 2008-4510   |
| Judge: Nora S. Anderson  |
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court  
DATA ENTRY DEPT.  
FEB 21 2020

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ACCOUNTING AND REQUEST FOR CONSTRUCTION OF

JPMORGAN CHASE BANK, N.A.,

File No. 2008-4510

as Trustee of the trust created under  
Agreement dated December 22, 1934  
between Edward I. Devlin, as Donor, and  
JPMorgan Chase Bank, N.A., as Trustee  
for the benefit of

JO D. TALBOT,

Deceased.

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A N D E R S O N , S .

In this contested accounting proceeding, movant, Karen Cullin, beneficiary under decedent's will and the former executor of his estate, has filed a motion for summary judgment on various grounds, including lack of standing by respondents (takers in default of decedent's exercise of her power of appointment) and lack of subject matter jurisdiction by Suffolk County, Surrogate's Court, which presided over prior proceedings. Movant also argues, *inter alia*, that despite having entered into a stipulation in open court to settle a potential probate contest, she never formally renounced her interest in the subject trust and that the matter should be determined by a 2016 decision from the United States Tax Court.

Further, she raises the issue of whether decedent exercised her testamentary power of appointment.

Respondents oppose by arguing that the motion is factually and legally baseless and contravenes the terms of the above stipulation among the parties in Suffolk County, Surrogate's Court, on March 21, 2007. They argue that movant relinquished all right, title, and interest in the subject trust, consented to the settlement of the trustee's account, and agreed to be responsible for any federal and state estate taxes, including interest and penalties. Moreover, respondents argue that many of the issues movant raises now regarding the open court stipulation were previously litigated and decided against her, and that she should be collaterally estopped from raising those same issues in this court.

One respondent has raised the threshold procedural issue of movant's failure to attach her pleadings (i.e., objections) to the motion for summary judgment as required by CPLR § 3212(b). According to the record, movant attempted to file objections, but due to a miscommunication with the court, her objections were never accepted for filing. Nevertheless, movant filed the instant motion for summary judgment.

Despite the procedural defect, all parties have argued the motion on the merits and have proceeded as if objections had

been filed. Moreover, respondents have not argued that they have been prejudiced by the procedural defect, nor does movant's conduct rise to the level of "willful and contumacious" (*Matter of Rosen*, NYLJ, Feb. 10, 2014 at 22, col 3 [Sur Ct, NY County 2014]). Based on these facts, and in the exercise of the court's discretion and its policy preference to resolve disputes on the merits, the court deems the failure to file objections excusable error (*Home Ins. Co. v Meyers Parking Sys., Inc.*, 186 AD2d 497 [1st Dept 1992]; *Lirit Corp. v S. H. Laufer Vision World, Inc.*, 84 AD2d 704 [1st Dept 1981]; (*Lang v French & Co.*, 48 AD2d 641 [1st Dept 1975])).

Notwithstanding, for the following reasons, the motion is denied.

#### **BACKGROUND FACTS**

JPMorgan Chase Bank is trustee of the "Devlin Trust" ("Trust") created under an Agreement, dated December 22, 1934, between Edward I. Devlin, as donor, and JPMorgan Chase Bank as trustee for the benefit of decedent, Jo D. Talbot (formerly known as Jean Dickson Devlin II).

Under Article FIRST of the Devlin Trust, income is payable to Talbot for life, and upon her death the principal is payable

to whomever Talbot appointed by her will. The Devlin Trust states, in relevant part:

[T]he Trustee shall pay over the entire principal of the Trust to whomever the said Jean Dickson Devlin II shall by Will appoint, and, in the event of her failure to make such appointment to her children, if any, per stirpes and not per capita, and if there are no children her surviving, then to the lineal descendants of the Donor, then living, per stirpes and not per capita.

Decedent Jo D. Talbot died on December 20, 2005, without issue. She signed a testamentary document purporting to be her last will and testament while hospitalized six days before her death. The will made no reference to the power of appointment contained in the Devlin Trust. Decedent left her multi-million-dollar estate to her caregiver and friend, Karen Cullin (hereinafter "movant" or "Cullin") under the residuary clause, which provides as follows:

I give, devise and bequeath all the rest and remainder of my estate, both real and personal, or mixed, of whatsoever nature and wheresoever situate, of which I may die seized or possessed or which I may be entitled to at the time of my death to KAREN CULLIN, to be hers absolutely and forever.

In 2007, the Will was presented for probate in Suffolk County. Respondents Robert Sweeney; Brian, Patrick, Joseph, Sean, and Michael Sweeney; and Deirdre Devlin Zube [collectively "Sweeneys" and "Zube"], who would take in default of the

exercise of the power of appointment, appeared in the probate proceeding and demanded SCPA § 1404 examinations.

Respondents claimed their interests would be adversely affected if the Will were admitted to probate. The attorney-drafter contested their standing, alleging that decedent was adopted in Maine, 50 years earlier, and thus any interest which her biological family may have had in her estate was terminated. The parties engaged in motion practice, and by decision and order dated January 11, 2007, the Suffolk County Surrogate granted respondents' motion to conduct SCPA § 1404 examinations, ruling that their pecuniary interests under the Devlin Trust, which had been created by decedent's biological father, Edward I. Devlin, was in jeopardy and that respondents would be adversely affected if the Will were admitted to probate.

The Surrogate specifically stated that the issue of whether decedent had exercised the subject testamentary power of appointment was not before the court and that the decision should not be interpreted as a finding regarding the power of appointment.

During the course of the SCPA § 1404 examinations, the parties settled the probate contest by a stipulation entered in open court on March 21, 2007. The stipulation included the following terms and conditions:

- a. The Sweeneys and Zube consent to the probate of the will and to the appointment of Karen Cullin as executor;
- b. The Sweeneys and Zube agree to waive any interest they may have to share in or receive a distribution from the estate, except as set forth in the stipulation;
- c. Residuary Beneficiary Karen Cullin waives any right she may have to share in or receive a distribution from the Devlin Trust;
- d. Residuary Beneficiary Karen Cullin consents to the settlement of the account of the trustee and agrees to be responsible for any federal and state estate taxes, including any interest and penalties incurred by the estate and further agrees to indemnify and hold the Respondents harmless from any estate tax liability, including any interest and penalties incurred by the estate;

(Transcript of Stipulation, March 21, 2007, pages 10-11).

After the Stipulation was read into the record, the Surrogate conducted a detailed allocution of Cullin. However, Cullin thereafter refused to comply with its terms. Respondents filed various motions seeking, *inter alia*, to enforce the Stipulation.

In opposition, Cullin argued that the Devlin Trust is not an estate asset, that the Sweeneys and Zube lacked standing, and that Suffolk County Surrogate's Court lacked subject matter jurisdiction over the Devlin Trust and could not enforce the Stipulation.

In a decision and order dated August 13, 2008, the Suffolk Surrogate found that Cullin's argument of lack of jurisdiction over the Devlin Trust was misplaced (*Matter of Talbot*, NYLJ, Sept. 29, 2008 at 46, col 4 [Sur Ct, Suffolk County 2008]). The court stated that it acquired jurisdiction over Cullin when she agreed to waive any claims she may have had in the Devlin Trust (*id.*). The court also stated that parties "freely and voluntarily entering into an agreement for the purpose of settling a litigated matter must be accountable for their performance, or failure to perform, the obligations undertaken" (*id.*).

The court found that based "upon the undisputed facts established by the papers before the court," Cullin had breached the letter and spirit of the Stipulation and sua sponte removed her as executor and revoked her letters testamentary (*id.*). The court ordered that Cullin, her attorney "and any and all of Karen Cullin's agents, servants, employees and assigns are enjoined from any and all acts inconsistent with the stipulation entered into on March 21, 2007, including but not limited to obtaining access to the Devlin Trust in which she waived any claim thereto" (*id.*). The court further ordered them to "comply with all the terms of the stipulation" and "to cooperate to effectuate same" (*id.*).

On May 27, 2011, Cullin moved to vacate that part of the Stipulation that included her waiver of interest in the Devlin Trust, alleging that she had been defrauded by respondents regarding their blood relationship to the decedent. She sought to enforce the Stipulation by prohibiting respondents from obtaining information related to an ongoing federal estate tax audit.

In a decision and order dated July 12, 2011, the Suffolk Court stated that stipulations entered in open court are favored by the courts and will only be set aside where there is fraud, collusion, or mistake. The court found that none of Cullin's arguments had satisfied that standard. Further, the court found that arguments concerning decedent's relationship, or lack thereof, to the Sweeneys and Zube had been raised previously. With full knowledge of the relationships, all parties had voluntarily entered into the settlement agreement to avoid a potential probate contest. Accordingly, the court denied Cullin's motion.

Thereafter, Cullin appealed the decision to the Appellate Division, Second Department. By decision dated March 13, 2013, the Appellate Division reiterated that open court settlements are binding and will only be invalidated where there is fraud, collusion, or mistake (*Matter of Talbot*, 104 AD3d 775 [2d Dept

2013]). The court affirmed the order of the Surrogate's Court and found that "Cullin failed to establish that the Stipulation was procured by fraud" and concluded that "the court properly denied Cullin's request to vacate the provision in the Stipulation in which she waived her rights under the Trust" (*id.*). On April 30, 2013, Cullin moved to reargue the appeal, or in the alternative, for leave to appeal to the Court of Appeals. The Appellate Division denied her motion (*Matter of Talbot*, 2013 NY Slip Op 77195(U)).

Despite two decisions by the Suffolk Court, and two decisions by the Appellate Division, Cullin has filed the instant motion arguing that: (1) she is the "rightful remainderman" of the Devlin Trust, (2) the Trustee should be ordered to distribute the remainder of the Trust to her, and again (3) Suffolk Surrogate's Court lacked subject matter jurisdiction over the Devlin Trust, and (4) the Sweeneys and Zube lacked standing to appear in the probate proceeding. In addition, she argues for the first time that a 2016 United States Tax Court decision issued after the parties had entered into the Stipulation should be determinative and that decedent never renounced her interest in the Devlin Trust.

**DISCUSSION**

On a motion for summary judgment, the movant must as a threshold matter make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If movant succeeds, the burden shifts to the opposing party to submit admissible proof that establishes there are material issues of fact that require a trial (*id.*). The papers submitted by the party opposing the motion should be viewed in a light most favorable to the opposing party (*Robinson v Strong Memorial Hosp.*, 98 AD2d 976 [4th Dept 1983]).

**COLLATERAL ESTOPPEL**

Respondents argue that the issues of lack of standing and lack of subject matter jurisdiction have been litigated and decided against movant. The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity" (*Buechel v Bain*, 97 NY2d 295 [2001]). Two requirements must be satisfied to invoke collateral estoppel. First, a litigant asserting collateral estoppel must demonstrate that the same issue was

decided in a prior action against a party, or one in privity with a party. Second, the party to be precluded from relitigating the issue must demonstrate "the absence of a full and fair opportunity to contest the prior determination (*id.*)."

Applying these principles, this court concludes that respondents have sustained their burden of showing that the issues of lack of standing and lack of subject matter jurisdiction were decided in prior proceedings among these same parties. Both the Suffolk County Surrogate's Court and the Appellate Division, Second Department found Cullin's arguments to be without merit. The issues were fully litigated and decided against her. Cullin has thus failed to satisfy her burden of showing the absence of a full and fair opportunity to contest the prior determinations. Accordingly, she is barred under the doctrine of collateral estoppel from re-litigating those issues in this court.

#### **THE 2016 UNITED STATES TAX COURT DECISION**

Cullin argues that a 2016 United States Tax Court decision should control regarding her entitlement to the Devlin Trust. Specifically, she argues that "the IRS conceded that Jo D. Talbot did not have a general power of appointment," and that the tax court determined that the Trust was not an asset of decedent's estate.

Cullin's analysis of the United States Tax Court decision is flawed and unsupported by the record. But even if her analysis was accurate, it would not change the fact that she waived her rights to share in or receive a distribution from the Trust.

Nowhere does the Tax Court decision state that the value of the Trust was not included in the gross taxable estate. Nor does the decision refer to whether the decedent had a general power of appointment. On the contrary, the Tax Court decision makes no findings of fact or law. The decision merely states there is no deficiency in estate tax due from Cullin or overpayment due to Cullin and that she owes no additional estate tax.

Accordingly, the Tax Court decision has no bearing on the Stipulation, and Cullin has no basis to lay claim to the Trust now. Although Cullin argues she is the "rightful remainderman" of the Trust, both the Suffolk Surrogate's Court and the Appellate Division, Second Department, have ordered that she is not entitled to the Devlin Trust because she waived any claims she may have had when she knowingly and voluntarily entered into the Stipulation on March 21, 2007. Prior decisions of those courts concluded she was bound by the Stipulation because she had presented no evidence that would relieve her of compliance.

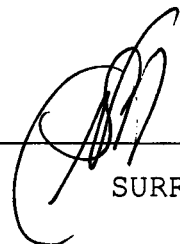
The 2016 Tax Court decision upon which she relies does not alter the effect of the Stipulation or the prior determinations.

In view of this court's findings, movant has failed to make out a prima facie case for the relief sought, and her remaining arguments are rejected as moot. Accordingly, movant's motion is denied.

This decision constitutes the order of the court.

Dated:

*Feb 21, 2020*



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