Matter of Walegur
2020 NY Slip Op 30727(U)
March 10, 2020
Surrogate's Court, New York County
Docket Number: 2013-998/B/C
Judge: Rita M. Mella

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Petition of THOMAS R. WALEGUR and PATRICIA A. BALTRUS for an Order directing a Genetic Marker Test pursuant to EPTL 4-1.2(a)(2)(C) and to Suspend and Revoke the Letters of Administration issued to LYNDSEY E. WALEGUR in the Estate of

EDWARD J. WALEGUR

Deceased,

Pursuant to SCPA 711 and for the Appointment of MATTHEW BALTRUS as Administrator d.b.n.

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DECISION and ORDER
File No.: 2013-998/B/C

M E L L A, S.:

Following is the recitation, as required by CPLR 2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Order to Show Cause, Affirmation of Robert N. Swetnick, Esq., in Support with Exhibits A-D, Affidavit of Lyndsey Walegur in Support of Motion to Vacate, Reargue and Renew and in Opposition to Petitioners' Motion for Summary Judgment, with Exhibits A-C, and Affidavit of Laura Parker in Support, with Exhibits A-C	1, 2, 3, 4
Affirmation of Mary E. Mongioi, Esq., in Opposition with Exhibits A-P, and Affidavit of Megan Shaffer, Ph.D.	5, 6
Reply Affirmation of Robert N. Swetnick, Esq., in further Support of Motion	7

By order to show cause, Lyndsey Walegur moves to vacate, pursuant to CPLR 5015, her default in answering petitioners' summary judgment motion.[1] In the alternative, Ms. Walegur seeks leave to reargue and renew petitioners' prior motion (CPLR 2221). On the October 11, 2019 return date of the Order to Show Cause, the court denied the motion in its entirety.

[1] That unopposed summary judgment motion was granted by decision dated July 10, 2019.

Relevant Background

In this miscellaneous proceeding, petitioners seek to revoke the Letters of Administration issued to Lyndsey Walegur in the estate of decedent Edward Walegur. Decedent's estate has been the subject of protracted litigation. At the heart of this litigation is the challenge by petitioners, two of decedent's siblings, to Ms. Walegur's claim that she is decedent's daughter and his sole distributee. It is undisputed that Ms. Walegur was born during the marriage of decedent and Ms. Walegur's mother, Laura Parker. After extensive motion practice during a two-year period, and upon a showing that in the petition for the dissolution of their marriage filed in a Florida court, decedent and Ms. Parker had represented under oath that there were no children of the marriage, this court ordered a genetic marker test to establish if decedent was Ms. Walegur's father. The results of that test showed that the probability of paternity was 0.00%. Petitioners' subsequent motion for summary determination that Ms. Walegur should be removed as administrator of decedent's estate because she was not a distributee of decedent was granted by this court by the above-mentioned July 10, 2019 decision.

Motion to Vacate Default

As it is well established, "[a]n application brought pursuant to CPLR 5015 to be relieved from a judgment or order entered on default requires a showing of a justifiable excuse and legal merit to the claim or defense asserted" (*Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9 [1st Dept 2002]). As set forth below, Ms. Walegur showed neither.

In support of her motion to vacate, Ms. Walegur argues that her failure to oppose the motion for summary judgment should be excused as being the product of the "nonfeasance of her former counsel in protecting and preserving her right to oppose the motion while she obtained new counsel." Ms. Walegur further contends that "[i]t does not matter whether [former

counsel] failed to [preserve her right to respond] out of oversight, incompetence or malice." The court disagrees.

The record reveals that, when Ms. Walegur's former counsel filed his motion to be relieved from further representing her, he was aware of petitioners' summary judgment motion and that he had failed to oppose it. Yet, former counsel also failed to include in the order to show cause and papers he submitted in connection with his motion a request for vacating Ms. Walegur's default in opposing petitioners' motion or for an extension of time to respond to the motion or for a stay of the underlying proceedings. As noted by the court during the oral argument of the present motion, the failure of former counsel in this regard was not an isolated instance of negligence but a pattern of conduct on the part of counsel that included missing deadlines imposed by the court (including twice-missed deadlines to file a verified answer), failing to oppose petitioners' applications, failing to appear or appearing late to answer the court's calendars, and making last-minute requests to be relieved of deadlines.[2] Of the twenty orders, decisions and decrees entered by this court in matters related to this decedent's estate, several were required to address counsel's intransigence or that of Ms. Walegur herself in failing to comply with this court's orders. In light of this "pattern of intentional and repeated failure[s by counsel for Ms. Walegur] to attend to his obligations," the absence of a response to petitioners' summary judgment motion should not be excused as mere law office failure (*Spivey*

[2] In a particularly egregious example, former counsel had filed a motion for summary judgment on Ms. Walegur's behalf that was returnable before the court on October 25, 2016. That motion was held in abeyance pending the completion of discovery pursuant to CPLR 3212(f). In a decision dated December 29, 2016, the court advised the parties that, once discovery was completed, Ms. Walegur's motion could be restored to the calendar and the parties given an opportunity to supplement their papers. Despite numerous attempts by a court attorney-referee to contact Ms. Walegur's former counsel to learn of Ms. Walegur's intent regarding her motion, former counsel never responded.

v City of New York, 167 AD3d 487, 487 [1st Dept 2018]; *Ferraro Foods, Inc. v Guyon, Inc.*, 165 AD3d 628, 630-631 [2d Dept 2018] [neglect or alleged incompetence of prior counsel and bare allegation that counsel had not informed client of need to answer complaint insufficient to establish reasonable excuse for default]).

Movant's reliance on cases in which a party's default was vacated despite its counsel's failure to appear at court conferences, file responsive pleadings or respond to dispositive motions is unavailing. In those cases, unlike here, the claim of law office failure was supported by "a detailed and credible explanation" that established that counsel's neglectful conduct had been beyond the control of the client (*see Sarcona v J & J Air Container Station, Inc.*, 111 AD3d 914, 915 [2d Dept 2013]; *Bardes v Pintado*, 115 AD3d 894 [2d Dept 2014]) or despite the client's efforts to keep in communication with the lawyer concerning the litigation (*see Inwald Enterprises, LLC v Aloha Energy*, 153 AD3d 1008, 1011 [3d Dept 2017]; *Abel v Estate of Collins*, 73 AD3d 1423, 1425 [3d Dept 2010]). By contrast, here, in his affirmation in support of his motion to withdraw as counsel for Ms. Walegur, her former counsel reported that his attempts to communicate with his client had been unsuccessful until shortly before the return date of the summary judgment motion. Additionally, the proposition that the court may not look into the motives behind counsel's failures in evaluating whether there is a reasonable excuse for a default is contradicted by the authority upon which movant relies (*see Inwald Enterprises, LLC v Aloha Energy*, 153 AD3d at 1010 [whether there has been willfulness is a factor the court should consider in determining reasonable excuse]). In any event, that same authority recognizes the principle that "there indeed may be instances where counsel's inaction or dilatory conduct may be imputed to the client" (*id.* at 1011).

Ms. Walegur has also failed to establish that she had a meritorious defense to petitioners'

motion for summary judgment.[3] Contrary to her argument, and for the reasons stated in this court's July 10, 2019 decision, through their submissions, petitioners made a prima facie showing that Ms. Walegur was not decedent's daughter and, therefore, was not among the class of persons entitled to receive letters of administration in his estate (*see* SCPA 1001). Petitioners' proof, including the results of the court-ordered DNA test showing conclusively that decedent was not Ms. Walegur's biological father as well as the sworn statements by decedent and Ms. Parker, in their Petition for Dissolution of Marriage, that there was no child of their union and that Ms. Parker was not pregnant, effectively rebutted the presumption of legitimacy on which movant had relied in her petition for letters of administration and in contesting this proceeding seeking to revoke those letters (*see Matter of Ludwig*, 239 AD2d 122 [1st Dept 1997] [results of properly administered blood test excluding husband's paternity sufficient to rebut presumption of legitimacy]).

Movant attacks the reliability of the results of that test on two bases. First, she contends that the results are incomplete because the genetic material of petitioner Patricia Baltrus has not been tested against decedent's, despite this court's order directing her to provide a DNA sample for testing.[4] As support for this contention, Ms. Walegur cites to a statement in a document produced by LabCorp, the laboratory chosen by petitioners to conduct the genetic marker test, stating that "[a] more definitive conclusion may be reached if additional paternal relatives (such

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[3] Movant correctly contends that the quantum of proof needed to prevail in a motion to vacate a default is less than that required to prevail in a motion for summary judgment (*see Inwald Enterprises, LLC v Aloha Energy*, 153 AD3d at 1010). The court concludes here that this lower quantum of proof has not been met by movant.

[4] At the oral argument of this motion to vacate the default, petitioners' counsel represented that Patricia Baltrus had provided a DNA sample to LabCorp and that the test comparing Ms. Baltrus's sample with Ms. Walegur's sample had yielded inconclusive results.

as grandparents, acknowledged children and, other aunts and uncles) plus the mother of the child are submitted for testing." This statement appears in the LabCorp document showing the inconclusive results of a prior DNA test comparing Ms. Walegur's genetic material to that of petitioner Thomas Walegur. That test was conducted before it was known that genetic material of decedent, a femur bone sample in the possession of the New York City Office of the Chief Medical Examiner, was available for testing. The quoted statement from the laboratory was relevant to this case only as long as genetic material from decedent himself remained unavailable.

The affidavit of Michael Baird, the Chief Science Officer and Laboratory Director of DNA Diagnostics Center, another nationally recognized and accredited laboratory, disproves movant's contention regarding the incompleteness and inconclusiveness of the results of the test of the genetic materials of decedent and Ms. Walegur. Mr. Baird explains that "[t]he best way to establish a parent child biological relationship is to test samples derived from the alleged parent and child. In this case, this involves samples from the femur of the Decedent and from [Ms. Walegur.]"[5] According to Mr. Baird, "[i]f there is sufficient viable DNA from the femur sample, the test should be able to include or exclude the alleged father as the biological father" but if the sample does not have sufficient DNA, testing decedent's biological relatives can be useful in making a determination. The results of the test of samples from decedent and Ms. Walegur having been conclusive here, the fact that Ms. Baltrus's sample was not compared to that of decedent's or Ms. Walegur's does not render the test inconclusive.

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[5] This affidavit, dated January 16, 2018, was submitted in support of petitioners' prior motion for an order directing the New York City Office of the Chief Medical Examiner to release decedent's bone sample to LabCorp for testing. The affidavit is also part of the record in the present motion.

Relying on a "Comment" posted on an internet website by a writer whose credentials in the field of DNA testing are not provided, Ms. Walegur suggests that there is a second basis for questioning the reliability of the results of the DNA test excluding decedent as her biological father: that petitioners have failed to establish the integrity of the test. In particular, movant argues that petitioners' proof fails to show that the sample was viable for testing and that it was, in fact, properly tested despite the time that elapsed between decedent's death and the test.

Preliminarily, the court rejects movant's invitation to speculate as to the integrity of the test results based on unsworn statements on a website by one who has not been qualified as an expert. Turning to the evidence, in an affidavit submitted in opposition to the instant motion, Megan D. Shaffer, a Technical Director in the DNA Identification Testing Division of LabCorp, who signed the report on the analysis of the specimens in this case and who "under penalties of perjury" asserts that the results "are true and correct," avers that decedent's three-inch bone sample was in good condition and "not excessively degraded or otherwise inadequate for genetic testing," was sufficient in size for DNA processing, and that DNA extracted from this sample resulted in "a complete genetic profile sufficient for comparison to relevant samples." Ms. Shaffer further states that the packaging containing decedent's bone sample was received by LabCorp from the New York City Office of the Chief Medical Examiner and contained no signs of tampering. Ms. Shaffer's credentials in the field of paternity evaluation are well established based on her having reviewed testing results in more than 20,000 cases of disputed paternity.[6]

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[6] Movant argues that the court may not consider the Shaffer affidavit because it was not part of the record of the original summary judgment motion. The court disagrees. In determining motions under CPLR 5015 (a), affidavits addressing whether the movant has shown a meritorious defense are not only accepted by courts but often necessary (*see Pariser Indus., Inc. v T & T Laundry Corp.*, 2003 WL 21283550, 2003 NY Slip Op 50934 [U] [App Term 2d & 11th Jud Dists] [CPLR 5015 [a] motion properly granted where, in opposition, no affidavit by

Additionally, the declaration from an official of the New York City Medical Examiner's Office, that he is in possession of a bone sample of decedent obtained during decedent's autopsy and to which a label identifying the Medical Examiner's case number was affixed, that he has packaged the specimen and labeled it with decedent's name, and that "the proper chain of custody was followed according to established protocol," puts to rest movant's questioning of whether the sample belonged to decedent.[7]

Shaffer's affidavit is not the only evidence on the record that discredits movant's attack on the integrity of the test. As already mentioned, Mr. Baird's affidavit establishes that a result including or excluding decedent as the father could be obtained "if there is sufficient viable DNA" in decedent's femur sample (emphasis added). It is fair to assume that, if the testing here yielded a result sworn to be "true and correct" by the person conducting the analysis of the specimens, it is because decedent's bone sample was viable for testing.

Even if petitioners had failed to establish a prima facie entitlement to judgment as a matter of law, the additional proof offered by Ms. Walegur — her mother's explanations for decedent's and her statements in the divorce Petition and for the omission of decedent's name as father from decedent's birth certificate, as well as Ms. Parker's averments that she and decedent conceived Ms. Walegur during Ms. Parker's visit to New York City in July of 1990 — does not raise a meritorious defense because, in light of the DNA test results, this new evidence fails to

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someone with personal knowledge was submitted]; *Elliot Place Properties, Inc. v Perez*, 53 Misc 3d 1212 [A] [Civ Ct, Bronx County 2016] [same]; *Choi Yim Chi v Miller*, 63 Misc 3d 354 [Sup Ct, Queens County 2019]; *Estate of Witzigman v Drew*, 48 AD3d 1172 [4th Dept 2008] [affidavit of handwriting expert considered in opposition to motion to vacate default]).

[7] This declaration was sent to LabCorp by the Medical Examiner's Office together with the bone sample.

create a material issue of fact concerning whether Ms. Walegur is decedent's biological daughter.

Finally, Ms. Walegur's reliance on the doctrine of equitable estoppel — and specifically "paternity by estoppel" — to establish a meritorious defense to petitioners' claim that she is not decedent's daughter is misplaced. As Ms. Walegur would have it, equity should estop petitioners, who stand in decedent's shoes for the purposes of this proceeding, from denying that Ms. Walegur is decedent's daughter based on decedent's treatment of Ms. Walegur as a daughter during his life. But decedent himself denied paternity in a sworn statement to a court on which that court relied to grant him relief, and thus petitioners are not estopped from continuing to assert such denial. The decisions cited by Ms. Walegur in this connection, in which past claims to paternity by word or deed were held to be binding on the putative father, are thus not apposite here.

In any event, none of those cases determines a right to inherit claim by an adult child whom a genetic marker test has shown not to be the biological child of the decedent. In fact, the applicability of the "paternity by estoppel" doctrine in the context of proceedings to establish succession rights or a father-child relationship after the putative father's death is questionable (*Abreu v Colvin*, 152 F Supp 3d 166 [SDNY 2015] [Family Law and Intestacy Law principles often diverge because they serve different purposes and estoppel principles used to protect a minor child from being delegitimized for child support purposes are not controlling when determining intestacy rights]). Considerations of fairness direct that this doctrine be applied where the financial and emotional support of a minor child is at stake and the alleged father has in the past assumed a paternal role toward the minor that he cannot fairly be allowed to disclaim to the minor's prejudice. But such considerations are not relevant when the alleged father has

died and the child is an adult and, therefore, a minor child's financial and emotional support needs are no longer in issue.

Ms. Walegur attempts in the present motion, for the first time in the multi-year history of this litigation, to establish paternity (and thus her right to serve as administrator of decedent's estate) through the provisions of EPTL 4-1.2 (a)(2)(C)(ii),[8] but in light of the results of the genetic marker test here, the possibility of establishing a right to inherit from decedent as a result of his claimed open and notorious acknowledgment is not available to her. This is demonstrated by the legislative history of the most recent amendment to the statute. This 2010 amendment allowed non-marital children to prove paternity after the death of their father either through the results of a genetic marker test or through open and notorious acknowledgment by the father. As noted by the Memorandum by the Sponsor in the Assembly of the 2010 amendment, "although in most cases, the results of a genetic marker test will be dispositive of the non-marital child's status, it is conceivable that a court may determine for policy or equitable reasons that a father's open and notorious acknowledgment prevails" (Sponsor's Mem in Support, Bill Jacket, L 2010, ch 64 at 6). Even if the court were to agree that the evidence presented by Ms. Walegur amounts to open and notorious acknowledgment, it concludes that on this entire record, the equities do not support overruling the results of the DNA test.

Motion to Renew and Reargue

To the extent that the motion seeks leave to renew, it is also denied. The facts offered in the affidavits of Laura Parker and Ms. Walegur in support of the motion are not new and, in any

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[8] Up until now, Ms. Walegur had relied on the presumption of legitimacy as proof of paternity. In fact, she opposed petitioners' application for a genetic marker test pursuant to EPTL 4-1.2 (a)(2)(C) on the ground that the statute was not applicable to her as a marital child.

case, even if considered by the court, do not support a change in its prior determination.

This decision, together with the transcript of the October 11, 2019 proceedings, constitutes the order of the court.

Dated: March 10, 2020

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