McNeil v McNeil
2020 NY Slip Op 34796(U)
December 7, 2020
Supreme Court, Tompkins County
Docket Number: Index No. EF2020-0036
Judge: Joseph A. McBride
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At a Special Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, via Teams, on the 17th day of November 2020.

PRESENT: HON. JOSEPH A. MCBRIDE
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: TOMPKINS COUNTY

MICHAEL J. MCNEIL,

Petitioner,

-vs-

SUSAN B. MCNEIL,

Respondent.

DECISION AND ORDER

Index No. EF2020-0036

APPEARANCES:

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JOSEPH A. MCBRIDE, J.S.C.

The case before the Court follows Petition for a special proceeding pursuant CPLR Article 4 and General Obligations Law §5-1510(2)(e) and §5-1505(2) filed by Michael J. McNeil ("Petitioner") against Susan B. McNeil ("Respondent"). There are currently two motions before the Court. First, Respondent filed a motion for an Order transferring this Special Proceeding to the Surrogate's Court of Tompkins County. Subsequently, Petitioner filed a cross-motion for partial summary judgment pursuant CPLR §3212.[1] The case was heard at oral argument via Microsoft Teams at a Special Motion Term on November 17, 2020. Court received and reviewed said motions and decided; as discussed below.[2]

BACKGROUND FACTS

Petitioner and Respondent are siblings, and son and daughter, respectively, to Richard J. McNeil, deceased. Decedent passed away on or about Septmeber 25th 2018, at Cayuga Medical Center, following a stroke. Respondent held Power of Attorney for decedent prior to his death. Decedent left a last will and testament dated March 11, 2011, which was filed with the Surrogate's Court, County of Tompkins, on or about October 5, 2018, at which time preliminary letters testamentary were duly issued to Respondent. Petitioner has alleged that Respondent engaged in self-dealing in violation of her role as fiduciary for the decedent. In May 2019, Petitioner applied to the Surrogate's Court for an order requiring Respondent to provide accurate financial information of the decedent. Without an evidentiary hearing, the Surrogate denied Petitioner's application and issued Letters Testamentary to Respondent to probate decedent's estate. After reviewing the decedent's bank records, Petitioner alleges that in the two years leading up to decedent's death, Respondent, through her use of the power of attorney, engaged in numerous financial transactions resulting in the gratuitous transfer of thousands of dollars from the decedent to herself and to Phillip McNeil (the parties' sibling). On January 15, 2020, Petitioner commenced this current action before this Court pursuant CPLR Article 4 and General

[1] Petitioner's Motion for Summary Judgment was denied from the bench at Oral Argument, however the Court indicated they would write a formal Decision and Order, contained herein.
[2] All the papers filed in connection with this motion are included in the electronic file maintained by the County Clerk and have been considered by the Court.

Obligations Law §§5-1510 and 5-1505 in his capacity as child of the principal, seeking a Court review of various financial transactions by Respondent as agent for the decedent to determine if she breached her fiduciary duty and engaged in self-dealing.

After a preliminary conference, this Court allowed the parties to engage in discovery, originally requiring discovery to be completed by August 17, 2020. In May 2020, Respondent filed a motion for a protective order and Petitioner filed a cross-motion to compel discovery responses. By Order dated June 17, 2020, Respondent's motion was denied, and Petitioner's motion was granted with a caveat that Petitioner would tailor the discovery requests "related to suspicious activity" and Respondent would have until August 4, 2020 to respond to such tailored requests. In August 2020, Respondent hired an attorney who requested the discovery requests be tailored once again claiming they were too voluminous. In opposition, Respondent notified the Court that there were over 400 suspicious transactions and by the nature of Respondent' alleged conduct, there would be numerous discovery requests. After a conference, by Order dated Septmeber 24, 2020, Petitioner was ordered to tailor interrogatories once again (to transactions over $250) and serve upon Respondent by October 6. Respondent would then have three weeks after service of the same to respond to such demands. Moreover, Petitioner was not required to answer any discovery demands at that time. At a conference on October 6, 2020, Petitioner reported to the Court that they just discovered that approximately $77,000 was withdrawn from the decedent's bank account on the day he died. The Court once again instructed Respondent to answer the discovery questions about the "suspicious activity." As of November 30, 2020, Respondent has yet to respond to Petitioner's discovery demands.

On October 13, 2020, Respondent filed this current motion to transfer the matter to Surrogate's Court arguing that allowing this Special Proceeding to continue in Supreme Court, it would be duplicative of the proceeding in Surrogate's Court, requesting this Court exercise its power to transfer the matter claiming this special proceeding "directly pertains to the affairs of the decedent and the probating of his will." On October 23, 2020, Petitioner filed opposition to the motion to transfer and filed a cross-motion for partial summary judgment as it pertains to the limited transactions equaling approximately $77,000 reportedly taken on the day the decedent died. Petitioner argued that the current proceeding should remain in Supreme Court as the subject matter is only for the time period while Respondent held Power of Attorney, prior to

decedent's death and therefore not related to probating the estate. Further, Petitioner specifically alleged that the reported missing $77,000 was withdrawn between the hours when the decedent suffered his stroke, which lay him unconscious in a hospital, and when he died therefore, Petitioner should receive judgment as a matter of law for those specific transactions.

The matter was scheduled for oral argument on November 17, 2020. Respondent argued that this Court should exercise its jurisdiction and transfer the matter in an effort to maintain judicial economy, urging that Surrogates Court can award damages if necessary, but stating that an agent cannot be held liable for transactions specifically directed by the decedent's wishes indicating Portioner will likely not succeed on the merits. Petitioner argued that this statute was created for situations such as this, for transactions that occurred prior to the death of decedent, claiming that Surrogate's Court should not hear this petitioner as these specific transactions do not relate to the estate of the decedent.

It should be noted that the Court indicated at oral argument that it will not entertain argument as to the motion for partial summary judgment at that time as it is clear there is outstanding discovery and consequently questions of fact remain. Therefore, that motion would be denied. The Court decides the issues as described below.

LEGAL DISCUSSION AND ANALYSIS

Transfer

It is undisputed that "Supreme Court and the Surrogates Court have concurrent jurisdiction in matters involving decedents' estates, [and] that Supreme Court ordinarily refrains from exercising the concurrent jurisdiction where all the relief requested may be obtained in the Surrogate's Court and where the Surrogate's Court has already acted." Dunham v. Dunham, 40 AD2d 912, 913 (3rd Dept. 1972), see also Williams v. Williams, 36 AD3d 693, 695 (2nd Dept. 2007). It further appears clear that the Surrogates Court can entertain Petitions that seek accountings of the actions of attorneys-in-fact. See Matter of Ferrara, 7 NY3d 244 (Ct. of App. 2006) (matter remitted to Surrogate's Court for further proceedings within the scope of General Obligations Law Article 5 Title 15); see also Matter of Curtis v. Aikins, 83 AD3d 1182 (3rd Dept. 2011) (Despite seeking accounting of respondent's role as both attorney-in-fact and coexecutor,

Petitioner pursued objections only to the accounting submitted by respondent in her capacity as attorney-in-fact, where court thereafter entered a decree judicially settling the final account.)

Here, the Court finds it worth noting that in each of the above-mentioned cases can be distinguished from the case at hand. Specifically, in the cases Matter of Ferrara and Matter of Curtis v. Aikins, respective petitioners filed proceedings challenging the fiduciary integrity of attorneys-in-fact in Surrogates Court under the SCPA §2103. In the case at hand, Petitioner filed a Special Proceeding in Supreme Court under the General Obligations Law. Further, in Williams v. Williams, and Dunham v. Dunham, while the two cases were determined to be better suited in the Surrogates Court, each dealt "matters relating to the affairs of decedents" or the review of wills including conditions that existed after the decedents' deaths. In the case at hand, the Petitioner is seeking review of transactions that solely occurred during the decedent's lifetime while Respondent was attorney-in-fact.

For further guidance, the Court reviewed the legislative history of General Obligations Law §5-1510. According to the practice commentaries included under this section, prior to the enactment of §5-1510 in 2008, there was no remedy for problems that arise regarding a power of attorney. Chapter 644 created an avenue for a special proceeding under CPLR Article 4 "to provide for a speedy resolution of power of attorney claims" if an "agent, principal, or third party believed that a meritorious claim needed resolution." See NY CLS Gen. Oblig. §5-1510, (Practice Commentaries). Further, in review of the relevant commentaries under the Surrogates Court Procedure Act §2205, the practice insights urge beneficiaries to consider "options" when the attorney-in-fact is also the estate fiduciary. When compelling an account of an attorney-in-fact, when there are merely one or two questionable transactions at issue, it is advised as "wise" to commence a proceeding under SPCA §2103. Alternatively, the beneficiaries are urged to seek a separate proceeding if the beneficiaries seek to compel a full accounting of the attorney-in-fact as part of the fiduciary's account as fiduciary. See NY CLS SCPA §2205, (Practice Insights: Compelling the Account of an Attorney-In-Fact). Finally, according to SPCA §2103, prior to certain revisions, at the inquisitorial phase "procedure requires that the fiduciary have explicit information before an order will be granted." See NY CLS SCPA §2103 (revision notes). The statute was then expanded to allow fiduciaries to maintain a proceeding only requiring the fiduciary to have a "reason to believe" there was a violation. See Id.

Here, looking to the relevant case law, as well as the legislative history of the applicable statutes the Court is not persuaded that the Court *must* transfer the matter to Surrogate's Court. It is clear that when the relevant SCPA was enacted in 1966, Surrogate's Court was a court and consequently the SCPA was a statute of limited jurisdiction. Petitions were entertained in limited circumstances when reviewing matters pertaining to the estate of a deceased person. The trend in relevant case law encourages Supreme Court to transfer jurisdiction when a Petition is filed under the scope of the SCPA to review matters involving decedents' estates when the executor also acted as the attorney in fact. See Dunham, *supra*. It should also be noted, both Dunham and Williams as cited above were decided prior to the creation of §5-1510 in 2008. The commentary is clear, §5-1510 was created allowing a special proceeding for an extensive review into the conduct of attorneys-in-fact. The Court distinguishes the current case as one looking to review the conduct of Respondent when she held power of attorney solely under the Article 4 special proceeding, rather than a dual examination under the SCPA. Therefore, the Court will retain jurisdiction over the present matter as we are almost a year into the proceeding. Respondent's motion to transfer is DENIED.

Summary Judgment

Pursuant CPLR §3212(b), the motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party. While the Court recognizes that any party may move for summary judgment at any time "after issue has been joined," the Court believes that a motion for summary judgment is premature at this time. Courts have repeatedly held that it is an error for the trial court to grant summary judgment prior to the completion of discovery. See Saguid v. Kingston Hosp., 213 A.D.2d 770 (3rd Dept. 1995); see also Ferrara v. Maio, 221 A.D.2d 588, 589 (2nd Dept. 1995).

The Court recognizes that this matter has been outstanding for approximately 11 months. Joinder of the issue occurred when Respondent filed an Answer on February 21, 2020 and initial discovery was ordered to be completed by August 2020. Regardless of the Court's several attempts to have the parties complete discovery without Court intervention, discovery is still

outstanding. While Petitioner may or may not have a legitimate claim that delayed discovery response might be due to Respondent's own tactics, in the year of the COVID-19 pandemic, the Court will give liberal allowances for the completion of discovery without the consequence of summary judgment. Moreover, Respondent's Counsel filed his initial Notice of Appearance on August 18, 2020. Petitioner filed this summary judgment motion just two months later. Meanwhile, on Septmeber 22, 2020, the Court ordered that Respondent's discovery demands were to be held in abeyance until Petitioner's demands (and Respondent's objections) were resolved. Therefore, to give the parties an opportunity to complete discovery prior to a decision on summary judgment, Petitioner's motion for summary judgment is DENIED without prejudice as premature. Petitioner will have the opportunity to renew the motion at the appropriate time.

CONCLUSION

Based on all the factors and the foregoing discussion, Defendants', motion to transfer is DENIED and Petitioner's motion for summary judgment is DENIED as premature.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this DECISION AND ORDER by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 12/7, 2020
Norwich, New York

HON. JOSEPH A. MCBRIDE
Supreme Court Justice