

Schwaber & Kafer P.C. v Alpizar
2021 NY Slip Op 30327(U)
February 5, 2021
Supreme Court, New York County
Docket Number: 157599/2020
Judge: Mary V. Rosado
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO **PART** **IAS MOTION 26**

Justice

-----X

SCHWABER & KAHER P.C.,

Petitioner,

- v -

HENRY ALPIZAR, GABRIELLE HALL

Respondent.

INDEX NO. 157599/2020

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTIONS**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 16, 19, 23, 24, 25

were read on this motion to/for

LEAVE TO FILE

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 17, 20, 21, 22, 26, 27

were read on this motion to/for

DISMISSAL

Motion sequence numbers 001 and 002 are consolidated for disposition. Upon the Order to Show Cause dated December 10, 2020 (Motion Seq. 001) by Susan Kafer, Esq., a member and officer of Petitioner law firm Schwaber & Kafer P.C., for leave to sue Henry Alpizar, the Incapacitated Person, and Gabrielle Hall, Esq., Guardian of Mr. Alpizar; the Order to Show Cause dated December 10, 2020 (Motion Seq. 002) by Michael Fenton, Esq., counsel for Gabrielle Hall, Esq., to dismiss the action and award costs and attorney's fees to the Respondent; Affirmation of Michael Fenton, Esq. dated October 26, 2020; Verified Reply in Opposition by Susan Kafer, Esq. dated January 6, 2021; Affirmation in Further Support of Michael Fenton, Esq. dated January 11, 2021; and after a hearing on January 12, 2020, where the Court heard from Petitioner's counsel and Respondent's counsel; it is hereby

ORDERED that the motion to dismiss by Michael Fenton Esq. (Motion Seq. 002) is granted and the motion for leave to sue by Susan Kafer, Esq. (Motion Seq. 001) is denied.

As an initial matter, both parties allege procedural issues with the opposing party's motion. However, in the interest of justice and to not waste judicial resources and Mr. Alpizar's assets, this Court will consider both motions.

Pursuant to Letters of Appointment for the Guardian of the Estate dated February 3, 2020, the Court in Mecklenburg County, North Carolina adjudicated Mr. Alpizar an Incapacitated Person and Ms. Hall was appointed the Guardian for Mr. Alpizar (Petition ¶ 4, 6; Ex. B).

Mr. Fenton, counsel to Ms. Hall, registered the North Carolina guardianship in New York pursuant to Mental Hygiene Law Article 83 on August 10, 2020 under Index No. 500079/2020 (*id.* at ¶ 5, 12; Ex. B).

Petitioner commenced this action on September 17, 2020, seeking permission to bring a plenary action against Mr. Alpizar and Ms. Hall, to determine and to enforce an attorney's charging lien against same respondents for legal services provided to Mr. Alpizar in or about 1998, in relation to his real property located in New York County (Petition ¶ 7-9). Petitioner alleges that this Court has jurisdiction because "Mr. Alpizar owns real property in New York County; he derives regular income from the rental of an apartment at said real property; his retainer agreement with [Petitioner] covers legal services to be provided in New York; and . . . Ms. Hall participates in decisions relating to her ward's interest in the management and sale of the real property and taxes relating thereto" (Verified Reply ¶ 5; Petition ¶ 13).

In order to commence a proceeding against a guardian, "approval of the appointing court must be secured to sue a guardian in his or her representative capacity" (*In re Linden-Rath*, 188

Misc 2d 537, 539 [Sup Ct, NY County 2001]). It is well settled that “once a guardian is appointed for an incapacitated person, litigation against the incapacitated person and against the guardian as representative of the incapacitated person should not proceed without the permission of the court which appointed the guardian” (*Wright v Rickards*, 94 AD3d 874, 875 [2d Dept 2012]). This requirement to receive permission from the appointing court for leave to sue a guardian “cannot be waived by the guardian or by action of another court, nor is the appearance of a . . . guardian in another action tantamount to permission to sue” (*Linden-Rath*, 188 Misc 2d at 539-540). In addition, “the court, which by its committee takes possession of the property of the incompetent person, is clothed with full authority to pay all just claims against the incompetent to the extent of his estate, and to determine the validity of claims by reference, if the facts are disputed” (*In re Snow*, 252 AD 369, 371-372 [252 AD 369 [1st Dept 1937]]).

Mental Hygiene Law Article 83, which addresses jurisdictional and transfer issues relating to guardianships, is “New York’s enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act” and its purpose is to create “a uniform process to resolve jurisdiction issues in guardianship proceedings when two states have connections with the individual” by “providing a more streamlined and predictable process, saving state funds and conserving judicial resources, and reducing the possibility for abuse and expense of the alleged incapacitated person” (*Matter of J.D.S.*, - NYS 3d —, 2020 NY Slip Op 20303 [Sur Ct, NY County 2020]). In determining which state is the more appropriate forum for the court to exercise jurisdiction over a guardianship proceeding, there is “the need to consider that the court making such an appointment should be well positioned to exercise a degree of supervision over the resultant guardianship” (*id.*)

Here, it is undisputed that Mr. Alpizar was adjudicated an Incapacitated Person by Order of the Court in Mecklenburg County, North Carolina, on February 3, 2020, prior to the commencement of this action. Ms. Hall was appointed guardian of Mr. Alpizar in the same order. Therefore, the Court in North Carolina is the court which appointed the guardian, and as such, Petitioner needs the permission of the court in North Carolina to pursue litigation against Mr. Alpizar and Ms. Hall.

Furthermore, although the North Carolina judgment adjudicating Mr. Alpizar as an Incapacitated Person was registered in New York as a foreign judgment pursuant to Mental Hygiene Law Article 83, there has been no further action relating to this individual in this jurisdiction.

The North Carolina Court has been supervising “all matters regarding the real property of the Estate, including the proposed sale of the real property” in New York County and the same court also ordered Ms. Hall to sell Mr. Alpizar’s property (*id.* at ¶ 12, 14). Moreover, as the Letters of Appointment from the North Carolina court fully authorizes Ms. Hall to “receive, manage and administer the property, estate and business affairs” of Mr. Alpizar, and Petitioner concedes that Ms. Hall has been managing Mr. Alpizar’s real property in New York County, it seems that such real property is under the purview of the North Carolina court, and this Court will not interfere (Ex. B; Verified Reply ¶ 5, 8; Petition ¶ 13).

In addition, Mr. Fenton is requesting that this Court impose sanctions pursuant to 22 NYCRR §130-1.1, which provides that: costs; sanctions (a) the court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonably attorney’s fees, resulting from frivolous conduct . . .” In accordance with 22 NYCRR §130-1.1 (c), conduct is

frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injured someone; or (3) it asserts material factual statements that are false.

Here, the facts alleged by Mr. Fenton do not meet this standard, and therefore, Mr. Fenton's request for sanctions and penalties against Petitioner for frivolous conduct pursuant to 22 NYCRR § 130-1.1 is denied.

Accordingly, it is

ORDERED that the motion to dismiss (Motion Seq. 002) is granted in part and denied in part; and it is further

ORDERED that the motion for leave to sue (Motion Seq. 001) is denied; and it is further

ORDERED that Michael Fenton, Esq. shall serve a copy of this Order with Notice of Entry upon all parties entitled to notice.

This constitutes the Decision and Order of this Court.

<u>2/5/2021</u>		<u>Mary V Rosado</u>	
DATE		MARY V. ROSADO, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE