

Matter of Wood

2023 NY Slip Op 30367(U)

February 3, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2016-2396/B

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

February 3, 2023

ESTATE OF BERNARD WOOD, Deceased
File No.: 2016-2396/B

In this contested probate proceeding, the decedent's son moves for an order (i) enforcing a certain stipulation of settlement in a divorce action between the decedent and his surviving spouse, the petitioner herein; (ii) declaring that under such stipulation the spouse has no right to receive any share of the decedent's estate; and (iii) directing that if SCPA 1404 hearings do not occur by a date certain the probate petition will be dismissed. The petitioner opposes the son's motion.

Background

The decedent died on August 1, 2016, survived by a spouse (hereinafter the "Petitioner"); two daughters; and a son (hereinafter the "Movant"). The Movant is not the Petitioner's son.

There are two competing proceedings in this estate. By a petition filed on October 25, 2016, the Movant seeks to receive letters of administration (File No. 2016-239). Subsequently, the Petitioner commenced the instant proceeding (File No. 2016-239/B) to probate a purported will which appears to have been executed on July 3, 2002 and names her as the estate's executor and sole beneficiary. The administration proceeding is being held in abeyance pending the outcome of this probate proceeding.

While each of the daughters consent to the Petitioner's application, the Movant does not. Previously, he moved for an order of summary judgment dismissing this proceeding, which was denied by the court's decision dated July 18, 2019. That order also

directed the parties to proceed with SCPA 1404 examinations, to be taken by personal appearance. To date, those examinations have not been conducted.

The Stipulation and Divorce Action

The motion centers around a divorce action that the decedent, as plaintiff, commenced against the Petitioner, as defendant, on or about December 14, 2009 in the Supreme Court, Bronx County, bearing Index No. 12305/09. In that proceeding, the parties, who were each represented by counsel at the time, entered into a stipulation of settlement (hereinafter, the “Stipulation”) that was fully executed on January 17, 2015. The decedent, however, died prior to a judgment being entered in the divorce action.

The Stipulation provides, *inter alia*, that the Petitioner is to receive maintenance and an interest in the decedent’s pension benefits. Particularly relevant to the matter at bar are the Stipulation’s provisions allowing the decedent to retain exclusive occupancy and possession of the marital residence, a two bedroom condominium located at 1410 Wood Road, Unit MB, Bronx, New York (hereinafter, the “Condominium”), which was titled in the name of the decedent and the Petitioner as tenants by the entirety. According to the parties, the Condominium is the estate’s only asset.

Under the Stipulation, the Petitioner was obligated to transfer her title in the Condominium to the decedent by a quitclaim deed, after which the decedent would refinance the mortgage on the property in his name only. The parties further agreed that consideration for this transfer of ownership would be sixty monthly payments of \$366.00 (hereinafter, “Condominium Payments”), commencing on the Stipulation’s execution date.

To date, the Petitioner continues to reside in the Condominium. She has not

conveyed the realty to the decedent or his estate. According to the Petitioner, she never received any Condominium Payments from the decedent.

THE MOTION

The request for declaratory relief

The Movant's attorney, who also represented the decedent in the divorce action, argues that the Stipulation is enforceable despite the decedent dying prior to the entry of the divorce judgment. According to counsel, all of the matters in the divorce action had been resolved prior to the decedent's death, and what only remained to be completed was the entry of final judgment of divorce entered in the Supreme Court. Moreover, counsel contends that the decedent, partially performed his obligations under the Stipulation, conveying benefits which the Petitioner accepted. As such, the parties conduct constituted a ratification of the Stipulation.

In opposition, the Petitioner's counsel argues that the Stipulation is not enforceable for two reasons. First, she asserts that because the decedent died prior to the entry of a judgment of divorce, the divorce action abated and the Stipulation executed in contemplation of the divorce is unenforceable. Second, counsel posits that the Stipulation is ineffective because the decedent failed to make any Condominium Payments and he only partially paid the spousal maintenance required under the Stipulation.

It is well settled law that when a party to a divorce action dies prior to entry of a final judgment of divorce, the action abates because the marital relationship between the parties no longer exists (*Matter of Forgione*, 237 AD2d 438 [2d Dept 1997]). While an exception to this rule exists where the court has made a final adjudication of divorce but

has not performed the “mere ministerial act of entering the final judgment” (*Cornell v. Cornell*, 7 NY2d 164, 169-170 [1959]; *Matter of Rivera*, 130 AD3d 932 [2d Dept 2015]), the record at this juncture does not support a finding that this exception is applicable here. Nonetheless, even if the divorce action abated due to the decedent’s death, the Stipulation would still be binding if the parties intended it to be an enforceable agreement upon its execution (see *Matter of Germain*, 2017 NY Misc LEXIS 3158 [Surr Ct Nassau Cty 2017]).

The court’s reading of the Stipulation’s clear and unambiguous language leads to the inescapable conclusion that it was intended to be an immediately enforceable contract between the parties. The Stipulation provides that the parties entered into the agreement to resolve “. . . all of their respective rights, remedies, privileges and obligations to each other arising out of their marriage obligations to each other. . . which shall be fully described and bounded thereby, fixing now and forever their rights therein” (Stipulation, page 2). Both parties agreed to “the matter being placed on the uncontested matrimonial calendar for a divorce. . .” (Stipulation, page 4). And Article VIII of the Stipulation directs, *inter alia*, that the Petitioner will transfer sole title to the Condominium so he can “immediately” refinance its mortgage, and that as consideration thereof the decedent should electronically deposit monthly payments of \$366.00 into the Petitioner’s checking account in consideration thereof “commencing on the date the instant stipulation is executed”(Stipulation, page 8). Finally, Article XXVI of the Stipulation states that it shall survive and not be merged in any judgment of divorce (Stipulation, page 20).

Accordingly, the court finds the Stipulation to be an independent contract, binding on the parties unless impeached for some cause recognized by law, and subject

to the ordinary principles of contract construction and interpretation (*Meri v. Meri*, 67 NY2d 359, 362 [1986]; *Keller-Goldman v. Goldman* 149 AD3d 422 [1st Dept 2017]; *Iannuzzo v Iannuzzo*, 154 AD3d 923 [2d Dept 2017]; *Matthews v Roe*, 193 AD3d 919 [2d Dept 2021]; *Matter of Dindiyal*, 2009 NY Misc LEXIS 6103 [Surr Ct Nassau Cty 2009]).

The Petitioner's reliance on the holding in *Passmore v. King*, 186 AD2d 241 (2d Dept 1992) is misplaced. In *Passmore*, the issue was whether an agreement concerning equitable distribution rights to the proceeds from an anticipated sale of marital property was enforceable where the husband's death abated the contracting parties' divorce action. Here, there is no claim seeking to effectuate equitable distribution, and the Stipulation clearly indicates the parties' intentions to opt themselves out of the equitable distribution statute (see Article XIV of the Stipulation).

Furthermore, the court is not persuaded by the argument that the Stipulation is ineffective because it was breached by the decedent. As an initial matter, the Petitioner has not established such noncompliance in her papers opposing the instant motion. Moreover, even if there were breaches by the decedent, the Stipulation provides the Petitioner with remedies. Specifically, under Article VIII of the Stipulation, the Petitioner may sue the estate for "money damages for any cause or causes arising out of a breach of their Stipulation" (Stipulation, page 6).

The Stipulation is enforceable and under its terms, "[e]ach party hereby releases, waives and relinquishes any and all right that he or she may have, or may hereafter acquire, as the other party's spouse. . . (a) to share in the estate of the other party upon the latter's death; and (b) to act as executor or administrator of the other party's

estate. This provision is intended to and shall constitute a mutual waiver by the parties to take against each other's wills now or hereafter in force.." (Stipulation, pages 5 and 6).

Article VII of the Stipulation further states that "[t]he parties intend by the aforescribed waiver and release to relinquish any and all rights in and to each other's estate, including the rights of set-off now provided in Section 5-3.1 of the Estates, Powers and Trust [sic] Law of the State of New York, and all distributive shares presently provided in Section 4-1.1 of the Estates Powers and Trust [sic] Law, and all right of election presently provided for in Section 5-1.1 of said law. . ." (Stipulation, page 6).

Article VII of the Stipulation specifies that "[n]otwithstanding any of the foregoing, it is agreed that either party may serve as the executor of the estate of the other or may accept a specific bequest if provision is made in the other party's will" (Stipulation, page 6).

Based on the foregoing, the court finds that, regardless of the status of the divorce action, the Petitioner relinquished any rights she had as a surviving spouse of the decedent's estate. If the propounded will is admitted for probate, under its terms the estate's sole beneficiary would be the decedent's daughter, Camille Wood. Nevertheless, consistent with Article VII of the Stipulation, the Petitioner is permitted to move forward with her petition to probate the propounded will and serve as the estate's executor.

The motion to enforce the Stipulation

The court's determination of the parties' rights under the Stipulation is relevant to the relief being sought in this probate proceeding, in light of the dispute between the parties regarding the Petitioner's eligibility to serve a fiduciary. The same cannot be

said of that branch of the motion seeking to enforce the Stipulation, which the court interprets as an application to compel the conveyance of the Condominium to the estate.

This is a court of special proceedings (see *Matter of Peters*, 132 AD2d 1250 [4th Dept 2015]). The enforcement of the Stipulation's provisions regarding the Condominium will require a determination of what, if anything, the estate owes to the Petitioner under the Stipulation (the Petitioner alleges she has claims for unpaid maintenance and Condominium Payments). Such inquiry exceeds the scope of a probate proceeding. Moreover, the application is premature because there is no estate fiduciary to effectuate the Condominium's transfer or address the intertwined claims that the Petitioner asserts against the estate. Accordingly, the Movant's request to compel the conveyance of the Condominium is denied, without prejudice to seeking such relief in an appropriate proceeding after the validity of the propounded will is adjudicated and a fiduciary is appointed for the estate.

The motion to fix dates for SCPA 1404 examinations

As previously noted, the court's July 18, 2019 decision directed that SCPA 1404 examinations should be taken by personal appearance.¹ On March 31, 2022, reargument was heard by the court, on the record, as to whether the SCPA 1404 examination of the purported will's only surviving witness, who resides in Florida, could be conducted remotely (i.e., using a platform such as Zoom or Teams). After affording the parties' respective counsel an opportunity to be fully heard, the court determined that the deposition of the alleged witness could be conducted remotely. The court further held that

¹As the propounded will contains an *in terrorem* clause, the Movant is entitled to SCPA 1404 examinations of the instrument's witness (only one is alive) and draftsman as well as the Petitioner.

the Petitioner's examination must be taken in-person.

On January 23, 2023, the parties' counsel participated in an off-calendar conference with a member of the court's Law Department, during which the Movant's attorney stated that new counsel would be substituting for him in this matter. Consequently, both sides agreed that SCPA 1404 examinations could not be scheduled until replacement counsel appears in this proceeding.

As such, the court denies, without prejudice, that branch of the motion which seeks to impose a deadline with penalties for completing SCPA 1404 examinations. Counsel for the parties are directed to appear for a conference on the court's February 9, 2023 calendar, at a time to be determined, to schedule SCPA 1404 depositions in accordance with the court's March 31, 2022 ruling from the bench.

CONCLUSION

This decision constitutes the order of the court. Counsel for the Petitioner is directed to serve notice of its entry upon all parties and counsel appearing in this proceeding within five days from the date hereof.



HON. NELIDA MALAVE-GONZALEZ,
SURROGATE