

Matter of Waheed v Kirwan

2023 NY Slip Op 32146(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 152196/2023

Judge: Shahabuddeen Abid Ally

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SHAHABUDDEN ABID ALLY PART 16TR
Justice

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INDEX NO. 152196/2023
MOTION DATE _____
MOTION SEQ. NO. 001

In the Matter of SEHRA WAHEED,
Petitioner,
- v -

CHRISTOPHER GRANT KIRWAN, as Trustee of the
Salam Family Irrevocable Trust 2020, and
CHRISTOPHER GRANT KIRWAN, Individually,
Respondent.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 10, 12, 15-22,
24-30
were read on this motion to/for JUDGMENT - SUMMARY

Petitioner commenced the instant Article 77 proceeding by order to show cause, seeking various relief relating to a condominium apartment located at 1 Irving place, Apt. P7C, New York, NY (the "Apartment") currently held in the Salam Family Irrevocable Trust 2020 ("Trust"). Petitioner requests an order directing, *inter alia*, that respondent as trustee distribute her purported share of the Trust in order to pay for petitioner's outstanding medical, housing, and other expenses. Respondent opposes the requested relief and seeks sanctions on the grounds that petitioner is seeking relief identical to that sought in a previous proceeding. The parties appeared before the Court via Microsoft Teams on May 30, 2023. However, due to technical issues there was no oral argument and the parties consented to submission of the petition on the papers. Upon consideration of the above cited papers and for the reasons that follow, the petition is dismissed in its entirety.

Background

In 2020, Waheed Salam established the Salam Family Irrevocable Trust 2020 for the benefit of his three daughters, of which petitioner is one. Respondent is the spouse of Sanah Waheed Kirwan, another of Waheed Salam's daughters. Respondent was appointed by Waheed Salam to serve as trustee upon the Trust's formation.

Petitioner commenced a special proceeding pursuant to Article 77 on or about June 2, 2021 seeking distribution to her of her purported share of the trust assets based upon allegations that respondent breached his fiduciary duty exerted undue influence upon Waheed Salam (*Waheed v Kirwan*, Index No. 155345/2021 [Sup Ct, New York County]). After motion practice and limited discovery, that proceeding was resolved in an order issued February 15, 2023 in which that court denied the petition in its entirety.

Petitioner commenced the instant proceeding on March 7, 2023.

Discussion

The doctrine of res judicata prohibits a party from relitigating issues that were determined on the merits by a court of competent jurisdiction in a prior proceeding (*see Gramatan Home Investors Corp. v. Lopez*, 46 NY2d 481 [1979]). This applies to claims actually litigated in the prior proceeding as well as claims that *could* have been raised in the prior proceeding, on the reasoning that parties that have been given a full and fair opportunity to litigate a claim should not be allowed to do so again (*see O'Connell v Corcoran*, 1 NY3d 179, 184-185 [2003]; *Gramatan Home Invs Corp v Lopez*, 46 NY2d 481, 485 [1979]). Additionally, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy"

(*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981], citing *Matter of Reilly v Reid*, 45 NY2d 24, 29-30 [1978]).

In the previous proceeding, petitioner sought an order: (A) removing respondent as trustee and appointing an independent trustee in his place; (B) awarding petitioner compensatory and consequential damages for respondent's breach of fiduciary duties; (C) authorizing the Sheriff to seize the property until an independent trustee was appointed or, in the alternative, appointing a Receiver to seize the property until an independent trustee was appointed. The court summarized the relevant terms of the Trust Agreement as follows:

Upon review of the Trust Agreement, the sole asset held by the Trust is "Condominium Unit P7C, located at One Irving Place, New York, New York 10003." The intent of the Grantor was to create "a supplemental needs trust which confirms to the provisions of Section 7-1.12 of the New York Estates, Powers and Trusts Law (EPTL)." Pursuant to Article III of the Trust, "The Trust shall, nevertheless, terminate upon the death of the Grantor, at which time the remaining Trust estate shall be distributed pursuant to the Terms of Article V . . ." Pursuant to Article V of the Trust, after payment of Grantor's debts at the time of his death and several other payments, the net proceeds of the apartment shall be divided "(i) Ten (10%) per cent to the Islamic Cultural Center of New York; (ii) Thirty (30%) per cent to each of the Grantor's biological children or their issue per stirpes."

(*id.* at 3). Finally, the court pointed to Article VI of the Trust, entitled "Spendthrift Provisions," which provides as follows:

No beneficiary of any trust created by this Trust Agreement shall have the power to anticipate, transfer, sell, assign, or encumber any payment or distribution of either principal or income to be made under the provisions of such trust, and any anticipation, transfer, sale, assignment or encumbrance of any interest of any such beneficiary, whether of income or principal, whether by voluntary act or by operation of law, shall be void, and no payment or distribution shall be made by the Trustee to such beneficiary. If, notwithstanding the above, it shall be held that the interest, whether of income or principal, of any beneficiary of any trust under this Trust Agreement has vested in any vendee, transferee, assignee, receiver or trustee in bankruptcy of such beneficiary, whether by voluntary transfer or by operation of law, then to the extent of such transfer, sale, assignment, or encumbrance, such interest shall cease, and the Trustee may thereupon apply any payment or distribution, whether of income or principal thus attempted to be sold, transferred, assigned, levied upon or taken, to the use of the beneficiary who would have been

entitled thereto in the absence of such transfer, assignment, levy or encumbrance, or o the use of such beneficiary's family, as the Trustee, in his uncontrolled discretion, may deem best.

(*id.*) Based on the above, the court concluded that because the Grantee Waheed Salam was alive and still residing at the Apartment, the relief sought by petitioner was “specifically disallowed by the plain meaning of the Trust Agreement” (*id.*).

In the instant proceeding, petitioner again seeks an order compelling respondent to distribute her purported share of the Trust in order to pay for medical, housing, and other expenses (Petition at ¶ 1-6, 17). Petitioner again seeks removal of respondent as trustee on grounds that he breached his fiduciary duties (Petition at ¶ 19). The basis of these claims is identical that underlying the previous proceeding and which was adjudicated by that court. The parties do not dispute that the Grantor was still living as of the date of this petition's submission and that no events have occurred since the February 15, 2023 decision and order in the prior proceeding to change the positions of the parties relating to the Trust. The Court thus concludes that, as petitioner's central claim is the same as in the prior proceeding, the parties are the same, both sides had full and fair opportunity to litigate their positions, and the determination of the prior proceeding was rendered on the merits, the instant action is precluded by *res judicata*. Accordingly, petitioner's requests for relief as set forth in paragraphs 1-6, 17, and 19 of the petition are denied.

With regard to the petitioner's remaining claims, the Court finds that petitioner has not met her burden to demonstrate entitlement to judgment to any of the claims. A proceeding brought pursuant to Article 77 of the CPLR is governed generally by CPLR Article 4, which provides rules of procedure applicable to all special proceedings. Pursuant to CPLR § 409(b), a special proceeding is to be adjudicated in the same manner as a motion for summary judgment

(see, e.g. *Friends World College v Nicklin*, 249 AD2d 393 [2d Dept 1998][“In a special proceeding, where no triable issues of fact are raised, the court must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it”]; see generally CPLR § 3212). Accordingly, the party seeking relief has the burden to demonstrate *prima facie* entitlement to judgment as a matter of law and that there are no material issues of fact in dispute (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ Med Center*, 64 NY2d 851, 853 [1985]).

With regard to paragraphs 7 (home owners and business insurance), 12 (legal fees accrued in the previous proceeding), and 16 (order of protection against respondent), petitioner has not demonstrated a legal basis or authority that would permit this Court to grant such relief. The remaining portions of the petitioner comprise various grievances that are either conclusory, unsupported by documentation in admissible form, have no demonstrable damages, or do not sufficiently specify the nature of the relief sought. As such, all remaining relief requested by petitioner is denied.

Finally, respondent seeks an order imposing sanctions upon petitioner in the form of attorneys’ fees. A 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 reasonable attorney’s fees, resulting from frivolous conduct” (22 NYCRR 130-1.1[a]). Here, the Court declines to exercise its discretion to impose sanctions at this time. However, petitioner is cautioned that conduct is considered “frivolous” where “it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” or “it asserts material factual statements that

are false” (22 NYCRR 130-1.1[c]) and any future litigation should be undertaken with this in mind.

Based on the foregoing, it is hereby:

ORDERED that the petition is denied and dismissed in its entirety; and is further


ORDERED that respondent’s application for sanctions and attorneys’ fees is denied; and it is further

ORDERED that respondent shall serve upon petitioner and upon the Clerk of the Court a copy of this decision and order with notice of entry within thirty days thereof; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any and all other requested relief has been considered and is denied.

This constitutes the decision and order of the Court.

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| <u>6/30/2023</u> DATE |  SHAHAB UDDEEN ABID ALLY, A.J.S.C. | | | |
| CHECK ONE: | <input checked="" type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> GRANTED | <input checked="" type="checkbox"/> DENIED | <input type="checkbox"/> NON-FINAL DISPOSITION |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | | | <input type="checkbox"/> GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | | <input type="checkbox"/> SUBMIT ORDER |
| | | | | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | | | <input type="checkbox"/> OTHER |
| | | | | <input type="checkbox"/> REFERENCE |