

Matter of Chimsanthia (Scott)

2023 NY Slip Op 32370(U)

July 13, 2023

Surrogate's Court, New York County

Docket Number: File No. 2017-4536/F

Judge: Rita Mella

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

July 13th 2023

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

-----X
In the Matter of the Application of Nittaya Chimsanthia and
Jonathan Sokolow, as Co-Executors of the Estate of

JOSEPH D. SCOTT, JR.,

DECISION and ORDER

Deceased,

File No.: 2017-4536/F

Pursuant to SCPA 2103 to Compel Turnover of Decedent's
Property Held by Lawrence Scott and Bridget Larigan, as the
Preliminary Co-Executors of the Estate of Theresa Scott and
The Estate of Joseph Scott, Sr.

-----X
M E L L A, S.:

Papers Considered

Numbered

Notice of Motion, dated December 16, 2022, by Respondents for Summary Judgment, together with Affirmation of Michael L. Kenny, Esq., Attaching Exhibits	1, 2
Affidavit of Lawrence Scott, in Support, attaching Exhibits.	3
Memorandum of Law in Support of Motion	4
Reply Memorandum of Law in Further Support	6

In this turnover proceeding by the co-Executors of the estate of decedent Joseph Scott, Jr.,¹ Respondents, who are the fiduciaries of the estates of decedent's parents, move for summary judgment dismissing the petition. The motion, which was unopposed,² is granted in part and denied in part as set forth below.

After a modification on an appeal of this court's prior decision resolving Respondents' motion to dismiss (*Matter of Scott*, 200 AD3d 450 [1st Dept 2021]), only two claims remain as

1 This proceeding was first commenced when Petitioners were Preliminary co-Executors, but probate of decedent's will has been granted, and they are now co-Executors and the caption is modified accordingly. This matter was also commenced while decedent's parents were alive, but now their estate fiduciaries have been substituted as respondents here (CPLR 1015[a]).

2 One of the co-executors of decedent's estate, decedent's surviving spouse, purported to appear through new counsel who filed a "letter brief" in opposition to the instant summary judgment motion. Counsel failed to appear for oral argument on the motion, however, and by order dated February 3, 2023, the court directed him to file corrected papers, in particular to file a signed version of his papers (*see* 22 NYCRR 130-1.1-a), and to provide an office address in New York State (Judiciary Law § 470). There was no compliance with the court's order and the opposition papers were not considered. Decedent's other co-executor defaulted.

grounds for turnover: one for conversion regarding certain personal property; and the other for unjust enrichment regarding two further claims: (a) the value of certain improvements to and maintenance of a house in Amagansett, New York (Amagansett House) allegedly paid by decedent, and (b) three checks totaling \$410,000 (two from 2014, from the decedent to his parents. That appeal eliminated from this case the claim of constructive trust over the Amagansett House, which had sought specific performance of an alleged oral agreement (*id.*).

Respondent-Movants seeking summary dismissal of these remaining claims have the burden of showing entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316 [2009]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). This is true regardless of the filing of opposition, and the “[f]ailure to make such showing requires denial of the motion” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Tulino v Pipa*, 162 AD3d 709 [2d Dept 2018]).

The conversion claim involved certain personal property of decedent alleged to have been taken from the Amagansett house. Respondents’ evidence established that any contested personal property was returned or was not the decedent’s or his surviving spouse’s (*see Matter of Coviello*, 78 AD3d 696 [2d Dept 2010]). There being no opposition, summary dismissal of claims for conversion is appropriate and is granted (*see Pasek v Cath. Health Sys., Inc.*, 186 AD3d 1035, 1036 [4th Dept 2020]).

Regarding unjust enrichment, Petitioners sought both damages for claimed maintenance and improvements allegedly paid by decedent benefiting the Amagansett House, and recoupment of \$410,000 in payments made by decedent in three checks to his parents – \$55,000 in May of

2014; \$165,000 in July of 2014; and \$190,000 in June of 2017. Only the check for \$165,000 from 2014 has the memo line of the check filled out. It states “Larry House.”

As to the improvements to the Amagansett House and its maintenance, movants provided admissible proof establishing that decedent or his estate did not make the payments that the petition alleged were made and that, instead, the work in the house and the payments for utilities and maintenance were made by his parents (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Friedman v BHL Realty Co.*, 83 AD3d 510 [1st Dept 2011]). Petitioners have provided no opposition and thus no evidence contradicting movants’ proof (*see Lebedev v Blavatnik*, 193 AD3d 175, 182 [1st Dept 2021]). Consequently, the court grants that portion of the summary judgment motion regarding monies allegedly spent on the Amagansett House (*Mente v Wenzel*, 178 AD2d 705 [3d Dept 1991]).

Regarding the two payments decedent made by check in 2014, totaling \$220,000, movants established their entitlement to judgment as a matter of law by providing proof in admissible form that decedent, at the time he made these payments, knew that Respondents were not planning to retain those funds, and that Respondents did not in fact retain these funds, because they were meant to be gifted to decedent’s brother, Lawrence, who is also known as Larry. Under these circumstances, movants have established that Respondents, now their estates, are not in possession of the property sought to be recovered (*Clifford R. Gray, Inc. v LeChase Const. Services, LLC*, 31 AD3d 983 [3d Dept 2006] [essence of unjust enrichment claim is that defendant is in possession of property that rightly belongs to plaintiff]) and decedent’s estate cannot “in equity and good conscience” claim the return of funds that decedent knew would not be retained by Respondents (*Fulton v Hanken & Mazel, PLLC*, 132 AD3d 806

[2d Dept 2015] [summary judgment dismissing unjust enrichment claim properly granted when movant established that, in accordance with the terms of a contract of which plaintiff was aware, movant did not retain property claimed by plaintiff]).

The court reaches a different result regarding the final check at issue, the one for \$190,000, from 2017 to decedent's mother. Although movants argue that this check was meant to repay certain out-of-pocket medical expenses paid for the decedent, the sole support for such an explanation comes from the self-serving affidavit of Respondent Lawrence Scott (*Republic Nat'l Bank of NY v Luis Winston, Inc.*, 107 AD2d 581 [1st Dept 1985][hearsay cannot justify a grant of summary judgment]; see *Savage v Delacruz*, 100 AD2d 707 [3d Dept 1984]; cf. *Wilbur v Wilbur*, 266 AD2d 535 [2d Dept 1999]).

Movants additionally argue for application of the so-called "voluntary payment doctrine" which "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dubrow v Herman & Beinin*, 171 AD3d 672, 673 [1st Dept 2019], quoting *Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]). However, with support for this claim regarding the \$190,000 payment limited to Respondent Lawrence Scott's self-serving affidavit, movant has not established that decedent "had full knowledge of the facts" and thus failed to make out a prima facie case; summary judgment is thus denied as to this payment (see *E.D.&F. Man Sugar, Inc. v ZZY Distribs., Inc.*, 150 AD3d 452 [1st Dept 2017]).

CONCLUSION

Accordingly, the motion for summary judgment as to the unjust enrichment claim regarding the \$190,000 payment made by decedent in 2017 to his parents is denied. The

balance of the motion is granted and Petitioners' other claims are dismissed. Upon the filing of a note of issue and certificate of readiness, the matter will be set down for a pretrial conference.

This decision constitutes the order of the court.

Clerk to notify.

Dated: July 13, 2023



SURROGATE