

Estate of Donadio

2023 NY Slip Op 32850(U)

August 8, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2017-1973/D

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

August 8, 2023

ESTATE OF PAT DONADIO, Deceased
File No.: 2017-1973/D

Proceeding and Motion

Joseph Donadio, the estate's executor ("Petitioner"), brings this proceeding pursuant to SCPA 2103 to recover funds currently being held in four financial accounts. Three of those accounts are titled in the name of James D. Post ("James"), who was the decedent's neighbor. A fourth account is titled in the name of James and his wife, Kim Post ("Kim")(collectively, the "Posts"). All of the accounts are subject to a restraining order imposed by the court prohibiting transfers or withdrawals of their funds.

The Posts interposed objections to the relief sought herein. James also filed a verified claim in the amount of \$1,063,000.00 against the estate, a sum allegedly representing the amounts sought to be recovered by Petitioner in this proceeding and monies he returned to the decedent's temporary successor Article 81 guardian approximately five years ago. Pending before the court is Petitioner's summary judgment motion, pursuant to CPLR 3212, requesting an order dismissing the objections, denying the Posts' claim and directing the turnover of the funds sought to be recovered. The Posts oppose the motion. Capital One Bank, the only other respondent appearing in this proceeding, does not oppose Petitioner's application.

The following papers were read on this motion:

Petitioner’s notice of motion and its supporting papers; the opposing affirmation of the Posts’ counsel and its supporting papers; Petitioner’s reply memorandum of law; and the Declaration of Stephen J. Steinlight, Esq., dated May 19, 2023, submitted by Capital One Bank. The motion has been decided as set forth below.

Background

The decedent died on August 10, 2017, at the age of 91. On April 20, 2022, the court issued a decree admitting his Last Will and Testament, dated March 6, 2015 (the “will”) to probate and awarding letters testamentary to Petitioner, who is the decedent’s nephew. The will names Petitioner the estate’s executor and sole beneficiary. It bears mentioning that the will specifically disinherits the decedent’s brother, Frank Donadio (“Frank”). Under a prior purported will filed with the court, dated May 4, 1993, Frank was the nominated executor and bequeathed one-half of the decedent’s estate.

The Article 81 proceeding

The decedent’s reasons for changing his testamentary plan surfaced in a Mental Hygiene Law Article 81 proceeding that Frank commenced in the Supreme Court on August 5, 2015. There, Frank sought, *inter alia*: (i) to become the guardian of the decedent’s person and property and (ii) injunctive relief restraining multiple financial accounts, containing over \$1,000,000.00 in the aggregate, held in the names of James and/or Kim which the decedent allegedly funded from a joint account he held with Frank. The order to show cause commencing the Article 81 proceeding named the Posts as respondents and included a temporary restraining order (“TRO”) prohibiting them from withdrawing or transferring funds from financial accounts funded by the decedent.

The Article 81 proceeding's presiding judge, Hon. Sharon A.M. Aarons, appointed Frank to serve as the decedent's temporary guardian. Subsequently, Judge Aarons removed Frank from this position by an interim order, dated September 25, 2015, wherein, *inter alia*, she (i) determined that Frank's continuation as temporary guardian posed a danger to the decedent's assets, health and well-being; (ii) appointed a successor temporary guardian, Melissa Lucas, Esq., to serve in Frank's stead and (iii) directed Ms. Lucas to seek the return of any funds that the decedent had given to James for safekeeping to hide from Frank.

A hearing in the Article 81 proceeding commenced on November 13, 2015 and extended over a period of four days, concluding on November 23, 2015. At the hearing, Judge Aarons heard testimony from the decedent, the Court Evaluator, the successor temporary guardian, the lawyer who drafted the decedent's will, Frank and James, who elected to proceed *pro se*.

James testified over a three-day period that the decedent had transferred approximately \$1,000,000.00 to financial accounts titled in his and/or Kim's name so he could hide the money from Frank. The sum and substance of James' testimony regarding the transferred funds was that they remained available for the decedent's use while he was alive. However, it was his belief that after the decedent died the monies would become his and/or Kim's property. James also testified that he had found the lawyer for the decedent who drafted and supervised the execution of his will as well as a power of attorney that named the attorney and James as the decedent's agents.

On the record presented, Judge Aarons rendered a decision and order dated March 1, 2016 which determined, *inter alia*, that (i) the decedent was an incapacitated

person requiring a guardian for his person and property; (ii) Frank was not qualified to serve as the decedent's guardian, because of a conflict of interest and a probability that Frank had "in the past utilized the AIP's [decedent's] money for his own purposes"; (iii) the Posts financially exploited the decedent, receiving nearly \$1,000,000.00 from him, including approximately \$300,000.00 to purchase a townhouse for their son, James Post, Jr.; (iv) the decedent believed that Frank was misappropriating his assets; and (v) rather than reporting Frank's alleged financial improprieties to the police, the decedent schemed to hide his money from Frank by having James deposit it in various accounts held under the Posts' names, "upon the mere promise that such monies would be returned to him upon request." Consequently, Judge Aarons appointed a permanent guardian for the decedent's person and property, empowering him, *inter alia*, "to recover any and all monies transferred from the bank accounts and/or brokerage accounts of the IP [the decedent] to the financial accounts of James Post, Kim Post and/or James Post Jr. or to the Petitioner Frank Donadio."

The funds sought to be recovered

After the Article 81 proceeding was commenced, James returned approximately \$316,394.75 to the decedent while he was alive. As evidenced by his correspondence to the temporary successor guardian, Ms. Lucas, James agreed that he would pay back \$500,000.00 held in JP Morgan Chase and \$200,000.00 held in Capital One Bank so "it will be over."

It appears that Petitioner is not seeking repayment of the decedent's funds that were given to James' son to purchase a townhouse. This proceeding focuses on the following four accounts established by James (the "Post Accounts") which Petitioner

alleges, and James does not deny, were solely funded by the decedent with monies he sought to hide from Frank:

- Two accounts at JPMorgan Chase Bank, namely (i) an annuity with Symetra Life Insurance Company, titled under the names of James and Kim Post, bearing Account #...4913, in the approximate amount of \$500,000.00, plus any increases and (ii) Account #...0829, titled under the name of James Post, in the approximate amount \$15,000.00, plus any interest.
- Two accounts at Capital One Bank, titled under the name of James Post: (i) Account #8696, in the approximate amount of \$231,231.00, plus any interest; (ii) Account #5351, in the approximate amount of \$183.22, plus any interest.¹

The instant turnover proceeding

The funds in the Post Accounts were not recovered prior to the decedent's death. After this court issued preliminary letters testamentary to Petitioner, he moved in the Article 81 proceeding for an order, *inter alia*, (i) vacating the temporary restraining order ("TRO") on the Post Accounts and (ii) directing JPMorgan and Capital One Bank to pay the funds held in their respective Post Accounts to the estate. By an order dated January 3, 2020, the Hon. Howard E. Sherman granted his application to vacate the TRO. Judge Sherman declined to make any directive regarding the distribution of the Post Account funds to the decedent's estate, reasoning that such an order is properly within the jurisdiction of the Surrogate's Court, not the Supreme Court.

Petitioner commenced the instant turnover proceeding by an order to show

¹According to Petitioner, this account contains \$7,061.25. According to Capital One Bank, there is only \$183.27 remaining in the account.

cause dated June 1, 2021, which included a TRO enjoining withdrawals or transfers from the Post Accounts pending the proceeding's outcome. Jurisdiction has been obtained over all of the interested parties to the instant turnover proceeding, namely James, Kim, JPMorgan Chase and Capital One Bank. The Posts and Capital One Bank are the only respondents to have appeared herein, doing so through their respective counsel.

James filed verified objections on January 6, 2022 alleging, essentially, that the decedent wanted him and his wife to keep the funds in the Post Accounts in consideration of the love and kindness they gave him over a ten-year period. In addition, James filed a verified claim against the estate IN the amount of \$1,063,000.00, a sum including funds in the Post Accounts as well as the monies previously turned over to the temporary successor guardian (hereinafter, the monies demanded in the verified claim shall be referred to as the "Transferred Funds") . As detailed in the claim, the Transferred Funds represent the

...agreed value of the services provided to Pat Donadio (the "Decedent") during his lifetime by Claimant including financial services, companionship, running errands, transportation, personal care, services to the decedent' dog, and gifts from the decedent to the Claimant. Claimant was forced to deliver the moneys he had rightfully received from the Decedent to the Decedent's Guardian and/or his Estate without due process or the advice of counsel. As a result, the choices and intentions of the Decedent were thwarted and the Claimant was deprived of what was rightfully his.

Discovery in this proceeding is complete and Petitioner's motion for summary judgment is fully briefed. On the parties' consent, the court marked Petitioner's summary judgment motion "submitted" on July 25, 2023.

The Summary Judgment Motion

Petitioner's arguments

Petitioner asserts the following grounds in support of his motion for summary judgment:

1. **Res judicata and collateral estoppel.** Petitioner argues that the Article 81 court determined (i) the decedent lacked the capacity to make a gift of the Transferred Funds to the Posts and (ii) the Transferred Funds belonged to decedent, not to the Posts, and should be returned. Citing the doctrines of *res judicata* and collateral estoppel, Petitioner contends that James is precluded in this proceeding from relitigating the issue of who owns the Transferred Funds.

2. **Failed gift.** According to Petitioner, the court cannot find the decedent made an inter vivos gift of the Transferred Funds, even if he had sufficient mental capacity to do so when the monies were delivered to the Posts, because the decedent never gave, and the Posts never accepted, a present interest in the Transferred Funds. As support for this position, Petitioner points to those portions of James' testimony in the Article 81 proceeding where he admits that the decedent could use the Transferred Funds at any time and it was his (James') understanding that he would be the beneficiary of the Transferred Funds after the decedent's death.

3. **Statute of frauds.** Petitioner asserts that the statute of frauds obviates the Posts' claim to the Transferred Funds because no written agreement exists

memorializing the decedent's alleged intention to give the Posts the monies as a testamentary bequest, whether as compensation for their alleged personal services or in recognition for their purported acts of kindness.

The Posts' arguments

The Posts raise the following defenses to Petitioner's summary judgment motion:

1. **Collateral estoppel does not apply.** The Posts assert that Petitioner's collateral estoppel argument fails because (i) the validity of the decedent's fund transfers was not actually litigated nor determined on the merits in the Article 81 proceeding and (ii) the Posts were denied a full and fair opportunity in the Article 81 proceeding to litigate whether they received the Transferred Funds as gifts or a form of compensation. Regarding the second point, the Posts aver that James was denied due process in the Article 81 proceeding because he was not represented by counsel and did not call or cross-examine witnesses.

2. **Part performance.** The Posts contend that the decedent's delivery of the Transferred Funds constitutes partial performance of his verbal agreement to make them a testamentary bequest, raising triable issues of fact precluding summary judgment.

3. **Inter vivos gift.** The Posts insist there is abundant evidence that the decedent completed an inter vivos gift of the Transferred Funds to them. They posit that the actual transfer and the Post's acceptance of the alleged gift raise material factual issues regarding the decedent's donative intent, which defeats Petitioner's summary judgment motion.

Discussion

It is well settled that the doctrine of *res judicata* bars all claims "arising out of the same transaction or series of transactions as a claim that was previously resolved on the merits and which the party opposing preclusion had a full and fair opportunity to litigate" (*Platon v Linden-Marshall Contr. Inc.*, 176 AD3d 409,410 [1st Dept 2019]). "The general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein" (*In re Raftery*, 309 NY 605, 616 [1956]).

"Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, 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" (*Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). The rule applies "not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]).

For the related doctrine of collateral estoppel to apply, "the issues raised must be identical and must have been decided in the prior action and be decisive to the present action; and the party that is precluded must have had a full and fair opportunity to contest the prior determination" (*Hughes v Farrey*, 30 AD3d 244, 247 [1st Dept 2006]; *Grayes v DiStasio*, 166 AD2d 261, 263 [1st Dept 1990]). Under collateral estoppel, also referred to as issue preclusion, where the prior judgment conclusively resolves an issue actually litigated and determined on its merits in the first proceeding, the issue cannot be

relitigated in a subsequent case, even if the second matter raises different defenses and/or causes of action (see *Buechel v Bain*, 97 NY2d 295, 303 [2001]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]).

At the hearing in the Article 81 proceeding spanning four days, multiple witnesses, including James, gave extensive testimony. On the evidence presented, Judge Aarons rendered a written decision and order with numerous findings of fact, including that the decedent gave approximately \$1,000,000.00 of his assets to the Posts in an effort to hide them from his brother “on the mere promise that such monies would be returned to him [by the Posts] upon request.” Furthermore, Judge Aarons concluded that James and Kim had a history of financially exploiting the decedent and specifically empowered the decedent’s Article 81 guardian to marshal the Transferred Funds, which the court determined were the decedent’s assets.

The ownership of the Transferred Funds was fully litigated and determined on the merits in the Article 81 proceeding. The Posts, who were joined as respondents in the Article 81 proceeding, had a full and fair opportunity to present evidence, defend their receipt of the Transferred Funds and assert their claims to those assets. They were served with process which clearly gave notice that the ownership of the Transferred Funds would be a subject of a hearing. Considering that prior to the hearing the Article 81 court issued (i) a TRO prohibiting the Posts from accessing the Transferred Funds; (ii) an order suspending James’ power of attorney and (iii) an interim order directing the decedent’s temporary successor guardian to seek an accounting from James and the return of the monies he received from the decedent, it cannot be said that the Posts were victims of unfair surprise at the hearing.

During the hearing, Judge Aarons twice asked James on the record if he was going to obtain counsel, and each time James declined to do so. Contrary to the Posts' contention, the fact that they elected not to retain an attorney or cross-examine witnesses does not constitute a denial of due process in the Article 81 proceeding.

The Posts' assertion that the Article 81 court's authority was limited to determining that the decedent was an incapacitated person as of the date of the hearing is unavailing, for several reasons. First, under MHL 81.21 the Article 81 court had the authority to ascertain the assets of the decedent's estate, and it was within its jurisdiction to determine that the Transferred Funds belonged to the decedent. Based on all of the evidence presented, the Article 81 court determined that the Transferred Funds remained the decedent's assets, despite being held in financial accounts owned by the Posts, and could be recovered by his temporary and succeeding permanent Article 81 guardians. Furthermore, Judge Aarons' decision and order considered the circumstances of all funds transferred to the Posts prior to the Article 81 hearing, and found that those transfers were irrational and the product of the decedent's lack of capacity.

The Supreme Court fully and finally decided the ownership of the Transferred Funds in the Article 81 proceeding and the Posts are precluded from now relitigating this issue under the doctrines of *res judicata* and collateral estoppel. Even if this was not the case, however, the Posts' claims to the Transferred Funds would fail.

As an initial matter, the statute of frauds bars the decedent's alleged oral agreement to allow the Posts' to keep the Transferred Funds after he died. As there is no writing memorializing this agreement signed by the decedent, it is void under General Obligations Law § 5-701 (a) (1) and EPTL § 13-2.1 (a) (2).

The Posts' invocation of part performance is ineffectual. That exception to the statute of frauds applies to General Obligations Law § 5-703, which deals with real estate transactions and expressly reserves the court's power "to compel the specific performance of agreements in cases of part performance." It does not, however, extend to General Obligations Law § 5-701 or to EPTL § 13-2.1 (a) (2) (see *Stephen Pevner, Inc. v Ensler*, 309 AD2d 722 [1st Dept 2003]; *Messner Vetere Berger Mcnamee Schmetterer Euro RSCG v Aegis Group PLC*, 93 NY2d 229, 234 [1999]). Even assuming, *arguendo*, that the defense of part performance could be relevant, it would be inapplicable here because the decedent's actions of hiding the Transferred Funds from his brother in accounts owned by the Posts are not "unequivocally referable" to the alleged oral agreement that the monies would be testamentary gifts to the Posts (see *Anostario v Vicinanza*, 59 NY2d 662, 664 [1983] [holding that for actions to be "unequivocally referable" to an alleged oral agreement, they must be explainable only with reference to the alleged agreement, without any possibility of another reasonable explanation]).

With regard to Posts' argument that the delivery of the Transferred Funds constituted an inter vivos gift, it is their burden to establish, by clear, convincing and satisfactory evidence that (i) the decedent intended to irrevocably transfer to them a present interest in the monies; (ii) the decedent delivered the monies to them; and (iii) they accepted the gift of the present interest in the monies (see *Gruen v. Gruen*, 68 NY2d 48 [1986]; *In re Swanson*, 1096 AD2d 844 [2nd Dept 1985]). While there is no dispute that the Transferred Funds were delivered to the Posts to hold in various financial accounts, the court finds that the Posts have not met their heightened burden of showing that the decedent intended to give them, or that they accepted, an irrevocable present interest in

the monies. Their own self-serving claims of gift in the instant proceeding are insufficient and rebutted by the Article 81 testimony of the decedent and James regarding their mutual understanding that the Transferred Funds would be returned to the decedent upon request.

Conclusion

Petitioner has made a *prima facie* showing of entitlement to the judgment he seeks as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In response, the Posts have failed to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which would require a trial of the instant proceeding (see *Zuckerman*, 49 NY2d at 562), despite the court having drawn all reasonable inferences in favor of the Posts in its review of the record (see *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]). Accordingly, this decision constituting the order of the court finds that the funds in the Post Accounts are assets of the decedent's estate and it is

ORDERED, that Petitioner's motion for summary judgment is granted, in its entirety; and it is further

ORDERED, that the objections filed by James Post and Kim Post are dismissed; and it is further

ORDERED, that the verified claim filed by James Post in this proceeding is denied; and it is further

ORDERED, that the court's temporary restraining order is hereby removed from the following two Capital One Bank accounts, both titled under the name of James

Post: (i) Account number8696; (ii) Account number5351, and Capital One Bank shall turn over to Petitioner, Joseph Donadio, as the Executor of the Estate of Pat Donadio, all of the funds is those accounts, as those funds are assets of said estate; and it is further

ORDERED, that the court's temporary restraining order is hereby removed from (i) an annuity with Symetra Life Insurance Company, titled under the names of James and Kim Post, bearing Account Number ...4913, and (ii) JP Morgan Bank Account Number ...0829, titled under the name of James Post, and JPMorgan Chase Bank shall turn over to Petitioner, Joseph Donadio, as the Executor of the Estate of Pat Donadio, all of the funds being held under those account numbers, as those funds are assets of said estate; and it is further

ORDERED, that Petitioner is directed to serve a copy of this decision and order upon counsel for the Posts, Capital One Bank and JP Morgan Chase, with notice of entry, within five days from the date hereof and file proof of such service with the court.

Proceed accordingly.


HON. NELIDA MALAVÉ-GONZÁLEZ,
SURROGATE