

Estate of McLendon

2024 NY Slip Op 31794(U)

April 16, 2024

Surrogate's Court, Bronx County

Docket Number: File No. 2010-2227/B

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

April 16, 2024

ESTATE OF JOSEPH PATRICK MCLENDON, Deceased
File No.: 2010-2227/B

In this settled estate, the New York State Insurance Fund (“NYSIF”) filed a motion pursuant to CPLR 5015 (a) (1), (3) and (4) seeking, inter alia, to vacate this court’s decree dated May 3, 2019 (“the decree”) that, inter alia, allocated the settlement proceeds to wrongful death causes of action; granted leave to distribute the settlement proceeds and judicially settled the account of the co-administrators, the decedent’s mother, who was appointed guardian of the property of the decedent’s four infant children, and his spouse, on the grounds, inter alia, that it was procured by fraud, misrepresentation or other misconduct of the co-administrators and/or their attorneys (“the attorneys”). NYSIF also asserts that the court lacks jurisdiction to dispose of its statutory lien against the settlement proceeds pursuant to Workers Compensation Law § 29. Although the motion was served upon the attorneys and two other sons who attained majority, NYSIF failed to name and serve the co-administrators, the infant distributees and their respective property guardian, the guardian ad litem appointed for the infants in the underlying proceeding or other parties who would be impacted should this decree be set aside. The attorneys oppose the motion and

attempted to file a cross motion seeking its dismissal as lacking merit. Although the cross motion was untimely submitted and not accepted for filing by the Miscellaneous Department, NYSIF served and filed a reply.

Two conferences were held with a member of the court's Law Department at which the attorneys reiterated a "no-pay" position and the court informed NYSIF that it should have filed a petition requesting the relief sought citing all individuals and entities that would be adversely affected by the relief sought and potential clawback of a portion of the distributed settlement proceeds. No additional documents have been filed by NYSIF to date. For the reasons stated below, the court dismisses NYSIF's motion and the attorneys' cross motion on procedural grounds.

BACKGROUND

The decedent died on June 22, 2010 as a result of injuries sustained in a workplace explosion. In addition to the spouse, his distributees are six children, all of whom were under the age of 21 at the time of his death, and four of whom are infants. Jurisdiction was acquired over all the necessary parties in the compromise proceeding, and a guardian ad litem was appointed for the four infant distributees. NYSIF, who was properly served with citation seeking to disallow its workers' compensation claim based on the proposed allocation to wrongful death, did not appear on the May 8, 2018 return date or assert opposition. Accordingly, a decision issued on April 18, 2019 approving the relief requested and directing a decree to be settled. The decree dated May 3, 2019 judicially settling the co-

administrators' account provided, inter alia, for the distribution of the \$4,000,000 gross settlement proceeds for injuries sustained in the workplace explosion; allocation of the net distributable proceeds to the wrongful death cause of action; directed the payment of counsel fees and disbursements and the award to the guardian ad litem; authorized commissions; directed distribution of the remaining funds to the spouse and six children pursuant to the formula enunciated pursuant to Matter of Kaiser, 198 Misc 582 [Sur Ct, Kings County 1950]; and authorized the purchase of annuities for the infant distributees with most, if not the entirety, of their distributive shares. The up-front proceeds to be paid to the infants, if any, were to be paid to the duly appointed guardian of each infant's property jointly with the Guardian Clerk of this court, subject to further order of the court. The decree also provided that the co-administrators proceeded at their own peril with regard to any claims by parties over whom the court did not have jurisdiction. Accordingly, the entire net distributable proceeds were paid as directed therein, and annuities were funded for the infant distributees with most, if not all, of their distributive shares. The decree was not settled with notice of entry upon NYSIF.

DISCUSSION

As NYSIF asserts that the court lacks jurisdiction to dispose of its statutory lien against the settlement proceeds pursuant to WCL § 29, it could have filed an application in the trial court determining its claim and thereafter filed an appropriate application in whatever court it deemed

appropriate. However, should it seek redress herein, it must file a verified petition and obtain jurisdiction over all individuals or entities who would be affected should the decree be vacated and against whom clawback may be sought including, inter alia: the co-administrators, all of the distributees, the infants' property guardian, the guardian ad litem, the attorneys, the annuity issuers and broker (SCPA 301 [1 [a]; SCPA 303).

As this court does not have jurisdiction over all necessary parties, this decision constitutes the order of the court dismissing NYSIF's motion in its entirety as procedurally defective, without prejudice to re-asserting the relief sought by filing an appropriate petition and obtaining jurisdiction over all necessary parties in this court or commencing an action in the Bronx County Supreme Court where the underlying causes of action were pending. The attorneys' cross motion is dismissed in its entirety as late filed and moot.

The Chief Clerk is directed to mail copies of this decision and order to the attorneys for the co-administrators and NYSIF, the co-administrators, Barbara Wiscovitch and Marie Odette McLendon, and the two adult sons, Joseph P. McLendon, Jr. and Diante Joshua McLendon and the guardian ad litem..

Proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
Surrogate