Matter of Rosetti
2024 NY Slip Op 34661(U)
February 22, 2024
Surrogate's Court, Albany County
Docket Number: File No. 2019-360/L
Judge: Stacy L. Pettit
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State of New York

Surrogate's Court, Albany County

In the Matter of the Removal of JOAN ROSETTI as Trustee of the Rosetti Family Irrevocable Trust dated September 2, 1992, commonly known as the Rosetti Family Irrevocable Trust I.

In the Matter of the Removal of RICHARD C. ROSETTI as Trustee of the Rosetti Family Irrevocable Trust dated January 4, 1993, commonly known as the Rosetti Family Irrevocable Trust II.

In the Matter of the Removal of RICHARD C. ROSETTI as Trustee of the Rosetti Family Irrevocable Trust dated July 1, 1997, commonly known as the Rosetti Family Irrevocable Trust III.

In the Matter of the Removal of JOAN ROSETTI as Trustee of the Rosetti Family Irrevocable Trust dated December 7, 2010, commonly known as the Rosetti Family Irrevocable Trust V.

In the Matter of the Removal of RICHARD C. ROSETTI as Trustee of the Rosetti Family Irrevocable Trust dated December 7, 2010, commonly known as the Rosetti Family Irrevocable Trust VI.

DECISION AND ORDER

File Nos. 2019-360/L
2019-360/M
2019-360/N
2019-360/O
2019-360/P

Appearances: Christopher Massaroni, Thomas Collura, Michael Zahler, Attorneys for Petitioner Richard G. Rosetti, Hodgson Russ, LLP, Albany

James Towne, Jr., Robert H. Coughlin, Jr., Eugene P. Devine, Attorneys for Respondents Richard C. Rosetti and Joan Rosetti, Towne Law Firm, PC, Albany

William J. Dreyer, Attorney for Matthew Falvey, Alexandra Falvey Watson and Megan Falvey McVey, Dreyer Boyajian LLP, Albany

[* 1]

John M. Czygier, Guardian ad Litem, Lewis Johs Avallone Aviles, LLP, Islandia

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Pettit, S.,

Pending before this Court is a motion by respondents Richard C. Rosetti and Joan Rosetti to strike certain documents filed by petitioner Richard G. Rosetti in these contested proceedings to permanently remove respondents as trustees of certain trusts.

Petitioner commenced these proceedings pursuant to SCPA 711 and 712 to remove respondents as trustees by verified petition and order to show cause, which order was issued by this Court on September 5, 2023. The order suspended respondents as trustees pending the determination of the petition. The order further directed respondents to file their answer by September 28, 2023, and petitioner to file a reply by October 10, 2023. Thereafter, respondents moved, by order to show cause issued September 19, 2023, to resettle and reargue the September 5, 2023 order which suspended them as trustees. Respondents' motion was submitted for decision on October 10, 2023, and was denied by this Court's decision and order issued October 20, 2023.

On Monday, October 16, 2023, less than one week after the filing of his reply pleading, petitioner filed a letter application to the Court requesting that the Court accept the enclosed affidavit of petitioner's accounting consultant Niall Murphy in further support of the petition to remove respondents as trustees of the trusts and in further opposition to respondents' pending motion to resettle. Along with the letter and the Murphy affidavit, petitioner filed Exhibit 22, which is referenced in the Murphy affidavit. Petitioner's letter stated that the filing was being made at that time due to newly discovered evidence reported to petitioner by his consultants on Friday, October 13, 2023. On October 24, 2023, respondents, by letter, requested an opportunity to respond to petitioner's October 16th filing, and to have until November 15, 2023 to do so, which

request was granted. On November 15, 2023, respondents made the instant motion to strike the October 16th filing. Petitioner has submitted papers in opposition to the motion to strike and in support of his letter application for leave to file the Murphy affidavit and exhibit. Neither the guardian ad litem nor the other interested parties have filed papers on this motion, and the matter is now submitted for decision.

With respect to the October 16th filing, neither party submitted those documents with their motion papers; however, "a court is empowered to take judicial notice of its own records as well as those of the same court in another action" (*Oakes v Muka*, 56 AD3d 1057, 1059 [3d Dept 2008]). Petitioner's October 16th letter refers to both his petition and respondents' motion to resettle and reargue. In the first paragraph, it states that the information submitted is important to "the pending motions for removal and 'resettlement' because it contradicts one of the central themes of Respondents' opposition papers." With respect to this statement, the Court notes that petitioner mischaracterizes his own petition as a motion, as the only motion pending was respondents' motion to reargue and resettle. The reference to "[r]espondents' 'opposition papers'" can only relate to the pleadings in this proceeding. The second paragraph of the October 16th letter states that petitioner "request[s] permission to submit the enclosed affidavit . . . in further support of the petition to remove Respondents as Trustees of Trusts I, II, III, V and VI." The penultimate paragraph states that petitioner "request[s] that the Court accept the enclosed affidavit . . . in further support of Petitioner's Motion to Remove and in opposition to Respondent's Motion to Resettle." Although petitioner mischaracterizes his own petition as a motion in the letter's first and penultimate paragraphs, the Court can forgive such error under CPLR 2001, as all parties are aware that petitioner had a pending petition – not motion – for removal. It is also worth noting that the exhibit associated with the Murphy affidavit is entitled "Exhibit 22," which suggests that it is associated

with those exhibits submitted in support of the petition, which were marked Exhibit 1 through Exhibit 20, and petitioner's reply pleading, which was supported by Exhibit 21.

In their October 24, 2023 letter in response, respondents interpreted petitioner's filing as "sur-reply papers to be used by the Court in its determination of [petitioner's] pending petition;" however, they then cited CPLR 2214, which is a rule for "motion papers; service; time," in support of their request that the papers be stricken from the record for having been filed without first receiving permission from the Court to do so. Respondents had requested additional time to respond to petitioner's filing, and suggested that they wished to respond to the substance of the filing, as they asserted that there were "explanations which cast a completely different light on these latest claims."

Respondents now move to strike petitioner's October 16th filings on the grounds that (1) the documents contain prejudicial allegations which are subject to public scrutiny and (2) that the documents were filed improperly and relate to no pending application. Respondents assert that the submission was improper in form, manner and timing regardless of whether it was made in opposition to their then-pending motion to resettle and reargue the September 5, 2023 order, or made in support of the petition to remove respondents as trustees.

First, to the extent the parties raise arguments regarding whether petitioner's submission could properly be filed in further opposition to respondents' motion to resettle and reargue, that issue has been mooted by the Court's issuance of a decision on petitioner's motion on October 20, 2023. The motion to resettle and reargue was decided by the Court prior to any determination being made regarding the October 16th submission. Accordingly, to the extent petitioner requested that the Court consider the Murphy affidavit in further opposition to respondents' motion to resettle and reargue, such request was implicitly denied (*see e.g. Banker v Banker*, 56 AD3d 1105, 1107

[3d Dept 2008]). As respondents' motion to resettle and reargue was denied, petitioner was not aggrieved by that order and was likewise not aggrieved by the Court's denial of his application to add the October 16th filing to the motion papers. Nor are respondents aggrieved by the Court's denial of petitioner's letter application as it applied to their motion to resettle and reargue, as such denial is part of the relief they are currently seeking.

Respondents contend that the October 16th filing influenced the Court with respect to its decision denying their motion to resettle and reargue. As stated in that decision, however, respondents failed to establish entitlement to resettle or reargue the prior order. Respondents' arguments in support of their motion to resettle and reargue the order suspending them as trustees focused on petitioner's qualifications to act as a successor trustee and the scope of his authority in that role – none of which was related to the Court's prior order. Respondents bore the burden on their motion to resettle and reargue (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed & denied* 80 NY2d 1005 [1992]), but they failed to identify any facts or law that had been misapprehended or overlooked by the Court when it issued the initial order. Thus, even if the Court had considered petitioner's October 16th filing as part of his opposition papers when deciding respondents' motion, it would not have changed anything because respondents failed to establish their entitlement to reargue or resettle the order.

Relatedly, respondents note that the October 20, 2023 decision denying their motion for reargument and resettlement failed to recite the papers considered. Consequently, they assert, that omission raises concerns that the Court relied on this improper submission in denying their motion. Respondents are correct that a decision should recite the papers used on the motion (see CPLR 2219); however, "'the omission of such a recital is not an uncommon irregularity which a party may remedy by seeking resettlement even after an appeal has been taken'" (*Emigrant Funding*

Corp. v Kensington Realty Group Corp., 178 AD3d 1020, 1022 [2d Dept 2019], quoting *Singer v Board of Educ. of City of N.Y.*, 97 AD2d 507, 507 [2d Dept 2019]). To the extent respondents are concerned that the lack of a recital of the papers considered for the October 20, 2023 decision hampers appellate review, the Court notes that no appeal lies from the denial of a motion for reargument (*see Carlucci v Dowd*, 216 AD3d 1286, 1289 [3d Dept 2023]; *Van Ryn v Goland*, 189 AD3d 1749, 1750 [3d Dept 2020]), nor does an appeal lie from the denial of a motion to resettle a substantive portion of an order (*see Matter of Torpey v Town of Colonie, N.Y.*, 107 AD3d 1124, 1126 [3d Dept 2013]; *Tidball v Tidball*, 108 AD2d 957, 958 [3d Dept 1985]).

Next, the Court will consider the procedural arguments regarding acceptance of the October 16th filing in further support of petitioner's pleadings in this proceeding to remove respondents as trustees.[1] In support of their motion to strike, respondents argue that there was no legal basis for the submission of additional affidavits in support of the petition at that juncture of the proceeding, after all pleadings had been filed.[2] They contend that if petitioner desires to submit additional proof, he can seek leave of court for additional submissions. Petitioner did, however, seek the Court's approval by way of his October 16th letter application. Thus, respondents' concern seems to be with the fact that the application was made by letter instead of by notice of motion. Accordingly, respondents made the instant motion to strike in order to "to right the ship." To this end, the Court finds that the respondents received notice of petitioner's request, the Court provided respondents with time to respond to petitioner's application, and both sides have briefed the issue;

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[1] Respondents state that they have not waived their right to respond to the substance of petitioner's filing. The Court disagrees. Respondents requested and received time to respond to the filing. That time has now passed and respondents' response consists of this motion to strike. Respondents are not entitled to an additional opportunity to respond to the procedural correctness of the October 16th filing. They will, of course, have opportunities to respond to the substantive content of that filing during the course of this proceeding. Furthermore, respondents do challenge the substance of the filing on this motion, as they argue that it contains scandalous and prejudicial allegations.

[2] It is noted that, in a special proceeding, the pleadings may be supported by affidavits (*see* CPLR 403 [b]).

thus, any procedural concerns have been alleviated (*see People v Bigwarfe*, 128 AD3d 1170, 1171 [3d Dept 2015], *lv denied* 26 NY3d 1038 [2015]).

The Court has discretion to permit a late filing "upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed" (CPLR 2004; *see Matter of State of New York v Robert C.*, 113 AD3d 937, 939 [3d Dept 2014]). "In considering an application for an extension of time under CPLR 2004, 'the court may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay, whether the moving party was in default before seeking the extension, and, if so, the presence or absence of an affidavit of merit'" (*Garrison v Dick's Sporting Goods, Inc.*, 187 AD3d 1379, 1381 [3d Dept 2020], quoting *Tewari v Tsoutsouras*, 75 NY2d 1, 11–12 [1989]; *see Matter of Burkich*, 12 AD3d 755, 756 [3d Dept 2004]).

With respect to petitioner's October 16th filing, it was concededly untimely; hence, the request for permission to file. The September 5, 2023 order directed petitioner to file reply papers by October 10, 2023, and such papers were filed on October 9, 2023. The length of the delay was minimal, as the request was made less than a week after the reply pleading was due. The only prejudice to respondents that has been raised is that the timing of the filing suggests that it was intended to influence the Court regarding respondents' motion to resettle and reargue. The Court has already indicated that the October 16th filing was not considered when respondents' motion was decided, and that the denial of respondents' motion was due to their failure to meet their burdens on the motion. Moreover, had petitioner timely filed the Murphy affidavit with his reply pleading on October 10, 2023, it would have been part of the record when the Court decided respondents' motion. The Court does not discern any prejudice to respondents based on petitioner's minimally late filing related to his reply pleading. Petitioner has explained that the

reason for the late filing was that the information was made known to him after his reply pleading was filed.[3] Petitioner was not in default at the time of his request, so an affidavit of merit was not required. Specifically, although permitted, a reply pleading was not required. Nonetheless, one had been timely filed on October 9, 2023. Accordingly, petitioner has shown good cause to permit the October 16th filing as part of his reply pleading (see *Matter of State of New York v Robert C.*, 113 AD3d at 939).[4] Respondents' motion to strike the filing as procedurally improper is denied.

Respondents also argue, in support of their motion to strike, that the October 16th filing should be stricken from the record because it contains prejudicial allegations which are subject to public scrutiny. CPLR 405 (a) and 3024 (b) permit a party to move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading. "In reviewing a motion pursuant to CPLR 3024 (b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]; *see Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities*, 81 AD3d 145, 148 [3d Dept 2011], *affd as mod* 19 NY3d 106 [2012]).

Respondents initially assert in their motion papers that the October 16th filing was made "to publish scandalous information for public consumption," and that it "makes scandalous representations." Respondents fail, however, to specifically identify what is scandalous or prejudicial about petitioner's filing. Furthermore, in their reply papers, respondents concede that

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[3] Petitioner further explains that, although he became a co-trustee of the trusts following the Court's September 5, 2023 order suspending respondents, he was not granted access to the trust records until September 25, 2023. Had respondents promptly provided petitioner access to the records, he might have been able to timely submit the Murphy affidavit in accordance with the deadlines in the Court's order.

[4] Respondents take issue with the fact that petitioner did not seek the Court's permission prior to filing the Murphy affidavit and exhibit, and assert that he should have first sought permission and only filed his proposed supplemental pleading if permission was granted. In support of this argument, respondents rely on CPLR 2214 and a federal case filing in support of their position; however, neither the Federal Rules of Civil Procedure, not CPLR 2214 apply here.

"[they] are not suggesting that the evidence the petitioner claims to have is irrelevant" and note that they are making "a motion to strike an improper filing from the docket, not a motion to preclude." As set forth in petitioner's October 16th letter, the Murphy affidavit indicates that respondents paid themselves trustee commissions despite their statements in, among other things, their verified answer in this proceeding, that they did not take commissions. The contents of the October 16th filing respond directly to an affirmative defense in respondents' answer; therefore, the Court finds that the representations are not "unnecessarily inserted in [the] pleading" (CPLR 3024 [b]; *see Pisula v Roman Catholic Archdiocese of N.Y.*, 201 AD3d 88 [2d Dept 2021]). Accordingly, there is no basis to strike the filing as scandalous or prejudicial, and respondents' motion to strike on this ground is denied. It is hereby

ORDERED that petitioner's letter application is granted to the extent that the Murphy affidavit with exhibit is accepted as filed with petitioner's reply pleading; and it is further

ORDERED that respondents' motion to strike the October 16th filing is denied.

This constitutes the decision and order of the Court. You are hereby notified that this order has been entered this date in the office of the Clerk of Albany County Surrogate's Court. At the time of the filing of this decision and order, NYSCEF shall transmit by e-mail to the e-mail service addresses of record a notification that the decision and order has been filed and is accessible through NYSCEF. Such notice shall not constitute service of notice of filing or entry by any party (*see* 22 NYCRR 207.4a [h]).

Dated and Entered:

February 22, 2024

Hon. Stacy L. Pettit, Surrogate

Papers Considered

1) Respondents' Notice of Motion to Strike, dated November 15, 2023; Attorney Affirmation of James T. Towne, Jr., dated November 15, 2023, with Exhibits A-B; Respondents' Memorandum of Law in Support of Motion to Strike, dated November 15, 2023.
2) Petitioner's Attorney Affirmation of Christopher Massaroni in Opposition to Respondents' Motion to Strike and in Further Support of Petitioner's Letter Application, dated December 8, 2023, with Exhibits A-B; Petitioner's Memorandum of Law in Opposition to Respondents' Motion to Strike, dated December 8, 2023.
3) Respondents' Reply Attorney Affirmation of James T. Towne, Jr., in Support of Motion to Strike, dated December 22, 2023; Respondents' Reply Memorandum of Law in Support of Motion to Strike, dated December 22, 2023.
4) Petitioner's October 16, 2024 Letter Application of Christopher Massaroni, with Affidavit of Niall Murphy, with Exhibit 22 (judicial notice taken of this filing).