

Matter of Koepfel

2016 NY Slip Op 30509(U)

March 25, 2016

Surrogates's Court, New York County

Docket Number: 1996-4098/A

Judge: Rita M. Mella

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

New York County Surrogate's Court

Date: MARCH 25, 2016

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In the Matter of the Application of the Law Offices of Craig
Avedisian, P.C. and Richenthal, Abrams and Moss to Fix
and Determine a Charging Lien Pursuant to Judiciary Law § 475
and for a Money Judgment and Related Relief Against
William W. Koeppel, regarding the Estate of

DECISION AND ORDER

File No.: 1996-4098/A

ROBERT A. KOEPPEL,

Deceased.
-----X

MELLA, S.:

Papers Considered

Numbered

Notice of Motion, dated November 13, 2015, for Partial Summary Judgment
by Petitioners, with Affidavit, dated November 13, 2015, of Craig
Avedisian, Esq., attaching Exhibit A (September 26, 2012 Affirmation
of Craig Avedisian, Esq. with Exhibits); Exhibit B (September 26, 2012
Supplemental Affirmation of Craig Avedisian, Esq.; Exhibit C (Affidavit,
dated October 18, 2012 of William W. Koeppel with Exhibits; Affidavit,
dated October 23, 2012, of Allan Povol, CPA with Exhibit); and Exhibit D
(Reply Affidavit, dated November 1, 2012, of Craig Avedisian, Esq.
with Exhibits)

1, 2, 3, 4, 5, 6

Affirmation, dated December 10, 2015, of Anthony Genovesi, Esq., in
Opposition, with Exhibit 1 Affidavit, dated December 11, 2015, of Allan
Povol, CPA, and Exhibit 2, Affidavit, dated October 18, 2012, of
William W. Koeppel (previously submitted), and attaching Exhibits
A through L

7, 8, 9

Reply Affidavit, dated December 18, 2015, of Craig Avedisian, Esq.,
With Exhibits

10

At the call of the calendar on February 19, 2016, the court granted this partial summary
judgment motion by the petitioning law firms (the "Firms") against their former client, William
Koeppel, only to the extent of directing the use of certain 2004 appraisals by Robert Von Ancken
in the valuations at issue, pursuant to the provisions of the parties' July 10, 2006 retainer (the
"2006 Retainer"). The motion was otherwise denied.

The money judgment and charging lien sought by petitioners are for legal fees for their representation of respondent Koeppel culminating in an August 28, 2008 closing, based on a January 3, 2008 settlement, of a decade-long dispute among other members of his family (the “2008 Settlement”). The current dispute, involving a multimillion dollar fee demand, centers on whether the petitioning firms achieved “an increase in gross value” in the settlement for respondent Koeppel, above a \$43,640,000 “trigger amount” as set forth in the 2006 Retainer and on which a \$650,000 flat fee and sliding scale performance fee are based. Koeppel has requested an immediate trial on the valuation questions regarding what the settlement was worth to him, where expert testimony may be offered.

The original November, 2008 trial was adjourned upon respondent’s request for discovery, after which cross-motions were filed for partial summary judgment. The Appellate Division affirmed this court’s conclusion in resolving those motions that the 2006 Retainer remained valid for determining the fee in this matter and that “the precise value of what William [Koeppel] received in settlement cannot be calculated on this record and is accordingly an issue to be resolved at a hearing” (*Matter of Koeppel*, 32 Misc 3d 1245[A] [Sur Ct, New York County, Jan. 19, 2011], *affd In re Koeppel*, 95 AD3d 453 [1st Dept 2012]).

Although Koeppel argued in opposition to the present motion that successive summary judgment motions are prohibited, this is not an unyielding rule (*Varsity Transit v Board of Educ. of City of New York*, 300 AD2d 38, 39 [1st Dept 2002]).¹ Notwithstanding the prior cross-motions for partial summary judgment, which dealt primarily with the validity and construction of the parties’ 2006 Retainer, a later motion can be permitted to clarify the issues remaining for a hearing (*see id.*). Petitioners satisfied their burden to obtain summary resolution (CPLR 3212;

¹In any event, the petitioning Firms’ prior motion was only for partial summary judgment.

Zuckerman v City of New York, 49 NY2d 557 [1980]) of one valuation issue under the 2006

Retainer: the use of the 2004 appraisal figures by Mr. Von Ancken because that was required by the parties' 2006 Retainer.

Koeppel failed to offer any evidence to bring into question the clear mandate of the 2006 Retainer: "The valuations used will be based on Mr. Von Ancken's 2004 appraisals adjusted only for mortgages to third parties." A Notice to Admit (CPLR 3123) served on Koeppel by petitioners seeking to confirm the values under these particular appraisals, and attaching those appraisals to that notice, was not objected to by Koeppel. Consequently, the court holds that \$36,000,000 is the initial value of the entity known as Whitehouse Estates, which is the value of that entity as determined by the 2004 Von Ancken appraisal. This is relevant because Koeppel received all the remaining ownership interest in this entity outright in the 2008 Settlement, which added to his minority interest in Whitehouse prior to the settlement. In this regard and in respect of the charging lien claimed by petitioners, there has been no showing as a matter of law that there are no assets, as Koeppel argued on this motion, to which the charging lien can attach.²

Use of these 2004 appraisals as required by the 2006 Retainer also compels the conclusion that the initial, unadjusted value of the testamentary trust remainder to Koeppel from the 2008 Settlement is \$108,650,000, with this sum comprised of the 2004 Von Ancken appraised values for various entities owned by the trust and in which Koeppel has a remainder interest.³ The parties, however, argue at length in these papers about the appropriate adjustments

²The extent and value of Koeppel's pre-settlement interest in Whitehouse Estates is vigorously contested by the parties.

³The Firms assert that these entities are wholly owned by the trust. Koeppel has not raised an issue of fact on this issue and, further, has admitted that their values as per the 2004 Von Ancken appraisals are: Clypeta Realty Co., \$46,000,000; Twenty-Sixth Management Co., \$8,200,000; Whitehouse Construction Corp., \$7,000,000; Eighth City Realty Corp., \$30,000,000;

to the initial, unadjusted value of the trust remainder, and, in the end, petitioners failed to meet their burden of showing the final value of the remainder to Koeppel from the 2008 Settlement. Those issues remain for trial.

The court also deemed meritless petitioners' argument that the decision of the Appellate Division, which affirmed, without modifying, this court's prior summary judgment decision, has already determined that the \$43,640,000 trigger amount was reached. The decision of this court from which Koeppel appealed had not addressed the value of the settlement to Koeppel. While the Appellate Division has the authority to reach the merits of an argument not resolved in the order appealed from, it may only do so where the argument is clearly supported by facts already in the record (*DeRosa v Chase Manhattan Mortgage Corp.*, 10 AD3d 317 [1st Dept 2004]).⁴ Nonetheless, given that there was no indication in the appellate decision that the court was modifying this court's conclusion that a hearing was necessary on the valuation issues, the decision's language that the "evidence . . . indicates" that the trigger amount may have been reached cannot be read as making a factual determination on that point.

Third Nassau Corp., \$4,150,000; Eleventh National Corp., \$4,600,000; Kingsbrook Holding Corp., \$1,000,000; Peter Stuyvesant Apts., Inc., \$5,000,000 (Brooklyn); Tenth Manhattan Corp. \$2,700,000. These total \$108,650,000, which is the initial, unadjusted value as per the parties' 2006 Retainer of Koeppel's remainder interest. Whitehouse Construction Corporation is an entity separate from Whitehouse Estates. The 2008 Settlement gave Koeppel a 100% ownership interest only in the latter entity, Whitehouse Estates, and its value is not included in the value of the trust remainder because, after the 2008 Settlement, the trust no longer owned it.

⁴Although there was some evidence in the prior record as to the value of the settlement to Koeppel, the Firms' main arguments in this regard were premised on an issue on which they did not prevail, namely, that there needed to be no adjustment to the Von Ancken appraisal numbers for the testamentary trust entities due to the fact that Koeppel did not receive them outright in the 2008 Settlement. Although Koeppel did not lose them to another family member in the settlement, he maintained them as a future interest, a remainder interest, of which he receives possession if he survives his mother, the trust's lifetime beneficiary. This court held, as affirmed by the Appellate Division, that Koeppel's receipt or maintenance of this future interest needed to be valued as such since that is what Koeppel kept in the 2008 Settlement with his family.

Questions of fact were also raised regarding the other assets or provisions of the 2008 Settlement that were claimed by the Firms' as "an increase in the gross value" over the trigger amount that Koepfel received in the 2008 Settlement. Those questions are to be resolved at the trial as well.

Petitioners' partial summary judgment motion was granted from the bench only to the extent set forth herein, and it was otherwise denied in favor of a trial to commence, subject to the filing of a notice of issue and certificate of readiness, on September 8, 2016, at 10:00 a.m. in Room 503 of the courthouse on any and all claimed adjustments or remaining valuation issues. A separate pretrial order will be entered regarding the requirements for the pretrial conference and trial.

This decision together with the transcript of the February 19, 2016 proceedings constitute the order of the court.

Dated: March 25, 2016



SURROGATE