

Chiantella v Chiantella
2011 NY Slip Op 34203(U)
August 15, 2011
Supreme Court, Queens County
Docket Number: 1853/11
Judge: Bernice D. Siegal
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Joachim Anthony Chiantella,

Petitioner,

-against-

Lucy Chiantella Revocable Trust of 2002 and Bernard
Vishnick and John Gavros as Co-Trustees of the Lucy
Chiantella Revocable Trust of 2002,

Respondent.

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Index No.: 1853/11
Motion Date: 5/4/11
Motion Cal. No.: 6
Motion Seq. No.:

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QUEENS COUNTY CLERK
FILED

The following papers numbered 1 to 16 read on this motion for an order granting cancelling and discharging of record the mortgage on the property described in the Petition regarding premises at 63-25 254th Street, Little Neck, New York, 11362, Queens, Block 8374 Lot 140 and recorded in the Office of the City Register on December 10, 2004 as File No. 2004000763376; and granting judgment against each Trustee in the sum of \$1500 and paying the reasonable value of legal fees of Petitioner to the extent permitted by law.

	PAPERS NUMBERED
Order to Show Cause - Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion- Affidavits-Exhibits.....	5 - 9
Reply and Opposition to Cross Motion.....	10 - 12
Reply Affidavits.....	13 - 15
Memorandum of Law in Support of Cross-Motion.....	16

Upon the foregoing papers, it is hereby ordered that the Order to Show Cause and the Cross-Motion are resolved as follows:

Petitioner moves by Order to Show Cause for an order cancelling and discharging of

record the mortgage on the property described in the Petition regarding premises at 63-25 254th Street, Little Neck, New York, 11362, Queens, Block 8374 Lot 140 and recorded in the Office of the City Register on December 10, 2004 as File No. 2004000763376. Respondents, Bernard Vishnick and John Gavros, move to dismiss petitioner's cause of action pursuant to CPLR § 3211, dismissing the complaint against them on the grounds that there is no subject matter jurisdiction in the Supreme Court of the State of New York, County of Queens and that the complaint should be brought in Queen's County Surrogate Court.

Petitioner's Order to Show Cause seeking an order cancelling and discharging of record the mortgage on the subject property is granted and Respondent's Cross-Motion to dismiss Petitioner's cause of action is denied as more fully set forth below.

Facts

This is an action by petitioner for satisfaction of the mortgage of the subject property pursuant to terms of the Lucy Chiantella Revocable Trust of 2002. Petitioner is the beneficiary of a trust written by Lucy Chiantella ("Trust") that was executed on November 6, 2002, upon Lucy's death. The trust provided that one-half of the remaining trust fund shall be paid on the third anniversary of the grantor's death to Joachim Anthony Chiantella ("Joachim"). The remaining balance of the trust fund shall be paid on the seventh anniversary of the grantor's death to Joachim, at which time the trust would terminate. Since over seven years have passed since the grantor's death, petitioner claims that he is entitled to a full satisfaction of the mortgage. Respondent claims petitioner has made several misstatement of facts and cross-moves to dismiss the claim due to lack of subject matter jurisdiction. According to a forum clause in a 2004

stipulation of settlement, Queens County Surrogate Court retains sole jurisdiction with respect to any action necessary to enforce or implement the terms of the stipulation. On appeal from Suffolk County Supreme Court, which granted respondents motion to dismiss based on lack of subject matter jurisdiction, the Appellate Division, Second Department held that Suffolk County Supreme Court did have subject matter jurisdiction.

Discussion

The court will first address Respondent's cross-motion to dismiss based on lack of Subject Matter Jurisdiction. Forum selection clauses in an agreement are "prima facie valid." (See *Fleet Capital Leasing v. Anguili Motors, Inc.*, 15 A.D.3d 535 [2nd Dept. 2005].) But, where real estate is non-testamentary and not part of the estate, it is "beyond the jurisdiction of the Surrogate's Court..." (*Ramsey v. Ramsey*, 69 A.D.3d 829, 832 [2nd Dept. 2010].)

Respondents contend that this Court lacks subject matter jurisdiction due to a forum clause in a 2004 settlement agreement. The clause states that any conflict arising out of the agreement is under the sole jurisdiction of the Queens County Surrogate's Court. The Appellate Division Second Department, in a similar conflict between the same parties, held that petitioner's action should not be dismissed "upon the ground that the Surrogate's Court has exclusive jurisdiction."¹ (*Chiantella v. Vishnick*, 84 A.D.3d 797, 798 [2nd Dept. May 3, 2011].)

Furthermore, CPLR § 7701 authorizes special proceedings in the Supreme Court relating to express trusts, including inter vivos and testamentary trusts thus dismissal of the petition is not

¹The court notes that the Second Department decision in *Chiantella* came down during the pendency of this motion.

mandated. (*Id.* At 526.) Because as petitioner correctly contends, his claim relates to a matter of express trust, this Court does have jurisdiction. Following the Appellate Court's holding, respondents' cross-motion to dismiss based on lack of subject matter jurisdiction is denied.

This court will next address Petitioner's Order to Show Cause. Petitioner asserts that Joachim is the beneficiary of the Trust that was executed on November 6, 2002. The Trust provided that seven years after Lucy's death, the remaining balance of the trust fund shall be paid on the seventh anniversary of the grantor's death to Joachim, at which time the trust would terminate. There is no dispute that these were the terms of the Trust and that seven years has elapsed since Lucy passed away. Pursuant to a Stipulation dated June 22, 2004, the parties entered into an agreement whereby Respondent, Bernard Vishnick, as co-trustee of the Trust, agreed to sell the property located at 63-25 254th Street, Little Neck, NY 11362 to Joachim. Petitioner asserts that he is now entitled to a full satisfaction of the mortgage. Petitioner contends, and it is undisputed by Respondents, that there is nothing due on the mortgage and that a satisfaction of mortgage is to be provided.

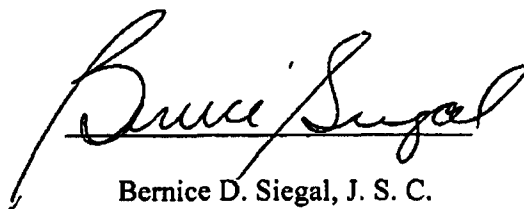
Respondents contend that Joachim is ignoring the terms of the Trust and stipulation of settlement and attempting to have the trust avoid its obligation to pay its administrative and other expenses prior to the discharge of the mortgage. However, the stipulation of settlement is devoid of such requirement as a condition precedent to the satisfaction of mortgage.

Finally, the court notes that Petitioner's Order to Show Cause is devoid of a basis for the imposition of judgment against each trustee in the sum of \$1,500 or for the award of legal fees.

Accordingly, Petitioner's Order to Show Cause for an order cancelling and discharging of record the mortgage on the property described in the Petition regarding premises at 63-25 254th

Street, Little Neck, New York, 11362, Queens, Block 8374 Lot 140 and recorded in the Office of the City Register on December 10, 2004 as File No. 2004000763376 is granted. That portion of the Order to Show Cause seeking a judgment against each trustee in the sum of \$1,500 and for reasonable legal fees of Petitioner is denied,

Dated: August 15, 2011



Bernice D. Siegal, J. S. C.

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