

Tsavaris v Tsavaris

2011 NY Slip Op 32626(U)

October 5, 2011

Sup Ct, NY County

Docket Number: 103246/11

Judge: Louis B. York

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SCANNED ON 10/7/2011

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: YORK
Justice

PART 2

FRANK TSAVARIS
- v -
FRANK TSAVARIS

INDEX NO. 103246/11
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED WITH ACCOMPANYING
MEMORANDUM DECISION.**

FILED

OCT 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/5/11

Ley
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----- x
ARTHUR F. TSAVARIS, Individually and as
Co-Trustee of the Josephine Tsavaris Irrevocable
Trust,

Index No. 103246/11

Plaintiff,

-against-

FRANK G. TSAVARIS, and **HARRY J. TSAVARIS**,
Individually and as Co-Trustees of the Josephine
Tsavaris Irrevocable Trust,

Defendants.
----- x

FILED

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LOUIS B. YORK, J.:

This decision addresses the combined motion by Plaintiff Arthur F. Tsavaris (hereafter Arthur) requesting, pursuant to CPLR § 2221, leave to reargue and leave to renew his prior motion seeking removal of the defendants Frank G. Tsavaris and Harry J. Tsavaris (hereafter Frank and Harry respectively) from their positions as co-trustees of the Josephine Tsavaris Irrevocable Trust. For the reasons stated *supra*, the motion is denied.

FACTS

Arthur, Frank and Harry are the co-trustees of the Josephine Tsavaris Irrevocable Trust (hereafter the Trust), an irrevocable inter-vivos trust whose sole assets consists of a multiple dwelling house located in Bronx, New York, near the Throgs Neck Bridge. Josephine Tsavaris, the co-trustees' mother, is the grantor of the Trust and the sole income beneficiary. Under the terms of the agreement creating the Trust, the co-trustees are required to unanimously consent to all actions to be taken regarding the Trust property. Following a series of disagreements regarding the proper management of the trust, Arthur moved by Order to Show Cause, seeking the removal of Frank and Harry as co-Trustees. The Court denied Arthur's motion in an order

dated August 13, 2011 and entered August 13, 2011. Arthur now seeks leave to renew and leave to reargue the Court's decision by Order to Show Cause dated August 18, 2011.

Arthur seeks leave to renew and the prior motion based on two grounds. First, Arthur states that he has recently discovered that one of the apartments is presently occupied by a tenant and that he never agreed to the trust entering into such a contract. Arthur states that he has no knowledge regarding the lease or when the tenant moved into the apartment. Second, Arthur states that in the time since the Court's order denying Arthur's motion, Frank and Harry have continued to refuse to work with Arthur to manage the Trust.

Arthur also seeks leave to reargue the prior motion based on three grounds. First, Arthur states that the court erred by not ordering an evidentiary hearing prior to handing down its decision. Second, he points out that the Certificate of Occupancy lists only two apartments in the dwelling. Finally, Arthur contends that the court was mistaken in its characterization of Frank and Harry's decision to deposit trust income into the account of the sole income beneficiary, Josephine Tsavaris, rather than into a trust bank account.

DISCUSSION

When considering a motion for leave to reargue or renew, the Court must decide each part of the motion as if it were separately made (CPLR § 2221 [f]). With respect to a request for leave to renew, such a motion must be based on new facts not offered in the prior motion that would change the court's determination (CPLR § 2221 [e] [2]). However, "[r]enewal is granted sparingly and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application (Matter of Weinberg, 132 AD2d 190, 210 [1st Dept 1987]; see CPLR § 2221 [e] [3]). The first basis for Arthur's motion to renew is that since the decision was made Arthur has learned that one of the basement apartments is presently being rented by a

tenant. The Court, in its prior decision, stated that the property was currently vacant. It appears that the court's finding may have been based on a misreading of a statement made in the affirmation in opposition but since Arthur states that he had not been aware of the fact and the issue was not specifically addressed in the prior papers the court will address this fact as a motion to renew. To the extent that Harry and Arthur have expressed an interest in renting the basement apartments despite they apparently are not being covered by the Certificate of Occupancy, this issue is also addressed below as part of the motion to reargue.

The court denies the motion to renew based on the rental of the basement apartment because Arthur's excuse for his failure to present the evidence in the prior motion is unreasonable. The proponent of a motion to renew is required to show that the new evidence was not previously discovered despite due diligence (*see Taub v Art Students League of N.Y.*, 63 AD3d 630, 631 [1st Dept 2009]). Harry has stated that the basement apartment in question has been continuously rented since before the Trust was established. As such, and given Arthur's fiduciary duty to the property, the court does not find Arthur's explanation of surprise to be a reasonable excuse for not presenting this fact previously. Furthermore even if the Court accepted Arthur's explanation this fact alone would not change the Court's prior decision.

With regard to Arthur's claim that in the time since the Court gave its decision, Frank and Harry have refused to work with Arthur to resolve the issues with the trust, the Court does not feel that this new fact is sufficient to change the Court's prior decision. Given the significant disagreement between the co-trustees about the best way to manage the property, there can be no doubt that it will take the co-trustees to work out a consensus. Given that this motion to renew was made only 5 days after the entry of the prior order, the Court cannot conclude that sufficient time has passed to rule out the possibility of a compromise between the co-trustees. That being

said, if this impasse continues to the point where it is clear that no working agreement can be reached, the co-trustees are free to bring a new motion.

In contrast to a motion seeking leave to renew, a Court, in its discretion, may grant a motion seeking leave to reargue based on a showing that the court overlooked or misapprehended matters of fact or law in its prior decision (*see* CPLR § 2221 [b] [2]; *Marini v Lombardo*, 17 AD3d 545, 546 [2d Dept 2005]). Regarding the court's decision not to order a hearing, notwithstanding disputed issues of fact, the court determined that even taking all of Arthur's claims at face value, Harry and Frank's conduct was not such that it required the drastic remedy of removal. Furthermore, regarding Arthur's arguments involving the Trust Bank Account, the Court fails to see how it has misapprehended these facts or law in rendering its decision. While the court agreed with Arthur that trust income should be deposited in a trust bank account, Frank and Harry's decision to deposit trust income directly into the account of the sole income beneficiary did not necessitate removal as there was no showing that the action was motivated by any intent to defraud, was based on the advice of counsel due to Josephine's entitlement to all net income from the trust, and did not lead to any loss.

With respect to the Certificate of Occupancy, the Court agrees with Arthur that renting of apartments not covered by the Certificate of Occupancy could have serious negative repercussions. However given no showing that the rental was based on anything but an innocent mistake due to the fact that the family built and began renting the apartments many years before the property was put in trust, the Court does not see any reason why this mistake should warrant removal and instead recommends that the co-trustees either cease renting the two basement apartments or obtain an new Certificate of Occupancy. Furthermore, Arthur has failed to cite any case that dictates that either of these errors require removal. Thus, as the court has already

[* 6]
explained, these are problems that can and should be dealt with by the co-trustees sitting down and reaching a mutually acceptable agreement as their fiduciary duties require.

Therefore, for the reason's stated *infra*, the motion requesting leave to renew and leave to reargue is denied.

Based on the foregoing, it is


ORDERED motion requesting leave to reargue and leave to renew the prior motion for removal of the defendants Frank G. Tsavaris and Harry J. Tsavaris (hereafter Frank and Harry respectively) from their positions as co-trustees of the Josephine Tsavaris Irrevocable Trust is denied.

Dated: 10/5/11

Enter:

OCT 07 2011

NEW YORK
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Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.