

**Matter of Yaremo**

2013 NY Slip Op 30717(U)

January 23, 2013

Surrogate's Court, Nassau County

Docket Number: 2010-361102/A

Judge: III., Edward W. McCarty

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

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In the Matter of the Petition of Peter Yaremo,  
Requesting an Order Directing Elizabeth Yaremo  
As the Co-Executor of the Estate of

File No. 2010-361102/A

Dec. No. 28332

THEODORE YAREMO,

Deceased,

and/or Computershare, Inc., d/b/a Computershare  
Investor, as Transfer Agent, to execute all and any  
Documents to Complete the Transfer of Title of  
Stock Certificates to Peter Yaremo Services.

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Before the court is a motion to dismiss, pursuant to CPLR 404 for lack of subject matter jurisdiction, filed on behalf of Elizabeth Yaremo, as co-executor of the estate of Theodore Yaremo, the decedent herein. The motion seeks dismissal of a petition filed on behalf of Peter Yaremo, a co-executor of decedent's estate, which petition requested a court order directing Elizabeth Yaremo, and Computershare, Inc., doing business as Computershare Investor, a stock transfer agent, to execute documents necessary to complete the transfer of ExxonMobil corporate stock certificates, currently registered in the name of the decedent, to Peter Yaremo in his individual capacity.

#### BACKGROUND

The decedent, Theodore Yaremo, died on May 14, 2010, leaving a last will and testament dated August 6, 2003. The decedent was survived by three children: Peter, Elizabeth and Theodore. The will nominated Peter and Elizabeth as co-executors and directed that each receive an equal one-half share of the decedent's residuary estate. The will was admitted to probate and letters issued to Peter and Elizabeth on October 27, 2010.

## PETITION FOR AN ORDER COMPELLING A CO-EXECUTOR TO ACT

In his petition, Peter alleges that the decedent gifted two ExxonMobil stock certificates to Peter on or about December 29, 2004, by endorsing the certificates in blank, communicating that he was making a gift, and physically delivering the certificates to Peter. Peter further alleges that the decedent's intent was to make a gift to Peter of all of decedent's interest in the stock, and that the gift was then accepted. The stock certificates are identified by numbers N922137 (800 shares) and W291171 (2,500 shares). Photocopies of the stock certificates have been filed and the reverse side of each certificate, which is a standard form for the sale, assignment and transfer of the shares of stock, reflects the date of December 24, 2004 and the decedent's signature; the balance of each form is entirely blank. On certificate N922137, the decedent's signature does not appear on the proper line for a transfer of the shares.

Peter took no further steps to transfer the certificates into his own individual name until after the death of his father, when he requested that the transfer agent register the shares in Peter's name individually. The transfer agent, Computershare, Inc., doing business as Computershare Investor as Transfer Agent (hereinafter, "Computershare"), was unwilling to register the stock certificates in Peter's individual name without the written consent of Elizabeth as co-executor of decedent's estate. Elizabeth has refused to execute the required documents.

Peter asserts that Elizabeth disputes that decedent gifted these shares of stock to Peter in 2004; she takes the position that the shares are a part of the decedent's estate, to be shared equally between the two siblings, in accordance with the terms of decedent's will. Peter asks the court to direct Elizabeth, or in the alternative, Computershare, to take all required actions and execute all documents necessary to register the two stock certificates in Peter's name.

No opposition to the petition was filed on behalf of Computershare.

#### MOTION TO DISMISS

Elizabeth filed the present motion to dismiss under CPLR 404, which is an objection in point of law. The basis for Elizabeth's objection is that Peter's petition fails to state a case for discovery and delivery of assets belonging to the estate of the decedent, because Peter claims to own the stock as a result of a gift which Peter claims was completed in 2004. Accordingly, it is argued, if the gift was completed in 2004, then (1) this court lacks subject matter jurisdiction over the shares, which have no connection to the administration of decedent's estate; and (2) Elizabeth has no fiduciary obligation to take any action to transfer the property to Peter. Elizabeth maintains that Peter's petition must be dismissed. She further notes that she offered to provide a full accounting of the estate assets, in the context of which she and Peter could address any disputes regarding estate assets.

In addition, Elizabeth argues that jurisdiction fails because Peter failed to serve her with a written demand for the relief he seeks prior to bringing this cause of action, which is a condition precedent to an action brought under SCPA 2102.

#### AFFIRMATION IN OPPOSITION

Peter responded with an affirmation in opposition to the motion, asserting that the court has broad jurisdiction regarding any matter which pertains to an estate. He further argues that if Elizabeth agrees that the shares are not an estate asset, then she must take the action required by the transfer agent to facilitate registration of the shares in Peter's name. If she takes the position that the shares constitute an estate asset, then she must concede that this court has jurisdiction. In response to Elizabeth's assertion that Peter did not meet the condition necessary for an action

pursuant to SCPA 2012, Peter asserts that this is not an action under that section but is rather a petition brought pursuant to SCPA 2105, for delivery of property belonging to him that is under the control of a fiduciary. Peter further claims that the court has jurisdiction over this proceeding in that he seeks a declaratory judgment that the shares belong to him and, conversely, not to decedent's estate. Thus, according to Peter, the essential question before the court is whether the ExxonMobil shares are an estate asset, which question may properly be heard by the Surrogate's Court. Peter asks the court to consider this question in advance of an accounting proceeding that may be filed.

#### AFFIRMATION IN SUPPORT OF THE MOTION

Elizabeth's attorney then filed an affirmation in support of the motion to dismiss. He notes that the petition filed on behalf of Peter does not ask the court for a declaration that Peter is the owner of the ExxonMobil shares, but rather, requests that the court direct the action necessary for the registration of the corporate shares in Peter's individual name. Counsel for Elizabeth reiterates that if, in fact, the shares were delivered and the gift was completed in 2004, there would be no need for Elizabeth to take any action now to complete the transfer.

#### ANALYSIS AND CONCLUSION

The petition filed by Peter is premised upon his assertion that decedent made a completed gift of the ExxonMobil shares to Peter in 2004. If Peter is correct, then it follows that this court lacks jurisdiction over the ExxonMobil shares, as they were transferred out of decedent's estate almost six years prior to his death, though the court would have jurisdiction to decide the issue regarding the purported gift.

On the other hand, if Peter's presumption is incorrect, and the gift was never completed,

this court has subject matter jurisdiction over the ExxonMobil shares. However, even if the court were to agree with Peter's assertion that Elizabeth's refusal to provide Computershare with her written approval of the stock registration sought by Peter is analogous to a fiduciary's wrongful retention of property belonging to someone other than the estate, the court can only direct a fiduciary to deliver property to its rightful owner where the claimant has clearly established his right to the claimed property (*Matter of Litman*, 13 Misc 2d 108, 110 [Sur Ct, Nassau County 1958]; *Matter of Kenney*, 171 Misc 87 [Sur Ct, Kings County 1939]). Peter has failed to do this. Peter's possession of the two certificates, which appear to have been dated and signed but not otherwise completed by the decedent, together with his self-serving statements, are insufficient to demonstrate that Peter has an absolute right to the ExxonMobil shares.

The motion to dismiss is granted. As noted by Elizabeth, the question of whether or not the shares were the subject of a completed gift may be addressed in an accounting proceeding brought by either party as a co-executor of decedent's estate.

This constitutes the decision and order of the court.

Dated: January 23, 2013

EDWARD W. McCARTY III  
Judge of the  
Surrogate's Court