

Ranaldo v Zucker

2013 NY Slip Op 32455(U)

September 26, 2013

Surr Ct, Nassau County

Docket Number: 343358/D

Judge: Edward W. McCarty III

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

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Probate Proceeding of the Estate of

VERA RANALDO,

Deceased.

File No. 343358/D

Dec. No. 28989

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Diane Ranaldo, as Distributee of the Estate of

VERA RANALDO,

Deceased,
Petitioner,

File No. 348679

Dec. No. 29261

-against-

Virginia Zucker, a/k/a Virginia Ranaldo Zucker, individually
and as Trustee of the Ranaldo Family Revocable Trust,

Respondent,

for an order and decree declaring null and void, rescinding,
setting aside, vacating and cancelling a certain purported
amendment to the Ranaldo Family Revocable Trust.

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In these probate and miscellaneous proceedings, Virginia Zucker seeks an order taxing costs and disbursements against Diane Ranaldo in the amount of \$1,050.00 (costs) and \$13,141.55 (disbursements), for a total of \$14,191.55.

The decedent, Vera Ranaldo, died testate on August 5, 2006, survived by two daughters, Virginia Zucker and Diane Ranaldo. A purported will dated July 13, 2005 was offered for probate by Virginia. The purported will specifically disinherited Diane and bequeathed the decedent’s residuary estate to the Ranaldo Family Revocable Trust, which was amended by a First Amendment. The First Amendment also disinherited Diane.

Diane objected to the probate of the will and to the validity of the First Amendment. A

jury trial was held to determine the validity of the will and the First Amendment. The jury returned a verdict in favor of Diane, denying the purported will probate and voiding the First Amendment. The court rendered a decree dated February 7, 2011 in the probate proceeding and a decree dated March 7, 2011 in the miscellaneous proceeding. Neither decree provided for the reservation of costs in the trial court after an appeal.

Virginia appealed the decrees, and, ultimately, was successful in her appeals. The Appellate Division, Second Department's order dated March 20, 2013 reversed both decrees on the law and ordered "that one bill of costs is awarded to Virginia Zucker payable by Diane Ranaldo personally."

Thereafter, Virginia submitted a proposed decree in the probate proceeding on notice in accordance with the Appellate Division, Second Department's order. That decree was signed on May 6, 2013. No decree was submitted for the miscellaneous proceeding.

Virginia has now submitted a bill of costs. Diane objects to the bill of costs based upon the following: (i) the bill of costs was not submitted timely; (ii) the request for costs in the amount of \$1,050.00 is incorrect as a matter of law; and (iii) the request for disbursements includes disbursements for the prior proceedings in this court.

SCPA 2302 (2) clearly provides that a court may award costs upon the rendering of a decree. A bill of costs must be presented at or before submission of a decree finally disposing of the issues before the court (*Matter of Nelson*, NYLJ Sept. 26, 1990, at 20, col. 6 [Sur Ct, Nassau County]). If there is an affirmance or reversal "with costs," the costs referred to are those in the appellate court and not costs of the lower court. SCPA 2304 provides only for the award by a appellate court of costs incurred with respect to an appeal pending before it (Warren's Heaton on

Surrogate's Court Practice § 104.02 [7th ed]). If the decree appealed from does not grant costs and does not direct that the grant of costs be reserved for a supplemental decree, the right to costs related to the proceeding in the trial court is forfeited (*Matter of Lewin*, 57 Misc 2d 201 [Sur Ct, Broome County 1968]; Warren's Heaton on Surrogate's Court Practice § 104.02 [7th ed]). The power of the surrogate to award costs ends with the entry of a decree in the proceeding before him, unless there is such a reservation for costs or allowance for the supplemental decree to be entered after final determination of an appeal (*Matter of Nova*, 50 Misc 2d 689 [Sur Ct, Nassau County 1966] [the failure to reserve in the decree appealed from the fixation of costs and allowances prevents their later allowance]).

As to the issue of timeliness, here, the bill of costs was not submitted prior to the decree dated May 6, 2013 issued in the probate proceeding. A decree, however, has not yet issued in the miscellaneous proceeding, which was tried together with the probate proceeding. Accordingly, there has been no final resolution, and the bill of costs is, therefore, timely.

Concerning the amount of costs and disbursements, Diane is correct that the fixation of costs is limited to the costs of the appeal because there was no reservation for costs in either the decree dated February 17, 2011 or the decree dated March 7, 2011. Thus, the costs are limited to the costs of the appeal. Costs awarded on appeal are fixed in the amount by CPLR 8203 and 8204 (SCPA 2304 [4]). CPLR 8203 (a) provides that "[u]nless the court awards a lesser amount, costs awarded on appeal to the appellate division shall be in the amount of two hundred fifty dollars." Thus, the costs reflected in the proposed bill of costs in the amount of \$1,050.00 are reduced to \$250.00.

An award of costs includes necessary disbursements. CPLR 8301 provides that "a party

to whom costs are awarded in an action or an appeal is entitled to tax his necessary disbursements . . . “ CPLR 8301 (a) provides for twelve categories of appropriate disbursements on an appeal. Here, the following disbursements are allowed:

Expenses of reproducing appellate brief and record	\$6,138.33
Stenographers’ fees and jury trial transcript	2,535.00
Clerk’s fees Appellate Division	445.00
Surrogate’s Court Fee for Two Subpoenas of Court Files to Appellate Division	130.00

Diane has objected to the stenographers’ fee/transcript fee; however, taxation of such has been allowed because a transcript of the trial must generally be made part of the record on appeal (NY Civ Prac, Weinstein-Korn-Miller ¶ 8301.28 [2d ed]).

With respect to the disbursements regarding printing papers for hearing (\$488.94) and transcript of examination before trial (\$250.00), there is no indication that these charges were related to the appeal. As stated above, the decrees did not preserve costs in the proceedings before this court. Accordingly, total disbursements in the amount of \$9,248.33 are allowed.

The bill of costs will be modified as hereinabove set forth.

This is the decision and order of the court.

Dated: September 26, 2013

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

