

Swezey v Lynch

2018 NY Slip Op 32810(U)

October 25, 2018

Supreme Court, New York County

Docket Number: 155600/13

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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OSQUGAMA F. SWEZEY and JOSE DURAN, on their
Behalf and as Representatives of a Class of
Judge Creditors of the Estate of Ferdinand
E. Marcos

Petitioners,

-against-

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MERRILL LYNCH, PIERCE, FENNER & SMITH,
INCORPORATED and NEW YORK CITY DEPARTMENT OF
FINANCE,

Respondents.

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Hon. C. E. Ramos, J.S.C.:

The petitioners move for an order directing the New York City Department of Finance (DOF) to transfer to the New York State Comptroller (comptroller) the sum of \$625,975.87 which the DOF retained out of the funds deposited with it pursuant to orders of this Court.

Background

The petitioners are torture victims who seek to execute on two judgments against the Estate of Ferdinand Marcos, the former dictator of the Republic of the Philippines. The funds that are the subject of this turnover proceeding are funds that were deposited decades ago by a Panamanian corporation named Arelma, Inc. (the Arelma assets) with a New York office of Merrill Lynch, Pierce, Fenner, & Smith Inc. (Merrill Lynch). Petitioners claim in this proceeding that they are entitled to execute against the

Arelma assets because Arelma was the alter ego of Marcos. Other intervenors in this proceeding, namely the Philippines National Bank and Arelma, Inc. (Intervenors) claim that the Republic of the Philippines has a right to the Arelma assets superior to that of the petitioners. The claims of the petitioners and intervenors has not been adjudicated because the Republic of the Philippines has refused to participate in the turnover proceeding, and has been the subject of numerous decisions of this Court.

In the course of litigating this proceeding, petitioners, intervenors and Merrill Lynch agreed that the Arelma assets held by Merrill Lynch and not producing any interest or other appreciation in value, were to be sold and deposited with the DOF (Exhibit C, annexed to the Glen Aff.). The DOF received the Arelma assets, \$39,895,985.56, on February 4, 2010 pursuant to order of this Court.

The DOF had custody of the Arelma assets, which it placed in an interest bearing account, until April 4, 2017 when it deemed the funds "abandoned" to the comptroller, pursuant to the New York Abandoned Property Law. When it abandoned the Arelma assets to the comptroller, the DOF retained \$826,455.87 as a "2% adm. fee to the City pursuant to CPLR 8010."

In support of their motion, the petitioners assert that the DOF was not entitled to a two percent administration fee under

CPLR 8010 because it had not made a payment out of court, and is only entitled to retain as a service fee one-half of one percent of the sum received, which here totals \$199,480.

In opposition, the DOF relies upon section 600 and 602 of the Abandoned Property Law which is addressed to court-deposited funds and states that the funds to be transferred to the comptroller are reduced by "such legal fees as [the DOF] may be entitled to." The DOF also relies upon CPLR § 8010 (1) which states that the Department is entitled to "two percent upon a sum of money paid out of court by him."

The parties' dispute thus centers on determining whether the release of dormant court-deposited funds by the DOF to the comptroller under the Abandoned Property law, rather than by court order, constitutes a payment "out of court" that would entitle the Department to retain a two percent fee.

Discussion

The DOF is the custodian of court-deposited funds in New York City under Article 26 of the CPLR. When the DOF takes custody of court-deposited funds, it is entitled to two statutory fees, set forth in CPLR 8010: one fee for investing, and one fee for making payment. Specifically, sub-section (1) of CPLR 8010 entitles the DOF to receive "two percent upon a sum of money paid of out court by him." Sub-section (2) entitles the DOF to "one-half of one percent upon a sum of money invested by him."

The term "paid out of court," as used in CPLR 8010 (1), has not been judicially construed. The Court of Appeals has stated that "when the language of a statute is clear and unambiguous, the statute should be construed so as to give effect to the plain meaning of the words" (*People v Museum of Modern Art*, 93 NY2d 729, 743-44 [1999]).

The plain meaning of the term "paid out of court," which triggers the DOF's entitlement to a two percent fee for its custodial services, is the payment of the money out of court, either an award of the court or other order of the court directing payment.

Considering the construction of CPLR 8010 with the Abandoned Property Law does not alter this Court's conclusion. Abandoned Property Law §§ 600 and 602 directs the DOF to transfer dormant court-deposited funds to the comptroller without a court order, after five years. The substance of this transfer is a ministerial act triggered by the passage of time, which runs from the date the DOF takes custody of the money (Abandoned Property Law § 600 [1] [a]). The ministerial act of transferring abandoned funds to the comptroller does not entitle the DOF to a two percent fee under CPLR 8010 (1) because it is not money "paid out of court" to the party entitled to the money or other order directing payment.

This Court originally ordered the DOF to take custody of the

Arelma assets, and neither this Court, nor any other court with competent jurisdiction, has awarded the Arelma assets or otherwise directed payment thereof out of the DOF's custody.

Thus, the only fee to be retained by the DOF for its services as custodian of the Arelma assets is the retention of one half of one percent of the sum initially received by him for its placement of the funds in an interest bearing account. There is no statutory authority for the DOF's retention of two percent for transferring funds as abandoned property to the comptroller's custody, by passage of time.

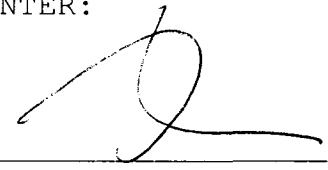
Accordingly, it is

ORDERED that the petitioners' motion for an order directing the New York City Department of Finance to transfer to the New York State Comptroller the sum of \$625,975.87 is hereby GRANTED.

Settle Order.

Dated: October 25, 2018

ENTER:



J.S.C.
CHARLES E. RAMOS