

<b>Johnson v Johnson</b>
2020 NY Slip Op 32197(U)
July 7, 2020
Supreme Court, New York County
Docket Number: 650681/2020
Judge: Engoron
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

CHERYL JOHNSON, CHERISE JOHNSON,
Petitioners,

INDEX NO. 650681/2020
MOTION DATE 02/18/2020
MOTION SEQ. NO. 001

- v -

BARBARA JOHNSON,
Respondent.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion for STAY

Upon the foregoing documents, the Temporary Restraining Order that this Court granted on March 16, 2020 is hereby dissolved; the instant request for a preliminary injunction is hereby denied; and the instant case is dismissed, as there is a prior action pending in a more suitable forum.

Background

At all times here in issue, New York resident Charlotte Cottman ("Ms. Cottman") resided in a nursing home. According to the instant petition, in June 2019, Ms. Cottman ostensibly changed the beneficiary of her life insurance policy and 401k plan to respondent, Barbara Johnson, only (NYSCEF Doc. 1, at 5). Respondent is Ms. Cottman's niece by marriage (NYSCEF Doc. 10). Ms. Cottman's biological nieces, co-petitioners Cheryl Johnson and Cherise Johnson, allege that respondent "isolated" Ms. Cottman from co-petitioners and other relatives, took Ms. Cottman's keys, and failed to provide Ms. Cottman with appropriate nutrition and adequate hygiene (NYSCEF Doc. 21). However, respondent counters that she and Ms. Cottman's best friend, Barbara Garrison, alternated staying with, shopping, cooking, and cleaning for Ms. Cottman (NYSCEF Doc. 23, at 2).

On July 7, 2019, Ms. Cottman passed away without a surviving spouse or children (NYSCEF Doc. 10). On or about August 14, 2019, respondent filed a Petition for Probate and Letters Testamentary, either in this Court or in New York County Surrogate's Court (the record is unclear) and presented a document purporting to be Ms. Cottman's Last Will and Testament (the "Cottman Will") (Exhibit A; NYSCEF Doc. 12) for probate (NYSCEF Doc. 1, at 4). The Cottman Will names respondent as the executor and sole beneficiary of Ms. Cottman's estate. Co-petitioners assert the following: (1) they never received notice that Ms. Cottman had executed a Last Will and Testament; and (2) Ms. Cottman was not of sound mind or in possession of testamentary capacity on April 12, 2019, the date on which she allegedly signed and executed the Cottman Will.

On October 22, 2019, the Circuit Court of Cumberland County admitted the Cottman Will as valid because the New York County Surrogate's Court had declared it so (NYSCEF Doc. 1, at 6).

On or about November 1, 2019, Metropolitan Life Insurance Company ("MetLife") informed co-petitioner Cheryl Johnson that she was no longer a beneficiary to Ms. Cottman's insurance policy.

On or about November 21, 2019, co-petitioners filed with the New York County Surrogate's Court their objections (the "Objections") to the admission to probate of the Cottman Will, which, according to the Verified Petition, they believe is fraudulent. Co-petitioners asked the New York County Surrogate's Court for permission to obtain and examine Ms. Cottman's medical records (NYSCEF Doc. 1, at 8).

Co-petitioners assert that respondent has refused (approximately seven times) to receive service of the Objections; they claim that respondent "hides from the process server, lies about her identity and claims that she is another person and she evades service at her home" (NYSCEF Doc. 1). Co-petitioners also claim that respondent "threatened" the individual attempting to serve process upon her (NYSCEF Doc. 21, at 4).

On or about December 6, 2019, co-petitioners' cousin Stanley May allegedly informed them that respondent intended to sell Ms. Cottman's land and real property (NYSCEF Doc. 1).

Co-petitioners now allegedly seek "to prevent a severe injustice attempted to be committed by [respondent] or any interested party in the Estate of Charlotte Cottman" (NYSCEF Doc. 1). They allege that the Cottman Will "was fraudulently obtained; was not the fruit of Ms. Cottman's intent; was improperly [sic] executed due to Ms. Cottman's lack of testamentary incapacity [sic]" (NYSCEF Doc. 1, at 3).

By the instant order to show cause, co-petitioners seek the following relief: (1) to enjoin respondent from distributing, selling, conveying, or transferring to herself or anyone any and all of the assets of Ms. Cottman's estate, pending a hearing; (2) to enjoin life insurance companies that had issued policies to Ms. Cottman from distributing, selling, conveying or transferring insurance proceeds to respondent or anyone, pending a hearing; (3) to enjoin respondent from commencing or continuing an ancillary probate proceeding in Virginia, where Ms. Cottman owned real property; and (4) to enjoin respondent from distributing, selling, conveying or transferring to herself or anyone Ms. Cottman's real property at 1250 Amphill Road, Columbia, VA 230038 (NYSCEF Doc. 1, at 2-3). Co-petitioners seek a temporary restraining order to prevent respondent "from dilapidating, distributing and wasting the assets" (NYSCEF Doc. 1, at 3).

According to the instant petition, currently, respondent is also attempting to file a petition for ancillary probate or its equivalent in Virginia to sell real property that Ms. Cottman owned in that state (NYSCEF Doc. 1, at 3). Co-petitioners claim that allowing respondent to continue as an executor of Ms. Cottman's estate and to file for the same in Virginia would compromise

judicial economy (NYSCEF Doc. 1, at 9). Ackert v Ausman, 29 Misc 2d 974, 979 (Sup Ct, New York County 1961).

In March 2020, respondent opposed co-petitioners' requests, asserting that they had failed to submit evidence establishing that Ms. Cottman did not have capacity to understand and voluntarily sign the Cottman Will and/or that Ms. Cottman "would have" given a "portion" of her estate to co-petitioners. She argues that co-petitioners have failed to demonstrate that they will suffer irreparable harm or that the equities balance in their favor.

Respondent asserts that she has established the validity of the Cottman Will (NYSCEF Doc. 9, 10, 11). Ms. Cottman apparently "explicitly" informed respondent's counsel of her wish to name respondent as her executor and sole beneficiary "because she had no personal relationship whatsoever with her nieces or nephews, and she had no other surviving family members" (NYSCEF Doc. 9, at 3). Emily Finsterwald, Esq., who states that she witnessed Ms. Cottman's signing the Cottman Will, affirms that Ms. Cottman understood and communicated the Cottman Will's terms, signed voluntarily, and failed to reference any third party's directives. Respondent also claims that, when she asked co-petitioners to help her with her duties for Ms. Cottman, co-petitioner Cherise Johnson declined on the ground that she takes care of her grandchildren, and co-petitioner Cheryl Johnson declined on the ground that she has only one car (NYSCEF Doc. 23, at 2).

Co-petitioners answered that Ms. Cottman suffered from depression since her brother passed away in winter 2019, and that Ms. Cottman regularly entered the hospital from the time of her brother's passing until her death. They allege that, on May 29, 2019, respondent ordered Ms. Cottman to sign a Power of Attorney "in order to obtain control and power" over her. To that end, co-petitioners state that Ms. Cottman's Chase Bank checking and savings statement read \$43,879.80 on May 13, 2019 and, at the time of their Answer, read \$0.00 (NYSCEF Doc. 20, at 3). Additionally, co-petitioners assert that the signature on the Cottman Will reads "Charlotte Comman" rather than "Charlotte Cottman." Co-petitioners claim that they called Ms. Cottman and checked on her food and medical care daily (NYCEF Doc. 20).

According to co-petitioners, an action that they commenced in the New York County Surrogate's Court (index no. 2019-2908) is currently active (NYSCEF Doc. 20, at 5).

## Discussion

### Summary of This Court's Decision

This Court is dismissing this case because there is a prior action pending in a more appropriate forum. However, even if this Court were not to dismiss this case, it would dissolve the Temporary Restraining Order that it signed on March 16, 2020 and deny the instant motion for a preliminary injunction, both because co-petitioners have failed to demonstrate likelihood of success on the merits.

### Standard for a Temporary Restraining Order and Preliminary Injunction

According to long-established case law, pursuant to CPLR 6301, a court should (or at least can) grant a temporary restraining order and preliminary injunction should upon a showing of: (i) a

likelihood of success on the merits of a cause of action; (ii) irreparable injury in the absence of an injunction; and (iii) a balancing of the equities in the movant's favor. E.g., Primo Enterprise v. Bachner, 148 AD2d 350 (1<sup>st</sup> Dept 1989). CPLR 6301 also provides that a court may grant a temporary restraining order pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

“An injunction is appropriate where injunctive relief is deemed necessary to maintain the status quo, even if the movant's success on the merits cannot be determined at the time that the application for a preliminary injunction is brought.” Mr. Natural, Inc. v. Unadulterated Food Prods., Inc., 152 AD2d 729 (2d Dep't 1989). Likewise, pursuant to CPLR 6301, a temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

#### Co-Petitioners Have Failed to Demonstrate A Likelihood of Success on the Merits

Respondent asserts that co-petitioners' claims are contradictory, as they both allege that respondent isolated Ms. Cottman from her family and that they visited Ms. Cottman, both at home and in the hospital (NYSCEF Doc. 22, at 3-4). Respondent asserts that “self-serving, conclusory or speculative assertions, even when sworn to by a fact witness, are insufficient to meet the proponent's greater burden to prove entitlement to judicial relief.” E.g., Giordano v. Market America, 15 NY3d 590 (2010). (NYSCEF Doc. 22, at 7).

Co-petitioners assert that Ms. Cottman, who entered a nursing home in May 2019, suffered from senility, dementia, and other cognitive impairments when she allegedly signed the Cottman Will on April 12, 2019 (NYSCEF Doc. 1, at 8). However, as respondent argues, co-petitioners have failed to submit medical records and/or evidence from a medical professional to substantiate their claims that Ms. Cottman “lacked capacity” (NYSCEF Doc. 9).

The signature on page two of the Cottman Will clearly reads “Cottman” rather than “Comman” as co-petitioners assert (Exhibit A; NYSCEF Doc. 24). “It is well-settled New York law that, when an attorney supervises the execution of a Will, the attorney's supervision creates a presumption that the Will was lawfully executed and is lawfully valid.” Matter of Moskowitz, 41 AD3d 481 (2d Dept., 2007). “It is similarly well-settled that, when the Will is self-proving, the sworn testimony of the attesting witnesses creates a presumption that the Will was lawfully executed and is lawfully valid” (NYSCEF Doc. 9 at 10). Thus, pursuant to the affirmation of witness Emily Finterwald, Esq., who asserts that Ms. Cottman “exhibited no signs of confusion, misunderstanding, reluctance or incomprehension” when she signed the Cottman Will on April 12, 2019, this Court finds the Cottman Will to be valid (NYSCEF Doc. 11). Thus, co-petitioners have failed to demonstrate that Ms. Cottman was incapacitated (NYSCEF Doc. 9, at 6).

#### Action Apparently Pending in the New York County Surrogate's Court

As respondent asserts, “The issue at the heart of this proceeding and the related proceeding in Surrogate's Court is whether Ms. Cottman's Will is valid and should be probated according to the terms therein” (NYSCEF Doc. 22, at 3). Obviously, Surrogate's Court is the most appropriate forum for a dispute over the validity of a purported will.

Conclusion

Thus, for the reasons stated herein, the Temporary Restraining Order that this Court granted on March 16, 2020 is hereby dissolved; the instant request for a preliminary injunction is hereby denied; the instant case is dismissed; and the Clerk is hereby directed to enter judgment accordingly.



7/7/2020

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE