

**SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER**

Proceeding to Discover Property Withheld in the
Estate of

DECISION and ORDER

ELIAS SCHWARTZ,

File No. 2020-3053/E

Deceased.

SALL - S.

In this contested miscellaneous proceeding, Penny Judelson (Penny), as limited administrator of the estate of Elias Schwartz (decedent), moves, pursuant to CPLR 3212, for partial summary judgment for an order (1) declaring that the objectant Lawrence Schwartz (Lawrence) did not have authority to transfer the decedent's home to himself as sole trustee of The Elias Schwartz Irrevocable Estate Reduction Trust; (2) directing Lawrence to turn over the net proceeds of the sale of the home to her, with interest; and (3) expanding the limited letters previously issued to her as limited administrator to enable her to receive the net proceeds of the sale of the house plus interest, without bond. Lawrence opposes the motion. For the reasons set forth below, the motion is granted in part and denied in part.

Procedural Background

The decedent died on January 7, 2019, survived by his two children: Penny and Lawrence. On December 8, 2020, Penny filed a petition in this court to compel production of a will, and on January 11, 2021, the court issued an order to Lawrence and an attorney, Robert Gordon, Esq., to produce the paper writing dated July 26, 2015 (2015 instrument)

ESTATE OF ELIAS SCHWARTZ
File No. 2020-3053/E

purporting to be the decedent's will and to attend an inquiry respecting their possession or knowledge of any instruments purporting to be the decedent's testamentary instruments. Lawrence did not appear for the inquiry. Robert Gordon, Esq. did appear and testified that he did not possess the original of the 2015 instrument (Deposition of Robert Gordon, Esq., February 17, 2021 [hereinafter Gordon Tr.] at 8).

Subsequently, on March 31, 2021, Penny filed a petition for letters of administration and temporary administration, and thereafter, on June 24, 2021, Lawrence filed a petition to probate the 2015 instrument, seeking letters testamentary and preliminary letters testamentary to issue to him. A copy of the 2015 instrument was attached to an affidavit of comparison, however, the original of the instrument has never been filed.

On July 9, 2021, the parties entered into a stipulation whereby they agreed to the issuance of limited letters of administration to each of them for the limited purpose of filing a discovery proceeding pursuant to SCPA 2103, each against the other, for the recovery of estate assets.

The Pleadings

On August 16, 2021, Penny filed this proceeding seeking an order directing Lawrence to turn over to the administrator or executor of the decedent's estate the net proceeds of the sale of the decedent's house at 98 Havilands Lane in White Plains, New York (the decedent's house), together with statutory interest at nine percent.

ESTATE OF ELIAS SCHWARTZ

File No. 2020-3053/E

On October 27, 2021, Lawrence filed verified objections in which he acknowledged that he is in possession of the proceeds from the sale of the house and asserting that he is the rightful owner by virtue of the last will and testament and by the trust.¹ Lawrence's first objection alleges that both he and Penny had a confidential relationship with the decedent, and he objects to her attempt to create a picture of undue influence. He further objects to her claims for reimbursement and to her qualifications to bring this proceeding, asserting that the decedent's assets were disposed of by waste or negligence. He also asserts that in not taking steps to undo the sale to the third parties, Penny ratified the transaction and that the mistakes in the power of attorney or other documents were ministerial in nature and did not rise to the level where any inference of undue influence and lack of capacity could be inferred.

Factual Background

The following facts are taken from the movant's statement of undisputed material facts and are not disputed insofar as they relate to this motion.

The decedent purportedly executed a will on April 14, 1994, naming his children as equal beneficiaries and nominating Penny as executor.² After the decedent's death, Lawrence showed her the 2015 instrument, in which the decedent nominated Lawrence

¹ In his objections, Lawrence alleges that he is the rightful owner of the proceeds from the sale "by virtue of the Last Will and Testament of _____ (LWT) and by the trust _____ created under said LWT" (see Objections at ¶3 [blanks in the original]). The 2015 instrument does not reference a trust.

² The 1994 instrument attached as Exhibit A to Penny's affidavit nominates Penny as executor and names the residuary beneficiaries as Penny, Lawrence and Susan. Susan predeceased in 2012 (see Affidavit of Penny Judelson, sworn to May 6, 2022, at ¶ 3 and Exhibit A to the petition).

ESTATE OF ELIAS SCHWARTZ
File No. 2020-3053/E

as executor, devised his house to Lawrence, and named Lawrence and Penny as equal residuary beneficiaries.

On February 16, 2018, the decedent purportedly executed the power of attorney which is the subject of this motion. The decedent's signature was notarized by Robert Gordon, Esq., whom Penny asserts was Lawrence's attorney.³ On March 18, 2018, the decedent executed "The Elias Schwartz Irrevocable Estate Reduction Trust", which nominated Lawrence as trustee and sole remainderman.

On June 25, 2018, utilizing the power of attorney, Lawrence transferred the house from the decedent to himself as trustee. The deed and the power of attorney were recorded in the Office of the Westchester County Clerk on August 7, 2018.

On December 19, 2018, Lawrence sold the house as trustee to unrelated third parties, resulting in net proceeds of \$685,698.41.⁴

As noted, the decedent died on January 7, 2019.

The Motion

Penny brings this motion for partial summary judgment solely on the issue of the validity of the power of attorney executed by the decedent on February 16, 2018. She

³ At his deposition, Attorney Gordon testified, in answer to the question as to whether he prepared the power of attorney form: "Yes, I prepared it but it was not for Elias. I prepared it because Larry asked me to prepare it. . . he said he needed a power of attorney" (Gordon Tr. at 17-18).

⁴ In his statement of material facts, Lawrence neither admits nor denies that the net proceeds of the sale were \$685,698.41 and asserts that it is not relevant to any issue related to the pending motion. The court notes that pursuant to the Uniform Rules for the New York State Trial Courts, Section 202.8-g, "[e]ach numbered paragraph in the statement of material facts required to be served by the moving party may be deemed admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party." ([22 NYCRR] §202.8-g [c]).

ESTATE OF ELIAS SCHWARTZ
File No. 2020-3053/E

submitted the New York State Statutory Short Form Power of Attorney form executed by the decedent and asserts that because none of the powers listed in paragraph (f) of the form under Grant of Authority, including the general grant of authority in subparagraph P, are initialed, as required by the General Obligations Law 5-1501(1) in effect at the time the power of attorney was executed, Lawrence had no powers as agent under the power of attorney. In addition, the power of attorney executed by the decedent did not include a statutory gift rider, thus there could be no gift to Lawrence, either.

In opposition, Lawrence submitted an affirmation from his counsel asserting that the motion for summary judgment is premature because he has not yet filed an answer. He also contends that Penny did not establish prima facie entitlement to summary judgment because she did not prove that the power of attorney was not a non-statutory power of attorney to which the requirements of initialing the powers would not apply.

Legal Analysis

Summary Judgment

In order to prevail on a motion for summary judgment, the moving party must submit sufficient evidence in admissible form to show that there are no material issues of fact and that she is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden then shifts to the party opposing the motion to show the existence of triable issues of fact (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). The court's task is not to resolve issues of fact but merely to determine if factual issues exist (*see Dyckman v Barrett*, 187 AD2d 553 [2d Dept 1992]). Summary judgment is a

ESTATE OF ELIAS SCHWARTZ
File No. 2020-3053/E

drastic remedy that will only be awarded where there is no triable issue of fact (see *Barclay v Denckla*, 182 AD 2d 658 [2d Dept 1992]). Thus, the court must construe the facts in the light most favorable to the non-moving party so as not to deprive that person of her day in court (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]), however, mere conclusions, unsubstantiated allegations, or expressions of hope, are insufficient to defeat a summary judgment motion (*Zuckerman v New York*, 49 NY2d at 562).

With respect to Lawrence's argument that this motion is premature because he has not yet filed an answer, the Surrogate's Court recognizes two types of pleadings responsive to a petition: an answer or objections (see SCPA 302 [1][a] [emphasis supplied]); see also *Matter of Ellis*, 252 AD2d 118 [2d Dept 1998] [In proceedings before the Surrogate's Court, an answer and an objection serve the same purpose]; *Matter of Herle*, 173 Misc 879, 881 [Sur Ct, Kings County 1940] [in Surrogate's Court proceedings, the controverting document which may be filed by a respondent is an objection since its object, like that of an answer, is to advance reasons why the relief sought should be denied"]. Thus, issue was joined in this proceeding when Lawrence filed his objections on October 27, 2021, and the motion for partial summary judgment is not premature (see *Matter of Friedlander*, NYLJ, May 19, 1997, at 1, col 5 [Sur Ct, Nassau County] ["Issue is joined upon the filing of the objections"]).

It is undisputed that the decedent did not initial any grants of authority on the statutory short form power of attorney or execute a statutory gift rider. The case law is clear that a failure to initial the pertinent sections of the statutory short form power of

ESTATE OF ELIAS SCHWARTZ
File No. 2020-3053/E

attorney renders the agent without authority (see *Jacobs v Mazel*, 112 AD3d 1115, 1116 [3d Dept 2013]; *Matter of Marriott*, 86 AD3d 943 [4th Dept 2011] [voiding the purported conveyance of real property pursuant to a power of attorney where the principal did not initial the powers sections, and concluding that the proceeds from the sale of the property constituted property of the estate]; *Matter of Armanno*, 2020 NY Slip Op 51282[U] [Sup Ct, Dutchess County] [court on its own motion invalidated a power of attorney where the principal failed to initial the powers listed in section P]).

The cases cited by Lawrence for the proposition that the requirements of the General Obligation Law pertaining to the statutory short form power of attorney do not apply to a non-statutory power of attorney are unavailing. Lawrence has not submitted any evidence (let alone any admissible evidence) to support his conclusory allegation that the power of attorney at issue here is a non-statutory power of attorney. The power of attorney is on a form clearly titled

**POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM**

Moreover, Attorney Gordon, who prepared the statutory short form power of attorney for Lawrence, testified that he did not discuss the power of attorney with the decedent nor did he ever have a discussion with the decedent as to what types of powers Lawrence should be granted under the form; he was just there to notarize the document (Gordon Tr. at 18 & 19).

Penny has established a prima facie case that the power of attorney executed by the decedent is not valid because, by failing to initial any of the powers, including

ESTATE OF ELIAS SCHWARTZ
File No. 2020-3053/E

subparagraph P, the general grant of authority, the decedent did not, in fact, grant any power to Lawrence to act as his agent. The burden then shifted to Lawrence to submit facts to support his assertion that the proffered statutory short form power of attorney is a non-statutory power of attorney. This he failed to do.

For the foregoing reasons, the motion for partial summary judgment is granted as to the issue of the invalidity of the power of attorney; the net proceeds from the sale of the decedent's house constitute property of the estate. The court denies the request to impose statutory interest at 9%, without prejudice to renew at such time as an accounting is rendered. The only remaining issue concerns who should hold the net proceeds pending a determination of who the fiduciary of the estate will be.

The court will issue limited letters of administration to Penny upon her duly qualifying (SCPA 708) and posting a bond in the amount of \$342,849.00. The letters of administration shall be limited to opening an estate account, receiving the net proceeds from the sale of the decedent's house (\$685,698.41) and depositing them into the estate account. Lawrence is directed to transfer \$685,698.41 to Penny as limited administrator within 10 days of the issuance of the limited letters of administration. No distributions shall be made or claims paid pending the determination of who should be the fiduciary of the estate.

The foregoing concludes this turnover proceeding.

The court reviewed the probate file (File No. 2020-3053/C) and notes that no citation ever issued. Moreover, the original of the 2015 instrument has not been filed with

ESTATE OF ELIAS SCHWARTZ
File No. 2020-3053/E

the court. Lawrence is directed to file the original of the 2015 instrument or amend his petition accordingly, within 30 days hereof, so that a citation can issue, and probate can proceed. If he fails to do so within 30 days, Penny shall file a petition for probate of the 1994 instrument.

This constitutes the decision and order of the court.

The following papers were considered:

1. Notice of motion dated May 6, 2022; statement of undisputed material facts; affirmation of Irma Nimetz, dated May 6, 2022, in support; affidavit of Penny Judelson, sworn to May 6, 2022; exhibits and memorandum of law; and
2. Affirmation of Howard D. Lee, dated June 7, 2022 and Statement of Material facts; and
3. Reply affirmation July 5, 2022; exhibits and reply memorandum of law.

Dated: White Plains, NY
October 25, 2022



HON. BRANDON R. SALL
Westchester County Surrogate

To: Frank Streng, Esq.
(Attorney for Petitioner)
Via NYSCEF

Howard D. Lee Esq.
(Attorney for Objectant)
Via NYSCEF