

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: :
THE ESTATE OF: :
KAY A. KUNTZ, : **No. 41-14-0322**
Deceased :

OPINION AND ORDER

Before the Court is Beneficiary's Motion for Sanctions and Contempt of Court based on the Estate Counsel's failure to attend scheduled depositions on August 2, 2017. A hearing was held November 17, 2017. On that same date, it was the intention of the Court to hear the Estate Counsel's Motion for Sanctions originally scheduled for July 14, 2017. Additionally, the Court heard the Estate's Motion to Compel Interrogatories and Produce Documents filed in April of 2017.

Background

Kay A. Kuntz (Decedent) died on May 25, 2014. At the time of her death, she left a will, which authorized specific bequests for her four grandchildren and her church. Decedent specifically bequeathed all of her tangible personal property and household effects, together with any insurance thereon, including, but not limited to furniture, pictures, books jewelry, automobile and wearing apparel to her heir, daughter, and direct issue Lori Ann Kuntz (Beneficiary).

She also directed that her residuary Estate be given devised and bequeathed to Lori Ann Kuntz. Lori Ann Kuntz (Beneficiary) is the sole residuary legatee of the Last Will and Testament drafted by Estate Counsel one month prior to decedent's death in March 2014. For the past three years, the Estate and the Beneficiary have

been involved in litigation regarding the disposition of decedent's Estate. This controversy has centered on the ownership of the only real property in the Estate, 65 Hocker Lane, Jersey Mills, Pennsylvania in McHenry Township, Lycoming County.

The controversy arises over paragraph seven of the Will. Decedent signed the document stating

I give my co-executors the fullest power and authority in all matters and questions, and to do all acts which I might or could do if living, including, without limitation, complete power and authority to sell (at public or private sale, for cash or credit, without or without security), mortgage, lease, dispose of and distribute in or in kind of property, real and personal, at such times and upon such terms and conditions as they may determine, all without Court Order.

Last Will and Testament of Kay A. Kuntz, 3/24/2014, page two of four.

Decedent designated Patricia and Richard Hull as personal representatives (Hulls). On July 16, 2015, the Honorable Marc F. Lovecchio heard testimony on a dispute between the Co-Executors and the Beneficiary over the Estate debt; the Beneficiary had challenged the information being provided to her about the value of the real property in the Estate and whether she could purchase the property. Judge Lovecchio held that the law supported the Beneficiary's desire to purchase the real Estate despite the fact that the Co-Executors have the discretionary authority to sell.¹ He granted the Beneficiary's Motion for a Protective Order and blocked the Estate from entering into an agreement of sale for the property along with creating an obligation on the Estate to provide both a letter of assurance to enable Beneficiary to obtain a mortgage; and, a formal accounting to Beneficiary including calculating a final amount to satisfy the debts and liabilities of the Estate.

¹ Opinion and Order, July 15, 2015.

Sometime in late May 2016, the Beneficiary received a letter notifying her of an auction date and warning her to remove any items from the real estate that she wished to retain. As a result of that letter and what she perceived as the Estate failing to comply with Judge Lovecchio' s order, Beneficiary filed a Motion for Protective Order with this Court to cancel the auction. On June 9, 2016, this Court issued an order cancelling the auction. Depositions were originally scheduled for June 26, 2016. Petitioner's Exhibit 1. The deposition date was changed to accommodate the entry of appearance of Attorney Kristine Waltz on behalf of the Hulls and Estate Counsel's travel schedule.

Testimony

Kristine Waltz, Esq. Attorney to Hulls individually

The testimony of Kristine Waltz, Esq. establishes that the Attorney for the Estate was aware of the date scheduled for depositions. Both Petitioners and Respondent, Estate Counsel, submitted the subpoena of the Estate Counsel for the August 2, 2017, date. The Co-Executors hired separate counsel to represent them after being served with the objections to the Estate and realizing that the Beneficiary was asking the Court to surcharge them specifically. Deposition of Richard Hull, 8/2/2017, at 77.

Attorney Waltz testified that she suggested to Estate Counsel (Attorney Weiss) that rather than not show up for the deposition that he file a motion for a protective order with the Court. She testified that there was **no agreement** between her and Estate Counsel that he need not be there because she agreed to represent the interests of the Estate at the deposition.

Christopher Kenyon, Esq. Attorney to Beneficiary

Kenyon testifies it was not until June that there was significant communication from all sides regarding scheduling of depositions. Petitioner's Exhibit 2 is an email from Weiss to Kenyon indicating that he planned to take Kenyon's and the Beneficiary's deposition. In that same email, Estate Counsel reiterated his oft made request that Estate Counsel be supplied all of the Beneficiary's bank applications from February 2015 through December 31, 2016.

Discussion

The power of the several courts of this Commonwealth to issue attachments and to impose summary punishments for contempt of court shall be restricted to the following cases:

- (1) The official misconduct of the officers of such courts respectively.
- (2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.
- (3) The misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.

42 Pa.C.S. § 4132.

As a licensed attorney, Estate Counsel is an officer of the Court and his failure to comply with any Court orders is contemptuous. The subpoena that was delivered to Estate Counsel's courthouse mailbox plainly states that it is an Order of Court. The only determination for the Court to make is whether Attorney Weiss's failure to attend was for a legitimate reason.

A court may exercise its civil contempt power to enforce compliance with its Orders for the benefit of the party in whose favor the Order runs but not to inflict punishment. *Id.* A party must have violated a court Order to be found in civil contempt. [Goodman v. Goodman, 383 Pa. Super. 374, 556 A.2d 1379, 1391 (Pa.Super. 1989)].

The complaining party has the burden of proving by a preponderance of evidence that a party violated a court Order. C.R. by Dunn v. Travelers, 426 Pa. Super. 92, 626 A.2d 588, 592 (Pa.Super. 1993).

However, a showing of non-compliance is not sufficient in itself to prove contempt. Wetzel v. Suchanek, 373 Pa. Super. 458, 541 A.2d 761, 762 (Pa.Super. 1988). If the alleged contemnor is unable to perform and has in good faith attempted to comply with the court Order, contempt is not proven. *Id.* (emphasis in original). The alleged contemnor has the burden of proving the affirmative defense that he has the present inability to comply with the court Order.

In re Estate of Disabato, 165 A.3d 987, 992 (Pa. Super. Ct. 2017).

Attorney Weiss argued that he is not a party to the underlying matter so the service upon him via courthouse mailbox was improper. Attorney Weiss never presented to the Court any reason why he was unable to comply with subpoena but rather gave a myriad of reasons as to why his compliance with a Court Order, a subpoena to attend and testify, was not necessary. Attorney Weiss felt that he was not a party to the action, that Attorney Waltz could adequately represent the interests of the Estate, and that any misstatement by the Hulls regarding the administration of the Estate could be rectified later. He also argued to the Court that because Attorney Kenyon canceled his subsequent deposition scheduled for October 3, 2017, that truly there was no need to take his deposition so any willing failure on his part to attend left the parties unharmed.

Attorney Weiss was aware of the August 2, 2017 deposition date prior to the deposition, regardless of whether he learned of the deposition from courthouse mail or through conversations with other counsel. The inference from his email communications is that he intended to participate. The conversations that Attorney Waltz testified to having with Attorney Weiss prior to the depositions where he

indicated he might not attend make evident to the Court that Attorney Weiss intentionally failed to comply with a subpoena when he was in fact able to comply. Holding Attorney Weiss in civil contempt is appropriate, as the Court finds he had no legitimate reason not to attend the scheduled depositions. His presence as Estate Counsel was and is necessary to resolve the disputed issues surrounding the administration of the Estate.

ORDER

AND NOW, this day of December, 2017, after hearing the Motion for Sanctions and for Contempt of Court against Elliott B. Weiss for Failure to Appear for his Deposition and for Failure to Produce a Copy of the Estate File, and amendment to the Motion the Motion is **GRANTED**. It is ORDERED and DIRECTED that:

- a. Attorney Weiss shall reimburse Attorney Roberts the filing fees for the Motion for Sanctions and amendment to the Motion.
- b. Attorney Weiss shall reimburse the Estate the \$1,000 in attorney's fees it paid to Attorney Waltz for her legal work in representing the Hulls at the deposition in August.
- c. Attorney Weiss shall pay \$875 in attorney's fees to Attorney Kenyon.
- d. Attorney Weiss shall pay \$875 in attorney's fees to Attorney Roberts.
- e. The request for reimbursement of Beneficiary's traveling expenses for her appearance at the deposition is hereby DENIED. The Court finds that she appeared at the depositions voluntarily and therefore is not entitled to reimbursement for her travel.

f. Any further request for Sanctions made by Attorney Roberts in his August 11, 2017, filing or August 26, 2017, amendment is hereby DENIED.

2. After hearing on the Estate's Motion to Compel Documents, the Motion is hereby **GRANTED**. Senior Judge Michael Williamson ordered these documents be produced by his Order of September 19, 2017. Beneficiary must produce these documents **within thirty (30) days of the filing date of this Order**.

3. After hearing on the Estate's Motion to Compel Answers to the Interrogatories, the Motion is hereby DENIED. The Court finds that Estate Counsel could have obtained these answers at the Deposition of Lori Kuntz on August 2, 2017, and by his willing and intentional failure to appear at the deposition and depose the beneficiary he has waived his request to answers to interrogatories.

By the Court,

Nancy L. Butts, President Judge

cc: Christopher Kenyon, Esquire- Lori Ann Kuntz
Lee Roberts, Esquire- Lori Ann Kuntz
Kristine L. Waltz, Esquire-Co-Executors
Elliott Weiss, Esquire-Estate
Gary L. Weber, Esq.