

Citation: *Green Estate v. Kinvig*, 2014 YKSM 5

Date: 20140415
Docket: 13-S0032
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON

Before: His Honour Judge Chisholm

JUDY GREEN, EXECUTRIX OF THE ESTATE
OF THOMAS GREEN

Plaintiff

v.

DARREN KINVIG AND
LEANNE KINVIG

Defendants

Appearances:

Meagan Lang

Darren Kinvig and Leanne Kinvig

Counsel for Plaintiff

Appearing on their own behalf

REASONS FOR DECISION

[1] I delivered an oral decision with respect to this matter on March 13, 2014.

I indicated written reasons would follow. These are my reasons.

[2] This matter is before me with respect to the issue of the Court's jurisdiction to hear the claim and counterclaim which are presently set for trial.

[3] On July 3, 2013 the Plaintiff filed a claim against the Defendants for repayment of \$25,000 to the Estate of the deceased, Thomas Green. This money is alleged to have been a loan made by the deceased to the Defendants in the months before his death.

[4] On August 16, 2013, the Defendants filed a reply and counterclaim. The substance of their reply is that the money they received from Mr. Green was a gift rather than a loan, and they, accordingly, take the position that nothing is owed to the Estate. In the counterclaim, the Defendants seek compensation from the Plaintiff for storage, transportation and administrative services with respect to various tasks the Defendants undertook for the benefit of Mr. Green and his Estate both before and after his death.

[5] At issue in the claim is the Plaintiff's intended reliance on an annotation about the \$25,000 in a handwritten document prepared by Mr. Green that elsewhere indicates it should be attached to any existing will.

[6] After hearing argument on the issue of jurisdiction, it is clear the Plaintiff is not arguing that handwritten notations on a document in question form part of Mr. Green's will. Indeed, there is a superseding will that has been probated and is being acted on. The Plaintiff rather seeks to rely on the notations only to demonstrate that the intention of the deceased was to loan, rather than gift, money to the Defendants prior to his death.

[7] While in their pleadings, the Defendants rely on portions of the *Wills Act* to argue that the handwritten notations do not amount to a valid testamentary document, after hearing the Plaintiff's oral submissions, the Defendants say that they will only argue at trial that the handwritten notations should be given little, if any weight.

[8] Both parties to this action are content to have it proceed in this Court,

however parties cannot consent to jurisdiction where none exists.

Legislation

[9] Section 2(2)(b) of the Yukon *Small Claims Court Act*, R.S.Y. 2002, c.204, states:

(2) The Small Claims Court does not have jurisdiction in

...

(b) any action against the personal representatives of a deceased person or in which the validity of a devise, bequest, or limitation under a will or settlement is disputed;...

Analysis

[10] I have no difficulty in finding the Plaintiff's claim is properly before this Court. The Plaintiff, on behalf of the Estate, quite simply seeks repayment of what is alleged to have been a loan to the Defendants.

[11] The more difficult question is whether this Court has jurisdiction to hear the counterclaim. Does the counterclaim fall within the language of s. 2(2)(b) of the *Small Claims Court Act*?

[12] The Small Claims Court of Nova Scotia considered a similar situation in *Parker v. Cox*, 2008 NSSM 29, wherein the Plaintiff, in her capacity as executrix of her father's estate, sued the former executor for certain amounts of money. The Small Claims Court of Nova Scotia was not permitted by statute to adjudicate a claim 'in respect of a dispute concerning the entitlement of a person under a will, or settlement, or an intestacy'. The Court ruled that the legislation did not prohibit hearing a claim by an executrix of an estate where the action was

in contract or tort.

[13] The Small Claims Court legislation in the Yukon is not identical to that of Nova Scotia and, in particular, does not refer to the Court's lack of jurisdiction to deal with 'actions against the personal representative of a deceased person'. In my view, though, there is a difference between an action against an executrix for breaches of her duty as executrix (e.g. breach of the duty to account, breach of the duty to obtain fair market value in the sale of property) and an action against the executrix in her role of settling the estate. In the latter situation, the executrix is acting on behalf of the estate, which is not a legal entity, to bring resolution to all outstanding matters.

[14] It is of significance in my view that the wording of section 2(2)(b) of the *Act* does not state 'any action *by or against* the personal representative of a deceased person'. A personal representative therefore may commence an action on behalf of the estate (e.g. in contract or tort), which may be heard in Small Claims Court. Logically then, the legislators must have seen fit for this Court to hear a matter where the personal representative is defending an action with the same or similar subject matter.

[15] I find that the lack of jurisdiction in the Small Claims Court to hear matters involving actions against personal representatives refers to actions against an executrix personally, where it is alleged, for example, she has failed in the performance of her duties. This is not the situation in the case at bar. The counterclaim is not an action challenging the actions of the executrix. The

Defendants seek compensation for services performed which benefited the deceased and the estate.

[16] I find this Court has jurisdiction over both the claim and counterclaim in this matter.

CHISHOLM T.C.J.