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A Court Holds Sacred the Disposition of the Dead



In *Cunningham v. St. Patrick's Cathedral*, a New York Supreme Court recently posed the following question:

When a man's stated intention about his burial site is not followed because the parties involved in the burial believed he would have accepted an offer to be buried at a more prestigious location, how should a Court analyze an application for disinterment?

The Court found that the petitioner had provided a “good and substantial reason” for moving the remains of the decedent to St. Mary’s Cathedral in Peoria, Illinois, and that the respondents, who control St. Patrick’s Cathedral in New York City, “failed to supply a sufficient reason to reject the application.”

Joan Sheen Cunningham was the niece of the venerable Archbishop Fulton J. Sheen, known especially for his television and radio preaching. According to the decision, she moved to New York from Illinois when she was ten years old and was raised by Archbishop Sheen. When she was older, she became his loyal and longtime assistant. The proceeding was brought because respondents denied petitioner’s request to disinter the remains of Archbishop Sheen from a crypt in St. Patrick’s Cathedral, so he can be re-interred in St. Mary’s Cathedral in Peoria, Illinois.

As told by the Court, “Archbishop Sheen, who led a long and distinguished career as a teacher and preacher of the Roman Catholic faith, passed away in December 1979. Five days before he died, he executed a will which specifically stated his desire to be buried in a plot, which he had purchased in 1976, located in Calvary Cemetery in Queens, New York. After his death, however, petitioner contends that Cardinal Cooke, of the Archdiocese of New York, sought her permission to inter Archbishop Sheen in a crypt in St. Patrick’s Cathedral in Manhattan.

Petitioner, as Archbishop Sheen's closest living relative, assented to this request and Archbishop Sheen was interred at St. Patrick's Cathedral in 1979."

"In 2002, Bishop Jenky of the Diocese of Peoria, Illinois, began the process to explore whether Archbishop Sheen should be declared a Saint of the Roman Catholic Church. Petitioner claims that the Archdiocese of New York had no interest in this cause for canonization and cites to a letter from Cardinal Egan in 2002 suggesting that Peoria was the 'ideal diocese' to start the canonization process. Peoria is where Archbishop Sheen grew up, his parents are buried there and it is where he studied and became a priest. Petitioner further claims that Cardinal Egan promised Bishop Jenky that the Archdiocese of New York would consent to transferring Archbishop Sheen's remains to Peoria if the cause for canonization was successful."

Cunningham brought the proceeding because she claimed the canonization process has stalled now that the Archdiocese of New York objects to transfer Archbishop Sheen's remains to Illinois. In defense, the respondents claimed that it was Archbishop Sheen's desire to be buried in the Archdiocese of New York. They also argued that as operators of Archbishop Sheen's resting place, they "cannot consent to the instant application because they must respect his wishes."

The Court ruled that because the Archdiocese of New York does not consent to the disinterment, "the statutes of New York allow for petitioner to seek permission from a court to disinter Archbishop Sheen."

"A body interred in a lot in a cemetery owned or operated by a corporation incorporated by or under a general or special law may be removed therefrom, with the consent of the corporation, and the written consent of the owners of the lot, and of the surviving wife, husband, children, if of full age, and parents of the deceased. If the consent of any such person or of the corporation cannot be obtained, permission by the county court of the county, or by the supreme court in district, where the cemetery is situated shall be sufficient. N-PCL 1510(e)."

"The principles guiding a court in a contested disinterment proceeding were elucidated by the Court of Appeals in *Currier v. Woodlawn Cemetery*, 300 NY 162 (1949). "The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned. While the disposition of each case is dependent upon its own particular facts and circumstances and while no all-inclusive rule is possible, the courts, exercising a benevolent discretion, will be sensitive to all those promptings and emotions that men and women hold sacred in the disposition of the dead."

"And looming large among the factors to be weighed are the wishes of the decedent himself. If the deceased had been a member of a faith which forbade disinterment if he had agreed with the cemetery corporation that there should be no exhumation whatsoever if he had elected to be laid in hallowed earth and the request was for reburial in unconsecrated ground, then only compelling considerations would justify disinterment and removal."

The Court recognized that "being interred at St. Patrick's Cathedral is a great honor and understands that an esteemed priest of the Catholic Church probably would cherish the

opportunity to be interred at St. Patrick's Cathedral." But what was relevant to the Court was that this decision contravenes Archbishop Sheen's will, that the Archdiocese of New York suggested it and that the respondents, by Cardinal Cooke, sought petitioner's permission.

The Court noted that it took no position, and had no interest in opining, on issues of Catholic canon law; "that is a province reserved for the Catholic church alone." Rather, the decision resolved a dispute between the family of a decedent and the entities which oversee the burial site.

"Courts have often ruled in favor of a deceased's family in disinterment proceedings where the only objector was the cemetery."

"The Court finds that the motivation of petitioner and all other family members for moving the remains is understandable and important to them and 'that not whim or caprice motivated petitioner's decision, but rather sound reason and laudable purpose.'"

"There is no evidence to suggest that this proceeding is anything other than petitioner's carefully considered request made with honest intentions. Petitioner noted her close relationship with Archbishop Sheen and recounts that she left her family in Illinois to be with her uncle in New York when she was just ten years old. Petitioner contends that Archbishop Sheen raised her as if she was his daughter. Further, petitioner does not stand to gain financially if the Court rules in her favor and, as she states in her affidavit, petitioner attempted to resolve this dispute before bringing this proceeding and derives no joy in suing respondents."

The Court reasoned that in addition to the Archbishop's strong connection to St. Mary's Cathedral, "despite the decedent's known wishes expressed in a will written just five days before his death, the parties agreed to ignore that provision of the will and interred him elsewhere. Now, almost forty years later that agreement cannot be used to support either the claim that the decedent would want to have his remains stay in that alternate burial place or that they should be moved to another location. However, the agreement demonstrates that respondents suggested and offered petitioner the opportunity to overlook decedent's written burial wishes and then gave petitioner the final say. Certainly, there is no evidence that, in 1979, respondents insisted on strictly enforcing Archbishop Sheen's will."

Finding that there was no support for the conclusion that Archbishop Sheen expressed a specific desire to be buried in St. Patrick's Cathedral, the Court concluded that the respondents failed to identify a good reason to deny petitioner's request. It concluded: "When Archbishop Sheen passed away, respondents allowed petitioner to decide whether to change Archbishop Sheen's burial location. In a similar fashion, this Court now defers to petitioner's request."

Emails Between Attorneys Not Contract of Sale



In *42nd Ave. Commons, LLC v Barracuda, LLC*, the Second Department Appellate Division affirmed an order of the Supreme Court, Queens County, which granted the defendant's motion to dismiss an action for specific performance of a contract to purchase real property, and to cancel a notice of pendency filed against the subject real property.

"Specific performance" is an order of a court which requires a party to perform a specific act, usually what is stated in a contract. It is an alternative to awarding monetary damages and is considered an "equitable remedy" commonly used in the form of injunctive relief concerning real property.

New York's "notice of pendency" statute replaces the common law rule of "lis pendens." The statute, like its common law predecessor, allows a party claiming an interest in real property to notify prospective purchasers or encumbrancers of the property that it is the subject of litigation. A notice of pendency may be filed in any action in a court of the State or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property. It is relatively simple to satisfy the statutory requirements to file a notice of pendency, and because of this, it invites potential abuse by parties seeking to restrict property owners' ability to convey marketable title.

Here, in dismissing the action and discharging the notice of pendency, the Court relied upon New York's General Obligations Law § 5-703(2), which specifically provides that "a contract . . . for the sale, of any real property . . . is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing."

The Court found that the defendant "proffered sufficient documentary evidence that the defendant, as seller, never executed the contract of sale. The plaintiff's evidence, submitted in opposition, that emails were exchanged between the parties' attorneys, which emails purportedly reflected the parties' agreement to the material terms of the proposed contract for the sale of real property, was insufficient to establish that the statute of frauds was satisfied." "An agent may only bind a party to a real estate contract if authorized to do so in writing. The unwritten apparent authority of an agent is insufficient to satisfy the statute of frauds." Here, even if it were found that the defendant's attorney subscribed the subject emails, there was no allegation in the complaint, and there was no evidence, that the defendant's attorney had been authorized in writing to bind the defendant to the contract of sale. Further, the emails exchanged by the parties' attorneys established that the parties did not intend to be bound until the signing of a formal contract of sale."

Judgment Debtor Corporation And Its Sole Shareholder Held In Contempt



In *Discover Technologies, LLC v. Arcovis, LLC*, the petitioner Discover Technologies, LLC commenced this special proceeding to enforce a judgment that it obtained against respondent Arcovis, LLC in another action, and to hold Arcovis and its principal shareholder in contempt of court for failure to respond to a “subpoena *duces tecum* and *ad testificandum*.”

A subpoena *duces tecum* (or subpoena for production of evidence) is a court summons ordering the recipient to appear before the court or the attorney who served it and produce documents or other tangible evidence for use at a hearing, trial or deposition. A subpoena *ad testificandum* is a court summons ordering the recipient witness to testify orally at a hearing, trial or deposition. A combined subpoena, as here, requires the recipient to do both. An individual who receives a subpoena but fails to appear may be charged with contempt of court and subjected to civil or criminal penalties. In addition, a person who has been served with a subpoena and has failed to appear may be brought to the proceedings by a law enforcement officer by order of the court. A subpoena *duces tecum* and *ad testificandum* is a helpful tool for a judgment creditor to find out from a judgment debtor what assets are available to satisfy the judgment.

As the Court here noted, to “prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to the parties. The actions of the alleged contemnor must have been calculated to, or actually defeated, impaired, impeded or prejudiced the rights or remedies of the other side.”

The Court further noted that under New York’s civil rules, “a party has the right to obtain financial disclosure to aid it in the recovery of the money it is due and its collection efforts. Further, a judgment creditor may pursue a contempt finding when an information subpoena is disregarded.” The Court found that the affidavit of service of the subpoena submitted by Discover is “prima facie evidence that service was properly made.” Arcovis never denied being served.

The Court held that Discover had established its need to access the information requested in the subpoena to aid the enforcement of the judgment against Arcovis. Discover demonstrated that Arcovis failed to provide responsive documents and failed to produce its principal for a deposition in response to the subpoena. In addition, Discover showed that the principal of Arcovis was a party to Arcovis’ contempt in failing to respond to the subpoena, noting that an “individual may not use his or her position as sole stockholder and president of a corporation to shield himself or herself from contempt proceedings when disobeying court orders.” The Court concluded that Arcovis’ and its principal’s disobedience of the subpoena had “defeated, impaired, impeded or prejudiced” Discover’s right to ascertain information about Arcovis’

financial resources to satisfy the judgment and granted the petition to hold Arcovis and its principal in contempt. It imposed a \$250 fine, awarded reasonable attorneys' fees and costs of the proceeding, and allowed Arcovis and its principal to purge this contempt finding and the corresponding fine by producing documents and the witness for a deposition in response to the subpoena, within a reasonable time (60 days or less).

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