

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D27089  
C/ct

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - March 22, 2010

FRED T. SANTUCCI, J.P.  
DANIEL D. ANGIOLILLO  
JOHN M. LEVENTHAL  
PLUMMER E. LOTT, JJ.

2009-06661

DECISION & ORDER

In the Matter of Herman Evert, Jr., a/k/a Herman  
F. Evert, Jr., deceased.  
Bette Dee Evert, etc., petitioner-respondent;  
William Evert, et al., respondents-appellants.

(File No. 172/04)

Phillips, Weiner, Artura & Cox, Lindenhurst, N.Y. (Michael S. Cox of counsel), for  
respondents-appellants.

Vittoria & Purdy, LLP, New York, N.Y. (John G. Lipsett of counsel), for petitioner-  
respondent.

In a proceeding to discover withheld property pursuant to SCPA 2103, William Evert  
and Roger Evert appeal from an order of the Surrogate's Court, Suffolk County (Czygier, S.), dated  
June 12, 2009, which, inter alia, in effect, denied their motion to vacate their default in failing to  
comply with discovery.

ORDERED that the order is affirmed, with costs payable by the appellants personally.

The petitioner is the successor administrator of the estate of Herman Evert, Jr., a/k/a  
Herman F. Evert, Jr. (hereinafter the decedent), who died on December 9, 2003, survived by four  
sons, Herman, Clifford, and the appellants, William and Roger. In 2004 the petitioner's predecessor  
administrator commenced this proceeding to discover withheld property pursuant to SCPA 2103.  
The petition alleged, inter alia, that William Evert improperly obtained money from the decedent. The  
appellants defaulted in answering the petition. Thereafter they did not respond to the petitioner's

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discovery demands, failed to oppose the petitioner's motion to compel discovery, did not comply with a court order directing compliance with discovery, and did not oppose a subsequent motion by the petitioner, made pursuant to CPLR 3126, for an inquest based upon the failure to comply with discovery. The appellants appeared at the inquest. After the inquest the court entered an order directing the appellants to pay the sum of \$88,030 to be distributed by the administrator of the estate of Herman Evert, Jr., a/k/a Herman F. Evert, Jr., to the estate of Herman F. Evert III, "representing the latter's intestate share of the former's estate, together with interest."

Generally, to vacate a default, the movant is required to demonstrate a reasonable excuse for the default and a meritorious defense (*see* CPLR 5015[a][1]; *Diamond v Vitucci*, 36 AD3d 650). Here the appellants failed to demonstrate a valid excuse for their multiple defaults. The appellants' conduct cannot be excused merely because they chose to represent themselves. "A litigant appearing pro se acquires no greater right than any other litigant and such appearance may not be used to deprive [the petitioner] of the same rights enjoyed by other [petitioners]" (*Roundtree v Singh*, 143 AD2d 995, 996, quoting *Morgan v Sylvester*, 125 F Supp 380, 388, *affd* 220 F2d 758, *cert denied* 350 US 867; *see* *Walter v Jones, Sledzik, Garneau & Nordone, LLP*, 67 AD3d 671, 672, *lv denied* \_\_\_ NY3d \_\_\_, 2010 NY Slip Op 67166 [2010]; *Kanat v Ochsner*, 301 AD2d 456, 458). It was not reasonable for the appellants to ignore the petitioner's demands and the orders of the court because they allegedly believed that the petitioner had herself obtained the information and documents which had been demanded. Accordingly, the appellants were not entitled to vacatur of their default (*see* *Brightly v Florida N., Inc.*, 54 AD3d 1127; *Marinoff v Natty Realty Corp.*, 17 AD3d 412; *Matter of Gambardella v Ortov Light.*, 278 AD2d 494).

The appellants' remaining contentions are without merit.

SANTUCCI, J.P., ANGIOLILLO, LEVENTHAL and LOTT, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court