

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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CA 09-02136

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND PINE, JJ.

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IN THE MATTER OF THE JUDICIAL SETTLEMENT  
OF THE ACCOUNT OF HSBC BANK USA, NA, AS  
SUCCESSOR EXECUTOR OF THE ESTATE OF  
EDWARD MAKOWSKI, DECEASED, RESPONDENT.

----- MEMORANDUM AND ORDER

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF  
THE ACCOUNTS OF DAVID DALE, AS EXECUTOR OF  
THE ESTATE OF EDWARD MAKOWSKI, DECEASED,  
APPELLANT.

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IN THE MATTER OF THE APPLICATION FOR REMOVAL OF  
THE EXECUTOR IN THE ESTATE OF EDWARD MAKOWSKI,  
DECEASED.

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IN THE MATTER TO COMPEL THE FIDUCIARY TO  
ACCOUNT IN THE ESTATE OF EDWARD MAKOWSKI,  
DECEASED.

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DAVID DALE, APPELLANT PRO SE.

MICHAEL J. RYAN, BUFFALO, FOR RESPONDENT HSBC BANK USA, NA.

O'BRIEN AND O'BRIEN, AMHERST (JAMES F. O'BRIEN OF COUNSEL), FOR  
RESPONDENTS BENEFICIARIES OF THE ESTATE OF EDWARD MAKOWSKI, DECEASED.

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Appeal from an order of the Surrogate's Court, Erie County  
(Barbara Howe, S.), entered September 23, 2008. The order, inter  
alia, denied the request of David Dale, as executor of the estate of  
Edward Makowski, deceased, for a decree exonerating him with respect  
to a prior order removing him as executor.

It is hereby ORDERED that the order so appealed from is  
unanimously affirmed with costs.

Memorandum: David Dale, the executor of decedent's estate before  
HSBC Bank USA, NA (HSBC) became the successor executor, appeals from  
an order denying his request for the issuance of a proposed decree  
that would, inter alia, "exonerate[]" him in connection with a prior  
order removing him as executor based on "his failure to provide an  
adequate interim accounting" (*Matter of Makowski*, 13 AD3d 1210, 1211).  
We previously determined that Surrogate's Court did not violate Dale's  
due process rights when it permanently removed Dale as executor  
"because his interim accounting did not meet the minimal legal  
requirements for an accounting (see SCPA 719 [1]), nor did his interim

accounting comply with the terms specified by the court with respect thereto" (*id.* at 1212). We reject the contention of Dale that the stipulation of discontinuance executed by him, as well as the attorney of record for HSBC and the beneficiaries of the estate, restored him to the position of executor of the estate and nullified only those prior orders that were adverse to him. Pursuant to the terms of the stipulation of discontinuance, the actions referenced therein were "discontinued on the merits." By discontinuing an action, "the action is as if it never had been" (*Loeb v Willis*, 100 NY 231, 235; see *Hotel Prince George Affiliates v Grimbilas*, 241 AD2d 302, 303, *lv dismissed* 91 NY2d 887, *rearg denied* 91 NY2d 957). Thus, there was no pending action in which the Surrogate could issue Dale's proposed decree (see *Herald Sq. Foot Care Assoc. v Indemnity Ins. Co. of N. Am.*, 257 AD2d 551; *D'Amico v Nuzzo*, 194 AD2d 761).

Dale's contentions with respect to an order entered in March 2009 are not properly before us because Dale did not file a notice of appeal with respect to that order (see CPLR 5513 [a]; *DiSanto v DiSanto*, 29 AD3d 935). In any event, to the extent that it appears on the record before us that Dale contends with respect to that order that the Surrogate erred in refusing to recuse herself, we note that the request for recusal was made in a "responding affidavit" rather than by way of a motion on notice pursuant to CPLR 2211, and no appeal as of right would lie from that order (see CPLR 5701 [a] [2]; *New York State Div. of Human Rights v Oceanside Cove II Apt. Corp.*, 39 AD3d 608, 609). We note in addition that we are unable to conduct meaningful appellate review of any contentions with respect to that order because there is no proper record on appeal concerning the order (see 22 NYCRR 1000.4 [a] [2]; *Mergl v Mergl*, 19 AD3d 1146). Finally, the contention of Dale that this Court should recuse itself is made for the first time in his appellate brief rather than by way of a motion pursuant to 22 NYCRR 1000.13 and thus is not properly before us.