

Matter of Frankel

2016 NY Slip Op 32016(U)

July 1, 2016

Surrogate's Court, Nassau County

Docket Number: 2905921

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**Accounting of Wilbur F. Breslin as Executor of the
Estate of**

**ROBERT FRANKEL,

Deceased.**

DECISION

**File No. 290592I
Dec. No. 31502**

**Accounting of Wilbur F. Breslin as Executor of the
Estate of**

**ROBERT FRANKEL,

Deceased.**

DECISION

**File No. 290592I
Dec. No. 31503**

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion for Summary Judgment with Exhibits	1
Affirmation of Robert M. Calica in Support of Renewed Motion for Summary Judgment	2
Affidavit of Wilbur Breslin in Support of Renewed Motion for Summary Judgment	3
Memorandum of Law in Support of Renewed Motion for Summary Judgment	4
Notice of Cross-Motion for Partial Summary Judgment with Exhibits	5
Memorandum of Law in Opposition to Motion and in Support of Cross-Motion	6
Reply Affirmation in Support of Motion and in Opposition to Cross- Motion with Exhibits	7
Reply Memorandum of Law in Further Support of Motion and Opposition to Cross-Motion	8

In this executor’s accounting proceeding, the executor moves the court for an
order:

- a. Granting partial summary judgment in favor of Executor Breslin under CPLR 3212(e) upholding the effectiveness of, and specifically enforcing a certain lawyer-drafted Stipulation of Settlement, the Purchase and Sale Agreement dated October 20, 1995, and its implementing

documents, including, inter alia, its allowance of the Breslin claim against the Estate to the extent of \$8,623,683 as of September 18, 1995, and the option of Executor Breslin's son, Kenneth Breslin, to purchase the remainder of the Decedent's residuary estate (now owned by Weary Realty LLC), if so advised, for the contractually fixed sum of \$2,500,000;

b. Dismissing the Objections of the Frankel Children which falsely claim the comprehensive Stipulation of Settlement, the Purchase and Sale Agreement, and its implementing documents, were all improperly "induced" by Breslin by means of "fraud, "overreaching," and "misrepresentation";

c. Imposing sanctions under 22 NYCRR Part 130 against the Objectors, the Frankel Children, and their counsel for frivolous and abusive conduct; and

d. Granting Executor Wilbur F. Breslin such other and further relief as the Court may deem appropriate.

The motion is opposed by the objectants who also cross-move for an order:

. . . pursuant to SCPA § 102, CPLR 3212(e) and CPLR 2215 requiring the Executor, Wilbur F. Breslin, to immediately return to the Estate herein \$9,176,729.53 that the Executor has paid himself from the Estate to satisfy a claimed debt of the decedent, plus interest, on the ground that there is no disputed material issue of fact as to the Executor having improperly paid himself from the Estate without his claim having been first proved and allowed by the Court as required by SCPA § 1805(1), and granting such other and further relief as the Court may deem just and proper.

Background

Robert Frankel (the decedent) died on April 21, 1995, survived by his wife, Adele Frankel-Loeb, and three adult children, Wendy Frankel, Richard Frankel and Lynn Frankel Fleetwood (Wendy, Richard and Lynn, collectively, the objectants). Under the terms of decedent's will, each of the objectants is a beneficiary under Article III of the will and a beneficiary of 1/3 of decedent's residuary estate. Although they had originally filed waivers and consents to probate proceeding and to the appointment of the nominated co-executors,

Wendy, Richard and Lynn thereafter moved for permission to revoke their waivers and consents. Ultimately, pursuant to a settlement reduced to a written stipulation, the will was admitted to probate and Wilbur Breslin became executor upon the nomination of Richard, as permitted by the will.

Prior to his death, the decedent owned a chain of stores and was a real estate investor and manager. The decedent and the accounting executor Wilbur Breslin (Breslin) jointly owned a number of real estate ventures, and had personally and jointly guaranteed related bank debt of approximately \$100,000,000.00. At the time of the decedent's death, some of these ventures were in financial distress. Shortly after the death of the decedent, an arrangement was reached among Gerald Deutsch and Stephen Levy, the then-serving preliminary executors of the decedent's estate, Breslin, and the decedent's children, whereby Breslin's family purchased, for the sum of \$2,902,500.00, control over a portion (40%) of the decedent's assets, and reserved the right to acquire the remaining assets for an additional \$2,500,000.00. This was accomplished by the transfer of the assets of the residuary estate to an entity evidently created for that purpose, known as Weary Realty, LLC (sometimes referred to simply as Weary Realty). The option of Breslin's son Kenneth to purchase the remaining interests in Weary Realty is referred to as the Weary Option. Pursuant to the agreement to settle the probate proceeding, on December 11, 1995, Breslin was appointed as successor executor of the estate, taking over management of the real estate ventures that previously had been jointly owned by Breslin and the decedent, as well as the decedent's assets and properties.

On September 12, 2012, Breslin filed a judicial accounting in which he sought settlement of his account, approval of legal fees, and his release and discharge, individually

and as successor executor. The account shows total principal charges of \$18,510,068.89 and income charges of \$6,813,228.50, with total income of \$5,478,074.46 on hand as of March 31, 2010.

On February 25, 2013, the objectants filed their objections to Breslin's account. The objections do not follow the usual and customary format of objecting to the account schedule by schedule. Rather, the objections are more in the form of a narrative, and while individual schedules and individual entries within schedules are referenced, the objections fall under three broad categories: (1) Breslin improperly charged, and repaid to himself from estate assets, debts that are not proper debts of the estate; (2) Breslin is improperly charging interest to the estate on the debts, whether the debts are valid or invalid; and (3) Breslin improperly caused the estate to make payments to himself and/or his partnerships.

The motion for summary judgment

The court notes at the outset that this is Breslin's second motion for summary judgment, the previous one having been denied. After the completion of additional discovery, the second motion was made. While the court recognizes that successive motions for summary judgment are generally discouraged, "where, as here, evidence produced from additional discovery places the court in a far better position to determine a legally dispositive issue, the court should not be precluded from exercising its discretion to consider the merits of the motion" (*Foster v Kelly*, 119 AD3d 1250, 1251 [3d Dept 2014][internal quotations and citations omitted]). Accordingly, the court will address the merits of Breslin's second motion for summary judgment.

As indicated above, Breslin's current motion seeks an order from the court affirming the validity and effectiveness of a series of agreements and other documents executed

incident to the settlement of the probate contest and, on the basis of the validity and effectiveness of those instruments, dismissing the objections to Breslin's account. Specifically, the notice of motion seeks a determination that the instruments executed by the parties allow Breslin's claim against the estate to the extent of \$8,623,683.00 as of September 18, 1995 and the validity of the Weary Option in favor of Breslin's son. Although not identified in the notice of motion as an item upon which summary relief was being sought, the memorandum of law filed in support of Breslin's motion also seeks an order determining that Lynn Frankel's objections must be dismissed on grounds of waiver and tax estoppel. Although opposing counsel notes that this prayer for relief was not mentioned in the notice of motion, nevertheless the substance of this claim is also discussed at some length in the memorandum in opposition to Breslin's motion. "The presence [as in this case] of a general relief clause enables the court to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced" (*Tirado v Miller*, 75 AD3d 153, 158 [2d Dept 2000]). Therefore, the failure to expressly pray for dismissal of Lynn's objections on these additional grounds in the notice of motion is not fatal because that relief was sought in the memorandum of law in support of the motion and was also addressed at length in the memorandum in opposition to Breslin's motion and the court is satisfied that no party will be prejudiced by the court's determination of that issue (*412 W. 12th Street IN LLC v C and A Capital LLC*, 2013 NY Slip Op 33099[U] n 4 [Sup Ct, New York County 2013]).

Breslin's claim against the estate

Among the documents executed incident to the settlement of the probate proceeding was a Purchase and Sale Agreement, dated October 20, 1995, by which Kenneth Breslin

would become the owner of 40% of Weary Realty. On December 6, 1995, another Agreement was executed by Breslin and the objectants, identified in the Agreement as “sellers” of their interests in Weary Realty, by which, among other things, Breslin agreed to indemnify the sellers for any claim, loss, or adverse tax consequence, etc. arising from or in connection with the transfer of 40% of Weary Realty to Kenneth Breslin. This Agreement also contained the following provision: the sellers

“acknowledge that Breslin is a creditor of the Estate, and [the sellers] hereby consent to and agree that they will not object to the Claim. In so consenting and agreeing, [the sellers] hereby explicitly acknowledge that they are aware of, and that Breslin has disclosed to them, that conflicts of interest may arise due to Breslin being both an Executor ...of the Estate as well as a creditor of the Estate. Breslin hereby represents to [the sellers] that he holds a claim against the Estate in the form annexed hereto as Exhibit ‘A’ (‘Claim’).”

Exhibit A to the Agreement is a claim against the estate and is addressed to the then preliminary co-executors. It provides, in part,

“You are hereby notified that there is due to me from the estate of Robert Frankel, deceased, the sum of eight million six hundred twenty-three thousand six hundred and eighty-three (\$8,623,683.00) dollars, with interest thereon, for, among other things, loans made by me to various business entities in which the deceased and I (or entities controlled by either of us) were partners or shareholders (the ‘Businesses’), which loans were the responsibility of the deceased and which were paid by me upon the deceased’s failure to pay same.”

Each of the objectants also signed a document on December 6, 1995 entitled “ACKNOWLEDGMENT AND CONSENT” which provides, among other things:

The undersigned acknowledges that Wilbur Breslin has disclosed to the undersigned that said Wilbur Breslin may have potential conflicts of interest in serving as the fiduciary of the Estate, in that he is also a creditor of the Estate; and, with full knowledge of such potential conflicts, the undersigned hereby consents to Wilbur Breslin, in his capacity as fiduciary of the Estate, utilizing the assets of the Estate for the purposes of disposing of obligations and debts on which the Estate and Wilbur Breslin are both liable, and for

paying the Claim of Wilbur Breslin against the Estate . . . provided such payment is made in accordance with applicable law; and

The undersigned hereby approves of and consents to the Claim, and hereby waives any objection to the Claim.

It is therefore clear from these documents that the objectants were fully aware of Breslin's claim against the estate in the sum of \$8,623,683.00 and expressly and repeatedly acknowledged that they would not object to it, despite the fact that Breslin, as both a creditor of the estate and the fiduciary of the estate, may have had a conflict of interest with regard to the claim. These documents, along with many others, were executed as part of the resolution of the litigation in the probate proceeding.

It is well settled that stipulations are favored by the courts and will not be set aside lightly (*see Hallock v State of New York*, 64 NY2d 224 [1984]). Stipulations are especially favored where the parties have been represented by counsel (*see Matter of Stark*, 233 AD2d 450 [2d Dept 1996]). The court notes that here, all parties were represented by competent counsel at and prior to the execution of the documents settling the probate proceeding and that the time records of the objectants' attorneys at the time reveal that they performed a pain-staking review of all the documents and the terms thereof, devoting hundreds of hours of legal services before any of the parties became bound to the agreements. Stipulations of settlement which put an end to litigation promote efficient dispute resolution and are essential to the litigation process (*see Hallock v State of New York*, 64 NY2d 224 [1984]; *Gage v Jay Bee Photographers*, 222 AD2d 648 [2d Dept 1995]). In this court's decision on Breslin's prior motion for summary judgment the court noted that, despite the strong policy in favor of the settlement of litigation, since a stipulation of settlement is a contract between the parties, the court may, in its discretion, relieve a party from a stipulation upon a showing

of those grounds necessary to avoid a contract such as fraud, collusion, mistake or accident, citing *Matter of Marquez* 299 AD2d 551 (2d Dept 2002).

Here, however, there being no evidence of fraud, collusion, mistake or accident, the objectants' counsel argues in his memorandum that

“yes, the [objectants] knew that [Breslin] was their father's lifelong friend and they mistakenly trusted him implicitly to do the right thing. So yes, through Breslin's misrepresentations and omissions they were induced to enter into transactions that they should never have agreed to. But that is not what this proceeding is about. The [objectants] have not asserted any such 'claims' in their Objections and the words 'fraud,' 'overreaching' and 'misrepresentation' appear nowhere in their Objections. There is nothing to dismiss.”

Similarly, in footnote 7 of the memorandum in opposition to the motion for summary judgment counsel asserts “the [objectants] have not sought to rescind the '1995 Stipulation,' for fraud or otherwise, and their Objections to the Accounting are just that: objections which point out reasons why the Accounting is not accurate and should not be accepted.”

Therefore, there being no claim of fraud, overreaching, or misrepresentation, or that the 1995 Stipulation should be rescinded, the issue is simply whether Breslin has made out a prima facie case for summary judgment dismissing the objections (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) and if so whether the objectants have raised any material issues of fact requiring a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As to any objection related to Breslin's claim against the estate in the sum of \$8,623,683.00, the objectants' acknowledgment of the debt and their express, unambiguous agreement, spelled out clearly in several different documents incident to the settlement of the probate proceeding, leads to the conclusion that Breslin has made out a prima facie case for

summary judgment as to the claim.

In opposition, the objectants point to SCPA §1805(1), which precludes a fiduciary from paying out of estate assets any debt allegedly owed to the fiduciary until the debt is proved and allowed in the fiduciary's accounting. They contend that, despite their express consents to the payment of the claim and their representation that they would not object to it, Breslin should nevertheless have to prove the validity of the debt. The court disagrees. The stipulation of settlement in the probate proceeding and the other documents executed incident to the settlement constitute a contract between the parties. "A stipulation of settlement is a contract, enforceable according to its terms" (*Alshawhati v Zandani*, 82 AD3d 805, 807 [2d Dept 2011], *quoting McKenzie v Vintage Hallmark*, 302 AD2d 503, 504 [2d Dept 2003]). "The cardinal rule of contract interpretation is that, where the language of the contract is clear and unambiguous, the parties' intent is to be gleaned from the language of the agreement and whatever may be reasonably implied therefrom" (*Matter of Polsinelli*, 111 AD3d 1131 [3d Dept 2013] [internal citations omitted]). The court finds the language in the several documents to be clear and unambiguous and further finds that the statement by the objectants that they "consent to and agree that they will not object to the Claim" cannot be "reasonably implied" to mean that they reserve the right to object to the claim. The objectants have failed to raise an issue of fact requiring a plenary trial.

Accordingly, Breslin's motion for summary judgment is **GRANTED, TO THE EXTENT** to the extent that the objections regarding the Claim in the principal sum \$8,623,683.00, are dismissed.

Objections have also been raised both to the fact that interest was paid on the Claim at all, and separately, to the rate of interest that Breslin paid to himself on the Claim. Breslin has not made a prima facie showing of the right to summary judgment on this issue and to

the extent that the motion sought summary judgment on the interest paid on the Claim it is **DENIED**.

The Weary Option

As indicated above, the Weary Option, if enforceable, would permit Breslin's son Kenneth to purchase the remaining 60% of the shares of Weary Realty LLC for the sum of \$2,500,000.00. In this executor's accounting proceeding, Breslin seeks summary judgment on behalf of his son against the objectants in their capacities as shareholders of Weary Realty LLC as to the ongoing validity of the Weary Option. Kenneth Breslin has no interest in the estate of Robert Frankel. An action or proceeding to enforce the option would be commenced by Kenneth Breslin, an individual, against the other shareholders of Weary Realty LLC. That action or proceeding has nothing to do with the affairs of the decedent Robert Frankel or the administration of his estate. The decedent never held an interest in Weary Realty; in fact, it did not exist until after his death. The fact that the objectants assigned their interests in the residuary estate to Weary Realty does not bestow on this court jurisdiction over any controversy that might involve Weary Realty, e.g., an employment dispute or an action by a vendor for payment. Breslin's reliance on *Matter of Brener* (12 AD2d 452 [1st Dept 1960]) is misplaced because in *Brener* what was at issue was the validity of the assignment of the assignor's interest in the estate. Here, it is not the validity of the assignment of the objectants' interest in the estate that is in issue, but rather a potential dispute between the assignee and a third party. Since the validity of the Weary Option in no way affects the affairs of the decedent or the administration of his estate, this court lacks the subject matter jurisdiction to determine that issue as the jurisdiction of the Surrogate's Court does not extend to "independent matters involving controversies between living persons" (*Matter of Deans*, 68 AD3d 767, 768 [2d Dept 2009], quoting *Matter of Lainez*, 79 AD2d 78, 80 [2d

Dept 1981]; *see also Matter of Lupoli*, 237 AD2d 440 [2d Dept 1997]).

Accordingly, the branch of Breslin's motion which is for summary judgment confirming the validity of the Weary Option is **DENIED**, without prejudice to commencement of an action for that relief in a proper forum.

Standing of Lynn Frankel Fleetwood

In addition to the reasons Breslin seeks to dismiss the objections of all three objectants generally, he also moves specifically with regard to any objections filed by Lynn Frankel on grounds of waiver and tax estoppel. Breslin cites *Mahoney-Buntzman v Buntzman*, 12 NY3d 415 (2009), for the proposition that “[a] party to litigation may not take a position contrary to a position taken in an income tax return” (*Mahoney-Buntzman v Buntzman* (12 NY3d at 422 [2009])). Breslin argues that in her personal income tax filings Lynn abandoned any interest she had in Weary Realty LLC, taking an ordinary loss of over \$4 million, which resulted in her taking tax deductions of approximately \$1.9 million on her personal returns. Lynn was represented by her own tax counsel with regard to the abandonment of her interest in Weary Realty and the consequent tax benefit that she received as a result. The only interest that Lynn had in the estate was transferred to Weary Realty LLC, as indicated previously. Reaping substantial personal gain, she asserted to the Internal Revenue Service that she had abandoned any interest in Weary Realty LLC. As the Court of Appeals has said, “[w]e cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under penalty of perjury on income tax returns” (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009])).

Accordingly, the court finds that Lynn Frankel Fleetwood has no interest in the estate of Robert Frankel and therefore does not have standing to object to the executor's account (*see Matter of Pratt*, 129 Misc 2d 826 [Sur Ct, Nassau County 1985]). Breslin's motion to

separately dismiss the objections of Lynn Frankel Fleetwood is therefore **GRANTED**.

The branch of Breslin's motion for an order dismissing the objections to the validity of the Stipulation of Settlement, Purchase and Sale Agreement and other implementing documents on grounds that the documents were all improperly induced by Breslin by means of fraud, overreaching, and misrepresentation is **GRANTED**, as the objectants have not argued in opposition to the motion that their objections were based on any such fraud, overreaching or misrepresentation.

The branch of Breslin's motion seeking the imposition of sanctions against the objectants is **DENIED**, there having been no adequate showing that the objectants' conduct was totally without basis in law or was intended to prolong these proceedings.

The cross-motion seeks an order directing Breslin to immediately return to the estate the sum of \$9,176,729.53 that the Breslin purportedly paid to himself to satisfy a claimed debt of the decedent, plus interest on grounds that the claim was not allowed pursuant to SCPA §1805 (1). To the extent that this refers to the Breslin's claim of \$8,623,683.00, it is **DENIED**, as the court has already granted Breslin summary judgment on that issue. To the extent that it refers to other indebtedness or the imposition of interest, the motion is also **DENIED**, as the movants have not established their right to summary judgment as to such issue or issues.

The cross-motion is therefore **DENIED**.

Settle order.

Dated: July 1, 2016
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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