

Dowdell v Fidelity Brokerage Servs., LLC

2016 NY Slip Op 32045(U)

June 24, 2016

Surrogate's Court, Nassau County

Docket Number: 2014-382095/B

Judge: Margaret C. Reilly

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

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Jesse Dowdell,

Petitioner,

**for a Declaratory Judgment and Other Relief
as to Ownership of IRA Account,**

-against-

Fidelity Brokerage Services, LLC, Estate of

JAMES E. DOWDELL, SR.,

Deceased,

**by Nora Gluth, Executor; Nora Gluth, Individually;
Ethel Talty; Joan Miller; and James E. Dowdell, Jr.,**

Respondents

-----X

**In the Matter of the Proceeding for Limited Letters
of Administration in the Estate of**

JAMES E. DOWDELL, SR.,

Deceased.

-----X

**Petition for a Compulsory Accounting and Related Relief
in the Estate of**

**JAMES E. DOWDELL, SR.,
a/k/a JAMES DOWDELL,**

Deceased.

-----X

PRESENT: HON. MARGARET C. REILLY

DECISION AND ORDER

**File No. 2014-382095/B
Dec. No. 31670**

**File No. 2014-382095/C
Dec. No. 31671**

**File No. 2014-382095/D
Dec. No. 31738**

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

In connection with the motion to dismiss the cross-claim:

Notice of Motion to Dismiss..... 1

Affirmation of Counsel for Nora E. Gluth..... 2

Affirmation in Opposition to Motion to Dismiss..... 3

Affirmation in Further Support of Motion to Dismiss..... 4

In connection with the motion to dismiss the petition for limited letters:

Affidavit in Support of Petition for Limited Letters. 5

Notice of Cross-Motion to Dismiss. 6

Amended Notice of Cross-Motion to Dismiss..... 7

Notice of Motion to Dismiss..... 8

Affirmation in Opposition to Motion to Dismiss..... 9

Reply Affirmation in Support of Motion to Dismiss. 10

In connection with the petition to compel an account:

Petition for a Compulsory Accounting. 11

Verified Answer..... 12

Reply Affirmation. 13

I. PROCEDURAL HISTORY

Before the court are three related proceedings, filed by four of the five children of James E. Dowdell, Sr.:

A. In connection with File No. 2014-382095/B, a petition for a declaratory judgment, Nora E. Gluth seeks an order dismissing a cross-claim asserted by Ethel A. Talty and Joan M. Miller.

B. In connection with File No. 2014-382095/C, a petition for limited letters of administration, Jesse Dowdell seeks an order dismissing the petition filed by Ethel A. Talty and Joan M. Miller.

C. In connection with File No. 2014-382095/D, Ethel A. Talty and Joan M. Miller seek an order compelling Nora E. Gluth to account as the executor of the estate of James E. Dowdell, Sr.

II. BACKGROUND

James E. Dowdell, Sr. (the decedent) died on November 7, 2014, a resident of East Williston, Nassau County, New York. He was survived by five children: Ethel A. Talty, Joan M. Miller, Nora E. Gluth, James E. Dowdell, Jr., and Jesse Dowdell. The decedent left a last will and testament dated September 6, 2011 that was admitted to probate on June 29, 2015. Letters testamentary issued to the nominated executor, Nora E. Gluth.

Under the terms of his will, the decedent bequeathed \$100,000.00 to James Dowdell, Jr. The will states that in the event that the decedent had been granted a power of appointment under the will of his wife, he exercised it in favor of Ethel A. Talty, Joan M. Miller, Nora E. Gluth, and Jesse Dowdell. The decedent left his residuary estate in four equal shares to Ethel A. Talty, Joan M. Miller, Nora E. Gluth, and Jesse Dowdell, to the exclusion of James Dowdell, Jr.

III. RELIEF REQUESTED

A. Order pursuant to CPLR §3211 (a) (3) Dismissing the Cross-Claim

In connection with File No. 2014-382095/B, a proceeding brought by Jesse Dowdell for a declaratory judgment, Nora E. Gluth moves for an order pursuant to CPLR §3211 (a) (3), dismissing the cross-claim asserted by Ethel A. Talty and Joan M. Miller against Nora E. Gluth, on the grounds that the cross-claimants lack standing to assert any cross-claim on behalf of the decedent's estate.

B. Order Dismissing the Petition for Limited Letters

In connection with File No. 2014-382095/C, a proceeding commenced by Ethel A. Talty and Joan M. Miller for limited letters of administration, Jesse Dowdell moves for an order dismissing the petition, on the grounds that Ethel A. Talty and Joan M. Miller have another action pending in this court for the same relief.

C. Order to Compel an Account

In File No. 2014-382095/D, Ethel A. Talty and Joan M. Miller have commenced a proceeding asking the court to order Nora E. Gluth to file her account as the executor of the decedent's estate, on the grounds that seven months have passed since the issuance of letters testamentary.

IV. ANALYSIS

A. Dismiss the Cross-Claim

The motion to dismiss the cross-claim¹ was filed by Nora E. Gluth in the proceeding commenced by Jesse Dowdell (File No. 2014-382095/B) for a declaratory judgment that distribution of the decedent's Individual Retirement Account at Fidelity Brokerage Services, LLC (the IRA) is governed by the beneficiary designation executed by the decedent on September 21, 2011. Ethel A. Talty and Joan M. Miller filed objections to the relief requested and also filed, in their individual capacities, a cross-claim alleging that Nora E. Gluth, Jesse Dowdell and James E. Dowdell, Jr. exploited the

¹Objectants Ethel A. Talty and Joan M. Miller label it a "Counterclaim and Cross-Claim," but it is referred to by all parties throughout these papers and in this decision as a cross-claim.

decedent's diminished capacity and caused him to transfer money from his pension and the IRA to his personal and/or business accounts to facilitate transfer of these funds to themselves or others. On that basis, Ethel A. Talty and Joan M. Miller argue that they are entitled to recover from Nora E. Gluth, Jesse Dowdell and James E. Dowdell, Jr., a share of all funds misappropriated.

In her motion to dismiss the cross-claim, Nora E. Gluth, one of the three designated beneficiaries² and the executor of the decedent's estate, seeks an order, pursuant to CPLR §3211 (a) (3), dismissing the cross-claim asserted by Ethel A. Talty and Joan M. Miller against Nora E. Gluth, on the grounds that this claim can only be asserted by the estate, and, therefore, Ethel A. Talty and Joan M. Miller lack standing. Counsel for Nora E. Gluth notes also that no evidence was submitted with the cross-claim, and that the cross-claim is based on an alleged conversion of the decedent's assets, which is a claim that can only be brought by the personal representative of the decedent's estate.

In his affirmation filed in opposition to the motion to dismiss the cross-claim, counsel for Ethel A. Talty and Joan M. Miller points out that Jesse Dowdell, in his petition for a declaratory judgment, has taken the position that the IRA is not an estate asset. On that basis, Ethel A. Talty and Joan M. Miller individually, and not on behalf of

²The other two individuals named in the September 21, 2011 beneficiary designation are Jesse Dowdell and Ethel A. Talty.

the estate, seek to recover from Nora E. Gluth, Jesse Dowdell and James E. Dowdell, Jr., individually, a share of any funds transferred out of the decedent's pension and the IRA.

Counsel for Nora E. Gluth responded with an affirmation in further support of his client's motion to dismiss, arguing that the cross-claim is a claim of the estate, and not a claim of individuals, even if Ethel A. Talty and Joan M. Miller happen to be individuals who would benefit if the assets were returned to the estate.

The cross-claim filed by Ethel A. Talty and Joan M. Miller is based upon the misappropriation and conversion of the decedent's assets during his lifetime. Generally, a proceeding to recover converted property must be commenced by the personal representative of the estate (*McQuaide v Perot*, 223 NY 75, 79 [1918]). However, there is an exception to this general rule where the executor has herself been charged with the fraudulent transfer of property, or where the executor unreasonably refuses to sue to recover property of the estate (*Castor v Pulaski*, 117 AD3d 1552, 1554 [4th Dept 2014] [citation omitted]).

In this proceeding, Ethel A. Talty and Joan M. Miller filed their cross-claim to protect their individual rights in the declaratory judgment proceeding, not on behalf of the estate. At the same time, in a separate proceeding, they petitioned the court for limited letters of administration in order to investigate, on behalf of the estate, whether assets belonging to the decedent were misappropriated prior to his death. As discussed below, the court is granting the separate petition for limited letters. At the same time, the court

grants the motion of Nora E. Gluth and dismisses the cross-claim filed by Ethel A. Talty and Joan M. Miller in their individual capacities for shares of any misappropriated funds.

B. Dismiss the Petition for Limited Letters

Jesse Dowdell moves for an order dismissing the petition of Ethel A. Talty and Joan M. Miller for limited letters of administration (File No. 2014-382095/C), on the grounds that the petitioners have another action pending in this court for the same relief.

Counsel for Ethel A. Talty and Joan M. Miller filed an affirmation in opposition to the motion, in which counsel states that his clients seek appointment as limited administrators of the decedent's estate pursuant to SCPA §702, in order to investigate and commence proceedings against Nora E. Gluth, who serves as the executor of the decedent's estate, James E. Dowdell, Jr., and Jesse Dowdell. In support of his clients' petition for limited letters, counsel states that in spite of evidence showing that assets belonging to the decedent, the decedent's estate, and/or Vigilant Investors Corp.³, have been misappropriated, Nora E. Gluth, as executor of the decedent's estate, has failed to initiate proceedings to discover and recover these assets, and it is unlikely that she will do so, because it is alleged that she is a party to the improper taking of the decedent's assets during his lifetime.

³According to the objections filed by Ethel A. Talty and Joan M. Miller in the declaratory judgment action brought by Jesse Dowdell, the decedent maintained a Vigilant Investors Pension account with Morgan Stanley, valued at \$2,000,000.00. Ethel A. Talty and Joan M. Miller allege that the Vigilant Investors Pension was converted to the IRA to facilitate the looting of the account by Nora E. Gluth, James E. Dowdell, Jr., and Jesse Dowdell.

Jesse Dowdell bases his motion to dismiss the petition for limited letters upon the cross-claim filed by Ethel A. Talty and Joan M. Miller in response to his petition for a declaratory judgment. Counsel argues that the petition for limited letters must be dismissed under CPLR §3211 (a) (4) because the petition seeks the same relief, against the same parties, concerning the IRA, that Ethel A. Talty and Joan M. Miller seek in the cross-claim they filed in Jesse Dowdell's declaratory judgment proceeding.

SCPA Section §702 was originally created for the issuance of limited letters in estates where issuance of full letters was unnecessary (*Matter of Stoller*, 4 Misc 3d 538, 539 [Sur Ct, New York County 2004]). As amended in 1993, the statute now provides authority to the court, in certain circumstances, to grant limited letters even when full letters have already been granted. Once such circumstance is articulated, subdivision (9) of SCPA §702 permits the court to issue limited letters where there may be a claim of the estate against the executor in his or her individual capacity.

The minimum amount of proof needed to commence a proceeding against an executor in his or her individual capacity “is the submission of allegations made merely upon information and belief” (*Matter of Leistner*, 12 Misc 3d 1153(A) [Sur Ct, Nassau County 2006], *citing Matter of Berger*, NYLJ, Feb. 10, 2004, at 26, col 6 [Sur Ct, Westchester County]). The granting of limited letters “does not resolve the various contested factual issues concerning the validity of the transfers. It only allows inquiry into those transactions” (*Matter of Oppmann*, NYLJ, Nov. 30, 2001, at 17, col 1 [Sur Ct, Westchester County]). When there is a conflict of interest between the purported claim of

the estate for which the limited letters are requested and the interests of the executor, the court may issue the letters in order to protect the estate (*Matter of Vasquez*, 162 Misc 2d 184 [Sur Ct, New York County 1994]; *Matter of Oppmann*, NYLJ, Nov. 30, 2001, at 17, col 1 [Sur Ct, Westchester County]; *Matter of Rosasco*, 19 Misc 3d 1109 [A] [Sur Ct, New York County 2008]).

The relief sought in these two proceedings overlaps but is not identical. As noted above, the court has granted the motion to dismiss the cross-claim for shares of misappropriated funds. At the same time, the court grants the petition filed by Ethel A. Talty and Joan M. Miller for limited letters of administration in the decedent's estate in order to investigate whether assets belonging to the decedent or the decedent's estate have been misappropriated.

C. Compel an Account

Ethel A. Talty and Joan M. Miller seek an order requiring Nora E. Gluth to file her account as executor of the decedent's estate (File No. 2014-382095/D). In her answer to the petition to compel her to account, Nora E. Gluth claims that her ability to file a judicial account is affected by the following proceedings and motions before this court: (a) the petition for limited letters filed by Ethel A. Talty and Joan M. Miller and the motion filed by Jesse Dowdell to dismiss the petition; (b) the petition for declaratory judgment as to ownership of the decedent's IRA, and the motion to dismiss the cross-claim filed by Ethel A. Talty and Joan M. Miller in that proceeding; and (c) an SCPA

§2103 proceeding filed by Nora E. Gluth concerning items alleged to be in the possession of Ethel A. Talty and Joan M. Miller.⁴

In the reply affirmation filed by counsel for Ethel A. Talty and Joan M. Miller, counsel argues that none of the court proceedings referenced by Nora E. Gluth prevent her from filing an interim account as the executor of the decedent's estate.

It is well established that a fiduciary is obligated to account for his or her actions (*see Matter of Kassover*, 124 Misc 2d 630 [Sur Ct, Nassau County 1984]). The court sees no reason that Nora E. Gluth cannot file an interim account of her proceedings as the executor of the estate of James E. Dowdell, Sr., noting where appropriate any pertinent issues that have not yet been resolved among the interested parties.

V. CONCLUSION

A. The court grants the motion filed by Nora E. Gluth for an order pursuant to CPLR § 3211 (a) (3) dismissing the cross-claim asserted by Ethel A. Talty and Joan M. Miller individually against Nora E. Gluth.

B. The court denies the motion filed by Jesse Dowdell for an order dismissing the petition of Ethel A. Talty and Joan M. Miller for limited letters of administration. Limited letters shall issue upon petitioners' due qualification, without bond.

C. The court grants the petition filed by Ethel A. Talty and Joan M. Miller to compel Nora E. Gluth to account. Nora E. Gluth is directed to file an interim account and

⁴This decision does not address File No. 2014-382095/F, the SCPA §2103 proceeding filed on April 27, 2016, by Nora E. Gluth against Ethel A. Talty and Joan M. Miller.

petition for its judicial settlement and to cause citation to issue within forty-five (45) days of personal service of a copy of this order. Enforcement of this order by contempt requires that Nora E. Gluth be served with an attorney-certified or court-certified copy of this order (SCPA § 607).

D. A conference in connection with all of these proceedings will be conducted on the return date of the citation to be issued in connection with the judicial account of Nora E. Gluth. In the event that an accounting citation has not been issued on or before September 13, 2016, a conference will be held at this court on that date at 9:30 a.m.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: June 24, 2016
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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