Matter of Doerschuck
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Surrogate's Court, New York County
Docket Number: File No. 3816/61
Judge: Renee R. Roth
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NOV -8 2004

SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Judicial Settlement of the Intermediate Account of IBJ Whitehall Bank & Trust Company, as Trustee under Article SEVENTH of the Last Will and Testament of

File No. 3816/61

WALTER J. DOERSCHUCK,

Deceased.

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R O T H , S .

Three motions are pending in this contested intermediate accounting for the trust created under Article SEVENTH of the will of Walter J. Doerschuck covering the period from July 13, 1990, through September 30, 1999. In the first, petitioning trustee, IBJ Whitehall Bank & Trust Company, seeks summary judgment dismissing the pro se objections of the life income beneficiary, Georgiana Doerschuck. In the other two, Georgiana, again appearing pro se, asks the court to 1) recuse itself, 2) "strike the record" and 3) disqualify Emmet Martin & Marvin, counsel for the trustee, and Cadwalader, Wickersham & Taft, a firm that is not involved in this proceeding.

Before turning to the merits of these applications, a discussion of the long history of this case is necessary.

Mr. Doerschuck (Walter) died on November 21, 1961. He was survived by his wife, Gladys Doerschuck (Gladys), and son,

Walter Doerschuck, Jr. (Junior). Gladys died in 1976 and her will was admitted to probate in this court. Walter's will established several trusts. The one at issue here, the Article SEVENTH trust, was funded with one-quarter of decedent's residuary estate and provided income for life to Junior, and then, upon his death, to Junior's wife, Georgiana Doerschuck (Georgiana), with remainder upon her death to Junior's then living issue.

The original trustees were decedent's brother, Richard Doerschuck, Junior and Manufacturers Hanover Trust Company. Richard died in 1964 and successor letters of trusteeship issued to Littleton Fox, who resigned in 1971. Junior and Manufacturers Hanover continued to serve together until September 25, 1978, when Manufacturer's Hanover was allowed to resign. Georgiana was then appointed successor trustee to serve with Junior. By decrees dated September 24, 1965, August 3, 1972, and October 4, 1979, the accounts of the various trustees were judicially settled from the inception of the trust, December 1, 1961, through September 25, 1978.

After Georgiana's appointment as trustee, she recommended that her brother, Joseph Margraf, serve with her. He was appointed on June 11, 1980 and served with Georgiana and Junior

until Junior died in Florida on June 7, 1985. After his death, Georgiana, who had executed a separation agreement with Junior almost two years earlier, became embroiled in a particularly acrimonious litigation with her children (the presumptive remaindermen of the Article SEVENTH trust) in Florida with respect to Junior's estate.

Eventually, the animosity Georgiana harbored toward her children pervaded the administration of the Article SEVENTH trust. Her brother Joseph, who refused to administer the trust to the detriment of the remaindermen, then became the object of Georgiana's animus. As a result, Joseph petitioned for permission to resign and to settle his account as trustee on September 23, 1986. Joining in the petition were Georgiana's children in their capacity as executors of their father's estate.

Although the account covered the period September 25, 1978, through the date of Junior's death, June 7, 1985, as it related to each fiduciary, Georgiana did not join in the accounting. Instead, she filed objections in her capacity as co-trustee and as secondary income beneficiary, claiming that a portion of the trust income had been paid to her late husband Junior in contravention of their separation agreement and that she was

entitled to have her legal fees paid from the assets of the trust.

During the course of the proceedings, Georgiana had a succession of four lawyers. Finally, as a result of her behavior at a hearing on March 23, 1987, in which she appeared pro se, the court appointed a guardian ad litem for her. A hearing was later held to determine Georgiana's fitness to continue as a trustee of the trust at issue here as well as the trust created for the benefit of Junior and his issue under Article EIGHTH of the will of Gladys. Based upon a three-day hearing in December of 1988, this court first suspended Georgiana's letters of trusteeship for both trusts and then ultimately revoked them, finding that she lacked the ability to understand and discharge her duties as trustee and to act impartially for the benefit of all trust beneficiaries (Matter of Doerschuck, NYLJ, May 31, 1990, at 25, col 2).

In that decision, which Georgiana did not appeal, all outstanding issues in the accounting proceeding relating to the Article SEVENTH trust were also addressed. Specifically, Joseph's application to resign was granted and J. Henry Schroder Bank and Trust Company (now IBJ Whitehall) was appointed as successor trustee. Georgiana's objections were determined as

follows: her claim for legal fees was denied on the ground that such fees were not incurred in furtherance of her fiduciary responsibilities; she was estopped from claiming entitlement to one-fourth of the income already paid to Junior, since such payments had been made with her full knowledge as a trustee, but Georgiana was not estopped from asserting her right to income that had not been distributed to Junior and one-fourth of such income was directed to be paid to her (id.).

Thereafter, the account was supplemented for the period from June 7, 1985, to July 13, 1990, the date that IBJ Whitehall became the sole trustee. Georgiana did not file objections to the supplemental account and, by decree dated June 27, 1991, the trustees' account was judicially settled for the period September 25, 1978, to July 13, 1990. It is noted that Georgiana attempted to file additional objections to the account after such decree was entered. The objections were returned to her with a letter from the Clerk of the Court advising that, in view of the decree, her only recourse was to seek to set it aside. No such application was ever made.

The latest chapter in the saga of the Article SEVENTH trust began when IBJ Whitehall filed its interim account on May 18, 2000, covering the period July 13, 1990, to September 30, 1999.

The account shows that the trust, valued at the start of the accounting period at $567,562.07, generated income of $250,835.74. After payment of administration expenses and accrued income due Junior's estate as set forth in Schedule I of the prior accounting, Georgiana received income of $208,637.72.

On the return date of the citation, Georgiana filed objections. Her initial pro se pleading consisted of two versions of the objections and a four-page summary of them. With this submission, she also filed voluminous amounts of "documentary evidence" to support her objections. However, virtually all of such "evidence" relates to the prior accounting period. The two versions of the objections, which are largely in narrative form, share some identical pages, but only one, which is 36 pages in length, appears to be complete.

The objections ramble and focus primarily on matters unrelated to the account at issue, including Georgiana's claim that the Central Intelligence Agency implanted her with a "deadly object" called "CATO" that enables the police to track her whereabouts. It is observed that Georgiana made similar allegations in a complaint she filed in United States District Court for the District of New Mexico in 2002. The court sua sponte dismissed the complaint, finding that the facts alleged

were "delusional, fanciful and fantastic and therefore frivolous."

Given Georgiana's past history and the nature of her objections, the court appointed a guardian ad litem for her in this proceeding. Georgiana then retained an attorney, who filed a notice of appearance on October 16, 2000. When it appeared that such attorney was taking no action to amend Georgiana's pleading, the trustee made the instant motion for summary judgment. On the return date of the motion, Georgiana's attorney appeared without filing opposition papers and instead requested additional time to file amended objections. He was given two weeks to make such a filing, but did not do so.

Instead, almost a month later Georgiana filed an undated two-page, single-spaced unverified document purporting to be "further objections" to the account. Annexed to this document was what Georgiana described as the "Accounting that my [certified public accountant] finished for me." However, such "accounting" bears no resemblance to the form of a judicial accounting. Rather, it appears to be some kind of analysis of the trust's performance and income and principal accounts.

Shortly after Georgiana filed these "further objections," her attorney moved to withdraw, citing irreconcilable

differences. Although Georgiana did not oppose the application, she was far less mild in describing such differences, alleging, among other things, that her attorney was "aiding and abetting" the trustee and its attorneys in perpetrating a fraud. Given the circumstances, the court granted the application, noting that, in any event, Georgiana had a guardian ad litem to protect her interests in this proceeding (Matter of Doerschuck, NYLJ, February 26, 2002, at 18, col 6). Such guardian ad litem, after an investigation and review of the trustee's interim account, filed a report indicating that he did not believe there was a basis to file objections.

Since her attorney's withdrawal, Georgiana has filed four pro se applications with the court. First, she commenced a proceeding in which she sought an order directing the trustee of the Article SEVENTH trust to make a principal invasion of $25,000 on her behalf. Since the trustee had no power to invade principal on Georgiana's behalf and none of the special circumstances that would permit such an invasion under EPTL 7-1.6 were present, the application was denied (Matter of Doerschuck, NYLJ, May 31, 2002, at 18, col 5). Thereafter she brought a proceeding to compel the trustee to account for the trust created under Article EIGHTH of Gladys' will. As

Georgiana has no beneficial interest in that trust, her application was denied for lack of standing (Matter of Doerschuck, NYLJ, May 31, 2002, at 18, col 4).

These applications were followed by Georgiana's two pending motions which ask the court to 1) "strike the record," 2) recuse itself and 3) disqualify the law firms of Emmet Martin & Marvin (Emmet) and Cadwalader Wickersham & Taft (Cadwalader). It is noted parenthetically that Georgiana filed a petition for writ of mandamus regarding these motions in the Appellate Division, First Department. Such petition was dismissed without opinion, but with a direction to the Clerk of that Court not to accept any further filings from Georgiana without prior leave of court (Matter of Doerschuck, 2004 NY Slip Op 06623).

Before addressing the trustee's motion for summary judgment, we first turn to the other pending motions. Georgiana's request that the court "strike the record" makes no sense at all. Moreover, even if it did, the basis for the motion, namely Georgiana's unsubstantiated claim that original documents from the court's files were stolen and replaced with forgeries in 1991, has nothing to do with this proceeding, which was commenced in May of 2000. Accordingly, such motion is denied.

Her motion asking this court to recuse itself must also be denied. The law is clear that where claims of bias are at issue, the trial judge is the "sole arbiter of recusal" (People v Moreno, 70 NY2d 403, 405), since the existence of bias or prejudice on the part of a sitting judge is a matter of personal conscience (see Matter of Smith, 84 AD2d 664; Casterella v Casterella, 65 AD2d 614). Furthermore, the bias required for a judge's recusal must be from an "extrajudicial source" and result in a predisposition about the merits that is not warranted by the facts or issues presented in the case (see People v Moreno, 70 NY2d at 407, supra; Matter of Brody, NYLJ, July 14, 1992, at 22, col 6).

To the extent that Georgiana's claims of bias can be understood, they appear to be based on this court's decision to revoke her letters of trusteeship in 1990 and to appoint a guardian ad litem to protect her interests in both this and the prior accounting proceeding. Such decisions, which were made in the ordinary exercise of this court's authority, do not demonstrate any basis for recusal.

Finally, Georgiana seeks to disqualify two law firms, Cadwalader and Emmet. Cadwalader represented Georgiana's three children in their individual capacities in the prior accounting

proceeding. Since Cadwalader has not appeared in this proceeding on behalf of any party, this portion of the motion is also denied.

The other firm, Emmet, is counsel to the trustee. Many of Georgiana's allegations of misconduct against the firm involve matters dating back to the 1960's and early 1970's, when the firm did not represent her, but rather, her husband, Junior. It is noted that these same allegations had been raised by Georgiana in 1987 and again in 1999 in complaints filed with the Disciplinary Committee for the First Department against a now deceased partner of Emmet. In each instance, the Committee conducted an investigation and then closed the file on the matter after determining that there was no basis to take action.

To the extent that any cognizable issue can be gleaned from Georgiana's submissions, it is that Emmet previously represented Georgiana for a time when she was a trustee of the Article SEVENTH trust. In this regard, the record shows that such firm represented the trustees of the Article SEVENTH trust long before Georgiana's appointment as trustee. After her appointment, the firm continued to represent the trustees until Georgiana retained other counsel sometime prior to the commencement of the previous accounting proceeding in 1986 at

which time she raised no issue in this court with respect to Emmet's alleged conflict.

Disqualification of an attorney is appropriate where the moving party is a former client of the adverse party's counsel and there is a substantial relationship between the subject matter of the current representation and the prior representation (see Solow v W.R. Grace & Co., 83 NY2d 303). Even absent such a substantial relationship, disqualification is warranted if the attorney received confidential information about the movant that is "substantially related" to the current litigation (Lightning Park, Inc. v Wise Lerman & Katz, P.C., 197 AD2d 52, 55). However, because a party's choice of counsel is an important right, the burden is on the movant to demonstrate a basis for disqualification (see id.; Olmoz v Town of Fishkill, 258 AD2d 447).

Georgiana has failed to meet her burden. The record demonstrates that no relationship exists between the current accounting proceeding and Emmet's representation of Georgiana during a portion of the prior accounting period. As noted above, Georgiana did not raise the alleged conflict in the trustees' prior accounting and such account was settled by decree entered more than thirteen years ago. Moreover, the

present proceeding involves the propriety of the actions of the current trustee, who was appointed long after Emmet no longer represented Georgiana. Accordingly, the portion of the motion seeking to disqualify Emmet is denied.

We now turn to the trustee's motion for summary judgment, which Georgiana has not opposed. The standard for determining a motion for summary judgment is clear. The movant "must make a prima facie showing of entitlement to judgment as a matter of a law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320). The failure to make such a showing requires denial of the motion without regard to the sufficiency of opposing papers (id.). However, once this burden is satisfied, the party opposing summary judgment must come forward with proof, in admissible form, establishing a genuine issue of material fact (see S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338).

In an accounting proceeding, the accounting party has the burden of proving that all the assets are accounted for and that the accounting is complete and accurate (see Matter of Schnare, 191 AD2d 859). As a rule, however, the fiduciary makes a prima facie showing of accuracy and completeness by filing the account with an affidavit attesting to its accuracy (see SCPA 2209).

The objectant then has the burden of coming forward with evidence that the account is inaccurate or incomplete (see Matter of Schnare, 191 AD2d 859, supra).

The trustee asserts that summary judgment is warranted because Georgiana's pleading fails to identify any action of the trustee that was "imprudent or unreasonable." According to the trustee, "substantially all" of Georgiana's allegations are rooted in matters outside this accounting period. Moreover, to the extent that any of her allegations can be viewed as possibly relevant, their incoherent nature makes it virtually impossible to discern any specific objections to the account.

The court is aware of the difficulty presented when there is a request for summary dismissal of a pleading such as the one here, which fails to meet basic pleading requirements. Such requirements -- sufficient particularity, for example -- are intended to give the court and parties notice of the claim (see SCPA 302; see also CPLR 3013, CPLR 3014). Although pleadings in the Surrogate's Court are often liberally construed (see Matter of Allan, 5 NY2d 333), especially in cases where a party is appearing pro se, they nevertheless must include allegations that are sufficiently clear to form the basis of a cognizable objection (see e.g. Matter of Julliard, 169 Misc 270; Matter of

Bielby, 91 Misc 353).

Here, the trustee is correct that, with all the verbiage, it is extremely difficult to identify any cogent objection to the fiduciary's conduct during this accounting period. Most of Georgiana's allegations are unrelated to the administration of this trust or, if related, they concern matters outside this accounting period. Moreover, to the extent that Georgiana's allegations can reasonably be viewed as relating to this proceeding, they primarily concern the procedural narrative in the trustee's petition and not the substance of the account. For example, she complains that the trustee lists her grandchildren, the contingent remaindermen, "out of [chronological] order [of birth]."

Given the nature of Georgiana's pleading and the fact that she has not countered the trustee's contentions in this motion, an argument certainly can be made that summary judgment is warranted. However, the court finds that, notwithstanding the irrelevancies and undecipherables that are characteristic of most of her pleading, Georgiana has managed to make three comprehensible and relevant objections.

The first, based on what appears to be a mismanagement theory, is that the trustee is not entitled to $1,989.05 in

"paying out" commissions as set forth on Schedule H (see SCPA 2309[1]). The second is that the administration expenses charged to income are improper. Finally, the third is that she never received $5,406.02 in income shown to be on hand at the end of the prior accounting period.

With regard to the objection to the trustee's commissions, it is clear that such commissions, due from principal, are permitted under SCPA 2309(1) and presumed reasonable (see SCPA 2312[4]). Accordingly, since Georgiana has failed to offer any evidence of misconduct or mismanagement, let alone evidence that would create an issue of fact concerning the trustee's entitlement to commissions, this objection is dismissed.

With regard to Georgiana's objection that all administration expenses charged to income are improper, the trustee has made a prima facie showing of the accuracy and completeness of its account, but Georgiana has failed to specify a single administration expense that she claims is not properly calculated or allocated to income. It is noted that this objection appears to be based on Georgiana's misconception that decedent's will directs that she receive the gross income of the trust. Not only does the will clearly state in Article SEVENTH that she is entitled to the trust's "net income," but certain

costs, namely annual commissions, are allocated in part to income by statute, where, as here, the will does not specifically provide otherwise (see SCPA 2309[3]).

Georgiana's final objection is that she never received $5,406.02 in income that was on hand at the close of the prior accounting period. This objection would be easily disposed of if the income on Schedule F-1 of the prior account was reflected on Schedule A-2 of the instant account, but it is not.

An examination of Schedule F-1 of the prior account shows that the former trustee held a total of $5,406.02 at the end of the accounting period, namely $3,159.91 in cash held in the Bank of New York Deposit Reserve and $2,246.11 due from principal of the trust. An affidavit of counsel for the current trustee that was submitted with the instant account explains that the $2,246.11 is reflected on Schedule C-2 as part of an $18,039.98 adjustment from principal to income that was used to offset administration expenses. A review of Schedule I of the prior account supports this position as it shows that the $2,246.11 was included in the adjustment amount that appears on Schedule C-2. Thus, contrary to Georgiana's contention, the account shows that she received credit for those funds.

As for the remaining $3,159.91, however, such funds were

not collected by the trustee and, therefore, do not show up in any of the income schedules of the account. The trustee's explanation for this discrepancy in Schedule I is that the $3,159.91 was distributed by the Bank of New York, the custodian of the prior trustee, directly to Georgiana on August 28, 1990 (along with $1,334.34 of dividends received by the Bank of New York between the date of delivery of the trust's assets to the current trustee and the registration of the assets in the current trustee's name).

Nevertheless, in light of Georgiana's claim that she never received this money, the trustee's statement in the account that the $3,159.91 was distributed to Georgiana by the custodian of the prior trustee is an insufficient basis upon which to grant summary judgment. It is noted that the trustee has not specifically addressed this objection, let alone provided evidence that the prior trustee distributed such funds to Georgiana. The trustee, who was charged with collecting these funds, presumably satisfied itself as to the distribution of said funds prior to filing its account and thus would be in a position to offer evidence on this issue. Georgiana, on the other hand, would have to prove a negative, namely that she never received the funds.

Under these circumstances, summary judgment is not warranted with respect to the $3,159.91. Accordingly, the trustee is directed to submit evidence on this issue within 30 days of the date of this decision and Georgiana, if she wishes, may respond within 30 days after the date of service of such submission. A decision shall issue with respect to this objection after the parties' submissions, if any.

Finally, we turn to Georgiana's "further objections" to the account. As noted above, on the return date of the motion for summary judgment, the court gave Georgiana's then counsel an opportunity to file amended objections. Georgiana's untimely submission of unverified "further objections," however, did not comply with the court's directive. Accordingly, these purported objections are not properly before the court.

Moreover, these "further objections" do not establish any improper conduct on the part of the trustee and also suffer from the same infirmities as Georgiana's prior submission. To the extent that any of her allegations can be understood to relate to the actions of the current trustee, Georgiana appears to claim that 1) $300,000 in "fees" were improperly taken out of income, 2) $113,000 is "missing" from the trust and 3) the trust was managed imprudently.

As noted above, Georgiana's claim that no fees should be taken out of her income is contradicted by the terms of the will. In any event, not only does Georgiana fail specifically to identify any "fees" improperly taken from income, but the total she claims to be at issue, namely $300,000, does not appear anywhere in the accounting. Rather, the account shows a total of only $29,147.36 in administration expenses paid out of income.

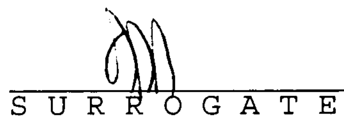
With regard to her claims that $113,000 is "missing" from the trust and that the trust was managed imprudently, other than the "accounting" she submitted, which is discussed below, she offers no specifics on these issues, upon which she would have the burden of proof (see e.g Matter of Baker, 42 App Div 370 [objectant had the affirmative burden to establish more assets than are acknowledged in the accounting]; Matter of Newhoff, 107 Misc 2d 589 [objectant had the affirmative burden of demonstrating the impropriety of the fiduciary's investment practices], affd 107 AD2d 417).

As for her "accounting", allegedly prepared by a certified public accountant (who is not identified), it is not in the form of a judicial accounting, but rather appears to be some kind of analysis of the trust's performance and income and principal

accounts. The "accounting" purports to show that funds are missing from the account and that Georgiana would have received more income had the trustee not sold any of the assets of the trust during the accounting period. However, it is riddled with flawed assumptions provided by Georgiana. For example, a footnote indicates that certain figures are based on her representation that the "payments of attorneys fees are not allowed under the Trust agreement." In addition, despite the court's efforts, it is impossible to reconcile many of the numbers in the "accounting" with the trustee's account. To the extent that the numbers can be reconciled, it is unclear what conclusions can be drawn from them especially since parts of the analysis appear to be based on faulty assumptions.

Accordingly, the trustee's motion for summary judgment is granted except as to Georgiana's objection to the $3,159.91 that the trustee claims was distributed to her by the custodian of the prior trustee. Georgiana's motions are denied and her objections dismissed except as noted above.

This decision constitutes the order of the court.



S U R R O G A T E

Dated: October 29, 2004