

**Matter of the Estate of Puk**

2007 NY Slip Op 30425(U)

March 22, 2007

Sur Ct, Nassau County

Docket Number: 0327219

Judge: John B. Riordan

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SURROGATE'S COURT: STATE OF NEW YORK  
COUNTY OF NASSAU

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Accounting by JoAnn Goddard, as Executrix  
of the Estate of

File No. 327219

Decision No. 923

JOSEPH PUK, SR.,

Deceased.

-----X

Accounting by JoAnn Goddard, as Trustee of the  
Living Trust dated March 4, 2002 of

Decision No. 924

JOSEPH PUK, SR.,

Deceased/Grantor.

-----X

Accounting by JoAnn Goddard, as Trustee of the  
Irrevocable Trust dated April 1, 2002 of

Decision No. 925

JOSEPH PUK, SR.,

Deceased/Grantor.

-----X

Petition by John J. Puk to Remove JoAnn Goddard,  
as the Executor of the Estate of

Decision No. 131

JOSEPH PUK, SR.,

Deceased

to Remove and/or Suspend JoAnn Goddard as Trustee of  
the Joseph Puk Sr. Irrevocable Trust, dated April 1, 2002;  
and to Suspend JoAnn Goddard as Trustee of the  
Joseph Puk Sr. Living Trust, dated March 4, 2002.

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In each of these accountings proceedings, John J. Puk seeks an order (i) compelling JoAnn Goddard to comply with outstanding document requests and directing her to appear for the completion of her SCPA 2211 examination and (ii) assessing attorneys' fees and costs against JoAnn Goddard. John has also commenced a proceeding by order to show cause for (i)

removal of JoAnn Goddard as executor of the estate, (ii) removal and/or suspension of JoAnn Goddard as trustee of the Irrevocable Trust dated April 1, 2002 trust (hereinafter “the Irrevocable Trust”), and (iii) suspension of JoAnn Goddard as trustee of the Living Trust dated March 4, 2002 trust (hereinafter “the Living Trust”).

Joseph Puk, Sr. died on December 20, 2002 leaving a will dated March 4, 2002 which was admitted to probate by this court on October 30, 2003. Letters testamentary issued to JoAnn Goddard on that date. The decedent was survived by four children, John J. Puk, Joseph Puk, Jr., JoAnn Goddard and Richard Puk. Under his will, the decedent bequeathed his estate to his four children equally. At the time Joseph Puk Sr. executed his will on March 4, 2002, he created the Living Trust which named three of his four children as beneficiaries upon his death. Joseph Puk, Jr. was the child excluded from sharing in the Living Trust. Thereafter, on April 1, 2002, Joseph Puk, Sr. created the Irrevocable Trust which he funded with his home in Garden City, New York. The remainder of the Irrevocable Trust was to be shared by his four children equally. After the decedent’s death, the four children reached a settlement agreement which attempted to resolve the disparate treatment by the decedent of his son Joseph in the Living Trust.

On June 10, 2005, John J. Puk commenced a compulsory accounting proceeding with respect to the Living Trust, the Irrevocable Trust and his father’s estate. JoAnn Goddard argued that she did not have to account due to the terms of the settlement agreement. By decision dated September 13, 2005, this court, on its own initiative, directed JoAnn Goddard to account as executor and as trustee of both trusts. Thereafter, JoAnn Goddard filed an accounting and a petition for each of the Living Trust, the Irrevocable Trust and the estate.

On April 19, 2006, the original return date of the citation in each accounting proceeding,

John J. Puk and Joseph Puk, Jr. appeared by counsel and requested an SCPA 2211 examination of JoAnn Goddard with respect to each proceeding. Ms. Goddard's examination was scheduled for May 16, 2006. On April 20, 2006, John J. Puk served a notice for discovery and inspection of documents in each proceeding. Thereafter, it was discovered that service of the citation upon Richard Puk in each of the proceedings was deficient. Accordingly, a supplemental citation returnable on May 24, 2006 was issued. In view of the jurisdictional issue, the SCPA 2211 examination was adjourned without date.

JoAnn Goddard's examination was then set for June 22, 2006. A week before that date, however, Joanne Goddard's counsel advised that the supplemental citations they served upon Richard Puk by certified mail were returned to their office unclaimed. Thus, a second supplemental citation for each proceeding was issued. Service was properly effectuated and jurisdiction was completed on June 19, 2006.

JoAnn Goddard's examination began on August 7, 2006 but was not completed on that date. Counsel agreed that the fiduciary's examination would remain open and certain documents either required to be produced pursuant to the notices of discovery and inspection or the production of which was called for at the August 7, 2006 deposition would be provided. The parties agreed that the time to file objections would be extended to October 2, 2006. Since the documents were not provided, the completion of the examination did not take place and the time to file objections was again extended on consent to November 2, 2006. John's counsel asserts that to date JoAnn Goddard has failed to respond to the outstanding discovery demands as outlined in his letter dated August 10, 2006 to opposing counsel and has failed to make herself available for examination.

JoAnn opposes the motion on the grounds that she did, in fact, appear for her

examination and was in the process of obtaining new counsel at the time the instant motion was made. In addition, JoAnn's current counsel claims that JoAnn has substantially complied with the prior discovery requests and that her substantial compliance requires that the motion be denied. Counsel cites *Bach v City of New York*, (304 AD2d 686 [2d Dept. 2003]) in support of his position. In that case, however, the court was asked to strike the defendant's answer which it declined to do in view of the defendant's substantial compliance with discovery. Here, John has asked only that JoAnn Goddard be directed to comply with the outstanding discovery and be directed to appear for the completion of her SCPA 2211 examination. Moreover, there has been no showing of substantial compliance.

Accordingly, the motion is granted. The court directs JoAnn Goddard to comply with the outstanding items in the notices of discovery and inspection and to produce those documents requested at the SCPA 2211 examination held on August 7, 2006 as outlined in counsel's letter dated August 10, 2006, on or before April 14, 2007. The examination of JoAnn Goddard shall be continued in this court on April 23, 2007 at 10:00 a.m., and, if her deposition is not completed on that day, at 10:00 a.m. on each subsequent day thereafter until her deposition is completed. The request for costs is denied at this time; however, any delay in compliance with this court's present order will result in appropriate sanctions.

John has also commenced a proceeding, by order to show cause, to: (i) suspend and remove JoAnn Goddard as trustee of the Irrevocable Trust for alleged gross misconduct and failure to appear for the completion of her SCPA 2211 examination and to appoint himself as successor trustee or, in the alternative, to suspend her from taking any action as trustee with respect to the Garden City property and appoint himself as trustee for the limited purpose of administering the Garden City property, (ii) suspend JoAnn Goddard from taking any action as

trustee of the Living Trust with respect to administering the Garden City property for alleged gross misconduct and her failure to appear for the completion of her SCPA 2211 examination and appoint himself as limited trustee for the purpose of administering the Garden City property and (iii) suspend and remove JoAnn Goddard as executor for her failure to appear for the completion of her SCPA 2211 examination.

This proceeding requests relief pursuant to SCPA 711 and 712. Where a fiduciary has violated her fiduciary obligations, “the Surrogate is vested with discretion to select a number of courses of relief, the most serious of which is revocation of letters and removal of the fiduciary” (*Matter of Duke*, 87 NY2d 465, 473 [1996]). “Not every breach of fiduciary duty warrants removal and courts are generally hesitant to exercise the power to remove a fiduciary....” ( *Matter of Collins*, 36 AD3d 1191, 1193 [3d Dept 2007]). Removal may only be granted “when the grounds set forth in the relevant statutes have been clearly established” (*Matter of Petrocelli*, 307 AD 2d 358, 359 [2d Dept 2003]).

With respect to the branch of the application to remove JoAnn as executor, the only argument petitioner has advanced is that JoAnn failed to appear for the completion of her SCPA 2211 examination. The court declines to remove JoAnn for her failure to appear since her deposition was not pursuant to court order. If, however, she fails to appear and submit to her deposition in the court on April 23, 2007 at 10:00 a.m. and, if this deposition is not completed on that day, at 10:00 a.m. on each subsequent day thereafter until her deposition is completed, she will be in violation of this court’s order and petitioner may renew his application for her removal.

Concerning the Irrevocable Trust, petitioner seeks to suspend JoAnn as trustee for her failure to appear for her SCPA 2211 examination and for alleged misconduct with respect to the

administration of the Garden City property. Concerning the Living Trust, John alleges that JoAnn made transfers to herself and to Richard in violation of the trust agreement, paid herself trustee commissions in excess of the actual amount due to her and failed to properly administer the Garden City real property. Although, the real property is held in the Irrevocable Trust, it is alleged that the expenses on the Garden City property were and continue to be paid out of the Living Trust.

The court finds that JoAnn's failure to reschedule her SCPA 2211 examination does not warrant her removal as trustee of the Living Trust or trustee of the Irrevocable Trust for the same reason it did not support her removal as executor. With respect to the allegations regarding inappropriate transfers from the Living Trust, a review of the transcript from the SCPA 2211 examination demonstrates that JoAnn claims that the transfers were gifts made at the direction of the grantor. Similarly, JoAnn claims, with respect to the overpayment of commissions, that she was advised by her then attorney of the amount she should take as commission. She agreed at her deposition that, if that amount is incorrect, she will make whatever adjustment is necessary. Summary removal of a trustee "will constitute an abuse of discretion where the facts are disputed, where conflicting inferences may be drawn therefrom, or where there are claimed mitigating facts that, if established, would render summary removal an inappropriate remedy" (*Matter of Duke*, 87 NY2d 465, 473 [1996]). Here, the facts surrounding these transfers are in dispute and there may be mitigating facts concerning the overpayment.

The court is, however, mindful that the settlement agreement was entered into between the parties on July 14, 2003, yet the Garden City real property held in the Irrevocable Trust has not been sold. Paragraph 6 of the Agreement provides that the house "shall be sold as soon as reasonably possible after the execution of this Agreement." It appears that a contract of sale was

entered into sometime in 2004, but the sale was never effectuated. JoAnn claims that the sale was aborted when it was determined that a certificate of occupancy was needed for a sun room. A claim, however, has been filed against the estate by a real estate broker in the amount of \$31,500.00 with respect to the aborted sale which apparently belies JoAnn's position. In any event, the court is troubled by the trustee's delay in selling the Garden City property, as well as the possible financial harm to the Irrevocable Trust, caused by the aborted sale and resulting claim. The court, however, is not persuaded by the argument that simply because the Living Trust pays expenses on the Garden City property, JoAnn's actions or inaction as trustee of the Irrevocable Trust warrant her removal as trustee of the Living Trust. Accordingly, a hearing limited to the issue of the removal of JoAnn Goddard as trustee of the Irrevocable Trust is scheduled for June 29, 2007 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: March 22, 2007

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court