

Matter of Griffin

2007 NY Slip Op 30428(U)

March 22, 2007

Surrogate's Court, Nassau County

Docket Number: 0335637

Judge: John B. Riordan

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

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In the Matter of the Petition of Marybeth Cully for a
Compulsory Accounting and Related Relief in the
Estate of

File No. 335637

Dec. No. 208

MARY R. GRIFFIN,

Deceased.

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This is a proceeding by an unsecured creditor of the decedent to compel her executor to render and settle his account (SCPA 2205; SCPA 2206).

Petitioner essentially claims that the decedent executed a note in the principal amount of \$13,000 with interest in the amount of 9.9 percent per annum payable to her order on August 8, 2000. Petitioner asserts that a partial payment of \$7,700 was made to her on February 10, 2002 by decedent's then attorney-in-fact, Joan Cole. Petitioner now seeks the balance of the note and interest thereon to date.

The executor has filed an answer wherein he objects to the filing of a judicial accounting as receipts and releases have been collected from all beneficiaries and filed with this court. The executor also objects to the compulsory accounting on the grounds that the claim is invalid and pleads three affirmative defenses and two counterclaims.

The executor now moves this court for an order dismissing the petition on the grounds that the statute of limitations has expired and that the petition fails to state a cause of action upon which relief can be granted (CPLR 3211[a][5] and [a][7]).

The court notes that SCPA 1809(3) suggests that a court may determine the validity of a claim preliminary to an accounting. Thus, the court can, by converting a petition for a

compulsory accounting in an estate into a SCPA 1809 proceeding, obviate the need for a full accounting where the only issue is the validity of the claim (SCPA 1809[3]; Turano and Radigan, New York Estate Administration [2007 ed.] §5.07[c]). Accordingly, this petition is deemed to be one to determine the validity of the claim.

STATUTE OF LIMITATIONS

The executor asserts that the claim arose on August 8, 2000, the date of the note. He alleges that the statute of limitations expired on August 9, 2006. This proceeding was commenced by the filing of the petition on November 27, 2006. Therefore, the executor argues, this attempt to determine the validity of petitioner's claim is barred by the six-year statute of limitations (CPLR 213). Petitioner asserts that the statute of limitations runs from February 10, 2002, the date of partial payment, which revived the entire debt, and thus this proceeding is timely commenced.

It is well settled law that part payment is considered as an acknowledgment of the debt and a promise to pay the remainder (*Smith v Ryan*, 66 NY 352 [1876]; *see also* GOL 17-101). Where part payment of a debt, whose enforcement is otherwise barred by the statute of limitations, is made under circumstances from which a promise to honor the obligation may be inferred, the payment will be effective to make the time limitation for bringing an action start anew from the time of such payment (*Roth v Michelson*, 55 NY2d 278, 281 [1982]; *Saljanin v Vuksanaj*, 284 AD2d 525 [2d Dept 2001]; Carmody-Wait 2d §13:452). The burden is on the creditor to show that the debtor's payment was in fact payment of a portion of the admitted debt. The creditor must show that it was paid and accepted by the creditor as such a partial payment accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more funds being due from which a promise may be inferred to pay the remainder.

Thus, the mere part payment itself is not sufficient to take the case out of the statute of limitations (*Sweeney v Gould Paper Co.*, 7 AD 2d 147 [4th Dept 1959]; *Arkport State Bank v Nutter*, 282 AD 412 [4th Dept 1953]; *see Matter of Pappalau*, 261 AD 705 [3d Dept 1941]; *Carmody-Wait* 2d §13:455).

In the instant matter, the petition contains the letter of Joan Cole dated February 10, 2002 enclosing the partial payment and acknowledging the full debt of \$13,000. The letter states that “the remainder will be paid as soon as funds are available.” The executor has pled as a first counterclaim that “any payments received by the claimant were made as a result of a mistake. Respondent demands recovery of same.” The executor’s affirmation in support of the motion admits that Joan Cole made a partial payment of \$7,700 on February 10, 2002 but “evidently she was fooled by petitioner. I don’t believe Joan Cole ever saw the underlying document.” Assuming that these allegations of the executor raise a factual issue, they are insufficient to grant the relief requested herein. At best, from the executor’s point of view, he may have raised a factual issue about the partial payment as a revival of the statute of limitations. Accordingly, the executor’s motion to dismiss the petition on these grounds is denied.

FAILURE TO STATE A CAUSE OF ACTION

Examination of the four corners of this pleading manifests a claim cognizable under the law (CPLR 3211[a][7]; *Foley v D’Agostino* 21 AD2d 60 [1st Dept 1964]). To the extent that the executor seeks to attack the underlying facts in support of the claim, he fails to do so other than by his own personal ruminations about the note and the fact that the decedent was 87 when she executed it and did not call him for his legal advice. To the extent that the motion is treated as one for summary judgment (CPLR 3211[c]), the executor has failed to make a prima facie

showing of entitlement to summary judgment as a matter of law (CPLR 3212; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Accordingly, the motion to dismiss the petition on these grounds is also denied.

The parties are directed to appear on April 17, 2007, at 9:30 a.m., for conference to schedule discovery and fix a date for trial.

Settle order on notice.

Dated: March 22, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court