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

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In the Matter of the Account by HARVEY B. ETESS,
as Executor of the Estate of

MOLLIE ETESS,

Deceased.

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File No. 335687

Decision No. 79

In this accounting proceeding by the executor of the estate, petitioner, Harvey B. Etess, moves pursuant to CPLR 3211[a][1], [5] and [7] and CPLR 3212 for an order (1) dismissing the objections to the account filed by objectants, Paul Etess and Linda Meisel, and (2) granting the executor's application to have the court fix counsel fees and disbursements to be charged against the objectants' interests in the estate and to fix fees incurred in defending against the objections. The objectants oppose the executor's motion and cross-move for an order pursuant to CPLR 3124 and 3126 to compel the executor to fully produce documents. The executor opposes the objectants' cross-motion. For the reasons that follow, the executor's motion is granted in part and denied in part and the objectants' cross-motion is denied.

FACTS

The decedent, Mollie Etess, died on November 24, 2004 leaving a Last Will and Testament dated March 5, 1983. Under Article THIRD of the will, the decedent's residuary estate was divided equally among her four children, Harvey, Paul, Linda and Michael, and Linda received a bequest of the decedent's jewelry.

The dispute between the executor and two of his siblings, the objectants herein, arises from allegations that the executor converted assets between 1986 and 1989 or into the early 1990s in the amount of $400,000 belonging to decedent and her husband Joseph. The objectants

base this allegation on a comparison of the 1986 and 1989 joint income tax returns of Joseph and the decedent that shows approximately $23,000 less in taxable interest income in 1989 than in 1986. They also assert that evidence of $55,000 of proceeds from a sale of real property in 1986 is missing from the returns. Finally, the objectants allege that the executor failed to include in his account three joint accounts titled in his name and that of the decedent.

The decedent's husband, Joseph Etess, suffered a stroke on July 31, 1989 and was hospitalized while he and the decedent were living in Liberty, New York. He transferred to Long Island Jewish Hospital in Lake Success, New York, for his care and had rehabilitation therapy at Parker Geriatric, which is also located in Lake Success. In the fall of 1989, he and the decedent relocated to Nassau County. In 1990, prior to selling their home in Liberty, the decedent purchased a cooperative apartment in Roslyn Gardens, New York. Joseph appointed his son Harvey, the executor herein, as his attorney-in-fact on June 7, 1990. The house the decedent and Joseph owned in Liberty was sold. The closing occurred on June 9, 1990, netting $81,649. The executor used the power-of-attorney on that date at the closing. The executor asserts that that was the only occasion when he acted as Joseph's attorney-in-fact. The record is devoid of any evidence to the contrary.

After Joseph's stroke in July 1989 and continuing into 1990 or 1991, decedent and Joseph had their assets transferred to financial institutions in Nassau County. On March 28, 1991, the decedent executed a power-of-attorney, also naming Harvey as her attorney-in-fact. According to Harvey, he never acted as attorney-in-fact for the decedent. Again, the record is devoid of any evidence to the contrary. Joseph died on June 20, 1991.

In her affidavit in opposition to the executor's motion, Linda asserts that the executor "was the decedent's lifeline. She relied upon him for her medical care and her financial security,

just as she had done with my father when he was alive." The executor is a medical doctor; he retired from practice several years prior to the decedent's death. Linda also states that the decedent was "so afraid of Harvey that she never wanted to discuss her finances with us." The decedent died on November 24, 2004.

BACKGROUND

Preliminary letters testamentary issued to Harvey on March 1, 2005. The objectants commenced a proceeding seeking, among other things, revocation of the executor's preliminary letters and issuance of temporary letters of administration to them. Letters testamentary issued to the executor on May 25, 2005. The May 24, 2005 Decree Granting Probate provided for the revocation of the executor's preliminary letters. No determination was made on the petition seeking revocation of the preliminary letters.

The objectants also commenced a proceeding seeking, among other things, an order revoking the executor's letters testamentary and granting letters of administration c.t.a. to them. They alleged that the executor was unfit to serve as fiduciary of the estate. The objectants then filed a motion pursuant to CPLR 3217[b] seeking an order allowing them to discontinue the removal proceeding. They asserted that the issues they raised in the revocation proceeding could be litigated in the context of the executor's accounting proceeding. The executor opposed the motion to discontinue and cross-moved for discovery. The court granted the objectants' motion to discontinue the proceeding, denied the executor's cross-motion, determined that the executor's request for counsel fees would await the accounting, and, on the court's own initiative (SCPA 2205[1]), ordered the executor to commence a final accounting proceeding within sixty days of the order (Decision No. 1119, February 1, 2006). Objectants' petition to compel the executor to file an account was mooted by the court's order in the second revocation proceeding.

On February 22, 2006, the executor filed a petition for judicial settlement of his account as executor, along with his account for the period from November 24, 2004 to January 3, 2006. Jurisdiction was obtained over Paul, Linda and Michael. Michael did not appear in the proceeding.

The objectants moved for an order pursuant to CPLR 3124 compelling discovery, and the executor cross-moved for an order striking objectants' notice for discovery and inspection. The court denied the objectants' motion and granted the cross-motion to the extent that the document demand was vacated without prejudice to the service of a new demand upon completion of the SCPA 2211 examination of the executor and the joinder of same by the filing of objections. The court directed that the executor's SCPA 2211 examination be held at the courthouse on September 19, 2006 and that he produce at the examination all the books and records compiled during the course of and used in the preparation of the account (Decision 441, August 16, 2006).

The SCPA 2211 examination of the executor was conducted on the scheduled date. On September 26, 2006, the objectants filed their verified objections to the executor's account. Specifically, they object to:

> "1. Executor's Commissions as being unwarranted due to the misconduct and breach of fiduciary duty by the Executor, including but not limited to willful and malicious destruction of records and failure to account for property of the decedent converted by him prior to the death of the decedent.
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> 2. Executor's Commissions as being excessive and improperly computed.
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> 3. Attorney's Fees as being excessive.
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> 4. Attorney's Fees due to misconduct of the Executor.
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> 5. the Accounting for failure to include a claim against Harvey Etess, individually, for conversion of the

Decedent's assets prior to Decedent's death, said claim being in excess of $1,500,000.

6. the Accounting for failure to include a claim against Harvey Etess, individually, for breaching his fiduciary duty as attorney-in-fact for the decedent prior to her death, by not properly investing decedent's assets in a manner that would provide maximum return consistent with preservation of principal.

7. the Accounting for failure to include as assets of the Estate, accounts of the decedent at Dreyfus, T. Rowe Price, and Vanguard, said accounts having an approximate value of $230,000."

In support of his motion, the executor asserts that objections "5" and "6" are barred by the statute of limitations, that the objections are "conclusory, nonspecific and fail to allege a claim in legally sufficient form," that the objections should be dismissed on documentary evidence, that his moving papers show a prima facie entitlement to summary judgment and that the objectants have failed to raise any genuine issues of fact in their opposition papers. The objectants assert that their claims against the executor are not barred by the statute of limitations, that material issues of fact exist and that discovery is incomplete.

THE OBJECTANTS' CROSS-MOTION

Objectants cross-move to compel discovery from the executor. They assert that the executor's motion for summary judgment is premature because discovery has not been completed.

The scope of discovery is unquestionably broad in New York (CPLR 3101[a]; *see e.g. Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). The statutory mandate is that "[t]here

shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . .” (CPLR 3101[a]). The New York Court of Appeals has interpreted the words "material and necessary" "liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). This does not mean, however, that discovery is unlimited; additional disclosure is not warranted where is it nothing other than a "fishing expedition" (*see Greenberg v McLaughlin*, 242 AD2d 603, 604 [2d Dept 1997]). Further, a bald claim that additional discovery is necessary is not enough to avoid summary judgment "unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Ruttura & Sons Constr. Co., Inc. v Petrocelli Constr., Inc.*, 257 AD2d 614, 615 [2d Dept 1999]).

The objectants contend that not all of the requested documents have been provided, including five boxes that the objectants and their spouses state they saw in the decedent’s home after her death that they allege contained documents belonging to the decedent. They also contend that some of the documents that were produced were redacted or otherwise illegible. The objectants claim that the executor has not produced "missing tax returns" of the decedent that the executor is alleged to have told Linda he had. The objectants complain about the "[a]bsence of common sense records such as 1099's, Bank Statements, [the decedent’s] checkbooks, etc." and "[d]ocuments allegedly missing which belies [the executor’s] penchant for meticulous record keeping and [the decedent’s] pack rat reputation." Finally, the objectants assert that the executor has "refus[ed] to permit Discovery of questionable joint financial accounts."

In his opposition to the cross-motion, the executor asserts that he has provided to the objectants all the documents he had. In that regard, annexed as an exhibit to his moving papers is a letter dated November 7, 2005 (prior to the commencement of the instant proceeding) from the executor's attorney to the objectants' counsel showing a "schedule of assets and back-up documentation" that the executor asserts show the transfer of assets belonging to the decedent and Joseph from Liberty, New York, to Nassau County in 1989 and 1990 and other financial information. The executor explains the "back-up" sheets he provided to the objectants contain clean copies of the documents the objectants claim are illegible. The executor states that he brought to the SCPA 2211 examination all of the documents he was directed by the court to bring and that all the original documents the objectants requested he bring to the SCPA 2211 examination were brought and available to them. The executor notes that no formal request for additional discovery was made after the SCPA 2211 examination was concluded.

Additionally, the executor correctly points out that many of the documents the objectants claim were not produced are approximately twenty-years-old and the objectants have shown no proof that the executor ever had these documents in his possession or control. The executor also states that he voluntarily gave authorizations to the objectants to obtain the decedent's tax returns going back as far as 1986 and offered to give authorizations to them so that they could obtain the decedent's records from Citibank and financial institutions in Liberty. The objectants do not dispute these assertions.

The executor states that the five boxes that the objectants allege contained decedent's documents in fact that contained dishes. Annexed to the executor's reply/opposition to the pending cross-motion is an affidavit of his, sworn to on May 26, 2006, previously submitted in opposition to the objectants' motion for discovery prior to the executor's SCPA 2211

examination and in support of the executor's cross-motion to strike the demand. In that affidavit, the executor states that the documents stated "not to exist" or "not to be in [his] possession" in his Response to Document Demands dated March 27, 2006 "do not exist or not in [his] possession or control."

Finally, with respect to the accounts titled jointly at decedent's death in her name and the executor's, the executor has submitted documents he contends show that the funds in these accounts originated from his funds. More importantly, the executor has annexed to his moving papers the account applications for the three accounts. According to the application form, the Dreyfus account was opened on January 13, 1993 by the decedent and the executor. The decedent is listed as the "owner" of the account and the executor is listed as the "joint owner." Directly under their names, the form clearly states "[j]oint tenancy with right of survivorship presumed, unless otherwise indicated." Nowhere on the form is there any language to indicate that the account was anything other than a "[j]oint tenancy with right of survivorship." The signatures of the decedent and the executor appear on the reverse side of the application, again with the decedent's name on the line provided for the owner and the executor's name on the line provided for the joint owner. The space provided for a social security or employer identification number is blank. The information on the applications for the Vanguard and T. Rowe Price accounts is identical in these regards, except the date appearing next to the signatures is June 11, 1993 on the Vanguard application and May 21, 1993 on the T. Rowe Price application. The executor correctly notes that the objectants have offered nothing, other than pure speculation, to demonstrate that the accounts were not joint with right of survivorship.

The court finds that the executor has complied with the discovery requests and that the objectants have obtained ample discovery in order to be able to defend against the executor's

motions to dismiss and for summary judgment. The objectants do not allege that they need discovery from any other person or entity. Accordingly, the objectants' motion to compel additional discovery is denied.

THE EXECUTOR'S CPLR 3111 and 3212 MOTIONS

Objection "5"

The objectants object to the accounting on the ground that it fails to include a claim against the executor, individually, for "conversion of the Decedent's assets prior to Decedent's death, said claim being in excess of $1,500,000 [objection "5"]. The executor has moved to dismiss the objection on the ground that it is barred by the three-year statute of limitations for conversion and, indeed, even by the longer statute of limitations for fraud. The executor asserts that if the objection is intended as one for fraud, it should be dismissed for failure to plead fraud with particularity. He also moves for summary judgment.

The executor states that he was not appointed as attorney-in-fact for Joseph Etess until June 1990 and for the decedent until March 1991. He asserts that the objectants have submitted no evidence to support their allegations that the executor converted any of the decedent's assets or defrauded her in any way. Notably, the tax returns in question were not prepared by the executor, but by a "paid preparer."

The objectants claim that because the 1989 joint income tax return of decedent and Joseph Etess shows $23,000 less in interest income than does their 1986 joint income tax return and does not include $55,000 of proceeds from the 1986 "sale of the School Street property," the executor converted $400,000 in assets belonging to the decedent. The objectants do not explain how they arrived at their allegation that the "conversion" amounted to $1,500,000. Other than the tax returns, the objectants do not offer any documentary evidence on this issue. Nor do they

offer any evidence that the decrease in interest or the purported failure to include $55,000 of profit was attributable to actions of the executor. They devote most of their papers to their unsuccessful assertion that more discovery on this and other the other objections is needed from the executor. Finally, they argue that the decedent could not have discovered the "fraud" prior to her death because the executor was her "physician, had her power of attorney, and handled all of her financial affairs." The objectants assert that they, as her heirs, "have within the Statute of Limitations brought this proceeding after her death."

"The test of a cause of action to determine the applicable statute of limitations is its gravamen, and not the form in which it is pleaded" (*Matter of Carvel*, NYLJ, Nov. 24, 1995, at 33, col. 3 [Sur Ct ,Westchester County]; *see also Wilson v Bristol-Myers Co.*, 61 AD2d 965 [1978]. The statute of limitations for a discovery proceeding or a proceeding for replevin or conversion is three years (CPLR 214[3]). The statute of limitations for a proceeding in which fraud is alleged, however, is six years from the commission of the wrong or two years from the discovery of the fraud or the date on which it could reasonably have been discovered, whichever is later (CPLR 203[g]; 213[8]). Although fraud must be pleaded with particularity (CPLR 3016[b]), "if fraud is the cause of the injury, the form in which it is pleaded will be immaterial and the six year statute of limitations under CPLR 213(8) will apply. If fraud is not the gravamen of the complaint CPLR 213(8) cannot be invoked"(*Matter of Carvel*, NYLJ, Nov. 24, 1995, at 33, col. 3 [Sur Ct, Westchester County]).

The acts about which the objectants complain are alleged to have occurred from 1986 to at the latest sometime in the early 1990s, almost a decade-and-a-half ago. The court finds that the claim is barred by the three-year statute of limitations for conversion (CPLR 214[3]) and would be barred even if the statute of limitations period for fraud were applicable. There is no

evidence in the record to support the objectants' contention that the decedent could not have discovered the alleged fraud during her lifetime. Although the executor acted as the decedent's physician on a number of occasions and helped her at times with some financial arrangements, the record does not establish that the executor handled all of the decedent's financial affairs. Even if the statute of limitations was not a bar, to recover damages for fraud, a litigant must plead with particularity and prove "(1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant; (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it; (3) justifiable reliance of the plaintiff on the misrepresentation or material omission; and (4) injury" (*Jablonski v. Rapalje*, 14 AD3d 484, 487 [2d Dept 2005]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; CPLR 3016([b]). Certainly, if the objection were intended to sound in fraud, it was not pled with the requisite particularity, and there is nothing in the record that illuminates the objectants' allegations. Indeed, none of the elements of fraud was pled with particularity or otherwise.

The court also finds that the executor has made a prima facie showing of entitlement to summary judgment with respect to objection "5", were it otherwise not barred by the statute of limitations (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]) and that the objectants have failed to establish the existence of a material issue of law that would require a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The objectants' "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient," even when viewed in the light most favorable to them (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Prudential Home Mtge. Co. v Cermele*, 226 AD2d 357, 357-58 [2d Dept 1996]; *Marine Midland Bank, N.A. v Dino & Artie's*

Automatic Transmission Co., 168 A.D.2d 610 [2d Dept 1990]).

Accordingly, the court dismisses objection "5" on statute of limitations grounds and because there is no genuine issue of fact to be tried.

Objection "6"

The executor seeks summary judgment with respect to the objectants' claim that the accounting "fail[s] to include a claim against [the executor], individually, for breaching his fiduciary duty as attorney-in-fact for the decedent prior to her death, by not properly investing decedent's assets in a manner which would provide maximum return consistent with preservation of principal." As indicated above, the executor contends that he never acted as decedent's attorney-in-fact and objectants have not offered any evidence that he did. The objectants are apparently attempting to establish liability against the executor as attorney-in-fact pursuant to the prudent investor statute (EPTL 11-2.3), but an attorney-in-fact, simply by virtue of his appointment as such, is not subject to the prudent investor standard (EPTL 11-2.3[e][1]). In any event, there is no evidence whatever that the executor's action or inaction led to a loss in the decedent's assets. Accordingly, the executor's motion for summary judgment is granted; objection "6" is dismissed.

Objection 7 (the Dreyfus, T. Rowe Price and Vanguard Accounts)

The executor moves to dismiss under CPLR 3211[a][1] and for summary judgment pursuant to CPLR 3212 with respect to the accounts at Dreyfus, T. Rowe Price and Vanguard accounts that were titled in the names of the decedent and the executor. The executor asserts that he is entitled to judgment on this objection because he has produced documentary evidence proving that the money deposited into these accounts was solely his and that the account opening applications show, as a matter of law, that the accounts were titled jointly in the names of the

decedent and the executor, with right of survivorship. The court finds that the executor has met his burden of showing that he is entitled to summary judgment with respect to ownership of these accounts. The account applications show that the accounts were owned jointly by the decedent and the executor, with right of survivorship. Moreover, the objectants have failed to offer anything other than speculation and conjecture to show that any portion of the proceeds of these accounts is an estate asset. Their argument that they need additional documentation about the accounts is addressed above. The executor became the sole owner of the accounts upon decedent's death.

The accounts were opened in 1993, more than eleven years prior to the decedent's death. There is no evidence in the record that she was not fully competent at the time or that the opening of the accounts was the product of fraud or undue influence.

The executor's motion for summary judgment with respect to objection "7" is granted.

Objections 1-2 (Commissions)

The court grants the executor's motion for summary judgment with respect to objections "1" (commissions "unwarranted due to the misconduct and breach of fiduciary duty by the Executor") and "2" (commissions "excessive and improperly computed"). The court finds that the executor has met his burden of proving entitlement to summary judgment with respect to the entitlement and calculation of commissions, and the objectants have failed to articulate the basis for their claim that commissions were improperly calculated or to offer any proof that a genuine issue of fact exists about the executor's conduct.

Objections 3-4 (Attorney's Fees)

The executor's motion for summary judgment on objection "3" ("[o]bject to Attorneys' Fees as being excessive") is denied. The executor's attorney has not submitted an affirmation of

legal services as would be necessary to make that determination.

The executor's motion for summary judgment on objection "4" ("object to Attorneys' Fees due to misconduct of the Executor") is granted. The executor has made a prima facie showing of entitlement to judgment on that issue. The objectants have failed to offer any evidence sufficient to create a genuine issue of fact to support their allegation of misconduct by the executor.

The executor has also moved to fix attorney's fees and disbursements to be charged against the objectants' interests in the estate and whether to "fix further professional fees incurred by the objections." The court denies that request for relief. There is no proof in the record that the objectants' acted in bad faith or that their objections were frivolous or otherwise deserving of sanctions.

CONCLUSION

For the reasons stated above, the executor's motion for dismissal and summary judgment is granted in part and denied in part. The objectants' cross-motion to compel discovery is denied.

The executor is directed to serve and file his attorney's affirmation of legal services within thirty days of entry of the order. Objectants' opposition, if any, must be served and filed fifteen days thereafter.

This constitutes the decision of the court.

Settle order on five days' notice.

Dated: March 30, 2007

JOHN B. RIORDAN
Judge of the
Surrogate Court