

Matter of Darwish

2007 NY Slip Op 30722(U)

April 13, 2007

Surrogate's Court, Nassau County

Docket Number: 0327992/2007

Judge: John B. Riordan

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

-----X
 In the Matter of the Account by Evelyne Somekh and
 David Darwish, As Executors of the Estate of

File No. 327992

Dec. No. 145

MOUZLI DARWISH,

Deceased.
 -----X

Before the court in this contested accounting proceeding is a motion to dismiss the objections.

The decedent, Mouzli Darwish, died on September 4, 2002. She was survived by six children. The decedent's will dated February 2, 1989 was admitted to probate by this court on July 17, 2003. The decedent nominated two of her children, Evelyne Somekh and David Darwish, as co-executors. The decedent's will provides that her estate be divided equally between the six children.

Evelyne Somekh and David Darwish ("petitioners") filed a petition to settle their account with the court. Objections to the account were filed by three of the decedent's children; Claire Rabiea, Josette Buchman and Valentine Hillel ("objectants"). The objections can be summarized as follows: commissions are unwarranted due to misconduct by the fiduciaries; commissions are improperly calculated; attorneys fees are excessive; failure to include personal property; failure to include conversion claims in the amount of \$500,000 against both fiduciaries; failure to include rent collected prior to the decedent's death on one of her apartments; and failure to include a claim against Evelyne Somekh for payment of \$20,000 and for an additional \$25,000 allegedly used by Evelyne Somekh for renovations to her house.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always reviewed in a light most favorable to the nonmoving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of law that would require a trial (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (see *Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]); see *Prudential Home Mtge. Co., Inc. v Cermele*, 226 AD2d 357 [2d Dept 1996]).

Because Objections one through four deal primarily with the alleged misconduct of the fiduciaries and are closely related to the remaining objections, they will be addressed at the end of the decision.

Objection Five

The fifth objection is for failure to include all personal property belonging to the decedent. In support of their accounting, the petitioners attached an appraisal by Cornelius A. Heaney of the decedent's personal property. The appraiser valued the personal property at \$35,203.00. The objectants allege that items were omitted from the inventory that should have been included. They have specifically identified the items that they believe should have been included. As there is a question of fact as to whether the fiduciaries collected all of the decedent's personal property, summary judgment is denied as to this objection.

Objection Six

The Sixth objection is "failure to include a claim against Evelyne Somekh, individually, for conversion of the Decedent's assets in the three (3) years prior to the Decedent's death, said claim being in excess of \$500,000". It is uncontroverted that the decedent lived with Evelyne Somekh for approximately three years prior to her death. It is also uncontroverted that the decedent owned three condominiums, one of which had been her primary residence before she moved in with her daughter Evelyne. While the decedent lived with Evelyne Somekh, she collected rent in the total amount of \$5,850 per month on two of the three apartments. Moreover, at some point in 2002, the decedent obtained a mortgage loan in the amount of \$299,000 on one of her condominiums, allegedly to pay for her care. It is further uncontroverted that the decedent had three bank accounts which are listed on Schedule A of the accounting. Two of the accounts

were at Astoria Federal Savings Bank (a checking and money market account) and one account was at Smith Barney. The Astoria Federal Savings Bank accounts were held jointly with right of survivorship by the decedent and Evelyne Somekh and the Smith Barney Account was held by the decedent, Evelyne Somekh and David Darwish (*see* Schedule J of the Accounting). Although the three accounts are included in Schedule A, the petitioners, in Schedule J, "reserve the right to claim that title to the accounts passes by operation of law to Evelyne Somekh and/or David Darwish, as the case may be". The petitioners' proposed statement of issues indicates their election to treat the accounts as true joint accounts with right of survivorship.

The objectants allege that Evelyne Somekh converted the decedent's money for her own use. In support of their claim, they point to the fact that \$11,241.50 was withdrawn from the decedent's account via ATM machines and that \$234,275.20 was withdrawn by checks written to "cash."

The petitioners argue that joint bank accounts cannot be subject to conversion proceedings and that most of the withdrawals were used for the care of the decedent, were made prior to her death and should not be the subject of an accounting proceeding. With regard to joint bank accounts, to the extent that one party withdraws more than her one-half interest in the account, "she is subject to suit by plaintiff for conversion of the excess" (*Lenczycki v Shearson Lehman Hutton, Inc.*, 238 AD2d 248 [1st Dept 1997]; *see also Adams v Hickey*, 35 AD3d 328 [2nd Dept 2006]). Here, it is not clear whether the petitioners are claiming that the accounts in question were true joint accounts or convenience accounts. In either case, the objectants are clearly alleging conversion of at least part of the accounts and there is a question of fact as to what happened to the funds in the account. Furthermore, questions regarding authorized or

unauthorized transfers of a decedent's property prior to her death are properly before the court in an accounting proceeding (*see generally Matter of Naumoff*, 301 AD2d 802 [3d Dept 2003]).

For all of these reasons, summary judgment is denied as to this objection.

Objection Seven

The seventh objection is for failure to include in the accounting a claim against Evelyne Somekh for rent in the approximate amount of \$75,000 with respect to a condominium owned by the decedent on 100 South Middleneck Road, Great Neck, New York. As stated previously, the decedent resided in her own apartment at that address until sometime in 1999 when she moved in with her daughter, Evelyne Somekh. According to Ms. Somekh, the apartment was vacant for the first year when her mother lived with her because her mother wanted to return to the apartment. At some point thereafter, Evelyne Somekh's daughter, Lorraine, moved into the apartment. According to Ms. Somekh, the decedent did not want Lorraine to pay rent, but when Lorraine insisted on paying \$2100 per month in rent, the decedent told Lorraine to pay the money to Evelyne Somekh as a gift (*see Somekh transcript*, pages 58-61). As there is a question of fact regarding the payment or nonpayment of rent on this apartment and the bona fides of the purported gift, summary judgment is denied as to this objection.

Objection Eight

The eighth objection is for failure to include a claim against Evelyne Somekh for having paid herself \$20,000 just prior to the death of the decedent. Schedule J of the accounting contains the following statement: "[b]efore the decedent had procured a mortgage in June 2002 on the condominium at 100 Middle Neck Road to pay for her medical and personal care, Evelyne Somekh made loans to the decedent in the amounts of \$4,999, \$4,999 and \$10,000...As reflected

on Schedule A, by check dated August 29, 2002 in the amount of \$20,000 made payable to HSBC, the decedent's loan from Mrs. Somekh was repaid...". The objectants dispute that there was a loan between the decedent and Evelyne Somekh as the decedent had ample income from the rental of the apartments to cover her medical costs and would not have needed to borrow money from Evelyne Somekh. Further, there is no written agreement regarding the alleged loan. As there is a question of fact regarding this objection, summary judgment is denied.

Objection Nine

The ninth objection is for failure to include a claim against Evelyne Somekh for \$25,000 improperly converted from the decedent for her personal kitchen and bathroom renovations. The deposition testimony of both Evelyne Somekh and the contractor who worked on Mrs. Somekh's house clearly show that any work done to Ms. Somekh's house was done prior to the decedent moving in with Mrs. Somekh. The objectant has not offered any evidence to suggest that the work was paid for with the decedent's money. As there is no question of fact, summary judgment is granted and this objection is dismissed.

Objection Ten

The tenth objection is for failure to include a claim against David Darwish for allowing Evelyne Somekh to convert the decedent's assets and failure to take appropriate action against her. A fiduciary may commence a proceeding to recover assets in the possession of a co-fiduciary (*Matter of Hare*, 123 Misc2d 266 [Sur Ct. Nassau Co. 1984]). Moreover, fiduciaries may be liable for the actions of their co-fiduciaries (*see generally Matter of Goldstick*, 177 AD2d 225 [1st Dept 1992] modified on other grounds 183 AD2d 684 [1992]). As there is a question of fact regarding this objection, summary judgment is denied.

Objections One, Two, Three and Four

Objections one through four regard the executors commissions and attorneys' fees. With regard to legal fees, it is well settled that the Surrogate bears the ultimate responsibility to determine what constitutes reasonable legal compensation (*Matter of Stortecky v Mazzone*, 85 NY2d 518 [1992]). In determining the reasonableness, the court will consider the time spent, the difficulties involved, the nature of the services, the amount involved, the professional standing of counsel and the results obtained (*Matter of Potts*, 213 App Div 59 [4th Dept 1925] *affd* 241 NY 593 [1925]). The court must review all services performed by attorneys and professionals and the total fees paid to all the attorneys should not exceed one attorney's fee (*Matter of Mattis*, 55 Misc2d 511, 516 [Sur Ct New York County 1967]).

With regard to legal fees paid which are for services rendered on behalf of fiduciaries for the defense of the fiduciary on matters where the fiduciary is to be surcharged, these fees may not be paid from the estate (*Matter of Newhoff*, 107 AD2d 417 [2d Dept 1985]; *Matter of Hildreth*, 274 App Div 611 [2d Dept 1949]). As there is a question of fact as to the reasonableness of the fees and whether the fees should be paid form the estate, summary judgment is denied on objections three and four.

With regard to commissions, statutory commissions "must be awarded in the absence of mathematical error in their computation or allegations of misconduct amounting to dereliction, complete indifference or other comparable acts of misfeasance" (*Matter of Drier's Estate*, 245 AD2d 787, 788 [3d Dept 1997], *lv denied* 91 NY2d 812 [1997]). As there are questions of fact regarding the executors' acts and entitlement to commissions, summary judgment is denied on Objections one and two.

For all of these reasons, the motion for summary judgment is granted in part and denied in part. A trial on the issues is currently scheduled for April 30, May 1, 2 ,3 and 4, 2007.

This decision constitutes the order of the court.

Dated: April 13, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court