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

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Proceeding for Limited Letters of Administration,
Estate of

File No. 326997

MICHAEL S. McGEE, SR.

Dec. No. 346

Deceased.

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This is a proceeding brought by Dorothy McGee, the surviving spouse of Michael S. McGee, Sr., deceased, for an order granting limited letters of administration to her, without bond, pursuant to SCPA 702 (9), said letters to be limited to commencing and prosecuting a proceeding on behalf of the estate against Michael S. McGee, Jr., individually, to discover property withheld or to obtain information, pursuant to SCPA 2103. Michael Jr. is the executor of the estate. The decedent is his father. Michael Jr. opposes the relief sought in the petition and has moved for an order dismissing the petition pursuant to CPLR 3211 (a) (5) and (7).

On December 16, 2003, Dorothy filed a right of election pursuant to EPTL 5-1.1-A and a claim against the estate for payment of her exempt property rights of $15,000 cash under EPTL 5-3.1 (a) (5). On May 8, 2006, the court issued an order directing the estate to pay Dorothy the money owed to her under EPTL 5-3.1 (a) (5) and, to the extent the estate did not have sufficient funds to satisfy Dorothy's exempt property rights, to commence a turnover proceeding to recover the proceeds of checks issued to the decedent's grandchildren that did not clear prior to the decedent's death. Michael Jr. has commenced a proceeding against Colin McCarty, the only grandchild whose $10,000 check did not clear prior to the decedent's death. The estate has not paid Dorothy the money owed to her under EPTL 5-3.1 (a) (5).[1] The parties are litigating that issue in another proceeding in this court.

Dorothy asserts that she requires limited letters of administration in order to commence a discovery proceeding against Michael Jr. in his individual capacity in order to obtain a surcharge against him for $70,000, the total amount of the checks he wrote, purportedly acting as the decedent's attorney-in-fact, upon a Cross County Federal Savings Bank checking account in the names of Dorothy and the decedent, under a power-of-attorney the decedent executed six days before he died. The three sons of the decedent's son, Brian, each received two checks totaling $20,000 and the son of the decedent's daughter, Doreen McCarty, received a check for $10,000.

Dorothy alleges that the power of attorney was not valid or alternatively that Michael Jr. breached his fiduciary duty to the decedent because the gifts, which bankrupted the estate, do not effectuate the decedent's financial, estate or tax plans and fail to meet the criteria established by the New York Court of Appeals in *Matter of Ferrara* (7 NY3d 244 [2006]). Dorothy also claims that Michael Jr. exceeded his authority as attorney-in-fact since he admitted during a deposition that he wrote all seven of the checks in question after the execution of the power-of-attorney on January 7, 2003; therefore, the gifts totaling $20,000 to each of Brian's three children exceeded the $10,000 gift limitation to any one person in any year contained in the power-of-attorney. Finally, Dorothy asserts that the $70,000 should be recovered by the estate in order to apply that amount toward the bequests to the residuary beneficiaries and toward the amount used to calculate Dorothy's elective share and the amount she is due for her exempt property rights.

STATUTE OF LIMITATIONS

Michael Jr. has moved to dismiss Dorothy's petition under CPLR 3211 (a) (5) on the ground that the discovery proceeding Dorothy seeks to commence is barred by the statute of limitations. He asserts that a discovery proceeding must be commenced "by the earlier of one

year from the date letters are issued to the fiduciary or three years after a decedent's date of death."

Dorothy argues that the statute of limitations for claims against an attorney-in-fact does not commence running until he has accounted or the agency relationship between the attorney-in- fact and the principal is terminated by the principal's death, whichever is later. Dorothy correctly points out that Michael Jr. has not accounted for his stewardship as attorney-in-fact. Dorothy asserts that the statute of limitations for a breach of fiduciary duty is six years with respect to the claims she intends to raise as limited administrator.

The statute of limitations period for a discovery proceeding generally is three years (CPLR 214 [3]), unless fraud is alleged, in which case it 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" (*Matter of Kraus*, 208 AD2d 728, 729 [2d Dept 1994], citing CPLR 203 [f] and 213 [8]).

Dorothy is correct in asserting that the statute of limitations for a cause of action sounding in breach of fiduciary duty is six years (*Matter of Winne*, 232 AD2d 956, 957 [3d Dept 1996]).

The claim begins to accrue when there is an open repudiation of the fiduciary's obligation (*Matter of Barabash*, 31 NY2d 76, 80 [1972]) or the relationship has "otherwise terminated " (*Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 131 [1st Dept 1999]).

Dorothy has alleged that she is seeking limited letters of administration so that she can assert a cause of action against respondent for breach of fiduciary duty. Although Dorothy claims that the power-of-attorney is invalid, she does not state whether she intends to plead that

it was executed as a result of fraud. In any event, the court denies the estate's motion to dismiss on statute of limitations grounds. If appropriate, the executor can raise statute of limitations as an affirmative defense to Dorothy's claims in his answer if Dorothy commences a discovery proceeding against him. It is premature at this time to determine whether the estate is estopped from raising the defense of statute of limitations defense (see *Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]).

FAILURE TO STATE A CAUSE OF ACTION

Michael Jr. also moves to dismiss Dorothy's petition for failure to state a cause of action under CPLR 3211 (a) (7). He claims that there is no basis for granting limited letters of administration to Dorothy to commence a discovery proceeding against him. He asserts that Dorothy's claim to ownership of two savings accounts titled at the time of the decedent's death in both her and decedent's names, which the court determined were convenience accounts in which Dorothy had no interest renders her claim for the need for limited letters of administration frivolous and motivated by bad faith. The court is not persuaded by that argument.

Quoting *Matter of Stoller*, 4 Misc 3d 538, 539 (Sur Ct, New York County 2004) (Roth, J.), Michael Jr. also claims that Dorothy, as the surviving spouse, "cannot make any 'showing that any prejudice would result from deferring the commencement of a discovery proceeding . . . until . . . the beneficial interests in decedent's estate have been established . . . .'" Dorothy correctly points out that *Matter of Stoller* is distinguishable from the facts before the court. In *Matter of Stoller*, one of the decedent's sons sought limited letters of administration under SCPA 702 (9) to bring a discovery proceeding against his stepmother, who sought to probate an instrument containing an in terrorem clause (id. at 539). In *Matter of Stoller*, unlike here, the will had not yet been probated. Thus, the beneficial interests in the estate had not been

established (*id.* at 540). The *Stoller* court found that the petitioner had not made a showing of prejudice that would result in bringing a discovery proceeding against the widow after the will was probated (*id.*). The court stated, "But, more important, whatever the good faith of the present petition, it cannot be ignored that, when an in terrorem clause looms in the background, such an application is inherently suspect so long as the probate contest remains pending or imminent" (*id.*). There is no such concern with respect to Dorothy's petition for limited letters of administration.

Michael Jr. further argues that limited letters should not be granted to Dorothy because her claim for her elective share cannot be determined until after all of the estate's assets have been marshaled. To that end, he asserts that the estate's claim that the real property in Massapequa, New York, was owned by Dorothy and the decedent as tenants-in-common or as joint venturers must be decided before what Michael Jr. terms an "abusive and frivolous"

discovery proceeding is commenced. Michael's rationale is that if the estate's claim is denied, Dorothy will be entitled to 100 per cent of the net proceeds of sale of the real property, which will more than satisfy her elective share claim. Similarly, if the estate's claim is granted, the proceeds of sale will be added to the estate assets, leaving more than a sufficient amount to satisfy Dorothy's elective share claim.

Michael Jr. admits that it is possible that the estate will not have assets sufficient to satisfy the estate's debts, administration expenses and reasonable funeral expenses, and therefore, will not be able to satisfy all or some of Dorothy's elective share claim. He concedes that the recipients of the lifetime gifts might then be liable to contribute their proportionate share to satisfy Dorothy's claim.

Although Michael Jr.'s arguments are logical, they do not warrant the dismissal of Dorothy's petition for failure to state a cause of action. "[A] motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2d Dept 2006]). SCPA 702 (9) permits the court to grant limited letters to enable the holder thereof to commence a proceeding against the fiduciary in his individual capacity. This is precisely what Dorothy has alleged she will do. The court finds that her petition adequately sets for a cause of action for limited letters of administration.

Michael Jr.'s motion to dismiss the petition is denied in its entirety. He is directed to serve and file an answer to the petition on behalf of the estate within twenty days of entry of the order to be made herefrom.

Settle order on notice.

Dated: June 21, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

[1] According to Dorothy, the estate owes her $10,098.95, which is the difference between the exempt property amount of $15,000 minus $4,901.05, the amount she received after the decedent's death from a Cross County Federal Savings Bank account and an Astoria Federal Savings and Loan Association account which the court determined were convenience accounts in which Dorothy had no interest.