

Matter of Guthartz

2007 NY Slip Op 32956(U)

September 20, 2007

Surrogate's Court, Nassau County

Docket Number: 0343312/2007

Judge: John B. Riordan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

-----X
In the Matter of the Administration Proceeding, Estate of

File No. 343312

FRIEDA GUTHARTZ,

Dec. No. 474

Deceased.
-----X

In this administration proceeding, the decedent died intestate on November 14, 1998, a domiciliary of Florida. At the time of her death, the decedent owned certain residential real estate located at 16 Lake Road, Lake Success, New York. The decedent's husband, Barnett Guthartz, has filed a petition for letters of administration. The decedent's son, Alan Guthartz, has filed a cross-petition for letters of administration and objections to the petition. Thereafter, Barnett amended his petition to request temporary letters of administration which application is also opposed by Alan. Alan objects to the petitioner's application on the grounds that petitioner is a convicted felon and is not qualified by reason of dishonesty, improvidence and is otherwise unfit pursuant to SCPA 707(1)(e). Similarly, Barnett Guthartz and the decedent's other child, Janet Barry, have filed objections to the cross-petition on the grounds that Alan is not qualified for the office of administrator by reason of dishonesty, improvidence and is otherwise unfit for the execution of the office pursuant to SCPA 707(1)(e). They also object to the cross-petition on the grounds that Barnett, as the surviving spouse, has priority to act (SCPA 1001[1]) and that, in the event Barnett's application for letters is denied, Janet has equal rights to letters of administration as Alan.

Janet Barry has now moved by order to show cause for the appointment of the Public Administrator as temporary administrator of her mother's estate. Alan opposes the appointment of the Public Administrator. Also before the court is Barnett's motion for (i) an order compelling

Alan to answer certain interrogatories and produce certain documents and (ii) a protective order, pursuant to CPLR 3103, directing that the depositions of Barnett Guthartz and Janet Barry be held in the State of Florida where they both reside.

Concerning Janet's application for the appointment of the Public Administrator as temporary administrator of the estate, Janet argues that the premises, which is currently valued between \$1,000,000.00 and \$2,000,000.00, is in need of immediate administration. According to Janet Barry, since her mother's date of death, Barnett Guthartz has been advancing the funds to pay the real estate taxes on the premises. In addition, she alleges that her father paid for the decedent's funeral expenses and paid the homeowner's insurance on the premises for the period November 14, 1998 through approximately 2005. Janet also claims that Alan has been living in the premises rent free for several years. Ms. Barry further points out that New York State estate tax may be due and, in view of the length of time since her mother's date of death, substantial interest and penalties may be accruing. Moreover, she states that distribution of the estate cannot be effectuated because Alan refuses to vacate the premises. Accordingly, Janet asks that the Public Administrator be appointed as the temporary administrator in order to administer and sell the premises.

Alan's counsel has submitted an affirmation opposing Janet's application on the grounds that there is no need for the appointment of a temporary administrator. Counsel argues that there are no exigent circumstances as shown by the fact that the decedent died almost nine years ago. Counsel argues that a temporary administrator is not necessary and that the matter should proceed to a hearing on the issue of disqualification. Counsel further states that Barnett Guthartz has never made a demand for repayment of the real estate taxes or insurance and, in fact, promised Alan Guthartz that the premises would be his after the decedent's death. According to

counsel, Alan acted in reliance upon that promise and moved into the premises and expended funds to increase the value of the property. Counsel also raises the issue that Barnett may not be of sound mind and is being unduly influenced by Janet. In addition, he challenges whether the signature on Barnett's affidavit is actually Barnett's signature. Lastly, he argues that the delay in this proceeding has been caused by Barnett who refuses to come to New York to be deposed.

Barnett has submitted an affidavit responding to the allegations in counsel's affirmation. Barnett points out that counsel's affidavit is not based upon personal knowledge. Barnett argues that he has, in fact, made demands upon Alan for payment of the homeowner's insurance and the real estate taxes. According to Barnett, he stopped paying the homeowner's insurance premiums in 2005 and directed that the bills be sent to Alan, who then failed to pay them. As a result, Barnett claims that the homeowner's insurance was canceled in early 2006. Barnett contends that he never promised Alan that the premises would be his and that he, not Alan, paid for the improvements to the home, specifically the installation of a vertical lift to the home. Barnett also claims that it is his signature on his affidavit in this proceeding.

The courts have recognized that, under certain circumstances, acrimony or disharmony among the distributees may warrant the appointment of the Public Administrator. "Although such acrimony alone does not constitute grounds for disqualification as fiduciary (*Matter of Flood*, 236 NY 408, *Matter of Lipsit*; 50 Misc 2d 289; *Matter of Miller*, 48 Misc 2d 815, 819; see also, *Matter of Stanley*, NYLJ, Dec. 27, 1983, at 14, col 1; *Matter of Schreiber*, NYLJ, June 23, 1986, at 17, col. 1; *Matter of Mattin*, NYLJ, June 27, 1990, at 29, col 6), disqualification is warranted if the disharmony jeopardizes the interests of the beneficiaries and the proper administration of the estate (*Matter of Jurzykowski*, 36 AD2d 488, *affd*, 30 NY2d 510; *Matter of Edwards*, 274 App Div 244; *Matter of Younker*, 111 Misc 2d 599; *Matter of Lipsit*, 50 Misc 2d

289; *Matter of Doerschuck*, NYLJ, May 31, 1990, at 25, col 2; *Matter of Miller*, NYLJ, Aug. 7, 1985, at 14, col 2, reargued NYLJ, July 9, 1986, at 18, col 2, *affd*, 132 AD2d 662)” (*Matter of Rad*, 162 Misc 2d 229, 232 [Surr Ct, New York County 1994]; see also, *Matter of Venezia*, 2 Misc 3d 1008A [Surr Ct, Kings County 2004], 2004 NY Slip Op 50199U [2004]).

The papers submitted herein demonstrate that extreme acrimony exists between Barnett Guthartz, Janet Barry and Alan Guthartz. Moreover, serious allegations have been made concerning both Barnett and Alan’s ability to serve. There has already been a substantial delay in the administration of the estate, and the court is concerned that the issue of New York estate tax, and possibly interest and penalties, has remained unaddressed for a significant period of time. Accordingly, letters of temporary administration will issue to the Public Administrator upon duly qualifying.

With respect to the motion for an order compelling Alan to answer certain interrogatories and produce certain documents and for a protective order, counsel are directed to appear for a conference at the courthouse on October 2, 2007 at 9:30 a.m.

Dated: September 20, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

