

<b>Matter of Passalacqua</b>
2008 NY Slip Op 31823(U)
June 30, 2008
Surrogate's Court, Nassau County
Docket Number: 0329549/2008
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 Account of Proceedings of  
John W. Sinon, Public Administrator of Nassau County,  
as Administrator c.t.a. of the Will of

File No. 329549

Dec. No. 169

ROSARIA PASSALACQUA,

Deceased.

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In this contested accounting proceeding before the court is the Public Administrator’s motion to dismiss the objections.

The decedent, Rosaria Passalacqua, died testate on July 15, 2003, a resident and domiciliary of Nassau County. She was survived by four children, her daughter, Connie Mannino, and three sons, Joseph Passalacqua, Peter Passalacqua and Anthony Passalacqua.

By her last will and testament dated April 21, 1989, the decedent bequeathed her residuary estate equally to Connie, Joseph, Peter and Anthony and nominated Joseph as executor. Joseph filed a petition for probate of the will and for letters testamentary. Connie and Joseph were separately represented by counsel and Peter and Anthony appeared pro se in the probate proceeding. Connie, Peter and Anthony objected only to Joseph’s appointment as executor. In an on-the-record stipulation of settlement in open court on December 17, 2003, all four of the decedent’s distributees consented to the probate of the will and to the appointment of the Public Administrator as the administrator c.t.a. of the estate upon his duly qualifying. The will was admitted to probate by decree date March 1, 2004, and letters of administration c.t.a. were issued to the Public Administrator on that date.

On May 16, 2005, the Public Administrator filed his petition to judicially settle his account for the period from July 15, 2003 through March 31, 2005. The summary statement

shows charges to the accounting party of \$392,649.82. Jurisdiction has been obtained over Connie, Joseph, Peter and Anthony. On August 30, 2006, at the call of calendar on the return date of the second supplemental accounting, Peter and Anthony appeared pro se. The court directed that the parties confer with a member of the law department. Connie and the Public Administrator were each represented at the conference by counsel and Peter and Anthony represented themselves. The calendar marking made after the conference states that objections to the Public Administrator's account were due by October 6, 2006. Anthony's objections dated September 15, 2006 were filed on or about September 30, 2006. The court's records indicate that Peter's objections were filed on March 28, 2007, almost six months after they were due.

The Public Administrator now moves for an order (1) pursuant to 22 NYCRR 207.36 and 207.41 or, in the alternative, CPLR 3211(b) dismissing the objections filed by Peter Passalacqua as untimely and (2) pursuant to CPLR 3211(b) and 3212 dismissing objections "1" through "20" filed by Anthony Passalacqua to the Public Administrator's account and for summary judgment. Connie Mannino's attorney filed an affirmation in support of the Public Administrator's motion. Neither Peter nor Anthony filed papers in opposition to the Public Administrator's motion papers; however, Anthony has filed what he terms an answer dated March 6, 2008 in which he responds to Connie's attorney's affirmation in support of the Public Administrator's motion.

As indicated, Peter Passalacqua's objections were filed nearly six months after they were due. No motion for permission to file late objections was made, nor is it likely that any such motion would have been granted as the objections are largely unintelligible or not directed at the accounting. To the extent that Peter's papers articulate a proper objection to the accounting, they

are duplicative of Anthony's objections. The motion to dismiss Peter's objections is therefore granted.

The Public Administrator also moves to dismiss Anthony's objections pursuant to CPLR 3211(b) (without merit) and 3212 (summary judgment). CPLR 3211(b) allows this court to dismiss an objection on the grounds that it has no merit. However, "[u]pon a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Amerada Hess Corp. v Town of Southold*, 39 AD3d 442, 442 [2d Dept 2007] [citations omitted]; *see also Warwick v Cruz*, 270 AD2d 255 [2d Dept 2000]; *Abney v Lunsford*, 254 AD2d 318 [2d Dept 1998]).

Summary judgment pursuant to CPLR 3212 may 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], quoting *Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). 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 the 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]).

In an accounting proceeding, the burden of proof as to the propriety of payment of expenses is on the accounting party (*Matter of Taylor*, 251 NY 257 [1929]; *Matter of Shulsky*, 34 AD2d 545 [2d Dept 1970]). The fiduciary must make at least a prima facie showing of both the nature and character of the expenses and that they were fair and reasonable (*Matter of Fiore*, NYLJ, December 28, 2000 at 27 [Sur Ct, Westchester County]; *Matter of Seabury*, NYLJ, May 17, 1995 at 28, col 3 [Sur Ct, Bronx County]). Fiduciaries are expected to review and scrutinize all claims and charges before paying same and cannot, by making payment, shift the burden of reasonableness to the objectant (*Matter of Taylor*, 251 NY 257 [1929]). To warrant a surcharge, the fiduciary must be shown to have acted negligently or have failed to exercise prudence in the management of the estate assets resulting in a loss (*Matter of Donner*, 82 NY2d 574 [1993]; *Matter of Hann*, 93 AD2d 583 [4th Dept 1983], *affd* 62 NY2d 821 [1984]). Moreover, "[t]he

law is clear that on the settlement of an account the fiduciary must be allowed the reasonable and necessary costs actually paid (SCPA 2307[1]) to maintain estate property” (6 Warren’s Heaton on Surrogate’s Courts, 93.06[1] at 93-18 [7th ed]; see *Matter of Schneider*, 198 Misc 1017 [Sur Ct, New York County 1950]). The Public Administrator has the duty to safeguard and protect the assets of the estate, including the decedent’s residence (*Matter of Skelly*, 284 AD2d 336 [2d Dept 2001]; *Matter of Yarm*, 119 AD2d 754 [2d Dept 1986]).

With these standards in mind, the following determinations are made with respect to each of the objections in the order in which they are addressed in the Public Administrator’s moving papers.

Objection “19” states:

“At the start of all this entire event when Joseph Passalacqua was not sworn in as the executor to the Estate as per request of Peter Passalacqua, Anthony Passalacqua and Connie Mannino, the other three siblings to the Estate. As a client or consumer the Public Administrator of the court system should have given us some type of proposal, or estimate. This approximate estimate should have included the law firm assigned by the court and its personnel involved in any of the work being performed for the Estate. It should also include the Public Administrator and any of its personnel performing work for this Estate. The estimate should also have included the flat rate fee or percentage of what money would be charged to the Estate. This would apply to all of the personnel respectfully. Had this been done, after seeing the enormous amount that would be charged to the Estate, I never would have elected the court system to handle the selling of my mom’s Estate. It is also a very good possibility that Peter Passalacqua and Connie Mannino, my brother and sister would have probably agreed with me. We could have sold the house ourselves and hired an attorney for going into contract and then later for the actual closing all at the expense of 1/5th the cost[.]”

The Public Administrator construes this objection as being against the appointment of the Public Administrator and moves to dismiss it since Anthony stipulated in open court to the appointment of the Public Administrator as administrator c.t.a. To the extent that the objection is to the appointment of the Public Administrator, that aspect is dismissed. However, the court interprets the gist of objection "19" as to the Public Administrator's legal fees as shown on schedules "C" and "C-1" of the account. In that regard, the objection is dismissed as duplicative of objections "7" and "10", which are addressed below. In any event, the Public Administrator's legal fees will be addressed by the court either after a hearing or on submission after counsel to the Public Administrator has filed an affirmation of legal services with the court with service of a copy upon all parties, which should be done within 30 days of the date of this decision. Failure to do so may result in disallowance of the fee.

Next, the Public Administrator asks for judgment in his favor as to Objections "1", "4" and "17", which he characterizes as objections to the Public Administrator's sale of the premises, the price for which it was sold and the expenses and closing costs associated therewith.

Objection "1" states: "Objects to Schedule A Statement of Principal Received, subtitle Residence, in that said schedule residence was sold far below fair market price. No appropriate document, bill, receipt or date for the \$100.00 repair." Objection "4" states: "Objects to Schedule B, 25 West Maple Street, 7/24/04 sale of premises as previously stated." Objection "17" states: "Objects to statement of closing expenses, no supporting documents, and bills, paid receipts or copies of check payments."

EPTL 11-1.1(b)(5)(B) gives a fiduciary the power to sell property of the estate, except for that which is specifically bequeathed, at a "public or private sale, and on such terms as in the

opinion of the fiduciary will be most advantageous to those interested therein.” Further, in Article FIFTH of the will, the decedent specifically authorized the sale of “any part or all of [the] estate, at public sale, without court order, and on such terms as [the fiduciary], in his absolute discretion, may deem advisable . . .” (*see also* Article EIGHTH of the will). In this instance, as detailed in his moving papers, the Public Administrator, as administrator c.t.a., sold the decedent’s real property at public auction in accordance with EPTL 11-1.1(b)(5)(B) at a price that was 15 percent higher than the appraised fair market value. Thus, that part of objection “1” that objects to the price at which the real property was sold is dismissed under CPLR 3212. Although awkwardly worded, it appears that Anthony is also objecting in objection “1” to the \$100.00 credit repair listed in schedule “A” of the account, and the Public Administrator’s motion to dismiss that part of the objection is denied. While the court finds that the Public Administrator has failed to make a sufficient showing as to the nature or reasonableness of this expense (*Matter of Seabury*, NYLJ, May 17, 1995 at 28, col 3 [Sur Ct, Bronx County]), it is nevertheless dismissed as de minimus. Even if Anthony were to prevail on this objection, his 1/4 interest in the residue would only garner a \$25 charge in the account. The cost to determine the reasonableness and nature of the expense clearly does not justify pursuing the inquiry.

Objection “4” which is duplicative of objection “1”, is therefore also dismissed.

Although awkwardly phrased, objection “17” appears to be an objection to the amounts set forth in the closing statement. The court’s review of the closing statement reveals only the usual and customary adjustments and costs associated with the sale of residential real property. The motion to dismiss objection 17 is therefore granted.

Objection “2” states: “Objects to Schedule A Statement of Principal Received subtitled Misc. Personal Property- Jewelry- Items of jewelry missing which would make appraisal incorrect.” The Public Administrator avers that he accounted for all of the jewelry that came into his possession and that the amount reported in his account is that which is reflected in the appraisal conducted by Cornelius A. Heaney, the appraiser retained by the Public Administrator. Since the record is devoid of any evidence to support the claim that the Public Administrator has not accounted for all the jewelry that came into his possession, the Public Administrator’s motion for summary judgment is granted, and objection “2” is dismissed.

Objection “3” states: “Objects to Schedule A Statement of Principal Received, subtitle Rental Payment on Premises, the rental collected by Peter Passalacqua of \$6,000.00 would not be correct due to the fact that he paid house expenses.” It appears that Anthony is claiming that Peter should get a credit against the rental income he collected from a tenant at the decedent’s residence for household expenses Peter paid during the period of time the rental was collected. Annexed as exhibit “2” to the Public Administrator’s moving papers is a copy of a letter dated February 25, 2005 from his counsel’s office to Peter asking him to account for the amount of rent he received and the expenses he paid from the rental income. Peter did not respond to the request. The Public Administrator intends to charge the \$6,000.00 to Peter as a distribution to him on account of his share of the residuary estate. Further, Anthony does not have standing to make an objection on Peter’s behalf. Accordingly, this branch of the Public Administrator’s motion for summary judgment is granted, and objection “3” is dismissed.

Objection “5” states: “Objects to Schedule C, Statement of Funeral and Administration Expenses and Taxes, there were no supporting documents as far as bill or of payment [sic] for

funeral expenses of \$9,515.00.” Attached as exhibit “22” to the Public Administrator’s moving papers is a receipt marked “paid” from the funeral home showing the total cost of the decedent’s funeral of \$9,215.00, the amount listed in schedule “C” of the account. Additionally, a copy of a claim by Joseph in the amount of \$9,332.82 for reimbursement of funeral expenses paid (the remainder of the claim was for utility bills paid by Joseph) is annexed to the Public Administrator’s moving papers as exhibit “23”. Joseph was reimbursed for the funeral expenses from the estate. The remaining \$300.00 to which Anthony objects was for the biannual renewal of candle lighting services at the decedent’s gravesight, which was paid by the Public Administrator, as shown by the invoice and check annexed as exhibit “24” to the Public Administrator’s moving papers. Accordingly, this part of the Public Administrator’s motion for summary judgment is granted, and objection “5” is dismissed.

Objection “6” states: “Objects to Schedule C, Administration Expenses (Prin), no supporting documentation for bills, or paid receipts for all of the administrative expenses listed on Schedule C, pages 2 through 5.” Schedule “C” reflects that the Public Administrator paid \$9,727.80 in administration expenses and \$1,250.00 in fees and commissions (appraisals and auctioneer’s fees) and real estate taxes in the sum of \$1,904.70. Annexed as exhibit “25” to the Public Administrator’s moving papers are copies of invoices and receipts for these expenses. The only items for which receipts are not attached are the tax adjustments and payments reflected in the closing statement. The only evidence in the record supports that these were legitimate and reasonable expenses (*see Matter of Brandon*, NYLJ, Nov. 25, 2002, at 35 [Sur. Ct, Westchester County]), and objection “6” is therefore dismissed on the Public Administrator’s motion for summary judgment.

Objections “7” and “10” also concern legal fees (see objection “19” discussed above). Objection “7” states: “Objects to Schedule C, Attorney’s Fees, which are listed from the months of 12-22-03 to 2-28-05 where he has not shown the amount of hours on which particular days were dedicated to the Estate, I do not find it possible that he could have spent 8 hours a day for all those months on just this Estate alone.” Schedule “C” of the account includes \$11,105.00 in legal fees paid to counsel for the Public Administrator. The Public Administrator has provided his counsel’s invoices and the checks paid for legal services as exhibit “26” annexed to his moving papers. The documents comport with the amounts listed in Schedule “C”. However, the Public Administrator has not served or filed an affirmation of legal services, and the court cannot determine at this time the necessity or reasonableness of the legal services rendered. Therefore, the Public Administrator’s motion to dismiss or for summary judgment is denied with respect to objection “7”.

Objection “10” states: “Objects to Schedule C-1, Brosnan and Hegler, LLP, estimated Future Attorneys’ Fees, I would not be willing to pay future possible unknown attorneys’ expenses. They can be paid at the time the proper documentation is supplied.” Schedule “C-1” of the accounts lists estimated future legal fees as of the closing date of the account of \$12,000.00. Again, the court cannot pass on the propriety of these fees without reviewing an affirmation of legal services. Therefore, the motion to dismiss or for summary judgment with respect to objection “10” is denied.

Objections “8” and “15” concern fiduciary commissions. Objection “8” states: “Objects to Schedule C-1, the \$19,706.00 requested by the Public Administrator is inflated. No supporting documentation, such as bills, payments and receipts for services rendered.” Objection

“15” states: “Objects to Schedule I, Computations of Commissions, No supporting documents for what services were rendered for payments received.” According to Schedule “C-1”, the Public Administrator is seeking \$15,779.50 in administrator commissions pursuant to SCPA 2307(1) as computed in Schedule “I” and \$3,926.50 for his “reasonable and necessary expenses and disbursements” and a “reasonable amount for the expenses of his office, to be fixed by the court” (SCPA 1207[4]). In Nassau County, pursuant to an order of this court dated September 21, 1990, the office of the Public Administrator is entitled to an amount equal to one percent of the property received by the Public Administrator as reimbursement for the reasonable and necessary expenses of his office in administering the estate. Thus, that branch of the Public Administrator’s motion for summary judgment is granted as to objection “8” to the extent that it objects to the amount of \$3,926.50 pursuant to SCPA 1207(4). With regard to the calculation of the statutory commissions sought (\$15,779.50), the court finds the commissions have been properly calculated. Objection 8 is therefore dismissed in its entirety.

Objection “9” states: “Objects to Schedule C-1, Preparation of 2004 and 2005 fiduciary income tax returns. There are no supporting documents, such as bills, payments and receipts for services rendered.” The rule with respect to accountant’s fees is that normally an accountant’s services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37 [Sur Ct, Suffolk County]) and that the fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 AD 765 [2d Dept 1938]). “[T]he purpose of this rule is to avoid duplication (*Matter of Schoonheim*, 158 AD2d 183 [1st Dept 1990]). Where the legal fees do not include compensation for services rendered by the accountant, there is no

duplication and the legal fee is not automatically reduced by the accounting fee (*Matter of Tortora*, NYLJ, July 19, 1995, at 26)” (Warren’s Heaton on Surrogate’s Court Practice §93.08 [7th ed]). Accordingly, the Public Administrator’s motion to dismiss or for summary judgment is denied as to this objection, and the accounting firm is directed to serve and file within 30 days of the date of this decision an affidavit of accounting services detailing the services rendered. Failure to do so may result in disallowance of the fee.

Objection “11” states:

“Objects to Schedule C-1, Minerva and D’Agostino-unpaid attorneys’ fees, and Joseph Passalacqua, all of the bills by Joseph PASSALACQUA and the firm Minerva and D’Agostino representing him, have no right being submitted or paid by the Estate, He was never sworn in as executor to the Estate by the court. The firm Minerva and D’Agostino representing Joseph Passalacqua had immediate knowledge that the three siblings opposed Joseph Passalacqua as being the executor to the Estate. The firm of Minerva and D’Agostino surrendered the will to the court after a very long period of time allowing him to build up expenses meanwhile. I would like to make this very clear to the court that I as well as the other two siblings were under the understanding that Joseph Passalacqua was never sworn in as executor to the Estate and he and his attorney should not have assumed any privileges in executing any rights from that position. Therefore the expenses that were encountered are his expenses.”

Schedule “C-1” of the account shows the fees of Minerva and D’Agostino, P.C. as \$5,212.50, of which Joseph paid \$5,107.50. The Public Administrator states that these fees were included in the account because Joseph asserts they were incurred for the benefit of the estate and that the inclusion should not be interpreted to mean that the Public Administrator agrees with the value of the services or that they should be approved in full. Minerva and D’Agostino, P.C. has not served or filed an affirmation of legal services, and, as such, the court cannot yet ascertain

whether any or all of the requested fees are appropriate charges to the estate. Therefore, the Public Administrator's motion with respect to objection "11" is denied. The firm of Minerva and D'Agostino, P.C. is directed to serve and file within 30 days of the date of this decision an affirmation of legal services detailing the services rendered. Failure to do so may result in disallowance of the fee.

Objection "12" states: "Objects to Schedule D-Statement of all Creditors' Claims, I have no objections to reimbursement of \$525.00 to Connie Mannino for limousine rental [\$350.00] and funeral flowers [\$175.00]." Since there are no other claims listed on Schedule D other than the ones to which Anthony does not object, the Public Administrator's motion for summary judgment with respect to objection "12" is granted, and that objection is dismissed.

Objection "13" states: "Objects to Schedule E, Statement of Distribution Made, it was stated that I received the patio furniture, which I did not receive. They also stated I received the full-length real fur mink coat which I did not receive." The Public Administrator explains that he never came into possession of those items and that their inclusion on Schedule "E" under distributions to Anthony is an error. The Public Administrator is directed to serve and file an affirmation with a corrected Schedule "E" as aforesaid within 30 days of the date of this decision. Upon receipt of the corrected Schedule "E" objection "13" will be dismissed.

The Public Administrator seeks the dismissal of objections "14", "16", "18" and "20", which he asserts are insignificant and redundant. Objection "16" states: "Objects to Schedule J, Statement of other pertinent facts and cash reconciliation, Public Administrator refers to the wrong name for this Estate." In the heading of Schedule "J", the decedent's name is incorrectly listed as "Santa Brigulio". The Public Administrator states that the schedule is otherwise correct.

This is a harmless clerical error, and the objection is dismissed. The Public Administrator is directed to serve and file a corrected Schedule J within 30 days of the date of this decision.

Objection “18” states: “Objects to accounting as a whole in that it fails to provide adequate information regarding the actions of the administrator and the lawyers executing the estate. It also fails to provide adequate documents such as bills and copy of payments.”

Objection “18” is dismissed as it is overly broad and vague and is legally insufficient to raise a triable question of fact. Moreover, the alleged failure to provide the underlying documentation is not a proper objection to the account. As the Public Administrator points out, Anthony did not request an SCPA 2211 examination of the Public Administrator and did not serve any document demands.

Objections “14”, which states, “Objects to Schedule G, Statement of all Personal Property on Hand, to the final accounting on the basis that I have previously objected to the items listed in schedule G [jewelry (objection “2”, which was dismissed), rental payments (objection “3”, which was dismissed), and state bank estate account (to the extent it was incorporated in to objection “18”, which was dismissed)]” is dismissed as it is redundant.

Objection “20” states:

“As of 7-27-04 the closing of the premises of 25 West Maple Street, had been concluded. The attorney fees had been stated. Mortgage loan satisfaction and any liens also satisfied had been documented. Certified copies of title as well as deed to deed of property obtained, all property taxes for dwelling, whether debit or credit were satisfied. The sale of the house was completed. There should have been no further expenses by the Public Administrator or the court appointed attorneys’ firm. The closing of the dwelling had been satisfied with all needed and necessary documents as well as all expenses accounted for. After the

closing date of 7-27-04 the house was disposed of, there was nothing further to do related to the house[.]”

Objection “20” is dismissed as it is duplicative of objections “7” and “10”.

Finally, the Public Administrator is directed to serve and file an affidavit bringing the account down to date within 30 days of the date of this decision.

This is the decision and order of the court.

Dated: June 30, 2008

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court