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

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In the Matter of the Application of John W. Sinon, The Public Administrator of Nassau County, as Temporary Administrator of the Estate of

FRIEDA GUTHARTZ,

petitioner,

- against-

Alan Guthartz, Ona Guthartz, Barnett Guthartz and Janet Barry, respondents.

File No. 343312

Dec. No. 141

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Administration Proceeding, Estate of

FRIEDA GUTHARTZ,

Deceased.

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In this administration proceeding, the decedent Frieda Guthartz 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 was survived by her husband, Barnett Guthartz, and her two children, Alan Guthartz and Janet Barry. The following applications are currently before the court: (i) Janet Barry's application for the issuance of permanent letters of administration to the Public Administrator, (ii) Barnett Guthartz's motion for an order compelling Alan Guthartz to answer certain interrogatories and produce certain documents and for 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, (iii) Alan Guthartz's motion for reargument of the court's decision dated September 20, 2007 appointing the Public Administrator temporary administrator of the estate, and (iv) the

Public Administrator's application for a judgment of possession of the Lake Success premises and a warrant of eviction against Alan Guthartz and his wife Ona Guthartz.

**Procedural Background**

This proceeding was commenced by Barnett's petition for letters of administration. Alan filed objections to Barnett's petition and filed a cross-petition seeking an order granting the issuance of letters of administration to him instead. Thereafter, Barnett applied for temporary letters. Alan objected to Barnett's appointment on the grounds that Barnett was a convicted felon and was not qualified to act by reason of dishonesty, improvidence and was otherwise unfit pursuant to SCPA 707(1)(e). Similarly, Barnett and Janet filed objections to the cross-petition on the grounds that Alan was not qualified by reason of dishonesty, improvidence and was otherwise unfit for the execution of office (SCPA 707[1][e]).

By decision dated March 28, 2007 (Dec. No. 60), this court found that Barnett's 1977 Federal felony conviction would have been a misdemeanor in the State of New York under the applicable concomitant New York State statute in effect at the time the offense was committed and, therefore, on its own would not automatically bar his appointment. Nevertheless, the court opined that the crime still raised a question of dishonesty on Barnett's part. In addition, the court noted that Alan's qualification had been put at issue by Barnett and Janet who alleged that the State of New York had issued an investigative report regarding Alan's actions with respect to an entity known as the Nassau County Society for the Prevention of Cruelty to Children (an organization of which Alan had represented himself as the president and executive director). Barnett and Janet also alleged that there are a number of money judgments entered against Alan as further evidence of Alan's unfitness to serve. This court held that a charge of dishonesty must

be proved and set the matter down for an evidentiary hearing on May 29, 2007 on the issue of Barnett's and Alan's eligibility.

Subsequent to the court's March 28, 2007 decision, Janet moved, by order to show cause, for the appointment of the Public Administrator as temporary administrator of the estate. The application was opposed by Alan. In support of her application, Janet alleged that Barnett had been paying the expenses on the Lake Success home, specifically, the homeowner's insurance and real estate taxes, for the period November 14, 1998 through 2005. She claimed that Alan had been living in the home rent-free and that distribution of the estate could not be effectuated because Alan refused to vacate the premises or allow a sale. Janet also pointed out that the estate might owe New York State estate taxes and, in view of the length of time since her mother's date of death, substantial interest and penalties might be due. Alan argued that there were no exigent circumstances warranting the Public Administrator's appointment as temporary administrator.

By decision dated September 20, 2007 (Dec. No. 474), the court found that there had been a substantial delay in the estate administration and that the issue of unpaid estate tax was a significant concern. In view of the allegations made regarding both Barnett's and Alan's ability to serve, the apparent acrimony among the parties and the fact that there would be a delay in the issuance of letters, the court appointed the Public Administrator temporary administrator. The matter was set down for a conference to resolve the various discovery issues which had caused the parties to adjourn the hearing.

**The Lake Success Premises**

Pursuant to the rules of intestacy (EPTL 4-1.1[a][1]), Barnett is to receive the first

$50,000.00 of the estate and has a fifty (50%) interest in the residence and Janet and Alan each have a twenty five (25%) interest. Nevertheless, Alan concedes that he has lived in the residence since the decedent's death. Barnett and Janet claim that Alan has not paid any rent for his occupancy of the premises. As noted above, Barnett also alleges that he has paid the real estate taxes and homeowners' insurance from November 14, 1998 through 2005. According to Alan, the decedent "was desirous of leaving the house" to him and the decedent's will has "mysteriously disappeared." Alan further alleges that Janet and Barnett promised to relinquish their ownership in the house to him and that, in reliance on that oral promise, he moved into the home and made repairs. Barnett and Janet dispute Alan's claim, and Barnett claims that he, not Alan, paid for repairs to the home, including the installation of an elevator for Barnett's ailing wife.

Alan and Ona Guthartz commenced a proceeding in the United States District Court, Eastern District for a preliminary injunction barring a sale of the premises. The basis of that proceeding was that Janet and Barnett orally agreed to relinquish their interests in the premises to Alan. Barnett and Janet made a motion to dismiss the proceeding on the grounds that the court lacked subject matter jurisdiction. The Honorable William D. Wall, United States Magistrate Judge, issued a report and recommendation dated February 11, 2008, in which he recommended that the motion to dismiss be granted and that the complaint be dismissed for lack of jurisdiction.

**Claims Against the Estate**

Alan has filed a claim against the estate in the amount of $7,874,569.93 with interest. The claim relates to various alleged agreements between Alan and the decedent. Barnett has also filed a claim against the estate in the amount of $171,302.79 (together with real property taxes

paid after December 31, 2007). Barnett makes a claim for reimbursement for fifty (50%) percent of the real estate taxes paid by him, a real estate tax lien satisfied by him, payment of the decedent's funeral bill and interment charges and fifty (50%) percent of the homeowners' insurance paid by him.

**Motion to Reargue**

Alan argues that he should be given leave to reargue "that portion of the courts [sic] decision dated September 20, 2007 directing letters of temporary administration issue to the Public Administrator . . . . " A motion for leave to reargue is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221[d][2]).

It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Andrea v E.I. du Pont de Nemours & Co.,* 289 AD2d 1039 [4th Dept 2001]*; Bolos v Staten Island Hosp.,* 217 AD2d 643 [2d Dept 1995]; *Schneider v Soloway,* 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means in which an unsuccessful party is permitted to argue again the same issues previously decided (*Pahl Equip. Corp. v Kassis,* 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]), nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*Giovaniello v Carolina Wholesale Office Machine Co., Inc.,* 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt.,* 20 AD3d 388 [2d Dept 2005]; *Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v Lord & Taylor Ins. Co.*, 10 AD3d 374 [2d Dept 2004]; *Frislinda v X Large Enterprise*, 280

AD2d 514 [2d Dept 2001]; *Foley v Roche,* 68 AD2d 558 [1st Dept 1979]). Nevertheless, " [i]t is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision" (*Peak v Northway Travel Trailers,* 260 AD2d 840, 842 [3rd Dept 1999]). "Additionally, even in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate" (*Louis v S&W Realty Corp.*, 16 AD3d 729, 730 [3d Dept 2005]).

Alan claims that the court should not have issued temporary letters to the Public Administrator without first having a hearing on the disqualification. It is well settled that:

> "When it is shown that the estate assets are in jeopardy the Court has the discretion to appoint a temporary administrator, but this usually requires a showing of real necessity for doing so. It is also within the Court's discretion, where there is an anticipated delay in administration of an estate and where there is obvious hostility between the parties, to appoint a neutral party as temporary administrator " (*Matter of DeLuca,* 2007 NY Misc Lexis 2316 [Sur Ct, Suffolk County][internal citations omitted]).

The court notes that a hearing on the disqualification was, in fact, scheduled for May 29, 2007, but at the request of the parties was adjourned to allow the parties to conduct discovery. The hearing has not been rescheduled as discovery is not yet complete. There has been a significant delay - over ten years - in the administration of the estate. Moreover, there is a question as to whether New York estate taxes may be due. The court's prior decision granted Janet Barry's application solely to the extent of appointing the Public Administrator as temporary administrator, finding that it would be in the best interests of the estate for a fiduciary to immediately begin administering the assets. Neither Barnett nor Alan could be appointed as

temporary administrator since there is a possibility that either is unfit or otherwise ineligible to serve as administrator. If one is unfit to serve as administrator, he is also unfit to serve as temporary administrator (*Matter of DeLuca*, 2007 NY Misc Lexis 7316 [Sur Ct, Suffolk County]). Accordingly, the motion to reargue is denied as it was always the court's intention to require a hearing on the issue of eligibility once discovery is complete. Similarly, Janet's application for the issuance of permanent letters to the Public Administrator is denied at this time on the basis that there are facts in controversy and the issue of disqualification cannot be decided summarily.

**Barnett's Motion for an Order Compelling Alan to Answer Interrogatories and For A Protective Order**

**Interrogatories**

Barnett has moved pursuant to CPLR 3124 for an order compelling Alan to answer certain interrogatories which he has refused to answer and to produce certain documents which he has failed to produce. Specifically, Alan has refused to answer interrogatories numbers 31 and 34 through 40 of Barnett's and Janet's First Set of Interrogatories dated January 11, 2007. These interrogatories seek information concerning an entity known as the Nassau County Society for the Prevention of Cruelty to Children (Nassau County SPCC). Alan has conceded that he has been the executive director/president of the Nassau County SPCC since 1988 and a member since approximately 1987-88. The State of New York conducted an investigation into the SPCC and issued a report dated July 2001. The information sought by interrogatories numbers 31 and 34 through 40 includes the name of the bank or banks where the Nassau County SPCC maintained accounts from 1979 to date, the names and addresses of all the current members,

officers and shareholders of the organization, and the nature and description of any child protective services rendered or engaged in by the Nassau County SPCC or by Alan during the period 1979 to date. Barnett and Janet argue that these interrogatories are relevant to the dishonesty, improvidence and unfitness of Alan to act as a fiduciary of the estate.

Alan objects to interrogatory number 31 which asks for the name of the bank or banks where the Nassau County SPCC maintained accounts from 1979 to date on the basis of relevancy. As to interrogatories numbers 34 through 40, which seek information regarding the names and addresses regarding the members, officers and shareholders and a description of the child protective services rendered or engaged in by the organization or by Alan, Alan objects on the grounds of relevancy and that the information is privileged and confidential.

The July 2001 report questioned the activities of the Nassau County SPCC and Alan's role with respect to the organization. The report indicates that the Great Neck police department had been contacted during the course of the investigation and informed "the Commission that, along with multiple addresses, Mr. Guthartz has often used different birth dates and social security numbers." The court finds that the information sought by these interrogatories is directly relevant as to Alan's alleged dishonesty and his eligibility to serve as administrator. Concerning Alan's objection on the basis of privilege, the court finds that such objection is meritless. The Nassau County SPCC was required to make public filings with New York State and the Attorney's General's Charities Bureau which would include such information. Although the report indicates that the organization was deficient in these filings, this information was required to be made public.

In addition, Alan has refused to answer interrogatories numbers 1 through 25 of Barnett's

and Janet's Second Set of Interrogatories dated January 22, 2007 which seek information concerning a certain alleged "Irrevocable Stock/Bond Power" dated July 16, 1997. The stock/bond power was annexed as an exhibit to Alan's affidavit dated January 17, 2007. Alan contends that this alleged stock power was signed by the decedent and Barnett and transfers to him control of a Florida corporation, which he alleges is worth millions of dollars. Alan objects to all 25 interrogatories on the ground of relevance.

Barnett and Janet argue that Alan's objections to the Second Set of Interrogatories were due by February 13, 2007, but were not served until March 1, 2007 and are, therefore, untimely and thus waived. Moreover, they argue that even if the objection was timely made, it is clearly without merit since the alleged stock power is directly relevant to Alan's ineligibility to serve by reason of dishonesty. Barnett has stated that this alleged stock power is a fraudulent document and that he never signed such a document. Interrogatories numbers 1 through 25 seek to discover, among other information, who was in control of the original of the alleged stock power, the manner and circumstances by which Alan came to possess it and the place where it is was signed. Alan has introduced the alleged stock power to challenge Barnett's fitness to serve as administrator and to put into question Barnett's honesty. Accordingly, Alan cannot now argue that information concerning the alleged stock power is irrelevant.

The branch of Barnett's motion which seeks an order compelling Alan to answer interrogatories numbers 31 and 34 through 40 of the First Set of Interrogatories and interrogatories 1 through 25 of the Second Set of Interrogatories is therefore granted.

**Protective Order**

Barnett, who is approximately 92 years of age and resides in Florida, requests that the

court order that both his and Janet's depositions take place in Florida. It is alleged that Barnett is unable to travel because of certain medical complications. Barnett's physician has submitted a letter dated April 10, 2007 to that effect. In addition, it is alleged that Janet is the primary caregiver for her father. Janet argues that it would cause great hardship to her father if she were required to leave him to travel to New York for a deposition. Alan opposes the application.

CPLR 3110 (1) provides that a deposition will ordinarily be held in the county where the action is pending. When the party to be deposed demonstrates that being deposed in the county would constitute a hardship, the deposition may be held elsewhere (*see Wygocki v Milford Plaza Hotel*, 38 AD3d 237 [1st Dept 2007] [resident of Northern Ireland permitted to be examined outside of New York where doctor submitted a sworn letter identifying her many ailments and advising that traveling to New York could cause plaintiff further serious problems]; *Rogovin v Rogovin*; 3 AD3d 352 [1st Dept 2003] [defendant, a Kansas resident, granted a protective order allowing her deposition without New York by means of video conferencing where she established hardship]; *Kirama v New York Hosp.*, 13 Misc 3d 1246 A [Sup Ct, New York County 2006] [plaintiff, a resident of Morocco, granted protective order requiring her deposition by video conferencing as she would not secure a visa to travel to New York]).

Janet has not sufficiently established that being deposed in this county would constitute a hardship. Similarly, Barnett has failed to make such a showing. The letter from Barnett's physician is unsworn and out of date. The court will reconsider Barnett's application upon submission of a sworn statement from Barnett's physician detailing Barnett's infirmities and which establishes that travel to New York could further jeopardize Barnett's health. Accordingly, the application for a protective order is denied as to Janet and is denied with respect

to Barnett, subject, however, to reconsideration upon submission of a current sworn statement from Barnett's physician.

**Public Administrator's Application For a Judgment of Possession, Warrant of Eviction and For a Decree Awarding Money For Fair Use and Occupancy and Directing a Sale of the Real Property**

The Public Administrator contends that the residence, which is the sole asset of the decedent's New York intestate estate, must be sold in order to pay (a) the administration expenses of the estate; (b) decedent's funeral expenses; (c) decedent's creditors, including real estate taxes; (d) estate or death taxes; (e) any other debts, and (f) the respective shares of the decedent's estate to each of the Barnett, Alan and Janet.

By order to show cause, the Public Administrator seeks an order (i) awarding possession of the property to the Public Administrator; (ii) a warrant of eviction to remove Alan Guthartz and Ona Guthartz from possession; (iii) against each of Alan and Ona for a money judgment in an amount equivalent to the fair use and occupancy as determined at an evidentiary hearing from January 1, 2008 through the date of delivery of possession and the reasonable costs and disbursements associated with recovery, and (iv) authorizing and directing the Public Administrator as temporary administrator to sell the real property located at 16 Lake Road, Lake Success.

Pursuant to EPTL 11-1.1(b)(5), the Public Administrator, as temporary administrator of the decedent's estate, is authorized and empowered "[t]o take possession of, collect the rents from and manage" the decedent's property and "to sell" the property "at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested

therein." Moreover, pursuant to SCPA 1902, a disposition of real property is expressly permitted by the fiduciary to pay (a) administration expenses, (b) funeral expenses (c) creditors, (d) estate taxes, (e) debts, (f) the respective shares of the estate to each of the distributees and (g) for any other purpose the court deems necessary.

The court finds that a sale of the property is warranted in order to effectuate the distribution of the estate and to pay the estate administration expenses, debts and claims. Alan's claim to a "constructive trust" which he offers to bar a sale is unsupported. The court notes that Alan has failed to put the issue properly before the court by commencing a proceeding to impose a constructive trust despite his claims of an oral promise. "The usual elements required for the imposition of a constructive trust are: (1) a confidential or fiduciary relation; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment" (*Sharp v Kosmalski*, 40 NY2d 119, 121, [1976]; *Losner v Cashline, L.P.,* 41 AD3d 789, 790 [2d Dept 2007]); *see also Matter of Tschernia*, 2007 NY Slip Op 52510 [U] [Sur Ct, Nassau County 2007]). Alan has failed to offer any evidence in support of his claim other than his unsubstantiated allegation.

Accordingly, the Public Administrator is entitled to a judgment of possession, together with a warrant of eviction. Alan Guthartz and Ona Guthartz are granted a thirty (30) day stay of the execution of the warrant. In addition, the Public Administrator as temporary administrator is authorized and empowered to sell the premises. Alan Guthartz and Ona Guthartz are prohibited from interfering in any manner with the possession, control or management of said premises by the temporary administrator for the purposes of sale.

As to the branch of the application which seeks to charge Alan and Ona Guthartz with use and occupancy, the court notes that the general rule is that a co-tenancy allows a tenant in

common to possession of the entire property, and he is not obligated to pay rent unless he wrongfully excludes the other co-tenants from use and possession (*Matter of Spiss*, 50 Misc 2d 595 [Sur Ct, Erie County 1966]; *Matter of Hazley*, 166 Misc 745 [Sur Ct, Kings County 1938]). The court is mindful that Alan is a co-tenant, however, Ona is not. Here, the Public Administrator asks for use and occupancy charges from January 1, 2008. The issue of charges for use and occupancy will require an evidentiary hearing.

Counsel are directed to appear at a conference on August 1, 2008 at 9:30 a.m. to schedule a date for a hearing on the issues of (i) the disqualification of Barnett Guthartz and Alan Guthartz as administrator and (ii) charges for use and occupancy by Alan Guthartz and Ona Guthartz. A discovery schedule will also be addressed at that time.

Settle order and separate judgment of possession.

Dated: June 30, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court