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

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In the Matter of the Application of Dolores Nettis, Susan Nettis and Donna M. Cole, as Executors of the Estate of

JOHN J. NETTIS,

Deceased,

to Discovery Property Withheld.

File No. 350533

Dec. No. 514

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This is a proceeding pursuant to SCPA 2103 to discover property alleged to belong to the estate of the decedent, John J. Nettis, who died testate on December 27, 2007. The decedent's last will and testament dated November 3, 1998 was admitted to probate, and letters testamentary issued to the decedent's spouse, Dorothy Nettis, and to the decedent's two daughters, Susan Nettis and Donna M. Cole. Before the court is the respondents' motion for summary judgment dismissing the petition.

The respondents are Caprice Associates, LLC (Caprice LLC) and its members, Greg Ostheimer and Kurt Ostheimer. Prior to the decedent's death, he maintained a one-third interest in Caprice LLC, with Greg and Kurt owning the remaining two-thirds interest. The petitioners allege that Caprice LLC, Greg and Kurt have knowledge about and are in possession of $1,000,000.00 in life insurance proceeds that belong to the estate. According to the petition, prior to the decedent's death, Caprice LLC maintained two life insurance policies in the aggregate amount of $1,000,000.00 on each of the lives of the decedent, Greg and Kurt. The petitioners allege that until November 2007, a month prior to the decedent's death, Caprice LLC owned and was the beneficiary of the six life insurance policies. The petitioners further allege

that approximately one month before the decedent died, while he was gravely ill, Greg and Kurt, without the knowledge or consent of the decedent or his family, changed the ownership and beneficiary of the insurance policies on the decedent's life from Caprice LLC to Greg and Kurt individually, but the ownership and beneficiary of the life insurance policies on Greg and Kurt's lives were not changed. According to the petition, Greg and Kurt individually collected and are in possession of the proceeds of the life insurance policies on the decedent's life.

The respondents deny that the insurance proceeds belong to the decedent's estate. According to the respondents, in 1985 the decedent, Greg and Kurt were equal partners in a partnership that became known as Caprice Associates, which initially operated under an oral partnership agreement. In 1988, the three partners executed a written partnership agreement wherein they agreed on restrictions on alienation of their partnership interests, and agreed to a buy/sell in the event any of them should die. According to the respondents, to fund the buyout of a deceased partner's interest, they obtained life insurance coverage on each of their lives. The respondents have attached to the papers in support of their motion for summary judgment an application to ITT Hartford signed by the decedent showing the owner of the policy as Caprice Associates. The application bears the dates of April 4, 1996 and April 28, 1996. On the application, in response to the question, "Give the purpose of this insurance and the nature of the Owner/Applicant's insurance interest," are the words "partnership buy sell." The respondents have also submitted to the court a spreadsheet entitled "Hartford Life Payments." The spreadsheet shows the date of payment of the premium, the check number, the amount of the check, the policy number, the face amount of the policy, the insured's name and the date the policy was issued. The respondents explain that the policies all antedated the change of Caprice

Associates in 2006 from a partnership to a limited liability company. The respondents allege that from 2001 to January 2006, the policy on the decedent's life was not owned by the partnership, but by Greg and Kurt, although the partnership paid the premiums in after tax dollars.

The respondents assert that in January 2006, at the decedent's urging, the partners agreed to continue the partnership through a then inactive limited liability company that they had created in 2000. The respondents state that the limited liability company was governed by the partnership agreement and that the decedent, Greg and Kurt agreed to maintain the buy/sell obligation and the use of life insurance to fund a buyout.

Kurt avers that in January 2006, a representative from Hartford Life Insurance Company suggested that the owner of the life insurance policies be changed to Caprice LLC, which Kurt did. He states that from that time Caprice LLC paid the premiums on the policies. Kurt explains that in November 2007, while the decedent was ill, Kurt was told by tax counsel that for purposes of a buy/sell, the change in 2006 from individual ownership of the policies to ownership by Caprice LLC was ill advised and should be immediately changed back, which Kurt further explains he did in November 2007 for tax reasons in accordance with the partnership agreement and past practices and their "oral understanding as to the purpose of the insurance, all of which had been agreed to by Decedent." Based on the above, the respondents assert that at the time of the decedent's death Greg and Kurt owned the life insurance policy on the decedent's life. The respondents further assert that the petitioners have refused to discuss the buyout of the decedent's interest in Caprice LLC.

Apparently, the law firm that represents the respondents in this proceeding formerly represented Caprice LLC and the decedent when he was a principal of Caprice LLC. The petitioners assert that this is a conflict of interest that necessitates the firm's disqualification. However, the petitioners have not moved for disqualification of the firm.

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 fact 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]).

"[E]vidence excludable under the Dead Man's Statute [CPLR 4519] should not be used to support summary judgment" (*Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 313 [1972]). However, it may be used in opposition to such a motion (*Matter of Penn*, 14 Misc 3d 1203A [Sur Ct Nassau County 2006]). A review of the respondents' answer to the petition and the papers they filed in support of their motion for summary judgment are replete with statements supposedly made by the decedent. These statements are excludable under CPLR 4519. Further, the statements attributed to the Hartford Life Insurance representative and to Donna's "boyfriend or fiance," the latter of which are not discussed herein, are excludable as hearsay. Notably, the respondents did not submit an affidavit from either of them.

The respondents rely upon *Matter of Tract* (284 AD2d 543 [2d Dept 2001]) to support the proposition that statements by the decedent's former counsel are not barred by CPLR 4519. In *Tract*, the Second Department affirmed a decree of this court issued in a proceeding for an accounting of the decedent's interest in a partnership (*id.*). After a nonjury trial, this court had dismissed the amended petition based on language in the partnership agreement that the determination of a partner's net equity interest in the law firm was "final and binding" absent a showing of "gross negligence or willful misconduct." In *Tract*, the Appellate Division stated that the former partners of the firm were not disqualified from testifying about conversations with the decedent about whether life insurance proceeds the law firm had on the lives of its partners "were intended to be applied to reduce the death benefit owed to the estate of a partner . . ." (*id.* at 544).

The Second Department also stated that this court had correctly determined that the "life insurance proceeds were intended to be used to buy out the interest of a deceased partner" (*id.*).

Matter of Tract does not help the respondents here. First, that proceeding was decided after a trial. Here, although the proceeding was commenced with an order to attend and be examined, calling for the examinations of the respondents, it appears that none of them was deposed. In fact, it appears as though no discovery has been had. Second, the statements that the court finds are excludable under CPLR 4519 here are those that the respondents attribute to the decedent, not to Caprice LLC's counsel. Whether Caprice LLC's counsel is competent to testify is a matter to be determined at a trial upon a proper objection.

From the record as it exists, including the documentary evidence submitted by both sides, the court finds that the respondents have failed to make a prima facie showing that they are entitled to summary judgment (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]). Clearly, there are questions of fact about the ownership and beneficiary of the life insurance at the time of the decedent's death that can only be resolved after a trial. Summary judgment is therefore denied.

A conference with a court attorney-referee will appear on the court's calendar on November 13, 2008, at 11:00 a.m., for the purpose of scheduling discovery.

Settle order.

Dated: September 29, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court