

Matter of Canales Chicas

2009 NY Slip Op 31571(U)

June 30, 2009

Surrogate's Court, Nassau County

Docket Number: 354249/2009

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 Administration of
the Estate of

File No. 354249

MILTON RAMON CANALES CHICAS,
a/k/a MILTON CANALES,
a/k/a MILTON RAMON CANALES,

Dec. No. 279

Deceased.
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Before the court is a petition filed on December 22, 2008 by Kimberly Dawson as First Vice President of Countrywide, a creditor of the estate of Milton Ramon Canales Chicas, who was a resident of Uniondale. Petitioner asks the court to issue limited letters of administration to the Public Administrator of Nassau County so that he can defend the estate against Countrywide's mortgage foreclosure action against decedent's residential real property. The petition avers that the outstanding mortgage is in the amount of \$373,954.81 and that there are no other outstanding debts or funeral expenses.

Background

Milton Ramon Canales Chicas died on September 21, 2007 while visiting El Salvador. According to the petition before the court, decedent was survived by his wife, Gloria Canales, also known as Gloria Del Carmen Ramirez, and two minor children, Raymond and Bessie, all of whom are citizens and residents of El Salvador. The petition does not contain street addresses for these non-resident distributees. The petition further reflects that decedent was also survived by one adult child, Libanesa, who resides in decedent's Uniondale home, which is the subject of the foreclosure action underlying this petition.

Citation issued on December 22, 2008, listing Gloria, Libanesa and the Public

Administrator, and was returnable on February 18, 2009. Affidavits filed with the court indicate that the citation was served on Libanesa and the Public Administrator. An affirmation in support of amending the petition and dispensing with service on Gloria was filed by counsel on behalf of Bank of NY¹ on February 17, 2009, one day prior to the return date of the citation. Counsel for petitioner affirms that Libanesa advised his office that Gloria lives in El Salvador but that Libanesa was unable to provide Gloria's address. Counsel avers that Gloria's residency in El Salvador was confirmed by the process server's unsuccessful attempt to serve citation on Gloria at decedent's Uniondale home. Attached to counsel's affirmation is an affidavit of due diligence that reflects that in addition to attempting to serve Gloria at decedent's last address, counsel's staff also ran a computer search for Gloria using the on-line telephone directory for El Salvador, but did not find a listing for Gloria's name. The affidavit concludes by stating that "deponent duly exhausted all efforts to obtain jurisdiction over the defendant..."

Appearing before the court on the citation return date were counsel for petitioner, counsel for the Public Administrator, and Libanesa. At a conference held before a court attorney-referee, Libanesa advised the court and counsel for the other parties that decedent was also survived by a fourth child, Kimberly, who is five years of age, and who is not listed under 7(b) of the petition for letters of administration. Libanesa requested additional time to consult an attorney to determine her rights, if any, in connection with decedent's home and whether she should apply for letters of administration. Counsel for the Public Administrator advised the court that the Public Administrator intended to ask the court to excuse him from serving as administrator of

¹Affirmant does not explain why petitioner was originally listed as Countrywide, the petition reflects that the mortgage is held by Deutsche Bank, and the supporting affirmation was filed on behalf of Bank of NY.

decedent's estate.

A supplemental citation was issued February 18, 2009 and made returnable on March 25, 2009. The citation lists only Gloria, and the record does not indicate that it was served. Accordingly, prior to consideration of the relief requested in the petition, the court must determine whether jurisdiction has been obtained over the non-appearing parties.

Jurisdiction

Jurisdiction in an administration proceeding requires that notice of the petition be given to those individuals who have a right to letters of administration equal or prior to that of petitioner (Turano and Radigan, *New York Estate Administration* § 4.02 [d], at 161 [2009 ed]; Groppe *et al.*, *Harris New York Estates: Probate, Administration and Litigation* § 4:162, at 4-48 [5th ed]). Petitioner served Libanesa and the Public Administrator with citation, but did not serve decedent's wife or minor children. Petitioner asked the court to dispense with service upon Gloria on the basis that counsel has been unable to ascertain Gloria's whereabouts. While it is clear that the SCPA permits the court to dispense with service in the event that a distributee's whereabouts cannot be ascertained with due diligence (SCPA 1003 [4]; *see e.g. Matter of Ramm*, 22 NY2d 926 [1968]), it is substantially less clear whether petitioner has in fact exercised the requisite due diligence. Generally, the due diligence standard "requires a thorough search and includes inquiries at such places as offices of vital statistics, armed services, voting polls, motor vehicle departments, banks, utilities, schools, churches, the census bureau, police missing-persons bureaus, and telephone directories" (Turano and Radigan, *New York Estate Administration* § 2.10 [a], at 59 [2009 ed], citing *Matter of Layh*, 55 Misc 2d 92 [Sur Ct, Nassau County 1967]). Of course, only some of the above examples of due diligence would be apposite

when the individual being sought lives outside of the United States, but the court need not rule on the adequacy of petitioner's due diligence; the court may dispense with service based upon Gloria's status as a non-domiciliary (SCPA 1003 [2]), irrespective of the ascertainability of her whereabouts. An "eligible petitioner may receive letters of administration without being required under SCPA 1003 (2) to serve process upon any nondomiciliary alien distributee unless such a distributee has both requested and received permission from the court to act as a fiduciary" (*Matter of Albagli*, 141 Misc 2d 1073, 1076 [Sur Ct, Bronx County 1988]). On the same basis, and because their infancy renders them ineligible to receive letters (SCPA 707 [1] [a]), service upon decedent's minor children is unnecessary. The court therefore dispenses with the issuance and service of process on all four of these distributees, but directs that process must issue to Gloria and to decedent's minor children, and the guardians of these minors, at the time of the judicial accounting proceeding (SCPA 1003 [4]). Jurisdiction in connection with this petition is thus complete.

Appointment of the Public Administrator

The court must next consider the relief requested by petitioner for the issuance of limited letters to the Public Administrator and the responsive filing of the Public Administrator. Petitioner has asked the court to appoint the Public Administrator so that he can represent the estate in petitioner's foreclosure proceeding. In his answer and objection, the Public Administrator advised the court that decedent's residential property has an estimated market value of \$382,200.00, according to the Nassau County Department of Assessment, or \$338,000.00, according to website Zillow.com. Since the outstanding mortgage lien is \$373,954.81, the value of the property is insufficient to yield the total payoff amount required to

stop foreclosure, which is \$412,201.41, according to the payoff letter dated November 18, 2008.

The estate appears to be insolvent.

“When no eligible distributee can be located or no one takes the necessary steps to qualify...the court will issue letters to the public administrator” (Turano and Radigan, New York Estate Administration § 4.02 [e] [2] [E], at 171 [2009 ed] [internal citations omitted]). A Public Administrator who is reluctant to accept a fiduciary appointment is not empowered by statute to unilaterally reject letters issued by the court.

“Letters may be issued to another person or persons in the discretion of the court only when the Public Administrator has been excused from acting. As the Public Administrator cannot renounce his right to letters and can be relieved from his duty to administer such an estate only by order from the court...there can be no such thing as a *de facto* renunciation by the Public Administrator”

(*Matter of Warren*, 121 Misc 2d 660, 660-661 [Sur Ct, Kings County 1983]; *see* SCPA 1003 [3]).

In the proceeding before the court, the Public Administrator has asked to be excused from the issuance of letters of administration on the basis of good cause (insolvency of the estate) pursuant to SCPA 1003 (3), and because the Public Administrator avers that during the court conference held on February 18, 2009, a distributee, Libanesa, indicated her willingness to serve (*see Matter of Wyche*, 96 Misc 2d 324 [Sur Ct, Albany County 1978]). As an alternative to his own appointment, the Public Administrator asks that the court consider issuing letters to petitioner as a creditor of the estate. According to the Public Administrator, each of these two parties, Libanesa and petitioner, has a tangible interest in the foreclosure action. The Public Administrator cites two decisions issued by this court in which letters could have been issued to the Public Administrator but were not, and instead were issued to the party best able to proceed

and expend the necessary funds (*Matter of Webb*, Sur Ct, Nassau County, Oct. 26, 2006, File No. 339320, Dec. No. 664; *Matter of Waiser*, Sur Ct, Nassau County, Jan. 24, 2008, File No. 347400, Dec. No. 42).

Before the court can consider granting the relief requested by petitioner or the alternative relief requested by the Public Administrator, it must first consider whether another eligible person would be available and willing to serve as administrator (*Matter of Page*, 107 NY 266 [1887]; *Matter of Wyche*, 96 Misc 2d 324 [Sur Ct, Albany County 1978]). Decedent's adult daughter, Libanesa, has priority to receive letters (SCPA 1001 [1] [b]). In fact, "if there is any eligible person entitled to share in decedent's estate who will accept the appointment, the public administrator...has no rights" (*Matter of Bernich*, 98 Misc 2d 1036, 1037-1038 [Sur Ct, Dutchess County 1979]). Although Libanesa appeared at the conference, which was held on the first return date for this matter, and indicated to those present that she would consider serving as administrator of her father's estate, she did not file a petition for letters, despite being given ample time to consult with legal counsel and qualify.

Petitioner, as a creditor of the estate, is also an interested party who can receive letters at the discretion of the court pursuant to SCPA 1001 (8) (b), but a creditor will not be issued letters of administration where next of kin is available and willing to serve (*Matter of Barr*, 38 Misc 355 [Sur Ct, Suffolk County 1902]; Warren's Heaton, *Surrogate's Court Practice*, § 35.03 [12] [a], at 35-64 [7th ed]). Petitioner's right to receive letters is subordinate to that of Libanesa and the Public Administrator (*Matter of Weitz*, 69 NYS 2d 840 [Sur Ct, New York County 1944]). However, in the event that Libanesa abjures her right to letters and the Public Administrator is excused from serving, the court may grant letters to petitioner or to any other person, pursuant to

SCPA 1001 (8) (b) and (c).

In *Matter of Gjokaj*, decided by this court in 2002, letters of administration c.t.a. were granted to a creditor of the estate where the surviving spouse, who was the only distributee able to qualify, renounced her appointment as executrix. The court addressed the potential conflict of interest faced by a creditor serving as administrator, but noted that a conflict of interest is not grounds for ineligibility to receive letters (*Matter of Gjokaj*, NYLJ, July 26, 2002, at 28, col 4 [Sur Ct, Nassau County]). A “court can grant limited letters to a fiduciary who has a conflict of interests with the estate” (Turano and Radigan, *New York Estate Administration* §14.02 [b], at 473 [2009 ed] [internal citations omitted]).

Conclusion

The court grants Libanesa thirty days from the date of this decision in which to petition to qualify for letters; if Libanesa does not petition to qualify within that time period, the court will proceed on the assumption that Libanesa has chosen not to qualify and serve. In that event, the Public Administrator would have priority to receive letters of administration, but has asked to be excused.

The court declines to appoint the Public Administrator to administer this possibly insolvent estate when there are two interested parties who can serve as administrator. Therefore, the court grants the request of the Public Administrator and excuses him from serving.

In the event that Libanesa does not petition to qualify as administrator within thirty days of the date of this decision, limited letters of administration will issue to petitioner upon its duly qualifying.

Petitioner is directed to (1) amend its petition to add Kimberly under 7(b) and move

Gloria from 7(a) to 7(b) as a party whose whereabouts are presently unknown, as requested in the affirmation dated February 12, 2009 and filed on behalf of petitioner; (2) file an affirmation to clarify why the petition was filed on behalf of Countrywide, but reflects that the mortgage is held by Deutsche Bank and the subsequent supporting affirmation refers to petitioner as Bank of NY; and (3) qualify as administrator with limited letters in the event that Libanesa does not petition to qualify within thirty days of the date of this decision.

No distributions or payments of any recovery in the foreclosure action or any collected estate assets shall be made without further order of this court.

The clerk of the court is directed to mail a copy of this decision to counsel for petitioner, counsel for the Public Administrator, and Libanesa Canales.

This is the decision and order of the court.

Dated: June 30, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court