

**Matter of Olney**

2009 NY Slip Op 31853(U)

August 13, 2009

Surrogate's Court, Nassau County

Docket Number: 349652

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 Settlement of the First and Final Account of  
 the First and Final Account of Proceedings of ROBERT OLNEY,  
 as a Settlor and Successor Trustee, of the OLNEY FAMILY  
 TRUST created under Agreement dated December 21, 1995.  
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File No. 349652

Dec. No. 611

In this proceeding to settle the first and final account of the Olney Family Trust, the court issued a decision herein dated July 28, 2009, (dec. no. 357) which is vacated and replaced with the following decision.

Richard Olney, settlor, has moved by Order to Show Cause dated April 3, 2009 to vacate his default, and thereby grant him leave to file objections to the accountings for the trust. Petitioner Robert Olney, settlor and successor trustee, filed an Affidavit in Opposition on April 21, 2009. Richard Olney filed a Reply Affirmation on April 28, 2009.

The Olney Family Trust was established on December 21, 1995, with the brothers Robert, Michael and Richard Olney listed as settlors, and their father John C. Olney ("John") and Michael designated as trustees. On April 21, 2001, John resigned as trustee, and Robert became the successor trustee. Valerie Olney ("Valerie"), John's wife, passed away on July 8, 2002, and John died on March 16, 2006. Upon the death of Valerie and John, Article Seven of the trust provided that the trust would terminate. Accordingly, Robert as successor trustee, proceeded to terminate the trust by providing an informal accounting. After seeking Richard's approval of the accountings beginning on January 4, 2007, without success, Robert and Michael each submitted separate accountings and petitioned and cross-petitioned for their judicial settlement.

On December 3, 2008, after several conferences during the course of that year, Richard's counsel submitted a motion requesting that they be allowed to withdraw as Richard's counsel,

due to Richard's lack of cooperation. Richard's written consent released that firm from representing him, and acknowledged that the proceedings would be stayed for thirty (30) days to allow Richard to either obtain new counsel, or appear pro se in the accounting proceeding. Accordingly, on January 14, 2009, the court granted counsel's motion to be relieved as counsel, and the court scheduled an appearance by all parties on March 4, 2009. Moreover, the court directed that Richard be served with a copy of the order by overnight mail delivery.

On March 4, 2009, Richard Olney did not appear pro se before the court, counsel did not appear for Richard, nor did Richard communicate with the court. The matter was marked for decree, and on March 16, 2009, the court accepted Robert and Michael's accountings, subject to audit, and ordered Robert and Michael to settle their respective decrees. A proposed decree was settled on notice for presentation on April 6, 2009. Only then did Richard, through new counsel, file a motion on April 3, 2009, to vacate his default and have his objections accepted by the Court.

Under CPLR 5015(a)(1), a defendant seeking to vacate a default "must show a reasonable excuse for the default and a meritorious defense to the action," (*Hodges v Sidal*, 48 AD3d 633 [2d Dept 2008]). Furthermore, "the determination as to what constitutes a reasonable excuse is within the sound discretion of the trial court" (*Hodges v Sidal*, 48 AD3d 633 [2d Dept 2008]). While a medical condition may excuse a default, a court will not accept a party's medical condition as a reasonable excuse for not appearing before the court unless accompanied by fact-specific, corroborative evidence in evidentiary form. In *Burks v Weiss* (137 AD 2d 646, [2d Dept 1988]), the defendant sought to vacate a default judgment. The defendant submitted a social worker's report which referred to the defendant's suffering from depression, characterized

by a diminished capacity to think, concentrate or make decisions, but the report did not detail how long the defendant had suffered from the condition. In *Burks v Weiss* (137 AD2d 646 [2d Dept 1988]), the court noted that uncontroverted facts showed that the defendant understood the nature of the proceedings, held that the defendant's conduct was willful, and therefore denied the defendant's motion to vacate the default for failure to show a reasonable excuse for the default (see also *In re Fotiades*, 38 AD3d 892 [2d Dept 2007]; *Hargett v. Health & Hospitals Corp. of City of New York*, 88 AD2d 633 [2d Dept 1982]; *Matter of Nathalie A.*, 145 AD2d 629 [2d Dept 1988] [unsubstantiated claim that appellant's failure to appear or contact court was due to unspecified illness not held to be a reasonable excuse]).

Here, Richard's self-serving affidavit detailed various medical and psychological conditions, but was not accompanied by supporting factual evidentiary basis showing how Richard's conditions caused his failure to appear pro se, retain new counsel to represent him, or contact the court on or before March 4, 2009. Therefore, Richard's medical and psychological conditions are not a reasonable excuse for not appearing before the court, contacting the court, or for vacating the accounting decrees.

Failure to retain counsel, when a party has notice of the requirement to appear before the court, is not a reasonable excuse for a party's default. In such circumstances, a court may exercise its discretion to deny the vacating of a judgment or decree. In *In re Starasia C.* (18 AD3d 213 [1st Dept 2005]), a pro se defendant, who was duly notified of an appearance date, and defaulted by not appearing even though counsel was to be provided for her on that date, failed to demonstrate a reasonable excuse for her lack of appearance before the court and the

First Department affirmed the court's denial of the defendant's motion to vacate her default.

Analogously, in *M.P.S. Mktg. Servs. v Champion Intl. Corp.* (176 AD2d 250 [2d Dept 1991]), the defendant's motion to dismiss for plaintiff's failure to prosecute was denied by the trial court, and reversed by the Appellate Division. The First Department found that the plaintiffs' difficulty in finding new counsel did not constitute a reasonable excuse for delay in filing a note of issue. Here, Richard's letter to his former counsel submitted to the court as an exhibit in Robert's Affidavit in Opposition, and Richard's receipt of the Surrogate Court's order of January 14, 2009, show that Richard had more than the requisite thirty (30) days to retain new counsel before March 4, 2009, or appear himself pro se on that date.

Based on the foregoing, the court denies Richard's motion to vacate his default on objecting to the accounting because the movant has failed to show any reasonable excuse for his default despite repeated notices of his obligation to proceed on a case that has been delayed by Richard in the past.

When there is not a reasonable excuse under CPLR 5015(a)(1) for the court to vacate the default, the court need not reach whether a meritorious claim exists as a basis to vacate the default (*Mjahdi v Maguire*, 21 AD3d 1067 [2d Dept 2005]; *Krieger v. Cohan*, 18 AD3d 823 [2d Dept 2005]). Accordingly, given that the court has determined that neither Richard's medical and psychological condition nor his failure to retain counsel constitute reasonable excuses under CPLR 5015[a] to vacate the default, this Court need not reach whether Richard has presented a meritorious claim. However, it should be noted that even on this requirement, Richard fails to demonstrate any merit to his objections.

Mere suspicion of fraud, based on conclusory evidence, does not establish a meritorious claim sufficient to grant a motion to vacate a decree (*Matter of Pritchard*, 36 NYS2d 997 [Sur Ct, New York County 1942], affd 265 AD 814 [1<sup>st</sup> Dept 1942]), a beneficiary submitted an application to vacate an accounting decree settling an estate. The court noted that "a formal decree of this court may not be set aside on mere suspicion or without evidence sufficient to establish...grounds for vacatur"(*Matter of Pritchard*, 36 NYS2d 997 [Sur Ct, New York County 1942]; *see also Rosen v Brewster*, 160 AD2d 946 [2d Dept 1990]). The alleged suspicions raised by Richard are unsubstantiated in any minimal form whatsoever. They are merely conclusory and do not provide a scintilla of evidence or reason sufficient to vacate the default.

The decree previously settled by Robert Olney will be processed.

This is the decision and order of the court.

Date: August 13, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court