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

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Accounting by Frank Martinucci, as the Executor of the Estate of

MARY HOGANCAMP,

Deceased.

File No. 331605

Dec. No. 598

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In this accounting proceeding, the objectants, Elizabeth H. Cavagnaro and Mary Sue Wardell, move for an order granting summary judgment[1] pursuant to CPLR 3212 to them: (1) surcharging Frank Martinucci, as executor of the estate of Mary Hogancamp, in the amount of $105,180.82 for his failure to promptly transfer estate cash to an interest-bearing account and for leaving the cash uninvested (objections 6 & 7); (2) denying executor's commissions to Frank (objection 11) and (3) surcharging Frank in the amount of $51,781.51[2] for excessive and undeserved legal fees paid in connection with the estate administration and estate litigation and directing that Frank's attorney, Elliot Schlissel, refund that amount to the estate (objection 10). Frank opposes the motion.[3]

The decedent died testate on November 12, 2003 survived by two daughters, Elizabeth and Mary Sue. The decedent's last will and testament dated September 25, 1991 was admitted to probate on May 10, 2004, and letters testamentary issued to Frank on that date. Since Mary's

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[1]Since there are other objections about which the objectants have not moved for summary judgment, the motion is really one for partial summary judgment pursuant to CPLR 3212 (e).

[2]The objectants' papers list the amount to be refunded as $51,781.51 (affidavit in support of motion, at p. 1), $56,646.87 (affidavit in support of motion, at p. 15) and $48,477.01 (memorandum in support of motion, at p. 10).

[3]Both the objectants and Frank have submitted only their attorney's affidavit or affirmation in support of their respective positions on this motion.

husband predeceased her, under the terms of the will, Elizabeth and Mary Sue receive the decedent's entire estate in equal shares.

In October 2008, Frank filed his account as executor for the period from November 12, 2003 to April 30, 2008. The account shows total charges of $1,328,737.55, total credits of $1,190,586.96 and a balance on hand of $138,150.60. Elizabeth and Mary Sue filed objections to the account on May 15, 2009 in which they raise 14 objections to the account, including that Frank failed to collect interest on estate cash for almost three years, that he should be denied executor's commissions on the ground that he negligently performed and discharged his fiduciary duties and that fees paid to Frank's counsel are excessive and unreasonable.

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, 324 [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]), 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, 562 [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 viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 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, 357-358 [2d Dept 1996]).

Frank opened an estate checking account on July 14, 2004 with $202,752.00 of estate assets. On August 2, 2004, he deposited an additional $329,618.00, which was the proceeds from the sale of the decedent's house. The funds, less deductions for payment of estate taxes and other estate expenses, remained in the noninterest-bearing account for nearly three years until May 27, 2007. The balance of the account ranged from the low $400,000.00's to the high $300,0000.00's. In May 2007, Frank transferred $350,000.00 to an interest-bearing estate saving account, leaving $11,382.03 in the checking account. In July 2007, Frank transferred $10,000.00 of the funds remaining in the checking account to the estate saving account.

At his SCPA 2211 examination, when questioned about why he did not deposit the estate funds into an interest-bearing account prior to May 2007, Frank testified that, based upon his experience as a bank employee, he thought the account would be short term and, in 2005, when the estate was audited, "did not want to add any more confusion to it by adding interest on it to

give the IRS any additional interest to think about." According to Frank's testimony, it was in May 2007, because the estate audit was taking so long, that Frank decided that the estate money should earn interest. However, the estate audit had concluded in April 2007.

Based on these undisputed facts, the objectants assert that summary judgment should be awarded to them, surcharging Frank $105,180.82 for his failure to timely deposit the estate funds into an interest-bearing account.[4] The objectants base their calculation of the amount of the surcharge using the mean of the estate checking account's highest value and its lowest value, at the judgment rate of interest of nine per cent per annum.

The objectants' request for summary judgment on the amount of interest presupposes that they are entitled to summary with respect to the underlying issue of when Frank should have deposited the estate funds into an interest-bearing account. According to the objectants, Frank should have done so on the first day he received any estate funds. It is axiomatic that an executor owes the highest level of care and good faith to an estate and its beneficiaries and "is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate" (*Meinhard v Salmon*, 249 NY 458, 464 [1921]). It is equally true that one of an executor's primary duties is to make productive the funds with which he is entrusted (*Matter of Frey*, 55 Misc 2d 567, 568 [Sur Ct, Nassau County 1967]; *see also Cooper v Jones,* 78 AD2d 423, 428 [4th Dept 1981]). The duty to make the funds productive depends upon the exigencies of each situation (*Matter of Frey*, 55 Misc 2d 567, 569 [Sur Ct,

[4]The objectants also assert that Frank's misconduct is exacerbated by the fact that Frank had the funds in accounts that were approximately three times in excess of the then effective F.D.I.C. insurance limit of $100,000.00.

Nassau County 1967]). It is the executor's duty to "invest cash funds in an interest-bearing account unless they are to be used to pay claims and expenses within a reasonably short period of time" (*Matter of Cooper*, 78 AD2d 423, 428 [4th Dept 1981]). The retention of money beyond a reasonable time places the burden of explanation and justification upon the fiduciary when he accounts (*Matter of Frey*, 55 Misc 2d 567, 569 [Sur Ct, Nassau County 1967]).

Here, Frank waited nearly three years before investing the estate funds in an interest-bearing account. Under the circumstances of this estate, it is fair to conclude that this was not a reasonable length of time for Frank to allow the funds to remain unproductive. The court finds that the objectants have made a prima facie showing that they entitled to summary judgment as a matter of law, and the burden shifts to Frank to establish the existence of a material issue of fact (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992])

In his papers in opposition to the motion, Frank asserts that EPTL 11-1.1 (b) (3) gives an executor the power to invest, but does not require it, and that the will permitted Frank to retain the estate assets. Frank also asserts that his belief that the estate would be settled quickly and that he did not want to complicate the estate audit by transferring the funds to an interest-bearing account while the audit was ongoing excuse his waiting nearly three years to deposit the funds into an interest-bearing account and create issues of fact precluding summary judgment. Frank proffers that, since the objectants do not allege that Frank acted in bad faith, he should not be charged with 9 percent interest.

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Under these facts, Frank should have invested the money when it became apparent that the estate was not going to be settled quickly. Indeed, when Frank received notice that the estate was going to be audited, he should have realized that the estate was going to remain open for protracted period of time. On the record before the court, there does not seem to have been any barrier to Frank depositing the estate funds into an interest-bearing account upon his receipt of the funds. However, the court has the benefit of hindsight, which Frank did not when he placed the funds into a noninterest-bearing account as fiduciaries often do in the short term. Since the court must view the facts in the light most favorable to the Frank as the non-moving party, the court denies the objectants' motion for summary judgment as a triable issue of fact exists as to when the retention of the funds in the noninterest-bearing account became unreasonable. Having found that an issue of triable fact exists, it is premature for the court to impose a surcharge on Frank and for the appropriate amount of the surcharge to be determined. It is also premature to determine whether Frank's conduct as executor warrants the denial of any or all of his executor's commissions.

The objectants also move for summary judgment on the issue of whether legal fees paid to Frank's attorney in the amount of $51,781.51 should be refunded to the estate. In this regard, the objectants point to Frank's alleged waste of estate assets, to his delay in filing his account after being directed to do so by the court and to the more than $20,00.00 in interest and penalties the estate paid. The objectants assert that Frank should be ordered to personally pay all of the attorney's fees since his conduct as executor was so highly imprudent. While the court has the benefit of schedule C of the account, which itemizes the amount of the attorney's fees paid in respect to certain areas of estate administration, *e.g.*, for the audit, the attorney has not filed an

affirmation of legal services showing the breakdown of services within each category. Thus, the court cannot determine whether the legal fees paid were excessive. In any event, Frank is entitled to a hearing on this issue, unless he is willing to submit the question of legal fees to the court upon the filing of an affirmation of legal services by his attorney. Accordingly, the objectants' motion for summary judgment on this issue is denied.

The court has scheduled a status conference for October 28, 2009, at 3:00 p.m., with a member of the law department.

This is the decision and order of the court.

Dated: September 24, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court