

Matter of Menitskiy

2009 NY Slip Op 33102(U)

December 24, 2009

Surrogate's Court, Nassau County

Docket Number: 351064

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 Probate Proceeding, Will of

VALERY MENITSKIY,
a/k/a VALERY EVGENYEVICH MENITSKIY,

Deceased.

File No. 351064

Dec. Nos. 754, 861
and 862

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In the Matter of the Application of Yulia Malakhova,

Petitioner,

To Stay a Special Joint Meeting of Directors and Shareholders
and for the Issuance of Limited Letters of Administration in
the Estate of

VALERY MENITSKIY,

Deceased.

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Before the court in connection with this estate are a miscellaneous proceeding and a contested probate proceeding. In the probate proceeding, the preliminary executors, Martin R. Weinberg and Irina Andriasova-Sushko, have moved for an order dismissing the objections filed by Yulia Malakhova. In the miscellaneous proceeding, Yulia Malakhova, moved, by order to show cause returnable December 11, 2008, for an order staying the special joint meeting of directors and shareholders of MJV 1922 Corporation (“MJV” or “the Corporation”), restraining the sale of any property owned by the Corporation and requesting the issuance of limited letters of administration to her. In the miscellaneous proceeding, the preliminary executors have also now moved for permission to sell the property located at 4 Peachtree Lane, Roslyn, New York. Yulia has also filed a cross-motion seeking various relief in connection with the Corporation and distribution under the decedent’s purported will.

The decedent died on January 13, 2008 in Moscow, Russia, leaving a purported will dated August 17, 2007. The purported will nominates the decedent's attorney, Martin R. Weinberg, and Irina Andriasova-Suskho, as executors. Preliminary letters testamentary issued to them by decree of this court on April 25, 2008. The purported will bequeaths the decedent's 75% interest in the Corporation to Yulia. Yulia allegedly owns the other 25% interest in the Corporation. Mr. Weinberg claims that he is the president of the Corporation and has been so since its formation in 2005. At the time of the decedent's death, the Corporation owned real property located at 4 Peachtree Lane, Roslyn, New York and 20 Hickory Drive, Old Brookville, New York and two automobiles. The purported will also includes a \$300,000.00 cash bequest to Ms. Sushko.

Yulia is one of three women who were allegedly married to the decedent at the time of his death on January 13, 2008. Yulia claims she married the decedent on December 26, 2007, after his divorce from Olga Menitskaya became finalized on September 20, 2007. Olga has filed suit in Russia attempting to invalidate the marriage between Yulia and the decedent on the grounds that the September 20, 2007 divorce was invalid. The parties disagree over the status of the Russian proceeding. The preliminary executors contend that the Russian courts have determined that the divorce was not valid and that the determination is final. Yulia disputes this characterization of the Russian proceeding. Both Yulia and Olga have filed a Notice of Right of Election in the probate proceeding.

Yulia has filed objections to the will, limited to the appointment of the fiduciaries. A guardian ad litem was appointed for the decedent's child, Mikhail, who is eight years old. Mikhail lives with Yulia at the Peachtree Lane property. The guardian ad litem has filed his report wherein he has stated that he will not be filing objections to the purported will pursuant to

a stipulation of settlement. Pursuant to the terms of that stipulation, Ms. Sushko has agreed to assign to Mikhail one-half of whatever she ultimately receives under the will. The court has authorized the guardian ad litem to sign the stipulation on behalf of his ward.

After oral argument, on December 15, 2008, the return date of Yulia's order to show cause in the miscellaneous proceeding, the court lifted the temporary restraining order to allow the Corporation to sell one of the two vehicles owned by the Corporation and to list the real property located at 20 Hickory Drive, Old Brookville, New York with a real estate agent for sale. The court also directed that court approval would be required if a buyer was located and a contract of sale was to be entered into.

Thereafter, a number of conferences were held in an attempt to resolve the issues raised by Yulia concerning the Corporation. A stipulation of settlement was drafted, but not executed. As a result, the preliminary executors, by order to show cause returnable on March 11, 2009, asked for the court's permission to accept an offer on the Hickory Drive property in the amount of \$3.6 million. After oral argument, the court granted the preliminary executors permission to enter into a contract of sale.

The preliminary executors have now filed (i) a motion for an order authorizing the Corporation to sell the property located at 4 Peachtree Lane, Roslyn, New York and (ii) a motion dismissing Yulia's objections and admitting the purported will to probate. According to the preliminary executors, the Peachtree property is currently occupied by Yulia and no rent is being paid. A demand has been made for Yulia to pay the real estate taxes. The preliminary executors argue that it is necessary to sell the Peachtree property to pay the administration expenses of the estate. In addition, the preliminary executors allege that the books and records of the

Corporation reveal that the decedent loaned \$7.1 million to the Corporation during his lifetime. The preliminary executors contend that it is necessary for the Corporation to sell its assets in order to repay the \$7.1 million loan, which is an asset of the decedent's estate. The preliminary executors further contend that since the Corporation earns no income and expenses have and will continue to accrue, it is in the best interests of all the shareholders to sell the Peachtree property.

Yulia opposes the motion to sell the Peachtree property challenging the validity of the alleged \$7.1 million loan and the reasons asserted by the preliminary executors as requiring a sale of the Peachtree Lane property. With respect to the motion to dismiss her objections and admit the will to probate, Yulia consents to the admission of the will to probate, but objects to the issuance of permanent letters to Mr. Weinberg and Ms. Sushko. In addition, Yulia has cross-moved for an order (i) consenting to the dispositive provisions of the purported will; (ii) directing the preliminary executors to deliver to Yulia her specific bequest of the shares of the Corporation; (iii) directing the preliminary executors to turn over to Yulia's attorneys all of the assets of MJV and all corporate, business and legal documents and records of the Corporation; (iv) removing Martin Weinberg as a "self-appointed" director of MJV and as "self-appointed" president, vice-president, secretary and treasurer of the Corporation; (v) ordering limited and expedited disclosure in the form of examinations before trial of the preliminary executors with the concomitant document production; (vi) compelling the preliminary executors to comply with a Notice of Discovery and Inspection dated February 7, 2009; and (vii) revoking preliminary letters.

In support of the relief requested, Yulia argues essentially that the preliminary executors have only one goal which is "to convert the assets of MJV into cash for the estate, leaving no

monies and no assets” for Yulia and Mikhail. She claims that this is the exact opposite of what the decedent intended.

Yulia further claims that the decedent was the president of the Corporation and she was the vice-president. She disputes Mr. Weinberg’s allegation that he is the president. Yulia annexes documents relating to the purchase of the real estate that list the decedent as the president of the Corporation. Yulia further argues that Mr. Weinberg’s sworn representations that he is the sole officer and director of the Corporation are contradicted by the documentary evidence that shows that the decedent was president and Yulia was vice-president.

Despite this claim, however, Yulia also annexes copies of the certificates issuing shares of the Corporation to her and the decedent. The certificates were, in fact, signed by Mr. Weinberg as president. She further claims that she and the decedent together negotiated and purchased all of MJV’s assets, including signing contracts and opening bank accounts. Yulia alleges that she had signatory authority and signed all of the Corporation’s checks. According to Yulia, Mr. Weinberg has misappropriated the Corporation’s bank account by improperly changing title to the Corporation’s bank account, the address on the account and the signatory cards. Yulia claims that Mr. Weinberg transferred in excess of \$61,000.00 from the old account on which she was a signatory to the new account opened by him on behalf of the Corporation and refuses to provide her with documentation she has requested concerning this account.

Yulia also argues that there is a manifest conflict of interest given the preliminary executors fiduciary duties and Mr. Weinberg’s role in the Corporation. As to Mr. Weinberg, Yulia claims he is using his purported authority with the Corporation to sell the Corporation’s monies and deliver them to the estate. According to Yulia’s attorneys, Weinberg has “locked

Malakhova out of MJV, is selling off the assets, giving the proceeds to the estate and not Malakhova, this while being paid as both an officer and director of MJV. He is plundering the very corporation he is being paid to protect.”

As to Irina Andriasova-Sushko, Yulia claims her conflict is also manifest. She is a legatee of a \$300,000.00 bequest under the purported will. Thus, Yulia argues that, to the extent the assets of the Corporation are liquidated, Irina’s bequest will be funded. Yulia also claims that Ms. Sushko was a real estate broker on the Peachtree property and failed to disclose this to the decedent and Yulia when they purchased the property. Yulia also claims that in November/December 2007, Ms. Sushko did everything in her power to dissuade Yulia from traveling to Moscow to marry the decedent. Yulia claims that Ms. Sushko told her she would be unable to return to New York as her visa would be invalidated. According to Yulia, Ms. Sushko also advised her that she could arrange for a quick sale of the Hickory Property for “at least \$2 million” and she could help Yulia conceal the proceeds. Yulia also claims Ms. Sushko wanted Yulia to give Mr. Weinberg her power of attorney for MJV.

Additionally, Yulia claims that counsel for the preliminary executors misrepresented to the court that the only asset of the estate is the Corporation and its assets, but now claim that the estate is owed \$7.1 million from the loan made by the decedent to the Corporation. She also contends that the preliminary executors further misrepresented to the court in connection with the sale of the Old Brookville property that they would distribute the balance of the proceeds to Yulia after the payment of administration expenses.

Yulia argues that the preliminary executors have taken sides against her in her dispute with Olga as shown by the preliminary executors’ rejection of her Notice of Election. She also

claims that Mr. Weinberg has submitted documentation in support of Olga in the Russian courts.

Yulia contends that she has no objection to the will being admitted to probate, but objects to the issuance of letters to Ms. Sushko and Mr. Weinberg on the grounds that they are not “impartial unbiased fiduciaries.” They are committed to a single position to liquidate MJV for the benefit of the estate. She argues that Ms. Sushko and Mr. Weinberg are criminally dishonest, improvident and unfit to act given “their personal vested financial interests in the estate.” Yulia asks for limited discovery to show their disqualification. She also asks that the preliminary executors be ordered to comply with her Notice of Discovery and Inspection.

With respect to the cross-motion, the preliminary executors argue that Yulia’s request for an order directing the preliminary executors to deliver to her her specific bequest of the shares of the Corporation under Article THIRD is flawed. First, the request is more appropriately the subject of a separate proceeding, commenced by the filing of a petition on notice to all interested parties. In addition, currently the Corporation is the only asset of the decedent’s estate. The specific bequest may be subject to abatement to pay expenses. In addition, preliminary executors have no authority to make distributions. Thus, they could not have represented that they would have paid the balance of the net proceeds of sale of the Old Brookville property to Yulia nor could they make a distribution of the shares bequeathed under Article THIRD of the purported will.

As to the books and records of the Corporation, the preliminary executors argue that they are not required to turn over the documents. In addition, they claim that Yulia’s prior attorneys have been given access to such documents and records on other occasions.

The preliminary executors argue that Yulia's claim that Mr. Weinberg has received compensation from the Corporation and/or the estate is incorrect. Mr. Weinberg has never received compensation from either the Corporation or the estate. As to the removal of Mr. Weinberg as a director and officer of the Corporation, the preliminary executors argue that the Corporation's by-laws provide that a director may be removed by the vote of the shareholders and an officer may be removed by majority vote by the Board of Directors. Since the order to show cause stayed meetings of the Corporation, this relief is impossible. Nevertheless, the preliminary executors argue that removal is unwarranted under the BCL.

Concerning Yulia's request for disclosure, the preliminary executors argue that the motion to dismiss the objections is essentially a motion for summary judgment which stays discovery.

Lastly as to the issue of disqualification, the preliminary executors argue that there is no conflict of interest since in both their fiduciary and corporate capacities, Mr. Weinberg and Ms. Sushko are seeking to protect the value of the Corporation, which is a common interest for both estate administration and corporate purposes. They further contend that none of the allegations raised by Yulia warrant disqualification. The preliminary executors also ask for the imposition of costs in the amount of \$3,500.00.

The guardian ad litem has submitted a supplemental report in connection with the pending applications. The guardian ad litem objects to the sale of the Peachtree Lane residence where his ward resides at this time. The guardian ad litem objects on the grounds that it is unclear whether the proceeds from such a sale are necessary to pay estate taxes and administration expenses in light of the fact that the Old Brookville property and a car have

already been sold. Moreover, the resolution of the \$7.1 million dollar loan would likely moot other matters of contention.

ANALYSIS

A thorough analysis of the issues presented must begin with a discussion of the duties which a fiduciary owes to an estate and the beneficiaries thereof. With this in mind, however, the court recognizes that a testator's wishes regarding the appointment of a fiduciary even on a temporary basis will be honored unless there are serious and bona fide allegations of misconduct or wrongdoing (*Matter of Alfano*, NYLJ, May 29, 2001, at 32, col 6 [Sur Ct, Nassau County]; *Matter of Schell*, NYLJ, Mar. 15, 2000, at 30, col 2 [Sur Ct, Nassau County]; *Matter of Fordham*, NYLJ, Dec. 16, 1998, at 22, col 6 [Sur Ct, Bronx County]). It is well-settled that an executor has an absolute duty of impartiality to the beneficiaries of the estate (*Matter of Muller*, 24 NY 2d 336, 341 [1969], amended on other grounds 24 NY 2d 1029 [1969]; *Matter of Grawe*, 32 AD 3d 1309 [4th Dept 2006]). “[A]n executor owes a duty to all beneficiaries to be fair and impartial in all transactions that affect them; not preferring one to the detriment of others or conferring a benefit upon one at the expense of another . . . [h]ence, . . . neither. . . beneficiary has a right to expect that the executor will discriminate in his or her favor to the detriment of another. The executor must act in the best interests of the estate as a whole, which may incidentally benefit some beneficiaries more than others but not because of any partiality on his part” (*Matter of Darrow*, 120 Misc 2d 924, 926 [Sur Ct, New York County 1983]). A “fiduciary is under a duty of absolute loyalty to all beneficiaries and of fairness and impartiality to all. If in dealing with the respective beneficiaries their interests are so conflicting that the fiduciary cannot deal fairly with respect to them, he cannot properly act without applying to the

court for instructions” (*Matter of James*, 86 NYS 2d 78, 81 [Sur Ct, New York County 1948]; *see also Matter of Heinrich*, 195 Misc 803, 809 [Sur Ct, Monroe County 1949]).

In addition, SCPA 702(8) provides that limited letters may be issued, “in the discretion of the court, to represent the estate in a transaction in which the acting fiduciary could not or should not act in his or her fiduciary capacity because of conflict of interest.” SCPA 702(10) provides that limited letters may issue for “any other purpose or act deemed by the court to be appropriate or necessary in respect of the affairs of the estate, the protection thereof or to the proper administration thereof.” Thus, the application of SCPA 702(8) is discretionary with the court.

SCPA 702 was amended in 1993 to add subdivision (8) (L. 1993, c.514). “The new subdivision was enacted upon the recommendation of the EPTL-SCPA Legislative Advisory Committee, which suggested that while the authority to issue limited or restrictive letters in cases of potential or actual conflict already existed by virtue of the catch-all provision (formerly subdivision 8, now subdivision 10), the under-utilization of such a mechanism in those circumstances merited its explicit mention in the statute” (2 Warren’s Heaton on Surrogate’s Court Practice §33.09 [7th ed]). In *Matter of Stoller*, (4 Misc 3d 538, 540 [Sur Ct, New York County 2004]), Surrogate Roth noted that the additions of subdivisions (8) and (9) “reflect the Legislature’s understanding that the individual interests of fiduciaries may at times be at odds with the interests of the estates they have been appointed to serve, and they embody the Legislature’s practical response to such reality.”

Thus, SCPA 702(8) recognizes that, under certain circumstances, a fiduciary may be unable to carry out his duties because of a conflict of interest. SCPA 702(8) and (9) have typically been used to protect an estate from the prospect of self-dealing by the fiduciary (*Matter*

of *Goldman*, 196 Misc 2d 968 [Sur Ct, New York County 2003]). The court is mindful, however, that insofar as the conflict of interest is a situation created by the decedent's will, it will not be a basis for removal (*Matter of Weiss*, 33 Misc 2d 773 [Sur Ct, New York County 1962]).

Here, Yulia has failed to establish a conflict of interest. The conflict alleged in the dual capacities of Mr. Weinberg as an officer and director of the Corporation and as nominated fiduciary under the purported will was created by the testator. Moreover, this does not involve a typical case of self-dealing where the fiduciary acts in his own interest to the detriment of the beneficiaries. Thus, Yulia's request for the issuance of limited letters of administration is denied.

Concerning the remaining relief requested in Yulia's order to show cause and the preliminary executor's motion to sell the Peachtree Lane property, the court finds as follows. The stay on meetings of the directors and shareholders of the Corporation is hereby lifted. Nevertheless, the court agrees with the guardian ad litem that the preliminary executors have failed to show the necessity for the sale of the Peachtree Lane property upon the papers submitted. Additionally, the issue of the validity of the alleged \$7.1 million loan may moot such issues. Accordingly, the parties are to appear for a conference on January 5, 2010, at 9:30 a.m., to set down a date for a hearing to determine the validity of the alleged loan and to schedule discovery, if necessary.

Concerning the motion to dismiss the objections, the court notes that Yulia has consented to the admission of the purported will to probate, but objects to the appointment of Ms. Sushko and Mr. Weinberg as executors. Under SCPA 709, any person interested in the estate may object to the appointment of a fiduciary (*Matter of Judson*, NYLJ, Nov. 1, 1995, at

32, col 1). As stated above, there is no conflict of interest which warrants the issuance of limited letters of administration nor is there a conflict of interest which warrants the denial of letters. Nevertheless, Yulia also makes allegations which she claims warrant the denial of letters on the basis of dishonesty, improvidence or want of understanding.

SCPA 707(1)(e) contemplates disqualification on the grounds that a fiduciary is “likely to jeopardize estate property” (Turano, Practice Commentaries, Book 58A, McKinney’s Consolidated Laws of New York, 707, p. 530). The party alleging ineligibility has the burden of proof (*Matter of Krom*, 86 AD2d 689 [3d Dept 1982], *app dsmd*, 56 NY2d 505 [1982]). The dishonesty contemplated in the statute “must be taken to mean dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor” (2 Warren’s Heaton on Surrogate’s Court Practice, 33.02[6][b], p 33-21[7th ed]; *Matter of Flood*, 236 NY 408, 411 [1923]; *Matter of Martin*, 16 AD2d 807 [2d Dept 1962]).

Here, the grounds alleged to disqualify Ms. Sushko are that Ms. Sushko was a broker on the Peachtree Lane purchase and did not disclose this to either the decedent or Yulia. She also alleges that Ms. Sushko tried to discourage Yulia from traveling to Moscow to marry the decedent by making misrepresentations regarding Yulia’s visa. These unsubstantiated allegations, even if ultimately proven, are not sufficient to warrant the denial of letters to Ms. Sushko. These allegations do not rise to the level of serious misconduct or wrongdoing sufficient to override the testator’s wishes. However, the allegation about Ms. Sushko told Yulia that she could arrange for a quick sale of the Hickory Drive property and conceal the proceeds, which was not directly disputed by Ms. Sushko, may constitute dishonestly in money

matters sufficient to deny her letters. A hearing will be necessary to determine the truthfulness of the allegation.

The allegations regarding Mr. Weinberg may fall within the purview of SCPA 707(1)(e) and require an evidentiary hearing. The allegations against Mr. Weinberg are that he has misrepresented his role in the Corporation in sworn statements to the court and that he usurped \$61,000.00 in funds belonging to the Corporation. Such allegations if found to be true may warrant the denial of letters. The court notes that the documents submitted in connection with the cross motion are conflicting. There are documents which identify the decedent as the president of the Corporation and there are others that identify Mr. Weinberg as the president. Mr. Weinberg, however, has stated that he has been the president of the Corporation since its inception. In his affirmation in opposition dated December 15, 2008, Mr. Weinberger states, “At the request of the Decedent, I agreed to serve as President and have continued to serve as President since the inception of the Corporation, including acting on behalf of the Corporation in connection with the purchase of real property located at 4 Peachtree Lane, Roslyn, New York.” Yulia annexes documents in connection with the Peachtree Lane purchase that show the decedent signed as president. She also annexes documents filed with State Bank which list the decedent as president and Yulia as a director of the Corporation. Moreover, Mr. Weinberg stated initially that he maintained the books and records for the Corporation and that the Corporation’s only assets were the two pieces of real property and two automobiles. Now, however, he alleges the existence of a \$7.1 million loan to the Corporation from the decedent despite having kept the books and records since the inception of the Corporation. These discrepancies, as well as the allegation regarding the withdrawal of \$61,000.00, require further

inquiry and necessitate a limited hearing concerning these issues. Accordingly, at the conference on January 5, 2010, the issue of the ineligibility of both nominated executors will be set down for a hearing. Thus, the branch of the preliminary executors' motion to dismiss the objections which seeks an order directing that the propounded will be admitted to probate is granted; however, letters will not issue at this time.

Concerning the other relief requested in the cross motion, the court finds as follows. The branch of the cross motion seeking an order compelling distribution of the specific bequest under Article THIRD is not procedurally proper, but should be the subject of a separate proceeding on notice to all interested parties after the issuance of permanent letters. In addition, in view of a possible abatement under the will and the notice exercising her right of election filed by Olga Menitskaya, such a distribution is premature. The requests for the turnover of records and assets of the Corporation are also not properly before the court nor is the branch of relief seeking the removal of Mr. Weinberg as an officer and director of the Corporation, since these matters are properly the subject of a special proceeding commenced by petition. As to the issues concerning discovery, these matters will be discussed at the conference.

Requests for sanctions, attorneys' fees and costs are denied.

This constitutes the decision and order of the court.

Dated: December 24, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court