

Matter of Camacho

2009 NY Slip Op 33144(U)

December 4, 2009

Surrogate's Court, Nassau County

Docket Number: 355468

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. 355468

SALVADOR EDUARDO PERNIA CAMACHO,
a/k/a SALVADOR EDUARDO PERNIA,

Dec. No. 778

Deceased.
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Before the court is a petition filed on April 1, 2009 by June Bernadin, as Board President of First Buckingham Owners Corp., a creditor of the estate of Salvador Eduardo Pernia Camacho, who died on March 31, 2007, a resident of Freeport. Petitioner asks the court to issue limited letters of administration to the Public Administrator of Nassau County so that the Public Administrator can defend the estate against a foreclosure action by First Buckingham Owners Corp. on decedent's 35 shares of capital stock in First Buckingham Owners Corp. and the related proprietary lease on apartment 4J at 124 Smith Street in Freeport. There is also an anticipated foreclosure action to be commenced by Bank of America as successor in interest to Countrywide Mortgage in connection with a mortgage loan on apartment 4J. The petition avers that the outstanding loan held by Countrywide/Bank of America is in excess of \$100,000.00, and that petitioner is owed more than \$10,355.27 in unpaid maintenance fees, related legal fees which have accreted, and anticipated fees for an auction or foreclosure. The court has not been made aware of any other outstanding debts or funeral expenses.

According to the petition before the court, and an affidavit of due diligence and heirship filed simultaneously, decedent was survived by his wife, Sandra Janet Seda, a resident of New York City, and no issue. Citation issued on December 22, 2008, to Seda and the Public Administrator, and was returnable on March 31, 2009. Affidavits filed with the court indicate

that the citation was served on the Public Administrator, but that multiple attempts to serve Seda personally were unsuccessful. As a result, the court issued an order for substituted service on April 22, 2009. A supplemental citation, issued April 24, 2009, was properly served on Seda on May 4, 2009. Jurisdiction in connection with this petition is thus complete.

Appearing before the court on the citation return date were counsel for petitioner and counsel for the Public Administrator. Seda did not appear, nor did she respond to multiple written inquiries sent to her by petitioner at her home address. At a conference held before a court attorney-referee, 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 decedent's estate.

As indicated above, petitioner has asked the court to appoint the Public Administrator so that the Public Administrator can represent the estate in petitioner's foreclosure proceeding and in an anticipated foreclosure proceeding to be brought by Countrywide/Bank of America. In his answer and objection, filed August 26, 2009, the Public Administrator advised the court that decedent's residential property has an estimated market value of \$100,000.00. Since the outstanding lien held by Countrywide/Bank of America is in excess of that amount, and petitioner is owed more than \$10,355.27, the value of the property is insufficient to yield the total payoff amount required to stop foreclosure. The Public Administrator, in his objections, disputes the amount owed petitioner, on the grounds that the proceeds from petitioner's sublease of decedent's co-operative apartment between December 1, 2008 and November 30, 2009 should offset decedent's debt. Even if the Public Administrator is correct, and a lesser amount is owed, 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) (*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 or to Countrywide/Bank of America as a creditor of the estate. According to the Public Administrator, each of these two parties has a tangible interest in the foreclosure action. The Public Administrator cites three 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; *Matter of Chicas*, Sur Ct, Nassau County, June 30, 2009, File No. 354249, Dec. No. 279).

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]). Petitioner, as a creditor of the estate, is 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]). In this case, there is no next of kin who has indicated a willingness to serve. Petitioner's right to receive letters is also subordinate to that of the Public Administrator (*Matter of Weitz*, 69 NYS 2d 840 [Sur Ct, New York County 1944]). However, in the event that 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]). In petitioner's verified reply to the Public Administrator's objections, filed with the court on September 24, 2009, petitioner requests that

she be appointed in the event the court declines to appoint the Public Administrator, for the limited purpose of (a) disposing of the decedent's co-operative apartment by foreclosing on its lien and defending a foreclosure proceeding to be commenced by Countrywide/Bank of America, or (b) selling the co-operative apartment to satisfy its lien and the outstanding mortgage. Along with her reply, petitioner filed a corporate verification, consent, oath and designation.

The court declines to appoint the Public Administrator to administer this apparently 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. Limited letters of administration will issue to petitioner.

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.

Settle decree.

Dated: December 4, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court