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

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In the Matter of the Accounting by Julia Omanoff,
as Executor of the Estate of

File No. 300264

MICHAEL OMANOFF,

Dec. No. 900

Deceased.

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Pending before the court in this accounting proceeding is a motion to dismiss pursuant to CPLR 3211(a)(1) (dismissal based on documentary evidence) and for summary judgment pursuant to CPLR 3212 by Julia Omanoff, who is the executor of the estate.[1] The motion is opposed by objectant, William Omanoff.

The decedent died on April 24, 1997, survived by his wife, Julia, and by two adult children, Dennis and William. The decedent's last will and testament dated January 24, 1997 was admitted to probate on June 19, 1997, and Julia was appointed the executor of the estate.

In Article Fifth of the will, the decedent established a credit shelter trust for Julia's benefit. According to the terms of the will, during Julia's lifetime, (1) the trustees: (a) were to pay to Julia or apply for her benefit the net income of the trust in installments at least on a quarterly basis; and (b) in their sole and absolute discretion, could pay to Julia or apply for her benefit principal of the trust for her health, support and maintenance, and (2) upon written notice to the trustees, Julia could withdraw from trust principal an amount or amounts not to exceed, in the aggregate, $5,000 or five percent of the principal market value, whichever was greater, per year. Upon Julia's death, any remaining trust principal was to be divided equally between

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[1]According to the attorney who appeared for her, Julia suffers from advanced dementia. Dennis, in his capacity as Julia's attorney-in-fact, has filed a notice of appearance for Julia in this proceeding. Dennis has also appeared on his own behalf.

Dennis and William. In Article Seventeenth of the will, the decedent named Julia, Dennis and William as the co-trustees of the trust. The trust was never funded.

In July 2007, Julia filed an amended and restated account as executor for the period from April 24, 1997 to May 31, 2007. According to the amended and restated account, Julia received $204,406.54 in principal, consisting of $202,902.00 in New York Times class A stock and $1,504.54 from a Fidelity N.Y. municipal money market account, plus a $50,145.78 gain on the stock, for a total of $254,552.32. The account shows distributions to Julia, individually, in that total amount. Citation issued to Dennis and William, and both appeared by counsel. William filed verified objections to the account.

According to petitioner's counsel in papers filed in connection with a prior motion, Dennis testified at his deposition that (1) the New York Times stock sale proceeds were transferred into a Fidelity account in Julia's name and, thereafter, were transferred into a joint bank account in the names of Julia and Dennis and (2) moneys in excess of the amount of the decedent's accounts were expended on Julia's care. The petitioner and Dennis have previously admitted that Julia, in her individual capacity, received and used all of the assets in the estate account without having funded the credit shelter trust. Thus, the issue in the proceeding has been whether the funds from the decedent's accounts were used for Julia's benefit only or whether some or all of the money was used instead for Dennis's benefit.

Now, two years after Julia filed her account and when discovery is complete, she has moved to dismiss the proceeding she commenced and for summary judgment based on a theory advanced for the first time in her motion papers that documentary evidence shows that the money that was in the estate account came from an account in the names of the decedent and Julia that

was not validly created since the decedent's signature on the account application is a forgery and the decedent was incompetent at the time the account was opened in April 1997, more than 12 years ago. According to the petitioner's attorney, the assets in the account came from a joint account held by the decedent and Julia which was then fraudulently transferred to an account in the decedent's name only. The petitioner's attorney argues that, as a result, the assets that were in the estate account should have been restored to a joint account with right of survivorship in the names of the decedent and Julia and should have passed outright to Julia when the decedent died. The petitioner's attorney asserts that the fraud was discoverable only when he hired a forensic document examiner in or about 2009. In a report affixed to the moving papers, the examiner concludes that the decedent did not sign the card by which the account in his name alone was opened. The doctor hired by the petitioner's attorney, who never treated or examined the decedent, concludes in his report that from "March 30, 1997 to the date of his death the decedent was cognitively impaired to the degree that he could not have made on a reliable basis any complex financial or other personal decisions requiring the evaluation of significant high-level data to make such a decision reliably."

The petitioner's attorney further argues that the assets that were transferred from the joint account to an account in the decedent's name alone would at most constitute an incomplete gift since delivery failed by dint of the fraud involved in the opening of the account in the decedent's sole name. The petitioner's attorney states that Julia should have filed an account that stated that there were no estate assets and asks in the reply papers filed in connection with the motion that the court deem the pleadings as amended nunc pro tunc.

William argues that the motion should be denied for numerous reasons. In that regard, he points out that the only affirmation or affidavit filed in support of the motion is from the petitioner's attorney, who has no personal knowledge of the facts asserted to be true. William also argues that the fraud theory was advanced for the first time only after Julia developed Alzheimer's Disease and is wholly inconsistent with the petition she verified in June 2007 and the accompanying account she filed as executor of the decedent's estate. Further, William also points out that Julia signed the certificate release form in 1997 to transfer the stock to the decedent's account. William also argues that it is prejudicial to him for the petitioner's attorney to advance a totally new theory after two years having been spent on discovery. William asserts that it is improper for the petitioner to cast her motion as one to dismiss and for summary judgment when it is really a motion to amend the petition made at a time when the petitioner cannot be examined and he asserts that any attempt to amend the petition should be barred by laches. Additionally, William argues that the motion should be denied as there are questions of material fact as to whether the conclusions reached by petitioner's experts are correct. Finally, William argues that even if the court were to conclude that the decedent's signature on the account card was forged, there is a triable fact as to who forged the signature. William asserts that it is possible that Julia forged it and cannot now benefit from her own wrongdoing. William further asserts that the claim of forgery is barred by a six-year statute of limitations (CPLR 213 [1]).

CPLR 3211 (a) (1) allows the court to dismiss a proceeding when documentary evidence presented by the respondent conclusively shows the claims asserted by the petitioner are without merit.

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]).

Here, the petitioner's motion to dismiss the proceeding is improper since it was she who commenced it. The motion for summary judgment is also improper as it does not address the objections to the account she filed. She bases her motions on the forensic document examiner's conclusion that the decedent's signature is a forgery on the signature card creating the account whereby assets from an account in the names of the decedent and Julia were transferred to the account in the decedent's name. However, she raised this theory for the first time in this motion. It contradicts the allegations made in the petition and the information contained in the account. Significantly, William has not had the opportunity to test its veracity through discovery or by engaging an expert of his choosing. The same holds true for the petitioner's assertion that the decedent did not have the capacity to engage in any financial dealings at the time the money was moved to his account. Indeed, these theories are not properly before the court, and, in any event, the petitioner has failed to meet her burden of proving that there are no material questions of fact. Accordingly, her motion to dismiss or for summary judgment is denied.

If the petitioner wishes to assert these claims, she must move to amend her petition and the account. The court will not entertain a request to do so contained only in her attorney's reply affirmation.

The matter is scheduled for a conference on February 10, 2010, at 2:30 p.m.

This is the decision and order of the court.

Dated: February 4, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court