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

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In the Matter of the Petition of Sonia Frederico Barroso
against the Estate of

File No. 356861/A

VICENTE JULIANO BONNARD,

Dec. No. 26517

Deceased,

to Determine the Validity of a Claim.

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Before the court is a motion to dismiss the petition of Sonia Frederico Barroso, who seeks a determination of the validity of her claim against the estate of Vicente Juliano Bonnard. Petitioner worked as a personal assistant to decedent from June 2006 until his death. Her claim is based upon a written document, purportedly signed by decedent and two witnesses on October 3, 2007, but not signed by petitioner. It states that on September 1, 2017, or upon decedent's death, should that occur sooner, decedent will pay $200,000.00 to petitioner for her services as his personal assistant.

Decedent died on June 2, 2009, less than two years after the document was signed. Petitioner claims that decedent paid her $2,793.00, leaving a balance owed to her by decedent's estate in the amount of $197,207.00. Annexed to petitioner's papers is a photocopy of the written document in the original Portugese, as well as an English translation. The verified claim was sent to the estate fiduciaries, Vicente Juliano Bonnard, II and Debora Jean Bonnard, on August 19, 2009, and was denied by the fiduciaries on September 8, 2009.

Counsel for the respondents has now filed a motion to dismiss the petition pursuant to CPLR 3211 (a) (7) based upon a failure to state a cause of action. In support of this motion for dismissal, respondents raise three separate arguments: (1) petitioner's claim is time barred

under SCPA 1810 because more than 60 days passed between the rejection of her claim and the filing of the present petition; (2) petitioner has failed to put forth a possible cause of action, in that petitioner implies that her claim lies in breach of contract, yet she never alleges [a] the existence of a valid contract, [b] petitioner's performance under the contract, [c] respondents' material breach of contract, and [d] resulting damages; and (3) even if petitioner's claim can be sufficiently pleaded as existing pursuant to a contract, it is based upon a bilateral contract which is unenforceable under the statute of frauds, because the writing reflects mutual obligations and could not have been performed within one year, thus necessitating the signatures of both parties. Each of these arguments will be addressed by the court; for the reasons set forth below, the motion is denied.

(1) Is petitioner's action time barred?

Respondents rely upon SCPA 1810 to support their assertion that petitioner's claim is time barred, citing the following statutory language:

> "Nothing in this article shall prevent a claimant from commencing an action on his claim at law or in equity, provided that where a claim has been presented and rejected or deemed rejected pursuant to 1806 in whole or in part the action must be commenced within 60 days after such rejection."

It is argued by the respondents that under this section, the petition is untimely because more than 60 days elapsed between the rejection of the claim by the executors and the filing of the present petition to determine the validity of the claim. However, this is a misreading of the statute, which provides a short statute of limitations on a claimant's ability to relitigate a rejected claim in a forum other than the Surrogate's Court (*see Matter of Feinberg,* 18 NY2d 499, 507 [1966].

> "If a claimant presents a claim to the fiduciary and receives a notice of rejection, he can pursue his claim in any forum with subject matter jurisdiction; he need not proceed in the Surrogate's Court. He is, however, under a time limitation. If he

> wants to proceed elsewhere, he must commence the proceeding within sixty days after the fiduciary has rejected his claim."

(Turano, Practice Commentary, McKinney's Cons Laws of NY, 1996 Main Volume, SCPA § 1810). This position is reinforced by Turano's additional comment in the 2010 Electronic Update: "SCPA 1810 allows a claimant to bring an action in another court of competent jurisdiction as long as he does so within sixty days of the rejection of the claim; otherwise he may get relief only in the Surrogate's Court" (Turano, Supplemental Practice Commentary, McKinney's Cons Laws of NY, 2010 Electronic Update, SCPA § 1810).

This understanding of the statute and its predecessor, § 211 of the Surrogate's Court Act, is fully supported by case law. "[F]ailure to commence an action within 60 days after rejection of a claim by a preliminary executor bars civil action thereon and entitles the fiduciary to seek its adjudication in the Surrogate's Court" (*Matter of Cooper*, 55 Misc 2d 159, 162 [Sur Ct, New York County 1967]; *see also Matter of Feinberg,*18 NY2d 499, 507 [1966]; *Matter of Weber*, 165 Misc 815, 817 [Sur Ct, New York County 1938]).

The present petition is not time barred.

(2) Did petitioner fail to state a cause of action?

Respondents have moved pursuant to CPLR 3211 (a) (7) for a dismissal of the petition on the ground that petitioner has failed to state a cause of action. In deciding respondent's motion, the court's role is limited to making a determination as to "whether, deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained" (*Barry & Sons, Inc. v Instinct Prods. LLC*, 5 Misc 3d 172, 179 [Sup Ct, New York County 2004] [internal citation omitted], *revd in part on other grounds*, 15 AD3d 62 [1st Dept

2005]). "It is well-established law that a pleading, although inartfully drawn, should not be dismissed, so long as it sets forth a cause of action" (*McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990], citing *Kraft v Sheridan*, 134 AD2d 217, 218-219 [1st Dept 1987]). Pleadings must be liberally construed by the court (CPLR 3026), which must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Petitioner alleges the following:

1. There was an employment agreement attested to by decedent in writing (contract);

2. Petitioner fulfilled her obligations under the agreement (performance);

3. Decedent did not pay petitioner the amount stated in the contract (breach); and

4. The estate is indebted to petitioner for the sum stated in the agreement (damages).

Petitioner supports her claim with a document, purportedly signed by decedent, in which decedent agreed to pay petitioner $200,000.00 for her services as his personal assistant, with payment to be made on September 1, 2017 or upon decedent's death, if sooner. On this basis, petitioner argues that she is owed $200,000.00 plus interest from decedent's date of death, less any amounts paid to date, for the work she performed as decedent's personal assistant.

The court finds that the petition as filed, as well as the underlying claim, adequately sets forth the terms of the contract as well as the alleged breach, and provides the respondents with notice "of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action . . ." (CPLR 3013). The branch of respondent's motion to dismiss the petition for failure to state a cause of action is denied.

(3) Is petitioner's claim unenforceable under the statute of frauds?

Respondents assert that if petitioner's case is not barred as untimely, or dismissed for failure to state a cause of action, the claim is ultimately unenforceable under GOL 5-701 (the statute of frauds), which provides, in part, that an agreement which "[b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime" is void unless it is in writing and signed by the party to be charged (GOL 5-701 [a] [1]).

The courts have long interpreted GOL 5-701 (a) (1) "to encompass only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year" (*Cron v Hargo Fabrics*, 91 NY2d 362, 366 [1988] [internal citation omitted]). An agreement which "could have been fully performed within a year of the making thereof [is] not within the Statute of Frauds" (*Radnay v Charge & Ride*, 266 AD2d 194, 196 [2d Dept 1999]).

Respondent takes the position that the agreement before the court does not allow for petitioner's performance within one year, despite the fact that the agreement appears to allow for the possibility of a completed performance within that time frame, had decedent died within a year of the date of the agreement. But even if the respondent is correct, the fact remains that the agreement on which this claim is based is not a parol contract; petitioner has presented the court with a writing purportedly signed by decedent. Respondents maintain that the writing does not comply with the requirements of the statute of frauds in that it is a bilateral contract which requires the signatures of both parties thereto, not merely the signature of the party being

charged with a breach.[1] However, the statute of frauds requires only that the writing be "signed by the party to be charged" and not that it be signed by both parties. "The writing need only be signed by the party to be charged and amount to an acknowledgment of his obligation" (*Torreggiani v Coffee of Columbia*, 49 Misc 2d 785, 790 [Civ Ct, New York County 1965], citing *Spiegel v Lowenstein*, 162 App Div 443 [1914]). The party to be charged cannot argue that an agreement which he or she signed is invalid on the grounds that the claimant failed to sign it (*see European Am. Bank & Trust Co. v Boyd*, 131 AD2d 629, 630 [2d Dept 1987]).

The motion is denied. A scheduling conference in connection with the hearing to determine the validity of the claim will be held with a member of the law department on October 4, 2010 at 2:45 p.m.

This constitutes the decision and order of the court.

Dated: August 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court

[1]In support of this position, respondents cite *East 56th Plaza, Inc. v New York City Conciliation and Appeals Bd* , 80 AD2d 389, 402 (1st Dept 1981), which involved a real estate lease executed only by the tenant and not by the landlord. The First Department found that the parties unequivocally contemplated execution of the lease by both parties, and held that the lease was not binding. However, the cited decision was reversed by the Court of Appeals [56 NY2d at 544 [1982]), which found that the proposed lease, while unsigned by the landlord, constituted a binding offer which became enforceable once executed by the tenant.