

Matter of McFarland

2010 NY Slip Op 33060(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 0262853/L

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 Account of Julie S. McFarland Thompson,
 as Administrator of the Estate of

File No. 262853/L

ROBERT H. McFARLAND,

Dec. No. 26462

Deceased.

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 Before the court are two motions for summary judgment filed in connection with the contested account of Julie S. McFarland Thompson, the former administrator of the estate of Robert H. McFarland. The first motion was filed by the Public Administrator, who is the current administrator d.b.n. of the estate, and the second was filed by claimant Daquann Redd, an infant, and his mother, Sylvia Croker, as judgment creditors of the estate.

FACTS

Decedent died intestate on June 14, 1989, survived by his wife, Julie S. McFarland Thompson, and two infant sons. Letters of administration issued to Thompson on January 5, 1990 after she filed a bond issued by the Western Surety Company. In a decision dated January 13, 2003, Thompson's letters were revoked and letters were issued to the Public Administrator. Thompson filed her account as administrator on September 21, 2006, and objections were filed by (1) the Public Administrator; (2) Redd and Croker; and (3) decedent's brother, Mark McFarland, a non-distributee whose claim against the estate had been rejected by Thompson, as reflected in schedule D-2 of her account. The motions presently before the court followed.

All parties agree that at the time of decedent's death, his estate included four pieces of real property, referred to herein by their street name locations, Lindsey, Brooklyn, Prospect and

Broadway. There were outstanding mortgages on Lindsey, Brooklyn and Broadway. Schedule A of the account filed by Thompson further reflects that decedent's assets also included a 1989 Corvette automobile and a bank account in the name of MFR Management, Inc. containing \$87.00.

The real properties were not sold by Thompson, nor did she collect the full amount of the rental payments due the estate. Citibank foreclosed on Lindsey because the administrator failed to pay the mortgage. The administrator made some mortgage payments on Brooklyn in 1991. Although payments did not continue, the mortgagee never foreclosed on the property; the Public Administrator sold this property after being appointed administrator d.b.n. in 2003. Thompson paid real estate taxes on Prospect in 1992 and insurance payments in 1993, but subsequently Nassau County seized Prospect for failure to pay taxes. At Broadway in 1989, shortly after decedent's death, when the property was not insured and before an administrator was appointed, Redd fell and was injured. The account does not reflect whether the mortgagee foreclosed on this property. Redd and Croker brought a court action which Thompson did not defend, and a judgment was obtained by Redd and Croker against the estate.

SUMMARY JUDGMENT

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 Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding rather than issue determination" and summary judgment "should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable'"

(*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citations omitted]). 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 (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must “lay bare her proof and, avoiding conclusory allegations, set forth evidentiary proof sufficient to establish the existence of material issues of fact which [require] a trial of the action” (*Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996] [internal citation omitted]). “[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] [internal citations omitted]; see also *Prudential Home Mtge. Co. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

THE PUBLIC ADMINISTRATOR'S MOTION FOR SUMMARY JUDGMENT

The Public Administrator filed a motion for summary judgment seeking an order and decree, pursuant to CPLR 3212, granting his verified objections numbered 1 through 36 and 39 through 44 to the former administrator's account¹. The motion is denied except as noted in the Conclusion section of the decision. The objections are summarized and addressed below:

Objection 1: This is an objection to Thompson's petition and the relief requested therein. As discussed below, the court finds that there are triable issues of fact which require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). The motion for summary judgment is denied as to this objection.

Objections 2-3: With respect to schedule A, the Public Administrator objects to (1) the valuation of MFR Management, Inc., (2) the failure to value, identify and provide the account number of an unspecified "Bank Account," and (3) the failure to obtain a written valuation from a licensed or certified appraiser. Thompson, states, in paragraph 21 of her reply, that she has no knowledge of MFR Management, Inc. or its assets, as no records were left by decedent. The availability of such records, the existence of corporate assets other than the bank account, and whether there was sufficient information to obtain a proper valuation of MFR Management, Inc. are questions of fact. While it is the responsibility of the administrator to investigate the existence of and collect estate property, the objectant has the burden of establishing estate assets which he alleges were not accounted for, and this must be accomplished with a fair degree of certainty, and not on the basis of surmise and conjecture (*Matter of Antoniades*, 43 Misc2d 782,

¹The Public Administrator excludes from his motion objection 37 (rejection of the claim of Mark McFarland) and objection 38 (rejection of the claim of Redd and Croker).

783 [Surr Ct, Nassau County 1964]). In this case, Thompson testified that there were no existent records or other information available to place any value on MFR Management, Inc., aside from the small bank account in corporate name. The Public Administrator has not yet produced any concrete evidence to contradict the administrator's valuation of this asset (see *Matter of Antoniadis*, 43 Misc2d 782 [Surr Ct, Nassau County 1964]). The motion is denied as to this objection.

Objections 4-8 and 14-16: These objections concern the real property shown on schedule A and Thompson's alleged failure to obtain valuations and written appraisals of decedent's real property and the personalty shown on schedule A. Pages 18 and 21 of the account reflect payments made for appraisals of each of the real properties, as well as another fee paid for an unidentified appraisal. These schedule C credits raise a question of fact as to whether appraisals were obtained. However, the Public Administrator notes that these appraisals (which would date back 19 years) were not produced by Thompson when they were requested. While, under the circumstances, Thompson's failure to produce the appraisals does not entitle the Public Administrator to summary judgment, the court notes that an administrator's failure to maintain and produce accurate records will result in all obscurities, presumptions and doubts being held against her at trial (*Matter of Shulsky*, 34 AD2d 545, 547 [2d Dept 1970]). Summary judgment is denied with reference to these objections.

Objections 9-13, 17-19 and 43: In this group of objections to schedules A and J of Thompson's account, the Public Administrator objects to undisputed financial losses suffered by the estate as a result of real properties lost and rents uncollected. The Public Administrator argues that these losses are the direct result of Thompson's (1) "wrongful retention of, imprudent

failure to sell and waste associated with” decedent’s real property, (2) failure to realize increases on sales, and (3) failure to collect rent. Thompson challenges the Public Administrator’s arguments concerning the cause of these losses. Thompson argues that all four of the real properties were in deplorable condition, located in crime-ridden neighborhoods, and occupied by tenants who refused to pay rent and who caused serious damage to the properties. She claims that the estate lacked any liquid assets with which to maintain or improve the properties. Although Thompson maintains that she engaged the services of a licensed real estate broker to market the properties, they were not sold during Thompson’s tenure as administrator. Thompson’s position is supported by the affirmation of her attorney and by the affidavit of the real estate broker hired by Thompson to market the properties. Whether the failure to sell the properties owned by the decedent and to collect the full rents that were due thereon constitute breaches of fiduciary duty or were due to other circumstances are questions of fact. As there are triable issues of fact concerning the losses resulting from these properties, the motion for summary judgment is denied (*see Byrde v CVS Pharmacy*, 61 AD3d 907 [2d Dept 2009]).

Objection 20: This objection to schedule A-2 concerns Thompson’s failure to account for \$2,009.23 in account 29812782, the estate bank account opened by Thompson, reflected as a charge on schedule A but shown as a zero balance on schedule G. Schedule C shows total administration expenses far in excess of the total amount deposited into the estate account, indicating that the charges exceeded the credits, resulting in a negative balance. The Public Administrator has not established as a matter of law that this section of his motion should be granted, and it is, therefore, denied.

Objections 21-22: In these objections, the Public Administrator correctly notes Thompson's failure to report losses on schedule B and properly itemize funeral and administration expenses on schedule C. These objections relate to the format of the account, which can be corrected by Thompson filing an amended accounting. Therefore, Thompson is directed to amend her account to accurately reflect itemized credits on the appropriate account schedules. The motion is denied as to these objections.

Objections 23-26: These objections refer to the expenses shown on schedules C and C-1 as paid before and after the issuance of letters from accounts 49443259 and 29812782, and Thompson's failure to account for these expenses. The expenses paid before the issuance of letters from account 49443259 are reflected on page 9 of schedule C and itemized on pages 10-12 of the account; the expenses paid from account 29812782 are also shown on schedule C and are itemized on pages 13-15 of the account. Whether each of these entries reflects a proper expense is a factual question. The motion is denied as to these objections.

Objections 27-28: The Public Administrator charges Thompson with a failure to itemize estate expenses, including those paid from escrow. Expenses paid from escrow are reflected on pages 21-22 of schedule C. To the extent that there are any administration expenses which were not correctly itemized, Thompson is directed to amend her account to reflect this information properly. The motion for summary judgment is denied as to these objections.

Objection 29: The Public Administrator objects to any payment from the estate, including commissions, to Thompson. Whether Thompson is entitled to reimbursement is a question of fact. As to commissions, the account does not reflect that any were paid, but "[s]tatutory commissions must be awarded in the absence of mathematical error in their

computation or allegations of misconduct amounting to dereliction, complete indifference or other comparable acts of misfeasance" (*Matter of Drier*, 245 AD2d 787,788 [3d Dept 1997], *lv denied* 91 NY2d 812 [1998]). The court notes further that Thompson stated under oath that she voluntarily waived her commissions because "[t]he estate is broke" (Deposition of Thompson, Oct. 2, 2007, p 76, line 8) rendering this portion of the objection moot. As questions of fact remain regarding Thompson's entitlement to reimbursements, summary judgment is denied on this objection.

Objection 30: This is an objection to the legal fees paid to Thompson's current attorney, coupled with a request that the court fix these fees. It is well settled that the Surrogate bears the ultimate responsibility to determine what constitutes reasonable legal compensation (*Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]). In determining the reasonableness, the court will consider the time spent, the difficulties involved, the nature of the services, the amount involved, the professional standing of counsel and the results obtained (*Matter of Potts*, 213 App Div 59 [4th Dept 1925], *aff'd* 241 NY 593 [1925]). With regard to legal fees paid which are paid for services rendered on behalf of fiduciaries for the defense of the fiduciary on matters where the fiduciary is be surcharged, these fees may not be paid from the estate (*Matter of Newhoff*, 107 AD2d 417 [2d Dept 1985], *appeal denied* 66 NY2d 605 [1985]; *Matter of Hildreth*, 274 App Div 611 [2d Dept 1949], *aff'd* 301 NY 705 [1950]). As there is a question of fact as to the reasonableness of the fees and whether the fees should ultimately be paid from the estate, summary judgment is denied.

Objection 31: This objection concerns payments made to Thompson's previous attorney for the purpose of paying administration expenses and Thompson's failure to account for these

expenses. However, pages 21-22 of the account lists \$3,918.10 of these expenses in itemized format, the same total shown on schedule C. Motion denied as to this objection.

Objection 32: The Public Administrator objects to the schedule C-1 entry, “Total Due to Ms. Thompson: \$74,672.16.” Whether this amount is due to Thompson is a question of fact, not law, which requires a hearing. Motion denied as to this objection.

Objections 33-36: This group of objections pertains to schedule D entries, and Thompson’s alleged failure to identify and itemize all debts of decedent and creditors’ claims. Further, the Public Administrator objects to all of the claims listed under schedule D-2. However, the Public Administrator does not indicate which, if any, debts or claims Thompson omitted or why the three schedule D-2 claims should have been disallowed by Thompson. The burden is on the objectant to show that a claim was fraudulently or negligently allowed or paid (*Matter of Di Canio*, 11 Misc2d 270, 271 [Surr Ct, Nassau County 1958]). The objectant has not met his burden, therefore, his motion for summary judgment is denied as to these objections.

Objections 39 and 41: The Public Administrator objects to Thompson’s failure to list personal property on schedule E of the account and to show on schedule G personal property on hand. Whether decedent’s estate included personal property to distribute or to list on schedule G is a question of fact, not law. The burden of proof on this issue is on the Public Administrator. Motion denied as to this objection.

Objection 40: This objection concerns the lack of new investments, exchanges and distributions on schedule F. The Public Administrator argues that Thompson failed to support or defend this omission; Thompson’s position is that the estate had no assets other than unmarketable real estate, which would seem to support the lack of new investments, exchanges

and distributions. The Public Administrator has failed to establish his right to a verdict as a matter of law; therefore, the motion is denied as to this objection.

Objection 42: The Public Administrator correctly objects to the inclusion, in schedule J, of real property that was subsequently lost to foreclosure proceedings. As this is essentially an objection to the format of the account, which can be corrected, Thompson is directed to amend schedule J of her account to properly reflect the valuation of these properties at the close of the accounting. Motion denied as to this objection.

Objection 44: The Public Administrator seeks an order finding that Thompson failed to exercise proper conduct as the personal representative of the estate. A determination as to whether a fiduciary's actions measures up to the appropriate standards of conduct is a fact to be determined by the trial court (*see Matter of Donner*, 82 NY2d 574 [1993]; *Matter of Hubbell*, 302 NY 246 [1951]; *Matter of Winston*, 39 AD3d 765 [2d Dept 2007], *lv denied* 9 NY3d 806 [2007]). Motion for summary judgment as to this objection is denied.

The Public Administrator further requests that the court issue an order (i) denying the relief requested in Thompson's petition; (ii) disapproving the account as filed; (iii) holding the administrator personally liable for all actual losses incurred by the estate as a result of Thompson's wrongful retention of, imprudent failure to sell and waste associated with all real property shown on schedules A and J of the account; (iv) awarding a money judgment in favor of the estate against Thompson for damages she caused to the estate, and directing the surety to pay the entire amount of the surety's bond to the Public Administrator; (v) fixing the fees of Thompson's attorney; (vi) rejecting the claims of Fred M. Ainsley, Aston & Mavis C. Monies and Wall Street Clearance Co.; and (vii) for such other relief as the court shall direct. With

respect to the Public Administrator's request for an order directing the surety to pay the amount of Thompson's bond, "[a] fiduciary's liability must first be determined by the Surrogate's Court before a surety's liability under the bond can attach" (*Matter of Guzzo*, 292 AD2d 607, 608 [2d Dept 2002] [internal citations omitted]; *Matter of Zipsner*, 270 AD2d 279, 280 [2d Dept 2000]). The court will determine all of these issues following a trial.

Redd and Croker joined in the Public Administrator's application except as to that portion which requests that the proceeds of any judgment against Western Surety Company be paid into court,² and they further request an accounting from the Public Administrator. As noted above, it would be premature for the court to direct the surety to make any payment at this time. The court finds also that it would be premature to direct the Public Administrator to account until such time as the court makes a determination in connection with the objections presently before it in connection with Thompson's account.

CLAIMANTS' MOTION FOR SUMMARY JUDGMENT

A second motion for summary judgment was filed by Redd and Croker, seeking an order granting them summary judgment against Western Surety Company in the sum of \$60,000.00 plus interest pursuant to § 7-301 of the General Obligations Law, and for such other relief as the court deems proper. The motion is based upon an award of \$50,000.00 made to Redd and Croker in the Nassau County Supreme Court action which they brought against Thompson as administrator of this estate; judgment in the amount of \$78,043.50 was entered in the office of the clerk on June 29, 1995 and remains unsatisfied. This motion for summary judgment was

²Redd and Croker are seeking an order directing the surety to pay the amount of the bond, \$60,000.00, directly to them, as discussed in the section below.

opposed by Thompson and by Western Surety Company. Counsel for Redd and Croker filed a reply affirmation asserting that the opposition papers had failed to raise issues of fact. As discussed above, it would be premature for the court to direct any payment by the surety until after the completion of the trial in connection with the account (*Matter of Guzzo*, 292 AD2d 607, 608, [2d Dept 2002] [internal citations omitted]; *Matter of Zipsner*, 270 AD2d 279, 280 [2d Dept 2000]). The motion is denied.

CONCLUSION

The motions for summary judgment are denied.

Thompson is directed to make, serve and file all amendments to her account within thirty days of the date of this decision. If such amendments are not timely filed, summary judgment is granted as to objections 21, 22, 27, 28 and 42..

This matter will appear on the court's calendar for conference on October 26, 2010 at 2:45 p.m. to schedule a trial date.

Settle order.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court