

Matter of Oschitske
2010 NY Slip Op 33076(U)
September 30, 2010
Surrogate's Court, Nassau County
Docket Number: 355341/B
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 Estate of

JULIA OSCHITSKE
a/k/a JULIA OSICKI,
a/k/a JULIA OSHICKA,

Deceased.

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John J. Osicki, Jr., as Executor of the Estate of John J.
Osicki and Margaret A. Miller, Executrix of the Estate
of Florence M. Stephens,

File No. 355341/B

Dec. No. 26637

Petitioners,

-against-

Marion O’Brien, as Administrator c.t.a. of the Estate of

JULIA OSCHITSKE
a/k/a JULIA OSICKI,
a/k/a JULIA OSHICKA,

Deceased,

Respondent.

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Before the court in this miscellaneous proceeding is a motion by respondent to dismiss the petition pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. The motion is opposed by the petitioners. For the reasons that follow, the motion is granted.

The petitioners are John J. Osicki, Jr., as executor of the estate of John J. Osicki, and Margaret A. Miller, as ancillary executor of the estate of Florence M. Stephens. John J. Osicki and Margaret A. Miller are the decedent’s post-deceased children and beneficiaries under the decedent’s last will and testament dated February 24, 1949. The respondent is Marion O’Brien, the administrator c.t.a. of the decedent’s estate. Marion is a granddaughter of the decedent.

Marion's mother was Frances Emmet, one of the decedent's children.

The decedent, Julia Oschitske, died on June 30, 1956. She was survived by seven children: Julia McGrath, Sophia Osicki, Frances Emmet, Ann Osicki, Agnes McGrath, John Osicki and Florence Stephens. All of the decedent's children post-deceased the decedent.

In 2009, Marion petitioned to probate the decedent's will as an ancient document and for letters of administration c.t.a. In the probate proceeding, the court found that it appeared that the will remained in the possession of the decedent or her attorney until her death on June 30, 1956 and remained in the possession of the attorney draftsman and/or petitioner's attorney since that time. In the decision (Dec. No. 548, August 5, 2009), the court stated an affidavit satisfactorily explaining the delay in offering the will for probate had been filed. The court admitted the will to probate as an ancient document, and letters of administration c.t.a. issued to Marion on August 10, 2009.

The will provides that the decedent's real property in Floral Park was to be held for the benefit of the decedent's daughters, Sophia Osicki, Ann Osicki and Frances Helmke, and, upon Sophia's death, was to be devised in equal shares to all of the decedent's children and issue of any deceased child, per stirpes. The will nominated Ann as the executor and did not name a successor executor. Ann did not offer the decedent's will for probate and continued to reside in the decedent's real property until her death on December 3, 1999. The real property is alleged to be the only asset of the decedent's estate. Sophia died on February 22, 1981; Frances died on June 15, 1987; Ann died on December 3, 1999.

According to the petitioners, Ann's will bequeaths her entire estate to Marion and Marion's now deceased husband, Thomas O'Brien. Marion and Thomas are the nominated

executors under the will. Letters testamentary issued to them by this court on January 4, 2005. After Ann's death, Marion and her family are alleged to have treated Julia's real property as their own, despite inquiries from various family members about the status of Julia's estate. The petitioners assert that Marion, as the legal representative of Julia's estate, had the fiduciary duty to proceed diligently to probate Julia's will, to preserve the value of the real property and to distribute the net proceeds of sale to the beneficiaries of Julia's estate. Instead, petitioners allege that Marion violated her fiduciary duty by treating the real property as her own and making no effort to sell it until late 2009. As a result of the alleged delay, the real property was not sold until January 2010 when its value was severely diminished. The petition further alleges that Marion is seeking to retain for herself, for the estate of Ann Osicki and the estate of Michael McGrath sixty percent of the amount to be distributed. The petitioners allege that, as a result of Marion's breach of fiduciary duty, she should be denied any fiduciary fees and should be denied reimbursement from estate assets for the expenses and costs allegedly incurred in using and keeping the real property from 2000 to 2010. The petitioners also ask that the interest, if any, of the estate of Michael McGrath in Julia's estate, as well as Marion's interest, should be determined by the court. Michael was Agnes' surviving spouse.

In her answer, Marion denied the salient allegations contained in the petition and asserted thirteen affirmative defenses, including that (1) the petition fails to state a cause of action; (2) Marion owed no legal duty to the petitioners or to anyone else to propound Julia's will for probate; (3) Marion was not a fiduciary until her appointment as administrator c.t.a. in 2009; and (4) the proceeding is premature since Marion had not had a sufficient amount of time to file her account with the court. Marion's papers in support of her motion to dismiss the petition for

failure to state a cause of action emphasize these defenses. Marion attempted to settle her account informally by receipt and release, but the respondents opted to commence this proceeding.

In opposition to the motion, the petitioners argue that Marion was the *de facto* fiduciary of Julia's estate since at least 2000 since Marion treated Julia's real property as her own after Ann's death in December 1999 and because Marion's counsel gave assurances in and after 2004 that Marion would offer Julia's will for probate and would apply for temporary letters so she could sell the real property. The petitioners assert that their argument is bolstered by Marion's submission of an informal account for the period 2000 through 2010.

In resolving a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, a court must liberally construe the pleadings, take the allegations of the petition as true and give the petitioner the benefit of every possible inference (*AG Capital Funding Partners, L.P. v State Street Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). The petition is couched as one to disallow Marion's expenses and fees, but she has not come before this court seeking reimbursement of expenses or commissions. Indeed, the relief the petitioners are seeking is available in an accounting proceeding; accordingly, the court will treat this proceeding as a petition to compel Marion to account for her stewardship of Julia's estate since letters of administration c.t.a. were issued to her on August 10, 2009 (SCPA 2205). Marion is thus directed to commence an accounting proceeding and obtain a citation by December 30, 2010. The petitioners have not offered a sufficient factual basis for the court to direct Marion to account as a *de facto* fiduciary as they have failed to allege, even under the liberal pleading standard enunciated above, that Marion undertook the "duties and responsibilities ordinarily assumed by a fiduciary" (*Matter of*

Buxton, 1 Misc 3d 903(A), *4 [Sur Ct, Westchester County 2003] [“It is well settled that the court may deem a person to be a *de facto* fiduciary, even though he or she never qualified or was authorized to act in a fiduciary capacity, if that person undertook duties and responsibilities ordinarily assumed by a fiduciary”], citing *Matter of Donner*, 82 NY2d 574 [1993] [additional citations omitted]).

Accordingly, the petition is dismissed. The respondent is directed to file her account as set forth above.

This is the decision of the court.

Settle decree.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court