

Matter of Voneeden

2010 NY Slip Op 34131(U)

January 8, 2010

Surrogate's Court, Bronx County

Docket Number: File No. XXXXX

Judge: Lee L. Holzman

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January 8, 2010

ESTATE OF HORACE VONEEDEN, also
known as HORACE A. VONEEDEN, Deceased

In this SCPA 2103 turnover proceeding, the petitioner, who is the administratrix c.t.a. and the decedent's daughter, alleged in her petition that she was entitled to a recovery against the two respondents for cash withdrawn from the decedent's bank accounts totaling \$35,515.52, as well as personal property consisting of furniture, household effects, books, equipment and jewelry belonging to the decedent. The petitioner now moves for partial summary judgment holding the respondents jointly and severally liable for the sum of \$34,872.14. The respondents' prior attorney withdrew when he became a judge. Notwithstanding that a new attorney requested and was afforded several months to submit opposition to this motion, the respondents failed to submit any opposing papers.

The decedent died on August 23, 2004 at a nursing home. In support of the motion, the petitioner annexes her own affidavit, the

deposition transcripts of the respondents, the respondents' answer to the amended turnover petition and an affidavit by the decedent submitted in 2004 in a Mental Hygiene Law article 81 proceeding commenced in Supreme Court, Bronx County.

The respondent Violet Adino (Adino) is the mother of the respondent JoAnn Acosta (Acosta). In their amended answer, the respondents state, inter alia, that Adino was employed for many years as the decedent's secretary; she had a romantic relationship with the decedent from 1981 through 1987; she performed various services for him in 2003 and 2004; and that Acosta worked as the decedent's home health aide late in his life. Both respondents acknowledged, in their answer and in their depositions, withdrawing or writing checks totaling \$34,872.14 from various accounts belonging to the decedent. The respondents allege that they expended funds for the decedent's benefit on numerous occasions; however, with the exception of a few relatively modest expenditures, they failed to provide specifics to support their contention that they spent the sum of \$34,872.14 for the decedent's benefit for the period from the beginning of 2003 to the early part of 2004. At their depositions, both respondents acknowledged that they were joint account holders with the decedent, acting under a power of attorney executed by the decedent in favor of Adino. They further testified that they did not retain receipts or recall the nature of the numerous withdrawals made for the decedent's benefit and they did not realize that it was necessary to retain receipts and/or records. This is echoed

in the following portion of their answer:

“The money that was withdrawn \$34,872.14, from [the decedent’s] bank accounts by [the respondents] as evidenced by ATM withdrawals or cancelled checks, was done with [the decedent’s] consent and authorization. We were on his accounts [Joint Bank Account] and [Adino] had the Power of Attorney. He was always instructing [the respondents] every step of the way. Because at the time we were both working full time and taking care of him around the clock, and because he had instructed us as to what to do, no receipts were kept.”

The respondents also testified that on occasion they were paid by the decedent as home health aides, despite other individuals being paid for these services at or about the same time the respondents received remuneration. They also testified that they received payments for such services while the decedent was in the hospital.

Based on the respondents’ deposition testimony and their amended answer, the petitioner seeks partial summary judgment for the withdrawals the respondents conceded that they made and in breach of their fiduciary obligation to the decedent arising from the power of attorney in favor of Adino, are unable to account for the expenditure of the funds. Specifically, the petitioner contends the respondents bear the burden of establishing a prima facie case that the funds were properly expended, and because they already acknowledged that they failed to maintain records showing how the withdrawals were spent for the decedent’s benefit, they cannot meet their burden. The petitioner also argues that pursuant to CPLR 4519 the respondents are precluded from offering their self-serving testimony

at a trial.

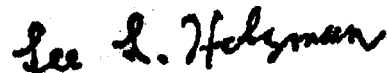
It is well settled that summary judgment cannot be granted unless it appears that no material triable issues of fact exist (see *Phillips v Kantor & Co.*, 31 NY2d 307 [1972]); *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). Initially, it is the movants' burden to establish that they are entitled to summary judgment by tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v Prospect Hosp.* 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). If a prima facie showing is made, the burden of going forward with proof, in admissible form, establishing that the movants are not entitled to judgment as a matter of law shifts to the party opposing the motion (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Nonetheless, summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined on the motion but must await the trial (see *F. Garofalo Elec. Co. v New York Univ.* 300 AD2d 186 [2002]).

Evidence that is inadmissible at trial under CPLR 4519 may be offered and considered in opposition to a summary judgment motion (see *Phillips v Kantor & Co.*, 31 NY2d at 315). However, the respondents failed to tender any opposition, despite being afforded ample time to do so. The allegations in the respondent's answer are not supported by any documents and fail to even provide an oral accounting specifically setting forth how

much was expended for each of the services provided or goods purchased for the decedent's benefit. The respondents concede that they withdrew \$34,872.14 of the decedent's funds. Furthermore, Adino, as the decedent's attorney-in-fact, had a fiduciary obligation to account for the funds expended, and where, as here, there is a failure to keep appropriate records, the attorney-in-fact has a "heavy burden of establishing the legitimacy of [his] undocumented withdrawals and alleged reimbursements" (see Matter of Garson, 17 AD3d 243 [2005] citing Matter of Roth, 283 AD2d 504 [2001]; Matter of Kent, 188 Misc 2d 509 [2001]). Based on the respondents' admissions, the petitioner made a prima facie showing that the respondents acted in concert in making the withdrawals from the decedent's account and their conclusory allegations that the funds were spent for the decedent's benefit fail to create any issue of fact with respect to their burden of establishing the legitimacy of their expenditures for either goods or services for the decedent's benefit. Accordingly, the motion for summary judgment is granted, and the respondents are jointly and severally liable to the estate in the sum of \$34,872.14 with statutory interest from January 31, 2004.

Notwithstanding their default, the decree to be entered hereon shall be settled on each of the respondents and the attorney who requested an extension of time to oppose the motion but failed to submit any opposition.

Settle decree.



SURROGATE