

Matter of Watson

2010 NY Slip Op 34132(U)

January 21, 2010

Surrogate's Court, Bronx County

Docket Number: File No. XXXXX

Judge: Lee L. Holzman

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January 21, 2010

ESTATE OF DERRICK WATSON, Deceased

In this contested administration proceeding, the decedent's adult daughter moves for summary judgment granting her petition for letters of administration. Originally, the daughter's petition stated that the decedent's distributees were the petitioner and two infant children; however, the parties now agree that the decedent's distributees also include an adult son and the petition was so amended. Each of the four children has a different mother. The guardian of the property of one of the two infant children is the only party who filed objections to the petition. Prior to the return date of the instant motion, the adult son submitted a pro se "affidavit in opposition."

The hostility between the parties antedates the decedent's death, as evidenced by a Mental Hygiene Law article 81 guardianship proceeding relating to the decedent in which the movant failed to list the objectant's infant as the decedent's child. The objectant and adult son both

allege that the movant seeks control of the decedent's assets for her own benefit.

In support of her motion, the movant avers, inter alia, that she has priority under SCPA 1001 (1) (b) inasmuch as no other child has petitioned to be appointed the fiduciary, and neither the objectant nor adult son alleged any statutory grounds that would render her, as a matter law, ineligible to serve. She argues that she did not know about the objectant's infant when she filed the article 81 proceeding and she first met the adult son at the decedent's funeral, after she filed her petition.

The objectant asserts that the movant's failures to list the infant in the article 81 application and the adult son in the application for letters of administration were intentional. The objectant further claims that the movant removed papers from the decedent's office including a purported testamentary instrument, and, if appointed, the movant will neither diligently search for any will that the decedent may have executed nor account for the true value of the property she allegedly already has taken. Accordingly, the objectant requests that the Public Administrator be appointed as fiduciary.

In his affidavit, the pro se adult son disputes the qualifications of the movant, asserting that she has caused many of the family's problems. Although he concedes that he never met the movant prior to the decedent's funeral, he states that, at that time, she acknowledged that she already knew who he was. He avers that his aunt's allegations in the article 81 proceeding were true and the petitioner's allegations were false. Therefore, he suggests

that he and the decedent's sister be appointed co-fiduciaries, though neither of them has filed a cross-petition to date.

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 movant's burden to establish that she is 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 movant is 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]).

Neither the objections nor the adult son's opposition establish that the movant is unfit to serve as the fiduciary of the estate because the parties ultimately stipulated that the petitioner and the decedent's sister would serve as co-guardians in the article 81 proceeding; and, therefore, the allegations of the petitioner's wrongful acts were never established.

Nonetheless, these allegations, if proven, would constitute an inability to serve due to dishonesty which is a statutory ground for disqualification [SCPA 707 [1] [e)]. Accordingly, a determination on this issue cannot be made on the basis of the papers submitted and a hearing must be held. The court is also concerned by the fact that at least two of the four alleged distributees are opposed to having the petitioner serve as the sole fiduciary.

This decision constitutes the order of the court denying the motion and scheduling the proceeding for a pretrial conference on February 24, 2010 at 9:30 A. M. The Chief Clerk shall mail a copy of this decision and order to all parties who have appeared.

Proceed accordingly.

Lee L. Helzman

SURROGATE