SURROGATE'S COURT: NEW YORK COUNTY

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In the Matter of the Estate of

ANITA APPLEBY,

Deceased.

File No. 2007-3532

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G L E N, S.

In this proceeding pursuant to SCPA 2103, the executor of the will of Anita Appleby seeks repayment of approximately $375,000 in a series of alleged loans decedent made to her son, David Appleby. David post-deceased his mother, and the successor fiduciary of his estate has moved for summary judgment dismissing the proceeding on a number of grounds.

Procedural History

The decedent died in September 2007. Her residuary estate passes in equal shares to David and to her other son, Thomas, whom she named as co-executors. David died in September 2008, leaving Thomas as decedent's sole surviving fiduciary. Thomas was also appointed administrator of David's estate by the Connecticut Court of Probate, District of Stamford, but thereafter resigned on the ground that a conflict of interest had developed. The Connecticut Court of Probate appointed Steven D. Smith as successor administrator of David's estate.

As administrator, Smith moves for summary judgment pursuant to CPLR 3212 in the underlying turnover proceeding on the following grounds:

1) The demand note sought to be enforced fails to recite the amount to be paid and is therefore fatally indefinite and legally unenforceable;

2) The claim is barred by the doctrine of judicial admission;

3) The claim is barred by the doctrine of quasi-estoppel;

4) The claim is barred by the Statute of Limitations.

Relevant Background

It is undisputed that David became seriously ill in 2000 and was unable to support himself or pay his child support obligations which amounted to $3,000 per month. Decedent began transferring between $1,000 and $5,000 per month to David to help cover his expenses. The payments are evidenced by one hundred-seventeen canceled checks written by decedent between February 2001 and September 2007, payable to David, and by entries in decedent's check register. In addition, Thomas submits a promissory note found among decedent's papers which reads, in relevant part, "On demand, DAVID APPLEBY . . . promises to pay ANITA APPLEBY . . . the sum of _____ ($_____) Dollars with no interest, until paid." The note is signed by David Appleby and dated "September ___, 2000."

Thomas maintains that the transfers were loans from the decedent, which she intended David to repay after her death from his share of her estate.

Summary Judgment

On a summary judgment motion, the movant must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant has made a prima facie case, the burden shifts to the opposing party to provide proof establishing there are material questions of fact that require a trial (*Zuckerman v City of New York*, 49 NY 2d 557 [1980]). In determining whether such factual issues exist, the court must view the evidence in a light most favorable to the non-moving party (*see Council of City of New York v Bloomberg*, 6 NY 3d 380, 401 [2006]).

Promissory Note

Smith argues the promissory noted dated "September ___, 2000" is unenforceable on the ground of indefiniteness for failure to specify the amount of the loan. His argument is not relevant, however, because Thomas does not seek to enforce the promissory note itself as a negotiable instrument in this proceeding. Rather, he submits the note for the limited purpose of demonstrating decedent's intent, and David's acknowledgment, that the transfers were loans and not gifts.

A loan need not be evidenced by a written note.[1] When there is no written loan agreement between the borrower and lender, the loan may nevertheless be proved by facts and circumstances viewed as a whole (*see e.g. Burnside v Foglia*, 208 AD2d 1085 [3rd Dept 1994]; *Matter of Druck*, 7 Misc 3d 893 [Sur Ct Kings County]). Here, in addition to the signed note and canceled checks, Thomas submits the affidavit and deposition testimony of decedent's nephew, an attorney who allegedly prepared the promissory note at decedent's request, and an affidavit from decedent's sister, all attesting that decedent stated the transfers were intended as loans to be repaid by David after her death. Thomas alleges that the decedent also made similar statements to him and that after her death David affirmed his obligation to repay the money he received from their mother.

The affidavits and deposition testimony of Thomas and of decedent's sister and nephew are excludable at trial as hearsay. However, although a party cannot rely solely on inadmissable

[1] Although David Appleby died a resident of Connecticut, there is no indication that the primary contacts for the subject transactions were other than with New York, where the decedent was domiciled and where she maintained her checking account. The parties do not argue that the law of another jurisdiction governs here, and the court has applied New York law in rendering this decision.

hearsay evidence to defeat a motion for summary judgment, such evidence may be considered if other admissible evidence is presented to create a triable issue of fact (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99 [1st Dept 1999]; *Koren v Weihs*, 201 AD2d 268 [1st Dept 1994]). Viewed in the light most favorable to the executor, as they must be, the signed promissory note (albeit lacking an amount) with the canceled checks and hearsay statements are sufficient to create a triable issue of fact as to whether the transfers were loans.[2] Accordingly, the court denies that portion of the motion seeking summary judgment on the ground a material term of the demand note is missing.

Quasi-Estoppel

Thomas did not include the claim for the monies in question as an asset on the federal and New York estate tax returns he filed for decedent's estate. Smith argues that the doctrine of quasi-estoppel therefore bars him from claiming that the transfers were loans. A quasi-estoppel, also termed an "estoppel against inconsistent positions," prevents a party from adopting a factual position in a court contrary to the factual position it previously asserted in a quasi-judicial or administrative proceeding (*PL Diamond LLC v Becker-Paramount LLC,* 16 Misc 3d 1105 [A] [Sup Ct New York County 2007]). The doctrine of quasi-estoppel has been expanded to estop a party from taking a position in court that is contrary to a position taken on tax returns (*Mahoney-Buntzman v Buntzman,* 12 NY3d 415, 422 [2009] ["We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns"]; *Naghavi v New York Life Insurance,* 260 AD 2d 252

[2] To the extent any of the evidence may also be excludable at trial under the "Dead Man's Statute" (CPLR 4519), it may nevertheless be considered to defeat a motion for summary judgment (*Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 310 [1972]).

[1st Dept 1999]). Thomas contends, however, that he was unaware that the estate had a viable loan claim when he filed the returns, because he did not discover the written note until afterwards, in the spring of 2010. The policy underlying the doctrine of quasi-estoppel is not served, and its application would be inappropriate, if Thomas reasonably believed the claim was unenforceable

-- and therefore of no value -- when he filed the returns. He has raised a material issue of fact requiring denial of the motion to dismiss the claim on the basis of quasi-estoppel.

Judicial Admission

Thomas also failed to list the monies in question as debts of David's estate in certain submissions he made to the Connecticut Probate Court when he was administrator. He filed a Return of Claims and List of Notified Creditors, dated March 12, 2009, and a Substitute or Corrected Return of Claims and List of Notified Creditors, dated February 1, 2010, both signed under penalty of false statement, and neither of which included David's alleged debt to his mother. Smith argues that the statements constitute formal judicial admissions, entitling him to summary judgment on the question.

A formal judicial admission is conclusive of the facts admitted. As the Court of Appeals stated in *People v Brown*, 98 NY2d 226 [2002], " 'A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary' " (*id.* at 232, fn. 2, *citing* Fisch, New York Evidence § 803, at 474 [2d ed]). Thomas's submissions in the Connecticut Court of Probate, however, are not formal judicial admissions.

The treatise cited in *Brown* explains, "Formal judicial admissions include those which

appear in the pleadings, a stipulation or other agreed statement of facts, or a declaration made in open court by a party or his counsel such as a waiver of proof, a concession of the truth of a relevant fact or a plea of guilt" (Fisch, New York Evidence § 803, at 474 [2d ed]). Thomas's submissions here were made pursuant to § 45a-361 of the Connecticut General Statutes which requires a fiduciary to file, within a certain period after appointment, a list of all claims *presented* to the fiduciary. The forms Thomas filed purport only to include "all claims exhibited to the fiduciary against [the Estate of David Appleby]." The filings were not made in any judicial proceeding and they did not concede any facts at odds with Thomas's averments in the present proceeding. Indeed, Smith does not allege that Thomas had at that point presented a claim against David's estate as decedent's executor. The statements filed in the Connecticut probate court therefore do not constitute formal judicial admissions, and the branch of Smith's motion seeking summary judgment on this ground is denied.

Statute of Limitations

Smith moves for summary judgment on the alternative ground that, even assuming the transfers were loans, the proceeding is barred by the six-year statute of limitations applicable to contractual obligations under CPLR 213 (2). He argues that the cause of action accrued in September 2000, the date on the executed promissory note, *i.e.*, months before David received any of the funds at issue here. He therefore maintains that the claim was time barred on October 1, 2006, several years before this proceeding was commenced. The court rejects this argument because petitioner is not seeking to enforce the promissory note. The claim is for repayment of each transfer by check, and for purposes of computing the period of limitations the court deems each transfer a separate loan.

As discussed above, Thomas maintains that the loans were to be repaid at decedent's death from David's share of her estate. His evidence as to the due date of the loans consists solely of hearsay statements inadmissable at trial. Such evidence, without more, is not sufficient to defeat a motion for summary judgment (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99 [1st Dept 1999]; *Koren v Weihs*, 201 AD2d 268 [1st Dept 1994]).

Further, in contending that the loans were intended to be paid from David's share of his inheritance, Thomas is essentially claiming that each transfer was an "advancement," defined in EPTL 2-1.5 as "an irrevocable gift intended by the donor as an anticipatory distribution in complete or partial satisfaction of the interest of the donee in the donor's estate. . ." For a transfer to qualify as an advancement, however, there must be a contemporaneous writing signed by the donor or donee, evidencing the intention that it be treated as such (EPTL 2-1.5 [b]). No such writing has been produced here.

When loans are made without any specified time of repayment, the law infers that the debt is payable on demand (*Minevitch v Puleo*, 9 AD2d 285 [1st Dept 1959]; *Seattle Pac. Indust., Inc. v Golden Val. Realty Assoc.*, 54 AD3d 930 [2nd Dept 2008]). A cause of action on a demand loan accrues when the right to make the demand is complete (CPLR 206 [a]). For purposes of this motion, then, the cause of action for each transfer arose on the date of the particular loan (*Seattle Pac. Indust., Inc. v Golden Val.Realty Assoc., supra,* 54 AD 3d 930; *Galietta v Gallieta*, 15 AD2d 603 [3rd Dept 1961]). The applicable period is six years (CPLR 213 [2]).

In accordance with the foregoing, and assuming for purposes of this motion that if the transfers were not gifts, they were loans, the court finds that the loans were payable on demand

and the claims accrued on the respective dates of execution of each check. The motion to dismiss the claim as barred by the six-year statute of limitations is granted to the extent of dismissing claims for all checks dated prior to May 10, 2004, six years before the commencement of this proceeding. The motion is otherwise denied.

Smith argues, in the alternative, that the applicable period of limitations is three years, pursuant to CPLR 214(3), governing actions to recover a chattel. The three-year period is generally applicable to SCPA 2103 proceedings, at least where a fiduciary is seeking return of estate property (*e.g. Matter of Kraus*, 208 AD2d 728 [2d Dept 1994]; *Matter of Reich*, 49 AD2d 858 [1st Dept 1975]). However, where the proceeding is not for replevin, but instead is rooted in a claim with a six-year statute of limitations, the six year period should apply. Thus, for example, the court in *Matter of Witbeck* (245 AD2d 848 [3d Dept 1997]) applied a six-year period in an SCPA 2103 proceeding where the "crux of the petition" sounded in quasi-contract, and was thus governed by CPLR 213 (1).

The petition in this case is for collection of debts, a claim with a six-year statute of limitations. The fiduciary of decedent's estate should have no less right than would the decedent to collect the claims. The court therefore denies so much of the motion as seeks to bar claims that accrued more than three years, but less than six years, before the commencement of this proceeding.

The parties will be contacted for a pre-trial conference regarding the transfers that remain at issue.

Settle order in accordance with the foregoing, including identification of the individual checks as to which the claims are barred.

SURROGATE

Dated: September 12, 2011