SURROGATE'S COURT: NEW YORK COUNTY

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Accounting by KAREN MATSEOANE, as Administrator of the Estate of

CAROL MATSEOANE, File No. 2007-2795/B

Deceased.

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GLEN, S.

Incident to her first and final account, which covers the period from January 28, 2006, to February 29, 2012, the administrator of the estate of Carol Matseoane seeks: (a) an order granting summary judgment dismissing objections filed by Subtle Engineering Company (Subtle), or, in the alternative, (b) a protective order limiting disclosure sought by Subtle. The administrator also seeks to impose upon Subtle and the attorney who has represented it in the proceedings in this court all of her reasonably incurred costs, including her attorneys fees, and financial sanctions pursuant to the Rules of the Chief Administrator (22 NYCRR §130-1.1 *et seq.*).

Prior to her death on January 28, 2006, decedent had filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code. Her bankruptcy complaint named Subtle, among others, as a judgment creditor. On June 20, 2007, Subtle filed a petition in this court seeking the appointment of the Public Administrator as estate fiduciary (SCPA § 1002[1]; SCPA § 1001 [8]). Prior to completion of jurisdiction, one of decedent's daughters, Dara Peterssen, wrote a letter to this court dated December 13, 2007, claiming that there was no probate asset and thus no estate for a fiduciary to administer. Ms. Peterssen annexed to her letter an uncertified copy of an order dated October 31, 2007, issued by the United States Bankruptcy Court for the Southern District of New York, dismissing an adversary proceeding commenced by Subtle, for failure to

prosecute. Also annexed to the letter was an uncertified copy of a November 7, 2007 "Order of Final Decree," declaring that decedent's (bankruptcy) estate was "fully administered," discharging decedent from personal liability for her debts, and further declaring that her Chapter 7 case was closed. A copy of Ms. Peterssen's letter, with its attachments, was also mailed to Subtle's counsel, Joseph A. Altman, Esq.

On the return date of Subtle's petition for the appointment of an administrator, in view of the Bankruptcy Court orders submitted by Ms. Peterssen, the court directed Subtle to establish that it was a creditor of the estate with standing to seek the appointment of an administrator. The matter was adjourned from December 21, 2007, to March 25, 2008. In what was styled as a "Reply Affirmation" dated March 24, 2008, addressing "the court's concern as to whether the Petitioner was a creditor of the estate," Mr. Altman represented that there was a pending motion before Bankruptcy Judge Robert E. Gerber to vacate the October 31, 2007 order dismissing Subtle's adversary proceeding, but that Judge Gerber would not calendar the motion until a fiduciary was appointed by this court upon whom service of the motion could be made. The matter was marked for decree granting letters of administration to the Public Administrator unless a cross-petition for letters was filed within two weeks. Decedent's daughter, Karen Matseoane, timely filed such a cross-petition, and limited letters were issued to her on May 21, 2008.

More than one year later, on July 31, 2009, Subtle filed a petition to compel Ms. Matseoane's account (SCPA § 2205 [2][a]). On the return date, at which Ms. Matseoane did not appear, the court asked Mr. Altman the following questions, and he gave the following answers:

Q. Do you know whether the judgment was discharged in bankruptcy?

A. I don't believe it was. That's why we brought the [application to compel the] accounting.

Q. And do you have any sense whether there's any money in this estate?

A. Uh, I know. Well. I believe that if there was.... money when the person died and she took the money then she probably should have paid off this debt and the children knew about the debt and they didn't account for it in their estate so that's why we're asking for the accounting.

Q. No. I understand that, but, if there [was] no money and there is no money then compelling an account is a sort of pointless exercise especially since [the administrator] isn't here, you're going to have to chase her, she's not [going to] do it, you're [going to have to] bring a contempt... You [want to] go through with this?

A. I have a client that wants to go through with it ....

Q. Okay. 60-day Order to account.

A. Okay. Thank you.

On March 4, 2011, Subtle petitioned to punish Ms. Matseoane for contempt, claiming that she had disobeyed the court's December 4, 2009 order to account. The matter was marked for a conference with a court attorney-referee. At the conference, Ms. Matseoane reiterated that Subtle's judgment had been discharged in bankruptcy and that her mother in any event had left no estate. Again, Mr. Altman insisted that his client's judgment had not been discharged. Having been unable to convince Mr. Altman that decedent had left no estate, Ms. Matseoane, who had been appearing pro se, retained counsel and filed an account of her proceedings as administrator of decedent's estate.[1] Objections thereto were filed by Subtle, which asserted that Ms. Matseoane had failed to include in her account all the property decedent possessed at the time of her death. Subtle also objected to Schedule D, in which Ms. Matseoane reported Subtle's claim as rejected, both as having been discharged by the Bankruptcy Court and as untimely. In

[1] By Decision and Order dated September 30, 2011, Subtle's application to hold Ms. Matseoane in contempt of court for failure to obey this court's order directing her to account was dismissed as moot.

response, Ms. Matseoane made the instant motion for summary judgment, pursuant to CPLR § 3212, seeking dismissal of Subtle's objections on the ground that Subtle lacked standing to object to her account since it was neither a creditor nor a person interested in the estate and also seeking sanctions and costs. An Affidavit in Opposition has been filed on Subtle's behalf.

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 Hosp.*, 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 that there are material questions of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 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 NY3d 380, 401 [2006]).

Ms. Matseoane relies not only on copies of the Bankruptcy Court orders, but also on a computer print-out from the Public Access to Court Electronic Records (PACER) system, which shows that on November 27, 2007, the Bankruptcy Court issued an Order of Discharge and Order of Final Decree. Ms. Matseoane further contends that the effect of such discharge is significant since, among other things, section 524 of the Bankruptcy Code states that a discharge "voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged" under relevant sections of Title 11 of the Code and "operates as an injunction against the commencement or continuation of

an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the debtor whether or not discharge of such debt is waived" (11 USCA § 524 [a] [1], [2]).

Subtle's purported standing in this court to seek relief in relation to this estate has always rested solely on its status as a judgment creditor. A creditor is defined in SCPA § 103 (11) as "any person having a claim against a decedent or an estate." Subtle ceased to fall within the statute's definition when its judgment was voided by decedent's discharge in bankruptcy. In other words, the documents submitted by Ms. Matseoane as evidence of such discharge establish a prima facie case for dismissal of Subtle's objections in this accounting. Subtle has failed to submit any evidence that would raise an issue of fact as to the discharge and therefore as to its standing to file objections herein. Accordingly, the objections are dismissed, and the account is approved. Ms. Matseoane's alternative request for a protective order is denied as moot.

SANCTIONS

As noted at the outset, Ms. Matseoane asks that costs and sanctions be imposed against Subtle and Mr. Altman for their misrepresentations concerning the status of Subtle's judgment during the several proceedings in which Ms. Matseoane would not have been embroiled had such misrepresentations not been made. The basis for such request is Rule 130-1.1, under which a party and its counsel may be made to pay the proverbial piper for their irresponsible positions in litigation.

Whether or not to impose costs and sanctions under the Rule is a matter of judicial discretion. Section 130-1.1 (c) of the Rule allows a court to sanction an attorney, a party, or

both, for engaging in frivolous conduct, including conduct "completely without merit in law" or "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another;" or consisting of "material factual statements that are false." Part 130-1.1[c][3]) further provides that,

> "[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

The court is persuaded that sanctions against both the party and its counsel are appropriate under the circumstances of this case. The court finds that Subtle and Mr. Altman engaged in frivolous conduct in the several proceedings in this court that they caused to be litigated here after the point at which both knew or should have known that Subtle had no viable claim against the estate.

It is not clear that such point had been reached when Subtle sought appointment of an administrator of this estate and claimed standing to seek such relief as a judgment creditor of the estate. After all, early on in the administration proceeding this court itself was apprised of Bankruptcy Judge Gerber's November 2007 Final Order of Discharge of the bankrupt (decedent). We nonetheless accepted Subtle's claim that its Judgment might still be viable because it had filed a motion with Judge Gerber to vacate his October 2007 Order (which had dismissed Subtle's action to enforce the Judgment). Even assuming arguendo that such a motion in the Bankruptcy Court was as a matter of law untenable once the Final Order was issued, that does not mean that Subtle (and its lawyer) necessarily acted in bad faith when they claimed that such a

motion was then pending (any more than this court acted in bad faith when it credited such proposition despite its knowledge of the Final Order). In other words, Subtle's assertion that a motion was pending before Judge Gerber could have been based merely upon a misunderstanding of the law, as opposed to bad faith.

But by 2009, when Subtle brought its petition to compel the administrator to account, Subtle and its counsel either knew or should have known that the judgment was a dead letter. By that point (well over a year after Subtle had taken steps to bring its motion before Bankruptcy Judge Gerber), there still was no trace of such a motion on the Bankruptcy Court's docket. From 2009 onward, absent such a trace (or some explanation from Subtle as to that absence), Subtle could no longer have retained a good-faith belief in the viability of its judgment. All of the administrator's costs and legal fees as a party on the contempt and accounting applications are thus attributable to the meritless position recklessly persisted in by her adversary in those proceedings, and to the extent that such expenses were reasonably incurred by the administrator, they should in fairness be shifted to Subtle. For, as an earlier court had occasion to note, where a party has baselessly forced another into the judicial arena, "[h]e alone has caused the expense, and if he prefers to spend his money in that way, [he] should not be denied the privilege" (*Matter of Wolke*, 155 Misc 235, 237 [Sur Ct, Kings County 1935]).

The parties will be advised of a hearing date to determine the costs and expenses to be imposed against Subtle in favor of the administrator.

Moreover, the imposition of sanctions in this case is warranted not only against Subtle, but also against Mr. Altman. As a prior court has observed,

"[A]n attorney is to be held strictly accountable for his statements or conduct

which reasonably could have the effect of deceiving or misleading the court in the action to be taken in a matter pending before it. The court is entitled to rely upon the accuracy of any statement of a relevant fact unequivocally made by an attorney in the course of judicial proceeding" (*Matter of Friedman*, 196 AD2d 280, 296 [Sup Ct, New York County 1994]).

In view of the foregoing facts, it is only fair that financial sanctions be imposed upon Mr. Altman as the spokesperson, if not the architect, of a groundless legal position, particularly in light of the unnecessary burden placed on judicial resources as a result. Mr. Altman is hereby directed, pursuant to Rule 130-1.3, to pay $2,500 to the Lawyers' Fund for Client Protection. This court will send a copy of this decision to the Fund as required by the Rules (22 NYCRR 130-1.2).[2]

This decision constitutes the order of the court.

SURROGATE

Dated: October 18, 2012

[2] The court "may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate" (*see* 22 NYCRR 130-1.2).