

Matter of McElduff

2014 NY Slip Op 31541(U)

June 19, 2014

Sur Ct, NY County

Docket Number: 2013-1424/A-B

Judge: Rita M. Mella

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of Maureen P. McElduff,
Patricia McElduff, as Temporary Administrator of the Estate
of Robert V. McElduff, Eileen M. McElduff, Kevin M.
McElduff, James F. McElduff, and Thomas L. McElduff
to Remove Edward W. McElduff as Administrator of the
Estate of

DECISION AND ORDER
File No. 2013-1424/A-B

DOROTHEA A. McELDUFF,

Deceased,

And to Appoint Maureen P. McElduff as Successor
Administrator.

-----X
Petition for a Compulsory Accounting and Related Relief
Pursuant to Sections 2205 and 2206 of the Surrogate's
Court Procedure Act against Edward W. McElduff, as
Adminstrator of the Estate of

File No. 2013-1424/C

DOROTHEA A. McELDUFF,

Deceased.

-----X
In the Matter of the Application of Maureen P. McElduff,
Patricia McElduff, as Temporary Administrator of the Estate
of Robert V. McElduff, Eileen M. McElduff, Kevin M.
McElduff, James F. McElduff, and Thomas L. McElduff,
Pursuant to Section 2102(4) of the Surrogate's Court
Procedure Act, to Compel Edward W. McElduff, as
Administrator of the Estate of

File No. 2013-1424/D

DOROTHEA A. McELDUFF,

Deceased,

To Make a Distribution.

-----X
M E L L A, S.

The court considered the following papers in deciding the motions for substitution for a
deceased party, the motion to dismiss, and the motions for a stay.

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion dated May 23, 2014, for Substitution for a Deceased Co-Petitioner in the Proceeding to Compel the Administrator to Account, with Affidavit dated May 22, 2014, of Movant Patricia McElduff and Exhibits A through G attached thereto	1, 2
Notice of Motion dated May 23, 2014, for Substitution for a Deceased Co-Petitioner in the Proceeding to Remove the Administrator, with Affidavit dated May 22, 2014 of Movant Patricia McElduff and Exhibits A through G attached thereto	3, 4
Notice of Motion dated June 5, 2014, to Dismiss Pursuant to CPLR 3211 the Petition to Make a Distribution or in the Alternative for a Stay Pursuant to CPLR 2201, with Affidavit of Paul J. Collins, Esq., and Exhibits A through E attached thereto	4, 5
Memorandum of Law in Support of Motion to Dismiss or for a Stay, dated June 4, 2014	6
Petitioner's Memorandum of Law in Opposition to Motion to Dismiss or for a Stay, dated June 11, 2014	7
Notice of Motion dated June 5, 2014, to Stay the Proceeding to Remove the Administrator, with Affidavit of Paul J. Collins, Esq., Dated June 4, 2014, and Exhibits A through C attached thereto	8, 9
Notice of Motion dated June 5, 2014, to Stay the Proceeding to Compel the Administrator to Account, with Affidavit of Paul J. Collins, Esq., Dated June 4, 2014, with Exhibits A through C attached thereto	10, 11
Affidavit dated June 11, 2014, of Steven J. Shore, Esq. in Opposition to Motion to Stay the Proceeding to Remove the Administrator with Exhibits A and B	12
Affidavit dated June 11, 2014, of Steven J. Shore, Esq. in Opposition to Motion to Stay the Proceeding to Make a Distribution with Exhibits A and B	13
Affidavit dated June 11, 2014, of Steven J. Shore, Esq. in Opposition to Motion to Stay the Proceeding to Compel the Administrator to Account with Exhibits A and B	14
Petitioners' Memorandum of Law dated June 11, 2014, in Opposition to Respondent's Motion for a Stay of the Proceeding to Compel the Administrator to Account	15

Papers Considered (Con't)Numbered

Petitioners' Memorandum of Law dated June 11, 2014, in Opposition to Respondent's Motion for a Stay of the Proceeding to Remove the Administrator

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Motions for Party Substitutions

At the call of the calendar on June 13, 2014, the court granted the two motions, pursuant to CPLR § 1015(a), to substitute for deceased petitioner Robert McElduff, the temporary administrator of his estate, Patricia McElduff, in both the proceeding to remove Edward McElduff, as administrator of the estate of decedent Dorothea McElduff (the "decedent"), and the proceeding to compel the administrator to account. The captions are modified accordingly.

Motion to Dismiss

The court denied the administrator's motion under CPLR § 3211 to dismiss a third petition made by the same intestate distributees of the decedent who have filed the petitions to remove Edward as administrator and to compel him to account. This new petition seeks to compel him as administrator to make an immediate distribution to petitioners, as part of their respective intestate shares, of decedent's 50% interest in a New York limited liability company, 19 Chelsea Square North (the "LLC"). The main asset of the LLC is a residential building in the Chelsea neighborhood, and petitioners, or most of them, reside in the building. As per the governing LLC operating agreement, the LLC will dissolve 180 days from Robert's death, which occurred on April 14, 2014, unless the LLC members owning a majority interest vote to continue the LLC. Petitioners claim, as they have in the proceedings to remove Edward and compel him to account, that Edward wants to cash out his individual interest in the LLC, and he is pursuing a course that will dissolve the LLC and lead to a sale of the building, despite their opposition.

If and when the decedent's interest in the LLC is distributed, then the petitioners will collectively hold a 65% interest in the LLC – each of the six petitioners will get a 5% interest to add to the 35% interest that they currently hold – while the administrator and other members of the LLC will collectively hold 35% – each of the four of them will receive a 5% interest in addition to the 15% interest that they currently hold. The petitioners, it seems clear, would vote to continue the LLC and seek to avoid its dissolution, without which a sale of the building it owns would not likely take place, unless, as also required by the LLC operating agreement, two-thirds of the LLC member interests vote to sell it.

The administrator's motion sought dismissal of the petition to compel an immediate distribution to petitioners of the decedent's LLC interests due to them on three grounds. The court held that none, however, had merit.

First, under CPLR § 3211(a)(4), the administrator claimed that there are four other actions pending “between the same parties for the same cause of action in a court of any state” This statutory basis for dismissal is grounded on the logical premise that a proceeding seeking the same relief between the same parties in another court, makes an identical proceeding subsequently brought in this court unnecessary or superfluous (*see White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90, 94 [1st Dept 1997]). However, movant is incorrect that the same relief or the same cause of action is being pursued in other proceedings.

The removal proceeding here does not seek immediate distribution of the decedent's LLC interests, nor does the proceeding to compel an account. Movant also relied on an action he commenced in Supreme Court, New York County to dissolve the LLC, which was dismissed in a March 24, 2014 decision of that court. That action is no longer pending, and in any event, it did not seek the relief of immediate distribution of decedent's LLC interests. The “other action” that the

administrator relies on is a mediation to which the parties agreed, scheduled for later this month.

By its very nature, mediation is not “another action . . . in a court.”

The motion to dismiss pursuant to CPLR § 3211(a)(4) on the ground that the same relief is sought in another court was therefore denied.

Second, the administrator claimed under CPLR § 3211(a)(7) that the petition fails to state a claim upon which relief can be granted.¹ Movant’s argument is refuted primarily by the statutes, SCPA § 2102(4) and EPTL § 11-1.5(c), which specifically authorize proceedings to compel a distribution (*see also* SCPA § 2216). Even if these explicit statutory authorizations did not decide the question, the administrator’s allegations that a distribution cannot now be made because he has not completed the administration of the estate or is awaiting a final estate tax closing letter and must pay fiduciary income taxes are merely responses in the nature of defenses that have yet to be adjudicated. Consequently, the motion was denied to the extent that it sought dismissal for failure to state a claim.

Third, the administrator contended that without a closing letter from the New York State Department of Taxation, it cannot be said that additional tax will not be due and that the Tax Department was consequently an indispensable party. CPLR 3211(a)(10), on which the administrator relies, provides that “the court should not proceed in the absence of a person who should be a party.” CPLR § 1001(a), however, defines such persons to be those “who ought to be

¹In analyzing this question, as stated in *Lawrence v Graubard Miller* (11 NY3d 588, 595 [2008]), the court:

“must accept the facts alleged in the petition as true, petitioner must be afforded every possible favorable inference, and we must determine whether the facts alleged by petitioner fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). Affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they ‘establish conclusively that [petitioner] has no [claim or] cause of action’ (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).”

parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by the judgment in the action” (*see Amsellem v Host Marriott Corp.*, 280 AD2d 357, 360-61 [1st Dept 2001]). This definition does not describe the Department of Taxation in this instance. The relief of distribution of the decedent’s LLC interests can be granted without prejudicing the interests of the Tax Department, which retains its remedies were it to seek to impose additional tax. While the administrator complained that he may be personally liable were there to be additional tax imposed, this is not prejudice to the Tax Department and was thus irrelevant to the question of whether the Tax Department is an indispensable party.

For all of the foregoing reasons and those placed on the record at the call of the calendar, the administrator’s motion to dismiss was denied.

Motions for a Stay

In the alternative, the administrator also moved for a stay of all three proceedings here because the parties are going to mediation and because Edward has appealed the decision granting the motion to dismiss his action in New York County Supreme Court to dissolve the LLC. Neither circumstance made a stay “proper” or “just” pursuant to CPLR § 2201, which provides the statutory authority for the court to stay the matters. The court denied these motions.

As petitioners’ responsive papers indicate, Edward, and those in the family who, at this point, want the LLC to dissolve, have not agreed to extend the time from Robert’s death beyond the 180 days within which a vote to continue the LLC must be made. As a result, time is of the essence, and a stay would be tantamount to ruling for one side in this controversy without even considering the merits. This same reasoning demonstrates that waiting for a decision in the appeal to the Appellate Decision of the dismissal of Edward’s action to dissolve the LLC, as the administrator argues, cannot justify a stay.

Proceedings to Make a Distribution, To Compel an Account and To Remove Administrator

Having denied the motion to dismiss and the motions for a stay, and given the timing issues, the court directed the administrator to file and serve his verified answer, if any, to the petition to make an immediate distribution no later than July 3, 2014.

As to the petition to compel the administrator's account, it was granted, and Edward McElduff was ordered to file the account of his proceedings as administrator of the estate of decedent Dorothea A. McElduff no later than August 1, 2014, together with a petition for its judicial settlement. The administrator is further directed to serve on petitioners' counsel at that time a courtesy copy of the account and petition that is filed with the court.

As to the removal proceeding, petitioners, among other things, have alleged that, despite his fiduciary obligations as administrator, Edward has sought to use the estate's interests in the LLC to further his personal interests. The parties have initiated discovery, and the deadlines for its completion in both the proceeding to remove the administrator and to make a distribution will be set forth in a separate order.

Conclusion

Accordingly, the motions for party substitution are granted, the motion to dismiss the petition to compel a distribution is denied, and the motions to stay the proceedings to remove the administrator, to compel his account and to compel a distribution are denied.

The administrator shall file and serve his verified answer to the petition to compel distribution no later than July 3, 2014. The petition to compel the administrator to account is granted and he shall file, no later than August 1, 2014, an account of his proceedings as administrator, together with a petition for its judicial settlement. Discovery shall be conducted in the proceedings to remove the administrator and to compel him to make a distribution within the

time frames to be set in a subsequent order of the court.

This decision, together with the transcript of the June 13, 2014 proceedings, constitute the order of the court. The clerk is to notify the parties of this decision.

Dated: June 19, 2014



SURROGATE