

**Matter of Schneider**

2014 NY Slip Op 33994(U)

December 19, 2014

Surrogate's Court, Suffolk County

Docket Number: 313 P 2004/A

Judge: Stephen L. Braslow

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FILED  
SURROGATE'S COURT  
SUFFOLK COUNTY

SURROGATE'S COURT : SUFFOLK COUNTY

DEC 19 2014

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Proceeding by Cynthia P. Schneider as  
Successor Executor of the Estate of  
Judith N. Doman to Compel Payment of a  
Legacy Bequeathed by, and Trust Income  
Provided for under, the Last Will and  
Testament of

) MICHAEL CIPOLLINO  
) CHIEF CLERK

) DECISION/ORDER

) By: HON. STEPHEN L. BRASLOW,  
) .....

) Acting Surrogate  
) .....

NICHOLAS R. DOMAN,

) Dated: December 19, 2014  
) .....

Deceased.

) File #: 313 P 2004/A  
) .....

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Captioned proceeding was commenced in or about February, 2011, upon the filing of a petition to compel payment of a legacy by the successor fiduciary of the estate of captioned decedent's post-deceased spouse (Judith Doman). By decision dated October 7, 2011, with the understanding of counsel for the parties, the within proceeding, as well as a pending motion for summary judgment and a motion to amend the answer filed in said proceeding, were held in abeyance to allow the parties to conduct settlement negotiations and attempt to resolve their differences. Said decision also allowed for restoration of the proceeding and pending motions to the court's calendar "...by letter from counsel for any of the parties on notice to his adversary..." (Estate of Nicholas R. Doman, File #313P2004/A, S. Czygier, 10/7/2011).

In March, 2012, the court received a "Consent to Change Attorney" form indicating that Novick & Associates would henceforth appear for respondent co-fiduciary Arlene Harris only, and that co-fiduciary Alexander Doman would appear as a respondent pro se. In June, 2012, Alexander Doman asked that the matter(s) be restored to the calendar and submitted a cross-motion to the court for summary judgment. Subsequently, petitioner's counsel submitted a cross-motion asking the court to disqualify Alexander Doman from representing himself herein and deny the cross-motion for summary judgment and the motion to amend the answer. In the alternative, petitioner asked that the court stay these proceedings pending final determination of the appeal of this court's decree dated October 3, 2011 in the Judith Doman Estate Accounting proceeding.

By decision/order dated October 31, 2012, captioned proceeding and the pending motion and cross-motion for summary judgment and

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the motion to amend the answer were held in abeyance pending final determination of the appeal of this court's October 3, 2011 decree in the Judith Doman Estate; the sum of \$217,123.75 was ordered held in a third-party escrow account of the parties' choosing, pending resolution of captioned proceeding; and the cross-motion to disqualify Alexander Doman from representing himself in these proceedings was denied (*Estate of Nicholas R. Doman*, File #313P2004/A, S. Czygier, 10/31/2012).

Subsequently, the Second Department issued a decision modifying the court's decree by substituting the amount of \$212,265.25 for the sum of \$136,603, which the court had found was the amount of excess annuity distributions made to Judith Doman. In all other respects, the court's decree was affirmed (*In re (Judith) Doman*, 110 AD3d 1073). An application to reargue a denial of leave to appeal this decision to the Court of Appeals has recently been denied (*In re (Judith) Doman*, 24 NY3d 934). Thus, it would appear that the appeals process concerning the Judith Doman accounting is at an end.

The parties have now renewed their applications in the captioned estate and have filed additional papers. The court has before it the aforementioned motion for summary judgment and a motion to amend the answer in the proceeding to compel payment of a legacy, as well as a cross-motion for summary judgment, a motion to strike petitioner's affirmation in opposition to respondent's motion to amend answer and cross-motion for summary judgment, and a cross-motion asking this court to schedule a conference. A separate motion is pending in the *Estate of Judith N. Doman* (File #1029P2006) to modify the court's accounting decree dated October 3, 2011. That motion will be the subject of a separate decision/order.

*Background*

The gravamen of the underlying proceeding to compel payment of a legacy is that the \$200,000 legacy payable to captioned decedent's post-deceased spouse, Judith Doman, under Paragraph Fourth(B) and the trust income (\$17,123.75) due her estate under Paragraph Fourth (P) of Nicholas Doman's last will and testament, which was admitted to probate by this court in June, 2004, remain unpaid. Petitioner alleges entitlement to statutory interest (9%) making the total amount claimed \$385,084.36 as of the date the motion for summary judgment on the petition to compel payment of a legacy was filed. In said motion, petitioner argues that the

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failure to make the payments is undisputed and the respondents, who are the co-fiduciaries of captioned decedent's estate, would be amply protected by a receipt, release and refunding agreement.

The motion to amend the answer filed in this proceeding, brought when Alexander Doman was still represented by the Novick Firm, asks the court for leave to amend their answer to assert a counter claim for petitioner's alleged gross negligence, bad faith and theft by conversion in her handling of attorneys' fees reported on the Judith Doman Estate's tax return and misuse of resulting refunds. This was purportedly to the respondents' detriment, as they were primarily responsible for paying said estate taxes.

In his cross-motion for summary judgment, Alexander Doman asks the court to dismiss the petition and to hold the legacy and trust income in escrow pending final determination of the estate tax refund due captioned decedent's estate and the outcome of the appeal in the related estate of Judith Doman. He argues that there are no assets from Judith Doman's estate available to pay the proposed counter claim but for the undistributed legacy and trust income.

*Discussion*

Initially, the court will address Alexander Doman's arguments that various filings from opposing counsel should be rejected as untimely. As Dr. Doman has had ample opportunity to respond to the allegedly late filings, there is no prejudice to his position on the various motions and applications. This portion of his request(s) for relief is, therefore, denied.

With respect to the application for leave to amend the answer in the captioned proceeding, it is axiomatic that, absent prejudice or surprise to the opposing party, a motion for leave to amend a party's pleading should be freely granted, unless the proposed amendment is "palpably insufficient" to state a cause of action or is patently devoid of merit (CPLR 3025(b); *Scotfield v. DeGroodt*, 54 AD3d 1017, 1018; citations omitted). There has been no demonstration of prejudice or surprise which would militate in favor of the court's denying the motion. Accordingly, the motion is granted.

With respect to the long pending motions for summary judgment and purported motion(s) arguing for and against a court conference, it is the opinion of this court that, now that a final decision has

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emanated from the Court of Appeals in the related (Judith Doman) proceeding, the situation before the court lends itself to one where a final resolution, including the possibility of an offset or offsets, is possible. Further, having granted leave to amend the answer in this proceeding, it is the court's usual practice to schedule a conference in order to either schedule pretrial discovery or attempt to foster a settlement.

Accordingly, for the reasons set forth herein, it is

ORDERED THAT respondents' motion to amend their pleading in accordance with the proposed amended pleading attached to the papers in support of the motion is granted; and it is further

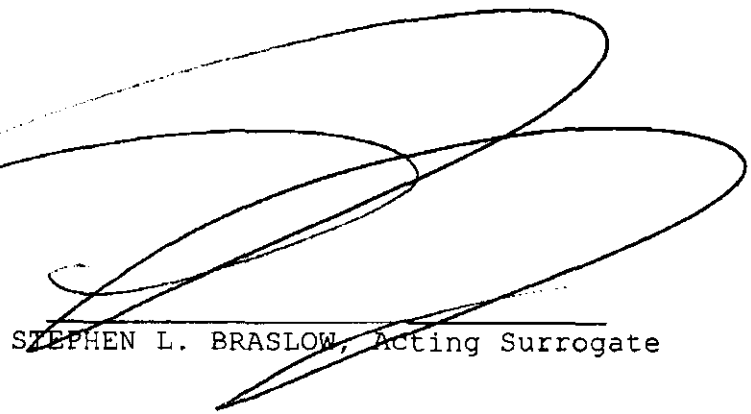
ORDERED THAT the amended pleading is deemed to have been served and filed with these papers; and it is further

ORDERED THAT pending motions for summary relief are denied, without prejudice; and it is further

ORDERED THAT any other pending applications for relief in captioned matter are denied, except to the extent outlined herein; and it is further

ORDERED THAT counsel for the parties and those representing themselves pro se, in this proceeding, as well as the related matter in the Estate of Judith Doman (File #1029P2006), shall appear in the Law Department of the Surrogate's Court, 320 Center Drive, Riverhead, New York for a conference on Wednesday, February 4, 2015 at 9:30 a.m. for further proceedings consistent herewith.

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