Matter of JPMorgan Chase Bank, N.A. (Van Patten)
2015 NY Slip Op 31989(U)
October 17, 2015
Surrogate's Court, New York County
Docket Number: 1988-2966.2
Judge: Nora S. Anderson
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New York County Surrogate's Court
DATA ENTRY DEPT.

OCT 17 2015

SURROGATE'S COURT : NEW YORK COUNTY
--X
In the Matter of the Settlement of the First Intermediate Account of Proceedings of JPMorgan Chase Bank, N.A., as Trustee of the Trust under Article TENTH of the Will of

CHARLES A. VAN PATTEN,

Deceased.
--X

File No. 1988-2966.2

A N D E R S O N , S.

Two motions in a contested accounting proceeding are before the court. One is a motion to dismiss objections; the second is a motion to amend objections, which if granted would render the former motion moot. The genesis of these motions is a trust created by Charles Van Patten under his will which has been admitted to probate. Decedent named his son, Philip Van Patten ("Philip"), as one of the lifetime income beneficiaries of the trust and named Manufacturers Hanover Bank (now JPMorgan Chase, N.A.) as trustee. Philip died on December 25, 2007, leaving a will which named his wife, Carol Van Patten ("Carol" or "objectant"), as his executor.

JPMorgan Chase filed an accounting of the trust for the period June 3, 1988, through December 31, 2007, and a supplemental account through June 30, 2011. Carol, as executor of Philip's estate, filed pro se objections to the accounting, which the trustee moved to dismiss on various grounds. By decision and order dated February 10, 2014, the court ruled that

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Carol could not prosecute objections pro se since her representation would implicate the interests of creditors of her husband's estate and would constitute her practicing law without a license. Accordingly, the court ruled that Carol's pro se objections would be dismissed unless she appeared by an attorney within thirty days of the service of the decision and order upon her. The type of service to be effectuated was not specified.

The trustee served Carol by regular mail on February 24, 2014. On March 28, thirty-two days after the mailing, an attorney filed a notice of appearance for Carol as executor of Philip's estate. The trustee argues that since the notice of appearance was filed two days later than the thirty days specified in the court's prior decision and order, it should be rejected as untimely and the court should sign its proposed decree dismissing Carol's objections.

SCPA §309 provides that service by mail is complete upon mailing, but does not specify how to calculate the time period for such service. CPLR § 2103[b][2] provides that five days shall be added to a prescribed period when service is by mail. The five-day extension applies not only to time periods set by statute or regulation, but also to any time period ordered by the court (*see, e.g.*, *Penn v American Airlines*, 192 AD2d 385 [1st Dept 1993]; *Corradetti v Dales Used Cars*, 102 AD2d 272 [3d Dept 1984]). Accordingly, objectant's appearance by an attorney was

timely.

Carol, now represented by counsel, moves to amend her pro se objections to the trustee's account. The trustee opposes her motion.

The proposed amended objections concern the adequacy of the income realized and paid to Philip as income beneficiary. The amendment asserts that the account "reflect[s] a mis-use of the trustee's power of adjustment, as set forth and interpreted in the Uniform Principal and Income Act, EPTL Article 11-A, and the Prudent Investor Act, EPTL § 11-2.3." Carol further alleges that the trustee failed to follow the intent of the grantor. Specifically, she objects that it did not provide a proper balance and that it should have exercised a greater focus on the primary income beneficiaries. She objects that the trustee did not shift funds from principal to income, therefore "favoring... accumulation of principal over income, and a distribution to the unnamed residuary beneficiaries rather than to the named income beneficiaries."

A decision to allow a proposed amendment to a pleading is committed to the court's discretion, (*Murray v City of New York*, 43 NY2d 400, 404-405 [1977]), and, as a general rule should be "freely given" (CPLR § 3025[b]; *Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 [1983]). In determining whether to allow the filing of an amended pleading, the court must consider

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whether the amendment is dilatory, lacks merit, or is prejudicial (*Detrinca v De Fillippo*, 165 AD2d 505, 508 [1st Dept 1991]). Mere lateness is not a basis for denying amendment unless a granting of the motion would cause the other side significant prejudice (*Giuffre v DiLeo*, 90 AD3 602, 603 [2d Dept 2011]; *Matter of Pinto*, 966 NYS2d 349 [Sur Ct, Richmond County 2012]). Here, the litigation is still at an early stage, and the motion to amend promptly followed the court's ruling which required objectant to proceed by attorney. Further, although petitioner alleges that the proposed amendment would be prejudicial because it raises new objections, in substance this is not the case. Carol's pro se objections raised the issue of whether the income beneficiary received the income to which he was entitled under the trust instrument,[1] which is sufficiently related to the proposed amended objection to avoid any surprise. Such circumstance does not suggest a basis to deny leave to amend (*see, Matter of Sackson,* NYLJ, 9/2/2010 at 33 col 6 [Sur Ct Nassau County] [amendment allowed where proposed amended pleading provide greater specificity to allegations already raised]).

Petitioner also asserts that objectant has failed to

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[1]Specifically, the pro se objections allege that the trust's mandate to distribute income was not obeyed to (Objections, Para. 3), and assert that "[i]t appears that income or interest [sic] may not have been wholly distributed, as instructed by said Trust document; but, instead reinvested as a principal holding in the Trust" (*id,* Para. 4).

demonstrate sufficient evidence of the merit of the proposed amendment in order to establish a prima facie case, adding that the proposed amendment is supported only by an affidavit of counsel. The cases differ in establishing how much of a showing is required in order to eliminate amendments that are "devoid of merit and legally insufficient" (*Matter of Springer*, NYLJ, 5/21/07 at 45 col 3 [Sur Ct Kings County]; *compare, Nichols v Curtis*, 104 AD3d 526, 528 [1st Dept 2013] [requiring "an affidavit of merits and such other evidence as is appropriate on a motion for summary judgment" *with MBIA Ins. Corp. v Greystone & Co. Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [movant "need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" [citations omitted]). In this case, there are ample circumstances to convince the court that the amendment should be allowed. These include the fact that the issues raised in the amendment are closely related to the issues raised in the verified pro se objections, and the attorney's affidavit serves to clarify and refine them. Further, discovery has not begun, so the trustee will not be prejudiced or surprised. Finally, the amended objections benefit from having been drafted by counsel and eliminate paragraphs from the pro se objections which do not raise meritorious issues. Thus the court, in its discretion, will allow amendment of objections,

except as set forth below.

The court limits the objections to the time period from February 3, 1992, through December 25, 2007. Philip signed a release for an informal account by the trustee's predecessor in interest which covered the period June 3, 1988, through February 3, 1992. Further, as objectant concedes, she lacks standing to object to the trustee's actions following decedent's death.

Accordingly, objection's motion to file its amended objections to the account of petitioner as trustee is granted to the extent described above.

This decision constitutes the order of the court.

S U R R O G A T E

Dated: October 17 , 2015