

Matter of Corn

2016 NY Slip Op 31543(U)

August 8, 2016

Surrogate's Court, New York County

Docket Number: 1997-3016A

Judge: Nora S. Anderson

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SURROGATE'S COURT: NEW YORK COUNTY

New York County Surrogate's Court

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In the Matter of the First and Final Accounting
Proceeding in the

Date: AUGUST 8, 2016

ESTATE OF ANNA CORN,

File No. 1997-3016A

Deceased.

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A N D E R S O N, S.

Before the court is the co-executors' motion for summary judgment dismissing the objections of decedent's grandson, a beneficiary of a testamentary trust, to the first and final accounting.

Decedent died on June 30, 1997. By decree dated December 31, 1997, letters testamentary and of trusteeship were issued to Norman Leibowitz, decedent's long-time attorney, and Elyse Fradkin, her granddaughter, who is also respondent's sister. The estate was fully distributed by September 30, 2000.

In 2011, respondent filed a petition to compel the co-executors to account. The court granted that application, and the co-executors filed their accounting on March 16, 2012, for the period June 30, 1997 to September 30, 2000. The objections to the accounting claim, inter alia, that there were infirmities in the probate proceedings and material omissions in the account as well as dispute specific line items.

The parties conducted discovery, including the exchange of documents and the depositions of respondent and the co-executors. Thereafter, they executed a June 24, 2014 stipulation, resolving their outstanding discovery disputes, and respondent's discovery motion, which was withdrawn with prejudice. The fiduciaries then filed this motion for summary judgment.

The “party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of factual questions” (*Nomura Asset Capital v Cadwalader, Wickersham & Taft*, 26 NY3d 40, 49, [2015], citing *Alvarez v Prospect Hospital*, 68 NY 2d 320 [1986]; see also *Estate of Donna Miller*, 2008 N.Y. Misc. LEXIS 6332 [Sur Suffolk 2008], citing *Andre v Pomeroy*, 35 N.Y. 2d 361 [1974]). If the movant succeeds in making such a case, the burden then shifts to the opposing party, who must provide proof in admissible form sufficient to establish the existence of material issues of fact, requiring trial (*Nomura Asset Capital, supra, at 49, citing Vega v Restani Constr. Corp.*, 18 NY 3d 499 [2012] quoting *Alvarez, supra, at 324*). The opposing party’s hope, unsubstantiated allegations or mere conclusions are insufficient to make out such a showing (see, *Zuckerman v City of New York*, 49 NY 2d 557, 562 [1980] [citations omitted]). Summary judgment cannot be granted unless it is clear that no material issues of fact exist (see, *Phillips v Joseph Kantor and Co.*, 31 NY 2d 307 [1972]).

In an accounting proceeding, the accounting party must prove that she has met her burden of accounting fully for all estate assets (*Matter of Doman*, 110 AD 3d 1073 [2d Dept. 2013], citing *Matter of Schnare*, 191 AD 2d 859 [3^d Dept. 1993]). Filing of an account is usually sufficient to sustain that burden, after which respondent has the burden of providing evidence in admissible form that the account is incomplete or inaccurate. (*Matter of Wellington Trusts*, 48 Misc 3d 1216[A] [Sur Ct., Nassau County 2015]). It is well-established that “[i]f, ‘[v]iewing the evidence ‘in the light most favorable to the nonmoving party,’ the nonmoving party, nonetheless, fails to establish a material triable issue of fact, summary judgment for the movant is appropriate” (*Nomura Asset Capital, supra, at 49, citing Ortiz v Varsity Holdings LLC*, 18 NY 3d 335, 339 [2011]; see *Alvarez* at 324).

Respondent, who executed a waiver and consent to the probate proceeding, has attempted to contest here matters relating to that proceeding, which are clearly outside the scope of the accounting. He now claims that the probate proceeding remains open because he was not duly served in that proceeding; that the will and trust documents were forged with the intent of defrauding him of his “expected inheritance”; and that he was never served with a copy of the December 31, 1997 decree. Objections relating to the probate decree are outside the scope of this accounting (*Estate of Brush*, 46 Misc 2d 277, 279 [Sur Ct., NY County 1965]). In any event, in view of his waiver and consent in the probate proceeding, given his failure to raise a challenge to that proceeding until years after the decree had been entered and the probate estate had been fully administered, (*see*, CPLR 5015[a]), and also given his failure to provide evidence that might establish a fraud upon the court in its issuance of the probate decree, summary judgment is granted to movants for all respondent’s claims relating to the probate proceeding.

Respondent asserts that the value of decedent’s estate differs in the accounting from the value set forth in the probate petition. A petition for probate is filed before a fiduciary has had access to decedent’s books and records. Therefore, the amounts identified at that time are likely to differ from the amounts set forth after a fiduciary has access to decedent’s accounts and assets. Summary judgment is granted to movants on this claim as well.

Respondent also asserts that a marital trust, created for the benefit of decedent by her predeceased husband, as well as two Paine Webber accounts, should have been included in the accounting as assets of the estate. The marital trust instrument provided that decedent was entitled to withdraw as much of the principal of the marital trust as she desired. As a Pennsylvania court found in a related proceeding, decedent had immediately received distribution of all Trust funds, upon being given the option to do so (*Matter of Corn*, 5/20/71, as

amended 2/15/72, O.C. No. 1290 IV of 1983 Control No. 120601, Ct. of Common Pleas of Philadelphia, Orphans' Courts Division). This court is bound by that court's finding that the marital trust was exhausted prior to decedent's death (*see, Ionescu v Brancoveanu*, 246 AD 2d 414, 416 [1st Dept. 1998]). Movants are granted summary judgment on respondent's claim for funds of the marital trust.

In response to the objection that movants failed to account for two Paine Webber accounts, movants presented the affidavit of a Paine Webber compliance officer stating that the two accounts in question were never owned by decedent. The bank officer also averred that the copies of statements issued by Paine Weber relating to decedent's account inadvertently included information about other accounts that were not owned by decedent. Respondent sought to depose the bank officer, but that examination apparently was not conducted before the parties executed a stipulation on June 18, 2014 indicating discovery was complete. Summary judgment is granted to movants on respondent's claim for the Paine Webber accounts in question.

Respondent proposes to offer "Forensic Expert Evidence" that there was forgery in several documents, i.e., the instrument creating a trust established by Irving Corn, decedent's predeceased husband, as well as prior wills and codicils purportedly executed by decedent. However, he has failed to produce such evidence here, in opposition to the motion for summary judgment. Summary judgment is granted to movants on the claims of alleged forgery.

Summary judgment is also granted to movants on respondent's claims that decedent and others engaged in fraud. Even if these claims were relevant to the accounting proceeding before the court, which they are not, they would be dismissed as based upon nothing more than speculation and innuendo.

Respondent's statements alleging undue influence and conflict of interest also fail, since they do not relate to the co-executors' actions as fiduciaries of the estate, and therefore have no bearing on this accounting proceeding.

Respondent further asserts that movants failed to account for all of decedent's tangible personal property. This objection must fail for the very fact that respondent has no standing to assert such a claim, as no benefit from such a claim would inure to him (*see, e.g., Matter of JP Morgan Chase*, 122 AD 3d 1274-1279 [4th Dept. 2014]). There is no question that decedent's will left her tangible personal property to her daughter and granddaughter only. Therefore summary judgment on this objection is granted to movants as well.

Respondent also objects to the payment of attorneys' fees and disbursements, in the amount of \$15,182.39, to New York counsel by co-fiduciaries. He points to an agreement between decedent and the attorney co-fiduciary which fixed the "amount for services to be rendered by (Leibowitz) as a co-executor and by (his) firm as attorneys for the normal administration of (decedent's) estate [,]" at \$40,000. Movants contend that fees and disbursements paid to New York counsel were not subject to that agreement. They argue that nothing in the letter prohibited them from hiring professionals to assist in the administration of the estate. They argue further that, at the time of the agreement, the attorney-fiduciary's law firm did not have a New York office, and that he needed to retain New York counsel to provide specific advice in the New York probate matter.

The attorney-fiduciary clearly knew at the time of the execution of that agreement that his firm did not have a New York office. He also knew, or should have known, that he would require New York counsel's assistance. If the stipulated fee was not intended to cover the adjunct services of a New York lawyer, it behooved counsel to include such a proviso expressly

in the instrument that he drafted (*see, e.g., Staviski v Christa Construction*, 83 AD 3d 1235, 1238 [3rd Dept 2011] ambiguity must be construed against the drafter).

Had the attorney-fiduciary not relinquished his claim for an executor's commission of more than \$64,000, the court would have surcharged the firm for the expenses for New York counsel. In light of that decision, the court is satisfied that the fee to the New York law firm, amounting to \$15,182.39, is more than amply covered by the attorney-fiduciary's waiver of commissions (*see, In re Lupoli*, 275 AD 2d 781 [2d Dept. 2000]). Under these circumstances, summary judgment is granted to movants on this claim as well.

Respondent contends that reimbursement of funeral expenses for decedent should have been paid by his sister, apparently challenging not the magnitude of the expense, but rather the source of the payment. He asserts that his sister had a joint checking account with decedent and therefore should have paid such expenses from that account. However, funeral expenses are estate expenses and therefore were properly paid from estate assets. EPTL 13-1.3(a) (1).

Respondent also objects to commissions paid to his sister on the ground that the will included the limiting condition that "any fiduciary other than any beneficiary hereunder, shall receive compensation for his or her services." Respondent executed a consent to payment of fiduciary commissions to his sister, although he asserts that he was coerced to sign the consent by his sister's threatening to withhold income payments to him until he was 55 years old, as the codicil of decedent's will provided her the power to do. Nothing in decedent's will required his sister to make annual payments to respondent; the language in the codicil left that decision to the co-fiduciaries.

The commissions in this case were taken by the fiduciary under claim of right, based solely upon a consent that the fiduciary had solicited from her brother. In such a context, the

consent represented self-dealing on the part of the fiduciary, since the consent not only was at the estate's expense, but also was to the advantage of the fiduciary. It has been noted in a similar context that "in ... instances of dealing between a fiduciary and the person for whom he is acting, there must be proof of full disclosure by the [fiduciary] of the facts of the situation and the legal rights of the beneficiary and there must be adequate consideration paid" (*Matter of Birnbaum* 117 AD 2d 409, 416 [4th Dept 1986], citing *Bogert, Trusts and Trustees* § 943, at 475-478 [rev 2d ed 1982]). In relation to the consent obtained in this case, the fiduciary has failed to make a prima facie showing that there was such full disclosure and adequate consideration. Accordingly, summary judgment is denied as to the objections to her taking of commissions.

CONCLUSION

Summary judgment is granted to movants on all claims raised by respondent but for the claim challenging the commissions paid to his sister, the co-fiduciary.

This constitutes the decision and order of the court.

DATED: 8-8 2016



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