

Matter of Stix (Raffe)
2016 NY Slip Op 32635(U)
December 28, 2016
Surrogate's Court, Nassau County
Docket Number: 312197/S
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Accounting by Carl Stix as Trustee of the Trust
Created under Article Seventh of the
Last Will and Testament of**

**DECISION AND ORDER
File No. 312197/S
Dec. No. 32157**

HYMAN RAFFE,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Amended Motion by Trustee for Summary Judgment.....	1
Attorney’s Affirmation in Support of Trustee’s Motion, with Exhibits.	2
Objectants’ Memorandum of Law in Opposition.	3
Affirmation of Angelo Grasso in Opposition, with Exhibits.....	4
Corrected Affirmation in Further Support of the Trustee’s Motion	5

Carl Stix seeks an order: (1) granting summary judgment dismissing objections filed by Beth Brenner and Bonnie Raffe to his account as trustee for the period of October 22, 2001 through December 31, 2011; and (2) allocating responsibility for payment of litigation expenses and legal fees incurred by Carl Stix in this proceeding against the objectants’ share of the distributions from the trust.

BACKGROUND

The background of this proceeding has been described in previous decisions issued in connection with this litigated estate administration. In brief, Hyman Raffe (the Decedent), died on January 3, 2000, survived by his wife, Joan Raffe, and his three daughters: Bonnie Raffe and Beth Brenner (collectively, the Objectants), and Patricia Raffe. The Decedent’s

will (the Will), which was admitted to probate by this court, created a trust (the Trust) under Article Seventh for the benefit of the Decedent's wife, Joan Raffe, who is to receive the income for her lifetime. In addition, the trustee has the authority to invade principal for Joan Raffe's maintenance, support, comfort, welfare or other use. Upon the death of Joan Raffe, the Trust will terminate, and the remaining principal and accumulated income will be distributed to Bonnie Raffe, Beth Brenner and Patricia Raffe, in equal shares.

The initial trustee of the Trust was Allan Brenner, who is the husband of Beth Brenner. Allan Brenner resigned in October 2001; Carl Stix (the trustee) then became the successor trustee. In response to an earlier petition filed on October 21, 2003 to compel the Trustee to account, the Trustee previously filed an intermediate account, covering the period from October 22, 2001 to December 31, 2003. In 2005, a settlement agreement was reached among the Trustee, all of the Trust beneficiaries, Allan Brenner and two other parties (the 2005 Agreement). The 2005 Agreement resulted in decrees on the Trustee's first intermediate account through 2003 and general releases signed by the Objectants, which released the Trustee individually and in his fiduciary capacity and waived all claims against the Trustee for the time period of that account.

The motion for summary judgment presently before the court was brought by Carl Stix in connection with the pending proceeding for the judicial settlement of his account for the period of October 22, 2001 through December 31, 2011. Bonnie Raffe and Beth Brenner

filed sixty-two objections to the Trustee's account.¹ A previous motion for summary judgment filed by the Trustee was denied as premature based upon outstanding discovery. Discovery is now complete.

THE MOTION

The Trustee seeks summary judgment on the following grounds:

1. The Objectants are unable to meet their burden of proof to present evidence in support of each of their objections to the Trustee's account.
2. The objections are barred under the terms of the 2005 Agreement.
3. The objections complain of transactions expressly permitted by the Will.
4. The objections are directly contradicted by the admissions made by the Objectants in response to requests to admit that were served upon them.
5. Some of the objections are rote and based on conjecture.

OPPOSITION TO THE MOTION

Counsel for the Objectants notes that his clients are two of the three remainder beneficiaries of a trust that has decreased in value from \$41,600,000.00 to \$29,500,000.00, even though the Trustee has made no distributions of principal. Counsel argues that the loss in value results from the Trustee's mismanagement of Trust assets, including Morania, Inc. (Morania), a home heating oil company owned entirely by the trust, which also paid substantial salaries and benefits to Joan Raffe and Patricia Raffe for no-show jobs. In

¹By a document titled Stipulation Withdrawing Certain Objections to the Account, filed with this court on July 6, 2016, objections no. 4-7, 16, 18, 20-22, 34(b), 34(f), 34(h), 34(l), 34(m), 34(o), 34(p) and 41 were withdrawn with prejudice, leaving 52 objections remaining.

addition, counsel points to the Trustee's sale of the trust's 66.67% interest in the New Jersey heating oil company known as Oil City, the Trustee's adoption of an investment strategy favoring income at the expense of principal, and the Trustee's unlawful transfer of \$3,000,000.00 of Trust principal to create a medical trust (the Medical Trust) for the benefit of Joan Raffe. Counsel notes that the Trustee has never accounted for the money used for the creation of this separate trust.

In his memorandum of law, counsel for the Objectants argues that the 2005 Agreement cannot govern the Trustee's transactions after the closing date of the first intermediate account, and that Trust language cannot exonerate the Trustee for objectionable behavior. He also asserts that his clients' statements do not bar their objections to the account.

The Objectants cite a 2004 email sent by the Trustee in which he expressed his goal of a four to five percent return on the Trust portfolio, and they assert that the Trustee provided \$100,000.00 a month to Joan Raffe by paying her an unearned salary plus expenses from Morania, buying bonds above par to generate above-market interest rates, and having the Trust lend money to Morania and other entities owned by the Trust with interest above the market rate, so as to increase Trust income.

Counsel for the Objectants argues that the court must deny the present motion for the following reasons:

1. A prior motion by the Trustee for summary judgment was denied, and multiple motions for summary judgment are disfavored.

2. The Trustee failed to comply with CPLR § 3212 (b) by failing to annex a copy of all the pleadings to his motion papers.

3. The 2005 Agreement does not cover any actions taken by the Trustee after the close of the earlier accounting period on December 31, 2003 and, therefore, res judicata does not apply.

4. Statements made by the Objectants did not recant their objections to the Trustee's accounting. Rather, the Objectants were simply unable to recite their objections by heart while being examined.

5. With respect to the objections concerning Morania (objections no. 1, 3, 10, 12, 38, 42, 43, 56, 57, 60 and 61), the Objectants argue that: (1) the issue is not whether the Trustee had authority to manage Morania, but whether the Trustee acted prudently, under the Prudent Investor Act, by keeping Morania open and lending it millions of dollars even though it was consistently losing large amounts of money, and that this is a question of fact for trial; (2) the Will's exoneration clause, cited by the Trustee, is void as a matter of public policy; (3) while assets were stolen from Morania under the watch of the Trustee, he has produced nothing to show that he initiated legal proceedings to recover the stolen funds; and (4) the payments made by Morania to Joan Raffe and Patricia Raffe were disguised principal distributions, and the Trustee cannot show that the Objectants ratified these payments.

6. With respect to the objection to the sale of Oil City (objection no. 45), the Objectants note that the value of the estate's 66.67% interest in the company is shown in the account as \$3,131,000.00, yet in 2010 the Trustee sold that interest for a note receivable in

the amount of \$966,098.00, which note the Trustee subsequently deemed uncollectible. Previously, the Trustee rejected significantly higher offers to purchase Oil City.

7. Although the Objectants testified at their depositions that they did not know what evidence they had to support their objections to the valuations used by the Trustee, objections to valuations are fact-specific and cannot be decided prior to trial.

8. With respect to the objections concerning the Trustee's distribution to create a medical trust, the Objectants assert that the Medical Trust is an asset of the Trust created under the Will, and should have been included in the Trustee's account. The Trustee testified that he believes the Medical Trust to be a sub-trust that reverts to the Trust upon the death of Joan Raffé, and yet he has never accounted for this asset.

9. With respect to the objections concerning investments made by the Trustee (objections no. 9, 11, 34, 36, 37, 39 and 58), counsel for the Objectants state that these objections concern the Trustee's decision to use Trust funds to lend money to entities owned by the Trust other than Morania as well as the Trustee's investment decisions that were made without regard for the interests of the remainder beneficiaries.

10. With respect to the Trustee's decision to retain \$6,800,000.00, or more than 23% of the Trust corpus, in cash, rather than in investments (objections no. 48 and 49), the Objectants argue that this is a violation of the Prudent Investor Act.

11. In connection with the objections to the trust's purchase of nearly \$55,000.00 in receivable legal fees from Oil City (objections no. 35 and 55), the Objectants maintain that this transaction is unexplained and unsupported by any evidence.

12. In connection with objection no. 13, the Objectants assert that the Trustee has failed to explain a \$1,079,000.00 redemption in the estate's Merrill Lynch account.

13. With respect to objections to professional fees and commissions (objections no. 17, 19, 23-31 and 62), the Objectants argue that while the Trustee was authorized to pay professional fees and commissions, the Objectants remain entitled to object to administration expenses, including legal and accounting fees, which in total exceeded \$1,700,000.00, on the ground that they are unreasonable. They note that the Trustee has not offered any evidence to support the reasonableness of fees paid to attorneys, accountants and investment advisors, even though this burden rests on the fiduciary. The Objectants argue further that the Trustee has not shown entitlement to commissions, and a dismissal before trial of objections to the commissions would be premature in light of the fact that the Trustee may be found guilty of misconduct at trial and denied commissions as a result.

14. Finally, the Objectants argue that there is no basis to charge the Trustee's legal fees against the Objectants' respective shares of the remainder of the trust.

AFFIRMATION IN FURTHER SUPPORT

Counsel for the Trustee asserts that the Objectants have failed to establish, through admissible evidence, that issues of material fact exist. He cites multiple cases to support the proposition that once a fiduciary has filed an accounting, the Objectants bear the burden of introducing evidence that the account is incorrect or incomplete, and he argues that the Objectants must support their claims with admissible evidence to defeat a motion for summary judgment. Counsel asserts that with respect to the objections challenging the

valuation of Trust assets, the Objectants failed to meet their burden because they provided no evidence such as appraisals, reports, comparables or affidavits to support alternative valuations. They failed to meet their burden to produce admissible evidence with respect to their objections to the Trustee's business decisions. The Objectants also failed to meet their burden with respect to their objections to fees and commissions, as payment of these fees was authorized under the Will and the Objectants have no evidence to support their objections. Counsel concludes that without the introduction of admissible evidence, the burden remains on the Objectants and never shifts back to the Trustee. Finally, counsel for the Trustee argues that the objections are precluded by the Objectants' admissions and by the 2005 Agreement, which specifically addressed a number of the Trustee's decisions, practices, and transactions, including: (1) paying salaries from Morania to Joan Raffe and Patricia Raffe; (2) the valuation of certain Trust assets; (3) the continued use of professional advisors engaged by the Decedent during his lifetime or by the initial trustee.

Arguing that the objections were filed in bad faith, counsel for the Trustee reiterates his request that the Objectants be charged with the Trustee's legal fees.

ANALYSIS

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for

determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets this burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]) and demonstrate that there is a genuine triable issue by allegations that are specific and detailed and substantiated by admissible evidence in the record (*see Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge, Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

The Trustee argues that the motion for summary judgment should be granted because the Objectants have not presented admissible evidence in support of their objections. However, the exhibits annexed to the Objectants' opposition papers include evidence supporting their objections to the management and valuation of trust assets and the Trustee's overall investment goals.

The Trustee further argues that the objections are barred by the 2005 Agreement, but that is only true concerning transactions reflected in the Trustee's first interim accounting, which ended on December 31, 2003.

The Trustee asserts that the Objectants are challenging transactions that are permitted under the terms of the Will, but the issue in this contested accounting proceeding is not merely whether the Trustee was authorized to act. Instead, the issue is whether the Trustee acted in accordance with the standards set forth in the Prudent Investor Act (EPTL § 11-2.3). Whether the Trustee's conduct was prudent is a question of fact to be determined by the court (*see Matter of Hubbell*, 302 NY 246 [1951]).

CONCLUSION

After reviewing all of the submissions as well as thousands of pages of exhibits, the court finds that the Objectants have raised triable issues of fact regarding all of the remaining objections to the account. The motion for an order granting summary judgment dismissing the objections and allocating responsibility for the payment of legal fees and expenses incurred by the Trustee is **DENIED** in its entirety.

In addition, the court, sua sponte, directs the Trustee to file a petition for judicial

settlement of his account as trustee of the Medical Trust, along with his accounting, and cause citation to issue, within 60 days of service upon him of a copy of this decision.

A conference in this matter will be conducted on the return date of the citation to be issued in connection with the Trustee's judicial accounting for the Medical Trust.

This is the decision and order of the court and no additional order need be submitted.

Dated: December 28, 2016
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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