

Matter of Malitz

2017 NY Slip Op 32063(U)

August 4, 2017

Surrogate's Court, Nassau County

Docket Number: 2016-391098/B

Judge: Margaret C. Reilly

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**SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

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**Petition for Limited Letters of Administration in
the Estate of**

DECISION & ORDER

MURIEL E. MALITZ,

**File No. 2016-391098/B
Dec. No. 33183**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Petition.....	1
Objections (Angorola).....	2
Objections (C. Malitz).	3
Motion to dismiss.....	4
Movant’s affidavit in support of motion	
Counsels’ affirmation in support of motion	
Memorandum of law in support of motion	
Affirmation in opposition to motion (Harold).....	
Affidavit in response to motion (C. Malitz).	
Affirmation in support motion (Bamdad).	

This is a motion to dismiss objections to a petition for limited letters of administration.

Petitioner seeks limited letters of administration for the purpose of commencing a proceeding (SCPA § 2013) to compel the delivery of a deed to real property. Objections were filed by two beneficiaries of the estate.

Petitioner moves for an order dismissing objections (CPLR § 3211 [a] [7]) and awarding attorneys’ fees and costs (22 NYCRR §130-1.1).

The decedent was survived by six children, including Jeanne Malitz (petitioner) and two objectants, Allison Angarola and Christina Malitz. Service of the objections of Christina Malitz was accomplished after the date of the notice of motion.

An instrument dated February 11, 2015, purporting to be the last will and testament of the decedent was filed with the court. There is no petition for probate. The decedent's daughter Christina Malitz, the nominated executor under the February 11, 2015 instrument, filed an affidavit for voluntary administration pursuant to Article 13 of the Surrogate's Court Procedure Act. A certificate of voluntary administration issued October 21, 2016.

Limited letters of administration may issue where it appears unlikely that the appointed fiduciary will pursue a claim against herself or another party that the fiduciary would not be inclined to pursue (*Matter of Leach*, 27 Misc 3d 1232 [A] [Sur Court, Bronx County 2010]).

The petition for limited letters of administration alleges that Christina Malitz exercised fraud and undue influence in the transfer of 100 Ocean Avenue, Point Lookout, New York, to Allison Angarola and that the real property is an asset of the estate.

A motion to dismiss pursuant to CPLR § 3211 (a) (7) may be addressed to objections filed to a petition under the Surrogates Court Procedure Act (*see e.g. Matter of Shay*, 33 Misc 3d 1230 [A] [Sup Ct, Bronx County 2011]). The test of the sufficiency of a pleading is whether it states a cause of action known to our law (*Nasca v Sgro*, 130 AD3d 588 [2d Dept 2015]). The pleading must be liberally construed and all allegations accepted as true (*Wilner v Allstate Ins. Co.*, 71 AD3d 155 [2d Dept 2010]). Here, the objections satisfy this standard as they allege grounds for disqualification of petitioner under SCPA § § 707 (d) (e).

Petitioner has filed an affidavit in which she denies the allegations that she is dishonest in money matters, engages in substance abuse and that she was convicted of a felony.

Where documentary proof is submitted in support of a motion to dismiss a pleading, the court must determine not whether the party has stated a cause of action but whether

she has one (*Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530 [2d Dept 2007]). The proof must conclusively establish that there is no cause of action (*Lucia v Goldman*, 68 AD 3d 1064 [2d Dept 2009]; *Luxury Autos of Huntington v Volkswagen Group of America, Inc.*, 49 Misc 3d 1207 [A] [Sup Ct, Nassau County 2015]). Affidavits are rarely sufficient to warrant dismissal under CPLR 3211 § (a) (7), (*Xia-Ping Wang v Diamond Hill Realty, LLC*, 116 AD3d 767 [2d Dept 2014]).

Petitioner's submissions are insufficient to dismiss the objections under SCPA707(1) (e) for failure to state a cause of action. However, objectant has failed to establish a basis for the denial of limited letters of administration.

Disqualification under SCPA 707 (1) (e) for substance abuse requires the objectant to show that the substance abuse is habitual (*Matter of Field*, 2015WL732330 [Surr Court, New York County 2015]; *Matter of Rad*, 162 Misc2d 229 [Surr Court 1994]).

Further, the inquiry on a petition for limited letters of administration is more limited than on a petition for full letters. Here, the assets of the estate are not in jeopardy as petitioner will have no authority to take custody of the assets. authority to take custody of any estate assets.

The petition for the issuance of limited letters of administration is granted. Letters will issue for limited purpose of commencing a discovery proceeding under SCPA 2103 for the determination of title to the real property located at 100 Ocean Avenue, Point Lookout, New York.

Petitioner's motion to dismiss the objections is **DENIED**.

Petitioner's motion for attorneys' fees and costs pursuant to 22 NYCRR 130-1.1 is **DENIED**.

The petition for limited letters of administration is GRANTED.

This is the decision and order of the court.

Dated: August 4, 2017
Mineola, New York

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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