

Matter of Marino (Gerlach)

2017 NY Slip Op 32320(U)

November 2, 2017

Surrogate's Court, New York County

Docket Number: 2007-0234/B

Judge: Nora S. Anderson

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court
Date: November 2, 2017

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Accounting by Janet Marino Gerlach as
Executor of the Estate of

File No. 2007-0234/B

EDWARD J. MARINO,

Deceased.

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A N D E R S O N , S .

Objectants have filed two motions in this contested executor's intermediate accounting, a "Motion to Stop Self-Dealing and to Compel Distribution" ("Motion 1"), and a motion to supplement the record ("Motion 2").

Background

Edward J. Marino died on December 22, 2006, survived by three adult children: Janet Marino Gerlach, Michael Marino, and Christopher Marino. Decedent's will was admitted to probate on January 30, 2007, and letters testamentary issued to Janet, the nominated executor.

The estate is valued at approximately \$16 million. At issue is testator's interests in three wholly owned real estate corporations (the "corporations"), collectively valued at approximately \$6.9 million.

The will provisions relevant to the corporations are:

Article V(A), in which decedent gives "all shares of voting stock" in the corporations to Janet and "all shares of non-voting stock" in the corporations, in equal parts, to Michael and

Christopher;

Article V(D), states:

"It is my wish that, although my surviving children shall have equal ownership interests in my corporations, my daughter, JANET MARINO GERLACH, shall have sole authority to make all decisions concerning my corporations, financial or otherwise . . . and all such decisions shall be made by my said daughter, in her sole and absolute discretion";

Article XIII(G), authorizes the executor to

"retain any business interest . . . for any period of time whatsoever, even though the interest may constitute all or a large portion of my estate" and "to . . . employ with compensation, as directors, officers, employees or agents of the business, any persons, including an Executor . . . hereunder . . ., without adversely affecting the compensation to which that Executor . . . would otherwise be entitled . . .";

Article XIV(B), in which decedent requests that, in the event Janet predeceases him, his executor "arrange for the sale of the various real properties owned . . . by my closely held corporations"

The residuary estate is divided equally among decedent's three children. The estimated value of the stock specifically bequeathed to each is about \$2.3 million and each has received approximately \$160,000 to date in distributions from the estate.

Pursuant to a stipulation in a separate proceeding to compel an accounting, Janet filed an intermediate accounting for the period December 22, 2006 through December 31, 2012. Christopher and Michael then filed objections, alleging self-dealing, improper handling of estate taxes, improvident holding of large

uninvested cash balances, failure to make timely distributions of estate assets, and failure to account for all estate assets. They also object to the payment of some or all of the executor's legal fees from the estate.

Undisputed Facts

Objectants have not disputed that for several years prior to testator's death, Janet provided real estate brokerage services to the corporations and was actively involved in the management of corporate properties. Her responsibilities included leasing properties, managing rentals, overseeing repairs, and acting as general contractor. At times, she redesigned buildings and oversaw the financial management of the real estate. The corporations paid brokerage fees to Janet's brokerage company, Hedgestone Realty, and management fees to Hedgestone Associates, Inc., a real estate management company co-owned by Janet and her husband. After testator became ill, Hedgestone Associates, Inc., increased its management services to the corporations.

Janet assumed full management responsibilities after testator's death. At that time, the corporations owned and operated 13 commercial and residential properties. Janet oversaw their maintenance, repairs, renovations and rentals, assured payment of mortgages, and reduced real estate taxes. Between June 2009 and December 2012, Janet paid herself approximately \$579,000 in compensation for these services.

In September 2007, Janet filed the estate's federal and New York State estate tax returns. The taxing authorities determined that the estate owed over \$8.1 million in combined federal and state estate taxes. Janet paid only \$4.6 million of the entire taxes due, electing to defer payment of the remaining approximately \$3.5 million (see Internal Revenue Code [26 USC] §6166), the full tax amount attributable to the total value of the corporations.

The state and federal government permit payments to be deferred over a period of fifteen years. Under §6166, the estate was obligated to pay interest only for the first four years and, beginning in year five, to make payments on account of the principal, plus interest on the balance owed. The parties agree that the interest rate on deferred taxes at the time of the election was two percent.

Motion 1

Objectants seek an order directing Janet: (1) to make no further payments to herself, her spouse or any entity in which she has an interest without further order of the court; (2) to reimburse the estate \$700,000, for alleged wrongful payments to herself or alternatively, to make immediate distributions of \$700,000 to each objectant, and (3) to sell immediately sufficient estate property to satisfy all deferred taxes.

Objectants' notice of motion contains two seemingly

contradictory requests for attorney fees. In request number (4), objectants ask "that [Janet's] attorney's fees be paid from the estate." In request number (5), they ask that she "be surcharged for the amount of Respondent's attorney's fees paid from the estate." Objectants have not addressed, much less clarified, these requests in their motion papers. The court further notes that, although a supporting affirmation seeks the revocation of Janet's letters, the notice of motion contains no request for such relief (CPLR 2214[a]) and objectants say nothing more about such relief in any of their motion papers. Accordingly, the court declines to address these matters (*see Bd. of Mgrs. of the Caton Ct. Condominium v Caton Dev. LP*, 41 Misc 3d 1231(A) [Sup Ct, Kings County 2013] ["[t]he court will not address the relief requested . . . which is unsupported by any legal argument"]).

Objectants seek the court's determination regarding their allegations of self-dealing and breach of fiduciary duty based solely on the record before the court. As such, their application is in the nature of a request for partial summary judgment and the court will rule accordingly.

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to show the absence of any disputed material fact (*see Alvarez v Prospect*

Hosp., 68 NY2d 320 [1986]; *Westhill Exports, Ltd. v Pope*, 12 NY2d 491 [1963]; *Matter of McIntosh*, NYLJ, Oct. 6, 2014 at 21, col 6 [Sur Ct, NY County 2014]). If the proponent makes such a showing, the burden shifts to the party opposing summary judgment, who must submit evidence demonstrating the existence of a genuine issue of material fact (see *Alvarez, supra*, at 324; *Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Matter of McIntosh, supra*).

Tax Deferral

Objectants maintain that, in electing the tax deferral, Janet improperly handled estate taxes and acted for her personal benefit. They claim that by extending the administration of the estate, Janet could continue to compensate herself for managing the properties, while continuing to withhold further distributions. Objectants also maintain that Janet's election to defer taxes resulted in her failure to perform the primary function of an executor, *i.e.*, to act expeditiously in marshaling assets, paying debts and administration expenses, and making distributions in accordance with decedent's wishes. Objectants ask the court to direct Janet to sell immediately sufficient estate property to satisfy all deferred taxes and to pay distributions to the beneficiaries.

The accounting shows \$8,311,781.86 currently on hand, consisting of \$26,535.60 in cash or cash equivalents and the balance in real estate holdings. This constitutes *prima facie*

evidence that the total of all estate assets were sufficient to cover the \$3.5 million tax liability attributable to the corporations. Thus, if Janet had sold some portion of the real estate, she could have paid the full amount of the tax due and thereby avoided long-term debt service and management expenses. The burden now shifts to Janet to come forward with evidence establishing that there is a genuine issue of material fact as to objectants' allegation that her decision to forgo such sales was imprudent or otherwise improper.

Janet relies in part on her deposition testimony to establish that her decision to defer taxes was the result of her considered judgment. She testified that she intended to honor decedent's expressed desire to elect a tax deferral and that she relied on the advice of her attorney and her accountant in performing her fiduciary duties. She further testified that she is a real estate broker and that, in her judgment, the deferral was in the best interest of the estate because it avoided sales in a depressed market.

Janet has submitted an affidavit of decedent's accountant which corroborates her assertion that testator had been in favor of an election to defer taxes. The accountant states that, after testator's death, he, Janet, and her attorney, all concluded that the deferral was in the best interest of the estate, considering "the lackluster state of the real estate market . . ., the

available cash in the estate, the estimated future cash needs of the [corporations], and the favorable interest rates available under IRC §6166."

In light of Janet's testimony, the affidavit of decedent's disinterested accountant, as well as the broad powers given specifically to Janet under the will to make decisions regarding the corporations, the court concludes that whether the tax deferral was a prudent choice or a improper implement of self-advancement are disputed issues of material fact not appropriate for summary determination.

Objectants' request for an order, pursuant to SCPA 2102(4) and EPTL 11-1.5(c), to compel final distribution at this time is predicated on an adjudication as to the propriety of the tax deferral. Factual disputes regarding such propriety preclude the court from now directing an immediate sale of the assets.

Conflict of Interest and Self Dealing

Objectants maintain that the executor breached her fiduciary duty of loyalty by favoring her individual interests over the interest of the estate. Specifically, objectants allege that Janet's dual roles as executor and as a compensated corporate manager inherently give rise to a conflict of interest. They argue that continuing the administration of the estate, while being compensated for managing the corporations, and withholding further distributions promotes her personal profit at their

expense.

A fiduciary is held to "the duty of the finest loyalty" (*Meinhard v Salmon*, 249 NY 458, 463-464 [1928]). Accordingly, "[a] fiduciary shall not engage in self-dealing[,]" and when he does "there is inevitably a conflict of interest" (*Flaum v Birnbaum*, 120 AD2d 183 [4th Dept. 1986]). The duty of loyalty does not permit a fiduciary to "occupy a position in which he has interests to serve other than the interest of the . . . estate" (*Matter of Bradley*, 143 NYS2d 264 [Sur Ct, NY County 1955]). When the fiduciary "has a selfish interest which may be served, the law does not stop to inquire whether the [fiduciary]'s action or failure to act has been unfairly influenced. It stops the inquiry when the relation is disclosed" (*Matter of Bradley, supra*).

Notwithstanding the foregoing, a testator may authorize his executor to continue or conduct the testator's business (see *Columbus Watch Co. v Hodenpyl*, 135 NY 430 [1892]; *Matter of Smythe*, 6 Misc 2d 130 [Sur Ct, Westchester County 1942]), and a testator is generally free to provide for the compensation of his fiduciary as he wishes (see *Matter of Grant*, 155 Misc 2d 819 [Sur Ct, NY County 1993]). Further, where an executor has direct experience managing a subject property or business during the testator's lifetime, additional compensation for such services may be allowable, because the executor offers the property or business something not to be expected in her role as executor

(see *Matter of Berkowitz*, NYLJ, Feb. 1, 2006 at 16, col 1 [Sur Ct, NY County 2006]; accord *Matter of McCord*, 2 AD 324 [1st Dept. 1896][executor allowed extra compensation where he had been manager of subject property prior to testator's death]; *Matter of Smythe, supra* [executor allowed extra compensation where she had been director and secretary and had actively assisted testator in conducting of business]).

Indeed, in assessing whether a conflict of interest exists where, as here, an executor pays herself for continuing the decedent's business, courts look to whether the executor was connected to the business before testator's death (*cf. Matter of Block*, 186 Misc 945 [Sur Ct, Bronx County 1946]; *Matter of Grossman*, 157 Misc 164 [Sur Ct, NY County 1935], *aff'd* 250 AD 503 [1st Dept. 1937]; see also *Matter of Smythe, supra* [finding no conflict of interest where executor had been director and secretary and had actively assisted testator in conduct of business]; accord *Berkowitz, supra* ["courts aim to avert [conflict of interest concerns] when they warn fiduciaries against hiring themselves where there is no special niche for them to fill apart from executorial"]).

Decedent, in Articles V(D), XIV (B) and XIII(G) of his will, authorizes the continuation of the corporations after his death. He specifically provides that Janet may be employed and compensated by the corporations, without adversely affecting the

compensation to which she would be entitled as executor. It is undisputed that Janet had direct experience working in the corporations during testator's lifetime. Since testator contemplated that Janet would not be limited to executor's commissions, but instead would also be compensated for her special expertise in managing the corporations, the court concludes that objectants have not met their burden of establishing a prima facie basis for a surcharge as a matter of law (see *Matter of Reichberg*, NYLJ, Jul. 31, 2002 at 30, col 4 [Sur Ct, Westchester County 2002]).

Objectants also assert that, by continuing to compensate herself while withholding further distributions, Janet is in breach of her duty to "treat the three children equally," as directed under Article V(D) (providing for the three children to "have equal ownership interests" in the corporations), and under Article VII(A) (dividing the residuary equally among the three children). Objectants argue that, in compensating herself, Janet is acting outside her authority with regard to corporate operations under Article V(D), which do not authorize additional compensation.

The court disagrees. If the court were to interpret the provisions for equal corporate ownership and equal division of the residuary as forbidding compensation to Janet for services rendered to the corporations, or requiring partial distributions

to objectants in an amount equal to Janet's compensation, such construction would render the compensation provision in Article XIII(G) a nullity. Moreover, no canon of construction or rule of reason supports objectants' theory that the absence of a provision for compensation in Article V, despite the presence of such a provision in Article XIII, is per se fatal to Janet's claim to compensation for managing the corporations.

Objectants also place misguided reliance on SCPA 2307(6). As executor, Janet may be entitled to receiving and paying out commissions (SCPA 2307[1]), as well as an additional commission of five percent of gross rents for collecting the rents and managing real property (SCPA 2307[6]; see also *Matter of Cristina*, NYLJ, Dec. 23, 2005 at 29, col 4 [Sur Ct, Queens County 2005]; *Matter of Brandon*, NYLJ, Aug. 9, 1996 at 29, col 2 [Sur Ct, Westchester County 1996]). Here, Article XIII(G) provides that Janet's compensation for employment by the corporations is separate from her executor compensation. SCPA 2307[6], therefore, does not limit Janet's compensation for such employment (see *Matter of Grant*, *supra*; *Matter of Smythe*, *supra*).

Accordingly, objectants have failed to establish entitlement to a surcharge as a matter of law on their claims of breach of fiduciary duty. The court has considered objectants' remaining arguments and finds them to be without merit.

Based on the foregoing, objectants' motion for partial

summary judgment is denied.

Preliminary Injunction

Objectants request that Janet be directed to make no further payments to herself, her spouse, or any other entity in which she has an interest without further order of the court. This is in effect a request for a preliminary injunction.

A preliminary injunction "protect[s] the movant from injury during the course of the litigation, ordinarily through preservation of the status quo until there is a determination on the merits" (Weinstein-Korn-Miller, NY Civ Prac ¶6301.02 [2d ed 2017]). This is precisely what objectants seek here. There is no substantive distinction between a request for a preliminary injunction and the relief objectants have requested.

CPLR 6301 provides that "a preliminary injunction may be granted in any [proceeding] where it appears that the [party opposing the motion] threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the [movant's] rights respecting the subject of the action, and tending to render the [decree] ineffectual." It is well settled that, to prevail on an application for a preliminary injunction, movant must show a likelihood of success on the merits, irreparable injury, and a balancing of the equities in movant's favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Castia, L.P. v Maplewood Equity Partners (Offshore) Ltd.*, 43 AD3d 260 [1st

Dept. 2007])). Irreparable harm is not established where an injury would be adequately compensated by monetary relief (see *NYC Off-Track Betting Corp. v Racing Ass'n*, 250 AD2d 437 [1st Dept. 1998]; *Sportschannel America Assoc. v Nat'l Hockey League*, 186 AD2d 417 [1st Dept. 1992])).

Unlike the facts presented in the case relied on by objectants, *i.e.*, *Patti v Holdings* (2008 NY Misc Lexis 10185 [Sup Ct, Nassau County 2008]), objectants allege here that the executor has made unauthorized payments to herself from estate assets. In this circumstance, a surcharge would sufficiently compensate objectants for any injury found to have been caused the estate in this connection (see *Matter of Ajar*, NYLJ, June 1, 1992 at 24, col. 5 [Sur Ct, Nassau County 1992]; see also *Matter of Raffe*, NYLJ, Mar. 20, 2014 at 29, col. 2 [Sur Ct, Nassau County 2014]; *Matter of Armata*, NYLJ, Dec. 14, 2004 at 31, col. 2 [Sur Ct, Suffolk County 2004])).

Accordingly, objectants have failed to establish that their allegations, if ultimately proved to be true, would amount to irreparable harm. Therefore, their request for a preliminary injunction is denied.

Based on the foregoing, Motion 1 is denied in its entirety.

Motion 2

In their second motion, objectants seek to supplement the record on Motion 1. They ask the court to consider a supplemental

affidavit of Christopher Marino to bolster their request for a preliminary injunction. Objectants maintain that this supplemental affidavit demonstrates -- through attached industry articles and court decisions discussing property management fees on residential and commercial properties -- that Janet has been over-compensated in relation to an industry standard fee for such services and has paid herself beyond "legal limits."


The supplemental affidavit does nothing to change the outcome of objectants' request for a preliminary injunction. It fails to establish irreparable harm (*see Matter of Ajar, supra; see also Matter of Raffe, supra; Matter of Armata, supra*) and, therefore, does not provide a basis for a preliminary injunction. Furthermore, the information objectants seek to add to the record was previously available, and supplemental papers are not to be used to correct deficiencies in a party's moving papers (*see Ostrov v Rozbruch, 91 AD3d 147 [1st Dept. 2012]; Matter of*

Schleifer, NYLJ, Mar. 30, 2016 at 30, col 5 [Sur Ct, NY County 2016]).

Based on the foregoing, Motion 2 is denied in its entirety.

This constitutes the decision and order of the court.

Dated: 1 November, 2017



S U R R O G A T E