

Matter of O'Leary
2017 NY Slip Op 32678(U)
December 21, 2017
Surrogate's Court, New York County
Docket Number: 2015-4628
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

December 21, 2017

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Proceeding for Judicial Settlement of the Account of
Frances O'Leary, as Executor of the Estate of

File No. 2015-4628

MARY O'LEARY,

Deceased.

-----X

ANDERSON, S.

In this contested accounting proceeding in the estate of Mary O'Leary, petitioner, a beneficiary and executor of decedent's estate, moves to dismiss objections filed by another beneficiary ("objectant").

Decedent died on October 4, 2013. Her will was admitted to probate in Bronx County Surrogate's Court where petitioner also commenced a proceeding for judicial settlement of her account. Objectant filed objections to petitioner's legal fees and to her failure to account for the proceeds of a life insurance policy as an estate asset. The proceeding was then transferred to this court.

Petitioner's motion to dismiss does not specify the statutory grounds upon which it is based. In view of the substance of her arguments, the court will consider her motion as one based upon objectant's failure to state a valid objection (CPLR 3211[a][7]), or as one based upon the documentary evidence (CPLR 3211[a][1]).

On a motion to dismiss objections to a fiduciary's account, the facts alleged by the objectant must be deemed to be true, and the objectant is to be afforded "the benefit of every favorable inference" (*Matter of Mercer*, NYLJ, June 17, 2015, at 27, col 6 [Sur Ct, Suffolk County] quoting *Matter of Lee*, 96 AD3d 941, 942 [2012]; *Matter of Shay*, NYLJ, Dec. 9, 2011,

at 26, col 1 [Sur Ct, Bronx County]; *see generally Leon v Martinez*, 84 NY2d 84, 87-88 [1994]).

The court's role "is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Matter of Mercer, supra; Leon v Martinez, supra*).

The first objection pertains to legal fees charged by petitioner while acting as counsel to herself as the estate's fiduciary. Objectant argues that since petitioner is entitled to executorial commissions, her claim for legal fees constitutes "double dipping." She states that "any service provided to the estate would have come under her role [as executor] and compensation for any such services would be included in the [statutory] commissions" Objectant also contends that any legal fees for services rendered prior to decedent's death cannot be charged to decedent's estate without decedent's expressed intent to be so charged.¹

If this objection were based solely on the theory that an executor who also acts as counsel to the estate is not entitled to receive both commissions and legal fees, the Court would dismiss the objection as a matter of law. However, the Court recognizes the mandate of CPLR § 3026 that pleadings are to be "liberally construed," and therefore considers this objection as one which alleges that some or all of the services for which petitioner seeks legal fees are executorial in nature, and as such, do not entitle petitioner to legal fees (*Matter of Schoonheim*, 158 AD2d 183, 187-188 [1st Dept 1990]; *Matter of McCranor*, 176 AD2d 1026 [3rd Dept 1991]; *Matter of Davis*, NYLJ, July 7, 2015, at 26, col 6 [Sur Ct, Bronx County 2015]). Accordingly, the objection states a valid claim.

¹ In her affidavit of legal services, petitioner states that fees incurred between October 2013 and March 2015 totaled \$2,000, representing 21 hours at \$100 per hour. Time sheets reflect only time accrued subsequent to decedent's death. Therefore, objectant's concern that some of petitioner's legal fees were attributable to work performed prior to decedent's death is without merit.

To the extent petitioner relies on her affidavit of legal services and time sheets as support for dismissal of the objection to legal fees, her reliance is misplaced. For example, petitioner's time sheets reflect one hour to "obtain[ing] letters testamentary, open[ing] estate checking account" and three hours to "prepar[ing] and fil[ing] list of assets with the court." These tasks, fall squarely within the responsibilities of an executor. Thus, the proffered documentary evidence does not support dismissal of the objection to legal fees.

The second objection concerns petitioner's failure to include as an estate asset the proceeds of \$15,453 life insurance policy. The parties do not dispute that decedent designated petitioner as the beneficiary of the policy without any reference to petitioner's status as the nominated executor. However, objectant argues that decedent intended the insurance proceeds to be used to pay for decedent's funeral expenses.

Again liberally construing objectant's pleading (CPLR § 3026), the court considers this allegation as tantamount to a claim for the imposition of a constructive trust on the insurance proceeds. While it is arguable whether the constructive trust claim against petitioner in her individual capacity is an appropriate objection to her account in her fiduciary capacity, the court exercises its authority under SCPA § 202 and recognizes objectant's claim for a constructive trust as legitimate (*see generally Matter of Artope*, 144 Misc 2d 1090 [Sur Ct, Nassau County 1989] [adjudicating a constructive trust claim raised in a probate proceeding pursuant to the Surrogate Court's powers under SCPA § 202]).

The imposition of a constructive trust is an equitable remedy available "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." *Beatty v Guggenheim Exploration Co.*, 225 NY 380,

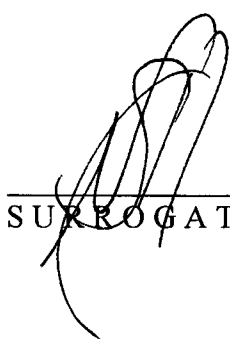
386 (1919). In *Beatty*, Judge Cardozo aptly described a constructive trust as “the formula through which the conscience of equity finds expression” (*id.* at 386). More recently, courts and commentators have noted both the “broad scope” and the flexibility of the constructive trust doctrine (*see Simonds v Simonds*, 45 NY2d 233, 241 [1978], *citing* 5 Scott, Trusts [3d ed], § 462.2 and Bogert, Trusts and Trustees [2d ed rev, 1978], § 471, at 29; *see also Weadick v Herlihy*, 16 AD3d 223 [1st Dept 2005]).

Four elements are basic to a claim sounding in constructive trust: (1) a fiduciary or confidential relationship; (2) a promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment. Although these factors are useful as a guideline, courts have stressed that they are not to be applied rigidly to limit the application of the doctrine (*see Simonds v Simonds, supra*, 45 NY2d at 241; *Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010]). Courts have imposed constructive trusts in the absence of one or more of the above-cited factors (*see, e.g., Latham v Father Divine*, 299 NY 22 [1949] [imposing a constructive trust in the absence of a fiduciary relationship]). Since objectant has made allegations which may, if proven, justify the imposition of a constructive trust with respect to the insurance proceeds, such a claim cannot be dismissed at this pre-discovery stage.

In sum, the objections to petitioner’s account raise cognizable claims which are not refuted as a matter of law by documentary evidence. Petitioner’s motion to dismiss is therefore denied in its entirety.

This constitutes the decision and order of the court.

Dated: *December 21*, 2017


SURROGATE