

<b>Matter of Assimakopoulos</b>
2017 NY Slip Op 32821(U)
July 5, 2017
Surrogate's Court, New York County
Docket Number: 2011-874/B
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court  
Date: JULY 5, 2017

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Proceeding to Settle the Account of the Public Administrator  
of the County of New York as Administrator of the Estate of

NICK ASSIMAKOPOULOS  
a/k/a NICHOLAS M. ASSIMAKOPOULOS,

DECISION  
File No.: 2011-874/B

Deceased.  
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M E L L A, S.:

The court considered the following submissions in deciding this motion for summary determination:

<u>Papers Considered</u>	<u>Numbered</u>
Objections to Account by Eva Lana, with Exhibits, filed February 24, 2015.....	1
Notice of Motion and Affirmation of Staci Graber in Support of Motion for Summary Judgment, with Exhibits, filed October 28, 2016.....	2,3
Affidavit of Nicolle Assimakopoulos-Panuthos in Response to Objections and in Support of Summary Judgment Motion, with Exhibits, filed December 7, 2016.....	4
Affidavit of Eva Lana in Opposition to Summary Judgment Motion, with Exhibits, filed December 12, 2016.....	5
Reply Affirmation of Staci Graber in Support of Motion for Summary Judgment, with Exhibits, filed January 9, 2017.....	6

In this proceeding to settle her first and final account, the Public Administrator of New York County (the "PA" or "petitioner"), as administrator of the estate of Nick Assimakopoulos, has moved for summary determination of the objections filed by Eva Lana ("Eva"), decedent's daughter and distributee.<sup>1</sup>

Decedent died on July 3, 2007, intestate, survived by his spouse Paula, who post-

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<sup>1</sup> In addition to summary dismissal of the objections to her account, the PA also sought in her motion authorization to make an advance distribution to the estate of decedent's spouse. From the bench at the calendar call on December 9, 2016, the court granted that request to the extent of allowing an advance distribution in the sum of \$50,000.

deceased in 2010, and two daughters, Eva and Nicolle Assimakopoulos-Panuthos (“Nicolle”). Letters of Administration were issued to the PA on February 17, 2012, after a delay caused by decedent’s dueling daughters.<sup>2</sup> The hostility between the daughters has continued in this accounting proceeding. Eva’s objections and the voluminous exhibits submitted in support appear to be largely if not entirely irrelevant to this straightforward account for an estate that had essentially a single asset—a condominium apartment. Indeed, many of the objections focus on the actions of Nicolle individually or in her capacity as the fiduciary of Paula’s estate.

The well-settled standard for determining a motion for summary judgment in an accounting proceeding may be summarized as follows. Naturally, the movant must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). When an accounting party is the movant and seeks dismissal of the objections to the account, her burden is to make a prima facie showing that the account is complete and accurate (*Matter of Doerschuck*, NYLJ, Jun. 11, 2008, at 39, col 3 [Sur Ct, NY County], citing

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<sup>2</sup> After Paula died a domiciliary of Florida, Nicolle and Eva were appointed as co-fiduciaries of her estate in Florida. On March 3, 2011, Nicolle filed a petition in this court for letters of administration in decedent’s estate as one of the personal representatives of Paula’s estate. Eva filed objections and a cross-petition on October 13, 2011. On December 28, 2011, Eva was removed as co-fiduciary of Paula’s estate in Florida. On January 31, 2011, the return day of Eva’s cross-petition, after concluding that the two daughters had demonstrated lack of fitness to serve as fiduciaries, the court denied both the petition and the cross-petition and appointed the PA. In a similarly contentious manner, Eva and Nicolle fought over the ancillary fiduciary appointment in Paula’s estate, which was resolved by decisions granting ancillary letters of administration c.t.a. to Nicolle (*Matter of Assimakopoulos*, NYLJ, Dec. 7, 2012, at 22, col 2 [Sur Ct, NY County]; *Matter of Assimakopoulos*, NYLJ, Jul. 5, 2013, at 27, col 2 [Sur Ct, NY County]). The appeal filed by Eva from the decree appointing Nicolle as an ancillary administrator is now pending before the First Department for the October 2017 Term (*Motion Orders*, NYLJ, Jun. 15, 2017, at 25, col 1 [1st Dept]).

*Matter of Schnare*, 191 AD2d 859 [3d Dept 1993], *lv denied*, 82 NY2d 653 [1993]). The burden is met by the filing of an account “with an affidavit attesting to its accuracy” (*id.*). In order to resist summary dismissal, objectant must proffer evidence to show the existence of a material issue of fact “as to the account’s accuracy or completeness” (*Matter of Antin*, NYLJ, Feb. 1, 2013, at 22, col 4 [Sur Ct, NY County], citing *Matter of Schnare*, 191 AD2d 859; *Matter of Corn*, NYLJ, Aug. 17, 2016, at 22, col 3 [Sur Ct, NY County]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” as evidence to such end (*Zuckerman v City of New York*, 49 NY 2d 557, 562 [1980]). In determining whether summary judgment is appropriate, the court “should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility” (*Dauman Displays v Masturzo*, 168 AD2d 204 [1st Dept 1990], citing *Assaf v Ropog Cab Corporation*, 153 AD2d 520 [1st Dept 1989]).

Movant has made a prima facie showing that the account is complete and accurate by filing her final account for the period of July 3, 2007 through November 18, 2014, and an affidavit attesting to its accuracy (SCPA 2209). The accounting reflects that the proceeds of the sale of decedent’s condominium constitute the sole estate asset (Schedule A). The account states that the property was sold for \$280,000 in a private sale on September 27, 2013, and that the amount of the net sale proceeds is \$207,061.67, after deduction of brokers’ fees, closing costs, and common charge arrears. Schedule C of the account lists the paid administration expenses which include those related to decedent’s condominium (e.g., appraisal, cleaning, auction expenses, and maintenance arrears). Schedule C-1 lists the unpaid administration expenses, including a rejected claim by Eva (\$1,838.28) and a partially allowed claim on behalf of Paula’s

estate (\$8,728). According to the account, the value of the distributable estate is \$182,444.87.

Those of Eva's objections that are relevant to the PA's proceedings as administrator of this estate center on (1) the condominium, (2) her rejected claim for reimbursement, and (3) certain TIAA-CREF accounts that, according to Schedule J, had been maintained in decedent's name but at some point had been closed by him. Each objection will be discussed separately.

### **The Condominium**

With respect to petitioner's actions concerning decedent's condominium apartment, Eva objects to: (1) the timeliness of the sale, (2) the advertising fees related to the sale at a public auction, (3) the sale price, (4) the payment of common charges and late fees, and (5) cleaning expenses.

The Public Administrator is "granted . . . the powers given by law to a fiduciary of a decedent's estate" (SCPA 1123 [1]) and "it is the fiduciar[y's] right to make the business judgment involving the time, price, manner and propriety of sale of real property" (*Matter of McKean*, NYLJ, Jun. 17, 1996, at 1, col 3 [Sur Ct, NY County], citing EPTL 11-1.1 [b][5][B]; *Matter of Bilyk*, NYLJ, Mar. 14, 2016, at 19, col 2 [Sur Ct, Bronx County]). Specifically, a fiduciary has discretion to sell the real property in a public or private sale based on terms the fiduciary considers as in the best interest of the estate (EPTL 11-1.1 [b][5][B]). It is, in fact, well settled that "[w]here a sale of estate property has been properly conducted, resulting in receipt of a fair price on reasonable terms, ordinarily no objection will lie" (*Matter of Derrick*, 34 Misc 3d 1214[A], 2011 NY Slip Op 52477[U], \*7 [Sur Ct, Kings County 2011], citing *Matter of Lovell*, 23 AD3d 386 [2d Dept 2005]). An objection as to the sale price will not prevail by showing that the fiduciary failed to sell the property for the highest price obtainable—the objectant must show

that the fiduciary “acted negligently, failing to exercise the diligence and prudence an ordinary person would in the conduct of her own affairs” (*id.*, citing *Matter of Scarsella*, 195 AD2d 513[2d Dept 1993]).

*Propriety of the Manner of the Sale*

Eva objects on the grounds that there was a delay in selling decedent’s condominium apartment and that incurring the advertising fees related to the sale of the condominium at public auction was improvident.

It is undisputed that, after her appointment as administrator on February 17, 2012, the PA intended to include the condominium in a June 2012 public auction. It is also undisputed that Eva and her son lived in decedent’s condominium since, at least, July 2011, and that Eva requested a delay in the sale of the condominium until the end of the 2011-2012 school year in order not to disrupt her son’s routine. After Eva vacated the premises in August 2012, petitioner included the condominium in the next scheduled public auction, on March 21, 2013. There were no bids on the condominium at the auction, and petitioner subsequently engaged brokers to sell the property privately. Petitioner avers that she followed the latest version of the Guidelines of the Administrative Board for the Offices of the Public Administrators (“Guidelines”) in first listing the condominium at the public auction and then proceeding with private sale, which was closed on June 11, 2013. Petitioner has made a prima facie showing that she exercised her judgment reasonably in selling the apartment.

Having put forth nothing but her unsupported allegations, Eva has failed to raise an issue of fact as to the propriety of the costs associated with advertising the sale at public auction. Under the circumstances here, she has also failed to raise any issue of fact with respect to the

propriety of the timing of the sale in light of the facts that: (a) the delay was the result, at least in part, of her own occupancy of the premises (*see Matter of Lowe*, NYLJ, Jun. 16, 2015, at 27, col 3 [Sur Ct, Suffolk County] [an objection on the issue of timeliness of the sale of real property was foreclosed as a matter of equity due to objectant's behavior that delayed the sale]); and (b) petitioner complied with the Guidelines in selling the property. Therefore, the objections as to the advertising fees in connection with the sale at auction and as to the timeliness of the sale of decedent's condominium are dismissed.

#### *Sale Price*

Objectant also asserts that the sale price of the condominium was below fair market value. In support of her motion to dismiss this objection, petitioner provides a copy of a March 2012 appraisal report. The report includes a list of comparable sales that took place around the time of appraisal and concludes that the property's value at the time was \$277,000. It is undisputed that in August 2013 the condominium was sold for \$280,000. In support of her objection, Eva asserts that the condominium was resold for \$369,000 around March 2016—more than 30 months after petitioner sold the property. In reply, movant notes that the condition of the property as of the 2016 sale was superior to that in 2013.

Petitioner has made a prima facie showing that the sale of the condominium was properly conducted. Petitioner followed the customary practices and ultimately entered into the contract of sale with the sole interested buyer two months after listing the property with real estate brokers, and sold the property for \$280,000, which was above the appraised value (*see Matter of Vartanian*, NYLJ 1202584642624 [Sur Ct, NY County 2013] [objection to sale of real property dismissed where appraisal substantially contemporaneous with closing supported conclusion that

sale price equaled or exceeded fair market value]). The sole support for Eva's objection—the fact that the same property was sold for a higher price in 2016—has no bearing on either what constituted a fair price in August 2013 or whether petitioner conducted the sale properly and exercised good business judgment. Therefore, the objection to the sale price is dismissed.

#### *Common Charges and Cleaning Expenses*

Eva's objection to the payment of the outstanding common charges incurred after decedent's death in the amount of \$38,408.01, including \$2,400 for late fees, is based on her argument that these charges "are not allowed by the condominium [bylaws]." The proof for this assertion provided by objectant—a one-page partial transcript of what appears to be an unidentified legal proceeding—fails to raise an issue of fact in view of petitioner's proof that decedent's estate was billed for those charges and that the charges were satisfied at the closing of the sale of condominium. Accordingly, the objection is dismissed.

Objectant also claims that the payment in the amount of \$1,200 to a company by the name of "Grandma's Attic Clean Outs" for cleaning the condominium in preparation for sale was "not accounted for despite a request for documentation."<sup>3</sup> Petitioner has provided a copy of the invoice bearing stamps of receipt and payment dated February 8, 2013, which is accurately reflected in Schedule C of the account. Objectant has thus failed to raise a material issue of fact with respect to the cleaning expense and this objection is dismissed.

#### **Eva's Rejected Claim**

Objectant asserts that movant rejected her claim for reimbursement for disbursements

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<sup>3</sup> In her response to the instant motion, objectant also claimed that the cleaning charge was exorbitant, but this had not been pled in her objections.

related to the repairs done to the condominium after decedent's death without a "cogent reason."<sup>4</sup> Specifically, Eva's claim for reimbursement, in the total sum of \$1,838.28, is for expenses allegedly related to: (1) lock installation and door repair in March 2009, (2) electric rewiring in June 2011, and (3) a lock change in February 2014.

Petitioner is correct that, upon decedent's death, title to the condominium vested in decedent's distributees as tenants in common by operation of law (EPTL 4-1.1; 6-2.2 [f]; *Matter of Barghenking*, NYLJ, Sep. 22, 2009, at 33, col 5 [Sur Ct, NY County]).<sup>5</sup> Relying on *Degliuomini v Degliuomini* (45 AD3d 636 [2d Dept 2007]), petitioner argues that Eva, as a tenant in common and occupant of the condominium, failed to establish her entitlement to reimbursement because the repairs were not necessary to protect and preserve the premises and were completed for her benefit as occupant of the apartment. One of the bills objectant provides to support her claim, however, shows that the apartment lock was changed at a time when objectant was not occupying the premises. The court concludes that there is a question of fact as to the validity of Eva's claim for reimbursement for the expenses of changing the lock in 2014, including whether such repair was necessary to protect or improve the condominium, and, therefore, summary determination of this limited objection is denied (*see Matter of Grasso*, NYLJ, Dec. 10, 2009, at 40, col 6 [Sur Ct, Suffolk County]).

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<sup>4</sup> On Schedule C-1 of the account, the rejected claim was described as one for "reimbursement of payment for expenses paid *while occupying decedent's Condo apartment after decedent's death* (emphasis added)."

<sup>5</sup> Paula on the one hand and, Nicolle and Eva on the other, held the tenancy in unequal shares in accordance with their respective intestate shares (EPTL 4-1.1).

**Decedent's TIAA-CREF Accounts**

Finally, Eva objects on the ground that the PA failed to account for decedent's annuity contracts held by TIAA-CREF. Petitioner made a prima facie showing that these accounts had been closed by decedent. Objectant's unsubstantiated allegation that the transfer of these assets was not properly investigated or her equally unsubstantiated contention that there are other accounts that petitioner failed to collect does not create an issue of fact requiring a trial.

Therefore, the objection concerning the TIAA-CREF accounts is dismissed.

**Other Objections**

The balance of the objections is dismissed as they relate to actions taken by Nicolle as fiduciary of Paula's estate and are not asserted properly in this accounting proceeding in decedent's estate.

**Conclusion**

Based on the foregoing, the administrator's motion for summary determination dismissing the objections as to decedent's condominium apartment, some of objectant's rejected claims, and the TIAA-CREF accounts is granted. The motion is denied with respect to objectant's rejected claim concerning the replacement of the condominium's lock in 2014.

Clerk to notify.

Dated: July 5, 2017

  
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