

Matter of Pines (Mahon)
2018 NY Slip Op 30732(U)
March 29, 2018
Surrogate's Court, Nassau County
Docket Number: 2013-373464/C
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 James Mahon, as Executor of the Estate of

DECISION & ORDER

MITCHELL PINES,

File No. 2013-373464/C

Dec. No. 33939

Seq. # 1

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion for Summary Judgment, October 17, 2017.	1
Affirmation of Charles D. Krieg, Esq. In Support.	2
Affirmation of James J. Mahon, Esq., In Support.	3
Memorandum of Law In Support.	4
Opposition by Neil Pines, dated November 14, 2017.	5
Krieg Affirmation in Further Support, November 27, 2017.	6
Order to Account, dated October 22, 2015.	7
Petition for Judicial Settlement and Account.	8
Copy of Closing Statement.	9
Attorney Affirmation Amend Petition [3].	10
Verified Objections, dated October 22, 2017.	11
Verified Objections, dated May 1, 2017.	12

Before the court is a motion for summary judgment seeking an order directing (1) the objections to the account of executor of the estate of Mitchell Pines be dismissed in their entirety; (ii) the account of executor be approved; (iii) the estate is entitled to its costs, expenses and attorneys’ fees incurred; and (iv) such other and further relief as this court deems just and proper.

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, *supra.*; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to establish through proof in evidentiary form that triable issues of fact exist or that the party has an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, *supra.*). The court's function is issue finding, not issue determination (*Matter of Suffolk County Dept. Of Social Services v James M.*, 83 NY2d 178 [1994]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence (*Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]; *Schuhmann v McBride*, 23 AD3d 542 [2d Dept 2005]). If the court has any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Freese v Schwartz*, 203 AD2d 513 [2d Dept 1994]). “Where different inferences may be drawn from facts that are undisputed, the case must go to trial and summary judgment will be denied” (*Sodexo Mgt., Inc. v Nassau Health Care Corp.*, 23 AD3d 370, 371 [2d Dept 2005]).

When a party seeks summary judgment it must affirmatively establish its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Voss v Netherlands Insurance Co.*, 22 NY3d 728, 985 [2014]; *Vega v Restani Construction Corp.*, 18 NY3d 499 [(2012)]; *Yun Tung Chow v Reckitt & Coleman, Inc.*, 17 NY3d 29 [2011]). That is to say, the party seeking summary judgment must establish, through evidence in admissible form, the merits of its position. “A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings, and by other available proof, such as depositions and written admissions” (CPLR 3212[b]).

While attorney affirmations are frequently utilized in summary judgment practice and are permitted pursuant to CPLR 2106, a person who is statutorily allowed to use an affirmation instead of an affidavit may not do so when that person is a party to the action (*Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 801 [1981], citing *Schutzer v Suss-Kolyer*, 57 AD2d 613 [2d Dept 1977]). The court must therefore ignore the affirmation of the executor, an attorney, offered in support of the motion.

In an accounting proceeding, the party submitting an account has the ultimate burden of demonstrating that he or she has fully accounted for all assets of the estate (*Matter of Tract*, 284 AD2d 543 [2d Dept 2001]). The party submitting objections bears the burden of coming forward with evidence to establish that the account is inaccurate or incomplete. Upon satisfaction of that showing, the accounting party must prove, by a fair preponderance of the evidence, that the account is accurate and complete (*Matter of Tract*, 284 AD2d 543 [2d

Dept 2001]). The burden of establishing that the account is inaccurate or incomplete must be established with reasonable certainty, and not left to mere conjecture or suspicion (*Matter of Antoniadis*, 43 Misc2d 782 [Sur Ct, Nassau County 1964]).

Starting with the criteria for summary judgment, the executor seeks approval of his final account and dismissal of the objections thereto, and thus must make a *prima facie* showing of his entitlement to such relief by presenting evidence in admissible form. There is a paucity of evidence before the court. As indicated above, the affirmation of the executor in support of the motion must be ignored (CPLR 2106; *Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 801 [1981]). Moreover, the affirmation submitted by his attorney in support of the motion is conclusory. For example, he avers that decedent's safe deposit box contained only decedent's high school and college rings which had only sentimental value. They do not demonstrate personal knowledge as to when, where and by whom the box was opened and/or how the value of the rings was determined. On this ground alone, *i.e.*, the inadequacy of the presentation, the motion for summary judgment must be denied.

Moreover, leaving aside the objections filed by Neil Pines which the court need not address, the court directs the petitioner to address several substantive deficiencies in the account and the petition for its judicial settlement.

First, as clearly stated in the instructions to the official forms for an accounting, all schedules must be completed, verified and filed. This includes Schedules F and K which are not part of the account filed. Second, Paragraph 5 of the petition for judicial settlement fails

to state the account and petition were filed in response to a court order directing its filing.

Third, the real property valued at \$515,000.00 on Schedule A, is not an estate asset and should appear on Schedule J rather than Schedule A.¹ Its value is not commissionable, rendering the executor's calculation of his receiving commissions, set forth on Schedule I, grossly inaccurate.

Fourth, Schedule A lists a loan receivable from decedent's daughter, Alison Jakubowski, of \$107,332.00, but neither the loan nor proceeds from collection of the loan are addressed on Schedules E (Statement of Distributions made), G (Property Remaining on Hand) or J (Other Pertinent facts). The cash distributions noted on Schedule E total only \$17,927.00.

Fifth, it appears from Schedule J that commissions of \$12,735.00 were improperly paid to the executor without prior court order (SCPA §§ 2307, 2310).

Sixth, the request for approval of counsel fees and accounting fees requires the submission of affidavits of services by those professionals including, without limitation, copies of contemporaneous time records in support of the charges and discussion of possible duplication respecting preparation of tax returns.

For the reasons stated above the executor's motion for summary judgment is **DENIED**. The executor shall file an amended accounting within forty-five (45) days of the

¹ The copy of the closing statement submitted to the court describes a sale by the Trust for the grandson as the seller of its 50% interest in the real property to Neil Pines, the owner of the other 50% interest.

date of this decision and order with proof of service of same on Neil Pines. Affidavits of service shall be filed by both counsel and the accountants with copies served on Neil Pines within forty-five (45) days of the date of this decision and order. The executor shall return his commissions to the estate account and file sufficient confirmatory documentation of such act with the court within forty-five (45) days of the date of this decision and order. Neil Pines shall have sixty (60) days from his receipt of the amended accounting to serve and file objections thereto, should he so desire.

This decision constitutes the order of the court.

Dated: March 29, 2018
Mineola, New York

E N T E R:

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

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