

Matter of Quinn

2018 NY Slip Op 31742(U)

July 11, 2018

Surrogate's Court, Nassau County

Docket Number: 2016-390356/F

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Application of Eileen Quinn for
Limited Letters of Administration in the Estate of**

CECELIA A. QUINN,

Deceased.

PRESENT: HON. MARGARET C. REILLY

DECISION & ORDER

File No 2016-390356/F

Dec. Nos. 34401

34402

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

Notice of Motion, Affirmation in Support and Exhibits.	1
Notice of Cross Motion, Affirmation and Exhibits	2
Affirmation in Support of Maureen Quinn’s Motion to Dismiss (Ronan)	3
Affidavit of Respondent Maureen Quinn’s Motion to Dismiss.	4
Reply Affidavit (Eileen Quinn).	5
Attorney Affirmation (Killeen)	6
Affidavit of Matthew Quinn in Opposition to Cross Motion	7
Reply Affirmation in Further Support of Motion to Dismiss and in Opposition to Cross Motion	8

Before the court in this pending proceeding for limited letters of administration, is a motion for an order: pursuant to CPLR Rule 3211 (a) (7) dismissing the petition by Eileen Quinn for limited letters of administration, and granting such other and further relief as the court deems just and proper. The movant is the attorney for the respondent, Maureen Eileen Quinn. The motion is opposed.

Also before the court is a cross motion which seeks: an order granting petitioner, Eileen Quinn, leave to amend the petition for limited letters of administration; deeming the proposed amended petition to be served and filed; denying the motion in chief; and for such other, further and different relief as to this court may seem just and proper. The cross-movant is the attorney for the petitioner, Eileen Quinn. The cross motion is opposed.

The decedent, Cecilia Quinn, died on June 17, 2016. She was survived by four children: Maureen Quinn (petitioner, nominated executor); Matthew John Quinn; Eileen Elizabeth Quinn (objectant); and Patricia Ann Quinn Warren. The decedent's last will and testament dated July 26, 2010 has been offered for probate. Pursuant to Article IV of the decedent's will, the decedent gave her tangible personal property and her residence located at 110 Kensington Road, Garden City equally to her children. In Article V of the will, the decedent gave to her trustees, the sum equal to the generation skipping transfer tax exemption to be divided in an equal number of shares so that there shall be set aside one share for each child living or to the living issue of the child who previously died. All the rest, residue and remainder was to be divided equally between the four children. The decedent nominated Maureen Quinn as executor and Eileen Quinn as the successor executor. Eileen Quinn filed objections to the probate of the decedent's will and to the appointment of Maureen Quinn as executor. Preliminary letters testamentary issued to Maureen Quinn.

On or about December 18, 2017, Eileen Quinn filed a petition for letters of limited administration wherein she asked: that letters of limited administration issue to her; that letters of temporary administration issue; and that the authority of her representative under the foregoing letters be limited to pursuing a discovery proceeding pursuant to SCPA § 2103.

The motion seeks to dismiss the petition pursuant to CPLR 3211 Rule (a) (7) for failure to state a cause of action. The movant argues that Eileen Quinn failed to set forth any of the grounds enumerated in SCPA § 702 for the appointment of a limited administrator. The cross motion seeks to amend the petition to include specific allegations in support of the

petition. If the cross motion to amend the petition is granted, the motion to dismiss pursuant to CPLR 3211 (a) (7) becomes academic.

Eileen Quinn cross-moved to amend her petition and to deny the motion in chief. Attached to the notice of motion is an affirmation from Eileen Quinn's attorney, a copy of a verified petition from Eileen Quinn wherein she requested that Maureen Quinn provide information regarding estate assets pursuant to SCPA § 2102¹, and a copy of the proposed amended petition. The amended petition sets forth, in pertinent part, that limited letters of administration must issue in order to commence a proceeding against Maureen Quinn for the recovery of funds that Eileen Quinn alleges Maureen Quinn unlawfully converted.

Maureen Quinn argues that the cross motion must be denied because it is procedurally defective and lacks appropriate substantiation as it is only supported by an affirmation of Eileen Quinn's attorney. She further argues that the cross motion must be denied because it is palpably devoid of any merit.

A verified pleading may be used as an affidavit whenever the latter is required (CPLR § 105 [u]; *see also Kempf v Magida*, 37 AD3d 763 [2d Dept 2007] and *Farage v Ehrenberg*, 124 AD3d 159 [2d Dept 2014] [holding that a verified answer annexed as an exhibit to a motion set forth evidentiary facts sufficient to qualify as an affidavit of merit]). The motion is not procedurally defective.

CPLR Rule 3025 (b) provides that a party may amend his or her pleading at any time by leave of court and that leave shall be freely given. Leave to amend a pleading should be

¹ The petition was rejected by the clerk as Eileen Quinn was not a fiduciary.

freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party” (*Trataros Constr., Inc. v New York City Hous. Auth.*, 34 AD3d 451, 452-453 [2d Dept 2006]). “The court need only determine whether the proposed amendment is ‘palpably insufficient’ to state a cause of action or defense, or is patently devoid of merit” (*Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]).

Pursuant to SCPA § 702 [8][9], the court may grant limited letters, in its discretion, “to represent the estate in a transaction in which the acting fiduciary could not or should not act in his or her fiduciary capacity because of conflict of interest” or to “commence and maintain any action or proceeding against the fiduciary, in his or her individual capacity, or against anyone else against whom the fiduciary fails or refuses to bring such a proceeding”. The minimum quantity of proof needed to commence a proceeding pursuant to SCPA § 702 is the submission of allegations made merely upon information and belief and the granting of letters does not resolve the contested factual issues but merely permits inquiry into any questionable transactions (*Matter of Leistner*, 12 Misc 3d 1153[A], [Sur Ct, Nassau County 2006] [internal citations omitted]).

The proposed amendment sets forth allegations that support the award of limited letters of administration and is neither palpably insufficient nor patently devoid of merit. The motion to amend the pleadings is **GRANTED**. The motion to deem service of the amended petition complete with the service of the instant application is **DENIED**; service of the amended petition will be deemed complete upon service of a copy of this decision and order.

Pursuant to CPLR § 3025 (d) service of an answer or reply to the amended petition shall be made within twenty days after service of a copy of this decision and order.

The motion to dismiss the proceeding pursuant to CPLR Rule 3211 (a) (7) is

DENIED.

This constitutes the decision and order of the court.

Dated: July 11, 2018
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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