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| <b>Matter of Quinn</b>                                                                                                                                                                                                         |
| 2018 NY Slip Op 32607(U)                                                                                                                                                                                                       |
| October 12, 2018                                                                                                                                                                                                               |
| Surrogate's Court, New York County                                                                                                                                                                                             |
| Docket Number: 2005-3606/A                                                                                                                                                                                                     |
| 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:

October 12, 2018

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In the Matter of the Petition of the United States Securities  
and Exchange Commission to Determine the Domicile of

ROCHELLE ROTHFLEISCH QUINN,

DECISION

File No.: 2005-3606/A

Deceased,

and to Determine the Ownership of Certain Property Held in  
Her Estate at Her Death.

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M E L L A, S.:

The court considered the following submissions in determining a motion to admit an attorney *pro hac vice* and a motion to dismiss:

Papers

Numbered

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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Notice of Motion for the Pro Hac Vice Admission of Christy J. White, Esq.,<br>Affirmation of Elizabeth Reilly Goody, Esq., in Support, with Exhibits,<br>and Affidavit of Christy J. White, Esq., in Support..... | 1, 2, 3 |
| Notice of Motion to Dismiss, Affirmation of John R. Cuti, Esq., in Support,<br>with Exhibits 1-16, and Memorandum of Law in Support of<br>Respondents' Motion to Dismiss the Petition.....                        | 1, 2, 3 |
| Opposition to Respondents' Pre-Answer Motion to Dismiss the Petition and<br>Affirmation of Elizabeth Reilly Goody, Esq., in Support, with Exhibits 1-12.....                                                      | 4, 5    |
| Reply Memorandum of Law in Further Support.....                                                                                                                                                                   | 6       |

Two motions were returnable before the court on May 8, 2018, in this proceeding commenced by the United States Securities and Exchange Commission ("the Commission"), seeking a determination of the domicile of decedent Rochelle Rothfleisch Quinn and the ownership of certain property held by decedent at the time of her death on November 5, 2004. The respondents in this proceeding are Thomas Quinn, decedent's surviving spouse, executor of her will, trustee of a trust created under Article THIRD of her will, and co-

trustee of a residuary trust created under Article FOURTH; and Frances Satalino, co-trustee of the Article FOURTH trust.

At the call of the May 8th calendar, the court granted the unopposed motion of petitioner for admission *pro hac vice* of Christy J. White, subject to the filing of additional information, which has since been provided (*see* 22 NYCRR §§ 520.11 and 602.2), and allowed her to appear and participate in the oral arguments with respect to respondents' motion to dismiss the Commission's petition. Following the arguments, that motion was marked submitted for decision.

#### Motion to Dismiss

In its petition, the Commission seeks a determination of the extent of its interest in shares of a French partnership known as SCI Le Mas des Roses ("SCI").<sup>1</sup> Any interest that the Commission has is the result of Quinn's assignment of his SCI shares to the Commission in May 2016. The instrument of assignment (the Assignment) was executed in the context of an agreement to resolve a proceeding in which the federal district court for the Northern District of Illinois made a finding in 2010 that Quinn was in contempt of a court order.<sup>2</sup> In the contempt proceeding, the federal judge had appointed receivers to identify assets of

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<sup>1</sup>The record before the court shows that SCI holds land on which there are a chateau and various other buildings, located in Mougins, France, and that SCI was formed in October 2004, around the same time decedent's will was executed, with the issuance of 36,004 shares, distributed to the shareholders as follows: 36,000 to decedent, and the remaining four, one each to decedent's three children and Quinn.

<sup>2</sup>This contempt proceeding had been commenced by the Commission in an effort to compel Quinn to satisfy an order of disgorgement entered against him in the same court in 1994, which directed Quinn to pay in excess of \$25 million in accrued interest and ill-gotten gains derived from certain fraud asserted by the Commission, plaintiff in that federal action.

Quinn that could be paid to the Commission to purge Quinn's contempt. Therein arose a dispute as to the ownership of the 36,000 shares of SCI initially issued to decedent. In the May 2016 Assignment, Quinn indicated his "wish[ ] to convey his total shares and interest" in SCI to the Commission, but the parties expressly stated their disagreement as to whether Quinn was the owner of 1 share – Quinn's position – or as many as 36,001 shares – the Commission's position – "which includes any shares inherited [under decedent's] will."<sup>3</sup>

Related to the relief regarding the shares of SCI, the Commission asks the court to determine whether decedent was a domiciliary of the United States or of France at the time of her death, asserting that such determination is relevant to whether her shares of SCI would be subject to French forced heirship laws which, in turn, has a bearing on the ownership of the shares.

The will of decedent, dated October 12, 2004, was admitted to probate in this court on December 5, 2005, with letters testamentary issuing to Quinn and letters of trusteeship issuing to Quinn and Satalino.<sup>4</sup> Decedent's will provided for decedent's children through a

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<sup>3</sup>The Assignment, titled "Assignment of Shares," between Quinn as Assignor and the Commission as Assignee, consists of three typed pages. The final recital paragraph provides that: "WHEREAS, pending final adjudication in a court of competent jurisdiction in France on the legal issue(s), referenced herein, Assignor [Quinn] wishes to assign to Assignee [the Commission] his total share(s) and interest, which, at a maximum, would be 36,001 ("Conveyed Shares")." Quinn then "assigns, sells, conveys, transfers and sets over unto [the Commission] . . . all right, title, and interest of Assignor in and to the Conveyed Shares" and also "represents and warrants to Assignee that, at the time of any assignment of the Conveyed Shares effected hereunder (i) Assignor will be the sole legal and beneficial owner of the Conveyed Shares . . . and (iii) Assignor will have the full power and authority to assign, sell, convey, transfer and set over to Assignee all of Assignor's right, title and interest in and to the Conveyed Shares . . ."

<sup>4</sup> In his initial verified probate petition, Quinn, swore that decedent's domicile at death was in New York, New York. The petition was subsequently amended to identify Boca Raton, Florida as decedent's domicile. This court proceeded with the petition for original probate of

trust created for their benefit under Article THIRD, funded with an amount equal to the value of the applicable estate-tax exemption. Her residuary estate passed to a trust created under Article FOURTH, referred to as the marital trust, of which Quinn is a lifetime beneficiary of income and, in the discretion of the co-trustee (other than Quinn), principal. Quinn also has a limited testamentary power to appoint the remainder “other than [to] himself, his estate, his creditors or the creditors of his estate” (Article FOURTH[A][2]).

Respondents Quinn and Satalino have moved to dismiss the petition on the grounds that documentary evidence conclusively establishes a defense; that this court lacks subject matter jurisdiction; that the Commission lacks legal capacity and standing; that the petition fails to state a claim; and that the Commission has failed to join necessary parties (CPLR 3211[a][1], [2], [3], [7], [10]).

In the petition before the court, the Commission asserts that Quinn assigned to it the 36,000 shares originally held by decedent, along with his 1 original share, and asks this court to determine its entitlement to the 36,001 shares as a result of the Assignment. The Commission alleges Quinn’s ownership of these SCI shares at the time of the Assignment,<sup>5</sup> and the relief it seeks hinges on that ownership, *i.e.*, his entitlement to transfer them. The Commission further alleges that it is a judgment creditor of Quinn as a result of the disgorgement order issued in 1994 in the federal civil action. Taking these factual allegations

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decedent’s will based on the representation in the petition that real property located in New York City was a major asset of decedent’s estate (*see* SCPA 1605 [original probate of non-domiciliaries’ wills]).

<sup>5</sup> The present petition states that “[o]n May 12, 2016, when Mr. Quinn executed the May 2016 Assignment of all his interests in the SCI to the Commission, he was the sole owner of 36,001 shares of the SCI, and transferred the same to the Commission.” (Pet ¶ 29.)

as true, and giving petitioner the benefit of all favorable inferences, as required on a motion to dismiss (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]), the court, nonetheless, concludes that dismissal of the petition is warranted on at least two grounds.

If, as the Commission alleges, Quinn was the owner of the 36,000 shares when he executed the Assignment, this court lacks subject matter jurisdiction, the claim being a dispute between living persons, unrelated to the affairs of a decedent (*see* SCPA 201[3]). While the scope of the court's jurisdiction has expanded in the last few decades (*see Matter of Piccione*, 57 NY2d 278, 288 [1982]), that scope is not without limitation, and the allegations here, in particular that these shares were owned by Quinn personally, present no matter relating to decedent's estate (*see Matter of Escobar*, NYLJ, Feb 25, 2014, at 27 [Sur Ct, Kings County]). The mere fact that an asset at some point in time belonged to a decedent or was marshaled and distributed through her estate or testamentary trust is alone insufficient to indefinitely ensnare the estate in future disputes of the ownership of that asset or property (*see Matter of Berkowitz*, 2016 NY Slip Op 30164[U] [Sur Ct, New York County] [Petitioners' argument "taken to its logical conclusion, would confer subject matter jurisdiction [upon] this court over litigation involving *any asset* that originated in a New York estate or trust"]).

Responding to that argument, the Commission avers that if the petition were to be dismissed on this basis, it would ask for leave to amend it to allege instead that there is a controversy as to whether the 36,000 shares remain in decedent's estate or in trust, a controversy that it contends this court should determine. Such an amendment, however,

would not save the Commission's petition here because, while arguably resolving the subject matter jurisdiction flaw, it would leave unresolved a standing one: the Commission has no interest in decedent's estate. SCPA 2101(1)(a) limits the parties who may commence a miscellaneous proceeding to "a fiduciary, creditor or person interested"; SCPA 103(39), as relevant here, defines a "person interested" as "[a]ny person entitled or allegedly entitled to share as beneficiary in the estate." The Commission, according to its own pleading, is purely a creditor of Quinn personally, not a creditor of decedent's estate. Nor is the Commission a beneficiary. It falls within none of the statutory categories that confer standing.<sup>6</sup>

Even if the Commission were to allege that Quinn assigned his interest in decedent's estate, such an assignment would not have effected a transfer of the 36,000 shares. Quinn's only interest under decedent's will was as beneficiary of the Article Fourth Trust,<sup>7</sup> and that interest is one in income generated by the Trust and, upon application to the co-Trustee, Satalino, distributions of Trust principal, in the Trustee's discretion. Quinn is not a remainder beneficiary, and his limited testamentary power to appoint the remainder would not allow him to have effected an appointment of Trust principal during his lifetime or to his

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<sup>6</sup> The Assignment should not be confused with an assignment of an interest in the estate of a decedent, as addressed by EPTL 13-2.2 (*cf. Matter of Lainez*, 79 AD2d 78, 80-81 [2d Dept 1981] *aff'd* 55 NY2d 657 [1981] ["It is well settled that the Surrogate's Court has no jurisdiction over a claim by a creditor against a distributee or legatee of an estate absent a showing that the distributee assigned his share [of the estate] to the creditor" prior to its distribution]).

<sup>7</sup> The Commission's allegation in the petition that the trustees of that Trust "by their actions" disregarded its terms and distributed all its assets outright to decedent's beneficiaries, including Quinn, even if true, does not aid the Commission. If those assets were distributed to Quinn outright prior to the execution of the Assignment, as the Commission seems to believe, the dispute would be between Quinn, personally, and the Commission, two living parties, and this court lacks jurisdiction to adjudicate it.

personal creditor.<sup>8</sup> Therefore, any such assignment would not have resulted in the relief the Commission seeks, *i.e.*, a declaration that it now owns the 36,000 shares of SCI (*see Matter of Stephens*, 64 NYS 990 [Sur Ct, Ontario County 1900]; *cf. Matter of Jordan, Matter of Jordan*, 202 App Div 710 [2d Dept 1922] [a proper assignment of an interest as sole legatee in a will renders the assignee a person interested in the estate]).

Absent standing to seek relief in decedent's estate—which despite the Commission's argument to the contrary, is a basis on which a pre-answer motion to dismiss may be made (*see Wells Fargo Bank Minnesota, N.A. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007])—the motion should be granted and the petition dismissed. Also dismissed on standing grounds is the portion of the petition that seeks a determination of decedent's domicile (*see SCPA* 2101[1][a]).

### Conclusion

The Commission has failed to establish that it is entitled to seek relief in the estate of decedent. It has also failed to establish that its dispute with Quinn regarding ownership of the shares, having no bearing on the decedent's estate, may be determined by this court. The Commission is not without remedy: it may bring an action either in Supreme Court, which has jurisdiction to determine whether Quinn, individually, owned the shares when he made the Assignment, or, as the parties agreed in the Assignment, in a court of competent jurisdiction in France.

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<sup>8</sup> Even if the 36,000 shares had been held in the Article Fourth Trust, Quinn could not have assigned those shares to the Commission because, under the terms of the will, he did not have possession, the right to possession, or the power to distribute the shares or any other portion of the principal of the Trust.

The motion to dismiss on the grounds of lack of standing and subject matter jurisdiction is thus granted and the petition is dismissed. In light of this, the court does not pass on the other grounds for dismissal raised by respondents.

This decision, together with a transcript of the May 8, 2018 proceedings, constitutes the order of the court.

Clerk to notify.

Dated: October 12, 2018

  
S U R R O G A T E