

<b>Matter of Capital One Bank, N.A.</b>
2018 NY Slip Op 33488(U)
August 14, 2018
Supreme Court, Richmond County
Docket Number: 85074/2018
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

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**Application of CAPITAL ONE BANK, N.A., as  
Trustee of the Supplemental Needs Irrevocable  
Trust under an agreement dated July 26, 2002  
between BARBARA ANN DIAZ, as Settlor and  
mother and natural guardian of STEPHANIE  
DIAZ, and NORTH FORK BANK, as Trustee, for  
the benefit of STEPHANIE DIAZ,**  
  
**Petitioner.**

**DCM Part 21**  
  
**Present:**  
  
**HON. ORLANDO MARAZZO, JR.**  
  
**DECISION AND ORDER**  
  
**Index No: 85074/2018**  
  
**Motion Seq.: #001**

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The following papers numbered 1 to 2 were fully submitted on the 29<sup>th</sup> day of May, 2018:

Papers Numbered:

Notice of Petition by Trustee for Judicial Settlement of Annual Accountings And Final Accounting (Affidavit of Serena Covino Regarding Filing of Annual Accountings and Final Accounting by Trustee) (Dated: March 15, 2018).....	1
Affirmation in Support of Petition for Judicial Settlement of Annual Accounting and Final Account of Trustee (Dated: March 29, 2018).....	2

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Upon the foregoing papers, the application of petitioner-trustee Capital One Bank, N.A., (hereinafter "Capital One") for an order pursuant to CPLR §7706 approving and settling its annual judicial accountings for the time-period of July 26, 2002 through December 31, 2016, and for an order further approving and settling its final judicial accounting for the time-period of January 31, 2017 through July 31, 2017, and for an order discharging Capital One from further liability to all persons interested herein, is denied without prejudice.

This special proceeding was instituted pursuant to Article 77 of the CPLR, following the \$725,000.00 settlement of the infant plaintiff's negligence action against defendant "Hunters'



APPLICATION OF CAPITAL ONE BANK, N.A.,

Ridge Company” (*see* Index No: 2471/1991, Supreme Court, State of New York, County of Richmond). It appears that on or about April 12, 2002, the late Justice Louis Sangiorgio executed an “Amended Infant’s Compromise Order” through which was established a Supplemental Needs Irrevocable Trust for the benefit of the infant plaintiff, Stephanie Diaz. The trust was funded from the net proceeds of the negligence settlement. Pursuant to Justice Sangiorgio’s order, a Trust Agreement dated July 26, 2002 was entered into between the Settlor of the Trust, Barbara Ann Diaz, and Petitioner’s predecessor<sup>1</sup> trustee, North Fork Bank.

At this juncture, the trust is depleted. Capitol One explains that “in order to pay, or apply for the benefit of the Beneficiary, so much of the net income and principal as the Trustee deemed advisable in its sole and absolute discretion, the Trustee sold all income producing investments and made such distributions to or for the benefit of the Beneficiary” and “as a result of the depletion of the SNT assets,” Capitol One seeks an Order “(1) approving and settling the annual verified accountings of Petitioner as Trustee from July 26, 2002 to December 31, 2016; (2) approving and settling Petitioner’s final verified accounting as Trustee for the period January 1, 2017 to July 31, 2017; [and] (3) discharging Petitioner as Trustee from all further liability” (*see* March 15, 2018 Affidavit of Capitol One Bank’s Vice President and Trust Officer, Serena Covino, paras 4, 5). No opposition to the application has been submitted.

Several discrepancies are apparent from the attachments to the aforementioned affidavit of Serena Covino (*i.e.*, the annual accountings for 2002, 2003, 2005, 2007 were “misfiled” with the Richmond County Surrogate rather than with this Court [*see* March 15, 2018 Affidavit of Serena Covino, paras 3(a), (b), (e), (f)]; several annual accountings were not served upon the New York City Human Resources Administration, Department of Social Services, (“DSS”) in

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<sup>1</sup> According to paragraph 4 of the Verified Petition, “[o]n or about December 1, 2006, Capital One acquired North Fork Bank and succeeded North Fork Bank as Trustee”.

APPLICATION OF CAPITAL ONE BANK, N.A.

contravention of Article VII (8) ( c ) of the July 26, 2002 Trust Agreement; the annual accountings for 2004 and 2006 appear to have been served **only upon DSS**, and not this Court, etc.).

In addition, a review of the May 22, 2018 Affidavit of Service of Anthony Arnold poses confusion. In it, Mr. Arnold attests that on May 8, 2018 he served “General Counsel, Department of Social Services” with the “within Notice of Petition by Trustee for Judicial Settlement of Annual Accountings and Final Accounting, Verified Petition for Judicial Settlement of Annual Accounting and Final Accounting of Trustee and Affirmation to **Amend** Petition for Judicial Settlement of Annual Accounting and Final Account of Trustee<sup>2</sup>.” Firstly, no “Affirmation to Amend Petition for Judicial Settlement” has been filed with this Court. More importantly, Article VII, paragraph (8)(c)(v) of the Trust Agreement provides that “[n]o Trustee shall be discharged from liability unless and until the final accounting is provided to DSS and DSS has not objected to said accounting pursuant to subparagraph (iv) of this paragraph (c)” . Paragraph (iv) mandates that DSS send “written objection by certified mail, return receipt requested to the Trustee...to any annual accounting within forty-five days of its receipt of such annual accounting” or the final accounting shall be deemed to be accepted and approved by DSS, and **“the Trustee shall file with the Court a certified statement that DSS either has accepted such annual accounting or has not objected to such annual accounting and shall deliver to DSS a written statement of filing with the Court of such statement...”** Here, no such certified statements have been submitted to the Court and, more importantly, if DSS was served on May 8, 2018, then its forty-five day time

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<sup>2</sup> Both of the April 20, 2018 Affidavits of Service upon Barbara and Stephanie Diaz indicate personal service of two documents: the “Notice of Petition by Trustee for Judicial Settlement of Annual Accountings and Final Accounting” and the “Verified Petition for Settlement of Annual Accounting and Final Accounting of Trustee.” These Affidavits of Service do not mention an Affirmation to **Amend** the Petition, as was purportedly served upon the Department of Social Services.

**APPLICATION OF CAPITAL ONE BANK, N.A.,**

period in which to pose an objection had not yet expired on May 29, 2018, the date on which this application was marked fully submitted.

Article 77 of the CPLR authorizes the institution of a special proceeding in the Supreme Court for the determination of matters relating to all types of express trusts, involving inter vivos and testamentary trusts (*Chiantella v. Vishnick*, 84 AD3d 797 [2d Dept. 2011]). An essential element of a trust is accountability of the trustee for its administration (*Application of Kassover*, 124 Misc. 2d 630 [1984]). A trustee has a duty to keep proper and accurate accounts and must render a full and accurate account of all transactions (*Matter of Iannone's Estate*, 104 Misc. 2d 5 [1980]). In a proceeding for judicial settlement of an account, the court has the power to initiate an inquiry into items of an account before approving them (see *Matter of Stortecky v. Mazzone*, 85 NY2d 518, 525; *Matter of Felice*, 1 Misc.3d 909(A)). The Court is "not a rubber stamp mechanically approving the computation of commissions...or any other statute regardless of the guardian's performance of his duties" (*In re Connors*, 24 Misc. 3d 980, [Kings County, 2009]).

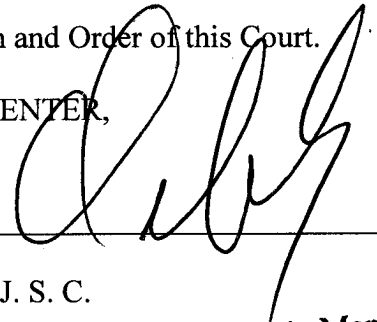
Accordingly, it is

ORDERED, that the application of Petitioner is denied, without prejudice to renewal, upon the filing of additional evidence as set forth above, and it is further

ORDERED, that this constitutes the Decision and Order of this Court.

ENTER,

J. S. C.



Hon. Orlando Marrazzo, Jr.  
Acting Supreme Court Justice

Dated:

8/14/18

