

**Matter of Herrera (Hortensia R. Allen
Irrevocable Grantor Trust)**

2018 NY Slip Op 34550(U)

March 5, 2018

Surrogate's Court, Kings County

Docket Number: File No. 2016-995

Judge: Margarita López Torres

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
Petition of Linda Allen Herrera, as Trustee and Beneficiary
of the

File No.: 2016-995

Hortensia R. Allen Irrevocable Grantor Trust.

DECISION and ORDER

-----X
In the Matter of the Petition for a Compulsory
Accounting and Related Relief in the Trust Estate of

File No.: 2016-995/A/B/C

Hortensia R. Allen,

DECISION and ORDER

Deceased.

-----X
LÓPEZ TORRES, S.

The following submissions were considered on this motion:

<u>Papers</u>	<u>Number</u>
Order to Show Cause, Affirmation in Support.....	1, 2
Affidavit in Opposition.....	3
Reply Affirmation.....	4
Notice Of Motion, Affidavit In Support.....	5, 6

Before the court is the motion by order to show cause of Linda Allen Herrera (petitioner), a co-trustee and beneficiary of the Hortensia R. Allen Irrevocable Grantor Trust, to suspend her co-trustee, Arnold B. Allen (respondent) for, *inter alia*, failing to account pursuant to this court's order dated June 8, 2017.

Petitioner has commenced two proceedings in this court seeking relief against the respondent. First, petitioner commenced, by order to show cause dated March 8, 2016, a petition seeking to remove the respondent as co-trustee, which is pending before the court. Thereafter, the petitioner commenced a petition to compel the respondent to account with respect to his actions as a co-trustee. A 45-day order to account was issued on June 8, 2017 (the order to account). The respondent failed to abide by the order to account and the petitioner moves, on this basis, pursuant to SCPA 2205(1)(b), to suspend the respondent as co-trustee.

The petitioner submits her attorney's affirmation with exhibits in support of her motion. The respondent submits his affidavit with exhibits in opposition, to which petitioner has submitted her reply affirmation. The respondent submits a separate motion seeking an extension of time to account, which is unopposed.

Background

Hortensia Allen (the decedent) created the Hortensia R. Allen Irrevocable Grantor Trust on October 12, 2011 (the Trust). The decedent appointed the respondent and Myra Allen Funn (Funn) as initial trustees. The decedent funded the Trust with her interest in the real property known as 1293 Carroll Street, Brooklyn, New York (1293 Carroll Street), her primary residence, and her interest in the limited liability company known as 949 St. John's Place LLC, which owned the real property known as 949 St. John's Place, Brooklyn, New York (949 St. John's Place), a multiple-unit dwelling and income-producing property.¹ The decedent, prior to her death, obtained a reverse mortgage line of credit for 1293 Carroll Street (reverse mortgage), prior to said property's transfer to the Trust. The respondent, prior to the decedent's death, had access to the reverse mortgage line of credit, and made certain withdrawals, the purpose for which is disputed by the parties.

The decedent died on November 9, 2014, and pursuant to the terms of the Trust, any remaining trust principal was to be distributed in equal shares to four separate descendants trusts, one for the benefit of each of the decedent's four children, namely the petitioner, respondent, Funn, and Carlos Allen (Carlos). However, as the 1293 Carroll Street reverse mortgage remained unpaid, the mortgagee, Nationstar Mortgage LLC d/b/a Champion Mortgage Company commenced a foreclosure action on April 2, 2015.

The decedent's children contemplated selling the other Trust property, 949 St. John's Place, in order to satisfy the reverse mortgage held on 1293 Carroll Street, and petitioner and Carlos secured a buyer who offered \$1,695,000.00. The respondent refused to sign the contract of sale. He alleged that the offering real estate broker was in allegiance with the petitioner, who he thought was orchestrating his ouster as trustee and attempting to deprive him of his interest in the trust principal. The respondent wanted first to resolve the manner of distribution before he would agree to sell. As a result of this, interest and penalties on the reverse mortgage continued to accrue, and as the Trust was cash poor, other bills such as real estate taxes remained unpaid and accruing.

¹ The Trust was the sole owner of the limited liability company.

Funn resigned as respondent's co-trustee on March 2, 2016, and petitioner became the successor co-trustee. Immediately thereafter, on March 8, 2016, petitioner petitioned to remove the respondent as her co-trustee. Petitioner alleged that the respondent was unilaterally marketing the 949 St. John's Place for sale in contravention of the terms of the Trust, which provided that, with the exception of banking and brokerage transactions, trustees must act jointly. In addition, she alleged that the respondent inappropriately drew on the reverse mortgage line of credit for his personal benefit, that he failed to pay real estate property taxes on 949 St. John's Place, that he did not obtain an EIN number for the Trust, that he did not open a bank account for the Trust, and that he had not filed any estate or income tax returns for the Trust.

On April 5, 2016, the parties appeared in court with their respective counsel. The court issued an order on that date prohibiting the respondent from transferring or selling the Trust property unilaterally. The matter was then adjourned to May 17, 2016, to permit the respondent time to file objections. On May 17, 2016, the parties appeared in court, and respondent requested additional time to file his objections. Objections were filed on or about May 31, 2016.

On June 29, 2016, a conference was held with the parties and a court attorney-referee, and discussions ensued regarding the sale of the real property at 949 St. John's Place for the purposes of satisfying the reverse mortgage on 1293 Carroll Street. The parties agreed to prepare a stipulation concerning the terms of sale and the selection of a real estate broker. The parties drafted a stipulation, which was not then executed, because another dispute arose concerning the selection of a particular broker from Corcoran.

After several months, the parties entered into a stipulation setting forth the manner of sale for 949 St. John's Place, including the selection of a broker and the payment of expenses. The stipulation was "So-Ordered" by the court on December 22, 2016. No sooner than the court so-ordered the stipulation, a dispute again arose between the parties. Prior to the parties engaging the broker, an offer to purchase 949 St. John's Place for \$1,700,000 was made directly to petitioner, which would obviate the need to retain the broker and pay his/her commission. The respondent declined this offer as being insufficient, and the petitioner requested a court conference. A conference was scheduled with a court attorney-referee for January 11, 2017, but by that date, the prospective purchaser had retracted his offer. Unpaid real estate taxes and water charges, interest and penalties continued to accrue on the Trust's properties.

The petitioner filed a petition verified on March 3, 2017 seeking a compulsory accounting and related relief pursuant to SCPA 2205 against the respondent (the compel proceeding). On

the return for that proceeding, the parties stipulated that the respondent would render his account within 45 days, and the court issued the order to account.² The order to account was served on June 9, 2017, and to date, the respondent has failed to file a petition to judicially settle his account as a trustee.

Motions

The petitioner moves to suspend respondent as co-trustee for his failure to account in compliance with this court's order. Petitioner avers that on July 31, 2017, after the order to account was served, her attorney contacted respondent's attorney to inquire as to when the petition to judicially settle his account would be filed. The respondent's attorney replied that the respondent "had difficulty obtaining bank statements from his parents' bank account, because the bank insisted that his power of attorney was deemed revoked at the death of his parents."³ The petitioner avers that this argument is contrary to the respondent's position in the removal proceeding, wherein his objections contained bank statements for the Trust for the years 2011, 2012, 2013 and 2014. The petitioner states that the respondent has failed to obtain a Federal Tax ID number for the Trust, has failed to open a separate bank account for the Trust, and has never filed Federal or state income tax returns for the Trust. Further, petitioner points out that although the respondent rejected two offers of \$1,700,000.00 to purchase 949 St. John's Place, it was ultimately sold for \$1,620,000.00.⁴ Petitioner further alleges that the lower purchase price was attributable to the respondent's neglect of the property's physical condition, including the lack of electrical power.

Respondent, in his affidavit in opposition, avers that he is missing certain bank statements, which precluded him from timely preparing the petition to judicially settle his account. He avers that he subpoenaed the bank on July 5, 2017; however, he claims that the bank rejected the subpoena. The respondent proffers no supporting documentation substantiating this assertion. He avers that while the bank has now supplied some of the requested documentation,

² Despite being a trustee of the Trust, and therefore a fiduciary, the respondent changed his address without informing the petitioner and thus, personal service of the citation could not be effectuated upon respondent. An order for substituted service was issued with a citation returnable on June 6, 2017.

³ One of the significant allegations raised by petitioner is that the respondent failed to properly manage the Trust by neglecting to open a separate bank account for the Trust, and instead utilized the decedent's personal account as the Trust's bank account pursuant to a power of attorney.

⁴ The court notes that it was not until the parties conferred during the compel proceeding that a bottom line purchase price was agreed to.

he still does not have complete records, and is thus unable to account.

On January 7, 2018, seven months after the order to account, and only in response to the petitioner's instant motion, respondent filed a separate motion seeking an extension of the order to account until March 31, 2018. Petitioner does not oppose this relief, but nonetheless avers that the suspension of the respondent, as co-trustee, is warranted. She avers that the respondent's failure to abide by the court's order is indicative of a pattern of violating his fiduciary responsibilities, and which she avers the respondent has not disputed.

Discussion

In order to supervise the administration of estates, New York has a vested interest in requiring fiduciaries to comply with orders of the court to ensure the protection of trust assets and innocent beneficiaries. Generally, removal of a fiduciary constitutes a judicial nullification of the grantor's choice of fiduciary; thus, such relief may be granted when the grounds set forth in the relevant statutes have been clearly established. *Matter of Duke*, 87 N.Y.2d 465, 472 (1986). With respect to trusts, the statutory framework for removal of a trustee rests with provisions in SCPA 711 (11) and 719. Pursuant to SCPA 719 (1), a trustee may be removed without a hearing, when after having been ordered to account, he fails to file an account within such time and in such manner as directed by the court. See, *Matter of Weinraub*, 68 A.D.3d 679 (2d Dep't 2009); *Matter of Makowski*, 13 A.D.3d 1210 (4th Dep't 2004); *Matter of Harvey*, 38 Misc. 3d 1205(A) (Sur Ct, Nassau County 2012); *Matter of Boscowitz*, N.Y.L.J., April 28, 2008, at 31, col. 6, 2008 N.Y. Misc. LEXIS 2663 (Sur Ct, New York County)(fiduciary fails to account after directed to do so by court order); *Matter of Regan*, N.Y.L.J., Nov. 26, 2007, at 31, col. 6, 2007 N.Y. Misc. LEXIS 8364 (Sur Ct, Westchester County).

It is undisputed that the respondent was ordered to account and has failed to do so, despite the pending proceeding seeking his removal as trustee. Throughout the proceedings, the respondent has impeded the efficient administration of the trust estate, and the court's guidance has been required to facilitate ordinary fiduciary tasks. For instance, respondent refused to consider two separate offers to sell the Trust's real properties, despite a pending foreclosure and the continuing accrual of proceeding and interest, taxes and penalties. The respondent failed to offer an adequate basis for such denial, other than that he resented that the petitioner's choice of broker. Thereafter, the court mediated a conference in order to obtain the respondent's agreement to the minimum purchase price he would accept for the sale of real property. Ultimately, the real property sold for less than the two previous offers, while the Trust's liabilities increased. The papers filed illustrate that the respondent's unreasonable position is

attributable to his belief that the petitioner's sole aim is to wrest control of the trusteeship from him, rather than to protect the Trust assets for all beneficiaries. Moreover, the respondent did not seek an extension of time within which to file his account until after the petitioner moved to have him suspended, which illustrates his disregard of not only the court's order, but also his fiduciary obligations.

Accordingly, based on his failure to account, as directed by this court's order dated June 8, 2017, respondent, Arnold B. Allen is suspended as co-trustee of the Hortensia R. Allen Irrevocable Grantor Trust dated October 12, 2011 pursuant to SCPA 719 (1) pending the hearing and determination of the removal proceeding [File No.: 2016-995]. Respondent's motion for an extension of time to file an account is granted.

Therefore, on the papers presented, and all arguments having been considered, the petitioner's instant motion for respondent's suspension and the respondent's motion to extend his time to account are resolved as follows:

ORDERED that Arnold B. Allen is suspended as co-trustee of the Hortensia R. Allen Irrevocable Grantor Trust dated October 12, 2011 pending the determination of the petition seeking his removal, and it is

ORDERED that Linda Allen Herrera shall act as the sole trustee of the Hortensia R. Allen Irrevocable Grantor Trust dated October 12, 2011 until further order of the court, and it is

ORDERED that the time for Arnold B. Allen to account for his actions as co-trustee of the Hortensia R. Allen Irrevocable Grantor Trust dated October 12, 2011 is extended until April 30, 2018.

Dated: March 5, 2018

Brooklyn, New York

Hon. Margarita López Torres
SURROGATE