

**Matter of Elghanayan**

2018 NY Slip Op 34596(U)

October 22, 2018

Surrogate's Court, Queens County

Docket Number: File No. 2003-4729/L

Judge: Peter J. Kelly

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This opinion is uncorrected and not selected for official publication.

Present: HON. PETER J. KELLY  
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY

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In the Matter of the Petition by Joseph Elghanayan  
for a Partial Distribution of Principal Under the  
Trusts Created Under Articles SIXTH and  
SEVENTH of the Will of

AGHADAN ELGHANAYAN a/k/a  
AGHADJAN ELGHANAYAN a/k/a,  
JOHN ELGHANAYAN,

File No. 2003-4729/L

Deceased.  
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Petitioner Joseph Elghanayan (hereinafter "petitioner") moves for summary judgment directing the trustees of decedent's testamentary trusts under articles SIXTH and SEVENTH of his will to make partial distributions. Respondents Liora Elghanayan and Louise Khagan, the trustees of the subject trust, oppose the motion. Respondents Joseph Elghanayan, Shokoufe Elghanayan, Vanessa Khani, David Elghanayan, and Deborah Khani did not file opposition to the motion.

The decedent died testate on November 28, 2003 survived by his wife, Moluk Elghanayan, and six children, Emmie Gabby, Liora Elghanayan, Louise Khagan, Shokoufe Elghanayan, Joseph Elghanayan and Helen Khani. Decedent's will was admitted to probate and letters testamentary and letters of trusteeship issued to

respondents Liora Elghanayan and Louise Khagan. Helen Khani subsequently died in 2012 survived by three adult children, Vanessa Khani, David Elghanayan and Deborah Khani. Moluk, decedent's spouse, also post-deceased him on December 19, 2014.

Pursuant to the terms of decedent's will, his residuary estate was bequeathed in trust for the benefit of Moluk in accordance with the provisions contained in Article SIXTH of the will, and for the benefit of his descendants in accordance with the provisions of Article SEVENTH.

Article SIXTH of the will provides, in pertinent part, as follows:

Trust for Wife

Any property given or directed hereunder to be paid to my Trustees, to be held and administered in accordance with the provisions of this Article, shall be held by my Trustees and disposed of as follows...

B. I direct my Trustees to pay or apply the net income of the trust to or for the use or benefit of my wife in at least quarterly installments so long as she lives, and I authorize and empower my Trustees, at any time or times, to pay to or apply for the use or benefit of my wife such part, parts or all of the principal of the trusts as my Trustees, in their discretion, determine is necessary for my wife's health...

C. On the death of my wife, I direct my Trustees to pay the then principal of the trust as follows...

2. To the extent that the principal of the trust consists of any business interests, including all commercial real estate interests ("such property"), I direct my Trustees to continue to hold such property, subject to the trust provisions of Article SEVENTH hereof.

3. I direct my Trustees to pay the balance of such principal, per stirpes, to such of my descendants as survive my wife.

Article SEVENTH of the will provides:

Trust for Descendants

Any property given or directed hereunder to be paid to my Trustees, to be held and administered in accordance with the provisions of this Article, shall be held by my Trustees and disposed of as follows:

A. During the term of the trust, I direct my Trustees to pay the net income of the trust, per stirpes, to such of my descendants from time to time living, annually.

B. The trust shall terminate upon the earlier to occur of (i) five (5) years from the death of the survivor of my wife and myself and [sic] (ii) the final disposition of all business interests, including commercial real estate interests.

C. Upon the termination of the trust, my Trustees shall pay the then principal of the trust, together with all the net income thereof accrued but not yet collected and collected but still on hand, per stirpes, to such of my descendants as are then living.

The term "business interests" is defined in Article FIRST, subparagraph (A)(7), of the will as follows:

7. The words "business interests" mean and refer to all business entities, including, without limitation, proprietorships, partnerships, joint ventures or corporations, in which I, my wife, my estate, my wife's estate, trusts for the benefit of my wife, and any family member of mine own, in the aggregate, twenty percent (20%) or more of the equity and/or voting power.

As decedent's spouse survived the decedent, she became the income beneficiary of the "Marital Trust" established for her benefit. At the time of Moluk's death, the trust contained some non-business assets, but primarily consisted of membership interests in limited liability companies (LLCs) and an interest in a general partnership. Subsequently, the trust sold its membership interest in one LLC. While the membership interests in the remaining LLCs and the partnership were not sold, the individual real estate properties owned by each of those entities were sold. The amount of all the sales totaled in excess of \$370 million.

This petition seeks an immediate partial distribution of principal from the trusts to the surviving five children of the decedent and each of the grandchildren mentioned above.

On a motion for summary judgment the proponent must establish his or her claim or defense sufficient to warrant the court in awarding judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320; Zuckerman v City of New York, 49 NY2d 557). The proponent must affirmatively demonstrate the merits of the claim

or defense, and cannot obtain summary judgment merely by pointing to gaps in the opponent's proof (see Doe v Orange-Ulster Bd. of Coop. Educ. Servs., 4 AD3d 387; Larkin Trucking Co. v Lisbon Tire Mart, 185 AD2d 614). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Alvarez v Prospect Hosp., 68 NY2d 320; Winegrad v New York Univ. Med. Center, 64 NY2d 851).

If the proponent makes a *prima facie* showing, the burden shifts to the opponent to assemble and lay bare affirmative proof to establish the existence of a genuine triable issue of fact (see Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824; Stainless, Inc. v Employers Fire Ins. Co., 69 AD2d 27, *affd* 49 NY2d 924). Allegations must be specific and detailed, substantiated by evidence in the record; mere conclusory assertions, surmise, conjecture or suspicion will not suffice (see Shaw v Time-Life Records, 38 NY2d 201; Matter of O'Hara, 85 AD2d 669). The papers submitted in support of and in opposition to the motion are scrutinized in a light most favorable to the party opposing the motion (see Robinson v Strong Memorial Hosp., 98 AD2d 976; Gitlin v Chirinkin, 98 AD3d 561). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (see Dykeman v Heht, 52 AD3d 767; Celardo v Bell, 222 AD2d 547).

In support of his motion petitioner submits an affirmation of counsel and various exhibits which include, *inter alia*, the verified pleadings. In opposition to the motion the trustees submit, with the affirmations of counsel, several exhibits which include, *inter alia*, a stipulation dated May 22, 2017 and the Court's order dated June 7, 2017. Petitioner filed an affirmation in reply and two affidavits in reply from accountants.

Petitioner contends in this motion for summary judgement that, since all of the properties were sold and the business entities dissolved,<sup>1</sup> there is a "final disposition of all business interests," thereby closing the class of beneficiaries to the five living children and the three grandchildren and further contends all of the parties necessary to this proceeding are presently before the Court.

In support of the amount of distributions sought, petitioner calculates the amount remaining in the trust after deducting prior distributions and commissions, and makes allowances for monies to be held in reserve for potential estate taxes, future commissions and general expenses. Even though such calculations are made, petitioner emphasizes he seeks a partial distribution pursuant to the terms of the

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Petitioner acknowledges Moluka Enterprises, LLC is not formally dissolved, but contends that it is merely holding a reserve for a single insurance claim.

trust instrument and does not seek an advance distribution under SCPA 2102 (5). He purports, therefore, that he is not required to show a need for such distribution or that the property of the estate is in excess of the requisite amount of all known claims as required pursuant to SCPA 2102 (5). Petitioner further contends that since the trustees admit they have funds in excess of what is being held in reserve for creditors, these funds should be distributed immediately to the beneficiaries.

In opposition to the motion, the trustees first contend that the “trigger event” compelling final distribution has not yet occurred since it has been less than five years since the death of decedent’s spouse on December 19, 2014, and a legal determination has not been made that a “final disposition of all business interests, including commercial real estate interests” has occurred as required by the Article Seventh Trust. The trustees point out that “commercial real estate interests” are specifically included as part of the final distribution of business interests and contend that “final disposition” means more than just the sale of the individual commercial real estate parcels.

Second, the trustees contend that since the Trust limits distribution to the descendants alive at the time of the trigger event and there is “...a question as to whether the trigger event has occurred,” all of the potential contingent remaindermen should have been cited in this proceeding and were not. Thus they argue that

summary judgment must be denied on jurisdictional grounds. The trustees' also argue that there are no excess reserves available for distribution, as additional taxes could be imposed by the Internal Revenue Service.

In reply, petitioner repeats his contention that the trust has terminated because all of the "assets of the trust" were sold and the business "entities have been dissolved." As a result, he alleges the petitioner's right to receive his one-sixth share of the principal of the trust has vested and, accordingly, the class of beneficiaries is now fixed at the five children and three grand children who have been cited and/or appeared in this proceeding. Furthermore, petitioner claims the amount of reserves held for taxes is excessive, as is the amount being held for general expenses

Turning to the merits of the motion, Article SEVENTH of the decedent's will provides for distributions from the trust in two instances.

The first, under subsection A, provides for payment of the "...net income of the trust, per stirpes, to such of my descendants from time to time living, annually." The instant petition does not specifically seek payment pursuant to this subsection and, furthermore, the papers do not contain any evidence regarding net income or other expenses of the trust. Essentially the motion papers are silent on the issue.

The second instance, pursuant to subsection C, provides for a final distribution of the principal of the trust, together with net income on hand "...upon the termination of the trust." Although petitioner contends he is entitled to a distribution because he believes the trust is terminated, petitioner does not seek a full final distribution but rather a partial distribution as he acknowledges that the trustees "...are entitled to maintain reasonable reserves for potential liabilities or expenses for valid reasons for so long as is necessarily required to resolve these few remaining issues" and "...is not seeking the distribution of any of the amounts the trustees claim they are entitled to receive in commission upon a final accounting." Thus, petitioner seeks an "advance distribution" of the final distribution provided for under Article SEVENTH C.

In order to obtain summary judgment granting this "advance distribution" petitioner would have to establish, *prima facie*, that the trust is, in fact, terminated; that all necessary parties are presently before the Court; and that the amount sought for distribution in the petition is less than or does not exceed the net assets of the trust after payment of the expenses of administering the trust or the establishment of a reserve to provide for said payments.

Subsection B of Article SEVENTH provides that the trust shall terminate upon the "earlier to occur of (i) five years from the death of the survivor of my wife and

myself and [sic] (ii) the final disposition of all business interests, including commercial real estate interests.”<sup>2</sup> As decedent’s wife survived him dying on December 19, 2014, the five year provision would not effectuate a termination of the trust until December 19, 2019.

Consequently, to establish an entitlement for distributions petitioner must establish *prima facie* that there has been a final disposition “of all business interests.” As set forth above, the term “business interests” as defined in the will refers to all business entities, including, without limitation, proprietorships, partnerships, joint ventures or corporations, in which the decedent, his wife, his estate, and his wife’s estate, trusts for the benefit of his wife, and any family member of his own, in the aggregate, twenty percent (20%) or more of the equity and/or voting power.

Although petitioner presents facts and a cogent argument in support of his claim that the trust terminated based upon counsel’s opinion, his motion papers are bereft of any case law or statutory authority in support of such a claim. It appears petitioner is relying on the court to supply the requisite legal analysis and precedents to establish what constitutes “final disposition” of decedent’s business interests.

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While not at issue herein, it appears petitioner and other parties have construed this clause as containing a grammatical error with the scrivener using “and” instead of “or.”

Additionally while the trustees, in opposition, correctly state that a legal determination regarding termination has not been rendered, such analysis misses the point as it is not the court's duty to make that determination in the first instance, but the trustees'.

Obviously, when the period set by the terms of a trust for its termination are met, it is a trustee's duty to convey the property to the individuals entitled to it. "However, it is also true that the trustee is entitled, as a matter of practical necessity to a reasonable period of time to wind up the affairs of [a] trust." (Neary v City Bank Farmers Trust Co., 260 AD 791; Matter of Wasserman, NYLJ, Jun. 28, 2002 at 2, col 5 [Sur Ct, Nassau County 2002]). A trustee is also entitled to have the court pass upon their accounts and, for their protection, make a decree of distribution (see Neary, supra).

The Court notes that the trustees, on June 8, 2018, subsequent to the filing of the instant motion and all affirmations in support and in opposition, filed a final account as trustees under Article Seventh of the decedent's will, and caused a citation to issue. The accounting petition sets forth as interested parties all of the parties to the instant petition as well as all of the contingent remainder persons, including two minors, who can be heard as to whether the trust has terminated.

Although the pendency of an accounting proceeding does not preclude a beneficiary from bringing a proceeding for distribution (see Matter of Kent, 173 AD 563), where, as here, the accounting proceeding can more appropriately address all issues including the trustees' determination on whether the "trigger event" has occurred, the amount to be held in reserve if necessary, as well as furnish an amount available for distribution if approximate, and such proceeding is on notice to all interested parties including contingent remaindermen, it appears that would be the most appropriate forum for the determination of the legal issues raised at bar.

Accordingly, the motion for summary judgment is denied and this proceeding is adjourned to November 1, 2018 for further proceedings.

This is the decision and order of the Court.

Dated: October 22, 2018

  
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