Present: HON. PETER J. KELLY
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY

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Accounting by CAROLYN SANCHEZ as
Administrator of the Estate of

File No. 2015-2697/E

PEDRO GARCIA TZIC,

Deceased.

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In this accounting proceeding, the petitioner ("Sanchez") moves pursuant to SCPA § 1810 and CPLR § 3212 for an order granting partial summary judgment disallowing and dismissing the claims presented to the fiduciary by the objectant, Queens Nassau Rehabilitation & Nursing Center ("Queens Nassau"). Queens Nassau opposes the motion contending that (1) the validity of the claim is currently pending in another court; (2) summary judgment is premature since discovery is not complete; (3) the contract at issue in the claim is valid; and (4) even if the contract is not deemed to be valid, Queens Nassau is entitled to compensation for its services.

As background, by order of Supreme Court Justice Charles Thomas dated August 14, 2008, and with the recommendation of Sanchez, attorney Candice A. Pluchino ("Pluchino"), was appointed the personal needs and property guardian of Pedro Garcia Tzic ("Tzic") pursuant to Article 81 of the Mental Hygiene Law. Tzic's incapacity and need for a guardian arose from the

traumatic brain injury he suffered when he fell some 15 feet at the construction site at which he was working. As a result of his injuries, Tzic was left so physically and cognitively impaired that he required around the clock care and supervision at a rehabilitation facility. An action to recover for the injuries suffered by Tzic was commenced and later settled for the sum of $12,000,000.00.

When Tzic was first placed in Queens Nassau, the costs for his care were paid by Workers' Compensation. Upon settlement of his personal injury action, however, those payments ceased. Sanchez, in her capacity as attorney of record for Tzic, filed an affirmation of emergency in the Supreme Court seeking to keep the sum of the settlement confidential insofar as Queens Nassau was concerned. Therein Sanchez stated:

> [I]t is requested that notice to the director of Queens Nassau, the facility where Mr. Tzic resides, be waived . . . Clearly Ms. Pluchino would be at a huge disadvantage in negotiating the monthly rate for Mr. Tzic at this facility if the director had a copy of this Petition which discloses the settlement amount.

Evidently, the Supreme Court granted Sanchez's request. Thereafter, Pluchino began negotiating with Queens Nassau for a new daily rate which had to be privately paid. In or about October 2012, Pluchino prepared a letter agreement which she presented to Queens Nassau for the residential care and treatment of Tzic. Under the terms of that agreement, Tzic was to be charged

"$355.00 per day for a private room, which amount is inclusive of costs for all medications and pharmacy charges up to the amount of $1,000.00 per month." The contract provided that any pharmacy charges above $1,000.00 per month were Tzic's responsibility. In an affidavit submitted in opposition to the instant motion, a representative of Queens Nassau averred that the daily private pay rate for a private room was $520.00 per day.

The controversy that has arisen is largely based on the following additional language set forth in the contract, namely, that the "arrangement will be and remain in full force and effect for a period of five (5) years guaranteed with no escalation or change and is not dependent on the survivorship of Mr. Tzic." At the time of the agreement, Tzic was thirty seven (37) years of age. Tzic resided continuously at Queens Nassau until his death on June 29, 2015, which was prior to the expiration of the five (5) year term set forth in the agreement. The record reveals that despite Tzic's injuries, his sudden death approximately three (3) years later, was not anticipated.

On or about December 3, 2015, Pluchino filed her final account as property guardian and a petition for its judicial settlement with the Supreme Court. In addition to the various relief requested, Pluchino sought "an order declaring a certain letter agreement which your petitioner negotiated with Queens Nassau Nursing and Rehabilitation Center and which provided for the fixed payments to the nursing home for a period of five years null and void and

of no effect whatsoever." The petition indicated that "Queens Nassau Nursing and Rehabilitation Center is being noticed of this proceeding which will provide them with an opportunity to appear and challenge the request to deem the letter agreement null and void and of no effect whatsoever."

By motion returnable on January 5, 2016, Pluchino, inter alia, sought an order judicially settling her account as guardian and a declaration that the agreement with Queens Nassau be deemed "null and void and of no effect whatsoever" on the basis that she did not have the Supreme Court's approval to enter into it, and further, because she never received a signed counterpart of the contract back from Queens Nassau. In addition, Pluchino asserted that Queens Nassau overcharged Tzic for medication and pharmacy charges.

While the record is unclear as to the timing, it appears that Sanchez, as the administrator of the estate, was permitted by the Supreme Court to participate in the above proceeding. What followed were "Preliminary Objections" and a series of "extensive" discovery motions by Sanchez, and a corresponding series of cross-motions by Pluchino seeking protective orders. Additionally, it appears that without court approval or the knowledge and consent of Pluchino, the guardianship account maintained by Pluchino was closed and

the funds turned over to Sanchez. Clearly, the once symbiotic relationship of Pluchino and Sanchez had completely deteriorated.[1]

Objections and partial opposition to Pluchino's final account and motion were filed by Queens Nassau on July 1, 2016, who maintained, in the exact same fashion as they do here, that the agreement was indeed valid. Alternatively, Queens Nassau sought a surcharge against Pluchino for all sums due. Sanchez filed an affirmation dated July 18, 2016 in partial opposition which, inter alia, sought to deny Queens Nassau's claim on the grounds that it was unconscionable and void ab initio as Pluchino was not authorized to enter into the agreement. Sanchez further sought to surcharge Pluchino for "multiple breaches of her fiduciary duty."

On April 24, 2017, the Supreme Court issued three orders, two of which struck certain discovery demands made by Sanchez, and the third which determined that the guardianship account had been improperly closed. Sanchez filed a notice of appeal with respect to each of these orders and further sought a stay of the guardianship accounting which was ultimately denied on June 22, 2017. Although Sanchez has clearly been vigorously pursuing the estate's interest in the Supreme Court and availing herself of all possible avenues for

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[1] The record does not clearly reflect why or when such hostilities emerged between Pluchino and Sanchez, although it is alleged that it was due to Pluchino's refusal to resign as guardian so as to permit Sanchez to serve (*see* Exhibit "Q" of Sanchez's moving papers).

relief, a final determination has not been made by the guardianship court with respect to Pluchino's account and the issues raised therein.

Turning to the procedural history of this matter in Surrogate's Court, it appears that approximately one month subsequent to the decedent's death, Queens Nassau filed a claim with the Queens County Public Administrator's Office[2] who was temporary administrator of Tzic's estate, for $313,465.00 allegedly representing the remaining balance under the above disputed agreement and an additional claim for $12,380.00 asserting that prior to his death, Tzic was undercharged for a period of 619 days.

Litigation then ensued between Sanchez and the Public Administrator, as Sanchez sought to become appointed the permanent administrator of Tzic's estate as designee of the beneficiaries of the estate, all of whom were residing in South America. By decision of this court dated December 23, 2015, Sanchez's request was granted and Sanchez was directed to render and settle her account as administrator within one (1) year of her appointment. Letters of administration were issued to Sanchez on February 9, 2016.

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[2] The temporary administrator acknowledged Queens Nassau's claim in Schedule J of its accounting, stating that "This claim was deemed rejected pursuant to the SCPA. This claim will be the responsibility of the permanent administrator; and appears to be at issue in the final account of the article 81 guardian."

On or about May 10, 2017, Sanchez, filed an interim accounting as administrator and petitioned for its judicial settlement with this court. Notably, Schedule J of Sanchez's accounting provided the following information:

> **Unresolved Litigation Pending in MHL Article 81 Guardianship Proceeding:**
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> Prior to decedent's death, he was an incapacitated person and ward in a guardianship proceeding . . . While it was anticipated that the guardianship matter would have been concluded by now, **there is pending litigation concerning**, inter alia, **a claim against the Estate by Queens Nassau Rehabilitation and Nursing Center in the amount of $325,845.** The Article 81 guardian entered into a purported contract with the nursing home without required court approval, for a guaranteed period of five (5) years and not contingent upon the ward's survival. **The matter, together with five other motions, were submitted for decision in July 2016, and decisions have not yet been issued. Until such time that this litigated guardianship matter is concluded, the outstanding charges owed to Queens Nassau Rehabilitation and Nursing Center remain a possible claim against the Estate** . . . (emphasis added).

Sanchez's petition, which included Queens Nassau as an interested party but made no reference to Pluchino, initially simply sought a release and discharge as administrator and approval of the payment to her of fiduciary commissions. Accordingly, the petition correctly indicated at that time that "no prior application has been made to this or any other court for the relief requested in this petition." Notwithstanding Sanchez's acknowledgment that the validity of the subject agreement was pending, and finalization of her accounting as

Administrator would require a determination from the Supreme Court, Sanchez later amended her prayer for relief to include a request that the claim presented by Queens Nassau be disallowed. Sanchez did not correspondingly amend her petition to indicate that a prior application had been made to the Supreme Court for the very same relief, nor did she modify the language set forth in Schedule J of her accounting.

Additionally, at no time did Sanchez amend her pleading to either include Pluchino as an interested party or seek affirmative relief against Pluchino. Nevertheless, Sanchez served Pluchino with the instant motion and sought to surcharge her in the event that the court determined that any monies were due and owing to Queens Nassau, which, naturally, prompted Pluchino to file an affirmation in opposition. Sanchez later stipulated to withdraw this branch of relief as against Pluchino from her motion. After additional discovery was permitted in this proceeding, the within motion was submitted for decision.

As a threshold matter, the court first turns to Queens Nassau's argument that denial of the within motion is warranted on the basis that the issue of the validity of its claim is pending in the Supreme Court. In this regard, CPLR § 3211(a)[4] provides as follows:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> ...
> 4. There is another action pending between the same parties for the same cause of action in a court of any

> state or the United States; **the court need not dismiss upon this ground but may make such order as justice requires**.

Pursuant to CPLR § 3211(a)[4], a court has broad discretion in determining whether an action should be dismissed on these grounds (*see Cherico, Cherico & Assoc. v. Midollo,* 67 AD3d 622 [2d Dep't 2009]). The court may dismiss where there is a substantial identity of the parties and causes of action (*see id.; see also Montalvo v. Air Dock Sys,* 37 AD3d 567 [2d Dep't 2007]). It is not necessary that the precise legal theories presented in the first action also be presented in the second, the actions need only be "sufficiently similar" and the relief sought "substantially the same" (*see id.*).

Here, it is undisputed that the very same issue before this court, namely, the validity of the contract entered into between Pluchino and Queens Nassau, was first placed in issue in Queens Supreme Court by Pluchino in the context of her accounting as Article 81 property guardian and a determination remains pending. Sanchez contends, however, that this court is the only forum permitted to make such a determination. In essence, Sanchez states that concurrent jurisdiction does not exist between the Supreme Court and the Surrogate's Court in this instance as the Supreme Court has effectively been divested of its jurisdiction pursuant to SCPA § 1810 which states a follows:

> Nothing in this article shall prevent **a claimant** from commencing an action on his claim at law or in equity, provided where a claim has been presented and rejected or deemed rejected pursuant to 1806 in whole or in part

> **the action must be commenced within 60 days after such rejection**. Failure to bring such action within 60 days shall not, however, be deemed a waiver of claimant's right to a jury trial (emphasis added).

Here, shortly after the temporary administrator was appointed, Queens Nassau, as prudence would dictate, promptly alerted the fiduciary of its claims in accordance with SCPA § 1802. It is Sanchez's position that because Queens Nassau did not commence an action concerning its claim in the Supreme Court within sixty (60) days of its rejection, they are relegated solely to the Surrogate's Court.

A plain reading of the statute does not support this argument when applied to the particular facts of this case. On its face, the limitations period referred to therein applies solely to claimants. Sanchez's argument fails to acknowledge that the issue of the validity of Queens Nassau's claim had previously *been raised by Pluchino* in the Supreme Court. In light of this salient fact, it would make little to no sense for Queens Nassau to commence its own action in the Supreme Court seeking the same relief, namely, a determination as to the enforceability of their agreement with Pluchino, only to themselves be confronted with a CPLR § 3211(a)[4] defense.

Nor does the decisional law cited by Sanchez provide a basis to divest the Supreme Court of the requisite subject matter jurisdiction to finally hear and determine the underlying merits of the issue that Pluchino has placed before it.

All of the decisional law relied upon in this regard is either factually dissimilar,[3] concerns wholly distinct legal issues,[4] or otherwise fails to support the argument.[5]

In fact, *Matter of Headlee,* cited by Sanchez, supports the *refusal* of the Surrogate's Court to accept jurisdiction of a creditor's claim where separate enforcement actions had been previously filed in the Supreme Court and dispositive motions were pending (25 Misc. 3d 1227(a) [Sur Ct, Dutchess Cty. 2009]). The Surrogate observed that under those circumstances, the claimants "cannot expect to achieve by indirection in this court that which they hope to obtain in the Supreme Court. To grant the relief requested by petitioners would be tantamount to giving them a second opportunity to succeed on their claims" (*id.*; *see also e.g., Matter of Willnus*, 2011 NYLJ Lexis 2275 [Sur Ct, Kings County 2011]). A similar situation is presented here, the only distinction being

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[3] Such as *Homemakers, Inc. of Long Island v. Williams,* 131 AD2d 636 [2d Dep't 1987] (concerning the late service of a counterclaim by a nursing home for services rendered); *VNB N.Y., LLC v. Intercontinental Gem Corp.,* 154 AD3d 903 [2d Dep't 2017]) (determining that the limitations period did not apply under the facts of the case).

[4] *Matter of Shannon,* 25 NY3d 345 [2015] (concerning the guardian's power to retain funds after the incapacitated party's death and holding that Mental Hygiene Law § 81.44 permits retention of funds solely for anticipated administrative expenses).

[5] *Matter of Headlee*, 25 Misc. 3d 1227(A)[Sur Ct, Dutchess County 2009]) (discussing the Surrogate's declination of jurisdiction where claimants had elected in the first instance to enforce their claims in the Supreme Court).

that it is the party opposing the claim that appears to be seeking a second bite at the apple in this forum. This is a distinction with no legal difference.

In sum, the court finds no merit in Sanchez's contention that this court is the sole and exclusive forum to adjudicate the merits of a claim commenced by Pluchino that has been pending in the Supreme Court for some time, and in which all parties concerned, including Pluchino, have actively and heavily participated.

Additionally, while Sanchez correctly observes that Queens Nassau failed to raise the affirmative defense of CPLR § 3211(a)[4] by responsive motion or pleading, thereby waiving it, this court is not confined, as the litigants are, to the dictates of the statute. "Independently of statute, the court in the exercise of discretion may consolidate actions or stay one or more actions pending the determination of other actions" (*Pollak v. Long Island Lighting Co.*, 246 AD 765 [2d Dep't 1935]; *Krisel v. Phillips Petroleum Co.*, 32 AD2d 628 [1st Dep't 1969]).

This court is of the opinion that the interests of justice and judicial economy will be better served by awaiting a determination of this issue by the Supreme Court. In reaching this conclusion, the court observes that it was Pluchino who first sought a determination of this issue in the Supreme Court. Maintaining jurisdiction in this court would effectively rob Pluchino, who has not been made a party in this proceeding, of her chosen forum without any notice or opportunity to be heard. Clearly, Pluchino who is a fiduciary appointed by

and accountable to the Supreme Court Justice presiding, has an ample stake in the outcome as it will impact upon the propriety of her activities as Tzic's guardian and the judicial settlement of her account.

Further, to the extent arguments are being made concerning the guardian's prudence in entering into the contract, the extent of the authority granted to her pursuant to the order of the Supreme Court and the Mental Hygiene Law, and alleged breaches of her fiduciary duties, it would seem that the Supreme Court is in the best position and is the more appropriate forum for such findings and, if necessary, the fashioning of an appropriate surcharge.

Based upon the foregoing, the motion for summary judgment is dismissed and this proceeding shall be marked off calendar and held in abeyance pending the outcome of the proceeding in the Supreme Court.

The parties are directed to proceed forthwith in the Supreme Court and promptly inform this court of the final determination at which time the matter shall be restored to this court's calendar.

This is the decision and order of the court.

Dated: August 3, 2018

SURROGATE