

Matter of Samii

2019 NY Slip Op 30075(U)

January 9, 2019

Surrogate's Court, New York County

Docket Number: 1998-3704/A

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

Date: JANUARY 9, 2019

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In the Matter of the Application of
Negar Yavari Samii to Remove Jacob
Shakarchy as Co-Administration c.t.a.
in the Estate of

MOHAMMED REZA SAMII,

File No. 1998-3704/A

Deceased.

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Accounting by Jacob Shakarchy as Co-
Administrator c.t.a. of the Estate of

File No. 1998-3704/B

MOHAMMED REZA SAMII,

Deceased.

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A N D E R S O N, S .

Movant, the widow of the above-named decedent and a co-administrator c.t.a. of his estate, petitioned to revoke letters issued to her co-fiduciary. The court ordered respondent co-fiduciary to account and ruled that removal would be considered in the context of the accounting proceeding (*Matter of Samii*, NYLJ, Nov. 17, 2011 at 18, col 4, 2011 NYLJ LEXIS 1020 [Sur Ct, NY County 2011]). Thereafter, respondent filed his interim account, to which both movant and the court-appointed Guardian ad Litem for decedent's infant son filed objections, and movant filed the instant motion for summary judgment on the removal application. Although numerous objections to the account have been made, movant alleges only one ground as the basis for her co-fiduciary's removal - i.e., that respondent and his law firm performed unnecessary legal services and charged excessive legal

fees to the estate, and to movant individually, in litigation regarding decedent's condominium, an asset of the estate.

Background. Decedent died after a brief illness at the age of 42, survived by movant and their infant son. In his will, which he handwrote shortly before his death, decedent left a house in Maryland to his mother and left movant a statutory one-third share of his estate. All remaining assets were left to his son, with the following direction: "all my asset [sic] should go to my trust and must be managed by my attorney [respondent]. My son should be in charge of the asset [sic] at age 25, if proven responsible and capable. He must be adicted [sic], and must have finished it academic studies." The will named no executor, and letters of administration c.t.a. were issued to the widow and the attorney.

After decedent's death, movant and her son continued to reside in decedent's condominium. In 2004, the Board of Managers of the condominium association sued movant, both in her individual capacity and as "executor" of the estate,¹ for her refusal to allow condominium staff access to the apartment in order to address emergency plumbing in the building, as required by its by-laws (*The Board of Managers of the Waterford Association, Inc. v Negar Samii and Negar Samii as Executrix of*

¹The complaint named movant as executor (rather than administrator c.t.a.).

the Estate of Mohammed Reza Sami, #114054/04 [Supreme Court, NY County]) ("the Waterford litigation"). Respondent's law firm became involved as counsel early in 2006, after which the scope and cost of the litigation increased dramatically. Counterclaims were asserted as well as a defense which contested the plaintiffs' notion as to what constituted a plumbing emergency. Defendant's counsel conducted extensive discovery in support of this defense. Ultimately, the Board of Managers moved for summary judgment to dismiss the counterclaims and on its affirmative case, both of which were granted (*Board of Managers v Samii, supra*, [Decision/Order May 7, 2009] [Sup Ct, NY County]). The rulings were affirmed on appeal (*Board of Managers v Samii*, 73 AD3d 617 [2010]).

During the course of the litigation with the condominium, respondent's law firm billed over \$700,000 in legal fees, as reflected in billing statements addressed to movant in her individual and administrator c.t.a. capacity. Payment of \$620,000 was made from the net proceeds of a \$3,500,000 medical malpractice settlement of a case brought on account of decedent's conscious pain and suffering and wrongful death, which were being held in an attorney escrow account pending conclusion of a compromise proceeding in this court brought pursuant to EPTL § 5-4.1 to determine the allocation and distribution of the proceeds. Before the compromise proceeding concluded,

respondent's law firm was substituted as counsel for the petitioning co-fiduciaries for the personal injury attorneys who had obtained the settlement. As an incident of this substitution, respondent's law firm assumed the role of escrow agent for the settlement proceeds. Ultimately, this court entered a decree directing distribution of \$1,788,599.83 to movant individually as decedent's spouse; \$996,942.10 to movant as court-appointed property guardian for her son; and \$158,655.24 to decedent's estate. Prior to entry of the decree, the escrowee had made advance payment of most of the spouse's share for her support and that of her son. The court approved these advances. However, the papers in this proceeding indicate that over \$600,000 of the advance payment went to respondent's law firm for legal services in the condominium litigation.

Movant alleges that respondent deliberately enlarged the scope of the litigation in order to charge exorbitant legal fees which far exceeded any possible benefit or recovery; and that he insinuated his firm into the compromise proceeding in order to obtain unfettered access to the escrowed funds to pay for what she describes as a frivolous litigation effort. She argues that the Supreme Court's summary rejection of respondent's theory of what constituted an emergency, was developed by respondent's law firm at great expense to the estate, which she asserts establishes the frivolity of the positions taken by the firm.

She also alleges that respondent and his firm wrongly collected their fees solely from her personal share of the settlement funds. Even though the apartment was an estate asset, the suit was brought against her in her fiduciary capacity as well as individually, and the bills were addressed to her in both of her capacities. Although movant does not dispute respondent's allegation that she approved each payment and signed the checks, she asserts that she did not understand that payment for the legal bills was being drawn from her personal funds. However, she also asserts that the payments constituted a loan by her to the estate in order to cover the estate's responsibility for that litigation.

Respondent disputes many of the facts alleged by movant. He denies that he engineered the change of counsel in the compromise proceeding in order to gain control of the escrowed funds. Rather, he alleges that his substitution was necessary because of disagreements between movant and the malpractice attorneys who initially held the funds. He alleges that movant was aware of the source of the funds which paid his firm's bills and that she approved every payment. He further argues that the litigation was not frivolous and that the summary disposition by the Supreme Court did not establish frivolity.

Respondent further denies that he escalated the scope and cost of the condominium litigation in order to charge high legal

fees to the benefit of himself and his firm. Rather, he casts blame for the high cost of the condominium litigation squarely on movant. He alleges that she insisted that he aggressively pursue the litigation in order to protect movant and her son from entry into their home by the condominium staff because she considered it intrusive and harassing. He further alleges that she was consulted at every step and was involved in all strategic decisions; and that it was only when the source of the money ran out that she objected to the course that the litigation had taken. While acknowledging that the estate, as well as movant, should bear some responsibility for the costs of the litigation, and that part of such payment might thus be characterized as a loan by movant to the estate, respondent makes no attempt in his accounting to apportion the costs between them.

Legal issues

Prematurity: Before turning to the merits of this summary judgment motion, the court must address respondent's argument that the motion is premature because discovery has not been completed in his accounting proceeding, in that movant has neither responded to his document requests nor submitted to a deposition. The accounting proceeding, however, has been pending for several years without any effort by respondent to compel discovery. Further, respondent does not identify any specific discovery needed to support his position on the issues of fact

raised in this motion. In such circumstances, a vague claim that more discovery is needed is insufficient to avoid consideration of the motion (*Chemical Bank v PIC Motors Corp.*, 58 NY2 1023 [1983]; *JPMorgan Chase Bank v Agnello*, 62 AD3 662 [2d Dept 2009]; *Smith v Andre*, 43 AD3 770 [1st Dept 2007]).

Summary judgment standards: With respect to the merits of movant's request for her co-fiduciary's summary removal, the applicable legal principles are well established. Summary relief is appropriate only if the evidence, viewed in the light most favorable to the non-moving party, shows that there are no triable issues of fact and the moving party is thus entitled to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Phillips v Kantor & Co.*, 31 NY2d 307 [1972]).

As a threshold matter, the movant

"must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers"

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986) (citations omitted). If the movant makes a prima facie case, the burden shifts to the opposing party to present evidence in admissible form sufficient to establish the existence of facts requiring a trial (*Alvarez, supra*; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Matter of Neuman*, 14 AD3d 567 [2d Dept. 2005]). If there

is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415 [2d Dept 1989]).

The alleged facts are not susceptible of summary disposition. The moving papers lack clarity as to whether, and to what extent, movant is seeking to vindicate harm to herself individually rather than to the estate. Regardless, movant has not met her initial burden of showing, prima facie, harm to the estate rather than to herself indirectly. Further, the evidence submitted reveals disputed questions of fact, including whether the litigation was frivolous; whether movant insisted on or prolonged its course; whether she understood and acquiesced in having her own funds used to finance it; her role in approving the fees paid; and the extent to which the litigation might have damaged the estate. When basic relevant facts are unaddressed or disputed, summary judgment is precluded (*Alvarez v Prospect Hosp.*, supra, 68 NY2d 320).

For these reasons, the motion for summary judgment must be denied. A conference will be scheduled to address appropriate further steps in these proceedings.

This decision constitutes the order of the court.

Dated: January 9, 2019



S U R R O G A T E