

Matter of Duell

2019 NY Slip Op 33594(U)

December 5, 2019

Surrogate's Court, New York County

Docket Number: 1977-4835/G

Judge: Rita M. Mella

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

New York County Surrogate's Court
DATA ENTRY DEPT.
Date: December 5, 2019

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Accounting of Benjamin Duell, as Executor of the Will of Irene
Duell, as Co-Trustee of Trust B under the Will of

DECISION and ORDER

MANNY E. DUELL,
Deceased.

File No. : 1977-4835/G

-----X
Accounting of Benjamin Duell, as Executor of the Will of Irene
Duell, as Co-Trustee of the Trust B Subtrust for the primary
benefit of Andrew Duell under the Will of

MANNY E. DUELL,
Deceased.

File No. : 1977-4835/H

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M E L L A, S. :

The following papers were considered in deciding these motions:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion of Andrew Duell for Leave to Amend Objections, Dated June 12, 2019	1
Affirmation of Thomas E. Butler, Esq., in Support of Motion, dated June 12, 2019, with Exhibits A through L	2
Memorandum of Law in Opposition to Motion, dated August 5, 2019	3
Affirmation of Daphne Morduchowitz, Esq., in Opposition To Motion, dated August 5, 2019, with Exhibits A through I	4
Affidavit of Allan Povol in Opposition to Motion, sworn To August 1, 2019	5
Reply Memorandum of Law in Further Support of Motion, Dated August 19, 2019	6
Reply Affirmation of Thomas E. Butler, Esq., in Further Support of Motion, dated August 15, 2019, with Exhibits A through Q	7

These are proceedings for settlement of the intermediate accounts of Irene Duell,¹ as co-trustee of Trust B under the will of her predeceased husband, Manny E. Duell, and as co-Trustee of the Trust B subtrust of which their son Andrew is the remainder beneficiary. Andrew filed objections to the accounts in September 2014 and moves here for permission to amend those objections. Andrew's brother, Benjamin, now substituted for Irene as petitioner (*see n 1*), opposes Andrew's request, claiming prejudice, extensive unexplained delay, and lack of merit of the proposed new objections.

Standards for Granting Leave to Amend

The applicable governing statute is CPLR 3025(b). It provides:

“Amendments and Supplemental Pleadings by Leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

In ruling on requests for permission to amend, courts have considered prejudice, delay, and merits of the proposed amendments. The decision in *Lucido v Mancuso* (49 AD3d 220, 222 [2d Dept 2008]) provides guidance for applying these factors within the “leave shall be freely given” framework of the statute:

“In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.”

See also Wells Fargo Bank, N.A. v Confino, 175 AD3d 536 [2d Dept 2019]).

¹ Irene Duell died on July 27, 2014. Benjamin Duell, the surviving fiduciary of her estate, has appeared in these proceedings and is substituted for her pursuant to SCPA 2207(3).

No one factor is controlling. The court has broad discretion in weighing these factors and ruling on the request for an amendment. As explained in *Murray v New York* (43 NY2d 400, 404-405 [1977]):

“The matter of allowing an amendment is committed almost entirely to the court’s discretion to be determined on a *sui generis* basis, the widest possible latitude being extended to the courts” (internal citations omitted).

After consideration of the customary elements, the court, in the exercise of its discretion, has determined to allow the proposed amendments for the reasons discussed below.

Delay

Petitioner’s characterization of the extent and significance of the delay in this case is somewhat overstated. The trusts were comprised of income-producing real estate, which, by the nature of these assets, rendered the transactions underlying the accounting entries numerous and fairly complex. The accounting schedules were supplemented by exhibits with certain unexplained entries that Andrew sought to investigate. Andrew’s attorney shows from deposition transcripts that the witnesses allegedly responsible for preparing the accounts and managing the trusts’ real property claimed lack of familiarity with many of these entries and were not able to clarify them. Numerous disputes also slowed the disclosure process.²

The last deposition was conducted in May 2018. Andrew claims that the discovery he conducted was not sufficiently informative to allow him to formulate the specifics of the objections originally filed some five years ago. It was for this reason that he hired an accounting expert to analyze the reported transactions that he believed had not been adequately explained. He also hired an appraiser to update the values of the trust properties.

² In December 2014 the parties agreed to the appointment of a referee to supervise the contentious discovery (CPLR 3104).

In February 2019, nine months after the conclusion of the last deposition, Andrew's counsel provided petitioner's counsel with the reports of these experts (CPLR 3101[d]). Included with these submissions was a summary of damages Andrew claimed on the basis of the experts' opinions. Petitioner served interrogatories in April 2019, to which Andrew responded in May 2019.

It is evident that the case did not lie dormant between the initial filing of objections and this request to amend those objections. This is not "utter failure to offer a reasonable excuse for . . . long delay in seeking amendment," as might warrant denial of a motion to amend (*see Inwood Tower v Summit Waterproofing & Restoration Corp.*, 290 AD2d 252, 253 [1st Dept 2002]).

Prejudice

The proposed amendments reflect information that Andrew obtained from the experts' reports. They concern: (1) an alleged overpayment of income to Irene Duell (amounting to more than \$3 million over the twelve-year accounting period for the subtrust, plus interest); (2) real estate management fees allegedly owed Andrew (amounting to about \$791,000, plus interest); (3) an increase of more than \$1.2 million over the original claim for trustee commissions allegedly owed Andrew;³ and (4) a new claim for allegedly understating by \$5.3 million the amount listed on Schedules G (Balance on Hand), based on entries denoted "Due from Duell LLC" appearing on exhibits to Schedules A.

No note of issue has been filed, and petitioner has not demonstrated that he will be prejudiced or is surprised by the additional objections. The amendments are primarily based on the interpretation of entries as they appear in the accounts. Except for the effect of updated appraisals on commissions claimed owed to Andrew, the proposed revised objections would not

³ Andrew was a co-trustee with Irene of the subtrust for his benefit.

bear on the values of the underlying data. Petitioner has not shown how granting this motion would require him to engage in extensive additional discovery, if any.

Nor has petitioner shown that the death of Thea Duell⁴ after the objections were filed has prejudiced his ability to litigate the objections as amended. Thea's deposition had been taken, in which she stated she was not familiar with the accountings and did not know who had prepared them. She professed ignorance of the meaning of the entries "Due from Duell LLC," which are central to the most significant of the proposed amendments.

For prejudice to defeat a motion to amend, the prejudice must be

"traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add."

(*A.J. Pegno Constr. Corp. v City of New York*, 95 AD2d 655, 656 [1st Dept 1983] [internal quotation marks omitted]).

No such prejudice has been shown in this case.

Merits

The court concludes that extensive consideration of the merits of the proposed amendments is not warranted at this stage. In *Lucido v Mancuso* (49 AD3d at 229) the court overruled older cases requiring evidence to substantiate proposed new claims, explaining:

"Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025 (b). The court need only determine whether the proposed amendment is palpably insufficient to state a cause of action or defense, or is patently devoid of merit" (internal quotation marks omitted).

⁴ Thea Duell was Andrew and Benjamin's sister, and daughter of Manny and Irene Duell.

In this case the proposed amendments are not palpably insufficient or patently devoid of merit. Moreover, they are primarily concerned with issues already raised by the original objections. The court can consider them fully and more efficiently in the context of deciding those objections, rather than in isolation on this motion.

Accordingly, the motion for permission to amend the objections is granted.

This constitutes the order of the court.

Clerk to notify.

Dated: December 5, 2019



SURROGATE