

<b>Matter of Dorsi (Kleiner)</b>
2020 NY Slip Op 30781(U)
March 11, 2020
Surrogate's Court, New York County
Docket Number: 2011-1295/D
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court  
DATA ENTRY DEPT.  
MAR 11 2020  
File No. 2011-1295/D

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In the Matter of the Accounting of  
H. Frances Kleiner, as Executor of  
the Estate of

EUGENE CARY DORSI,

Deceased.

-----X  
A N D E R S O N, S .

Incident to this contested executor's accounting in the estate of Eugene Cary Dorsi, the executor (decedent's ex-wife from his first marriage) moves for summary dismissal (CPLR 3212) of objections filed by decedent's ex-wife from his second marriage.<sup>1</sup>

Decedent died on March 17, 2011, survived by three children (two from his marriage to the executor and one from his marriage to objectant). Decedent's will, dated January 3, 2011, provided that his personal property and residuary estate be divided equally among his children subject to a reduction of his youngest child's share to reflect sums she receives as a beneficiary of any insurance policy on his life. Decedent also made a pre-residuary cash bequest of \$50,000 to the Cary Dorsi Revocable Trust which he had previously established for the benefit of objectant (the "Trust"). Letters testamentary issued in November

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<sup>1</sup> A motion by the executor to compel discovery from objectant is also pending. After a conference with the court, objectant produced additional documents, but the executor did not withdraw the motion. However, the implicit premise of the executor's motion for summary judgment is that discovery has been completed. Accordingly, the motion to compel is denied as moot.

2011.

The executor filed her account in August 2013. As amended and supplemented, the account covers the period from April 6, 2011 to January 31, 2014. Schedule A includes as an asset a \$39,000 "Claim for Monies Prior to Death." On Schedule J (Proposed distribution), the executor explains that the \$39,000 claim is against objectant and proposes that decedent's \$50,000 bequest to the Trust be reduced by "any amount determined by the court to be refunded to the estate [by Objectant]." The only other reference to the claim is in petitioner's "Wherefore Clause" where the executor alleges that objectant "had checks written to her[self], and used [decedent's] debit and credit cards" in the amount of \$39,000 during the last six weeks of decedent's life for purported expenses that remain unsubstantiated.

Objections were filed by the second ex-wife and the guardian ad litem for the minor daughter of decedent and objectant. However, the instant motion is directed only to the objections of the second ex-wife. Her objections fall into three categories: 1) those related to the executor's valuation of certain assets listed on Schedule A (the "Asset Objections"), 2) those related to the executor's rejection of her claims against the estate as reflected on Schedule D (the "Rejected Claims Objections"), and 3) those challenging the executor's proposed distribution of the estate's assets as set forth on Schedule J (the "Distribution

Objections").

### Discussion

Summary judgment is available only where no material issues of fact exist (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party seeking summary judgment "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" (*id.* at 324 [citations omitted]). If such a showing is made, the party opposing summary judgment must then come forward with proof establishing a genuine issue of material fact or must provide an acceptable excuse for the failure to do so (see e.g. *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

### The Asset Objections

Objection 1(a) charges that decedent's interest in Imagine Software as set forth on Schedule A was "not properly valued." The executor supports her \$100 valuation by describing decedent's interest as a "non-marketable contingent interest" in a privately held company and by noting that the valuation was accepted by the New York State Department of Taxation and Finance. At her deposition, objectant conceded that she had no evidentiary basis for challenging the executor's valuation, and her opposition papers do not address this objection. Accordingly, summary judgment is granted and Objection 1(a) is dismissed.

Objection 1(b) alleges that the executor should not have

included the \$39,000 claim against objectant as an estate asset because she "does not owe any money to the Estate." The executor argues that she has established her prima facie case for summary judgment by submission of her account and that objectant, in response, has not "met her burden" to establish that the transactions at issue were authorized. However, the executor improperly relies on *Matter of Schnare* (191 AD2d 859 [3d Dept 1993]) to meet her prima facie burden on this motion. That case stands for the general proposition that, in an accounting, the fiduciary meets her initial burden of proving that he or she has fully accounted for all estate assets merely by introducing the account into the record. The objectant then "bears the burden of coming forward with evidence to establish that the account is inaccurate or incomplete ...." (*id.* at 860).

*Matter of Schnare* is inapplicable here where the fiduciary is in essence seeking turnover of assets from the objectant within the accounting proceeding. Had the executor commenced a separate turnover proceeding under SCPA §§ 2103 and 2104 and subsequently moved for summary judgment, she would have had to demonstrate prima facie the estate's entitlement to the specific property in question (see e.g. *Matter of Castaldo*, NYLJ, Feb. 10, 1992, at 29, col 6 [Sur Ct, Bronx Co. 1992]; see also Margaret Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA § 2104 at 345). The result should be no different simply because the executor elected to seek turnover within her

accounting proceeding.

Here, the executor fails to establish prima facie the estate's entitlement to the \$39,000. Not only does the executor fail to identify in her pleading any of the specific misappropriations (which she alleges for the first time in her summary judgment motion), but she also fails to offer any evidence that decedent lacked capacity or did not voluntarily make or authorize the transactions underlying her claim. It is undisputed that decedent and objectant shared joint custody of their minor child and that their lives were inextricably intertwined, both personally and financially, particularly after decedent became terminally ill. It is also undisputed that decedent routinely reimbursed objectant for expenditures beyond his child support obligations. Under these circumstances, the executor's assertion that the payments were improper or unauthorized amounts to nothing more than conjecture. At best, the record raises fact issues regarding each of the transactions that cannot be resolved summarily. Accordingly, summary judgment as to Objection 1(b) is denied.

The Rejected Claims Objections

On Schedule D (Creditor's Claims), the executor states that objectant "has asserted claims that were either unsubstantiated or without merit and which have been rejected." She does not, however, identify those claims or provide the reason for their rejection as required (see Official Form for Non-Trustee

Accounts). Objection 2(a) is a general objection to the denial of these unspecified claims. Objections 2(b)-2(e) identify specific claims that objectant contends should have been allowed.

Objection 2(a) is a general objection, subsumed within Objections 2(b)-2(e); it therefore serves no independent purpose and is dismissed as duplicative.

Objection 2(b) alleges that the executor failed to identify as an allowed claim \$100,000 allegedly due to decedent's minor daughter under the October 5, 2005 divorce agreement between decedent and objectant (the "Agreement"). The basis for this objection is Article VIII, Paragraphs 1 and 2, of the Agreement, which provide that:

"[Decedent] shall maintain in full force an insurance policy(ies) on his life having an aggregate death benefit in the amount of \$500,000 for the benefit of the parties' child and [objectant], who initially shall be the irrevocable joint beneficiaries thereof to the extent of \$12,000 for the benefit of [objectant] and \$488,000 for the benefit of the Child ... [which] shall be reduced by the sum of \$25,000 for each calendar year following the execution of this Agreement."

It is undisputed that decedent maintained only a \$300,000 life insurance policy for the benefit of his daughter during his lifetime. According to objectant, by the time he died, four full calendar years had passed after the date of the Agreement. Thus, at his death, decedent should have maintained a \$400,000 life policy for his daughter's benefit (\$500,000 less \$25,000 x 4 years). Since he did not, objectant contends that her daughter has a valid \$100,000 claim for the difference (\$400,000 -

\$300,000).

Movant seeks summary dismissal of Objection 2(b) on a number of grounds. The court, however, need not reach the merits of these arguments. In her opposition papers, objectant concedes that her daughter's guardian ad litem, who has also asserted a claim against the estate based on decedent's failure to maintain sufficient life insurance, is the proper representative to pursue this and any other claims on behalf of her daughter. Accordingly, Objection 2(b) is dismissed.

Objection 2(c) alleges that Schedule D should have included objectant's claims for post-mortem "child support and [the daughter's] medical insurance" as set forth in objectant's July 2013 letter to the executor, a copy of which is attached to the objections and incorporated by reference (CPLR 3014). In the letter, objectant claims that the estate remains obligated to pay her "\$100,000 to cover 100% of the cost of the [child's] medical insurance premiums from the date of [decedent's] death until [the child] reaches the age of 22," and an additional \$8,340 for the daughter's estimated "unreimbursed medical and dental costs."<sup>2</sup>

The law is clear that support obligations survive the death of the party responsible for payment only if the agreement

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<sup>2</sup> In her papers opposing summary judgment, objectant claims entitlement to additional "unreimbursed medical and dental costs" beyond those described in her pleading. However, the court will not consider objectant's efforts to enlarge the scope of her objections in the absence of a formal motion to amend.

clearly provides for it (see *Cohen v Cronin*, 39 NY2d 42 [1976]). Here, the executor correctly notes that the Agreement makes no explicit provision that, in the event of decedent's death, the health insurance premiums and unreimbursed medical expenses that decedent was required to pay under Article X of the Agreement would become an ongoing obligation of his estate. To the contrary, the Agreement creates a mechanism for payment of these expenses from the proceeds of decedent's life insurance policy. Thus, Article VIII provides that the life insurance policy that decedent was required to maintain for the child's benefit would be held in a trust and that interest and principal from the policy's proceeds could be used to pay "[decedent's] direct child support obligations, together with the additional child support expenses enumerated in Article X hereof."

If, as objectant maintains, the parties intended the estate to have a continuing obligation to pay these expenses after decedent's death, there would have been no need to provide in the Agreement for the insurance policy's proceeds to be specifically earmarked as a source to pay for them. It is clear therefore that the purpose of decedent's obligation to maintain the insurance policy was to ensure that these expenses would continue to be paid in the event of decedent's death. The fact that the Agreement provided that the amount of required insurance would be reduced by \$25,000 until the daughter reached the age of majority only supports this conclusion. Under these circumstances, summary

judgment is granted and Objection 2(c) is dismissed.

Objection 2(d) alleges that the executor should have allowed objectant's claim for child support for the month of decedent's death (March 2011). The executor has submitted a copy of Objectant's bank statement showing a deposit for such payment. In her opposition papers, objectant does not offer evidence to the contrary. Accordingly, summary judgment is granted, and Objection 2(d) is dismissed.

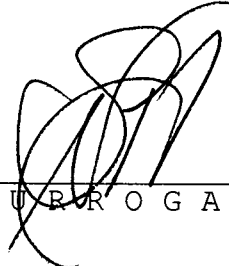
Objection 2(e) alleges that the executor failed to include on Schedule D \$4,565.44 in expenses that objectant "advanced for the Decedent's care." The executor contends that objectant never submitted proof to substantiate these expenditures, some of which appear to be unrelated to decedent's care. In her opposition papers, objectant seeks to substantiate only \$2,746.13 of the \$4,565.44 she alleges to have expended. She attaches a number of receipts for groceries, food deliveries and transportation. However, these receipts do not total even the \$2,746.13 that objectant now contends she spent for decedent's care. On this record, fact issues exist only as to the those purported expenditures that objectant has attempted to document (in Exhibit 59 attached to her opposition papers). Objection 2(e) is therefore dismissed to the extent that it relates to the other (undocumented) expenses objectant alleges she made for decedent's care.

The Distribution Objections

Objections 3(a), 3(b), and 3(c) allege that the executor's proposed distribution of estate assets (Schedule J) does not accurately reflect the estate funds due objectant and her daughter under the will. To the extent that these objections relate to objectant's daughter, they are dismissed, since, as noted above, the daughter's guardian ad litem is the representative with standing to raise issues on the daughter's behalf. To the extent that these objections relate to the executor's proposed distribution to objectant, the motion for summary judgment is denied. The executor has not established as a matter of law that her proposed distribution to objectant is correct given the issues discussed above that remain to be tried.

This decision constitutes the order of the court.

Dated: March 4, 2020

  
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S U B R O G A T E