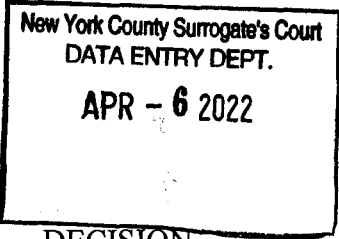


Matter of Duell
2022 NY Slip Op 30812(U)
April 6, 2022
Surrogate's Court, New York County
Docket Number: Index No. 1977-4835/G/H
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

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 Accounting of Benjamin Duell, as Executor of the Will of
 Irene Duell, as Co-Trustee of Fund B and of the Fund B
 Subtrust for the Primary Benefit of Andrew Duell, under the
 Will of

File No.: 1977-4835/G/H

MANNY E. DUELL,
 Deceased.

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M E L L A, S. :

<u>The following papers were considered in deciding this motion:</u>	<u>Numbered</u>
Notice of Motion for Summary Judgment, dated June 1, 2021	1
Memorandum of Law in Support of Motion, dated June 1, 2021	2
Affirmation of Peta Gordon, Esq., in Support of Motion, dated June 1, 2021, with Exhibits 1 to 67	3
Memorandum of Law in Opposition to Motion, dated July 8, 2021	4
Affirmation of Thomas E. Butler, Esq., in Opposition to Motion, Dated July 8, 2021, with Exhibits A to X	5
Affidavit of Gary B. Rosen in Opposition to Motion, sworn to July 7, 2021	6
Reply Memorandum of Law in Further Support of Motion, dated July 30, 2021	7
Affidavit of Allan D. Povol in Further Support of Motion, sworn to July 30, 2021	8
Statement of Peta Gordon, Esq., in Further Support of Motion, dated July 30, 2021, with Exhibits 1 to 17	9

This is an accounting proceeding commenced in 2012 by Irene Duell, as co-trustee of the residuary trust known as Fund B under the will of her predeceased husband, Manny Duell, and of the Fund B subtrust for the primary benefit of their son, Andrew Duell.¹ Irene died in 2014 and her younger son, Benjamin Duell, as the executor of her estate, has been substituted for Irene as Petitioner in this proceeding. Andrew² filed objections and amended objections to the account. Before the court is Benjamin's motion for summary judgment dismissing Andrew's amended objections.

Background

Andrew's subtrust was created by a decision of this court dated May 14, 1998, which divided Fund B into separate parts, one for the primary benefit, respectively, of each of decedent and Irene's three children. The proceeding to split the Trust arose from the longstanding hostilities between Andrew and his siblings, Thea and Benjamin, and between Andrew and Irene, over management of the Trust properties and other matters.

The undivided Fund B consisted entirely of income-producing residential, commercial, and mixed-use real estate in Manhattan. Irene and the three children, including Andrew, initially were beneficiaries of specific portions of the income (rents) from the undivided Fund B. After the Trust division and following protracted litigation, the individual properties were allocated and distributed among the three subtrusts. At that point, Andrew's and Thea's income interests had terminated.³ In accordance with the Fund B terms as applied to the subtrusts, Andrew and

¹ The accounting was compelled by order of the court dated September 14, 2012, granting Andrew Duell's petition for such relief.

² First names are being used because all parties share the same last name.

³ Prior to these distributions, Andrew and Thea were also entitled to discretionary principal distributions of up to \$15,000 for their health, education, or welfare, if required for those

Thea each received an outright (then overdue) distribution of a portion of the principal. On the death of Irene, Andrew and Thea became entitled to the principal balance of their respective shares. In Andrew's case, the remainder consisted of two buildings as originally allocated to his subtrust, referred to as "Building 29" and "Building 100." It is undisputed that Andrew received these properties outright and free of encumbrances.

This account consists of two parts. The first part encompasses the period from May 1, 1997, to December 31, 1998, and covers transactions prior to the division of Fund B. The second part encompasses the period from January 1, 1999, to December 31, 2011, and covers the transactions in the subtrust for Andrew's benefit.

Andrew and Irene were initially appointed as co-trustees of the undivided Fund B, but Andrew was removed after a four-day trial by order dated September 15, 1997. The order noted his "deceitful and malicious" behavior toward Irene and Thea, and his "animosity and hostility" toward Irene and the other beneficiaries. In a May 1998 order, Andrew was appointed again as co-trustee with Irene of his subtrust, "with the expectation that he will cooperate with his mother." He accepted his appointment and formally qualified in June 1998.

Andrew's Objections⁴

Commissions and Management Fees

Andrew objects to Irene's failure to pay him annual trustee's commissions as provided by SCPA 2309, including those allowed in subdivision 7 thereof for managing and collecting rents

purposes, but there were no other provisions for invasions of principal. No such discretionary distributions were made.

⁴ An objection based on the failure to include the estate of Andrew's sister as an interested party is not discussed here because it has been resolved by the addition of her estate as a party.

from real property.⁵ Central to these objections is Andrew’s claim that Irene “froze him out” of the day-to-day management. She had transferred the two properties allocated to his subtrust into limited liability companies while she was the sole trustee of Fund B. The companies hired a management firm (Duell LLC) to handle the buildings’ operations. Irene controlled both the limited liability companies and the management firm. Andrew alleges that Irene refused to meet or communicate with him and withheld relevant documents.

As to the subsection 7 compensation for real estate services, Andrew acknowledges that Duell LLC was employed and paid a fee to manage the properties and collect the rents for all the subtrusts. He conceded in a deposition that he did not perform any real estate management services. Because he did not actually perform such services, Andrew is not entitled to the additional commissions (*Matter of Smathers*, 309 NY 487, 495 [1956] [“[T]he Legislature clearly intended – and so indicated – that the extra compensation for management can be retained only ‘for such services’, i.e., for the active performance of the duties and obligations connected with the real property” (decided under SCPA former 285-a, predecessor to SCPA 2309 [7])]).

By contrast, eligibility for the commissions allowed by SCPA 2309 (2) is not similarly limited. They are generally payable in the absence of “bad faith, fraud, or personal enrichment” (*Matter of Blodgett*, 261 App Div 878, 878 [4th Dept 1941], *affd* 286 NY 602 [1941]; *Matter of JP Morgan Chase Bank, N.A.*, 133 AD3d 1292, 1295 [4th Dept 2015]). Here, the court has made no such adverse findings against Andrew in connection with the administration of his subtrust. Further, the court is mindful that in *Matter of Faulkes* (4 AD2d 954 [2d Dept 1957]), a co-executor was allowed statutory commissions despite having performed no services to the estate,

⁵ Irene did not take commissions.

where his co-fiduciary took possession of all the assets and excluded him from participation in its management. These principles, however, are not dispositive of the issue.

Where allowed, annual trustee's commissions under SCPA 2309 are based on the valuation of the trust computed each year, and are chargeable one-third to income and two-thirds to principal (SCPA 2309[3]). Commissions chargeable to income for a given year may be paid only from income earned from that year and retained in the trust (SCPA 2309 [4]).

It is undisputed that no income remains in the subtrust for payment of such commissions. Petitioner argues that even if Andrew were otherwise entitled to commissions chargeable to income, he has no right to receive them now because they were not paid from income earned for each associated year and no income was retained in the trust for payment of commissions. Andrew responds that Irene had an obligation to reserve income for this purpose.

Andrew recounts court proceedings he commenced against Irene in an attempt to gain input to management decisions. In October 2005, he filed a petition to require her to attend a court conference to set guidelines for their joint administration of his subtrust. He later brought a proceeding to have a neutral fiduciary appointed to select an independent property manager. In July 2012, he petitioned the court for Irene's removal as trustee.⁶

In all these proceedings, Andrew's pleadings made numerous demands for information and control, with recitations of Irene's alleged misdeeds and failings as a trustee. In none of his applications to the court, however, did Andrew ask for annual commissions, or ask that income be reserved for commissions, or complain of Irene's failure to pay or reserve funds for commissions. At oral argument on the instant motion, his counsel acknowledged that Andrew

⁶ The proceedings ultimately resulted in Irene's production of some documents to Andrew, the temporary hiring of an independent property manager, and Irene's resignation as trustee at age 92 with a neutral appointed to serve in her place.

did not ask for commissions, as did Andrew himself in a deposition. In these circumstances, the court finds that Andrew has waived his right to commissions chargeable to income. There is no basis to depart from the statutory requirement that such commissions cannot be paid when, as here, the income for the associated year has been fully distributed (*see Matter of Rosof*, NYLJ, Jan. 9, 2001, at 5, col 1 [Sur Ct, Nassau County]). The objection to the failure to pay these commissions is dismissed.

Commissions chargeable to principal here would be payable from the remainder already distributed to Andrew and are not in question. Andrew, however, is requesting interest on the commissions for the entire period of his tenure as co-trustee. In the exercise of the court's discretion, his objections to the failure to allow him interest on his principal commissions is also dismissed (*Carvel v Davis*, 255 AD2d 315 [2d Dept 1998] [award of interest on unpaid commissions is within Surrogate's discretion]).

Failure to account for all Fund B properties

For the period ending with the subdivision of Fund B, Petitioner has accounted only for those properties in the undivided Trust that were later allocated to Andrew's subtrust (*i.e.* Building 29 and Building 100). Many of Andrew's objections relate to the failure to account for the other eight properties originally held in Fund B. Petitioner maintains that Andrew has no interest in those properties, and therefore would have no standing to object to transactions involving them. Petitioner argues that accounting for the properties that passed to the two other subtrusts would serve no legitimate purpose and would waste resources and time.

The court agrees with Petitioner. None of the parties interested in the other properties has objected to their omission from the account and Andrew has no standing to interpose objections on their behalf (*Matter of JPMorgan Chase Bank N.A.*, 122 AD3d 1274, 1279 [4th Dept 2014])

["objectants do not have standing to challenge petitioner's conduct relating to non-objecting beneficiaries"]; *Matter of Brown*, 144 AD3d 587, 587 [1st Dept 2016] ["objectant lacks standing to contest the 2004 restatement because he had no beneficial interest in any prior version of the trust"]). The court notes that the decree on this accounting will discharge the trustee only for those transactions reflected in the account, and Andrew's counsel acknowledged at the oral argument on this motion that Andrew would not be exposed to liability if the decree is so limited.

Objections relating to Trust income

An objection based on Andrew's view that Benjamin was not entitled to any income from the subtrusts is dismissed as mooted by this court's decision dated November 19, 2021, determining that Benjamin in fact had an income interest.

Moreover, Andrew's interest in the Trust income terminated when he reached age 35, before the opening date of the account. He is not affected by the income transactions and has no standing to object to income payments to Benjamin, or to any payments charged to income. This is true of his claim of an overdistribution of income to Irene, which is therefore also dismissed.

Receivable allegedly due from Duell LLC

The account reflects a transaction labeled "due from Duell LLC" in the amount of approximately \$7,000,000, which was written off. Andrew objects to the failure to show this alleged receivable as an asset of his subtrust. Petitioner has explained that the entry is the result of a change in accounting protocols when Duell LLC took over as managing agent from a predecessor company which recorded rental income and expenses in a ledger separate from the book where net rental distributions were recorded. The write-off was made to reconcile the inter-company methods of recording their rent transactions and does not represent a debt. No

matter how this accounting entry is interpreted, however, it is clear that it cannot represent an amount due to Andrew. There is no dispute that the subtrust was funded solely with two buildings. There is no dispute that Andrew was only entitled to principal from his subtrust at its termination. There is no dispute that he had no rights in the subtrust's income. The account reflects no charges to principal whatsoever, and no reinvestments of the original principal.⁷ Andrew is claiming no damages resulting from the management of the principal. The two original properties are the same properties he received, free of trust and free of any encumbrances, when the trust terminated. Andrew has not offered, and cannot offer, any explanation of how he could be entitled to receive more from the subtrust than he has already actually received.

In his verified answer to Petitioner's Third Set of Interrogatories, Andrew confirmed that he is not seeking any damages other than those listed in a certain chart prepared by one of his expert witnesses and produced pursuant to CPLR 3101(d).⁸ All of the listed items—commissions, the “receivable” from Duell LLC, and “additional damages,” consisting of management fees and the alleged overpayment of income to Irene—are dismissed as discussed above. The remaining objections concern the alleged improper reporting of certain receipts and disbursements but for which Andrew claims no damages. These and any other objection not addressed in opposition to the instant motion are dismissed as abandoned (*Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]).

⁷ The record shows that a \$375,000 loan was taken and a mortgage given for renovations on Building 100, but the loan was repaid entirely before outright distribution to Andrew, without charge to principal.

⁸ The chart appears on page 5 of Andrew's Amended Expert Disclosure, dated June 22, 2020, submitted as Exhibit 57 to the affirmation of Peta Gordon, Esq., dated June 1, 2021.

Conclusion

Andrew's opposition to this motion raises no material issues of fact as would be required to deny Petitioner's motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). In accordance with the foregoing, the motion to dismiss Andrew's objections is granted.

Settle decree on accounting.

Dated: April 6, 2022



SURROGATE