

Matter of Nicholson
2022 NY Slip Op 32138(U)
June 21, 2022
Surrogate's Court, New York County
Docket Number: File No. 2013-1194/C
Judge: Nora S. Anderson
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New York County Surrogate's Court
DATA ENTRY
Date June 21st 2022

SURROGATE'S COURT : NEW YORK COUNTY

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Accounting of James A. Nicholson and
Justin M. Nicholson, as Co-Executors of
the Last Will and Testament of

File No. 2013-1194/C

RONALD A. NICHOLSON,

Deceased.
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A N D E R S O N , S.

This is a motion in a contested accounting proceeding where the spouse of the above named decedent ("objectant") seeks permission to amend her objections to the executor's accounting. Although CPLR 3025(b) provides that leave to amend a pleading "shall be freely given...", it is within the court's discretion to determine whether amendment should be allowed in any particular case (see, e.g., *Mayers v D'Agostino*, 58 NY2 696 [1982]). Here, where the proposed amendment would insert matters which cannot be fully adjudicated in this proceeding, and which are already raised in other proceedings where they can more appropriately be addressed, the motion to amend objections is denied. A brief history for the purposes of clarity follows.

Decedent, a successful real estate investor, died on October 25, 2012, survived by Objectant and three children. In his will, decedent left to Objectant substantial assets outright and his residuary estate to a trust established for her benefit (the "Marital Trust"). Decedent also provided that upon Objectant's death, the assets of the Marital Trust will pass to decedent's surviving descendants. James and Justin Nicholson, two of

decedent's three children, are co-executors of the estate and co-trustees of the Marital Trust.

Three years after decedent's death, James and Justin commenced this proceeding to settle their final account as executors for the period February 26, 2013 to July 31, 2015. In July 2019, after pre-objection discovery, Objectant filed the objections which she now seeks to amend (the "2019 Objections"). In the meantime, James and Justin had filed their interim accounting as trustees of the Marital Trust for the period December 1, 2013 to December 31, 2017. No objections have been filed in the proceeding concerning the Marital Trust.

The transactions set forth in these accounts reflect the complexity and sophistication of decedent's assets, which included interests in numerous closely-held limited liability companies and partnerships which owned and operated commercial real property and related businesses. Three of those real estate investments were tax shelters that decedent utilized during his life to reduce his income tax liability (the "Tax Shelters"). Shortly after decedent died, the executors on advice of counsel, determined that the Tax Shelters should be sold because they posed too great a financial risk to the estate, given the possibility that the Internal Revenue Service would try to eliminate the tax benefits of these kinds of investments, and that the executors failure to sell could be seen as a breach of

their fiduciary duties.

In May 2013, the executors' counsel informed Objectant, along with her tax and litigation counsel, of the executors' decision to sell the Tax Shelters and offered to sell them to her. Objectant declined to purchase the Tax Shelters and on October 2, 2013, executed a document in which she authorized the executors to proceed with the sale of the Tax Shelters to third parties. Shortly thereafter, the executors sold one of the Tax Shelters. They then distributed the other two in kind to the Marital Trust, one on December 31, 2014, and the other on August 21, 2015.¹

The Marital Trust held the two unsold Tax Shelters until they were ultimately sold in December 2015. Prior to the sale, the Tax Shelters generated losses which were declared on the income tax returns of either the estate or the Marital Trust for the years 2013, 2014 and 2015. This benefitted Objectant as income beneficiary, because the losses significantly reduced income tax liability of the estate and the Marital Trust.

However, the sales of the Tax Shelters generated significant capital gains tax liability, including certain "recapture gains" which equaled the amount by which the estate's and the Marital Trust's income taxes had been reduced as a result of the previous

¹Although distribution of the second Tax Shelter occurred after the close of the estate accounting period, it is listed on the proposed distribution schedule appended to the account.

losses. The trustees paid the taxes due from the sales from the principal account of the Marital Trust. Subsequently, they determined that the income tax burden imposed by the amounts recaptured should be reallocated to the income account, since the losses generated had benefitted Objectant by increasing the amount of income she received in the years before the Tax Shelters were sold.

For obvious reasons, the executors' account does not reflect the trustees' sale of the two remaining Tax Shelters, the related tax payments or the trustees' dispute with Objectant regarding the allocation of those taxes, since all of these events occurred after the assets were distributed in kind to the Marital Trust. Nonetheless, Objectant included in the 2019 Objections an introductory section, titled "Background," which is a narrative addressed to these events. Notably, none of the five enumerated and highly detailed "Specific Objections" that follow is related to the Tax Shelters.

Objectant now asks for leave to amend her objections to incorporate the "Background" section of the 2019 Objections into her "Specific Objections." Objectant claims that she merely seeks to reorganize and reword her prior pleading for purposes of clarity. However, even a cursory review of the proposed amended pleading makes clear that Objectant is seeking to import the parties' dispute concerning the propriety, timing and

consequences of the trustees' sale of the Tax Shelters into the Estate Accounting, where it does not belong.

It is unclear why Objectant is so determined to litigate these issues in this proceeding. After all, there are two other pending proceedings which raise these issues. The trustees, recognizing that they as presumptive remaindermen of the Marital Trust, had a conflict of interest with respect to their proposed reallocation of the "recaptured gains" to the Marital Trust's income account, commenced a proceeding in July 2017 asking for advice and direction and authorization to make the allocation. Objectant had filed a responsive answer and objections to that proceeding but has not yet proceeded with discovery. In addition, the trustees have filed an accounting which covers the period in which the sales of the Tax Shelters occurred. Yet, this is not the first time that Objectant has attempted to have issues relating to the estate and Marital Trust determined together. She previously moved to consolidate the two pending accounting proceedings. The court denied the motion, ruling that because discovery in the executors' accounting proceeding was far advanced while the trustees' accounting proceeding was still in its early stages, with discovery barely begun, consolidation would unduly delay the settlement of the estate (*Matter of Nicholson*, NYLJ, Jan. 6, 2020, at 21 [Sur Ct, NY County 2020]).

The cases which address whether the denial of an application

to amend a pleading pursuant to CPLR 3025(b) was an appropriate exercise of discretion have clearly defined the two situations which should inform a court's decision to deny such amendment. They are: 1) whether the proposed amendment would cause another party prejudice or surprise; and 2) whether the proposed amendment is palpably insufficient or devoid of merit (see, *Lemon v 56th and Park (NY) Owner, LLC*, 199 AD3d 64, 71 [2d Dept 2021] and cases cited therein). Both circumstances exist here. Prejudicial delay in closing the estate was the basis for the court's earlier decision to deny consolidation of the two accounting proceedings. The prejudice has only been exacerbated by the passage of time. Objectant waited nearly a year from the denial of her request for consolidation before engaging new counsel, and several more months passed before this motion was brought. In the interim, Objectant has declined to proceed with discovery in the other pending proceedings. Further, objectant would require additional discovery to support the amended objections. This alone provides a basis to deny the motion (see e.g. *Morningstar Mtge LLC v Fuller*, 182 AD3d 531 [1st Dept 2020] (denial of a motion to amend held to be a proper exercise of discretion where the proposed amendment would cause undue delay)).

Further, the proposed amendment is palpably insufficient in the context of the estate's accounting proceeding. Objectant's amended pleading would inject matters related to the trustees'

sale of the Tax Shelters into the executors' accounting when these issues are appropriately addressed in other proceedings, i.e., the trustees' accounting and the proceeding for advice and direction. Although Objectant asserts that the executors failed to disclose the timing or to explain the tax consequences of the sale of the Tax Shelters, and thus misled her into consenting to their sale to third parties, she does not argue that she would have purchased them herself under any circumstances and, indeed, makes no objection to the 2013 sale of the one Tax Shelter which did not trigger a recapture tax. Rather, the gravamen of her proposed amendment is her contention that 1) the trustees should not have sold the remaining Tax Shelters so that she, as income beneficiary, could have continued to enjoy the income tax benefits of the losses generated, and 2) having sold the Tax Shelters, the trustees should not be able to allocate any portion of the capital gains tax to the income account. Under these circumstances, to the extent that the proposed amended pleading alleges misconduct, it fails to identify the basis for a surcharge against the executors, i.e., it fails to identify conduct which resulted in injury to Objectant before the Tax Shelters were distributed in kind to the Marital Trust.² Since the basis for

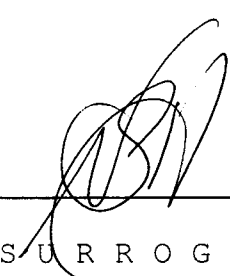
²The court has considered that the propriety of certain legal fees the executors incurred could require an examination of subsequent conduct by the trustees. However, this would not be a reason to adjudicate the objections to the trustees' conduct raised in the proposed pleading. In any event, the executors

surcharging a fiduciary is conduct that actually causes injury to the estate (see, e.g., *Matter of Jewell*, 145 AD3 1114, 1123 [3d Dept 2016] and cases cited therein), Objectant cannot prevail on her proposed objections in the estate accounting proceeding. It was only upon the sale of the Tax Shelters, which occurred after they were distributed to the Marital Trust, that Objectant could claim any suchchargeable harm.

For all these reasons, the court, in its discretion, denies Objectant's motion for leave to amend.

This decision constitutes the order of the court.

Dated: *JUNE 21, 2022*



S U R R O G A T E

_____ have offered to defer resolution of any objection to legal fees to the Trustees' Accounting.