

Matter of Milios

2023 NY Slip Op 31190(U)

April 17, 2023

Surrogate's Court, New York County

Docket Number: File No. 2022-2766

Judge: Hilary Gingold

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This opinion is uncorrected and not selected for official publication.

SURROGATE'S COURT : NEW YORK COUNTY

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Administration Proceeding,
Estate of

IONNIS MILIOS,

File No. 2022-2766
2022-2766/A

Deceased.

-----X
G I N G O L D , S .

Decedent's daughter and a friend, petitioning co-administrators, seek an order pursuant to CPLR 3211 dismissing the cross-petition of decedent's girlfriend which seeks the issuance of letters of administration to the Public Administrator.

The following papers numbered 1 through 14 were read in determining this motion:

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Affidavits-	
Memorandum - Exhibits	1-5
Affidavit of Service	6
Opposition Affidavits - Memorandum - Exhibits	7-9
Affidavit of Service	10
Reply Affirmation - Affidavit - Exhibits	11-13
Affidavit of Service	14

Ionnis Milios ("decedent") died intestate on June 10, 2022, survived by one daughter, Myrto Miliou ("Miliou"), who is a non-domiciliary alien residing in Greece. Miliou and

Virginie Stolz ("Stolz"), a New York resident (collectively, "petitioners"), sought letters of administration. Ellen Gooch, decedent's girlfriend ("cross-petitioner"), cross-petitioned for the issuance of letters of administration to the Public Administrator, alleging that Miliou was unfit to serve as a fiduciary.

Petitioners move to dismiss the cross-petition on the ground that: (1) they have priority to act as fiduciaries as a matter of law (see SCPA 1001[1][a]; SCPA 707 [1][c]),¹ and (2) the allegations in the cross-petition are insufficient as a matter of law to disqualify Miliou as a fiduciary under SCPA 707(1)(d). In opposition, cross-petitioner first argues, without any authority, that the motion is procedurally defective because, although cited in the notice of motion, petitioners fail to set forth the specific subparagraph of CPLR 3211 upon which they rely.

Although CPLR 2214(a) requires that a notice of motion specify the relief demanded and the grounds therefor, where the opposing party is aware of the grounds for the relief sought and has had ample opportunity to defend the pleading, courts have refused to dismiss the motion for failure to cite the specific statutory provision upon which relief is sought (see *Pace v Perk*, 81 AD2d 444

¹ Petitioners also allege that cross-petitioner lacks standing to file the cross-petition. It is clear, however, that as an alleged creditor, she has standing to bring the application (see SCPA 1002 [1]).

[2d Dept 1981]; *Matter of Blauman-Spindler v Blaumman*, 68 AD3d 1105 [3d Dept 2009]); *Meiselbach v New England Motor Freight, Inc.*, 2010 NY Slip Op 33526[U] [Sup Court, Nassau County 2010).

Here, cross-petitioner's opposition papers demonstrate that she had sufficient notice that petitioners were seeking dismissal of the cross-petition for failure to state a claim under CPLR 3211(a)(7). Indeed she responded to the motion as though it was brought under CPLR 3211[a][7]. Accordingly, there is no prejudice to cross-petitioner and no basis to deny the motion on technical grounds (see *Matter of Blauman-Splinder*, 68 AD3d at 144).

The standards on a motion to dismiss a pleading for failure to state a claim under CPLR 3211(a)(7) are clear. The court must "accept the facts as alleged in the [pleading] as true, accord [the pleader] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 [2017]; *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 N.Y.3d 208, 227 [2011]). However, dismissal of the claim is warranted if the allegations consist of bare legal conclusions or if the pleader "fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton*, 29 NY3d at 142; see *Simkin v Blank*, 19 NY3d 46,52 [2012]).

Under SCPA 1001[b], Miliou, as decedent's only child, has priority for letters over the Public Administrator, unless she is ineligible to serve pursuant to SCPA 707. Although Miliou is a non-domiciliary alien, she will be serving alongside Stolz, a New York resident, and is therefore eligible to serve under the exception to SCPA 707(c).

Pursuant to SCPA 707(1)(d), a fiduciary is ineligible to serve if he or she is "unfit for the execution of the office." Cross-petitioner alleges that Miliou is financially irresponsible and dishonest, and therefore unfit to serve based on (1) three emails between decedent and Miliou, dated between 2017 and 2021, where decedent questions his daughter's spending on a credit card,² and (2) the fact that Miliou listed her father's New York residence as her domicile address on the petition.³

Considering the allegations in the cross-petition and in the opposition papers against Miliou to be true, cross-petitioner does not state a claim for disqualification under SCPA 707(1)(d). As a matter of law, the allegations regarding Miliou's consensual use of decedent's credit card are insufficient. So too is Miliou's use of her father's address on the petition when she disclosed she was a

² For example, the emails reflect decedent telling his daughter to "hold your spending with Amex" and "try to keep it down to less than \$2,000 for the next month."

³ Miliou promptly updated her address to reflect her domicile address in Greece and gave the court a reasonable explanation for the error, explaining that she listed the New York address because she was living there at the time.

Greek citizen and sought letters with Stolz under SCPA 707(c) on that basis (see e.g. *Matter of Gottlieb*, 75 AD3d 99 [1st Dept 2010][affirming the trial court's appointment of an administrator c.t.a. without a hearing over objections that alleged he was a habitual drunkard, had incurred a federal tax lien and had been convicted of two traffic violations]; *Matter of Marsh*, 179 AD 2d 578 [1st Dept 1992] [conclusory allegations of improvidence and misconduct did not entitle the opposing party to a hearing on the appointment of the fiduciary]; *Matter of Resnick*, NYLJ, Dec. 8, 2022, at 26, col 1 [Sur Ct, NY County 2022][daughter appointed administrator despite a Florida felony conviction unrelated to financial misconduct and vague allegation she mishandled her father's estate]; *Matter of Stylanlou*, 2018 NY Slip Op 33145[U][Sur Ct, NY County 2018][court granted dismissal of objection to fiduciary's appointment, finding allegations of financial misconduct to be vague and speculative]).

In *Matter of Abrams*, 184 AD 3d 426 [1st Dept 2020], the First Department affirmed the trial court's dismissal of an objection to the appointment of co-administrators based on SCPA 707(1)(d), without an evidentiary hearing, where the allegations of unfitness were "scattered . . . irrelevant to operation of the estate's business or separated widely in time." The allegations here do not support a different result.

Finally, cross-petitioner argues that the motion should be

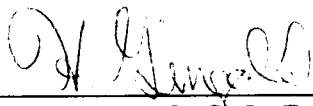
denied since she has properly pled a cause of action for a constructive trust. This argument fails as the instant proceeding pertains only to the appointment of an estate representative. Cross-petitioner will have the opportunity to raise her claims in an appropriate proceeding. Moreover, any concerns she may have in safeguarding estate assets for payment of her alleged claims can be alleviated by the imposition of a bond.

Accordingly, petitioners' motion is granted and the cross-petition is dismissed. Letters of administration shall issue to Myrto Miliou and Virginie Stolz upon their posting a bond in the sum of \$1,000,000.

This decision constitutes the order of the court.

Settle decree granting letters of administration to petitioners.

Dated: April 17th, 2023



S U R R O G A T E