

Matter of Nicole Symes Special Needs Trust
2023 NY Slip Op 32284(U)
July 3, 2023
Surrogate's Court, Bronx County
Docket Number: File No. 2018-652/A
Judge: Nelida Malave-Gonzalez
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SURROGATE'S COURT, BRONX COUNTY

JULY 3, 2023

IN THE MATTER OF
THE NICOLE SYMES SPECIAL NEEDS TRUST
dated May 10, 2013

ESTATE OF: RONALD SYMES, Deceased
File No.: 2018-652/A

In this contested matter, the third successor trustee (“Mr. Allen” or “the petitioner”) of the Nicole Symes Special Needs Trust (“the trust”) filed a petition seeking to compel the successor trustee (the “respondent” or “Mrs. Symes”), who is also the executor of the decedent’s estate, to account for the trust funds for the periods of May 10, 2013 through January 2019 and January 2019 through May 21, 2020, in her capacity as fiduciary of decedent’s estate and successor trustee, respectively. Respondent filed objections to the petition and a motion for summary judgment seeking an order, inter alia; (i) dismissing the petition, (ii) denying petitioner’s request to compel an accounting by her in either capacity, and (iii) awarding legal fees as against petitioner and the trust. Petitioner filed a verified reply to the objections and a cross motion also seeking summary judgment and an order,

inter alia: (i) dismissing respondent's objections and (ii) directing respondent to account for the trust funds for the requested time periods. For reasons discussed below the court grants respondent's motion for summary judgment to the extent that petition to compel an account is dismissed. Petitioner's cross motion for summary judgement is denied in its entirety.

It is uncontroverted that the decedent, Ronald Symes ("the decedent") executed his will and the Nicole Symes Special Needs Trust on the same date, May 10, 2013. Decedent died on January 9, 2018, whereupon his will was admitted to probate and letters testamentary, dated May 16, 2018, issued to decedent's spouse, Mrs. Symes, respondent herein.

The decedent's distributees are a spouse and four children. The will nominates Mrs. Symes as executor of his estate. Under Article 3 of decedent's will, the residuary estate is distributed equally between three of his four children excluding his daughter, Nicole Symes ("Nicole"), for which he explains "she currently has sufficient resources to provide for her needs" (Article 1), referring to the trust. Article 12 of the will, referred to as "Takers of Last Resort" states, "My Executors or my Trustees shall distribute any property that is not otherwise disposed of under my Will to the Nicole Symes Special Needs Trust, dated May 10, 2013." This is the only mention of the trust under decedent's will.

The trust nominates the decedent as trustee, who served as such until his death on January 9, 2018. Thereafter, pursuant to the trust,

Mrs. Symes served as successor trustee, until May 21, 2020. During that time, in or around February 13, 2019, Mrs. Symes, as fiduciary of decedent's estate, filed an affidavit of assets with the court pursuant to Uniform Rules 207.20. On or around May 21, 2020, pursuant to the powers enumerated under Article 6 of the trust, George Allen ("Mr. Allen"), petitioner herein, removed Mrs. Symes as successor trustee and appointed Sherilla Symes ("Sherilla") second successor trustee. Thereafter, on or about December 9, 2020, petitioner, Mr. Allen was appointed third successor trustee and filed the instant proceeding to compel an accounting on or about March 13, 2021.

In his petition, Mr. Allen states that the value of the trust is unknown. However, he believes \$1 million was to be used to fund an annuity for Nicole's benefit and another \$2 million, the remaining settlement proceeds from a cause of action, was used to fund the trust, consisting of real property and bank accounts. The petition states that many requests have been sent to Mrs. Symes to provide information regarding the trust for the period of 2013-2018 and 2019-2020, and those requests were denied. Petitioner states that no accounting has ever been filed, the total value of the trust is unknown at this time and he requests that Mrs. Symes file an accounting for the trust for the periods of May 10, 2013- January 9, 2018, as fiduciary of the deceased fiduciary, and from January 9, 2018-May 19, 2020, the period for which she served as successor trustee.

In her objections, Mrs. Symes argues that the petitioner's claims are barred based on: (i) lack of standing to commence this

proceeding, (ii) the applicable statute of limitations, (iii) the doctrine of laches, and (iv) SCPA 1802, 2205 and 2207. Further, Mrs. Symes argues that petitioner is not entitled to equitable relief. According to Mrs. Symes, during 2013-2018, when decedent served as trustee, and during 2018-2020 when she served as successor trustee, no accounting was requested by Nicole or petitioner, nor were any objections or concerns raised regarding the administration of the trust. Mrs. Symes states that in her capacity as executor of decedent's estate she collected estate assets, distributed them to the beneficiaries, received receipts and releases and closed the estate account in 2020 and therefore, no longer has any funds of the estate. She further alleges that it is uncontested that at no time during the years 2018 and 2019 while she served as executor of decedent's estate did Nicole, or any interested party, including petitioner file a notice of claim or object to the financial actions of the decedent, as trustee of the trust. Further, she argues that petitioner knew or should have known that the estate matter was closed and no claims could be filed against the estate.

Mrs. Symes argues that in 2019 she provided an accounting summary of her financial actions which was approved by Nicole, and notes that in 2020 she turned over all trust records, books and financial information to the second successor trustee, Sherilla, and therefore, no information is available to her to provide an accounting. She states that the second successor trustee never requested an accounting or inquired about the financial actions of either herself or that of the decedent, in relation to the

trust.

In his reply to respondent's objections, Mr. Allen states in pertinent part, that Mrs. Symes' objections and defenses raised are meritless and the objections should be dismissed. First, Mr. Allen argues that SCPA 2205 (2)(g) clearly allows a trustee to request an accounting from predecessor trustees of a trust, and therefore, as the third successor trustee, he has standing in this matter to seek an accounting. In relation to Mrs. Symes' defense that the relief is barred by the statute of limitations, Mr. Allen argues that in accounting proceedings, the 6-year period governing limitations begins to run when the trustee openly repudiates his fiduciary obligation and avers that neither the decedent nor Mrs. Symes openly repudiated their fiduciary duties while serving as trustee and successor trustee, respectively (*Matter of Henry Behr*, 191 AD2d 431 [2d Dept 1993]). Therefore, he argues the statute of limitations period has not begun and cannot be sustained as a matter of law. Since the time to bring a proceeding has not been invoked, he argues that Mrs. Symes' laches defense also fails (see *Estate of Barabash*, 31 NY2d 76 [1972] [holding that "[t]he defense of laches was unavailable because Respondent never repudiated [her] duty"]).

Mr. Allen argues that the objections under SCPA 1802, 2205 and 2207(2) are unsustainable. He contends that SCPA 1802 only provides that the fiduciary cannot be held personally liable for funds collected and distributed in good faith, it does not bar a request for an accounting. Further,

SCPA 2205 (2)(g) clearly allows a successor fiduciary to request an accounting from previous trustees and this provision supports his request for an accounting. Mr. Allen urges that pursuant to SCPA 2207, the court may direct Mrs. Symes to file an accounting as the executor of the estate of Ronald Symes, noting that an executor of a deceased fiduciary may be made to account as his testator might be (see *Matter of Clark*, 119 NY 427 [NY 1890]) [holding that the fiduciary] had the authority to wind up trusts which had been terminated by trustees' death and to account to the persons entitled [thereto]; see also *In re Brockway's Will*, 111 NYS2d 849, 1952 NY Misc LEXIS 2578 [Sur Ct, New York County 1952]).

Lastly, he alleges that the releases for the annual accounting forms that Nicole was asked to sign had been notarized prior to her signature and moreover, that Nicole is under a serious disability due to her medical malpractice claim and therefore it is irrelevant whether or not she requested an accounting. Although he previously lacked standing to request an accounting, as trustee, he now has a right to an accounting to ascertain how the funds of the trust were used. Accordingly, he asks the court to strike the objections and require respondent to file an account for the time in which Ronald Symes was trustee and for the time during which respondent served as successor trustee.

In her motion for summary judgment Mrs. Symes argues that petitioner's request for two separate compulsory accountings, i.e., an accounting for Ronald Symes, the decedent and initial trustee of the trust,

and an accounting from Mrs. Symes, the first successor trustee of the trust, is improperly conjoined with the prior proceeding to probate the decedent's will (File No. 2018-652). She asserts that petitioner knowingly misrepresented to the court that the trust is a testamentary instrument, created under the will, in an attempt to avoid paying the required fee for such filings. She states the trust created for Nicole is a private irrevocable inter vivos trust that is neither a testamentary trust nor a pour-over trust and is separate from decedent's will. As such, the request for Mrs. Symes to render these accountings are in her capacity as the successor trustee under the trust and not in her capacity as executor of decedent's estate, and since the trust has no relation to the estate, the petition should have been filed as an independent trust accounting proceeding. She states that petitioner is not requesting an accounting for decedent's estate and improperly seeks to compel an accounting by Mrs. Symes, in her former capacity as the legal representative of the decedent's estate, for the time decedent served as trustee. Further she argues, along with the improper proceeding being filed, that petitioner failed to name or serve citation upon all interested parties to the trust, specifically, the second successor trustee; and therefore the court has not obtained jurisdiction to hear the matter, and the matter should be dismissed.

Mrs. Symes urges that, to the extent that the request is for her to account as executor of decedent's estate, she is immune from claims not brought in a timely manner, where she would not have knowledge of such

claims and the assets of the estate are distributed in good faith (see SCPA 1802, see also *Matter of Bailey*, 147 Misc 2d 46 [Sur Ct, Bronx County 1990], see also, *In re Zirinsky's Estate*, 10 Misc 3d 186 [2005]). Moreover, she argues, that a Surrogate court can deny a petition for a compulsory accounting where, as here, the estate has been settled and the beneficiaries consented to it (see *In re Wagner's Estate*, 119 NY 28 [1890]).

According to Mrs. Symes, the three year statute of limitations for claims against the decedent Ronald Symes for conversion or replevin has passed (CPLR 214 (3); see also *Vigilant Insurance Company v Housing Authority of El Paso Texas*, 87 NY2d 36 [1995]). She states that since petitioner exercised his powers under the trust since early 2020, with any degree of inquiry, he knew or should have known the estate of Ronald Symes was distributed and settled in 2019, and she no longer had assets of the estate to account. For these reasons, he also knew or should have known that all records relating to the trust were given to the second successor trustee, whom he appointed, and therefore she has no assets, funds, accounts, books or records to provide an accounting.

Moreover, she urges, that if the court entertains petitioner's request to compel accountings, although improperly commenced, each request should be barred by the doctrine of laches (*Wertheimer v Cirker's Hayes Storage Warehouse, Inc.*, 300 AD2d 117[1st Dept 2002]; see also, *Kverel v Silvermon*, 172 AD3d 1345 [2d Dept 2019]). She states petitioner

knew that the decedent died in January of 2018 and yet no accounting was requested until 3 years after the decedent's estate was settled and assets distributed. The time petitioner waited to seek this relief has resulted in unavailability of information, witnesses and records (see *In re Linker*, 23 AD3d 186 [1st Dept 2005] [supporting the proposition that the petition should be dismissed under the doctrine of laches where the accounting party has been deceased for several years and critical records are no longer available to respondent due to petitioner's delay in seeking an accounting]).

She states that under Paragraph 17 of the supplemental provisions of the trust which reads, in part, "the release of the beneficiary shall settle the account and release the trustee against a later claim by any interested party," she therefore is not required to file an accounting pursuant to the terms of the trust (see Supplemental Provisions of the Special Needs Trust for Nicole Symes, paragraph 17). She argues that such exculpatory provisions in inter vivos trusts are valid and enforceable where the trustee acted in good faith toward the settler and beneficiaries (*Bauer v. Bauernschmidt*, 187 AD2d 477 [2d Dept [1992] citing *Matter of Cowles*, 22 AD2d 365 [1965], *aff'd* 17 NY2d 567 [1966]). She states that while she was under no obligation to do so, an informal accounting was provided to Nicole, who signed a release, and waived a formal accounting and any claims against the trustee (she attached the informal accounting as an exhibit). She also states her final account as first successor trustee of the trust was

provided to the second successor trustee and her counsel, who is alleged to be petitioner's counsel herein.

She further reiterates her objection that the requests herein are barred pursuant to SCPA 2207 (2) which states in pertinent part that a fiduciary of a deceased fiduciary can only be compelled to turn over assets that came into her possession. Here, she states the parties acknowledge that the trust assets were turned over to the second successor trustee (see *In re Read's Estate*, 141 Misc. 716 [1931]; *In re Fithian's Estate*, 1 Con. 187 [1888], *aff'd* 53 Hun 635; *In re Moore's Will*, 169 Misc. 336 [1938]).

Mrs. Symes urges that the pleadings, affidavits and exhibits provided show that there is no genuine issue as to any material fact. She requests an order granting summary judgment in her favor against petitioner, Mr. Allen and seeks an award of counsel fees to Mrs. Symes against petitioner and the trust for expenses incurred herein.

In petitioner's reply and cross motion for summary judgement, Mr. Allen urges that Mrs. Symes' motion for summary judgment must be denied as it is procedurally defective; she failed to include a complete set of the pleadings as required under CPLR 3212 (b), and the supporting affirmation of Edward M. Shapiro, Esq. is inadmissible hearsay, and should be disregarded in its entirety. Further, he argues that the uncontested documentary evidence proves that the decedent and Mrs. Symes served as trustee and successor trustee of the trust, respectively, and are required to account.

He argues that the proceeding is not barred by the statute of limitations for a proceeding to enforce a trustee's obligations, as it begins to run from the time the trustee repudiates such obligations (*Matter of Barabash*, 31 NY2d 76 [1972]). Thus, here the applicable statute of limitations for an accounting proceeding began to run in 2018, when Ronald Symes died.

Mr. Allen urges that an accounting is needed given the fact that out of the \$4.4 million settlement Nicole received, approximately, \$1.1 million remains unaccounted for. He states that after the payment of attorney fees and the purchase of the annuities, approximately \$2,050,000 was received by Ronald Symes as [guardian ad litem] of Nicole and later as trustee of the trust. After the purchase of the real property in the amount of \$539,000 and a New York Life Variable Annuity, an account was opened by the decedent, as trustee of the trust, which was presumed to be used for maintenance of the property. The total of that account as of March 31, 2020 was \$16,180.83. He states that the remaining \$1.1 million cannot be accounted for. If Mrs. Symes cannot account for the proceeds that the decedent received as the guardian of Nicole's property and later as trustee of the trust, petitioner has a valid claim against the decedent's estate for the settlement proceeds that cannot be accounted for. While exculpatory provisions of a trust, relieving the trustee's requirement to account, are enforceable where the trustee acts in good faith towards the settler and beneficiaries, and a settler of an inter vivos trust may limit the rights of

beneficiaries to compel an accounting (*In re Kasso*, 124 Misc 2d 630 [Sur Ct Nassau County 1984]), and require only an “informal accounting” after obtaining the appropriate “receipts and releases” (*In re Lifgren*, 36 AD3d 1042, 1044 [3d Dept 2007]), any trust provisions purporting to exempt a trustee of any duty to account are void as against public policy in New York (*Id* at 631-32). Additionally, until 2021, there was no other person who had standing to bring an accounting proceeding against the trustee besides the beneficiary. He states that Nicole trusted her father to faithfully manage the trust funds and this should not be held against her. He states that Nicole started to question the status of the trust in 2018 after the decedent died and the successor trustee was appointed. He states that once a trust is created, accountability must inevitably follow as an incident (see *In re Lifgren*, 36 AD3d 1042, 1044 [3d Dept 2007]; see also Bogert, Trust & Trustees §973 [2d ed 1921]).

Additionally, he urges that Mrs. Symes’ motion is premature as there is no decision on the objections, an accounting has not yet been filed and many of the essential issues of fact in the case are within the knowledge of individuals who have not yet been deposed (see *Plaza Invs. v Kim*, 208 AD2d 704 [2d Dept 1994]; *Lewis v Agency Rent-A-Car*, 168 AD2d 435 [2d Dept 1990]). He urges that his cross motion should be granted and respondent should be required to file an accounting for both requested periods and urges that respondent's motion should be denied in its entirety.

In her affirmation in further support of her motion, and in reply and opposition to the cross motion for summary judgment by Mr. Allen, Mrs. Symes argues that the Estate of Ronald Symes and the trust are separate and apart from one another; the trust was not created under the will, it is not a testamentary trust or a pour-over trust and therefore petitioner is required to start a trust accounting proceeding not an estate accounting proceeding, citation should have issued to all interested parties and the appropriate fee should have been paid. She further states that petitioner, Mr. Allen, does not deny that the requisite fee was not paid.

She states that the attorney's affirmation provided is not hearsay, and all facts contained in the affirmation are also included in the court's file and should be considered in granting summary judgment (see *Barca v City of New York*, 13 Misc 3d 464, 466-470 [Sup Ct Bronx County 2006]; *OLR ECW, L.P. v Abreu*, 59 Misc 3d 1204 [A] 98 NYSD 501 [Table], at fn 3 [Civ Ct New York County 2018] ; *People v Jones*, Misc 3d 590, at fn. 1 [NY Crim Ct 2017]).

Further, she argues that Mr. Allen's claim that the decedent and Mrs. Symes served successively as trustees, taken alone, while true, does not constitute a basis to deny her motion for summary judgment. She reiterates that on or about May 21, 2020 she was replaced as first successor trustee and gave all documentation to the second successor trustee, Sherilla [Symes] Lestrade, including all of the assets, funds, books and records. She states that she no longer has control or possession of any assets and it is

virtually impossible for her to generate any further trust accountings. She states she can provide the accounting that she previously furnished to Nicole and counsel, who she states is now Mr. Allen's counsel. She further states, as she no longer has any trust records, it is also impossible for her to prepare an accounting for the period in which her late husband served as trustee.

Mrs. Symes states that petitioner does not deny making false allegations in his opposition papers, including the fact that petitioner stated he had no information regarding the trust value, assets and administration, that he was denied requested information and that respondent was uncooperative and unwilling to account. Arguing that by his silence, petitioner admits these misrepresentations in his petition. She notes that Mr. Allen does not deny that a final trust accounting was provided, but rather complains that the trust accounting was not "filed" with the court. She urges that there is no requirement for the trustee of a private inter vivos trust to file annual, intermediate or final accounts with the Surrogate's Court. She alleges that Mr. Allen does not deny that: a) a trust accounting by Mrs. Symes was prepared and served upon Nicole and petitioner's counsel for the entire period for which she served as trustee; and, b) neither himself, Nicole nor the second successor trustee, Sherilla [Symes] Lestrade ever raised or filed any objection to the accountings provided, nor raised any objection to the financial actions of Mrs. Symes or the decedent, the initial trustee.

She argues that Mr. Allen does not dispute and fails to address

her argument that she should not be liable for any accounting or alleged financial improprieties of the decedent, in his capacity as trustee because: a) petitioner did not timely file a notice of claim against the decedent's estate, prior to the assets being distributed, settled and closed in 2020; and, b) under SCPA 2207 (2) no trust assets were ever a part of the decedent's estate or ever came into respondent's possession as executor of decedent's estate. She also notes that petitioner fails to meaningfully address her contention that under the circumstances, his request for an accounting is barred by laches, and argues that petitioner fails to distinguish the cited case law supporting this proposition.

Further, she concludes that, instead of countering her showing that this trust accounting is defective as filed, petitioner argues that her motion for summary judgment be denied because the pleadings were not annexed to respondent's moving papers. Mrs. Symes urges that she annexed all pleadings to her reply to the cross motion, and argues that under these circumstances such a technical oversight should be deemed non-prejudicial to the party opposing the summary judgment (*Long Island Pine Barrens Society, Inc. v County of Suffolk*, 122 AD3d 688 [2d Dept 2014]). In this context, she argues, a movant for summary judgment cures its procedural defect by annexing the pleadings to its reply papers (*Smith v Kaplan Belsky Ross Bartell, LLP*, 126 AD3d 877 [2d Dept 2015]). Noting that this precedent is emphasized in *Pandian v New York Health & Hosps. Corp.*,

in which the court unanimously held that “we reject the contention that the court should have dismissed defendants’ motion for failure to annex their answer to the initial moving papers, inasmuch as the responsive pleading was attached to the reply papers” (54 AD3d 590, 591 [1st Dept 2008]; *Montalvo v Episcopal Health Servs., Inc.*, 172 AD2d 1357 [2d Dept 2019]; *Avalon Gardens Rehab. & Health Care Ctr., LLC v Morsello*, 97 AD3d 611, 948 [2d Dept 2012]). Mrs. Symes argues that none of the cases cited by Mr. Allen on this issue involved a summary judgment movant curing the procedural defect by annexing the pleadings to their reply papers.

Lastly, she argues that petitioner’s opposing and cross-moving papers consist solely of an attorney’s affirmation with no personal knowledge of the facts and no affidavit by anyone with personal knowledge has been submitted. It is well settled that the affirmation of an attorney with no personal knowledge of the facts has no probative value and is insufficient to oppose a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Oquendo v Rosgro Realty Corp.*, 117 AD2d 528 [1st Dept 1986]). Therefore, she argues, petitioner’s papers are inadequate to oppose her motion for summary judgment or support his cross motion.

She requests an order : (a) granting summary judgment in her favor and against petitioner, George Allen; (b) denying petitioner’s cross motion; and (c) awarding counsel fees to respondent against petitioner and the trust for having to defend against the instant litigation.

Summary judgment cannot be granted unless it clearly appears that no material issues of fact exist (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]; *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs. Inc.*, 46 NY2d 1065 [1979]). When the movant makes out a prima facie case, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference, and issues of credibility may not be determined on the motion but must await the trial (see *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

First, in regards to petitioner's argument that respondent's motion for summary judgment should be dismissed as defective, the court finds any alleged defect by respondent for failing to attach the pleadings to her motion for summary judgment is cured and the court will consider respondent's motion for summary judgment on the merits (see *Smith v Kaplan Belsky Ross Bartell, LLP.*, 126 AD3d 877 [2d Dept 2015]). Although respondent failed to attach the pleadings to her motion for summary

judgment, the court's acceptance and consideration of the merits of the motion did not cause any prejudice to petitioner who was in possession of the pleadings and filed a reply to those pleadings prior to respondent's motion being filed. Further, any defects in respondent's filing was cured by her attaching the pleadings to her reply (see *Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590, 591 [1st Dept 2008]; see also *Long Island Pine Barrens Society, Inc. v County of Suffolk*, 122 AD3d 688, 691 [2d Dept 2015]).

A testamentary trust, created by a decedent's will, is subject to probate after the decedent's death. However, an inter vivos trust, created during the decedent's lifetime, is not subject to probate. (see EPTL §§1-1.5 &1-2.20). It is uncontroverted that the decedent's will was signed on the same date the trust was created and signed, namely May 13, 2013. The trust was funded by proceeds received by a settlement of a cause of action and created during decedent's lifetime.

Although the trust is mentioned in the will as "Taker of Last Resort" under Article 12, the testator's intent to keep the trust separate from the will is made clear in Article 1 of the will, in which the decedent names his four (4) children and indicates for purposes of the will all references to "my child" or "children" shall exclude Nicole, stating she has sufficient means to provide for herself. The will does not contain any "pour-over" provisions indicating any portion of the estate is to be used to fund the trust, nor is there a specific bequest to the trust under the will.

It is clear that the trust is an inter vivos instrument, and not subject to probate (see EPTL §§1-1.5 &1-2.20). As such, petitioner's proceeding to compel an accounting of the trust is improperly filed under the probate proceeding. Given these facts, the request for a trust accounting is denied.

Assuming arguendo, the petition was properly commenced, contained no procedural or jurisdictional defects, and the court was to entertain and consider the merits of the petition, objections, and the parties' respective motions for summary judgment, the court's decision would be the same.

It is well settled that a fiduciary, as an executor or a trustee, is obligated to account for his or her decisions and actions in administering an estate or trust (see generally SCPA Article 22; see also *Matter of Hunter*, 4 NY3d 260 [2005]). The SCPA does not require a fiduciary of a trust to give periodic or intermediate accountings, however, where trusts are managed over a lengthy period, trustees often account periodically, and a trust accounting is required when the trust relationship is terminated, when a petition for a compulsory accounting is filed or when a trust agreement requires an accounting (see SCPA Article 22, see also Turano Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 2205, at 18). While formal accountings of an estate are done in the context of a judicial proceeding, "[a] fiduciary may account informally by obtaining receipts and releases from interested parties regarding the handling of the

estate or trust (*Matter of Hunter*, supra at 268 n3). Such an informal accounting is as effectual for all purposes as a settlement pursuant to a judicial decree (*Matter of Leogrande*, 13 Misc 3d 1070 [Sur Ct, NY County 2006]; see also *Matter of Wagner*, 119 NY 28 [1890]).

Upon request, and in the best interest of the estate, the court may make an order requiring a fiduciary to file an intermediate or final account within such time and within such manner as ordered by it (SCPA 2205 [1] [a]). Such an order may be done by the court's own initiative or on the petition of any interested party or a successor fiduciary when the letters of the predecessor have been revoked or the predecessor has been removed (see SCPA 2205 [2]).

When a fiduciary dies, the court may grant to the fiduciary of the deceased fiduciary all of the rights and powers of the deceased fiduciary, subject to the duties and liabilities of the deceased fiduciary (SCPA 2207[7]). If an accounting proceeding is pending on the death of the fiduciary, the proceeding may continue where the fiduciary of the deceased fiduciary avails himself to the court (see SCPA 2207[3]). The fiduciary of the deceased fiduciary may voluntarily account for the acts and doings of the deceased fiduciary and for the property of the estate which had come into the possession of [the deceased fiduciary], whether or not such property has come into the hands of the fiduciary of the deceased fiduciary, however, [he] shall not be accountable for such property except to the extent that he shall have assets of the estate of the deceased fiduciary (see SCPA 2207[2]).

In considering motions for summary judgment, the record of the cross motion becomes the record of the original motion, and the court may review the record in its entirety, including a review of the procedural history (see *Barca v City of New York*, 13 Misc 3d 464 [Sup Ct, Bronx County 2006]). In reviewing the matter herein, it appears the probate proceeding filed in 2018 (File No. 2018-652), appointing Mrs. Symes, as executor and granting probate of decedent's will, a waiver and consent was filed for Nicole, dated February 27, 2018, indicating she received a copy of decedent's will and consents to probate of the will. An affidavit of capacity in relation to Nicole's ability to consent to the waiver was also provided, and both were accepted by the court. As such, the record indicates that the court accepts that Nicole has the capacity to knowingly and voluntarily consent to and/or waive any formal accounting, as provided under the trust. Petitioner's unsupported arguments in relation to Nicole's lack of capacity to request or waive a formal accounting is unavailing and the court finds them to be without merit.

The record shows that when finalizing matters in relation to the decedent's estate, Mrs. Symes, as executor, provided the court with an affidavit of assets of the estate and received the required receipts and releases from all interested parties, waiving the requirement of a judicial accounting (see *In re Wagner's Estate*, 119 NY 28 [1890] [stating that a compulsory accounting may be denied where the estate is settled and all of its beneficiaries have consented to its settlement]). Given the fact that only

an interested party may petition to compel a fiduciary to account, and the trust is not part of the estate nor subject to probate, petitioner, both personally and in his capacity as third successor trustee of the trust, lacks standing to request an accounting in decedent's estate (see SCPA 2205).

Mrs. Symes served in two fiduciary positions, simultaneously; as executor of decedent's estate and as successor trustee of the trust. In her capacity as executor of decedent's estate, Mrs. Symes is only accountable for the assets and property of the estate (see SCPA 2207[2]). There is no indication that trust assets were part of the decedent's estate or that Mrs. Symes, as executor, was in receipt of funds to be distributed to the trust. Distinguishing this from the *Matter of Clark*, (119 NY 427 [NY 1890]), where the court ordered a judicial accounting by the fiduciary of the deceased fiduciary, when trust funds were deposited into the trustee's personal account months prior to his death, before being deposited into the trust and the beneficiary filed a petition to compel an account the day before the fiduciary was appointed to the deceased trustee's estate. Accordingly, Mrs. Symes, in her capacity as executor of decedent's estate, is not accountable for the trust assets and cannot be compelled to account for such in her capacity as decedent's executor. As fiduciary of the deceased fiduciary, i.e., executor of the deceased trustee, Mrs. Symes may voluntarily, but is not required to account for decedent's actions as trustee (see SCPA 2207[2]). At the time of decedent's death, there was no on-going proceeding requesting the decedent to account as trustee nor for Mrs. Symes to account

for the period for which decedent served as trustee and therefore she is not accountable for decedent's actions as trustee for the period of 2013-2018. Petitioner's request for an accounting for the period 2013-2018, the time for which decedent served as trustee of the trust, is denied.

The trust provides in pertinent part, "to the fullest extent permitted by law, the Trustee shall be relieved of any requirement to submit accounts (including periodic accounts) for judicial settlement, although the Trustee may do so. Even without judicial settlement, the written consent of all available trust beneficiaries shall settle the account and release the trustee as against a later claim by any interested party. . . to the same extent as would a judicial settlement before all appropriate parties (Nicole Symes Special Needs Trust Exhibit A-Supplemental Provisions Part 1 A. 17). A person shall be regarded as unavailable to give any consent. . . if the person has not reached the age of eighteen (18), or the Trustee determines, in the Trustee's reasonable discretion, that the person is not competent . . . or available at a reasonable time for this purpose (Nicole Symes Special Needs Trust Article 7.2).

As third successor trustee of the trust, petitioner has standing to compel an accounting of the trust assets (SCPA 2205[g]). However, respondent provides a signed and notarized receipt and release by Nicole dated December 8, 2019, acknowledging and approving the 2018 Annual Summary and the 2018 and 2019 Trustee Commissions, referred to as the "Account," and waiving a formal accounting for the period of January 9,

2018-December 31, 2018, giving the same effect as a settlement pursuant to a judicial decree and, thereby relieving any obligation to file a judicial settlement (*Matter of Hunter*, 4 NY3d 260 [2005], see also *Matter of LeoGrande*, 13 Misc 3d 1070, 1076 [Sur Ct, New York County 2006]; see also *Matter of Wagner*, 119 NY 28 [1890]). Petitioner's contention that Nicole was unable to sign the receipt and release because of a disability is unpersuasive, given the affidavit of capacity provided and accepted by the court and the lack of evidentiary proof provided to indicate her inability to consent at the time of her signing the receipt and release. Similarly, the court is not persuaded by petitioner's claim that the receipt and release signed by Nicole had been notarized prior to her signing. These claims are unsupported by admissible evidence and hold no probative value (see *Zuckerman v City of New York*, 49 NYS2d 557 [1980]; see also *Oguendo v Rosgro Realty Corp.*, 117 AD2d 528 [1st Dept 1986]).

Petitioner provided a signed copy of the appointment and the acceptance of trustee appointment for Ms. Sherilla Symes, as second successor trustee, dated May 21, 2020. Respondent provided a signed and notarized final trust account with schedules and sworn statement, dated April 29, 2020, and argues that although not required, a formal accounting was provided to the second successor trustee. Within the sworn statement, Mrs. Symes provides that the accounting is for the period of January 9, 2018 through April 30, 2020, and indicates that all assets, income, accounts,

books and records of the trust, along with a signed, written and witnessed resignation as successor trustee were turned over to the second successor trustee on or about May 15, 2020. Petitioner does not deny that such records were turned over to the second successor trustee and her counsel, who is alleged to be petitioner's counsel in the instant matter, nor does petitioner deny that neither Nicole nor Sherilla objected to the accounting provided by Mrs. Symes. Petitioner provides no admissible evidence indicating any wrong doing by Mrs. Symes in her capacity as successor trustee, or that Nicole or Sherilla had concerns in relation to the administration of the trust; in essence he states that "he wants to know how the trust funds were spent," which is shown by the accounting respondent provided to the second successor trustee and filed with the pleadings herein.

The record indicates that Mrs. Symes provided the second successor executor a final accounting of all assets of the trust as required by law and in compliance with any requirements under the trust (see SCPA Article 22, see also Nicole Symes Special Needs Trust Article 17). There are no circumstances presented that would warrant the court to order a formal judicial settlement of the trust account (see *In re Lifgren*, 36 AD3d 1042 [3d Dept 2007]; *Matter of Kassover*, 124 Misc 2d 630 [Sur Ct Nassau County 1984] [where these courts found a judicial settlement necessary where there was self-dealing, allegations of wrong doing and breach of fiduciary duties]).

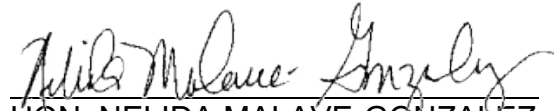
Accordingly, Petitioner's cross motion for summary judgment

is denied in its entirety. Respondent's motion for summary judgment is granted to the extent that the petition to compel an accounting is dismissed. Respondent fails to make any factual assertions or provide any statutory provisions warranting her request for attorney's fees. As such, respondent's request for attorney's fees is denied (see *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1 [1986])

The court considers the remaining arguments by the parties and finds them to be beyond the scope of the issues presented and need not be addressed.

This decision constitutes the order of the court.

Proceed accordingly.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE