

**Foncette v Daniel**

2023 NY Slip Op 33124(U)

September 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 525410/2021

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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KENRICK FONCETTE,

Plaintiff,

Decision and order

- against -

Index No. 525410/2021

SHARON DANIEL,

Defendant,

September 7, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1 & #2

The petitioner has moved seeking to compel the respondent "to provide an accounting and a record of all receipts, disbursements, and transactions entered into by the Respondent, and to deliver any property belonging to Whilma Foncette to her Guardianship Estate" (see, Verified Petition, ¶1 [NYSCEF Doc. No. 1]) pursuant to GOL § 5-1510(2). The respondent has filed a cross-petition essentially seeking a dismissal of the petition. Papers were submitted by the parties and after reviewing all the documents available on NYSCEF and all the arguments, this court now makes the following determination.

The petitioner and the respondent are siblings. Their mother, Whilma Foncette, was declared incapacitated in a decision and order dated April 1, 2021 (Index Number 512612/2020). The respondent was appointed Guardian of the property, and another sibling, Karen Moore was appointed Guardian of the person. As noted, the petitioner brings this petition seeking, essentially, an accounting from the respondent regarding her duties as the agent under Whilma Foncette's power of attorney until her

appointment as Property Guardian. The respondent seeks to dismiss the petition, arguing it has no merit.

Conclusions of Law

General Obligations Law § 5-1510(2)(e) states that concerning the duties of a power of attorney "a special proceeding may be commenced pursuant to this section for any of the following additional purposes: to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal" (id). Pursuant to that statute the petitioner seeks an accounting of the respondent's transactions during her tenure as agent under the power of attorney.

The respondent presents two reasons why the petition should be dismissed. First, the petitioner allegedly engaged in highly improper conduct himself including allegations he kidnaped his mother, and thus he has no basis to complain about his sister's alleged financial improprieties. Second, the petitioner has no legal basis to make the request without any evidence of wrongdoing.

Concerning the respondent's first argument, the mere fact the petitioner may have acted improperly does not foreclose his ability to seek an accounting. As the court observed in In re Walter K.H., 31 Misc3d 1233(A), 930 NYS2d 177 [Supreme Court Erie County 2011] "the duty of a fiduciary is owed to the principal,

in this case Rosalie H., not to any third party" (id). Thus, the petitioner's conduct has no bearing on whether he can pursue an accounting on behalf of the principal.


Concerning the legal basis for the petition, a careful reading of the statute in question notes that a petition may be filed to "approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal" (GOL §5-1510(2)(e)). Consequently, there is no right that entitles the petitioner to obtain copies of the above noted information. Rather, a hearing may be conducted where the court may be asked to "approve" all transactions undertaken by the agent. Thus, in Bonczyk v. Williams, 119 AD3d 1124, 990 NYS2d 304 [3<sup>rd</sup> Dept., 2014] the court noted that "petitioners commenced this special proceeding pursuant to General Obligations Law § 5-1510(2)(e) seeking judicial approval of the receipts, disbursements and transactions entered into by respondent on behalf of decedent" (id). Therefore, there is no specific requirement that mandates an agent must prepare an accounting on behalf of an interested party. Rather, a court proceeding can be commenced where all such expenditures made by the agent on behalf of the principal can be evaluated. However, the petition does not allege any improper conduct by the respondent. The petition does state that "petitioner has long feared that there has been significant waste and misappropriation of Ms. Foncette's

resources during Respondent's time as agent" (see, Verified Petition, ¶13 [NYSCEF Doc. No. 1]). However, other than that conclusory and vague assertion, there is no allegation of any misconduct that even demands a court hearing on the matter. Although the petitioner may not be aware of the respondent's expenditures and may not know with any certainty of any improprieties, nevertheless, some allegation requiring the court's involvement must be alleged in the petition. As the court held in Sheridan v. Silver, 2021 WL 5331549 [Supreme Court New York County 2021] "the Court finds that petitioner has not met her burden to compel the Court to require approval of the transactions at issue...It is undisputed that respondent is acting under a broad power of attorney that is not subject to any limitations. Under these circumstances, the Court declines to intervene without some actual showing of wrongdoing. On these papers, petitioner only offers speculation and innuendo about supposed malfeasance" (id). Similarly, in this case there is no allegation of wrongdoing at all. Therefore, based on the foregoing, the motion seeking the petition is denied and the cross-motion seeking, essentially, to dismiss the petition is granted.

So ordered.

DATED: September 7, 2023  
Brooklyn N.Y.

ENTER:

  
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Hon. Leon Ruchelsman, JSC