

Matter of Gerard (Peluso)

2023 NY Slip Op 34701(U)

July 24, 2023

Surrogate's Court, Albany County

Docket Number: File No. 2017-398/E

Judge: Stacy L. Pettit

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State of New York

Surrogate's Court, Albany County

In the Matter of the Petition of LOUISE GERARD, as Administrator of the Estate of MICHAEL PELUSO, Deceased, to Determine the Validity and Enforceability of a Claim Against the Estate.

DECISION AND ORDER

File No. 2017-398/E

Appearances: Gerard Parisi, Attorney for Petitioner Louise Gerard, Parisi, Coan & Saccocio, PLLC, Schenectady

John R. McFadden, Attorney for Respondent Dolores Peluso, Rhoades, Cunningham, & McFadden, PLLC, Albany

Albert F. Dingley, Attorney for Respondent Albany County Department of Social Services, Albany

Pettit, S.,

Pending before this Court is a motion by respondent Albany County Department of Social Services (hereinafter ACDSS), as creditor of the estate, for an order, among other things, granting summary judgment to ACDSS finding that its claim for \$591,810.99 is valid. Petitioner Louise Gerard, as administrator of the estate, and respondent Dolores Peluso (hereinafter Peluso), as beneficiary of the estate, have opposed the motion and it has been submitted for decision.

Decedent died intestate a resident of Albany County on March 18, 2017, survived by his siblings: petitioner, Peluso, and Louis Peluso.¹ On July 18, 2017, this Court issued letters of administration to petitioner.² On October 5, 2017, a notice of claim was presented to petitioner for \$591,810.99 by claimant Department of Health (hereinafter DOH),³ as a preferred creditor, for Medicaid paid for medical assistance provided to decedent. On October 26, 2017, petitioner rejected the claim,⁴ and no action or proceeding was initiated by the claimant thereafter. Petitioner's rejection was based upon her belief that decedent received the Medicaid payments under a distinct Social Security Disability plan designed for disabled workers who continue to work full time. Petitioner alleged that the program, known as Social Security Work Incentive section 1619 A and B, allowed for Medicaid coverage for personal care aides only to assist the full-time worker and need not be repaid.

In September 2021, petitioner commenced an accounting proceeding for decedent's estate, citing Peluso, the estate of Louis Peluso, DOH and NGM Insurance Company, as the surety on the bond. Prior to the return date, petitioner and Peluso stipulated that the filing of objections to the accounting by Peluso could be delayed until a determination was made as to the claim and filed the stipulation with the Court. ACDSS did not appear on the return date of the accounting citation but subsequently filed objections to the accounting. In April 2022, petitioner commenced a proceeding pursuant to SCPA 1809 to determine the validity and enforceability of the claim,

¹ Louis Peluso post-deceased decedent, survived by his spouse, Maria Peluso.

² In connection with the issuance of letters of administration, petitioner obtained a bond in the amount of \$166,666.67 from NGM Insurance Company.

³ The claim was brought by HMS, Inc., as authorized by the Commissioner of ACDSS. The claim identified the claimant as "New York State Department of Health, as supervising governmental entity of Medicaid administered by the Albany County Department of Social Services, (hereinafter, collectively "NYS DOH"), with an address of New York State Department of Health Corning Tower, Empire State Plaza, Albany, NY 12223."

⁴ Petitioner mailed the rejection notice to DOH at the address designated on the claim for receipt of payment – a lockbox in Massachusetts – and filed a copy with the Court.

requesting that the claim be disallowed. Herein, petitioner asserts that the claim should be dismissed due to ACDSS's failure to timely answer the accounting petition. Petitioner further points out that the validity and enforceability of the claim should be determined before the accounting proceeding continues, as all the remaining resources of the estate on hand are at stake in the present claim (see SCPA 1809 [3]).⁵ ACDSS timely answered the petition. Therein, it asserted that it is the claimant on behalf of the DOH under Social Services Law §§ 61, 62 (1), 104 and 369 as the social services district that provided medical assistance to decedent Michael Peluso. ACDSS disputed its default in the accounting, arguing that service of the accounting citation was improperly made on DOH.⁶ Peluso appeared in this proceeding in support of petitioner's position. The estate of Louis Peluso and the surety on petitioner's bond were both served with the citation but failed to appear. The parties engaged in discovery on the issue of ACDSS's claim. ACDSS now moves this Court for an order under CPLR 3212 for summary judgment on its claim. Specifically, ACDSS moves this Court for an order and judgment in its favor in the amount of \$591,810.99, plus interest, for Medicaid payments made for the care of decedent; an order that, pending determination of this motion, petitioner is stayed, enjoined and restrained from transferring, conveying, gifting, disbursing or divesting herself of any assets, in any manner that would defeat collection of the public funds of Medicaid disbursed on decedent's behalf; and an order removing petitioner as administrator.

In a proceeding to determine the validity of a claim, the claimant bears the burden of proving their claim by clear and convincing evidence (see Matter of Fiebrantz v Estate of McCormick, 43 AD2d 794, 795 [1973], affd 35 NY2d 888 [1974]). Here, ACDSS argues that it

⁵ According to the accounting, there is \$269,667.37 on hand.

⁶ The affidavit of service states that the accounting citation was mailed to DOH at the Corning Tower address listed on the claim.

has a just claim against decedent's estate for Medicaid paid to decedent when he was 55 years of age or older, and that it timely notified petitioner of its claim. ACDSS refutes petitioner's position that decedent's Medicaid payments need not be repaid because Social Security Act § 1619 allows Medicaid coverage for personal care aides. ACDSS explains that Social Security Act §1619, known as the Medicaid Buy in for Working People with Disabilities, is an eligibility determination that can also be found at Social Security Law § 366 (1) (c) (5) and (6), and § 367-a (12) on eligibility. According to ACDSS, those statutes relate only to continued eligibility for Medicaid allowing an individual to earn income. Estate recovery of Medicaid claims is addressed by Social Security Act § 1917 (b) (1) and Social Security Law § 369 (2) (b), and is not mentioned in Social Security Act § 1619. Social Security Law § 369 states that recovery of "medical assistance for needy persons . . . must be pursued . . . from the estate of an individual who was [55] years of age or older when he or she received such assistance" (see also 42 USC § 1396p (b)(1); Matter of Abraham XX., 36 AD3d 1085, 1088 [3d Dept 2007], affd 11 NY3d 429 [2008]), and does not exempt those deemed eligible for assistance under Social Security Act §1619.

In response, petitioner raises no legal argument in support of her assertion that the Medicaid funds that decedent received are somehow exempt from recovery. Nor does she challenge the amount of the lien. Accordingly, the Court finds that ACDSS has established that it has a valid Medicaid claim against the estate, unless petitioner's other arguments call that status into question.

In opposition to ACDSS's motion, petitioner raises several arguments. First, she asserts that ACDSS has forfeited its claim because it failed to appear on the accounting citation return date despite being properly served. In the accounting proceeding, petitioner identified DOH as the creditor, and listed an address of Corning Tower, Empire State Plaza, Albany. Proof of service of the citation on DOH at that address was filed and no appearance on behalf of the claimant was

made on the October 19, 2021 return date. On October 22, 2021, an HMS representative forwarded an October 21, 2021 letter to the Court which had been sent to petitioner regarding the claim. Therein, HMS advised petitioner that it was a third-party liability contractor for the Office of the Medicaid Inspector General and directed petitioner to remit payment of the claim to DOH at a PO Box address in Boston, Massachusetts. The letter noted that litigation documents relevant to the above-referenced case must include the Office of the Medicaid Inspector General and ACDSS as named parties. On December 8, 2021, ACDSS filed its objections to petitioner's accounting. Thereafter, petitioner did not move to dismiss the objections or otherwise seek any relief adverse to ACDSS with respect to its alleged untimely appearance in the accounting proceeding. Rather, petitioner commenced this proceeding to determine the validity of the claim based on, among other things, ACDSS's failure to timely answer the accounting petition.

With respect to petitioner's timeliness arguments, ACDSS asserts that it did not receive proper notice of petitioner's rejection of its claim because the rejection was only mailed to a payment lockbox address, and that notice of the accounting proceeding was served on DOH, not ACDSS. Upon being served with the accounting citation, DOH sent petitioner a letter, copied to the Court, wherein it requested payment of the claim and noted that litigation documents relevant to the claim must include the Office of the Medicaid Inspector General and ACDSS as named parties. ACDSS then filed objections to the accounting, asserting that petitioner had breached her fiduciary duty by rejecting the claim and improperly diverting assets.

Petitioner argues that she is entitled to a default judgment against ACDSS in the accounting proceeding under CPLR 3215. As noted above, however, petitioner did not move for such relief in the context of the accounting proceeding. Given the confusion surrounding the proper parties to be served and their correct mailing addresses, as well as the timely filing of the claim and ACDSS's

continued participation in these proceedings, the Court declines to find that ACDSS has defaulted (see CPLR 3215 [f]; Kegelman v Town of Otsego, 203 AD3d 82, 84 [3d Dept 2021], lv dismissed 38 NY3d 1124 [2022]).

Petitioner next contends that the claimant waived its claim by not pursuing it for several years after she rejected the claim in 2017. It is well settled that “[a] waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. Such a waiver must be clear, unmistakable and without ambiguity” (Aron Law PLLC v Town of Fallsburg, 199 AD3d 1286, 1290 [3d Dept 2021], quoting Matter of Chenango Forks Cent. School Dist. v New York State Pub. Empl. Relations Bd., 95 AD3d 1479, 1484 [2012] [internal quotation marks, ellipsis and citations omitted], affd 21 NY3d 255 [2013]). “Equitable estoppel, by contrast, is a doctrine imposed as a matter of fairness that ‘preclude[s] a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted’” (Aron Law PLLC v Town of Fallsburg, 199 AD3d at 1290, quoting Matter of Shondel J. v Mark D., 7 NY3d 320, 326 [2006]).

Here, the Court is not convinced that ACDSS and/or DOH waived or should be estopped from pursuing its claim. Initially, it is noted that rejection of the claim was sent to a payment lockbox; accordingly, it has not been established that the claimant actually received notice of the rejection. In any event, once a claim is filed in an estate, that estate cannot be closed without addressing the claim (see SCPA 1808, 2202, 2203, 2205, 2210). Under SCPA 1808, “whenever a fiduciary rejects a claim in whole or in part all issues relating to the validity of the claim shall be tried and determined upon the judicial settlement of his [or her] account.” Here, petitioner filed a report pursuant to 22 NYCRR 207.42 in November 2019, explaining that the estate had not been

fully distributed because, among other things, “there is a Medicare Lien which wer [sic] are trying to resolve.” Petitioner was compelled to account by Peluso in 2021 and cited DOH on the accounting as a creditor. DOH responded to the citation within a couple of days of the return date. It appears there was some confusion about what address should be used to cite this creditor, and there may have been additional confusion about when objections were to be filed based on the stipulation executed by petitioner and Peluso that extended the deadline to file objections to the accounting until December 2021, which stipulation was filed with the Court prior to the citation return date. Since filing its objections to the accounting, ACDSS has vigorously pursued its claim. Accordingly, the Court does not find the claim is precluded by waiver or estoppel.

Petitioner next contends that ACDSS must consider the cost-effectiveness of pursuing its claim. Specifically, petitioner asserts that there are administration expenses, including her fiduciary commissions, and substantial tax liability that make ACDSS’s pursuit of its claim not cost-effective and contrary to principles of judicial economy. While it may be true that certain estate expenses take priority over ACDSS’s claim, that does not invalidate the claim. Furthermore, ACDSS has alleged that petitioner has breached her fiduciary duty, has distributed a substantial portion of the estate to herself, and allowed for excessive attorneys’ fees. Accordingly, ACDSS seeks to have petitioner surcharged for her actions. It is also noted that petitioner was required to obtain a bond in the amount of \$167,000 in order to be appointed as administrator of this estate. Thus, petitioner’s argument regarding the cost-effectiveness of ACDSS’s claim lacks merit.

Petitioner next argues that ACDSS’s collection of its claim out of estate assets would result in undue hardship. In support of this, petitioner points to language contained in DOH 11 OHIP/AM-8, which states that “[n]o recovery of Medicaid correctly paid will be pursued against all or a portion of the estate if it will result in undue hardship” (see also Social Services Law § 369

[5]). The circumstances considered to be undue hardship, however, do not appear to be present here. The DOH guidance provides as examples of undue hardship, “when the asset subject to estate recovery is the sole income producing asset of the beneficiary(ies), such as a family farm or family business and income produced by the asset is limited, or when the asset subject to recovery is real property of modest value . . . and the home is the primary residence of the beneficiaries.” This situation is not present here. Recovery of the claim against the estate assets, which were approximately \$715,000 gross, and did not consist of a residence or family business, would not result in the beneficiaries losing their home or means of employment. To the extent petitioner contends that decedent’s disability which qualified him for Medicaid constitutes compelling circumstances, the Court disagrees, as such a finding would effectively preclude recovery in all cases. As for her arguments regarding her own ailments potentially being exacerbated should be forced to repay the Medicaid claim, the Court does not find that this qualifies as compelling circumstances which would preclude recovery of the claim.

Petitioner also argues that ACDSS failed to follow its own procedure in prosecuting its claim. Petitioner points to language in Administrative Directive 02 OMM/ADM-3 which states that a local department of social services should file objections to an accounting within eight days after being served with an accounting citation by a fiduciary who has rejected its claim, or within sixty days after rejection of a claim, commence an action in a court other than Surrogate’s Court seeking payment of the rejected claim. Here, ACDSS did file objections to the accounting; however, the objections were filed over a month after the return date. ACDSS, however, was not served with the accounting citation; rather, it was served on DOH. As previously stated, this Court declines to invalidate the claim based on the timing of ACDSS’s filing of objections. It is noted

that petitioner did not move to dismiss ACDSS's objections to the accounting or otherwise raise an issue as to their timeliness when they were filed in December 2021.

Petitioner next asserts that ACDSS is at the end of the order of priority as a creditor of this estate. SCPA 1811 sets forth an order of priority for the payment of debts and funeral expenses of an estate. Petitioner asserts that there are significant tax debts, as well as funeral and administration expenses, which take priority over the claim of ACDSS. Peluso raises a similar argument in her opposition to ACDSS's motion. Specifically, she argues that she has claims against the estate for decedent's funeral expenses and burial plot, which she paid in her role as executor of the estate of Dorothy Peluso (mother of petitioner, Peluso and decedent), and that such expenses take priority over the claim of ACDSS. She further argues that petitioner and Louis Peluso received significant distributions from decedent's estate, while she had not received a distribution or been reimbursed for the funeral expenses.

Assuming that there are valid claims that take priority over that of ACDSS, the Court recognizes that there have also been significant distributions of the estate made to petitioner, Louis Peluso and to petitioner's prior attorney for legal fees. In addition, petitioner had to obtain a bond, which funds may potentially be available for payment of ACDSS's claim. Accordingly, this Court can determine that ACDSS has a valid claim against the estate without directing its payment at this time, given that there are still several issues to resolve with respect to the validity of other debts, expenses and distributions made from this estate.

As part of its motion for summary judgment, ACDSS requests that petitioner be removed as administrator and surcharged because she has improperly transferred estate assets, and engaged in self-dealing, thereby decreasing the assets available to satisfy its claim. In response, petitioner contends that, with respect to the allegations that she breached her fiduciary duties, she acted in

reliance on the advice of her counsel in rejecting the claim. “[F]ollowing the advice of legal counsel is not a defense to legal accountability when it involves a known breach of fiduciary duty” (Matter of Posner, 202 AD3d 492, 493 [1st Dept 2022]; see Matter of Rothko, 43 NY2d 305, 319-320 [1977]). The Court finds that there is insufficient information to determine whether petitioner breached her fiduciary duties, and such argument is better determined in the context of the pending accounting proceeding, as the purpose of the instant proceeding is to determine the validity of the claim of ACDSS. Moreover, the validity of other payments made by petitioner and the potential for surcharges can be more fully considered by the Court in the accounting proceeding; therefore, this argument is denied without prejudice to renewal in the accounting proceeding (see Matter of Robinson, 77 AD3d 839, 839 [2d Dept 2010]).

In conclusion, the Court does not find that there are any material issues of fact as to the validity of ACDSS’s claim for Medicaid expenses. Questions do remain as to the amount of taxes owed, the amount of other administration expenses, and whether petitioner breached her fiduciary duties as administrator of this estate thus warranting a reduction of commissions and/or a surcharge. Accordingly, it is hereby

ORDERED that the motion of ACDSS for an order pursuant to CPLR 3212 is granted to the extent that the claim of ACDSS in the amount of \$591,810.99 against the estate of Michael Peluso is determined to be a valid claim; and is otherwise denied without prejudice to renewal in the context of the accounting proceeding.

Dated and Entered: *July 24, 2023*



Hon. Stacy L. Pettit, Surrogate

Papers Considered:

- 1) Notice of Motion for Summary Judgment dated April 6, 2023; Affidavit in Support of Motion for Summary Judgment of Albert F. Dingley, Esq., dated April 6, 2023, and exhibits A-L.
- 2) Affidavit in Opposition of Louise Gerard, dated May 17, 2023, and exhibits A-F; and Memorandum of Law in Opposition of Gerard F. Parisi, Esq., dated May 17, 2023
- 3) Attorney Affirmation in Opposition to Motion of John R. McFadden, Esq., dated May 17, 2023, and exhibits A-D.