Date: January 11, 2024

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Account of Joseph Rosenbaum
as executor of the will of

LEONARD ROSENBAUM,

File No. 2010-4013/F

Deceased.

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GINGOLD, S.

The following papers were read in determining petitioner's motion filed on August 28, 2019:

	Papers Numbered
Notice of Motion dated August 26, 2019 – Affirmation of Michael H. Friedman dated August 26, 2019 and Exhibits – Affidavit of Joseph Rosenbaum sworn to August 9, 2019 and Exhibits	1-3
Notice of Cross-Motion dated October 3, 2019 – Affirmation of Michael C. Wimpfheimer dated October 3, 2019 and Exhibits – Affirmation of Moshe Rosenbaum dated September 24, 2019	4-7
Affirmation of Michael H. Friedman dated October 25, 2019 and Exhibits	8
Affirmation of Michael C. Wimpfheimer dated October 29, 2019 and Exhibits	9

The following papers were read in determining petitioner's motion filed on August 29, 2019:

	Papers Numbered
Notice of Motion dated August 23, 2019 – Affirmation of Michael A. Haskel dated August 23, 2019 and Exhibits – Affidavit of Joseph Rosenbaum sworn to August 22, 2019 – Affirmation of Avram E. Frisch dated August 8, 2019 – Affidavit of Ezra Turkel sworn to August 23, 2019 – Affirmation of Kerry Gotlib dated July 26, 2019 – Affidavit of Chaim Tesser sworn to August 9, 2019 – Memorandum of Law dated August 23, 2019	1-8
Notice of Cross-Motion dated October 3, 2019 – Affirmation of Michael C. Wimpfheimer dated October 3, 2019 and Exhibits – Affidavit of Moshe Rosenbaum dated October 2, 2019 and Exhibits	9-11

Affirmation of Michael A. Haskel dated October 28, 2019 and Exhibits	12
Affirmation of Michael C. Wimpfheimer dated October 31, 2019 – Affirmation of Moshe Rosenbaum dated October 31, 2019 and Exhibits	13-14

In this contested executor's accounting proceeding, petitioner Joseph Rosenbaum (Petitioner) filed two motions for partial summary judgment pursuant to CPLR 3212(e) seeking dismissal of certain objections to the account asserted by respondents Moshe Rosenbaum and Shoshanna Schilit (Objectants). Objectants opposed the motions and filed cross-motions. These motions are consolidated for purposes of this decision and order.

Background

Decedent Leonard Rosenbaum died on October 15, 2010. Decedent was survived by six children: Shoshanna Schilit, Yossie (Joseph) Rosenbaum, Aron Rosenbaum, Moshe Rosenbaum, Avrohom Rosenbaum and Chavie Turkel. Decedent's will dated June 24, 2010 was admitted to probate, without objection, and letters were issued to Petitioner, the nominated executor, in January 2011. Under the will, decedent's estate was to be divided among his six children, proportionally, based on the number of children of these beneficiaries (except for those beneficiaries without children). The will also named Chevra Anshei Toras Chesed, a not-for-profit religious organization which had been managed by decedent, as a beneficiary. At the time of decedent's death, the estate consisted primarily of two cooperative apartments, securities, and bank accounts, with an estimated value of two million dollars.

Petitioner filed this proceeding in 2013 seeking the judicial settlement of the estate's interim account for the period October 15, 2010 to April 30, 2013. Objectants filed objections to this account on June 9, 2014 (2014 Objections). Petitioner then supplemented the account in 2016

to account for the period April 30, 2013 through January 31, 2016. Objectants filed objections to this account on August 23, 2016 (2016 Objections). On July 13, 2017, Petitioner filed an affirmation in support of a third amended petition and accounting and Objectants filed an affidavit response thereto on August 1, 2017.

On August 28, 2019, Petitioner filed a motion partial summary judgment pursuant to CPLR 3212(e) seeking dismissal of certain objections (First Motion) and Objectants cross-moved for sanctions (First Cross-Motion). On August 29, 2019, Petitioner filed a second motion for partial summary judgment seeking dismissal of certain other objections (Second Motion) and Objectants cross-moved for various relief, including sanctions (Second Cross-Motion). The motions were marked submitted on November 1, 2019.

First Motion and First Cross-Motion

In his First Motion, Petitioner seeks dismissal of the objections insofar as they are based on an alleged debt owed by Petitioner to the estate pursuant to a default judgment (Default Judgment) entered in Supreme Court, New York County (*Leonard Rosenbaum v Joseph Rosenbaum*, 121987/00 [Ramos, J.] [Supreme Court Action]).

In the Supreme Court Action, decedent sought repayment of an alleged outstanding debt from Petitioner based on decedent's transfer of 27,000 shares of XCEED Inc. to Petitioner's brokerage account in March 2000 (Affirmation of Michael H. Friedman dated August 26, 2019, Exh. 3). Petitioner did not answer the complaint or amended complaint in the Supreme Court Action and a default judgment was entered against him in June 2001 for the sum of $823,500 based on the amended complaint. Decedent never took any action to enforce this Default Judgment during his lifetime but upon his death, Objectant Moshe sought repayment of the Default Judgment from Petitioner. As a result, Petitioner moved in the Supreme Court Action to vacate the Default

Judgment based on lack of personal jurisdiction. After a traverse hearing, the court found that while the original complaint was properly served, the amended complaint was not. Based on this, the court amended the Default Judgment to reflect the sum sought in the original complaint, which was $330,780 (Friedman Aff., Exh. 4). The court's decision was affirmed by the First Department on December 6, 2016 (*Rosenbaum v Rosenbaum*, 145 AD3d 460 [1st Dept 2016]).

Objectants allege that Petitioner's accounting is improper and inaccurate because it does not take into account the Default Judgment entered against Petitioner in the Supreme Court Action. Petitioner argues that the objections based on the Default Judgment should be dismissed because the debt underlying this judgment was repaid over 20 years ago.

In support of this contention, Petitioner relies on an unauthenticated brokerage statement for the period October 1 – November 30, 2001, which he claims shows repayment of the debt (Affidavit of Joseph Rosenbaum sworn to August 9, 2019, Exh. 1). However, even if the court were to consider this document, Petitioner has not shown how this brokerage statement supports his position. Although the statement shows the transfer of XCEED shares from Petitioner's account back to decedent's account, the number of shares transferred appears to be 1,290, which is far less than the underlying debt of 27,000 shares (Friedman Aff., Exh. 3 [Complaint, Exh. A]). Moreover, while it appears that Petitioner transferred additional shares to decedent's account at this time, it is unclear that these transfers were related to the debt.

Petitioner also submits the affirmation of Kerry Gotlib, decedent's estate attorney, which was previously submitted in support of Petitioner's efforts to vacate the Default Judgment in the Supreme Court Action (Friedman Aff., Exh. 6 [Affirmation of Kerry Gotlib dated January 2, 2015]). Attached to this affirmation are pages from a diary in which decedent kept track of the loans he extended to his children and any repayments of these loans (Friedman Aff., Exh. 6 [Gotlib

Aff., Exh. B]). Petitioner contends that these notes show that the loan from his father was repaid. However, even if the court were to consider these notes, they reflect a substantial outstanding loan from Petitioner to decedent at the time of death. According to decedent's own notes, at the time of his death, Petitioner owed debt to decedent in the sum of $21,613 and he owed a debt to decedent's beneficiary, Chevra Anshei Toras Chesed, in the sum of $226,440 (Friedman Aff., Exh. 6 [Gotlib Aff., ¶ 21]). Thus, Petitioner has not met his prima facie burden to show that the debt underlying the Default Judgment has been repaid and the motion must be denied.

The First Cross-Motion for sanctions must also be denied as Petitioner's motion is not frivolous.

Second Motion

In his Second Motion, Petitioner seeks (i) dismissal of paragraphs 2-3 of the 2014 Objections which allege that Petitioner breached his fiduciary duty to the estate by failing to diligently market and sell the estate's two cooperative apartments; (ii) dismissal of paragraph 4 of the 2016 Objections which assert that Chevra Anshei Toras Chesed is not a proper beneficiary of the estate; (iii) dismissal of paragraphs 5, 9, 11 and 14 of the 2016 Objections to the extent they assert that Petitioner wasted estate assets in his handling of a foreclosure action against a condominium apartment in New Jersey.

With regard to the cooperative apartments, Objectants allege that Petitioner acted negligently with regard to his sale of two cooperative apartments: Unit A601, a three-bedroom apartment, and Unit A602, a studio apartment, at 268 East Broadway, New York, New York, otherwise known as the Seward Park Cooperative (the Units). Objectants allege that Petitioner breached his fiduciary duty by (i) delaying the sale of the Units for several years while using the apartments to dodge creditors; (ii) selling the Units at a price that was substantially below market

value; and (iii) engaging in self-dealing by retaining Ezra Turkel, Petitioner's brother-in-law, as the estate's broker.

Under EPTL 11-1.1(b)(5)(B), a fiduciary of an estate has the "right to make the business judgment involving the time, price, manner and propriety of sale of real property." (*Matter of Assimakopoulos*, NYLJ, July 10, 2017, at 18, col 3 [Sur Ct, NY County]). "Where a sale of estate property has been properly conducted, resulting in receipt of a fair price on reasonable terms, ordinarily no objection will lie" (*Id; see also In re Lovell*, 23 AD3d 386, 387 [2d Dept 2005]). In fact, "[a]n objection as to the sale price will not prevail by showing that the fiduciary failed to sell the property for the highest price obtainable – the objectant must show that the fiduciary acted negligently, failing to exercise the diligence and prudence an ordinary person would in the conduct of her own affairs" (*Id*).

Petitioner argues that the objections regarding the sale of the Units must be dismissed because he acted diligently with respect to the marketing and sale of the Units. In support, Petitioner submits the affidavit of Ezra Turkel, who served as the estate's real estate broker in connection with the sale of the Units (Affidavit of Ezra Turkel sworn to on August 23, 2019). Petitioner retained Turkel in February 2011, immediately after he was appointed as executor of the estate (Turkel Aff., ¶ 4). At the time, the sales prices for apartments in Seward Park were still depressed, following the general recession in the real estate market and the financial crisis of 2008 (Turkel Aff., ¶ 5). Nevertheless, Turkel diligently marketed the Units by posting the listings in the building and online, promptly communicating with any prospective purchasers, and negotiating with the buyers to obtain a higher sales price for each Unit (Turkel Aff., ¶¶ 6-10). Ultimately, Turkel successfully sold the Units to third-party purchasers: Unit A601, the three-bedroom apartment, was sold in December 2012 for $790,000, and Unit A602, the studio apartment, was

sold in April 2013 for $305,000 (Turkel Aff., ¶¶ 11, 27). These prices were above average for similar apartments sold in Seward Park during this time period (Turkel Aff., ¶¶ 12-20, 28-32). Further, Turkel's commission of 3% for Unit A601, which was co-brokered, and 2% for Unit A602, were reasonable (Turkel Aff., ¶¶ 21, 27). Based on Turkel's detailed affidavit, which is also supported by the affidavit of Petitioner, Petitioner has made a prima facie showing that he acted diligently and with reasonable business judgment in the marketing and sale of the Units.

In opposition, Objectants attempt to raise an issue of fact by second-guessing Petitioner's actions. First, Objectants claim that Petitioner should have cleaned out the Units prior to marketing them, which would have resulted in a higher sales price (Affidavit of Moshe Rosenbaum dated October 2, 2019, ¶ 20). However, as Petitioner points out, storing their parents' belongings would also have been expensive and Petitioner acted reasonably in choosing to forego this expense. Moreover, there is no evidence that the Units were dirty and cluttered or that the condition of the Units resulted in a lower-than-average sales price. Objectants also argue that rather than retaining Turkel, Petitioner should have used a more experienced or larger brokerage company to sell the Units (M. Rosenbaum Aff., ¶ 20, 22). However, Turkel was familiar with the market, including Seward Park, and because he worked for a small business, Turkel was able to devote more attention to the sale of these Units. Thus, Petitioner acted well within his discretion in choosing to retain Turkel to market the Units.

Finally, Objectants attempt to create an issue of fact as to the fair market value of the Units. First, Objectants argue that Turkel used inapt comparables to reach his conclusion that the sales prices for the Units were above market value (M. Rosenbaum Aff., ¶ 23). Objectants argue that Turkel compared the sales prices of the Units to the sales prices of apartments in Hillman Housing, a different and allegedly inferior cooperative building. However, Turkel's affidavit relies primarily

on comparative prices from Seward Park and he only uses comparatives from Hillman House where no other similar sales were available. Thus, this argument lacks merit. Objectants also submit a list of what they claim are comparable sales of studio apartments in Seward Park (M. Rosenbaum Aff., Exh. U). However, the apartments on this list are not comparable to A602 as they are either at or above the tenth floor, are larger than A602, or were sold after A602 was sold. Thus, Objectants have failed to raise an issue of fact with regard to the sale of the units and any objections based on the Petitioner's sale of the Units must be dismissed (*Matter of Assimakopoulos*, NYLJ, July 10, 2017, at 18, col 3 [Sur Ct, NY County] [dismissing objection to accounting based on sales price of condominium where objectant's comparable was from a sale which occurred three years later]).

Next, Petitioner seeks dismissal of paragraph 4 of the 2016 Objections in which Objectants allege that Chevra Anshei Toras Chesed is not a proper beneficiary and seek the examination of certain books and records. This objection is improper on its face. Not only is this organization named as a beneficiary in decedent's will, but Objectants waived this objection by consenting to probate the will (*see generally Matter of Frutiger*, 29 NY2d 143, 148 [1971] [consent to probate is essentially a stipulation made by a party to a probate proceeding and court may not relieve a party from the terms thereof absent fraud, collusion, or mistake]). To the extent Objectants seek documents from the estate and the beneficiary, this relief is not the proper basis of an objection (*see Matter of Martinez*, NYLJ, December 22, 2022, at 12, col 2 [Sur Ct, NY County] [dismissing objection to account based on lack of discovery where it does not allege improper conduct by petitioner or defect in the account]). Thus, this objection must be dismissed.

Finally, Petitioner seeks dismissal of paragraphs 5, 9, 11 and 14 of the 2016 Objections to the extent these objections are based on the allegation that Petitioner wasted estate assets in handling certain property located at 143 Downing Street, Lakewood, New Jersey (143 Downing).

Decedent purchased 143 Downing in 1991 for the benefit of Objectant Moshe. He also entered into a mortgage to purchase the property, which was refinanced in 2006 (Affirmation of Kerry Gotlib dated July 26, 2019, ¶ 4 and Exh. K). While the deed and mortgage were in the name of decedent, Objectant Moshe was responsible for maintaining 143 Downing and paying all expenses (Gotlib Aff., ¶¶ 5-8 and Exhs. J [Deed], DD [1991 mortgage], L [2006 note], M [2006 mortgage]). In 2009, Objectant Moshe defaulted on the payment of the mortgage and the lender commenced a foreclosure action against decedent (*PNC Bank, NA v Leonard Rosenbaum*, Superior Court of New Jersey, Chancery Division, Ocean City, New Jersey Docket No. 24067-10 [Foreclosure Action]). After being appointed executor of the estate in January 2011, Petitioner appeared on behalf of the estate in the Foreclosure Action and actively defended the estate. Objectants now claim that Petitioner's defense of the Foreclosure Action was improper and wasteful.

Under EPTL 11-1.1(b)(13), the executor of an estate has the power to "contest, compromise or otherwise settle any claim . . . against the estate." As a result, the executor does not normally need court approval, nor the approval of a co-executor or the beneficiaries, to litigate or settle a claim against the estate (*see Matter of Rosen*, 129 Misc2d 753 [Sur Ct, Westchester County 1985]; *Matter of Rappaport*, 102 Misc2d 910 [Sur Ct, Nassau County 1980]). However, while a fiduciary has broad discretion to exercise this power and to make tactical decisions, he must act rationally and with the goal of preserving as much of the estate as possible (*Matter of Palma*, 17 AD3d 817, 819 [3d Dept 2005]; *see also DelRossi v Defendant V*, 6 Misc3d 454, 464 [Sup Ct,

Suffolk County 2004] [administrator was free to make tactical decisions to discontinue estate's claim for damages]).

Petitioner argues that the objections regarding 143 Downing should be dismissed because he acted prudently and reasonably with regard to the Foreclosure Action. Since the deed and mortgage were in the name of the decedent, Petitioner was required to defend the estate in the Foreclosure Action (Affirmation of Avram E. Frisch dated August 8, 2019, ¶ 3). Towards this end, Petitioner filed an answer with counterclaims, attended numerous court conferences, and attempted, unsuccessfully, to resolve the litigation by negotiating with the lender to obtain a deed in lieu of foreclosure (Frisch Aff., ¶¶ 19, 23-28; Affidavit of Joseph Rosenbaum sworn to August 22, 2019, ¶ 34). Eventually, in 2016, so much time had passed that the statute of limitations for the lender to obtain a deficiency judgment on the note expired (Frisch Aff., ¶ 30). Given the depressed real estate market and the large indebtedness that had accrued on the mortgage, Petitioner made the tactical decision, upon the advice of counsel, to stop defending the Foreclosure Action (J. Rosenbaum Aff., ¶¶ 34-36). As a result, a default judgment was entered on the mortgage in the amount of $240,256.79. The lender sold the property in a foreclosure auction, and then it was resold in April 2019 for $136,000, which would have left a deficiency of approximately $104,000 on the mortgage (Frisch Aff., ¶¶ 37-40). Thus, Petitioner has demonstrated, prima facie, that he acted reasonably and prudently with regard to 143 Downing by limiting the estate's liability in the Foreclosure Action (*see Matter of Palma*, 17 AD3d at 819 [executors did not breach fiduciary duty to estate by seeking to compromise $1.7 million claim for $100,000]).

In opposition, Objectants claim that Petitioner acted improperly by preventing Moshe from negotiating with the bank to resolve the Foreclosure Action (M. Rosenbaum Aff., ¶¶ 9-10, 34-36). However, Moshe does not provide any details about how he could have protected this asset or the

estate in the Foreclosure Action and merely speculates that he could have negotiated a better deal with the lender. This is insufficient to raise an issue of fact (*Schloss v Steinberg*, 100 AD3d 476 [1st Dept 2012] [speculative arguments are insufficient to raise a triable issue of fact]). Thus, to the extent that objections 5, 9, 11 and 14 are based on Petitioner's handling of the Foreclosure Action, these objections must be dismissed.

Second Cross-Motion

In the Second Cross-Motion, Objectants seek (i) an injunction preventing any further distributions from the estate by Petitioner; (ii) an order removing Petitioner as the executor and appointing Objectants as co-administrators; (iii) fixing attorneys' fees payable from the estate to Wimpfheimer & Wimpfheimer; and (iv) awarding sanctions against Petitioner and his attorneys for making this motion.

In support, Objectants submit two checks, each for the sum of $10,000, dated April 10, 2018 and April 29, 2019, which are from the estate to the law firm of Kurzman Eisenberg Corbin & Lever (Affirmation of Michael C. Wimpfheimer dated October 3, 2019, Exh. A). This firm represented Petitioner, in his individual capacity, in connection with his efforts to vacate the Default Judgment in the Supreme Court Action. To the extent Objectants seeks to remove Petitioner as the executor of the estate on the basis of these contested expenses, this request for relief is denied without prejudice to Objectants pursuing this relief in the pending proceedings to remove the executor (2010-4013/B,C and 2010-4013/D,E). The propriety of these expenses will be determined in the accounting.

Objectants also seek attorneys' fees from the estate payable to Wimpfheimer & Wimpfheimer for its representation of the estate in connection with the Default Judgment against Petitioner in the Supreme Court Action. In support, Objectants' counsel, Michael C. Wimpfheimer,

submits a list of services he provided with dates ranging from June 2017 to September 2019 (Wimpfheimer Aff., ¶ 15). However, no invoices or billing records are attached (*Matter of Freeman*, 34 NY2d 1, 9 [1974] [setting forth factors courts consider in determining reasonableness of legal fees]; *Forest Road Company v Garbo Holdings*, 73 Misc3d 1216[A] [Sup Ct 2021] [finding motion for fees deficient based on affirmation of counsel which was unsupported by documentation]). It also appears based on the descriptions of these services that a number of items were thrown into the bill which have nothing to do with the Default Judgment. Further, the proceedings to vacate the Default Judgment ended in December 2016 when the First Department affirmed the amended Default Judgment (*Rosenbaum v Rosenbaum*, 145 AD3d 460 [1st Dept 2016]). Thus, it is unclear what services Mr. Wimpfheimer could have been performing on behalf of the estate in connection with the Default Judgment. Accordingly, this request for relief must be denied.

Finally, Objectants' request for sanctions is denied as Petitioner's motion is not frivolous.

Accordingly, it is

ORDERED that the First Motion and First Cross-Motion are denied; and it is further

ORDERED that the Second Motion is granted to the extent that any objections based on (i) the Petitioner's alleged breach of fiduciary duty with regard to the sale of the Units and the Foreclosure Action and (ii) the designation of Chevra Anshi Toras Chesed as a beneficiary, are dismissed; and it is further

ORDERED that the Second Cross-Motion is denied without prejudice subject to Objectants seeking relief in the pending removal proceedings; and it is further

ORDERED that the discovery motions filed in September 2017 and January 2018, and the corresponding cross-motions, will be addressed at a status conference before the court on February 15, 2024 at 9:30 am in Room 401 at 31 Chambers Street, New York, New York.

Dated: January 11th, 2024

SURROGATE

To:

Michael H. Friedman, Esq.
Kurzman Eisenberg Corbin & Lever, LLP
One North Broadway, 12th Floor
White Plains, New York 10601
(914) 993-6045
mfriedman@kelaw.com
Attorneys for Petitioner Joseph Rosenbaum, Individually

Michael A. Haskel, Esq.
Law Office of Michael Haskel
167 Willis Avenue
Mineola, New York 11501
(516) 294-0250
haskelesq@aol.com
Attorneys for Petitioner Joseph Rosenbaum, as Executor
Respondents Avram Frisch, Kurzman, Eisenberg, Corbin & Lever, LLP,
Fiduciary Court Accounting Professionals LLP,
Chavie Turkel, Avrohom Rosenbaum, Aron
Rosenbaum, Anshie Toras Chesed

Michael C. Wimpfheimer, Esq.
Wimpfheimer & Wimpfheimer, Esqs.
330 West 58th Street, Suite 209
New York, New York 10019
(212) 247-8448
Michael@mwimpfheimer.com
Attorneys for Objectants Moshe Rosenbaum and Shoshanna Schilit