

**Matter of Estate of Neller**

2024 NY Slip Op 34648(U)

May 28, 2024

Surrogate's Court, Richmond County

Docket Number: File No. 2011-733/I

Judge: Matthew J. Titone

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This opinion is uncorrected and not selected for official publication.

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

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In the Matter of the Judicial Accounting in the Estate of

MARY NELLER,  
a/k/a MARY C. NELLER,

File Nos. 2011-733/I

Deceased.  
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The following papers numbered 1 to 5 were fully submitted on the 1st day of November 2023:

	Paper Numbered
Notice of Motion for Summary Judgment and to Dismiss Objections, with Supporting Papers, and Exhibits (Dated July 20, 2023) .....	1
Notice of Cross-Motion (Dated August 2, 2023) .....	2
Affirmation in Opposition and Reply to Cross Motion (Dated September 8, 2023) .....	3
Affidavit in Opposition to Motion for Summary Judgment..... (Dated October 24, 2023)	4
Reply dated November 1, 2023.....	5.

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**PROCEDURAL HISTORY**

In this contested proceeding, decedent died a resident of Richmond County on July 26, 2009. At the time of death, the decedent owned 196 Livingston Avenue, Staten Island, New York 10314 ("Premises"). Letters of Administration were issued to Paul P. Neller and Frances Valek on October 23, 2013.

Subsequently, this court approved the contract of sale for the premises. Further, a decree was signed by this court on February 22, 2019, which granted judgment against Georgianna

Neller and William Neller for use and occupancy regarding the premises in the total amount of \$108,000.00.

The decision and order of the court, regarding the sale of the premises and the determination of use and occupancy, and corresponding decree was affirmed by the Appellate Division Second Department on December 30, 2020.

A Judicial Accounting was filed on April 20, 2022, by Paul P. Neller and Frances Valek as co-administrators. Jurisdiction was deemed complete on May 9, 2023. Objections to the accounting were filed by Georgianna Neller and William Neller on February 27, 2023 and March 10, 2023. A discovery order was signed by this court on May 9, 2023 and the order directed that any motions were to be filed on or before August 2, 2023, and that all dates were final.

On July 20, 2023 the estate's fiduciaries, Paul P. Neller and Frances Valek ("Movants"), filed a summary judgment motion to dismiss all the objections to the accounting filed by Georgianna Neller and William Neller ("Objectants"). Georgianna Neller ("Cross-Movant") filed a cross-motion with the court on August 3, 2023. An Affirmation in Opposition and Reply to Cross-Motion was filed by Movants on September 8, 2023. An Affidavit in Opposition to Motion for Summary Judgment was filed by Cross-Movant on October 30, 2023. A Reply was filed by Movants on November 1, 2023. Oral Argument was then heard before the Surrogate.

All the papers filed and listed above are marked submitted.

### **DISCUSSION**

Summary judgment is designed to eliminate from the trial calendar litigation that can be resolved as a matter of law (Andre v. Pomeroy, 35 NY2d 361 [1974]). The court's burden is not to resolve issues of fact, but merely to determine if such issues exist (Dyckman v. Barrett, 187 AD2d 553 [1992]). It is a drastic remedy that will only be awarded when there is no triable issue

of fact remaining (Barclay v. Denckla, 182 AD2d 658 [1992]). The court, therefore, must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person of their day in court (Russell v. Barton Hepburn Hospital, 154 AD2d 796 [1989]).

A party submitting the account has the ultimate burden of demonstrating that all assets of the estate have been fully accounted for and the party objecting to the account has the burden of producing evidence to demonstrate that the account is incomplete or inaccurate (Matter of Crane 100 AD 3d 626 [2012]).

This court finds that that the Objectants have failed to raise a triable issue of fact in their objections. Self-serving conclusory statements are insufficient to raise a triable issue of fact.

Additionally, any objection to the enforcement of the judgment for use and occupancy of the premises is barred by the doctrine of *res judicata* and *collateral estoppel*.

The doctrine of *res judicata* “prevents a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter” (Matter of Josey v. Goord, 9 NY3d, 386, 389 [2007]).

Similarly, *collateral estoppel* “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party” (Greg v. Lan Zen Chen 220 A.D. 3d 697 [2023]).

In this proceeding the issue of use and occupancy was previously determined and an order for a judgment was issued by this court and affirmed by the Appellate Division Second Department. All parties had a full and fair opportunity to litigate the issue and an appeal was taken. Movants now seek to enforce the judgment, and prioritize the judgment over other creditors of William Neller, via a surcharge in the Accounting proceeding.

Prior to allowing the surcharge for the use and occupancy against the distributive share of William Neller to take priority over other creditors of William Neller, Movants must file an affirmation and an accompanying memorandum of law explaining the proposed order of the priority of the creditors in the Accounting.<sup>1</sup>

The Court shall now consider the remaining contentions of the cross-movant below.

**A. Caregiver Compensation Claim of Georgianna Neller**

Georgianna Neller, for the first time, seeks to be compensated for acting as a caregiver and power of attorney for her mother.

Surrogate's Court Procedure Act 1802 and 1803 address how to file a claim against the estate. SCPA 1802 provides that the claim must be presented within seven months from the date of letters being issued. In this estate, Letters of Administration were issued on October 23, 2013.

SCPA 1803 (1) and (2) state the following:

1. Every claim against the estate of a decedent other than claims for expenses of administration and claims of the United States or the state of New York must be in writing, contain a statement of the facts upon which it is based and the amount thereof. In addition, the fiduciary may require the claimant to present proof by affidavit that the amount of the claim is justly due, that all payments thereon, if any, have been credited, that the claimant knows of no offsets and no evidence of indebtedness and holds no security, except as specifically described in the affidavit.
2. The notice of claim required by this section shall be presented by delivering a copy thereof to a fiduciary personally or by certified mail return receipt requested addressed to the fiduciary at the place of residence stated in the designation required by 708 or if a notice has been published pursuant to 1801, 1 at the place specified therein or upon the clerk of the court pursuant to the designation required under 708 whenever the fiduciary cannot be found or served within the state after due diligence.

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<sup>1</sup> See an Affidavit by Joseph E. Skaist, title officer for Madison Title Agency LLC, in the File No. 2011-733/H which lists the other judgments. Proofs of payment of any judgments, if any, shall be provided to the court.

Cross-Movant does not provide proof that a claim was filed pursuant to SCPA 1802 with the fiduciary and in compliance with SCPA 1803. In opposition, the movants argue that they did not receive a claim from Cross-Movant and as such, any claim for compensation is barred by SCPA 1802, SCPA 1803 and CPLR 213.

CPLR 213 provides that a claim of breach of contract is governed by a six-year statute of limitations. Therefore, if this claim was plead as a breach of contract, the six-year statute of limitations pursuant to CPLR 213 would bar such claim since decedent died on July 26, 2009 and the need for services ended on that date. Further, Letters of Administration were issued on October 23, 2013, and still no claim was filed by Cross-Movant.

Upon review of all of the papers filed, and pursuant to SCPA 1802, SCPA 1803 and CPLR 213, Cross-Movant's claim for compensation is denied with prejudice, as it is time-barred and not in compliance with the foregoing statutes.

**B. Objection to the Commission of Fiduciaries**

Surrogate's Court Procedure Act 2307 governs how fiduciaries commissions are calculated and paid. In this estate, there were multiple Surrogate's Court proceedings and corresponding appeals which resulted in lengthy litigation and delay underpinning the request for commissions. Upon review of all the papers filed, the cross-motion to deny commissions is denied with prejudice.

**C. Cross-Movant's Claim for Attorney Fees**

This application is denied without prejudice for Cross-Movant to file a separate proceeding. A Surrogate's Court Procedure Act 2110 petition is required when a party is requesting the court to approve an attorney's fee.

Cross-Movant shall have forty-five days from service of a copy of this order on her to file a petition. Failure to file within forty-five days will result in this proceeding moving forward without consideration of this issue.

**CONCLUSION**

It is hereby:

ORDERED, that the motion of Movants for summary judgment is granted; and it is further

ORDERED, that Movants shall file with the court an affirmation with an accompanying memorandum of law delineating the order of the proposed priority of the creditors in their Accounting; and it is further

ORDERED, that the cross-motion is denied with prejudice, apart from Cross-Movant's request for attorney's fees, which may be filed as SCPA 2110 proceeding within forty-five (45) days of service of the order upon the Cross-Movant; and it is further

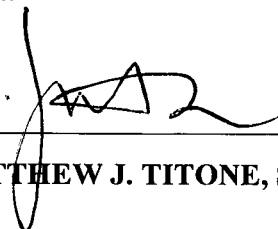
ORDERED, that Movants shall mail a copy of this decision via Federal Express to Objectants and file an affidavit of mailing with the court; and it is further

ORDERED, that any other remaining relief is denied with prejudice; and it is further

ORDERED, that this matter is restored to the court's calendar of August 5, 2024, at 10:00 a.m. for a virtual appearance.

This decision shall constitute the order of the court.

Dated: May 28, 2024

  
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MATTHEW J. TITONE, Surrogate