SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Accounting by Lucille Corrier as Administrator of the Estate of

IVAN ALLAN EZRINE,

Deceased.

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File No. 2013-3789/F

A N D E R S O N, S.

This is a contested administrator's accounting in the estate of Ivan Ezrine. At issue is the ownership of shares of a corporation which, in turn, owns a brownstone in Manhattan (the "Corporation"). Objectants, decedent's three children, assert that decedent's interest in the Corporation is an estate asset which should have been reflected on Schedule A of the accounting. The administrator, decedent's surviving spouse, asserts that she and decedent had entered into an agreement whereby upon his death, she would become the owner of decedent's 50 percent interest in the Corporation (the "Agreement"). Objectants now seek injunctive relief (CPLR § 6311), namely, an order 1) directing the administrator to obtain an independent appraisal of the property, 2) enjoining her from selling the property, or, in the alternative, 3) directing her to deposit the proceeds from any sale of the property with the court pending final determination of the ownership of the shares. For the reasons stated below, the motion is denied.

Decedent died on August 27, 2013, survived by the administrator and movants, his children from a prior marriage. In

lieu of a will, decedent and the administrator allegedly executed the Agreement, which provided that 1) their respective 50 percent interests in the Corporation would be as joint tenants with right of survivorship, 2) the survivor could sell or have the use or benefit of the properties owned by the Corporation as he or she saw fit and could use the proceeds "to maintain the survivor's health and lifestyle within reason, and with integrity ....", and 3) any remainder following the death of the survivor would be distributed equally to their respective heirs by a will or trust.

The administrator asserts that she has satisfied her obligations under the terms of the Agreement by executing a revocable trust in December 2013 to which she transferred ownership of the Corporation's shares. Under the trust, the administrator is entitled to income and principal upon request. Upon the administrator's death, movants are entitled to 50 percent of the trust's remainder.

Ever since their father's death, movants have aggressively (but unsuccessfully) litigated with the administrator. First, two of the movants sought letters of administration, arguing that their step-mother was not fit to carry out her fiduciary duties. However, the court found her eligible to serve (SCPA § 707) and, based on her priority as spouse (SCPA § 1001), granted her cross-petition for letters on December 2, 2013. Three months later, movants brought a proceeding under SCPA § 2102[1], seeking

information from the administrator relating to the Corporation, among other things. For a variety of reasons, including that the administrator had indicated that she was planning to file an accounting in which issues relating to the ownership of the Corporation could be adjudicated, the court directed a conference. The proceeding was thereafter discontinued by stipulation (*Matter of Ezrine,* NYLJ, July 25, 2014, at 22, col 4 [Sur Ct, NY County 2014]).

Instead of waiting for the accounting to be filed, however, movants commenced an action in Supreme Court, New York County, against the administrator in her individual capacity, seeking 1) a declaratory judgment that the Corporation does not own the brownstone and that the administrator is not the owner of the Corporation, and 2) damages for breach of fiduciary duty, conversion, and fraud. Movants also filed a notice of pendency against the brownstone, in effect enjoining the administrator from taking any action with respect to the property, including its sale. The court granted the administrator's motion to vacate the notice of pendency on the ground that the dispute did not concern the ownership of real property (the basis of a notice of pendency), but rather the ownership of the Corporation. The Supreme Court also *sua sponte* transferred the action to this court as one related to the affairs of a decedent (*Ezrine Poguntke v Corrier*, Sup Ct, NY County, April 28, 2015, Kornreich,

J., Index No. 162523/2014). The transfer rendered moot the administrator's motion seeking this court's consent to receive the transfer (*Matter of Ezrine,* NYLJ, May 7, 2015, at 25, col 5 [Sur Ct, NY County 2015]).

Following a conference in Surrogate's Court, movants stipulated to discontinue the transferred action in view of the fact that the instant proceeding had already been commenced and the issues raised could be adjudicated within the pending accounting (*Matter of Ezrine,* NYLJ, Jan. 22, 2016, at 25, col 3 [Sur Ct, NY County 2016]). After the account was amended, movants filed objections in July 2016, alleging, among other things, that the administrator had not accounted for all of decedent's assets, including the Corporation. Movants then filed the instant motion in which they also sought (unsuccessfully) a temporary restraining order (CPLR § 6313).

According to movants, a preliminary injunction is necessary because the administrator is marketing the brownstone before their interest in the Corporation has been adjudicated. They challenge the bona fides of the Agreement as the basis for their position and seek to preserve the status quo pending final disposition. They argue that, once the administrator sells the Brownstone, "she can use the proceeds to pay for her expenses - with no cap - until they are completely depleted." Movants also claim that the administrator is prepared to sell the brownstone

below its market value. This state of affairs, they assert, constitutes "irreparable harm."

It is well established that "[t]he drastic remedy of a preliminary injunction only issues when the moving party demonstrates a clear basis for the relief requested, a likelihood of success on the merits, irreparable injury absent the preliminary injunction and a balance of the equities that clearly favors granting injunctive relief" (*Matter of Nelson*, 110 AD2d 535, 536 [1st Dept 1985], *citing Gulf & W. Corp. v New York Times Co.*, 81 AD2d 772 [1st Dept 1981]). Here, movants have failed to demonstrate irreparable injury. As a result, the court need not consider the other elements required for a preliminary injunction.

The injury that movants describe is purely a monetary one. Movants do not seek preservation of the brownstone for their use. They do not propose that they would buy the administrator's interest in the brownstone in the event they prevail on their objections. Rather, they purport to need protection from the consequences of a sale by the administrator on two grounds. First, they are concerned that the brownstone will be sold for less than its fair market value and, second, the administrator will deplete the any sale proceeds, estimated to be in excess of $10 million, before their claims are adjudicated. In other words, movants request a preliminary injunction as security for

the surcharge they seek in this proceeding. The law is clear, however, that injury "compensable in money and capable of calculation, albeit with some difficulty, [is] not irreparable [harm]" (*SportsChannel Am. Assoc. v National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]).

Under these circumstances, movants should be placed in no better position than any other objectant seeking a surcharge in an accounting proceeding. If they prevail on their objections, the administrator will be surcharged for the value of movants' share of the Corporation as calculated under EPTL § 4-1.1.

This decision constitutes the order of the court.

Dated: April 11, 2017