

<b>Matter of Cooper</b>
2017 NY Slip Op 30941(U)
April 5, 2017
Surrogate's Court, New York County
Docket Number: 2016-504/A
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: APRIL 5, 2017

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In the Matter of the Application of Edith W. Cooper and  
Edward N. Cooper, as co-Executors of the Estate of

HENRY H. COOPER, JR.,

DECISION

Deceased,

File No.: 2016-504/A

for an Order Approving the Payment of Decedent's Debt  
to an Executor pursuant to SCPA 1805.

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M E L L A, S. :

In this unopposed application made pursuant to SCPA 1805, petitioners Edith Cooper and Edward Cooper, the co-executors of decedent's estate, seek court authorization to satisfy three promissory notes executed by decedent, as borrower, and payable to his daughter, Edith, who is one of the petitioners and co-executors. Petitioners seek authorization to pay these promissory notes at such time as funds become available to the estate through the financing or sale of decedent's townhouse located in Manhattan.<sup>1</sup> Petitioners also seek court approval for the payment of three additional promissory notes executed on the estate's behalf by the co-executors, as borrowers, with each executor, individually, as lender.

Decedent died testate in January 2016, at age 90, survived by five adult children. Under the terms of his Will, decedent gave his tangible personal property, his townhouse, his out-of-state real property and his residuary estate to his children in equal shares.<sup>2</sup>

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<sup>1</sup>Petitioners allege that decedent's estate is illiquid, and, as a result, they have been unable to pay administration expenses and taxes. In an effort to raise cash, the executors have listed the decedent's townhouse for sale.

<sup>2</sup> On September 26, 2016, Edith filed a renunciation pursuant to EPTL 2-1.11, disclaiming her interest under subparagraph B of Article One and Article Two of decedent's Will, including any interest in decedent's townhouse, and any property distributable under the residuary. This renunciation accelerates the interest of her three children, who are parties to this

Petitioners assert that the three promissory notes executed prior to decedent's death were designed to help decedent meet the expenses associated with continuing to reside in his townhouse. The first note is a mortgage agreement dated August 31, 2013, in which decedent, as mortgagor, promises to pay Edith and her husband, as mortgagees, \$1,200,000 with interest at an annual rate of 0.28%. The second and third notes, dated August 21, 2015 and December 22, 2015, respectively, are between decedent and Edith.<sup>3</sup> These latter two notes were executed by Edward, as decedent's agent under a power of attorney. Petitioners aver that decedent failed to make any payments on these notes prior to his death, and that no payments have been made by decedent's estate following his death.

Petitioners further allege that three additional promissory notes were executed after decedent's death by petitioners as fiduciaries of decedent's estate when funds were advanced by petitioners individually to pay estate administration expenses. The first of these promissory notes was executed on October 31, 2016, in the amount of \$25,000 borrowed from Edward, with an interest rate of 3.5% per annum. The other two were executed on November 1, 2016, and December 9, 2016, respectively, both in the amount of \$75,000, borrowed from Edith with the same interest rate of 3.5% per annum. Petitioners ask the court to approve payment of these notes at such time as funds become available to the estate.

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proceeding and have executed waivers and consents to the relief sought.

<sup>3</sup>The August 21, 2015 note is in the amount of \$204,754, with interest charged on unpaid principal at the rate of 0.56% annually. The maturity date on this note is June 1, 2018. The December 22, 2015 note is in the amount of \$140,000, with an interest rate of 0.75% annually. The maturity date on this note is January 1, 2019. The maturity date on both notes, according to their terms, is accelerated should decedent's townhouse be sold.

When a fiduciary is also a creditor of an estate, the inherent conflict of interest requires the court to determine the fiduciary's claim. A fiduciary may obtain court approval either in the accounting proceeding (SCPA 1805[1]) or in a separate proceeding (SCPA 1805[2]) at any time prior to an accounting proceeding (*see Matter of Bender*, 56 Misc 2d 585 [Sur Ct, Nassau County 1968]; Margaret Valentine Turano, Practice Commentaries, McKinney's Cons. Laws of NY, Book 58A, SCPA 1805).

Petitioners aver that the indebtedness evidenced by the August 31, 2013 promissory note is in the nature of a mortgage. In order to create a mortgage, there must be a conveyance of an interest in real property intended by the parties to be used as security for the payment of money (77 NY Jur 2d, Mortgages § 54). The formalities for the execution of a mortgage are the same as those for the execution of a deed, namely it must be in writing and subscribed by the mortgagor or by the mortgagor's agent authorized by writing (General Obligations Law § 5-703[1]). Proof of the debtor's execution of a promissory note with an unequivocal obligation to repay and his or her failure to pay according to its terms constitutes prima facie proof of the creditor's claim.

Petitioners attach as exhibits to their application a copy of the mortgage and note on the decedent's townhouse and copies of the other two promissory notes executed by Edward as attorney-in-fact. On the record presented by petitioners, the court concludes that they have demonstrated the execution of the initial three promissory notes which contain an unequivocal promise to pay, as well as decedent's failure to make payments, and thus have established, prima facie, valid claims based on these notes.

Although not a debt of decedent and thus not a proper subject of an application pursuant to SCPA 1805, petitioners' unopposed request for court approval of reimbursement for sums that they, as individuals, advanced for the benefit of the estate to cover administrative expenses,

together with interest, as reflected in promissory notes executed after decedent's death is also granted.

CONCLUSION

Based upon the foregoing, the court authorizes the fiduciaries to satisfy Edith's individual claims against the estate pursuant to the mortgage agreement and note executed on August 31, 2013, as well as the August 21, 2015 and December 22, 2015 promissory notes, including accrued interest, upon the sale of decedent's townhouse or the receipt of the proceeds from any further loan secured by the townhouse. The fiduciaries may also reimburse themselves from those funds for the sums they advanced to pay administration expenses, including accrued interest, pursuant to the terms of the October 31, 2016, November 1, 2016 and December 9, 2016 promissory notes.

Decree signed.

Dated: April 5, 2017

  
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SURROGATE