

<b>Matter of Goldberg</b>
2017 NY Slip Op 30966(U)
April 13, 2017
Surrogate's Court, New York County
Docket Number: 1985-3169/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 13, 2017

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In the Matter of the Petition of Dean Loren, Executor of the  
Will of Evelyn Goldberg, to Compel David Mandelbaum,  
Executor of and Trustee Under the Last Will and  
Testament of

SIMON A. GOLDBERG,

Deceased,

DECISION

File No.: 1985-3169/A

To Account Pursuant to SCPA 2205.

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M E L L A, S.:

The following submissions were considered in deciding this motion to enforce a stipulation of settlement:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion to Restore, Dismiss, and for Related Relief, dated September 29, 2015	1
Affirmation of John C. Fisher, Esq., in Support of Motion, dated September 29, 2015, with Exhibits A through L	2
Affirmation of Daniel Padernacht, Esq., in Opposition to Motion, dated January 11, 2016, with Exhibits A and B	3

In the context of this proceeding by the executor of the will of Evelyn Goldberg to compel the account of the executor of and trustee under the will of Ms. Goldberg's spouse, Simon Goldberg ("decedent"), the parties reached an agreement which was memorialized in a written stipulation executed by the parties and their counsel on May 29, 2015. Pursuant to that stipulation, petitioner agreed to discontinue the proceeding in exchange for: 1) payment to him, in his fiduciary capacity, of a sum representing additional income payable to Ms. Goldberg's estate after respondent's account was settled by decree dated December 28, 1995, and 2) an

[\* 2]

account by respondent for that additional income received to the date of the stipulation. The stipulation also contemplated the execution of a release by petitioner upon receipt of the account and payment, and petitioner's waiver and consent to any formal or informal accounting in the Estate of Simon Goldberg. On the record on May 29, 2015, in response to the court's inquiry, petitioner indicated that he understood and was satisfied with the terms of the stipulation that had been described on the record. Petitioner was represented by counsel in court on May 29, 2015.

Around the same time, an additional asset of decedent's estate was identified and then collected and accounted for after the execution of the stipulation. This asset was not addressed in the parties' May 29, 2015 agreement. It appears that discovery of this additional asset had an impact on petitioner's willingness to comply with the May 29, 2015 stipulation. Thereafter, both parties sought to restore the compel account proceeding to the court's calendar.<sup>1</sup> That relief, as sought in respondent's motion, which further sought dismissal of the petition on the grounds that the matter had been settled and discontinued pursuant to the May 29, 2015 stipulation, was granted by the court in a decision dated July 7, 2016, to the extent of restoring the proceeding and motion to the court's October 7, 2016 calendar for argument as to why the court should not compel compliance by both parties with the terms of the stipulation.<sup>2</sup>

Petitioner opposes the portion of the motion seeking dismissal of his petition and

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<sup>1</sup>From the bench on December 15, 2015, as memorialized in a written decision issued on January 28, 2016, the court declined to entertain petitioner's pro se application to restore because he failed to seek, in writing, the court's permission to make this application personally when represented by counsel in this proceeding (*see* CPLR 321[a]).

<sup>2</sup>This decision followed numerous conferences held with the court in an attempt to address the parties' concerns, especially those of petitioner, and assist with resolving this matter. In that context, the parties and court discussed a global settlement that would include the additional asset and a share of its value to be paid to Evelyn Goldberg's estate.

requests, among other relief: a) restoration of his petition to compel respondent to account to the calendar; and b) setting aside the May 29, 2015 stipulation for mistake, fraud and collusion; c) granting his petition to compel respondent to account; d) revocation of respondent's letters; and e) appointment of petitioner as successor executor so that he can prepare an amended account in decedent's estate. In addition to the opposition filed by petitioner's counsel, the court has received numerous communications from petitioner personally, some of which have been returned because they were sent pro se while he was represented by counsel.

At the request of the parties, respondent's motion was adjourned to December 9, 2016, at which time the parties represented on the record that they had reached an expanded settlement and would be entering into an amended stipulation.<sup>3</sup> The court directed the parties to file the new stipulation by December 16, 2016, and indicated that on that date, the motion would be marked submitted for the court's consideration.

A new stipulation was not filed with the court on or after December 16, 2016. Instead, correspondence dated December 17, 2016, from petitioner personally and addressed to Commissioner John Koskinen (of the Internal Revenue Service) and to this court (the "IRS letter") was sent to chambers. It appears that this correspondence was also sent to counsel for respondent, as well as to petitioner's counsel. Attached to this correspondence is: 1) a copy of a document titled "Stipulation and Agreement" that is dated December 16, 2016, and appears to be

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<sup>3</sup>Petitioner appeared through counsel on December 9, 2016, but did not appear personally. On December 8, 2016, petitioner's counsel had submitted to the court his and his client's request for an adjournment because petitioner was sick and unable to come to court. In petitioner's affidavit, dated December 6, 2016, requesting an adjournment, he states that "[t]here is no material or substantial problems [sic] as [petitioner] fully intends to deliver a waiver to [decedent's] Estate in exchange for funds over \$489,000 due and payable to [the] Evelyn Goldberg Estate . . . ."

signed by petitioner and respondent, but not their respective counsel, 2) a copy of a Receipt, Release and Indemnification Agreement also dated December 16, 2016, and apparently executed by petitioner on that date, 3) a copy of a document titled "Stipulation and Agreement to Withdrawal of Petition and Discontinuance of Petition for Compulsory Accounting," which is signed by petitioner but undated, and 4) a letter dated December 16, 2016, addressed to this court's law clerk, which indicates that petitioner is holding the original of the preceding three documents in escrow, to be delivered to the court upon a future return date that petitioner appears to be requesting. In the IRS letter, petitioner states, in part, that "Surrogate Mella order[ed him] to accept the forced accounting and [he is] forced to submit."

The parties having failed to file a new stipulation with the court, the pending motion by respondent is determined as follows:

The court concludes that the parties' May 29, 2015 agreement is a binding stipulation: it is in writing and it is signed by the parties, including petitioner and his counsel. Additionally, it was agreed to on the record (CPLR 2104). The court further concludes that petitioner has failed to establish his claims of fraud or mistake and therefore there is no justification for relieving him from the terms of the stipulation (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *see also Pasteur v Manhattan & Bronx Surface Tr. Operating, Auth.*, 241 AD2d 305 [1st Dept 1997]). Accordingly, the motion of the respondent to enforce the stipulation is granted.

The parties are thus directed to comply with the following clear and unambiguous terms of the May 29, 2015 stipulation:

1) respondent (in his capacity as executor of decedent's estate and trustee of the testamentary trust) is directed to pay \$255,343.87 to petitioner in his capacity as executor of

Evelyn Goldberg's estate;

2) respondent as executor is directed to provide petitioner with an informal supplemental account from the date of the decree settling the executor's account in the estate of Simon Goldberg to May 29, 2015; and

3) upon his receipt of the check from respondent, petitioner is directed to execute a receipt, release and refunding agreement releasing respondent from all liability in connection with his account through November 11, 2008.<sup>4</sup>

In light of the binding stipulation of settlement, the instant proceeding to compel the account of respondent is marked discontinued.

This decision constitutes the order of the court.

Clerk to notify.

Dated: April 13, 2017

  
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SURROGATE

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<sup>4</sup>This is the date of Evelyn Goldberg's death, at which time her lifetime interest in the income of the trust under decedent's will expired.