

Matter of Pappas

2017 NY Slip Op 31500(U)

July 17, 2017

Surrogate's Court, New York County

Docket Number: 2003-2184

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

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In the Matter of the Judicial
Settlement of the First Intermediate
Account of Robert H. Groman and Helga
Hensing, as co-Executors of the Last
Will and Testament of

File No. 2003-2184

CHRISTO BYRON PAPPAS,

Deceased.

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In the Matter of the Judicial
Settlement of the Second Intermediate
Account of Robert H. Groman and Helga
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File No. 2003-2184

CHRISTO BYRON PAPPAS,

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A N D E R S O N , S .

Pending in these intermediate accountings in the estate of Christo Byron Pappas are three motions. Two are by the executors who seek summary dismissal of former co-executor Laura Candela's objections to their first intermediate accounting and Nixon Peabody LLP's objections to their second intermediate accounting. The third is by Laura Candela, who cross-moves for omnibus relief, including that her objections to the first intermediate accounting be sustained in their entirety.

The long and contentious history of this estate is detailed in prior decisions and will not be repeated in its entirety here (see e.g. *Matter of Pappas*, NYLJ, Mar. 5, 2014, at 22, col 3 [Sur Ct, NY County 2014]; *Matter of Pappas*, 36 Misc 3d 1204[A], 2012 NY Slip Op 51189[U] [Sur Ct, NY County 2012]). The relevant

background follows. Decedent died on June 6, 2003. Under his will, probated in this court, he left his estate, worth approximately \$31,700,000, to family, friends and various employees of Byron Chemical Company, Inc. ("Byron Chemical"), the company of which he was the founder and majority shareholder. Letters testamentary issued on October 23, 2003, to petitioners, Robert H. Groman and Helga Hensing, and to objectant Candela, a beneficiary under the will and an employee and minority shareholder of Byron Chemical.

From the outset, the administration of the estate was fraught with conflict, including among the fiduciaries. By February 2004, Candela's relationship with her co-fiduciaries had deteriorated to the point that she sought permission to resign, alleging, among other things, that petitioners had systematically prevented her from carrying out her fiduciary obligations. This was about the same time that Candela commenced an action in Supreme Court, Nassau County, against decedent's estate, Byron Chemical, Nicholas Cola (a minority shareholder), and George Liss (Byron Chemical's former accountant), alleging, among other things, that Bryon Chemical had breached her executive employment contract and that decedent had engaged in fraudulent conduct related to Byron Chemical.¹

¹ Candela was successful on her employment contract claims against Byron Chemical, which are not at issue in this proceeding.

For their part, petitioners commenced two proceedings against Candela in this court, one relating to her employment contract and another relating to her ownership of another company, U&I Pharmaceuticals, which competed directly with Byron Chemical.²

In November 2004, Candela's application to resign as co-executor was granted. The decree included this court's standard direction that Candela "account for her proceedings" as fiduciary.

In March 2005, petitioners sought judicial settlement of their account from June 6, 2003 (the date of decedent's death) through December 31, 2004 (the "First Intermediate Accounting"), which included a request that Candela "be denied any and all commissions for acting as a Co-Executor ... in view of her past and continued actions to the detriment of Decedent's estate." Candela immediately requested SCPA § 2211 examinations. However, the executors had difficulty completing jurisdiction over almost 40 beneficiaries, some of whom had died.

In August 2006, when jurisdiction in the accounting proceeding remained incomplete, Candela commenced a proceeding to have the legal fees of the firm that had served as counsel to her as executor, Nixon Peabody, fixed and determined (SCPA § 2110).

² These proceedings remain pending.

However, Candela also had difficulty obtaining jurisdiction over these same beneficiaries. In April 2007, petitioners opposed Candela's fee application, asserting, among other things, that the legal fees at issue were either an improper estate expense or excessive. Alternatively, they requested that the application be consolidated with the pending accounting. In January 2008, petitioners and Candela entered into a settlement agreement in the SCPA § 2110 proceeding, which provided that petitioners pay Nixon Peabody approximately \$80,000 on account without prejudice to petitioners' raising an objection to such fees in their final accounting (see *Matter of Pappas*, NYLJ, Mar. 27, 2009, at 39, col 1 [Sur Ct, NY County 2009]).

Nine months later, Candela filed the only objections to the First Intermediate Accounting. Her first two objections (I and II) are to Schedules C-1 and I to the extent that they do not reflect Candela's entitlement to full statutory commissions under SCPA § 2307 in the amount of \$386,061. Her third objection (III) asks the court to surcharge petitioners for the amount of the legal fees she incurred in bringing the SCPA § 2110 proceeding (\$58,863).

Prior to adjudication of these objections, petitioners filed a second accounting for the period January 1, 2005 through September 30, 2008 (the "Second Intermediate Accounting"). Candela, Nicholas Cola and Nixon Peabody filed objections with

Nixon Peabody asking for the same surcharge of the executors to pay its legal fees that Candela had requested in her objections to the First Intermediate Accounting, except in a greater amount (\$66,876 vs. \$58,863).

For several years, little activity occurred in the accounting proceedings while petitioners litigated three different matters with Nicholas Cola and Byron Chemical in Supreme Court and this court. Eventually, petitioners reached a global settlement and sought this court's approval under SCPA § 1813. The court granted the application over Candela's objection (see *Matter of Pappas*, NYLJ, Mar. 5, 2014, at 22, col 3, *supra*). Thereafter, Nicholas Cola withdrew his objections to the Second Intermediate Account, and petitioners brought the instant summary judgment motions. Discussion of the merits of those motions and Candela's cross-motion follows.

Summary judgment is available only where no material issues of fact exist (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*id.* at 324 [citation omitted]). If such a showing is made, the party opposing summary judgment must then come forward with proof establishing a genuine issue of material fact or must provide an acceptable excuse for the failure to do

so (see e.g. *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The party attempting to resist summary judgment is entitled to every favorable inference that can reasonably be drawn from the evidence (see e.g. *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]). Nonetheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562, *supra* [citation omitted]).

Motion and Cross-Motion Related to First Intermediate Accounting

Candela's Commissions as Co-Executor (Objections I and II)

The executors argue that Candela's objections related to her commissions (Objections I and II) should be dismissed as a matter of law. First, they contend that Candela is not entitled to any compensation because she never accounted as directed by the court in November 2004. Second, they contend that, even if the court were inclined to award commissions to her, they should be determined on a *quantum meruit* basis for the period from June 6, 2003 through February 16, 2004, the day before Candela petitioned this court to resign. According to petitioners, this amount is \$231,384, the statutory commissions calculated through that date under SCPA § 2307, and not the \$386,061 claimed by Candela. Candela counters that, by objecting to the account, she in essence adopted it, *i.e.*, accounted herself. She maintains that she is therefore entitled to full statutory commissions (paying

and receiving) from June 6, 2003 through November 15, 2004, the date of the court's decree permitting her to resign.

There can be no dispute that an executor's commissions are generally paid upon an accounting (see SCPA § 2307[1]). This statutory framework gives those who have an interest in the estate an opportunity to evaluate how the commissions were calculated and whether there is a basis to challenge a fiduciary's right to them. If a fiduciary wishes to be paid before then, a court order is required to ensure that interested parties are protected in the event that the commissions are ultimately denied (see SCPA §§ 2310 and 2311). A fiduciary who ignores this requirement may be surcharged (see e.g. *Matter of Rothenberg*, NYLJ, Jan. 5, 1998, at 26, col 2 [Sur Ct, NY County 1998]) or suspended pending a hearing on removal (see *Matter of Martin*, NYLJ, 1202603926596 [Sur Ct, NY County 2013]).

Although Candela argues that she accounted when she filed objection in 2008, the mere act of filing objections is not, by any measure, tantamount to a judicial accounting (SCPA §§ 2208-2210). Nor has Candela adopted petitioners' account since she has not, at a minimum, filed and served an affidavit in accordance with SCPA § 2209 (Affidavit to account). As a result, Candela has never sworn that any portion of the executors' account is true and complete (see SCPA § 2209) or requested that she be discharged as fiduciary (see SCPA § 2208).

Contrary to petitioners' contention, however, the failure to account here does not require the denial of Candela's commissions as a matter of law. Candela was not directed to account upon an application by petitioners or a beneficiary. Moreover, she believes, albeit incorrectly, that, by filing objections, she did account. Under these circumstances, there are fact issues surrounding whether Candela flouted the court's direction to account upon her resignation and whether, as a result, she should be denied commissions. The case of *Matter of Labua* (NYLJ, May 28, 1998, at 33, col 3 [Sur Ct, Suffolk County 1998]) upon which petitioners rely is not to the contrary. In that case, on a motion for summary judgment, the court denied commissions to a former fiduciary based upon her failure to account. However, the denial came in the context of the accounting of the successor fiduciary, who, unlike here, had been forced to take and state the account of her predecessor while accounting herself. Here, petitioners' ability to account has never been dependent on Candela's satisfying her obligation to account, as evidenced by the two accountings they filed. To date, Candela is probably the only person negatively impacted by her failure to account since, as a result, she has not yet satisfied a precondition for seeking commissions (see SCPA § 2307[1]) and a discharge (see SCPA § 2208).

Executors are presumptively entitled to commissions unless

the court in its discretion denies payment based on the executor's misconduct (see e.g. *Matter of Gottlieb*, 221 AD2d 530 [2d Dept 1995]). Moreover, not every act of misconduct warrants denial of commissions. Courts must award commissions in the absence of "misconduct amounting to dereliction, complete indifference or other comparable acts of misfeasance" (*Matter of Drier*, 245 AD2d 787, 788 [3d Dept 1997] [citations omitted]). Thus, even fiduciaries who have been surcharged have been allowed commissions (*id.*).

Because Candela has yet to account, the court is not in a position to decide any issue relating to her commissions. Accordingly, the court sua sponte modifies its prior order directing her to account by specifying that she must account judicially (SCPA § 2205) within 30 days of service of notice of entry of this decision. The court can then determine, within such accounting, whether Candela is entitled to commissions and, if so, in what amount without delaying the judicial settlement of petitioners' First Intermediate Accounting.

Under these circumstances, the executors' motion is granted to the extent that Objections I and II are dismissed without prejudice to Candela's seeking commissions within her accounting and to the executors' raising any objections thereto. In view of the above, Candela's motion to the extent it seeks summary judgment on Objections I and II is denied.

Surcharge for Candela's Legal Fees (Objection III)

In Objection III, Candela requests that petitioners be surcharged \$58,863, the amount of legal fees she incurred in bringing the SCPA § 2110 proceeding. Petitioners make their prima facie case for summary judgment by correctly noting that the legal fees at issue were incurred beginning in August 2006, which is outside the period of the First Intermediate Accounting. They contend that, under these circumstances, this is not the proper proceeding in which to seek a surcharge. Petitioners are correct. The fees at issue were incurred outside the accounting period. Candela's argument that the SCPA § 2110 proceeding was aimed at recovering fees incurred by Candela during the period of the First Intermediate Accounting is unavailing. Candela's entitlement, if any, to these legal fees should be decided in petitioners' final accounting when, by the parties' agreement, the court will fix the fees Candela sought in the SCPA § 2110 proceeding.

For these reasons, petitioners' motion for summary judgment with respect to Objection III is granted without prejudice to Candela's raising this objection in petitioners' final accounting. In view of the above, Candela's motion to the extent it seeks summary judgment on Objection III is denied.

Other Relief Sought by Candela

In addition to asking for summary judgment on Objections I-

III, Candela seeks in her cross-motion various relief that was not the subject of any of her objections. For example, Candela asks the court 1) to surcharge petitioners for legal fees the estate incurred in litigations to which she was a party in her individual capacity and 2) to direct that the estate bear the expense of her legal fees in these litigations as well. The court need not reach the merits of this relief, however, because fatal to Candela's effort to make a prima facie case for summary judgment is her failure to have raised these issues in her objections.

As a general rule, summary judgment may not be granted on a claim that has not been pled (see e.g. *Moscato v City of New York*, 183 AD2d 599 [1st Dept 1992]). There are limited exceptions to this rule (see *id.*), but none would permit petitioners to offer entirely new facts in support of new claims to the prejudice of petitioners, as is the case here. Nor can Candela rely upon SCPA § 2110 (Compensation of attorneys) as a basis for the new relief since, among other things, that provision requires that the issue of legal fees be raised in a petition and not by a motion (SCPA § 2110[2]). Accordingly, that part of Candela's motion seeking summary judgment based on matters outside of her objections is denied.

Motion Related to the Second Intermediate Accounting

Petitioners' motion relates solely to the objection of

Candela's counsel, Nixon Peabody. As Candela did in her Objection III to the First Intermediate Accounting, the firm also seeks to surcharge the executors for legal fees the firm provided Candela in connection with her SCPA § 2110 proceeding, but in a larger amount (\$66,876 vs. \$58,863). As detailed above, the court dismissed Candela's objection without prejudice because the fees at issue had been incurred outside the period of the First Intermediate Accounting. That is not the case here since Candela's SCPA § 2110 proceeding was commenced and settled within the period of the Second Intermediate Accounting. However, since Nixon Peabody's objection seeks the same relief as Candela's (a surcharge to pay Nixon Peabody's legal fees), it should be determined with Candela's identical objection, *i.e.*, when the executors file their final accounting and the court fixes the legal fees Candela sought in the SCPA § 2110 proceeding per the parties' settlement agreement. Accordingly, petitioners' motion is granted without prejudice to Nixon Peabody raising the objection in the final accounting.

This decision constitutes the order of the court. The executors are directed to settle an accounting decree in the First Intermediate Accounting proceeding in accordance with this decision. A conference will take place with respect to the Second

Intermediate Accounting at 11:00 a.m. on August 16, 2017, in the
Law Department of this court.



S U R R O G A T E

Dated: July 17, 2017