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

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In the Matter of the Judicial Settlement of the
Account of Sidney Lerner as Executor
of the Estate of

SYLVIA LERNER,

Deceased.

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File No. 331740/C

Dec. No. 27465

In this accounting proceeding, beneficiary Eleanor Ayervais ("Objectant") has interposed objections to the account filed by executor Sidney Lerner. Sidney has moved for summary judgment dismissing these objections pursuant to CPLR 3212 together with costs and sanctions and other relief. The gravamen of the motion is that prior court rulings in unrelated litigation between the executor and Objectant are dispositive of the objections, requiring their dismissal under the doctrine of *res judicata*.

The motion is supported by two affirmations of Herbert Rubin, Esq., discussing the history of the litigation between the parties and the applicable law. The exhibits consist of various court decisions, filings, transcripts and a judgment obtained by the executor against the Objectant. The executor also submits a brief affidavit wherein he states: "I agree with and incorporate by reference the statements contained [in Rubin's affirmation] which relate to the facts of this case."

In opposition to the motion, Objectant submits an attorney affirmation and the Objectant's supplemental affidavit sworn to on May 9, 2011 in the probate proceeding herein, with exhibits.

Summary judgment is a drastic remedy which will be granted only when the party seeking

summary judgment has established that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, *supra.*; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to establish through proof in evidentiary form that triable issues of fact exist or that the party has an acceptable excuse for its failure to do so *(Zuckerman v City of New York*, *supra; Davenport v County of Nassau*, 279 AD2d 497 [2d Dept 2001]; *Bras v Atlas Construction Corp.*, 166 AD2d 401 [2d Dept 1991]). The court's function is issue finding, not issue determination (*Matter of Suffolk County Dept. of Social Services v James M.*, 83 NY2d 178 [1994]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence *(Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]; *Schuhmann v McBride*, 23 AD3d 542 [2d Dept 2005]; *Louniakov v M.R.O.D. Realty Corp.*, 282 AD2d 657 [2d Dept 2001]). If the court has any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Freese v Schwartz*, 203 AD2d 513 [2d Dept 1994]; *Groger v Morrison Knudsen Co., Inc.*, 184 AD2d 620 [2d Dept 1992]). "Where different inferences may be drawn from facts that are undisputed, the case must go to trial and summary judgment will be denied" *(Sodexho Management, Inc. v Nassau Health Care Corp.*, 23 AD3d 370, 371 [2d Dept 2005]; *Shea v Johnson*, 101 AD2d 1018, 1019 [4th Dept 1984]).

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form" (*Friends of Animals v Associated Fur Mfrs.,* 46 NY2d 1065, 1067-1068 [1979]). An attorney's affirmation that demonstrates no personal knowledge of the matter is without evidentiary value and thus is unavailing (*Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.,* 42 NY2d 496, 500 [1977]; *Israelson v Rubin,* 20 AD2d 668 [2d Dept 1964], *affd* 14 NY2d 887 [1964]; *Lamberta v Long Is. R. R.,* 51 AD2d 730 [2d Dept 1976]; *Zuckerman v City of New York*, *supra).*

On the surface, the primary issue presented for determination is whether the substance of the objections has been previously determined. As stated in *Matter of Hunter*, 6 AD3d 117, 122 [2d Dept 2004]:

> The doctrines of res judicata and collateral estoppel have, if anything, expanded in scope in the years that have gone by since the time that many of the cases cited above were decided. New York has adopted the "transactional" approach in deciding res judicata issues (*see O'Brien v City of Syracuse,* 54 NY2d 353, 445 NYS2d 687, 429 NE2d 1158 [1981]; *Matter of Reilly v Reid,* 45 NY2d 24, 407 NYS2d 645, 379 NE2d 172 [1978]), recognizing that "considerations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation" (*Matter of Reilly v Reid, supra* at 8, 407 NYS2d 645, 379 NE2d 172). The Court of Appeals has stated that the doctrine is "strong enough . . . to bar a second action even where further investigation of the law or facts indicates that the controversy has been erroneously decided" (*id.* at 28, 407 NYS2d 645, 379 NE2d 172 [1978]). The rule has accordingly been recognized that "under the general precepts of res judicata, an accounting decree is conclusive not only as to issues which were actively presented and determined, but as to those which could have been raised regarding all matters set forth in the accounting" (*Matter of Ziegler, supra* at 204-205, 613 NYS2d 316, citing Scott, "Trusts," § 220, at 374; *Matter of Roche,* 259 NY 458, 182 NE 82 [1932]; *Staples v Mead,* 152 AD

745, 137 NYS 847 [1912]; *Matter of Crawford, supra; Matter of Van Deusen, supra; Matter of Chapin,* 171 Misc 783, 14 NYS2d 91 [1939]; *see also Matter of Rudin,* 292 AD2d 283, 739 NYS2d 154 [2002], *affg.* NYLJ, March 2, 2000, at 30 col 2; *Matter of Hofmann,* 287 AD2d 119, 733 NYS2d 168 [2001]).

"Pursuant to the doctrine of res judicata, a valid final judgment, or a stipulation of settlement withdrawing a cause of action 'with prejudice' . . . bars future actions between the same parties on the same cause of action . . . As a general rule, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy...." *(Chiantella v Vishnick*, 84 AD3d 797, 798 [2d Dept 2011][internal citations omitted]).

At bar, the claim of res judicata is premised on the judgment obtained by the executor against the Objectant.[1] This is a money judgment only and appears to have been predicated upon monies transferred by the decedent to the Objectant for convenience purposes which the Objectant refused to return. A review of the objections, as found in the court's files, leads to the conclusion that they do not seek to re-litigate that liability. Rather there is an objection to the legal fees charged to the estate, an objection to the executor's personal claim of $117,073.22, and other accounting items, none of which were relevant to the judgment relied upon by the executor. The determination of the legal fees is a matter clearly subject to the court's discretion, regardless of whether or not it is raised in objections or agreed to by the parties.[2]

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[1] While a copy of the judgment is included, the pleadings have not been presented for the court's review and the executor relies on his counsel's conclusory presentation for the res judicata analysis. Likewise, a copy of the objections is not included with the executor's papers.

[2] With respect to attorneys' fees, the court bears the ultimate responsibility for approving legal fees that are charged to an estate and has the discretion to determine what constitutes reasonable compensation for legal fees rendered in the course of an estate (*Matter of*

The court notes that the executor's presentation is supported solely by an attorney's affirmation[3] and does not address the individual objections, but states in conclusory terms that they were or could have been litigated in the previous litigation. The doctrine of *res judicata* is inapplicable when, as here, the prior action concerned whether Objectant converted property belonging to the decedent and the current action concerns the executor's accounting, including the conduct of the executor and whether and to what extent counsel fees should be approved or awarded from the estate. The claims raised by the objections could not have been properly raised in the prior Supreme Court action (*Benjamin v Morgan Guar. Trust Co. of New York*, 163 AD2d 135,137-138 [1st Dept 1990]; *In re Carroll's Estate,* 247 AD 11 [1st Dept 1936], *mod* 274 NY 288 [1937]). The court therefore concludes that the objections are not barred by application of the doctrine of res judicata. The executor's motion for summary judgment is accordingly denied. The motion for sanctions is denied, as is the motion for a stay.

This matter will appear on the court's calendar on September 21, 2011, at 9:30 a.m.

Settle Order.

Dated: September 9, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court

Stortecky v Mazzone, 85 NY2d 518 [1995]; *Matter of Vitole*, 215 AD2d 765 [2d Dept 1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]).

[3] The executor's affidavit merely agrees with his attorney's statements and incorporates them by reference.