

**Matter of Fedder**

2016 NY Slip Op 32036(U)

September 20, 2016

Surrogate's Court, Nassau County

Docket Number: 2011-365365/A

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**In the Matter of the Petition of Wilbank Lee as  
Executor of the Estate of**

**NICHOLAS H. FEDDER,**

**To Discover Property and Compel the turnover of  
Property of the Estate pursuant to SCPA § 2103 from  
Citibank, N.A.**

**DECISION  
File No.2011-365365/A  
Dec. Nos. 31733  
31734  
31735**

**PRESENT: HON. MARGARET C. REILLY**

The following papers were considered in the preparation of this decision:

Notice of Motion with Exhibits . . . . .	1
Memorandum of Law in Support of Motion. . . . .	2
Attorney’s Reply Statement. . . . .	3
Reply Memorandum of Law in Support of Motion and Opposition to Cross Motion. . . . .	4
Amended Notice of Cross Motion for Summary Judgment (Executor) with Exhibits. . . . .	5
Memorandum of Law in Support of Cross Motion. . . . .	6
Notice of Cross Motion for Summary Judgment (Respondent Fedder) with Exhibits. . . . .	7
Affidavit in Support of Cross Motion (Respondent Fedder). . . . .	8
Executor’s Opposition to Cross Motion of Respondent Fedder. . . . .	9
Executor’s Reply Brief. . . . .	10
Memorandum of Law (Executor) in Opposition to Cross Motion of Respondent Fedder. . . . .	11
Reply Affirmation (Respondent Fedder). . . . .	12
Exhibits Marked Confidential. . . . .	13

Currently before the court in this SCPA §2103 discovery proceeding are: (1) a motion by respondent Citibank, N.A. (Citibank) for summary judgment dismissing the proceeding as against Citibank, and for other or alternate relief; (2) a cross motion by the executor for

summary judgment in favor of the estate; and (3) a cross motion by respondent Michelle Fedder (respondent Fedder), the daughter of the decedent, against Citibank on her cross claims.

The underlying discovery proceeding seeks the return to the estate of a sum of money (approximately \$103,000.00) that was on deposit with Citibank in the name of the decedent at the time of his death on March 23, 2011. Citibank paid the entire balance in the account to respondent Fedder on September 6, 2011, as the purported named beneficiary on the account. The executor contends, contrary to the positions taken by Citibank and respondent Fedder, that the account was not “in trust for” Michelle Fedder or anyone else and that the proceeds of the account therefore belong to the estate. His papers also intimate that Citibank recognized its error in paying the sums on deposit to respondent Fedder but has refused to admit that in its own self-interest. The salient issue in the case is whether or not the account at issue was in trust for Michelle Fedder. Although this would seem, at first blush, to be an issue susceptible to ready proof, the evidence adduced to date has been frustratingly inconclusive.

#### **Citibank’s motion for summary judgment**

In support of its summary judgment motion, Citibank includes the affidavits of several bank employees, including that of Chandra Thallman, a senior vice president in Citibank’s Global Technology Group. His affidavit indicates that among the items sought in the

executor's notice for discovery and inspection was metadata<sup>1</sup> concerning the subject account. Mr. Thallman avers that the metadata has been provided but that due to the manner in which the metadata was stored, "the only way to export it into a readable format without in any way altering the data was to extract data record information from the tape storage for presentation by the use of screenshots." Mr. Thallman goes on to aver that "the metadata contained on these pages show conclusively that the CD Account was In Trust For Michelle N. Fedder from the account's opening or shortly thereafter." The court's own review of the screenshots provided reveals that they are almost entirely illegible and could not possibly justify granting Citibank's motion for summary judgment.

Citibank posits that the holding in *Matter of Wess* (NYLJ, Jan. 28, 2013 [Sur Ct, New York County]) fully supports its entitlement to summary judgment. In *Wess*, as in this case, the bank was unable to locate the signature card used to open the account. In *Wess*, the bank produced the IRS 1099 forms for several years that reflected that the account was held in the name of the decedent "in trust for" another. Here, as indicated above, Mr. Thallman's affidavit asserts that the metadata prove conclusively that the account was in trust for respondent Michelle Fedder from inception or very shortly thereafter. However, this is contrary to the prior deposition testimony of Michael Auerbach, the Citibank branch manager

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<sup>1</sup> According to businessdictionary.com, metadata is "data that serves to provide context or additional information about other data. For example, information about the title, subject, author, typeface, enhancements, and size of the data file of a document constitute metadata about that document. It may also describe the conditions under which the data stored in a database was acquired, its accuracy, date, time, method of compilation and processing, etc."

where the account was maintained. At his deposition (Tr. 85-86), he was questioned about the IRS 1099 forms that are sent annually to depositors reflecting the interest earned on their accounts for income tax purposes. Although the form 1099 for 2011, the year of the decedent's death, indicates that the account was in the name of the decedent "in trust for" respondent Fedder," the 1099 forms for years 2009 and 2010 do not. When asked to explain why the form 1099 for 2011 reflects the account as being "in trust for" respondent Fedder and while the tax forms for prior years do not, he responded "[b]ecause Mr. Fedder added it on. He added a beneficiary to the CD." As respondent Fedder's attorney points out, the only form 1099 that indicated that the subject account was being held "in trust for" respondent Fedder was the 1099 for tax year 2011, which would have been created and sent in early 2012, after the decedent's death in September 2011. From the evidence adduced thus far, it would appear that the 1099's received by the decedent during his lifetime did not indicate that the account was being held "in trust for" respondent Fedder. This conflicting testimony of the Citibank employees is a sufficient basis on its own to deny the motion for summary judgment (*Thomas H. v Paul B.*, 18 NY3d 580 [2012]; *Felix v Falletta Carting Corp.*, 131 AD3d 667 [2d Dept 2015]).

Accordingly, that branch of Citibank's motion seeking summary judgment dismissing the proceeding as against it is denied.

Citibank's motion also seeks summary judgment dismissing the cross claims asserted against it by respondent Fedder. Those cross claims are for contribution and indemnification

in the event that the executor is successful in his proceeding against her. Alternatively, Citibank seeks summary judgment on its own cross claims against respondent Fedder in the event it is found liable to the estate. In *Collins v HSBC Bank USA* (305 AD2d 361 [2d Dept 2003]), the decedent Arthur Medley died on March 20, 1998 at which time he held a bank account in his own name in trust for one Carolina Miller. Carolina Miller post-deceased Arthur Medley on June 19, 1998 without having collected the proceeds of the account. On July 22, 1998, the bank mistakenly paid the proceeds to the estate of Arthur Medley. The administrator of Carolina Miller's estate commenced an action against the bank, who, in turn, brought a third-party action against the executors of Arthur Medley's estate. They claimed that they had distributed the assets of his estate, including the proceeds of the bank account, prior to being notified that Arthur Medley's estate was not entitled to the proceeds. On these facts the court held that "[g]enerally, if a payor pays money based upon the erroneous assumption that it is indebted to the payee, the payee is not entitled to retain the money acquired by the mistake of the payor, even if the mistake is the result of negligence. However, where the receiving party has changed its position to its detriment in reliance upon the mistake recovery may be denied" (*Collins v HSBC Bank USA*, 305 AD2d 361, 362 [2d Dept 2003], citing *Banque Worms v BankAmerica International*, 77 NY 2d 362, 366 [1991]; *Bank of New York v Spiro*, 267 AD2d 339 [2d Dept 1999]).

Here, respondent Fedder alleges that the account proceeds were properly paid to her, but, if it is determined that she was not entitled to the proceeds, she bore no responsibility for

the mistaken payment<sup>2</sup> and she detrimentally relied on the payment and the representation to her that she was entitled to the proceeds by using those funds to pay outstanding student loans. The time when respondent Fedder became aware that the estate was laying claim to the account proceeds and when and if she used those funds to her detriment are questions of fact precluding Citibank's motion for summary judgment dismissing the cross claims asserted against it by respondent Fedder as well as its alternate relief granting it summary judgment on its own cross claims against her.

Finally, the branch of Citibank's motion for sanctions against the executor's attorney are denied.

#### **The executor's cross motion for summary judgment**

Regarding the executor's cross motion for summary judgment, as indicated in the discussion of Citibank's motion for summary judgment dismissing the proceeding, there are undeniable questions of fact as to whether or not the account in question was, in fact, held "in trust for" respondent Fedder. That being the case, the executor's motion for summary judgment must also be denied (*see Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016][“Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts”]).

#### **Respondent Fedder's cross motion for summary judgment**

Respondent Fedder has also cross-moved for summary judgment on her cross claims

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<sup>2</sup> In fact, she was notified by the executor's attorney that she was the beneficiary on the account and only closed the account after having been so advised.

against Citibank. As indicated above in the discussion of Citibank's motion for summary judgment, the time when respondent Fedder became aware that the executor was laying claim to the sums on deposit in the account and whether or not she can establish that she detrimentally relied on the payment to her and the representations made that she was entitled to the funds in the account are questions of fact precluding a grant of summary judgment on her cross motion (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

Accordingly, the motion by Citibank for summary judgment is denied in its entirety as are the cross motions for summary judgment made by the executor and respondent Fedder.

A conference in this matter shall be held at the Nassau County Surrogate's Court on October 20, 2016 at 9:30 a.m. All parties are directed to appear for this conference.

This constitutes the decision and order of the court.

Dated: September 20, 2016  
Mineola, New York

**E N T E R:**

**HON. MARGARET C. REILLY**  
**Judge of the Surrogate's Court**

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