Matter of Mendelson (Kass)
2017 NY Slip Op 31497(U)
July 14, 2017
Surrogate's Court, New York County
Docket Number: 2009-4348/E
Judge: Rita M. Mella

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

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Accounting by William A. Kass, Esq. and Barbara K. Miller, as Co-Executors of the Estate of

DOROTHY K. MENDELSON,

Deceased,

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DECISION
File No.: 2009-4348/E

M E L L A , S.:

The following papers were considered by the court (CPLR 2219[a]) in deciding this motion for partial summary judgment (CPLR 3212) in a contested accounting proceeding:

Papers Considered	Numbered
Notice of Motion and Amended Notice of Motion for Partial Summary Judgment with Affirmation in Support of Donald Novick, Esq., with with Exhibits A through O	1,2
Affirmation of Philip T. Simpson, Esq., in Opposition to Motion, with Exhibits 1 through 9	3
Memorandum of Law in Opposition to Motion for Summary Judgment	4
Reply Affirmation of Donald Novick, Esq., with Exhibit A	5
Reply Affidavit of William A. Kass in Opposition to Motion	6

In this contested proceeding to settle the first intermediate account of Barbara K. Miller and William A. Kass, Esq., as executors of the will of Dorothy K. Mendelson, covering, as supplemented, the period from October 5, 2009 to May 31, 2015, respondent Jonathan Mendelson filed objections and now, after the conclusion of discovery, moves for partial summary determination (CPLR 3212) on a select number of his objections.

Specifically, Jonathan seeks a summary determination in his favor as to Objections 13 and 15 (executors' request for permission to satisfy the claim asserted by James Mendelson for payment of his legal fees in connection with the turnover proceeding commenced by Jonathan), Objection 16 (allocation of estate taxes), and Objections 17 and 18 (executors' request for fiduciary commissions on the value of decedent's co-op apartment). The executors oppose the

motion in its entirety.

For the reasons set forth below, the motion is granted.

Background

Decedent, Dorothy K. Mendelson, died on October 5, 2009. Her Last Will and Testament dated June 22, 2009, was admitted to probate by Decree of this court dated April 16, 2012. Letters Testamentary were issued to Mr. Kass (decedent's longtime friend and attorney drafter) and Ms. Miller (decedent's sister). Under the terms of decedent's will, decedent left her dog and cooperative apartment and one half of her residuary estate to her son, Jonathan. She left the other half of the residuary estate to a trust for the lifetime benefit of her other son, James, with the remainder going to Charlotte Mendelson, Jonathan's daughter and decedent's only grandchild. The assets of the estate, with a total date-of-death value in excess of $11 million, consist primarily of decedent's cooperative apartment, securities, cash, and tangible personal property.

Summary Judgment Standard

The movant for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law and tender sufficient evidence in admissible form to show the absence of any disputed material facts (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]). Upon such a showing by the movant, the burden then shifts to the party opposing summary judgment, who must submit evidence demonstrating the existence of a genuine issue of material fact (*Alvarez*, 68 NY2d at 324, *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

ANALYSIS

Objections 13 and 15: Legal Fees Paid by James in the Turnover Proceeding

Jonathan objects to the executors' proposal that his share of the residuary estate be charged with the legal fees incurred by James in connection with the turnover proceeding. In this regard, the parties engage in considerable argument, primarily as to whether the executors are collaterally estopped on the issue. More specifically, the parties here disagree as to whether the present legal fee-allocation issue was determined in Jonathan's favor in the turnover proceeding, thus precluding the executors from revisiting the issue in their accounting. According to Jonathan, such preclusion arose when this court, in the turnover proceeding, denied the executors' request to assess all the legal fees related to it against Jonathan as a sanction for his having commenced that proceeding (*see Matter of Mendelson*, NYLJ, Aug 2, 2013, at 31 [Sur Ct, New York County], *affd* 116 AD3d 477 [1st Dept 2014], *lv denied* 24 NY3d 907 [2014]).

As it happens, the court need not engage in the issue preclusion analysis because there is no support in the law for the executors' position. As a matter of basic principle, the legal fees for a beneficiary's attorney can be assessed against the estate or against the share of the estate belonging to another beneficiary or person interested (SCPA 2110[2]) only to the extent that the services provided have benefited the estate "as a whole" (*Matter of Wallace*, 68 AD3d 679, 680 [1st Dept 2009]). As was noted in this court's decision in the turnover proceeding, James had not been made a party to that proceeding; nor was he a necessary party to it; and he had not sought, much less been granted, leave to intervene in it. In other words, James had in effect been a mere interloper in the turnover proceeding. Moreover, as was also noted in the turnover decision, James's submissions had in essence merely endorsed the executors' arguments.

Accordingly, the court had not deemed James's submissions a "cognizable" element in the turnover proceeding (*see Matter of Mendelson*, NYLJ, Aug 2, 2013, at 31, *supra*, n 1). Under these circumstances, the legal fees incurred by James in that proceeding should not be shifted to the estate as a whole or to one of the other persons interested in the estate, since the services rendered by his attorney provided no value to support such a shift.

Objection 16: Allocation of Estate Taxes

Jonathan objects to the executors' calculation of the total estate tax chargeable against his interest in the Residuary Estate on account of the pre-residuary bequest to him of testator's apartment. Under Article SIXTH, testator directed that such taxes

> "shall be paid from my Residuary Estate, provided, however, [that] the share of my Residuary Estate to be distributed to . . . Jon . . . shall be reduced by the amount of such taxes attributable to the bequest of [my apartment] to him under Article THIRD hereof."

According to the executors' calculation (as reflected in their account), the sum of estate taxes reducing Jonathan's interest in the Residuary Estate on account of the apartment is $1,232,599.52. However, according to Jonathan's calculation, such sum should be $675,683.58.

Certain undisputed facts offer a broader perspective on the parties' competing calculations. One such fact is that the apartment bequeathed to Jonathan was valued at $2.35 million for estate tax purposes, representing 24% of the value of testator's gross estate. Another is that the sum identified by Jonathan as the estate tax attributable to the apartment represents 24% of the estate's total estate tax. A third is that the sum identified by the executors as the estate tax attributable to the apartment represents 43% of the estate's total estate tax.

For reasons that eventually will become apparent, we start by noting what the proper

allocation of estate tax would be if the will said nothing about allocation of estate tax. In such a case, EPTL 2-1.8(c) would apply, and it would apportion estate tax ratably among the beneficiaries, *i.e.*, make the beneficiaries liable for estate tax strictly in proportion to the relative values of their respective benefits. Thus, where a will does not provide otherwise, a beneficiary who receives, for example, one third of the taxable estate will have to bear the burden of one-third of the estate tax.

The Will in this case, however, does provide otherwise. As quoted above, its Article SIXTH contains a general rule that the burden of estate taxes is to be allocated to the residuary (which is divided equally between James's trust and Jonathan). However, the terms of the same Article include an exception to that general rule: "the share of my Residuary Estate to be distributed to son Jon ["Jonathan's share"] . . . shall be reduced by the amount of such taxes attributable to the bequest of [the apartment]." In other words, Article SIXTH provides for an apportionment of estate taxes between, on the one hand, Jonathan's share alone (to the extent of the estate tax attributable to the apartment) and, on the other hand, the residuary as a whole (consisting of both Jonathan's share and the share of James's trust). From this point, the amount by which Jonathan's share is to be reduced on account of the bequest of the apartment will be referred to as "the Offset."

The parties do not dispute that Article SIXTH contains such a general rule and such an exception to that general rule. But they disagree as to the rate of estate tax that is to factor in the calculation of the Offset.

For their part, the executors contend that the Offset should be calculated as the difference between (1) the estate tax actually payable by the estate and (2) the estate tax that would have

been payable if the apartment had not been part of the taxable estate. In other words, the executors propose that the Offset is a function of the highest marginal tax rate to which this estate is subject. The executors argue that their proposal is consistent with the testator's intention as reflected in Article SIXTH's use of the words "taxes attributable to the bequest of [the apartment]."

By contrast, Jonathan would calculate the Offset as a function of the average estate-tax rate actually payable by the estate. In other words, according to Jonathan, testator intended that the Offset be calculated by simply multiplying the estate tax by the fraction of the taxable estate that the value of the apartment represents.

Whether to grant or deny the motion in this connection ultimately turns on a determination of testamentary intent. As indicated above, the executors maintain that such intent is expressly stated by the phrase beginning "attributable to." But their argument proposes to give that phrase more weight than it (or like phrases, such as "in respect of," "attracted by," "resulting from," "on account of," *etc.*) can be made to bear. The most that can reasonably be said of Article SIXTH is that it is an example of a variation of the basic rule of apportionment (as reflected in EPTL 2-1.8[c]). In this case, the apportionment provided for by Article SIXTH is between one particular beneficial interest (here, Jonathan's Share, to which is allocated the estate tax attracted by the apartment) and the entire residuary (to which is allocated the balance of the estate tax). Since apportionment between or among two or more beneficial interests normally involves a simple calculation—*i.e.*, the estate tax payable multiplied by the fraction of the taxable estate that the benefit in question represents—any testamentary intention to depart from the usual calculation would have to be clearly indicated by the terms of a will. The Will in this case

contains no such clear indication.

In view of the foregoing, Jonathan has made a prima facie case for the pro rata apportionment of estate tax against his share based upon the simple calculation usually used in proration. The executors, for their part, have failed to raise any genuine question of fact in this connection. Indeed, the executors' own memorandum of law concedes that Mr. Kass, the drafter, never discussed proration vs. no proration with testator and that Mr. Kass himself had not thought about how to calculate the Offset until after the will was executed.[1]

Objections 17 and 18: Commissions on the Value of the Cooperative Apartment

Finally, Jonathan disputes the executors' request for commissions relating to the co-op apartment that was specifically bequeathed to him under the terms of decedent's will. His position in this connection rests on the ground that commissions are not ordinarily allowed to executors in respect of specific legacies. The executors agree that the apartment was specifically bequeathed, but they argue that the shares allocated to the apartment remained in decedent's name until they eventually sold the apartment.[2] They aver, without dispute from Jonathan, that they were required to make all maintenance and insurance payments as well as oversee the physical maintenance of the apartment from the time they took office in November 2009 until, according to their undisputed averment, July or August 2012 when Jonathan finally accepted

[1]There is thus no need to consider the merits of the parties' dispute as to whether Mr. Kass can retract part of his deposition testimony, since resolution of the issue would not affect the foregoing conclusion that Jonathan prevails on his objection.

[2] Formal title to the co-op apartment could not have automatically passed to Jonathan even in theory, since his ownership was subject to a precondition: the approval of the co-op Board.

keys to the apartment.[3] The executors also claim that they are entitled to commissions because of delay caused by Jonathan's probate objections and Jonathan's "obstinate and bizarre refusal" to sell the apartment to a highly qualified buyer for a record price.

As a threshold matter, when such an issue is raised in a testate estate, the property in question is always, by definition, held in the testator's name at the time of death (else the testator would not be able to bequeath or devise it).[4] Accordingly, an executor must always take at least some action with respect to such property, even if only to cooperate in its record transfer. Moreover, an executor is often as a practical matter called upon to perform various functions with respect to the property prior to its transfer, at whatever point the transfer may occur. If an executor's doing so were the test to assess entitlement to commissions, the general rule established by SCPA 2307 (2)(a) would be dwarfed by its exceptions. Recognizing that the legislature cannot have intended the statute to be relatively meaningless, case law has developed a test that honors the general rule but also acknowledges the possibility of exceptions to it.

In determining whether an executor is entitled to commissions on assets that are the

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[3] The executors' reliance on *Matter of Tobias*, NYLJ, June 5, 1995, at 28, col 3 [Sur Ct, New York County 1995], is misplaced. There, the executor was asked by the sole residuary beneficiary to help market and sell the apartment, which is not the case here.

[4] The decisions commonly say that title to specifically bequeathed or devised property passes automatically to the beneficiary or devisee. However, these decisions cannot be taken to mean that literally, since it is an incontrovertible fact that, where property is the subject of formal title, the executor is unavoidably going to have to be involved in formal transfer of title to the beneficiary. What the decisions mean in this respect is that beneficial entitlement passes automatically to specific beneficiaries or specific devisees, with only a "qualified legal title" passing to the fiduciaries (a term that is used in treatises and decisional law such as *Blood v Kane* (130 NY 514, 517 [1892]) to enable them to deal with the property to the extent that they, as fiduciaries, must do so either: (a) to protect the estate as a whole (as opposed to protecting the specific property), when circumstances require, or (b) to satisfy a duty imposed on the fiduciaries by the terms of will regarding the particular property).

subject of a specific legacy, the test is whether: (1) the will requires the executor to perform regular fiduciary duties with respect to such property (*Matter of Brooks*, 119 Misc 738 [Sur Ct, NY County 1922], *aff* 212 App Div 868 [1st Dept 1925]; *Matter of Doehla*, 104 Misc 2d 176 [Sur Ct, Nassau County 1980]; *Matter of Mattes*, 12 Misc 2d 502 [Sur Ct, NY County 1958]; *Matter of Berwind*, 181 Misc 559 [Sur Ct, NY County 1943]; *see Matter of Kuker*, 22 Misc 2d 63 [Sur Ct, New York County 1959]), or, even if the will's terms do not do so, (2) circumstances require the executor to take extraordinary steps with regard to the property in order to protect the estate as a whole, as opposed to merely protecting the property pending its in-kind distribution or pending distribution of the proceeds of the property's sale (*see Matter of Orecchia,* NYLJ, Oct. 16, 2015, at 23 col 4 [Sur Ct, NY County], and cases cited therein).

Here, the will itself does not impose duties on the executors in relation to the apartment. In addition, the executors' contention that Jonathan prevented a sale of the apartment at attractive terms, if true, would have bearing only on whether Jonathan disserved his own interests as beneficiary of the specific bequest of the apartment. The fact that the apartment was not sold until four years after decedent's death does not, without more, establish that the executors in this case were similarly situated to the fiduciaries whom case law has deemed to be entitled to commissions on a specific bequest for exceptional reasons (*cf Matter of Orecchia*, *supra*, and decisions cited therein).

Nor is it material to the commissions issue that the probate proceeding may have been protracted by the position that Jonathan assumed in the probate proceeding, since the administration of the estate was unaffected by any such delay, the issuance of preliminary letters having occurred soon after testator's death.

Thus, Jonathan has established prima facie that circumstances did not require the executors to take any steps with respect to the apartment that would warrant their entitlement to commissions on its value, and the executors have failed to raise a triable issue of fact in such connection.

On the basis of the foregoing, Jonathan's motion for partial summary judgment is granted.

The parties will be contacted for a conference.

This decision constitutes the order of the court.

Clerk to notify.

Dated: July 14, 2017

SURROGATE