Matter of Hassine
2018 NY Slip Op 33144(U)
December 10, 2018
Surrogate's Court, New York County
Docket Number: 2009-3748/C
Judge: Nora S. Anderson

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

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In the Matter of the Accounting of
Samuel Hassine as Executor of the
Estate of

DAVID HASSINE,

File No. 2009-3748/C

Deceased.

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A N D E R S O N , S .

In this contested executor's accounting proceeding, the parties have cross-moved for summary determination of the issues raised by the objections filed by decedent's two children.

Decedent died on August 29, 2009, at the age of 53, survived by objectants. His will, dated August 13, 2009, was admitted to probate on October 9, 2009. On October 14, 2009, letters testamentary issued to decedent's brother, the nominated executor. Objectants are the named successor co-executors and the sole beneficiaries under the will.

The accounting covers the period from decedent's death on August 29, 2009 to January 2, 2013. A prior proceeding to remove the executor was consolidated with this accounting proceeding (*Matter of Hassine*, NYLJ, Apr. 3, 2014, at 25, col 4 [Sur Ct, NY County]).

The objections center primarily around two issues. The first is whether certain assets should have been included in the account (the "Missing Assets Objections"). These objections relate to whether decedent's estate at his death was worth

approximately $600,000, as reported by the executor, or, whether the estate is largely unaccounted for, as objectants contend. Objectants estimate the estate's date of death value at more than $10 million. This issue turns on whether decedent owned outright 30 percent of certain family funds held in Swiss bank accounts (as objectants contend) or whether decedent had only a limited beneficial interest in the assets that terminated at his death (as the executor contends).

The second issue involves objectants' allegation that the executor engaged in self dealing when he sold decedent's share of a family business, known as Chelco USA, to himself individually, and that he undervalued the sale price for his own benefit and to the detriment of the estate. They also contend that the sale was made without the necessary authorization (the "Chelco USA Sale Objections").

The remaining objections (2[b], 4[d], 4[e], 5[a], 5[b], and 8[a]) have not been addressed in the parties' motion papers. Objections 4(a), (b), and (c), relating to the reasonableness of decedent's funeral expenses, have been withdrawn.

In their objections, objectants ask the court to surcharge the executor for [1] his failure to account for decedent's Swiss assets and for the undervalued sale of decedent's share of Chelco USA; [2] any penalties, fees, or additional taxes owed by the estate as a result of the executor's failure to marshal assets of

decedent's estate; and [3] lost interest or reduced return on estate assets. Objectants also seek a decree declaring the value of unaccounted assets at "no less than $2[million] (or such additional amounts as may be established)" and an order directing the executor to satisfactorily complete his account. Further, objectants ask the court to revoke the executor's letters, to appoint objectants as successor co-executors, to suspend the executor's letters pending disposition of the removal application, and to grant reasonable attorney's fees and costs.

After discovery was completed, the instant motions were filed. It is noted at the outset that in addition to seeking summary judgment on the Missing Assets Objections and the Chelco USA Sale Objections, objectants seek additional relief not sought in their pleading. Specifically, they seek an order declaring any alleged trust to be null and void. This request for relief will not be considered as it is not properly before the court. The executor's cross-motion for summary judgment seeks, in effect, dismissal of the Missing Assets Objections and the Chelco USA Sale Objections.

Undisputed Facts:

In or around 1956, decedent's family was forced to flee Egypt. Around this time, decedent's paternal grandfather instructed decedent's father to manage assets in a Swiss bank account for the benefit of decedent, decedent's brother, and

their sister. Relying on different parts of the record, objectants maintain that decedent's grandfather "donated" the funds, 50 percent to decedent's brother (hereinafter referred to as either "decedent's brother" or "the executor"), 30 percent to decedent, and 20 percent to their sister, all three were minors at the time, to be managed by their father. By contrast, the executor contends that the grandfather "entrusted . . . [their father] to manage a Swiss bank account . . . for the benefit of his 3 grandchildren, as [their father] deemed necessary[,] with the . . . general guideline [of]: 50% [to decedent's brother], 30% [to decedent], [and] 20% [to their sister]." Thus, it is objectants' position that the grandfather gave the funds outright to decedent's brother, decedent, and their sister, in the above-stated percentages, but because they were minors at this time, the funds would have been held for their benefit by the father. It is the executor's position that (1) the grandfather transferred the funds to the father, in trust, for the benefit of decedent and his two siblings, to manage as the father deemed necessary; and (2) instructed the father to give decedent's brother a 50 percent share of the fund's income, with decedent to receive a 30 percent share of the income, and the sister to receive a 20 percent share of the income. The instructions which the executor contends decedent's grandfather purportedly gave to decedent's father about the remainder was not revealed in the

record until 2011.

In the late 1970's and early 1980's, the father added business profits to the Swiss bank account(s) from a company or companies that he owned. There is no dispute that decedent ever personally generated any funds deposited into the accounts.

Around the same time, the father and decedent's brother founded Chelco Sound Inc., Chelco Realty Corp., and Chelco Travel Agency Inc., known collectively as Chelco USA. Decedent did not own any part of Chelco USA until 1994, when he became a 48 percent owner, with his brother and father owning 48 percent and four (4) percent, respectively.

In 1996, when decedent and his siblings were all adults, three new accounts were opened at Union Bank of Switzerland (UBS). The father, decedent, and his two siblings held signatory authority over the three accounts. The account documents show that decedent and his siblings were each, respectively, the first signatory on one of each of the three accounts.

In 2005, these three UBS accounts were closed and replaced with new UBS Swiss accounts. Decedent was not named as signatory on any of the new accounts. The brother's two adult children were added as signatories, however.

Around 2008, all UBS accounts were closed and the funds transferred to an account (or accounts) held in Banque Pictet & Cie. in Switzerland ("Pictet"). All of the family's Swiss assets

had been continuously held in Pictet at the time of decedent's death in 2009.

Prior to 2008, funds from the Swiss bank accounts were being routed to decedent and his two siblings in the United States in two ways. First, the father created a management fee structure to route payments from the Swiss accounts, through a family-owned Hong Kong pass-through entity, to Chelco USA. Through this management fee structure, Chelco USA, despite being an inactive company, paid decedent and his siblings salaries for almost 30 years. Second, funds from the Swiss accounts were transferred through the Hong Kong pass-through entity, to the father's "personal account" in the United States and, from there, distributed to decedent and his siblings.

Starting in 2008, the Swiss funds were routed to the United States through two different pass-through companies, Foundation International Research and Superga Corporation (and then through two additional companies), to Chelco USA, and, from there, routed to decedent and his siblings.

The family's Swiss assets were concealed from various authorities until around 2007-2008, when the family began the process of disclosing their foreign assets and accounts through the Internal Revenue Service (IRS) Offshore Voluntary Disclosure Program (OVDP). According to the parties, the IRS determined that the family had not acted with criminal intent, and the case was

transferred to its Civil Division.

In connection with the OVDP, which covered the period from 2003 to 2008, certain family members, including decedent and his brother, were required to file amended tax returns for 2003 through 2007 and an original tax return for 2008. Decedent (as well as other family members) also filed a 2008 Foreign Bank Account Report (FBAR) in connection with the OVDP. The IRS preliminarily accepted the family members into the OVDP on July 9, 2009. When decedent died less than two months later, the OVDP process was still ongoing.

On August 14, 2009 (two weeks before decedent's death), the father sold his four percent share of Chelco USA to decedent's brother for $30,000. The account reports that, on August 30, 2009 (one day after decedent died and before letters testamentary were issued), the brother sold decedent's 48 percent share of Chelco USA to himself for $504,000. The brother's admitted that he had not been appointed fiduciary at this time.

About one year after decedent died, in September 2010, the father, decedent's brother, his sister, their mother, decedent's children (*i.e.*, objectants), and his brother's two adult children, signed the "Family Agreement," which states as follows:

> "We all agree that [decedent's brother] is the Trustee of the Trust funds currently held in Europe for the descendants of [the father], and has absolute and unrestricted authority to make all decisions with regards [sic] to said funds,

> including but not limited to investments, distribution of income or principal, and all other payments or withdrawals. We all acknowledge that[,] in the event of the death or disability of [decedent's brother], the next senior descendant in kin of [decedent's father] will assume that same authority and so on."

The OVDP process was completed on or about April 14, 2011, when the IRS accepted a Closing Agreement On Final Determination Covering Specific Matters for certain family members, including decedent and his siblings.[1] Decedent and his siblings each owed individual back taxes for unreported income. In addition, the closing agreement signed by decedent's brother included a penalty in the amount of $7,454,235. The parties do not dispute that the IRS imposed the penalty with respect to the body of the Swiss funds, and that the penalty was imposed on decedent's brother as a family representative. From an account titled "Chelco 'Special Account'," the brother drew three checks to the IRS, dated January 21, 2011, and totaling $8,416,033, for the payment of back taxes and penalties.

In May 2011, decedent's father died. Shortly before his death, he signed an affidavit (the "2011 Affidavit"), stating that decedent's grandfather, in 1962, "told me to take control of

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[1] In general, an IRS closing agreement is "a written agreement between an individual and the Commissioner of the [IRS] which settles or 'closes' the liability of that individual . . . with respect to any Internal Revenue tax for a taxable period" (14A Mertens Law of Fed. Income Taxation 52:1 [Sept. 2018 Update]).

the assets in the Swiss account for the benefit of my three children" and that the grandfather had "entrusted me with the assets on the condition that I administer them in accordance with his instructions, as follows:

> a. I was instructed to invest the assets and to divide the income from the account among my three children in the following manner: 50% for [decedent's brother], 30% for [decedent] and 20% for [their sister]. I was permitted to distribute the income to a child or use it for his or her benefit. If a child died, I could distribute that child's share of the income to his or her surviving siblings.
>
> b. I was instructed to retain and preserve the assets in the Swiss account, unless I determined that I needed to pay out a portion of such assets to provide for my children's needs, such as their health and education. I could pay different amounts for each child, according to his or her needs. I could also do the same for their descendants.
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> c. On the death of the last of my three children, any assets remaining in the Swiss account should be distributed in the following manner: 50% to [decedent's brother's] children, in equal shares, 30% to [decedent's] children, in equal shares, and 20% to [their sister's] children, in equal shares. I could continue to hold assets for a minor child until the child became an adult.
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> d. I was instructed not to use the income or the capital of the account for my benefit or for my wife's benefit."

The father continues that he "administered the assets in the Swiss account in accordance with my father's instructions for over forty years" and that "I always considered myself to hold the assets in a fiduciary capacity for the benefit of my descendants."

About a year and a half later, in 2012, according to the executor, the family purported to place the family funds into a

so-called family trust in Wyoming (the "Family Trust"). An October 4, 2012 order of the Wyoming District Court (Ninth Judicial District) declared that the situs and principal place of administration of the subject trust were Teton County, Wyoming. There is no indication in the record that the Wyoming proceeding was on notice to anyone. Nor has any reason been put forth to explain the selection of Wyoming - a jurisdiction remote from the purported beneficiaries and initial trustees - as the situs for such a trust.

According to a "Resignation of Trusteeship and Acceptance of Successor Trusteeship" for the purported Family Trust, dated October 5, 2012, decedent's brother and sister were the then trustees "administering . . . the trust . . . in accordance with [the 2011 Affidavit]" but "desire[d] to resign in favor of RHT Private Advisors LLC."

On the same date, October 5, 2012, RHT Private Advisors issued what purported to be a restatement of the Family Trust, under which it would administer the trust for the benefit of the father's descendants. By the terms of that instrument, the purported trust's income was distributable to or for the benefit of "the [father's] then living children" (*i.e.*, decedent's brother and sister, and not objectants). According to the instrument's further terms, until the death of the survivor of the brother and sister, principal was distributable to or among

any of the father's descendants under a broad invasion standard. Upon the survivor's death, 50 percent of any remainder was distributable to the brother's issue, with the decedent's issue to receive 30 percent of any remainder, and the sister's issue to receive 20 percent of any remainder. The Amended and Restated Declaration was signed by decedent's brother, as President of RHT Private Advisors LLC. To date, the funds at issue remain in the purported Family Trust.

Summary Judgment:

Summary judgment has been said to be "a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues" (*Aguilar v City of New York*, 162 AD3d 601 [1st Dept 2018]). A 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]) and must present such evidence "in admissible form" (*see, Zuckerman v City of New York*, 49 NY2d 557 [1980]).

If such a showing is made, then the opposing party must "lay bare its affirmative proof to demonstrate the existence of genuine, triable issues" (*Corcoran Group, Inc. v Morris*, 107 AD2d 622 [1st Dept 1985], *affd*, 64 NY2d 1034 [1985]; *see also Alvarez, supra*). The opposing party may rely on hearsay evidence so long as it is not the only proof submitted (*Bishop v Maurer*, 106 AD3d

622 [1st Dept 2013]). In addition, evidence excludable at trial under CPLR 4519 (the Dead Man's Statute) may be used in opposition to a summary judgment motion *(Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]). Still, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" will not suffice to defeat the motion (*see, Zuckerman v City of New York, supra*).

The Missing Assets Objections:

The court will turn first to objectants' motion with respect to the Missing Assets Objections. As an initial matter, objectants' motion papers contain a lengthy discussion concerning the executor's purported inability to show that a valid trust existed at the time of decedent's death and their argument that the executor is estopped from asserting that funds in the Swiss accounts were held in trust. However, the failing of the adversary's proofs is not a substitute for the proof that movants themselves are obliged to submit to support summary judgment.

As movants, objectants must present evidence to show *prima facie* (1) that at the time of his death, decedent owned outright 30 percent of the funds in the family's Swiss accounts; and (2) the amount of funds that the executor should have reported in order to render the account complete and accurate (*see Matter of Schnare*, 191 AD2d 859 [3d Dept 1993] [ordinarily the fiduciary is "surcharged with the amount of the inaccuracies"].

First, objectants attempt to establish that, although the funds were held jointly among various family members at varying points in time, the structure and history of the family's Swiss bank accounts demonstrate an intent to split ownership of the funds among decedent, his brother, and his sister, 30, 50, and 20 percent, respectively.

Starting with the three UBS accounts opened in 1996 (and closed in 2005), they contend that the accounts were opened by decedent's brother, decedent, and their sister, and that the family assets were divided among these accounts in accordance with the 50, 30, 20 percent division. They point out that decedent had signatory authority over all of the accounts and assert that the account on which he was the first-named account holder held 30 percent of the funds.

In support of these assertions, objectants submit a draft of a money-flow chart (prepared by decedent's brother, at their father's direction, in connection with the OVDP), which was never submitted to the IRS. According to the draft, the father opened the three separate 1996 UBS accounts consistent "with the original intended division of assets: 50% [decedent's brother], 30% [decedent], 20% [their sister]." Further, objectants point to the account documents showing that decedent and each of his siblings were, respectively, the first-named account holders on one of the three accounts. They also submit the executor's

deposition testimony, that the account on which decedent was the first-named account holder from 1996 to 2005 held 30 percent of the family's funds.

Objectants do not dispute that these three UBS accounts were closed in 2005 and that, at this time, the father removed decedent as an account holder and signatory on the newly-opened UBS accounts. Nor do they dispute that when these new UBS accounts (opened in 2005) were closed in 2008 and the funds transferred to Pictet, decedent was also not an account holder or signatory on any of the Pictet accounts. Nevertheless, they contend that the subsequent transfers to accounts in which decedent was not a signatory was not intended to affect the ownership structure that was put in place in 1996. To support this, they point to (1) the draft money-flow chart and portions of the executor's deposition testimony to the effect that, in 2005, decedent's "share" had been placed into his brother's new account "for safekeeping," when decedent "contemplated remarrying"; and (2) the undisputed fact that decedent continued to receive funds from the accounts in the same manner as when he had been an account holder and signatory. They also argue that deposition testimony of the executor's own expert shows that "an individual can have an ownership interest in a bank account without having signatory authority over that account" and that "Decedent's removal as a signatory would not necessarily affect

his ownership or beneficial interest in the funds held in the foreign accounts."

Objectants' evidence is insufficient to meet their burden to make a *prima facie* case for decedent's ownership of the funds in question at the date of his death. None of the evidence establishes that it was decedent and his siblings who opened the UBS accounts in 1996, as opposed to their father. More important, however, these accounts were indisputably closed in 2005, in favor of accounts in which decedent was not a signatory and which were structurally different. Even if the evidence unequivocally supported objectant's theory that decedent was the owner the funds in one of the UBS accounts in existence from 2005 to 2008, because his "share" was transferred to his brother's account "for safekeeping," objectants provide no evidence regarding decedent's "share" or the purported structure of the accounts when the funds were transferred to Pictet in 2008, where they were held at the time of decedent's death. Moreover, objectants' reliance on the deposition testimony of the executor's expert is misplaced since he did not purport to be a fact witness who could establish that decedent had owned 30 percent (or even any portion) of the funds outright.

Objectants reliance on the draft money-flow chart is also insufficient. The draft describes the original funds as having been "donated" as follows:

> "[Decedent's] Grandfather . . . original Europe bank account assets from Egypt/France in 50's & 60's
> Donated by grandfather to his 3 grandchildren as follows: 50% [decedent's brother], 30% [decedent], 20% [decedent's sister] & to be managed by [the father]"

Although the word "donated" may suggest an outright gift, the following language that the funds were "to be managed by [the father]" hardly establishes that decedent was an outright owner of 30 percent of the funds. Nor does this language support objectants' theory that the grandfather instructed the father to manage the funds because decedent, his brother, and his sister were minors at the time. Objectants thus have failed to establish a *prima facie* case on this basis.

Second, objectants' contention that decedent owned "a portion of the funds" because most, if not all, of the funds in the family accounts were derived from the revenue of family businesses of which he was a part-owner is also insufficient to establish a *prima facie* case for summary judgment. Significantly, they concede that decedent personally did not generate any of that revenue and could not have, therefore, claimed it as his own in the absence of some other basis for an ownership claim. They argue, on reply, that the source of the funds is irrelevant because "it is undisputed that [the funds] were held 'for the benefit of' [decedent's brother], decedent, and [their sister]" and "since . . . no valid trust existed prior to [d]ecedent's death, [decedent] was an owner of 30% of the [funds] regardless

of their source." This issue, as explained above, is not properly before the court. Even if it were, however, the argument is without merit, because there is nothing in the record to suggest that if the purported trust were to be found invalid that the purported beneficiaries of the trust would be the outright owner of the funds.

Lastly, objectants reliance on tax returns and other documents generated as a result of the family's participation in the OVDP is misplaced. The parties have not addressed the admissibility of these documents, some, if not all, of which on their face appear to be hearsay for which an exception to the hearsay rule was not offered and in any event would not apply. Furthermore, these statements were made in the context of a settlement with the IRS regarding tax liability, and, as such, the truth of the statements regarding the nature of decedent's ownership interest cannot necessarily be assured where nothing in the record indicates that the nature of decedent's interest was relevant to that settlement. Contrary to objectants' assertions, the deposition testimony of the executor's expert does not establish that such a distinction (between decedent's outright ownership or interest in a trust) was relevant in connection with the family's participation in the OVDP.

To the extent that these documents are even admissible, they do not establish a *prima facie* case. None of them shows what

objectants ask the court to find - that decedent owned 30 percent of the family funds held in Swiss accounts. Also, as noted above, the context in which they were made raises a question about whether the statements necessarily reflect decedent's actual ownership interest. Furthermore, the deposition testimony of the executor's expert, upon which objectants themselves rely, raises a question about whether IRS Forms 3520/3520A, which decedent did not execute (but which objectants claim would have been required for decedent to execute if the funds were held in trust), would have been required in the context of the OVDP. Nor do the IRS closing agreements, which reference a controlling and/or beneficial ownership interest in (what are not disputed to be) two pass-through entities, associated with two Pictet accounts that are not described further, establish a *prima facie* case for summary judgment.

Moreover, objectants fail to establish the amount of funds that should have been included in the account. Significantly, the tax forms do not indicate the account or accounts in which decedent is alleged to have had a 30 percent ownership interest at the time of his death. Indeed, the proof submitted is contradictory on that point. The Pictet accounts named in the closing agreements and those listed in decedent's 2008 FBAR are not entirely the same.

In the end, objectants offer little more than speculation about the amount they claim should have been included in the account. They assert only that the executor "failed to account for or distribute any of [decedent's] . . . [30] percent . . . share of funds held in the [family's] foreign bank accounts, with an estimated value of . . . $38 [million] at the time of [decedent's] death." Accordingly, the court has no basis on which to direct a surcharge of the executor.

For the reasons outlined above, the court concludes that objectants have failed to establish a *prima facie* case that decedent owned 30 percent of the family's still un-quantified Swiss funds. Accordingly, their motion as it pertains to the Missing Assets Objections is denied.

Turning now to the executor's cross-motion for summary dismissal of the Missing Assets Objections, the court notes that, when an accounting fiduciary moves for summary judgment, he makes a *prima facie* case for the completeness and accuracy of his account "by filing an account supported by an affidavit attesting to its accuracy" (*Matter of Rudin*, 6 Misc 3d 1015[A][Sur Ct, NY County 2000], *affd* 292 AD2d 283 [1st Dept 2002]). The executor has met that burden. Accordingly, to resist summary judgment, objectants must show there is a "material question as to the account's accuracy or completeness" (*Matter of Antin*, NYLJ, Feb. 1, 2013, at 22, col 4 [Sur Ct, NY County]).

Objectants have met this burden. It is undisputed that the existence of the funds in the Swiss accounts was concealed from all authorities until the family members' participation in the OVDP. The executor's deposition testimony, put forth by objectants, shows that prior to this disclosure, for decades, and by design, among other things, the accounts shifted, the signatories to the accounts shifted, and that there were "shell corporations or sham entities . . . created in order to funnel money into the US" from the accounts. The lack of clarity as to the ownership of the funds that is created by this set of circumstances creates an issue of fact as to that actual ownership (*see generally Mega Pers. Lines v Halton*, 297 AD2d 428 [3d Dept 2002]). Therefore, summary judgment in favor of the executor is not warranted.

Since summary judgment is not warranted, the court need not address the additional arguments raised by the executor in his voluminous submissions.

Accordingly, the executor's cross-motion for summary judgment as to the Missing Assets Objections is denied.

The Chelco USA Sale Objections:

Objectants challenge the executor's sale of decedent's 48 percent share of Chelco USA to himself individually. They assert that he did so without authority and, moreover, that he undervalued the sale price.

Objectants establish a *prima facie* case that the sale was improper. It is unquestionable that the executor had no power to sell estate property before letters testamentary issued (EPTL 11-1.3) and that the executor's own account states that the sale occurred one day after decedent died (before letters issued). Moreover, even if the executor had the requisite authority to act because "the sale was finalized" after letters issued, the sale was still improper because the executor never sought the requisite court approval prior to the transaction (*see Matter of Scarborough Properties Corp.*, 25 NY2d 553 [1969]; *Matter of Pelda*, NYLJ, Nov. 14, 2003, at 17, col 2 [Sur Ct, Westchester County]) or obtained consent from the beneficiaries (*see Birnbaum v Birnbaum*, 117 AD2d 409 [4th Dept 1986]); *see also Matter of Kilmer*, 187 Misc 121 [Sur Ct, Broome County 1946]).

The executor's attempt to explain the circumstances of the sale does not raise a question of fact. In his affidavit, he describes a conversation he purportedly had with decedent (and their father) two weeks prior to decedent's death. In this conversation, the executor claims that he, his brother, and their father agreed that decedent's 48 percent share of the company (and the father's four percent share) would be sold to the brother and that the brother would pay for decedent's share after an appraisal of a company warehouse. According to the brother, because the appraisal was not completed until after decedent

died, "the final calculation of the price" was determined and paid, and the "sale was finalized," after decedent died.

However, the executor cites no authority for the proposition that the sale would be proper in these circumstances. Indeed, he concedes that he "now understand[s] that, after [decedent's] death, I should not have paid the purchase price." Moreover, whereas the Dead Man's Statute may not bar consideration of this proof under the circumstances here (*see Phillips v Joseph Kantor & Co., supra; Matter of Bergman*, NYLJ, Oct. 29, 2012, at 36, col 1 [Sur Ct, NY County]; *Matter of Steger*, NYLJ, Nov. 17, 2008, at 20, col 1 [Sur Ct, Nassau County]), the executor's statements are nonetheless based on uncorroborated hearsay as to what decedent said to him. This cannot be used to resist summary judgment (*see Bishop v Maurer,* 106 AD3d 622 [1st Dept 2013] ["hearsay evidence may be considered when submitted in opposition to a summary judgment motion, so long as it is not the only proof submitted").

Because there is no issue of fact concerning the propriety of the sale, the court turns to whether a surcharge is warranted because the sale was not made for a fair price (*see Matter of Kilmer, supra*). It is undisputed that in determining the sale price of $504,000, the executor calculated 48 percent of the $1.4 million appraised value of the warehouse ($672,000) less a 25 percent discount ($168,000). Objectants assert first that the discount was not warranted. However, that the executor applied a

minority discount does not establish per se that the sale price was unfair. Since objectants fail to present any proof in admissible form to challenge the use of a minority discount, such argument fails.

Next, objectants assert that the executor's method of valuation was flawed because it failed to include additional revenue in evaluating decedent's share of the company. Some of the evidence presented is hardly probative of whether the company was undervalued at the time of the sale in 2009, because it relates to a different time period. However, other evidence is probative. It is undisputed that the company was paying employee salaries at the time of the sale, which indicates that revenue was available. Yet, revenue was not considered. This is sufficient to establish *a prima facie* case that the appraisal upon which the sale price was based did not accurately reflect the value of the company. In response, the executor contends that the warehouse was Chelco USA's only asset of value, suggesting that its value was an appropriate way to value the company. This is sufficient to create a question of fact.

Based on the foregoing, objectants' motion with respect to the Chelco USA Sale Objections is denied.

On his cross-motion, the executor maintains that the sale price was fair as a matter of law. To support this, he relies on his affidavit in which he states that the warehouse was the only

asset of Chelco USA with value and that he based the sale price on the appraised value of the warehouse. Although this is sufficient to establish a *prima facie* case for summary judgment, the undisputed facts that Chelco USA was paying employee salaries at the time of sale, and not renting its warehouse space, raise a question of fact concerning the fairness of a sale price in a transaction that was not arm's length. Moreover, the executor's assertion that he applied a 25 percent discount to the appraisal value because his accountant told him that doing so was the proper way to value the shares is based on uncorroborated hearsay and cannot be used to support summary judgment.

Accordingly, the executor's cross-motion for summary judgment with respect to the Chelco USA Sale Objections is denied.

Executor Removal:

Objectants seek the executor's summary removal and, pursuant to the terms of the will, appointment of themselves as successor co-executors.

Objectants reference three subsections of SCPA 711 pursuant to which removal is sought. Under SCPA 711(2), a fiduciary may be removed where:

> "by reason of his having wasted or improperly applied the assets of the estate, . . . or otherwise improvidently managed or injured the property committed to his charge, . . . or by reason of other misconduct in the execution of his office or dishonesty, . . . improvidence or want of understanding, he is unfit for the execution of his office."

SCPA 711(3) provides for removal where a fiduciary "has willfully refused or without good cause neglected to obey . . . any provision of law relating to the discharge of his duty." Lastly, SCPA 711(8) provides that removal is warranted where the fiduciary "does not possess the qualifications required of a fiduciary by reason of . . . dishonesty, improvidence, want of understanding or who is otherwise unfit for the execution of the office."

The removal of an estate fiduciary is a matter within the discretion of the court (*see e.g. Stolz v New York Cent. R.R. Co.*, 7 NY2d 269 [1959]). It is a serious remedy to be granted sparingly (*see e.g. Matter of Duke*, 87 NY2d 465 [1996]). A fiduciary chosen by the testator may be removed "only upon a clear showing of serious misconduct that endangers the safety of the estate; it is not every breach of fiduciary duty that will warrant removal" (*Matter of Duke*, 87 NY2d at 473; *see also, Matter of Atkins*, NYLJ, Apr. 1, 2010, at 25, col 3 [Sur Ct, NY County]). Summary removal is appropriate where fiduciary misconduct is established by undisputed facts or concessions and not where the facts are disputed (*see Matter of Duke, supra*).

The first basis upon which objectants seek summary removal relates to the Missing Assets Objections. Since the assertions that purport to support these objections remain unproven, they do not provide a basis for summary removal (*see Matter of Duke,*

supra).

Objectants assert that the executor should be removed based on the Chelco USA Sale Objections. However, under the circumstances here, the sale alone is not sufficient to warrant the extreme remedy of removal, particularly where harm to the estate has not been established (*see Matter of Fulton*, 253 AD 494 [3d Dept 1938]). Accordingly, summary removal is not warranted on this basis (*see Matter of Duke, supra*).

Objectants further assert that the executor should be removed because he wasted Chelco USA's assets by failing to collect rent from third parties and paying employees despite the fact that the company was inactive. In the absence of additional proof detailing the circumstances surrounding the executor's conduct, and the resulting amount of any losses to the estate, the record before the court is insufficient to warrant summary removal.

Lastly, objectants contend that because, at the time of decedent's death, the executor held the same investment in Chelco USA as decedent, and the executor subsequently sold decedent's share (to himself), while maintaining his ownership in the company, he violated the "mandate" in Article ELEVENTH of decedent's will to treat decedent's property "in the same manner as he would treat a similar investment held by him in his individual capacity."

Article ELEVENTH of the will states in relevant part:

> "In addition to, and without in any way limiting, any powers or authority which my Executor would have in the absence of this Article, I authorize my executor . . . in his absolute discretion . . . to sell or liquidate [any property interest] at any time on such terms as he shall deem suitable and to treat such property in the same manner as he would treat a similar investment held by him in his individual capacity . . .."

This language authorizes, rather than mandates, the executor to act. Furthermore, it allows the executor to sell decedent's property in his discretion. Accordingly, the court declines to construe this language, as objectants would have it, as preventing the executor from selling decedent's share while keeping his own. Accordingly, this, too, does not provide a basis for summary removal.

Based on the foregoing, objectants' motion for summary removal is denied.

In his motion papers, while opposing objectants' request for summary removal, the executor does not address his own motion in this connection. Accordingly, to the extent he seeks summary judgment as it pertains to removal, he has failed to establish a *prima facie* case, and any such request is denied.

Based on the foregoing, these cross-motions for summary judgment are denied in their entirety.

This decision constitutes the order of the court.

Dated: December 10, 2018

S U R R O G A T E