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| Matter of Dreyfuss |
| 2018 NY Slip Op 33356(U) |
| December 18, 2018 |
| Surrogate's Court, Nassau County |
| Docket Number: 341357/D |
| Judge: Margaret C. Reilly |
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**SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**Proceeding for Payment of Income Distributions
Pursuant to SCPA 2105 in the Estate of**

DECISION & ORDER

KURT E. DREYFUSS,

**File No. 341357/D
Dec. No. 35013**

Deceased.

PRESENT: HON. MARGARET C. REILLY

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

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| Order to Show Cause, Affirmation and Exhibits..... | 1 |
| Affirmation and Affidavit in Opposition..... | 2 |
| Reply Affirmation. | 3 |
| Last Will and Testament | 4 |
| Decision, dated November 22, 2006. | 5 |
| Decision, dated February 16, 2017. | 6 |

Before the court in this miscellaneous proceeding is an order to show cause which seeks an order: granting a preliminary injunction compelling Jane Greenberg (respondent), as successor executor of the estate of Kurt E. Dreyfuss (decedent), to pay to Felicia Dreyfuss (petitioner) income generated from the estate assets in an amount to be set by the court on no less frequently than in monthly installments during the pendency of this proceeding.

I. Background

The decedent died on January 13, 2006. He was survived by the petitioner¹ (wife), and two children, respondent and Jeffrey Dreyfuss. The decedent's will dated February 2,

¹ It is conceded that the petitioner has diminished mental capacity. Her daughter, Dale Charkow, was appointed her attorney-in-fact with the authority to pursue claims and litigation.

1984 was admitted to probate and letters testamentary issued to the petitioner on May 9, 2006. Pursuant to Article SIXTH of the decedent's will, the petitioner was given "the control, use possession, proceeds and income from all the rest, residue and remainder of [decedent's] property, real, personal and mixed . . . for and during her lifetime, as she in her sole discretion may deem necessary and appropriate for her comfort and maintenance during her lifetime" Article SIXTH (a) provides, in part:

"I further direct that my said wife shall have absolute right and power to sell or dispose of any personal property, only or utilize the principal of any account, should she, in her sole discretion, deem it necessary for her comfortable support and maintenance in her lifetime, after exhaustion of her own personal funds."

By decision dated November 22, 2006, this court found that "it is clear that the testator intended for his wife to have a life estate in the property and that the wife's power to invade principal may only be made after she exhausted her own funds."

A petition to allow the petitioner to resign due to advanced age was filed in November of 2016. By decision dated February 16, 2017, the court granted the petition and successor letters testamentary issued to respondent on March 9, 2017.

On April 27, 2018, the petitioner filed a petition seeking an order to, among other things, compel respondent to pay the income from the estate to the petitioner for the remainder of her life in installments to be made no less frequently than monthly. The respondent argues that, as a threshold matter, the petitioner's application must fail because it rests solely on the inadmissible affirmation of counsel. However, attached as an exhibit to counsel's affirmation is a copy of the verified petition filed in the underlying proceeding.

CPLR 105 (u) provides that “[a] ‘verified pleading’ may be utilized as an affidavit whenever the latter is required” (*see Sanchez v National R.R. Passenger Corp.*, 21 NY3d 890 [2013]). As the copy of the verified petition is attached to the affirmation of counsel, the court will consider it.

II. Preliminary Injunction

Pursuant to CPLR 6301,

“[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.”

“The granting of a mandatory injunction compelling a party to affirmatively act has been labeled by this court as an ‘extraordinary’ and ‘drastic’ remedy. With respect to the granting of a preliminary injunction *pendente lite*, it has been held that ‘[such] extraordinary action is justified only where the situation is unusual and where the granting of the relief is essential to maintain the *status quo* pending trial of the action’” (*Times Square Stores Corp. v Bernice Realty Co.*, 107 AD2d 677, 682 [2d Dept 1985][internal citations omitted]).

In order to be entitled to a preliminary injunction, a movant must clearly demonstrate (1) a likelihood of success on the merits; (2) irreparable injury absent granting of the preliminary injunction; and (3) a balancing of the equities in the movant’s favor (*Doe v Axelrod*, 73 NY2d 748 [1988]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]).

“The purpose of a preliminary injunction is to maintain the status quo pending determination of the action” (*Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643 [2d Dept 2006]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the court (*Doe v Axelrod*, 73 NY2d 748 [1988]).

A. Likelihood of Success on the Merits

The petitioner commenced a proceeding pursuant to SCPA 2105 to compel the delivery of property held by the respondent which is claimed by the petitioner. The property is accrued income to which the petitioner is entitled in accordance with Article Sixth of the decedent’s will. Article Sixth provides that the petitioner is entitled to the income from the estate property “for and during her lifetime, as she in her sole discretion may deem necessary and appropriate for her comfort and maintenance during her lifetime.” The petitioner argues that the respondent arbitrarily stopped income payments to her, which the respondent denies. The petitioner further reports that she has not received any income payments for 2018, which is conceded.

The respondent argues that the petitioner received more than the entire income distribution to which she was entitled in 2017. According to the respondent, the total income for the estate in 2017 was \$11,761.00 and the petitioner received an unauthorized principal distribution of \$4,400.00 plus income distributions of \$6,596.00. The respondent also alleges that the petitioner also received a check for \$3,000.00 payable to the petitioner’s attorney. According to the respondent, the petitioner in 2017 received payments of \$13,997.00 which exceeded the amount of income she was owed for the year. Finally, the respondent argues

that the petitioner received \$170,000.00 in principal distributions, to which she was not entitled. The respondent further argues that she should not be required to make income distributions until the petitioner files an accounting and all improper withdrawals of principal are returned to the estate. With regard to the payment of income in 2018, the respondent argues that, as the will is silent with regard to the timing of payments, it is within her discretion to decide how to distribute income.

It is undisputed that the petitioner has an income interest in the property. It is also undisputed that no income distribution has been made to the petitioner in the 2018 calendar year. The question that is contested, however, is whether the respondent is entitled to withhold the income as she claims that the petitioner took principal to which she was not entitled. The petitioner denies that she owes the principal as she characterizes the principal distributions as distributions from a master limited partnership which are in the form of a decrease in the tax basis of the partnership units, and as a result there is no dissipation of estate assets. She therefore argues that the respondent will be unsuccessful in proving that there were unauthorized principal distributions.

The decedent clearly intended for the petitioner to have income during her lifetime as the petitioner in her sole discretion deemed necessary and appropriate for her comfort and maintenance. Since the death of the decedent, she has received distributions but none for the calendar year 2018.

“Although it is well settled that a trustee may retain all or part of a beneficiary’s interest in a trust in satisfaction of a debt owed to the trust by a beneficiary, the right to retain funds is

equitable in nature and must yield when necessary to provide for the support of the beneficiary and her dependents, especially where, as here, the beneficiary's dependents are the remaindermen of the trusts" (*Matter of Tananbaum*, NYLJ, June 8, 1995 at 1 col 3 [Sur Ct, New York County 1995] [internal citations omitted]).

In the instant proceeding, the question of whether the petitioner is indebted to the estate has not been established. The respondent alleges that there were improper distributions of principal but an account of the trustee's actions has not yet been filed. The petitioner, instead, has established that she is entitled to the income. Under these circumstances, the court finds that the petitioner has shown a likelihood of success on the merits.

B. Irreparable Injury and Balancing Equities

The petitioner must also demonstrate irreparable injury absent the granting of the preliminary injunction and a balancing of the equities that favors her position (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]). The alleged harm must be imminent and not remote or speculative (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713 [2d Dept 2011]). Finally, "[i]n order for a preliminary injunction to issue it must be shown that the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to the defendant through imposition of the injunction" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 70 AD2d 1021, 1022 [3d Dept 1979]; *see also Burmax Co. v B & S Indus.*, 135 AD2d 599 [2d Dept 1987]). Where "a litigant can be fully recompensed by a monetary award, a preliminary injunction will not issue" (*Dana Distribs., Inc. v Crown Imports, LLC*, 48 AD3d 613, 613 [2d Dept 2008]).

The respondent argues that the only loss that the petitioner will suffer is economic and as such she will not suffer irreparable harm. The petitioner is a ninety-three year old resident of a nursing home. She argues that without the payments of income she may be evicted from her nursing home, which would cause great harm. The respondent argues that the petitioner has failed to show that she would be evicted and that she has ample assets and long term care insurance which would prevent the alleged eviction. The potential harm of losing a place in a nursing home far outweighs any harm caused to the respondent through the imposition of the injunction.

III. Conclusion

One of the primary purposes of a preliminary injunction is to maintain the status quo pending the resolution of the underlying matter (*Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643 [2d Dept 2006]). The petitioner is clearly entitled to income which she allegedly relies upon to pay for her care. Although there are questions about set offs and improper distributions of principal, these questions are more readily addressed in an accounting proceeding. The respondent is correct that, where the will is silent with regard to the timing of the payment of income, it is in her discretion regarding the timing of the payments (*see Matter of Cetta*, 295 AD2d 863 [3d Dept 2002]). She, however, has a responsibility to administer the trust “with due regard to the respective interests of income beneficiaries and remaindermen” (EPTL 11-2.1 [a] [1]). The petitioner should receive payment of her income interest on a more frequent basis than annually. Accordingly, the respondent shall henceforth distribute the net income to the petitioner on a quarterly basis.

The petitioner has shown a likelihood of success on the merits. She has further shown the hardship she would suffer if the relief was not granted. Finally, the irreparable injury to be sustained by the petitioner is more burdensome than the harm caused the respondent through the imposition of the injunction.

Accordingly, the application for a preliminary injunction is **GRANTED**, upon the posting of an undertaking.

IV. Undertaking

The motion papers fail to properly address the subject of an undertaking, which is a mandatory prerequisite to an injunction (CPLR 6312 [b]). The sum fixed by the court for the undertaking must be sufficient to compensate the party being enjoined for the damages and costs sustained as a result of the issuance of the preliminary injunction in the event that it is later determined that the party seeking the preliminary injunction was not entitled to the injunctive relief (CPLR 6312 [b]; *Carter v Konstantatos*, 156 AD2d 632 [2d Dept 1989]). The absence of an undertaking would render the preliminary injunction voidable (*see Olechna v Town of Smithtown*, 51 AD2d 1036 [2d Dept 1976]).

“The fixing of the amount of an undertaking is a matter within the sound discretion of the [court], and its determination will not be disturbed absent an improvident exercise of that discretion” (*Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 896 [2d Dept 2006]). “The amount of the undertaking, however, must not be based upon speculation and must be rationally related to the damages the nonmoving party might suffer if the court later determines that the relief to which the undertaking relates should not have been granted”

(*Access Med. Group, P.C. v Straus Family Capital Group, LLC*, 44 AD3d 975, 975 [2d Dept 2007]).

The respondent argues that the petitioner should post a bond in the full amount to be distributed, plus twenty percent. The petitioner does not address the issue of an undertaking or the amount thereof. The parties shall submit papers on the issue of the amount of an undertaking (CPLR 6312 [b]) within twenty (20) days of the date of this decision and order.

This constitutes the decision and order of the court.

Dated: December 18, 2018
Mineola, New York

E N T E R:

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

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