

SURROGATE'S COURT : SUFFOLK COUNTY

In the Matter of the Estate of)

FILED
SURROGATE'S COURT
SUFFOLK COUNTY

JUN 20 2016

DECISION/ORDER

By: HON. JOHN M. CZYGIER, JR.,
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PAULINE FALCO a/k/a
PAULINE A. FALCO,

MICHAEL CIPOLLINO
CHIEF CLERK)

Surrogate
.....

Deceased.)

Dated: JUN 20 2016
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File #: 2015-248/B
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Captioned matter is the subject of a pending proceeding to remove an executor, and for other relief. Respondent fiduciary has moved for summary judgment dismissing the petition. For the reasons set forth herein, the motion is granted.

Background and Arguments

The record reflects that captioned decedent died testate on January 17, 2015. She was survived by four adult children, who each are entitled to a proportional share of the estate. Upon the admission of the decedent's last will and testament to probate, without objection, the nominated executor, decedent's son Anthony J. Falco, who is the respondent herein, received letters testamentary (issued May 11, 2015). By order to show cause and petition, petitioner, who is a daughter of the decedent, sought an order removing a summary proceeding commenced against petitioner's daughter (Jaclyn) and others in the Third District Court of Suffolk County to this court, as a matter related to the decedent's estate. The summary proceeding involved certain property at 21 Blackberry Lane in Huntington, New York, which the court is advised is an estate asset. As additional relief, petitioner seeks the executor's removal upon allegations that he breached his fiduciary duty to the estate's beneficiaries and dissipated estate assets.

The summary proceeding was transferred to this court and has since been resolved by stipulation of the parties and the execution of a judgment and warrant of eviction, which were filed on April 29, 2016. The request for the removal of the executor is still pending, and is now the primary subject of the instant motion for summary judgment.

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According to the moving respondent, he commenced the summary proceeding in order to be able to market and sell the premises at 21 Blackberry Lane ("the premises") and fulfill the terms of his mother's will. Respondent asserts that he was forced to do so, since petitioner's daughter's family was occupying the premises without paying rent or honoring the notice to quit served upon them. According to respondent, when he informed his siblings of his intent concerning the premises, no one voiced any objections, including petitioner. Detailing the procedural history in the District Court, respondent also references a "mechanic's lien" of \$160,000 apparently filed by Raheem Miller, Jaclyn's boyfriend, for repairs to the premises. There is also an action pending in the Supreme Court of Suffolk County to expunge the lien, challenging Miller's claim. Respondent notes that this is inconsistent with a counterclaim filed by Jaclyn in the summary proceeding for \$150,000 in repairs to the premises.

It is respondent's assertion that petitioner sought to delay her daughter Jaclyn's eviction, assert a counterclaim and otherwise delay the summary proceeding in order to obtain the premises at issue at a price far below its market value.

In support of respondent's application, other estate beneficiaries and the nominated alternate executor (Robin H. Kelly, Christine Falco) have submitted affidavits, asserting that the terms of the will are clear and that their brother (petitioner) has capably performed his duties as executor.

In opposition to the motion, claiming it is premature upon respondent's failure to provide information requested since September, 2015 concerning the estate and its assets. It is her contention that Jaclyn paid the real estate taxes on the premises after the decedent's death to prevent foreclosure on a tax lien. She advises the court that the premises were the subject of a condemnation application by the Town of Huntington in 2010, due to its advanced disrepair. According to petitioner, the decedent allowed her granddaughter, Jaclyn and Jaclyn's minor children to live on the property with her in order to establish residency for the local school district. Jaclyn and Miller then proceeded to renovate and rehabilitate the property. According to petitioner, the tax records will demonstrate that Jaclyn has been paying taxes on the premises since 2012 and kept the property out of foreclosure for nonpayment of taxes.

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Petitioner complains that the fiduciary refuses to disclose the estate's assets and liabilities, despite the demand on September 22, 2015 for this information. She also complains about the legal fees incurred by the executor to date in these proceedings, which is currently in excess of five percent (5%) of the gross estate. Reference is made to threatening telephone calls received from a person claiming to be a "friend of the family" inferring that these calls were made at respondent's behest; and to a request that a neighbor keep the executor informed of any "loud noises" at the premises (Affidavit in Opposition, p.11, ¶23).

Petitioner argues that the court should not grant a motion for summary judgment where the information necessary to oppose same is solely in the hands of the movant and where there is no opportunity to conduct discovery.

Discussion

SCPA 711 states, in part, as follows:

In any of the following cases a co-fiduciary, creditor, person interested, any person on behalf of an infant or any surety on a bond of a fiduciary may present to the court having jurisdiction a petition praying for a decree suspending, modifying or revoking those letters and that the fiduciary may be cited to show cause why a decree should not be made accordingly:

1. Where the respondent was, when letters were issued to him, or has since become ineligible or disqualified to act as fiduciary and the grounds of the objection did not exist or the objection was not taken by the petitioner or a person whom he represents before the letters were granted.

2. Where by reason of his having wasted or improperly applied the assets of the estate, or made investments unauthorized by law 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, drunkenness, improvidence or want of understanding, he is unfit for the execution of his office.

3. Where he has wilfully refused or without good cause neglected to obey any lawful direction of the court contained in any decree or order or any provision of law relating to the discharge of his duty.

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- 4. Where the grant of his letters was obtained by a false suggestion of a material fact.
- 5. Where by the terms of a will, deed or order, his office was to cease upon a contingency which has happened.
- 6. Where he has failed without sufficient reason to notify the court of his change of address within 30 days after such change.
- 7. Where he has removed property of the estate without the state without prior approval of the court.
- 8. Where he or she does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.....
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- 12. In the case of any fiduciary who fails to file an account within such time and in such manner as directed by the court.

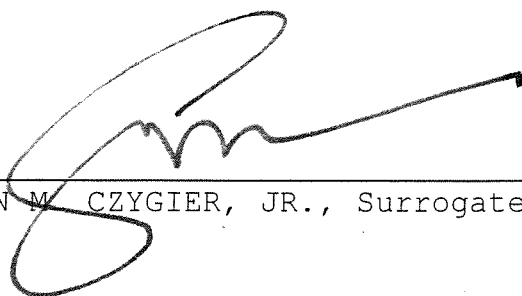
None of the foregoing applies to the situation before the court. In the absence thereof, the court finds that an application to remove the fiduciary is not warranted under these circumstances.

The primary complaint petitioner had was the summary proceeding pending against her daughter. This was resolved by stipulation. While respondent should, perhaps, be more forthcoming about the current asset and liabilities of the estate, this information was demanded at a time within which petitioner would not otherwise be allowed to compel an accounting in this court; i.e. less than seven months since the issuance of letters (see SCPA 2208(1)(a), SCPA 1802). Indeed, petitioner's remaining arguments are more akin to those raised in the context of an accounting proceeding than an application to remove a fiduciary. Further, while the legal fees denoted herein would, at first blush, appear to be excessive, the propriety of same would be appropriately assessed in the context of such an accounting proceeding, where the argument may even be raised that fees were incurred by the fiduciary in order to properly administer the estate and may, in large part, have resulted from petitioner's actions.

Accordingly, for the reasons set forth herein, it is

ORDERED THAT respondent's motion for summary judgment and an order, pursuant to CPLR 3212, dismissing the underlying petition is

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granted.



JOHN M. CZYGIER, JR., Surrogate

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