

SUCCESSFUL SUMMARY JUDGMENT BY OBJECTANT IN CONTESTED ACCOUNTING PROCEEDINGS ON THE RISE.

By Gary E. Bashian, Esq.*

Accelerated Judgments are a perfect tool to best help balance the rights of litigants who seek access to the Courts, and the practical demands of managing a ballooning docket. As a result, if the facts warrant it, and if the damage done to an Estate by a fiduciary is so egregious, Surrogate's Courts have become more receptive to Trusts and Estates practitioners who move for Summary Judgment on behalf of an Objectant in a Contested Accounting proceeding.

Traditionally, Summary Judgment has been an almost exclusive tool of the Accounting Petitioner in regard to Contested Accounting proceedings. Case law is replete with examples of fiduciaries that successfully move the Court to dismiss Objections to their Account as a matter of law pursuant to New York's Civil Practice Law and Rules § 3212. Countless Objectants who have challenged the validity of a fiduciary's Accounting have been turned away from the bench as they could not survive a Petitioner's Motion for Summary Judgment.

Objections to Accountings are often dismissed on Petitioner's Summary Judgment Motion. Petitioners often have little trouble establishing the propriety of the expenses that have been incurred on behalf of the Estate, that the Objectant has offered insufficient proof to rebut the Accounting, and/or because the Objectant seeks to hold Petitioner liable for a failure to maximize and increase the value of Estate assets to their fullest, usually alleging speculative or potential losses that the Court will, and should, not consider, i.e.:

Petitioners are afforded the protections of the Prudent Investor Rule, and as of July 1, 1995, the Prudent Investor Act.

Alternatively, an Objectant's Motion for Summary Judgment challenging an Accounting are often denied as there usually exist issues of fact regarding the appropriateness and legitimacy of expenses to grant the Motion, or the fiduciary was shielded by their acting in good faith.

However, the path to Summary Judgment for an Objectant is not as Sisyphean a labor as it might initially seem. Where it once appeared inevitable that this "stone would fall back on its own weight,"¹ an Objectant can nevertheless achieve an immense pre-trial victory by moving for Summary Judgment against a fiduciary if they are careful when choosing their issues, and avoid falling into the issue of fact arguments that fiduciary's counsel will undoubtedly pose. Indeed, he who chooses the issue, Plaintiff or Defendant, Petitioner or Objectant, very much becomes the architect of the litigation as a whole; a principle that comes into the sharpest of focus when an Objectant is seeking Summary Judgment in a Contested Accounting proceeding.

The all too familiar burden for a Movant on Summary Judgment is that they 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."² Where Movant's burden has been satisfied by a showing of sufficient proof, it then shifts to the opposition to essentially prove that there are questions of fact regarding Movant's claims so as to preclude the granting of Summary Judgment.³

As alluded to earlier, Objections to Accountings often times seem to have questions of fact that at first glance make it appear impossible for an Objectant to win given such constraints. Once an Objectant has moved for Summary Judgment, Petitioner will take every opportunity to show the Court that the expenses that have been contested cannot be decided as a matter of law but require the consideration of a fact finder. The nature and character of Objections to an Accounting almost instinctively lend themselves to the assumption that their legitimacy cannot be determined as a matter of law.

The reasons for this are clear: Objections to an Accounting contest the amounts paid for individual expenses check by check, dollar by dollar, and cent by cent. They essentially allege that what the fiduciary paid and/or received on behalf of the Estate was not a fair price for services rendered and/or assets sold. Objections then continue arguing all of the ways a fiduciary mismanaged the assets to the detriment of the Estate and its beneficiaries, or their failure to obtain a better price for the same.

Where an expense is alleged by an Objectant to be improper, and the allegation is supported by sufficient proof, Petitioner simply has to offer alternatively sufficient proof establishing the legitimacy of the expense in rebuttal. Before long, each and every contested expense sufficiently rebutted, no matter how innocuous, becomes a viable issue of fact ripe for Trial, and more importantly, a roadblock to relief for an Objectant on Summary Judgment.

Mindful of this, Objectant's counsel must carefully choose their issues when moving for Summary Judgment. Clearly, simply moving against the value or cost of the expenses themselves as offered in the Account is not a path to success.

However, in some situations, the Objectant can move for Summary Judgment questioning not the amount of the expense, but the propriety or legitimacy of the expense in the context of the fiduciary's duty of loyalty. For example: was the expense reasonable and necessary and did it benefit the Estate, was the expenditure a product of self-dealing, did the fiduciary reap a gain from the Estate in connection with the expense, etc.? Furthermore, the entirety of the fiduciary's Account can be challenged by an Objectant, and shown to be insufficient as a matter of law for failure to detail the financial history of the Estate with necessary particularity. Where either of the above are found by the Court, where there are no questions of fact present, a fiduciary can be surcharged, with the statutory 9% interest, for such improper expenses that they authorized be paid by the Estate.⁴ The discussion below is a conceptual blueprint that may help Litigators who find themselves moving for Summary Judgment on behalf of an Objectant in a Contested Accounting proceeding construct the best arguments available to them.

The foundation of this strategy for Summary Judgment lies in the fiduciary's duty of loyalty to the Estate. The first and primary duty the law imposes upon a fiduciary is that of loyalty, measured by something stricter than the "...morals of the marketplace. Not honesty alone, but the punctilio of an honor most sensitive, is the standard of behavior."⁵

Implicit in this principal, indeed the most fundamental characteristic of the duty of loyalty, is the duty not to self-deal.⁶ It is only when acting on behalf of the Estate with this highest loyalty, when free of accruing any benefit to the self in the execution of their duty, that a fiduciary is authorized to undertake their charge. A fiduciary is not granted the power to make unreasonable and unnecessary payments from Estate assets, or to themselves, their family, and/or their friends unless so directed by the terms of a Will. This

necessarily high standard that the fiduciary is held to is designed to protect not only the Estate and its beneficiaries, but to preserve a Testator's intent as closely and accurately as possible.

Importantly, a fiduciary's duty of loyalty to the Estate is also an integral part of their duty to Account. "As accountability is the primary principle of the fiduciary relationship,"⁷ the Account can be nothing less than the history of the Estate administration.⁸ It is no surprise that both accuracy and transparency are essential to all Accounts, and that it must provide everything necessary to make the story of the administration intelligible to those who read it.⁹ Clearly, a fiduciary's duty to "account" is no small undertaking; indeed, the Surrogate's Court Procedure Act devotes the entirety of Article 22 to "Accounting."

It is Objectant Counsel's task when moving of Summary Judgment in a Contested Accounting proceeding, if there is evidence of such behavior, to prove to the Court that the expenditures in the Accounting Petitioner offers were made in violation of the fiduciary's duties to the Estate, i.e.: to prove the impropriety of the expenses of administration as a matter of law. The successful strategy is not to argue that such expenses were merely excessive or a "bad deal," but to show that when the expenditure was made, to do so was a violation of their fiduciary duty as a matter of law.

Where the record establishes particularly egregious examples of a fiduciary that has breached their duty to the Estate, Objectant Counsel's task is made almost easy. Missing sums of money, missing assets, undervalued assets, exorbitant fees paid for simple services, fees paid for unauthorized or illegal services, etc. can all be surcharged against the fiduciary, and are appropriate for determination at Summary Judgment.

Sometimes less obvious though are payments made by a fiduciary to oneself, one's corporation, family, friends, etc. for tasks that could have been completed by neutral parties for equal or lesser value. Payments and expenses such as these can and often do qualify as self-dealing, and are surcharge-able. The law is clear that the prohibition against a fiduciary to engage in self-dealing is absolute. There is "a duty of undivided loyalty to the trust and to each of its beneficiaries. This duty is designed to prevent self-dealing. Hence, where a trustee is given absolute discretion, he must not use it to 'feather his own nest.' He must avoid all situations where his interests or those of a third party with whom he is aligned conflict with those of the beneficiaries."¹⁰ Where there is evidence of such self-dealing on behalf of a fiduciary, evidence which is usually present by their own admission in the Accounting that they offer to the Court, Objectant's can seize on this breach and move for a surcharge upon the fiduciary for the entire amount, with interest, from the date of payment. Again, the task is not to get bogged down in the morass of valuation, but to question and prove the legitimacy of the expense as a whole from the perspective of fiduciary duty, not economic prudence or reasonableness.

Likewise, another not immediately obvious, but equally valid ground for Summary Judgment, is if the Account itself is insufficient and fails to offer a complete and accurate accounting free of omissions and/or lacks transparency. The expenses in an Account that remain incomplete, or worse, opaque, can be surcharged against the fiduciary in some scenarios. Commonly, a fiduciary will offer a line item expense for a professional, maintenance, or other fee. A failure to itemize such a line item with enough specificity so that the Objectant, and more importantly the Court, can understand the reason for the expense, the nature of the transaction, and the reasonableness of the expense in light of

the benefits conferred to the Estate, is a breach of their duty and constitutes an insufficient Accounting. Where a fiduciary is allowed to amend their Accounting and fails to supplement and/or fully articulate their listing of expenses beyond line items or the bare offering of an amount without explanation where needed, they only exacerbate their breach and invite further scrutiny by both the Court and Objectant's counsel. Surcharges in situations such as these can be for the full line item amount if the fiduciary fails to cure the defect in the Account when given the opportunity.

It is important to note that Petitioner's counsel will bait Objectant's counsel into raising questions of fact by using the shifting burden of proof in a Contested Accounting to their advantage. Understanding this shifting burden is essential to an Objectant's success in this type of proceeding. The initial burden is on the fiduciary to prove the propriety of expenses and administration costs.¹¹ This initial burden is admittedly low as all a fiduciary must do is make a *prima facie* showing that the nature and character of the expenses incurred were fair and reasonable,¹² and that they were incurred on the Decedent's, or more accurately, the Estate's, behalf.¹³ Thereafter, Objectant bears the burden of showing that the Account is inaccurate or incomplete. This is a delicate point where Objectant's counsel must be very careful not to inadvertently create issues of fact where there are none. All Objectant has to show, by a fair preponderance of the evidence, is the lack of sufficiency of the Account as a matter of law so that the burden then shifts back to the fiduciary to prove that the Account is accurate and complete.¹⁴ It is essential that at this juncture that Objectant again clearly chooses and frames the issue before the Court that the accounting is insufficient as a matter of law. Fortunately for the Objectant in this situation, all doubts about the sufficiency of the Account will be resolved against a

fiduciary who fails to keep accurate records.¹⁵ Accordingly, Objectant need only show that the Accounting fails to fully account and/or is not transparent to shift the burden back to the Petitioner. No argument need be made about the validity of the value of the actual expenses which would in turn fatally create an issue of fact.

Lastly, another area of a Petitioner's Account that should be considered when drafting a Motion for Summary Judgment on behalf of an Objectant is that of gifts. Some Petitioners will attempt to remove assets from the Estate for one reason or another by claiming that they were gifted away by the Decedent immediately prior to death. As a matter of law, Petitioner has the burden to show by clear and convincing evidence that for such alleged gifts donative intent was present, and that delivery and acceptance of the gift were completed prior to death.¹⁶ Furthermore, where there is a confidential relationship between a Decedent and the fiduciary, the fiduciary must not only establish by clear and convincing evidence the three elements constituting a legally valid gift, but also that the transfer was made voluntarily, and free from undue influence or restraint.¹⁷ Notably, a confidential relationship exists where there is a sibling relationship.¹⁸ Failure on behalf of a fiduciary to prove all of these elements can result in a surcharge of the "gifted" asset for failure to include it as an Estate asset. Depending on the asset, such a surcharge can be in the hundreds of thousands of dollars with interest computed.

When a Contested Accounting is viewed through the conceptual lens of Summary Judgment, Objectant's Counsel must foremost consider issues of Self –Dealing, view the Account itself as a history of the fiduciary's duty of loyalty, and ensure that the fiduciary has met their duty to account. Although this logic will not work on every matter, bear them in mind the next time you are representing an Objectant in a Contested Accounting

proceeding and considering a Motion for Summary Judgment on their behalf where you might not have before.

* Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, he is presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section.

Mr. Bashian gratefully acknowledges the contributions of Andrew Frisenda, an associate at Bashian & Farber, LLP for his assistance in the composition of this article.

¹ The Myth of Sisyphus, Albert Camus; 1942

² Alvarez v Associated Fur Mfs., Inc., 46 N.Y.2d 1065 [1979]

³ Alvarez, supra

⁴ see generally Estate of Carbone, West. Cnty. Surr. Ct. Decision; April 13, 2011

⁵ Meinhard v. Salmon, 249 N.Y. 458 [1928]

⁶ In the matter of Carner, 2009 WL 3850238 [Surr. Ct. Westchester Cnty.]

⁷ Groppe et. al., Harris 5th Edition New York Estates: Probate Administration and Litigation § 17:1

⁸ Matter of Iannone, 104 Misc.2d 5 [Surr. Ct. Munroe Cnty. 1980]

⁹ Groppe et. al., Harris 5th Edition New York Estates: Probate Administration and Litigation § 17:27

¹⁰ In re Estate of James, NYLJ, 10/23/02, p.24 [Surr. Ct., Kings Cnty.]

¹¹ Matter of Taylor, 251 NY 257 [1929]

¹² Matter of Seabury NYLJ 5/17/95, 82:3 [Bx Cnty. Surr.]

¹³ Matter of Basso, NYLJ 7/17/87, 14:6 9 [Nass. Cnty. Surr.]

¹⁴ Matter of Schnare, 191 A.D.2d 859 [App. Div. 3rd Dept. 2003]

¹⁵ White v Rankin, 18 AD 293, 295 [App. Div. 2nd Dept. 1997]

¹⁶ see Gruen v. Gruen, 68, N.Y.2d 48 [1986]; Matter of Kelly, 285 N.Y. 620 [1941]

¹⁷ Matter of Gordon v. Bialystoker Center & Bikur Cholim, 45 N.Y.2d 692 [1978]

¹⁸ Matter of Silverman, NYLJ 1/16/2009, 39:2 [West. Cnty. Surr.]