

Matter of Bejjani

2019 NY Slip Op 31996(U)

July 12, 2019

Surrogate's Court, New York County

Docket Number: 2009-3663/A/B/C

Judge: Rita M. Mella

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

New York County Surrogate's Court

Date: JULY 12, 2019

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In the Matter of the Petition of Paul S. Forster, Esq., as
Co-Administrator of the Estate of

ANDREE T. BEJJANI,

Deceased,

DECISION and ORDER

File No.: 2009-3663/A/B/C

For Leave to Compromise, Allocate and Distribute the
Proceeds Derived from Causes of Action Arising out of the
Conscious Pain and Suffering and Wrongful Death of
Decedent.

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M E L L A, S.:

The following submissions were considered in deciding this motion for partial summary
determination and dismissal of certain objections:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion and Affidavit of Paul S. Forster, Esq., in Support of Motion for Partial Summary Judgment Dismissing Objections, with Exhibits	1, 2
Affirmation of Kenneth T. Wasserman, Esq., in Opposition to Motion, with Exhibits	3
Co-Administrator George Bejjani's Memorandum of Law in Support of Paul S. Forster's Motion for Partial Summary Judgment	4
Petitioner's Reply Memorandum of Law in Further Support of Motion for Summary Judgment	5

Before the court, in this heavily litigated estate, is co-administrator Paul Forster's motion
for partial summary determination of objections filed by Joseph Bejjani and Nada Bejjani (two of
decedent's three siblings and distributees of her estate)¹ to the co-administrator's petition for
approval of a proposed settlement of causes of action for the conscious pain and suffering and

¹Decedent's third distributee, George Bejjani, is the co-administrator of her estate, but is
not a petitioner in this proceeding; he has appeared as a respondent.

wrongful death of decedent Andree Bejjani and to allocate and distribute the proceeds.

Joseph (joined by Nada)² objected to essentially all the relief sought by the co-administrator, save reimbursement of any outstanding funeral expenses or related claims regarding decedent's funeral that was arranged by Joseph in New York.³ In his motion for partial summary determination, the co-administrator seeks dismissal of all objections concerning the settlement of the causes of action—including the payment of related attorneys fees and disbursements, the request for allocation of the settlement proceeds entirely to the cause of action for conscious pain and suffering, and distribution of the net proceeds in equal shares to decedent's three distributees. In addition, the co-administrator seeks dismissal of objections related to his receipt of statutory commissions and reimbursement of expenses paid by him, such as Surrogate's Court filing fees and the premium for the bond imposed on the letters of administration.

For the reasons addressed below, the motion is held in abeyance pending further order of the court.

Procedural Background

Decedent Andree Bejjani was murdered in her rented condominium unit on September 19, 2009, at age 44. Her admitted killer, along with various business entities that employed him

²Also addressed by Nada in her objections is petitioner's request that distributions for Nada be paid into the court for her benefit pursuant to SCPA 2218(2). Nada swears to there being no barrier to her receipt and full benefit, use and control of any funds to which she will be entitled. In light of her sworn statements, the protections of SCPA 2218 are not required here.

³The only other aspect of the instant petition that is not disputed is that decedent was domiciled in New York at the time of her death, an assertion about which there had been disagreement in the context of the administration proceeding.

or owned, operated or provided security for the hotel are the defendants in the action to recover damages for her conscious pain and suffering and wrongful death brought in the Supreme Court, Bronx County, which is now sought to be compromised by the co-administrator.

The initial appointment of a fiduciary for decedent's estate was contested, with each of decedent's three siblings seeking appointment. By decision of this court dated June 19, 2010, and then decree issued on July 15, 2010, George Bejjani and Paul Forster were appointed co-administrators, with letters issuing to them upon the posting of a bond in the amount of \$46,000.

Co-administrator Paul Forster commenced this compromise proceeding in the fall of 2017, and the first return date for citation was January 30, 2018. Even in advance of the issuance of the first citation, Joseph filed a *pro se* notice of appearance. Nonetheless, no one other than the co-administrator appeared on the January 30, 2018 return date, at which time the matter was marked submitted, subject to petitioner's providing additional information required by the court in order to determine the petition. Prior to the filing of this information, Joseph filed a motion seeking a stay of the proceedings to allow him an opportunity to retain counsel, and the co-administrator filed a cross-motion seeking "dismissal" of the motion and additional relief related to the compromise proceeding. Both motions were decided by the court on their return date, and subsequently memorialized in a written decision dated May 14, 2018, which directed an amendment to the compromise petition and the issuance of supplemental citation on it, to be made returnable on the court's July 25, 2018 calendar. The objections of Joseph (now represented by counsel) and Nada were filed on or within a day or two before that return date, but a second supplemental citation for another necessary party was required and was made returnable on September 21, 2018. At the July 25, 2018 appearance, the court indicated its intent to hold a

conference with the parties on the September return date.

On or around August 28, 2018, the co-administrator filed the instant motion for summary judgment, noticing September 21, 2018 as its return date as well. On that date the court held a conference, and thereafter, following an unsuccessful attempt to resolve the disputes between the parties and additional submissions, the motion was marked submitted.

Compromise Petition

As relevant to this motion to determine certain objections summarily, the relief sought in the compromise proceeding, as contained in the Third Supplemental Affidavit to Modify the Compromise Petition, is as follows: 1) approval of the settlement of the causes of action in the amount of \$1,500,000; 2) leave to discontinue the causes of action against the settling defendants and their insurance carriers and execute all documents necessary to effectuate the settlement; 3) approval of attorneys' fees and disbursements; 4) allocation of the settlement proceeds to the cause of action for decedent's conscious pain and suffering; 5) award of full statutory commissions to petitioner/co-administrator; 6) approval of reimbursement to petitioner for his disbursements, including filing fees in the earlier administration proceeding and the bond premium; 7) approval of reimbursement to petitioner for the cost of obtaining jurisdiction over the parties in the compromise proceeding; 8) removal of the limitations and restrictions on the letters of administration, without imposition of any additional bond, to permit the compromise, collection and payment of the settlement proceeds; 9) distribution of the net proceeds to decedent's three distributees; and 10) sealing of the record of this proceeding.⁴ Petitioner does

⁴Other relief sought concerns co-administrator George Bejjani: his disbursements, statutory commissions, and reimbursement for expenses for decedent's funeral in Lebanon. This relief is also objected to, but this motion does not seek dismissal of those objections.

not expressly seek judicial settlement of his account, although an accounting is filed. Each of these items is objected to by Joseph and Nada, and those objections are sought to be dismissed by petitioner.

Application to Seal

As a preliminary matter, no basis has been proffered to justify sealing the record before this court in this compromise proceeding (*see* 22 NYCRR 216.1[a] [unless otherwise provided by statute or rule, sealing of court records may only be ordered upon written finding of good cause]; *see also Matter of Nguyen*, NYLJ, Feb. 23, 2016, at 22, col 6 [Sur Ct, NY County]), and that request is denied. Any objection to the request to seal is, accordingly, moot.

Summary Judgment

In support of his motion for summary judgment, the co-administrator asserts that he has established a prima facie entitlement to judgment as a matter of law (CPLR 3212[b]) and that the objections set forth no ground to deny the relief requested in the petition.

With respect to the proposed compromise of the causes of action, the co-administrator asserts that he has established the fairness and reasonableness of the proposed settlement, supported by his own sworn statements and the affirmation of an attorney who represented the co-administrator in prosecuting the causes of action, and that objectants' assertion that the motion is premature and their general request for discovery are insufficient to defer summary judgment.

The responsibility of a court before whom an application to approve compromise of a wrongful death cause of action is made is to inquire into the merits of the action and the amount of damages proposed as a compromise and either disapprove or approve the compromise "for

such amount as it shall determine to be adequate” (EPTL 5-4.6[a], [e]). The court must determine the reasonableness and adequacy of the settlement and whether its approval is in the best interests of the estate and the persons interested in the proceeds—either as beneficiaries or distributees of the estate (EPTL 11-3.3[a] [where an injury causes the death of a person, damages for such injury are limited to those accruing before death and not damages for or by reason of death; any such damages recovered for the injury become part of the estate]) or distributees suffering pecuniary loss (*see* EPTL 5-4.3[a] [amount of wrongful death recovery should be “fair and just compensation for the pecuniary injuries” of distributees resulting from decedent’s death]; EPTL 5-4.4 [distribution of wrongful death damages to distributees]). (*See Matter of DeLong*, 89AD2d 368, 370 [4th Dept 1982], *lv denied*, 58 NY2d 606 [1983] [“the duty of the acting surrogate in deciding whether or not to approve the settlement [is] to exercise his judgment in the best interests of the parties interested”]; *see also Matter of Leopold*, 259 NY 274, 278 [1932] [Surrogate may approve compromise upon application and showing that compromise is in best interests of estate].)

The co-administrator has established, on the record before the court, the *prima facie* reasonableness and adequacy of the proposed compromise and a basis for its approval as in the best interests of the estate and distributees. In support of accepting \$1,500,000 — a settlement offer that was the result of two sessions of private mediation between the parties who appeared in the action — the attorney prosecuting the case on behalf of the co-administrators provides an affirmation explaining his opinion that the offer is “fair and reasonable, and is in the best interests of the distributees, the estate of the decedent, and those interested in this estate to accept it, given the inherent uncertainty of recovery if this action were to proceed to trial” (Rothenberg

Aff ¶ 19). He arrives at this conclusion, after extensive investigation and discovery, including approximately 19 depositions, and receipt and review of medical and autopsy reports. He further notes the particular uncertainty of going to trial here, where, if the corporate defendants were found to be merely negligent, then each is only proportionately liable. In such a case, the likelihood that the majority of fault would be assessed against the now-incarcerated defendant convicted of killing decedent (who defaulted in the action) causes counsel to conclude that it would be “nearly impossible to collect a judgment in excess of the sum of \$1,500,000 being offered in settlement” (Rothenberg Aff ¶ 19).

Movant having made a prima facie showing of entitlement to judgment as a matter of law on the reasonableness of the settlement and the adequacy of the amount, objectants must put forth evidence sufficient to raise a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Grullon v City of New York*, 297 AD2d 261, 263 [1st Dept 2002]).

In opposition to this motion, objectant⁵ maintains that summary approval of the settlement would be premature and that objectants are entitled to discovery to assess the reasonableness of the settlement. His counsel appends to his affirmation in opposition a First Set of Interrogatories and a First Request for Discovery and Inspection. These documents are dated September 14, 2018, after the filing of the instant motion, which stayed discovery here (CPLR 3214[b]). At the heart of the objections to compromise and for attendant relief is objectants’ two-fold concern: 1) their need to review the settlement and relevant documents to determine whether the settlement is reasonable and in the best interests of the estate, in particular, in light of 2) their

⁵Only Joseph filed opposition to the motion for summary judgment. Nada made a passing request along with her Objections for an opportunity to retain counsel, but, despite the passage of a year since making that request, no attorney has appeared for Nada in this proceeding.

wish to rule out the viability of a punitive damage claim, which was included in the complaint and might justify a much higher damage award.

This motion, served and filed after issue was joined as to these two objectants, is timely pursuant to CPLR 3212(a), even though jurisdiction over another respondent remained incomplete until the return date of the motion. A court may, nonetheless, order a continuance of a motion for summary determination to allow disclosure if it appears that “facts essential to justify opposition [to the motion for summary judgment] may exist but cannot then be stated” (CPLR 3212[f]). The party opposing summary judgment for such reason must “put forth some evidentiary basis to suggest that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*Reale v Tsoukas*, 146 AD3d 833, 835 [2d Dept 2017] [internal quotations omitted]; *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]).

Objectant has not been afforded an opportunity for any discovery in this proceeding and, for that reason, this motion should be held in abeyance to provide for such opportunity (*see Rensco Federal Credit Union v Hooley*, 132 AD2d 842, 843 [3d Dept 1987] [“a party should be permitted a reasonable opportunity for disclosure prior to the determination of a summary judgment motion . . . and in this case less than two months elapsed between joinder of issue and the making of plaintiff’s motion”]; *see also Colicchio v Port Authority*, 246 AD2d 464 [1st Dept 1998] [motion made shortly after request for pertinent documents made and unanswered]; *cf Ward v New York City Hous. Auth.*, 18 AD3d 391 [1st Dept 2005] [summary judgment may not be defeated on basis of needed discovery if lack of discovery is attributable to non-moving party’s inexcusable delay], *citing Meath v Mishrick*, 68 NY2d 992 [1986]). Any request for

disclosure, however, must seek information likely to uncover evidence relevant to the relief sought in this proceeding as opposed to seeking discovery premised on hope or speculation as to the existence of evidence sufficient to defeat the motion for summary judgment (*Vikram Constr., Inc. v Everest Natl. Ins. Co.*, 139 AD3d 720, 721 [2d Dept 2016]; *Auerbach v Bennett*, 47 NY2d 619, 636 [1979]). In that regard, the discovery allowed here is limited to that which would address whether the compromise is reasonable, and in the best interests of the estate, as pled by objectant.

Appropriate disclosure as to the compromise is sought by objectant in the following paragraphs of his First Request for Discovery and Inspection: 4, 5, 6, and 7.⁶

Objectant is directed to serve a revised Request for Discovery no later than **July 26, 2019**. Because this motion for summary determination is held in abeyance, the stay of disclosure, pursuant to CPLR 3214(b), is lifted regarding the relief in the petition and related objections that were not the subject of the motion for summary determination until further order of the court.

On the same day that the co-administrator filed his reply memorandum of law on this motion, he filed his fourth supplemental affidavit to modify the compromise petition wherein he includes a request for approval of attorneys fees and disbursements incurred by the co-administrators in connection with this proceeding and further requests that their payment be made from the shares of the proceeds for the objectants pursuant to *Matter of Hyde* (15 NY3d 179 [2010]). In light of this addition to the relief requested, and upon a determination that

⁶Any concern the co-administrator may have regarding production of materials related to the causes of action and compromise may be assuaged by the parties' entry into a confidentiality agreement, which could be provided to this court for so-ordering (*see Matter of Shure*, NYLJ, Dec 7, 2016, at 26, col 4 [Sur Ct, NY County]).

resolution of the balance of the relief sought in this proceeding will be facilitated by this direction, petitioner is ordered to amend this compromise petition to seek judicial settlement of his account for the proceeds of this settlement only (*see* SCPA 2205), and file an amended accounting for these proceeds. The co-administrator is directed to serve and file these amended papers by **August 15, 2019**.

The parties shall appear for a conference with the court on **August 30, 2019, at 11:00 a.m.** in room 503 of the Surrogate's Court for the purpose of discussing how the matter will proceed.

This decision constitutes the order of the court.

Clerk to notify.

Dated: July 12, 2019



SURROGATE