

<b>Matter of Modell</b>
2017 NY Slip Op 30697(U)
March 31, 2017
Surrogate's Court, Nassau County
Docket Number: 350478/O
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**In the Matter of the Petition of Mitchell Modell, Abby  
Modell, and Charles A. Lubitz, as Co-Executors of the  
Estate of**

**DECISION**

**File No. 350478/O  
Dec. No. 32308**

**WILLIAM D. MODELL,**

**Deceased,**

**To Appoint Successor Trustees of the Leslie Modell  
Family Trust, Pursuant to SCPA 1502.**

**PRESENT: HON. MARGARET C. REILLY**

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

Notice of Motion Regarding Statute of Limitations and for Entry of Decree, dated August 19, 2016.....	1
Affirmation in Support with Exhibits.....	2
Affirmation in Opposition, with Exhibits.....	3
Memorandum of Law in Opposition. ....	4
Reply Affirmation.. ....	5
Order to Show Cause, dated September 16, 2015. ....	6
Court Decision/Order, dated July 1, 2016. ....	7
So ordered Stipulation, dated July 28, 2016.....	8

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The petitioners Charles A. Lubitz, as executor of the Estate of William D. Modell, Mitchell Modell, and Abby Modell move for an order directing (1) entry of the decree noticed by the petitioners for settlement on January 13, 2016, thereby tolling the statute of limitations applicable to all causes of action which Abby Modell and Mitchell Modell have against the Leslie Modell Family Trust, under indenture dated December 26, 1968 (the Trust), from June 16, 2015; or (2) in the alternative, an order declaring that the Trust is equitably estopped from asserting a statute of limitations defense against Abby Modell and

Mitchell Modell in the proceedings commenced by them in this Court against the Trust for the recovery of the value of their shares of certificates of deposit seized by Sterling National Bank (File No. 350478/P & Q); and (3) such other and further relief as to the Court may seem just and proper.

The Leslie Modell Family Trust was created by the decedent William D. Modell in 1968 for the benefit of his daughter Leslie and her issue. In June 2005, William D. Modell, Mitchell Modell, and Abby Modell, surviving spouse of William's predeceased son Michael Modell, each pledged five certificates of deposit held at Sterling National Bank as collateral for a \$7.1 million loan from Sterling National Bank to the Trust. In November 2009, Shelby Modell, the decedent's surviving spouse and the sole trustee of the Trust, advised Sterling that she would make no more payments on the loan from the trust. Sterling, in turn, advised her that if she did not make a payment on the loan by a date certain, the collateral would be seized. No further payments were made on the loan and Sterling seized the petitioners' certificates of deposit that had been pledged as collateral for the loan.

In June 2012, petitioner Charles Lubitz, as executor of the estate of William D. Modell, commenced a proceeding against the Trust to recover the sum of \$1,747,686 plus interest, the value of the estate's lost collateral. By order dated July 30, 2015, the court granted Lubitz's motion for partial summary judgment and directed the Trust to make payment to the estate of the value of the lost collateral, plus interest. Demand letters for payment were made by counsel to Mitchell Modell and Abby Modell for payment of the value of their respective certificates of deposit seized by Sterling along with notice of the

parties' intention to commence legal proceedings to recover those sums if not voluntarily paid by the Trust. It is alleged that Shelby Modell received the demand letters on June 12, 2015 and resigned as trustee of the trust the very next day without appointing a successor trustee, although she had the power to do so, leaving the petitioners without a trustee who could be served with process.

In this proceeding for the appointment of a successor trustee of the Trust, the court rendered a decision, dated July 1, 2016,<sup>1</sup> wherein it vacated its decision, dated February 6, 2016 (which approved the appointment of a successor trustee) and its order, dated February 10, 2016, because the court failed to address the prayer for relief contained in the petition for the appointment of a successor trustee that the statute of limitations be tolled until a successor was appointed.

On July 28, 2016, following a conference with this court, the parties entered into a So-Ordered Stipulation that, among other things, vacated the decision and order by this court dated July 1, 2016. This stipulation further provided that the petitioner would file and serve a motion to reconsider the February 6, 2016 Decision and February 10, 2016 Order of this court.

Upon review of the current motion, the court holds that any statutes of limitation applicable to then potential [and now actual] causes of action that Abby Modell and/or Mitchell Modell may have against the Leslie Modell Family Trust are tolled for the period from June 16, 2015, the date of the resignation of the trustee, until the date of this order (*see*,

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<sup>1</sup> Subsequently vacated by stipulation and order, dated July 28, 2016.

*Zumpano v Quinn*, 6 NY3d 666, 673 [2006]; *General Stencils v Chiappa*, 8 NY2d 125, 128 [1966]).<sup>2</sup>

In the absence of a trustee for the trust, the court concludes that service on the persons designated in the order to show cause of September 16, 2015 and the other trust beneficiaries was sufficient to provide jurisdiction for the tolling motion, which also requested appointment of a successor trustee (SCPA §1502[4]).<sup>3</sup> The court notes that all necessary parties were given notice of the interim relief sought, i.e., the tolling issue, and no opposition thereto was interposed. The order to show cause also provided that the tolling would remain in effect until this proceeding for the appointment of a successor trustee was finally decided.

While raised by the Trustee's counsel in his response papers, the court is not addressing the nature of the causes of action which Abby Modell and Mitchell Modell have now presented against the Leslie Modell Family Trust and/or the duration of the appropriate statute of limitations. Such issues are not properly before the court in this special proceeding.<sup>4</sup>

Accordingly, the order originally noticed for settlement on January 13, 2016

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<sup>2</sup> Abby Modell and Mitchell Modell commenced separate proceedings against the Leslie Modell Family Trust on or about March 15, 2016.

<sup>3</sup> Counsel for Abby and Mitchell Modell correctly points out that Counsel for the successor trustee, appointed pursuant to the order of February 1, 2016, served and filed a general "Notice of Appearance" in this proceeding, thereby consenting to jurisdiction over the trust.

<sup>4</sup> Such a defense must be raised by answer or motion in the special proceedings commenced by Abby Modell and/or Mitchell Modell.

will be signed.

This constitutes the decision and order of the court.

Dated: March 31, 2017  
Mineola, New York

**E N T E R:**

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

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