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## SURROGATE'S COURT DECISION

Queens County Surrogate's Court

Decisions

Surrogate Nahman

Estate of VITO CRISTINA, Deceased In this proceeding to settle the account of the former executor, Richard J. Alaimo, objections were filed by the Public Administrator of Queens County as Temporary Administrator of the estate, by Stephanie DePace individually and as guardian of the person and property of Katlyn F. Toro, by Gioacchino Cristina, Rosallia Benvenuto and Frank Cristina, and by Crocifissa Cristina.

The branches of the petition requesting the Court direct Gioacchino Cristina, Crocifissa Cristina, Rosallia Benvenuto and Frank Cristina to return to the fiduciary the estate funds each received, and the objections thereto, were severed and consolidated with a turnover proceeding commenced by the Temporary Administrator seeking the same relief.

The remaining issues as set forth in the filed statement of issues were tried before the Court. Those issues principally pertain to the sale of the decedent's real property, the rents generated from those properties, brokers commissions, legal fees and surcharges.

Petitioner, as the accounting party, had the burden of proving that he fully accounted for all the assets of the estate. While the objectants had the burden of coming forward with evidence to establish that the account was inaccurate or incomplete, upon satisfaction of that showing, the petitioner had the ultimate burden of proving that the account was accurate and complete ([Matter of Curtis, 16 AD3d 725](#); [Matter of Schnare, 191 AD2d 859](#)).

Based upon the evidence adduced at trial, the Court finds and concludes as follows:

At the time of his death, the decedent owned six pieces of real property, three in New York City and three in Marlboro, New York. The objectants claim the petitioner improperly sold the three parcels of real property situated in the city of New York for below market value. One property was a brick semi-detached two-family house located at 68-31 75 Street, Middle Village, New York. The two other properties consisted of an attached brick six unit dwelling located at 210 Wyckoff Avenue, Brooklyn, New York, and a three-storied frame building containing four apartments and two vacant stores located at 1486 DeKalb Avenue, Brooklyn, New York.

The executor did not obtain appraisals for any of these properties before they were offered for sale. Rather, he permitted Rosetta Pirillo, a real estate broker with whom he and his wife had a close relationship, to set the sales prices. Rosetta Pirillo testified that she determined the listing prices for the properties based upon her review of recent comparable sales in the area. The list of comparable sales admitted in evidence, however, were for properties which had sold between late 1998 and early 1999.

The two Brooklyn properties went to contract in October 2000, and the Middle Village property went to contract in November 2000. All three properties sold in February 2001, approximately ten months after of the date of the decedent's death. The Middle Village property was sold to the adjoining property owner for \$375,000. The two

Brooklyn properties were sold as a package for \$320,000 to a purchaser who had bought other properties through the executor and broker. The selling prices for these properties were later fixed for contract purposes at \$170,000 for the Wyckoff Avenue property, and \$150,000 for the DeKalb Avenue property.

Evidence that the properties were worth considerably more than the selling prices was presented on behalf of the objectants. A licensed real estate appraiser testified that in his opinion, on the date of sale, the Middle Village property had a value of \$454,000, the Wyckoff Avenue property had a value of \$284,000, and the DeKalb Avenue property had a value of \$262,000. With respect to his appraisal of the Middle Village property in particular, the witness noted that a comparable property located one block away sold on the same day for \$447,000.

On cross-examination, the witness acknowledged that his appraisals were based upon forensic analysis of the properties, since he had not conducted a full inspection of the properties, and he had no information concerning the interior or exterior conditions of the properties when they were sold. The witness further testified that during the time frame in issue property values increased by approximately 25 percent per year.

Objectants also offered in evidence bank appraisals for the two Brooklyn properties. The Wyckoff Avenue property was appraised a few weeks after its sale for \$230,000. The DeKalb Avenue property was appraised eighteen months after its sale for \$420,000.

In rebuttal, petitioner called the principal of the purchaser of the two Brooklyn properties. He testified that at the time of contract the properties were in need of many repairs and that the DeKalb Avenue property lacked a proper certificate of occupancy for the one of the stores. He further testified that he spent between \$25,000 to \$30,000 in repairs at the Wyckoff Avenue property, and between \$65,000 to \$70,000 for the DeKalb Avenue property.

In weighing the evidence adduced on the valuation of the Brooklyn properties, the Court gives greater consideration to the written bank appraisals, since these appraisals were formal appraisals based upon full inspections of the properties. Because these appraisals were made six and eighteen months subsequent to the contract dates, however, a reduction in the market values is required to compensate for market increases over those periods of time. Taking the appraised value as of the date of the report, and deducting therefrom an amount based upon a 25 percent per year increase in value from the date of contract, the Court determines that the fair market value of the Wyckoff Avenue property was \$203,000.

Applying the same formula to the DeKalb Avenue property, results in a market value of \$269,000. The objectants, however, having presented evidence that it had a value of \$262,000, the Court fixes its fair market value at that slightly lesser amount.

With respect to the Middle Village property, the Court finds it had a fair market value of \$447,000. In reaching this determination, the Court has given much weight to the fact that a very similar property only one block distant sold the same day for that amount.

From the foregoing, the Court finds the each of the three properties was sold below fair market value.

The objectants argue that, in failing to obtain market value, the petitioner did not properly exercise his power of sale and, therefore, should be surcharged.

Generally, the determination to sell real property, and the terms of sale, are within the business judgment of the fiduciary ([Matter of Flaum, 168 AD2d 933](#); [Matter of Osterndorf, 75 Misc 2d 730](#)). EPTL §11-1.1(b)(5)(B) confers a wide range of discretion upon a fiduciary as to the price, terms and conditions of sale. Despite this grant of discretion, however, the fiduciary's actions must still comport with the best interests of the estate ([Matter of Kane, 98 AD2d 851](#)). A fiduciary owes the estate an active duty to use diligence and care to preserve its value and prevent loss ([Matter of Auditore, 249 NY 335](#)).

If a fiduciary fails to exercise a power of sale in a proper manner, and loss results to the estate, he or she may be surcharged for the loss. It is not enough, however, to show that the fiduciary did not get the highest price obtainable. It must be shown that the fiduciary acted negligently, and without the diligence and prudence which an or-

dinary person would have exercised in his or her own affairs (*Matter of Lovell*, 2005 NY Slip Op 8323, 2005 N.Y. App Div. LEXIS 12355 [2nd Dept, Nov. 7, 2005]; *Matter of Shurtleff*, 206 Misc. 255).

Here, the objectants have shown that the petitioner acted negligently and imprudently in the sales of those properties. It is undisputed that the petitioner never commissioned appraisals of the properties. He delegated his responsibility and relied totally upon the realty broker to determine the offering prices. Had the petitioner obtained appraisals of the properties, he would have had accurate valuations of those properties and would have recognized that the prices for which they were offered for sale were inadequate, especially in a rising market. The petitioner was negligent in failing to obtain appraisals for the properties and, given the clear inadequacy of each of the sales prices, he acted imprudently in failing to obtain the fair market value for each of the properties, all to the detriment of the estate.

Accordingly, the objections to the sales of the three properties are sustained. The petitioner is surcharged with respect to each of the three properties in the amount of the difference between the sales price and the market value as follows: for the Middle Village property, \$72,000, together with 9 percent interest from February 12, 2001; for the Wyckoff Avenue property, \$33,000, together with 9 percent interest from February 27, 2001; and, for the DeKalb Avenue property, \$112,000, together with 9 percent interest from February 27, 2001.

With respect to the real estate broker's commissions paid to Rosetta Pirillo, the objectants argue that they be disallowed because she failed to negotiate the best price for each of the decedent's properties and the amount she received was in excess of commissions normally paid for the services she actually rendered. They further contend that, because of the close relationship between the petitioner and Rosetta Pirillo, her employment created a conflict of interest. They ask that the petitioner be surcharged in the amount of commissions paid.

In total, Rosetta Pirillo received \$46,800 in real estate commissions from the sales of five of the decedent's properties. There was no contract between the petitioner and Rosetta Pirillo for her services. It was the decedent's siblings, Gioacchino Cristina and Crocifissa Cristina, who have no interest in the estate, not the executor, who had a management/sales agreement with Rosetta Pirillo. Under the terms of the agreement, Rosetta Pirillo was to manage the properties, collect the rents, and pay the expenses. She was also given the exclusive right to sell all the decedent's properties at a 6 percent commission.

Rosetta Pirillo listed the properties in local neighborhood newspapers and called a few local brokers concerning the properties. She did not list any of the properties with a multiple listing service. Any offers that were received by Rosetta Pirillo were passed on to Gioacchino Cristina for his approval. Ultimately the properties sold to parties who either knew the decedent or had prior dealings with Rosetta Pirillo or the petitioner. As noted above, the three city properties sold for well below market value.

It was the petitioner's duty to retain the services of an independent real estate broker to market and negotiate the sales of the decedent's properties in a manner most favorable to estate. Here, the petitioner not only subordinated his responsibility to the decedent's siblings, but he also failed to follow the rule of undivided loyalty to the estate by acquiescing to the agreement made with Rosetta Pirillo, with whom he and his wife had a personal and business relationship.

Under all the circumstances, the Court disallows the broker's fees paid to Rosetta Pirillo, and the petitioner is surcharged in the amount of \$46,800, together with 9 percent interest from June 12, 2002, the date of the last sales.

The objectants also object to the amount of rental income reflected in the petitioner's account. The objectants contend that the petitioner has failed to properly account for the rents and should be surcharged the sum of \$60,381. The petitioner concedes that the amounts stated in both his initial account and in the amendment thereto are inaccurate. He now claims that the account should actually reflect a net rental income of zero.

The petitioner did not collect the rents from the decedent's properties; he left that work to Rosetta Pirillo. Pursuant to the agreement with the decedent's siblings, Rosetta Pirillo collected the rents and paid the expenses.

The parties stipulated that the amount of gross rents receivable during the applicable period was \$60,381. The petitioner presented evidence that Rosetta Pirillo collected \$60,376, which she deposited into her own account. From that account she paid the expenses of the decedent's properties and other estate expenses in the amount of \$51,908.58, including two payments of \$2,000 each for funeral expenses, \$500 to pay for Crocifissa Cristina's airfare to return to Italy, and \$1,200 toward her management fee. From the sums collected she also made monthly cash payments to the building superintendent, paid herself additional management fees of \$600 per month and kept, as a 'tip' from Gioacchino Cristina, the balance of \$1,050.

The petitioner's account is clearly inaccurate with respect to the rental income. Nonetheless, the evidence establishes that Rosetta Pirillo collected the proper amount of rents due, less \$5, and that she used the bulk of the funds to pay for legitimate estate expenses.

There were certain payments and fees for items that were not appropriate estate expenses. The \$500 payment for Crocifissa Cristina's airfare was not a proper item of estate expense. It was also improper to retain the balance of the funds collected as a gratuity.

In addition, management fees were not properly chargeable to the estate. The management and collection of rents from the decedent's properties were part of the petitioner's duties as executor. If he had done the work himself, and had not waived commissions, he would have been allowed an additional commission pursuant to [SCPA §2307\(6\)](#). Here, the petitioner, shirking his executorial duty, left that work to be performed by Rosetta Pirillo in accordance with her agreement with the decedent's brother and sister.

The petitioner personally could have employed an agent to do this work if he was unable to do so himself. The law is clear, however, that if a fiduciary rightfully delegates a portion of his executorial work to another, he must pay for such services out of his commissions ([Matter of Grace, 62 Misc 2d 51, aff'd 35 AD2d 783](#)). Here, payment can not be made out of commissions, because the petitioner waived commissions. Consequently, the petitioner is personally surcharged for the \$6,600 in management.

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