SURROGATE COURT STATE OF NEW YORK
COUNTY OF KINGS

----------X

ACCOUNTING BY HARVEY HEINO, as the Co-Executor of the Estate of

ANDRE HEINO,

Deceased.

----------X

DECISION AFTER TRIAL
File No. 1999-4868

LÓPEZ TORRES, S.

In this robust and contentious accounting proceeding, Jay Heino (Jay) and George Heino (George, and together with Jay, the objectants) interpose numerous objections to the petition for judicial settlement of account (the accounting) filed by Harvey Heino (Harvey) in the estate of Andre Heino (the decedent). The decedent died testate on July 26, 1997, survived by three sons, Harvey, Jay and George. On December 22, 1999, the decedent's last will and testament dated December 24, 1990(the decedent's will), was admitted to probate and letters testamentary were granted to Harvey, Jay and George as co-fiduciaries of their father's estate.

On December 11, 2002, Jay filed a petition to compel an account by his co-fiduciaries, Harvey and George. On May 14, 2003, the court issued a decision and order directing both to account. On October 30, 2003, Jay filed a petition to revoke Harvey's letters testamentary for failure to comply with the order to account. On June 16, 2006, Harvey filed his petition for judicial settlement of account. No accounting was ever filed by George.

Verified objections to the accounting were filed by both objectants in or about October 2006.[1] Harvey filed a Note of Issue on December 30, 2007, and on April 15, 2008, he moved for partial summary judgment, seeking to dismiss three of the numerous objections raised by both objectants.[2] While the motion for summary judgment was pending, Jay filed opposition to Harvey's motion, and also filed a cross-motion for summary judgment in favor of those three objections to the accounting. Pursuant to its decision and order, dated December 3, 2008 (the 2008 decision), the court granted Harvey's motion for partial summary judgment dismissing the three objections, and also dismissed as untimely Jay's cross-motion. Upon appeal, the Appellate

---

[1] The majority of the objections filed by Jay and George, although filed separately, are generally identical; however, Jay does assert objections regarding certain actions alleged to have benefitted George improperly.

[2] Jay filed thirty-one objections to the instant accounting, while George filed twenty-seven.

Division, Second Department, affirmed the court's dismissal of Jay's cross-motion but determined that a triable issue of fact existed with respect to one objection, reversing and modifying only so much of the 2008 decision as related thereto. *In re Heino*, 73 A.D.2d 1062 (2nd Dep't 2010).

The Parties' Contentions and the Hearing

Upon remand and a narrowing of issues prior to trial, a number of objections remained to be determined at a hearing on the contested accounting. The objectants assert that the accounting is incomplete and inaccurate for i) the failure to include as an asset of the estate a purported ownership interest in 63 Associates, a general partnership (63 Associates), as well as the *pro rata* share of any partnership distributions made thereby subsequent to the decedent's death, ii) the failure to charge Harvey with losses alleged to have resulted by virtue of his failure to sell certain stocks, iii) the failure to satisfy certain specific bequests pursuant to Article FOURTH of the decedent's will, iv) the failure to include certain items of the decedent's personalty, v) the inclusion of payments to Harvey of real estate commissions, vi) the inclusion of payments of legal fees to Harvey's counsel, as well as exclusion of fees asserted to be due to Jay's counsel, vii) the inclusion of payments to other professionals, payments of loans to Harvey and third parties, and the acceptance of certain claims against the estate, viii) improper distributions to Harvey and George,[3] and ix) the failure to reflect accurately the value of certain real property, the value of gains and losses realized upon the sale of certain real properties, the balance of estate assets, and the value of Harvey's alleged personal use of certain real property. The objectants further assert that payment of commissions to Harvey must be disallowed and that letters tertamentary be revoked for these purported failures and improper actions.

A bench trial was conducted over the course of eight days, on April 30, May 2, May 3, May 31, June 7, June 8, June 25, and June 28, 2012. Oral testimony was given by each of Harvey, Jay and George, as well as by nine non-party witnesses, namely, Martin Ender, C.P.A. (Ender), Irwin Adelsberg, C.P.A. (Adelsberg), Allan Berger, a partner in 63 Associates (Berger), Rivie Schwebel, a partner in 63 Associates (Schwebel), Marc Fein, Esq. (Fein), Max Wasser, Esq. (Wasser), Pamela Gallagher, a paralegal with Gallet Dreyer & Berkey, LLP (Gallagher), Moshe Katlowitz, Esq., counsel to Harvey (Katlowitz), and Harvey Schwartz, Esq., counsel to

---

[3] Any objections to amounts alleged to have been improperly distributed to George are, as might be expected, interposed only by Jay.

Jay (Schwartz).[4] In addition, voluminous documentary evidence, consisting of seventy-eight (78) exhibits, was received into evidence.

The respective burdens of proof in a contested accounting proceeding, as articulated by the Appellate Division, Second Department, are as follows:

> [T]he party submitting an account has the ultimate burden of demonstrating that he or she has fully accounted for all the assets of the estate (*see Matter of Tract,* 284 AD2d 543 [2001]; *Matter of Schnare*, 191 AD2d 859[1993]). "While the party submitting objections bears the burden of coming forward with evidence to establish that the account is inaccurate or incomplete, upon satisfaction of that showing the accounting party must prove, by a fair preponderance of the evidence, that his or her account is accurate and complete" (*Matter of Tract*, 284 AD2d 543[2001] [internal quotation marks omitted]; *see Matter of Campione*, 58 AD3d 1032, 1034 [2009]; *Matter of Schnare*, 191 AD2d at 860).

Matter of Heino, 73 AD2d 1062, 901 NYS2d 671 (2d Dep't 2010).

Failure to Include Ownership Interest in 63 Associates

The objectants assert that at the time of his death in 1997 the decedent owned a 17.986% interest in 63 Associates, the value of which they assert to have been $1,528,810.00 and which is not included as an asset of the decedent's estate. The objectants further seek a *pro rata* share of the partnership distributions made since the decedent's date of death, plus interest thereon calculated at nine percent (9%) per annum.

Harvey's Evidence

In support of the accuracy and sufficiency of his accounting, Harvey proffered evidence to demonstrate that the decedent held no interest in 63 Associates at the time of his death, and indeed that the decedent had never held any interest therein. Harvey relies upon his own testimony, together with that of the objectants, two accountants for 63 Associates and two partners of 63 Associates, as well as upon voluminous documentary evidence in support thereof.

Harvey offered his own credible testimony regarding the ownership structure of 63 Associates as well as the history of its operation. He testified that 63 Associates purchased certain commercial real property located at 2927-2951 Avenue U (the Avenue U property) from

---

[4] The witnesses are listed chronologically, in the order of their appearance.

an entity known as 2927 Avenue U Realty Corporation (the corporation). Harvey testified that the shareholders of the corporation and of 63 Associates were identical, namely Harvey, Schwebel, Berger, David Elishis (Elishis) and Sam Prager (Prager). Harvey testified that he never held any portion of his ownership interest in either 63 Associates or the corporation as a "nominee" for the decedent. Harvey testified that the decedent was not identified in the 63 Associates partnership agreement as a partner thereof or as having any interest therein, and further that he had no arrangement with the decedent with respect to any portion of his interest in 63 Associates.

Harvey did proffer evidence of a limited role played by the decedent in the history of 63 Associates, testifying that the partnership obtained a mortgage from the decedent in 1994 (the 1994 mortgage), during a period of financial difficulty. Harvey proffered mortgage documents related to a refinancing of the real property in 1992, together with the closing statement for the 1994 mortgage, none of which identify the decedent as a partner in 63 Associates. Harvey also proffered documentary evidence of the repayment of the 1994 mortgage upon its assignment to a financial institution some four months later, and, again, neither the loan documents nor closing statement executed in connection with the assignment reflect that the decedent held any ownership interest in 63 Associates.

Harvey also offered the testimony of two accountants for 63 Associates, Ender and Adelsberger, who each offered consistent testimony regarding the ownership of 63 Associates. Ender testified that his company performed the accounting work, including preparation of the U.S. Partnership Tax Returns (the Forms 1065) for 63 Associates from the late 1980's until 1998. He testified that he obtained Forms 1065 and work sheets for 63 Associates for the years prior to his retention, and that the decedent was not identified as a partner therein. He testified further that during the period from the late 1980's until 1998 the decedent never made a capital contribution to 63 Associates and was never issued a K-1 reporting any income distributed therefrom. Ender also testified that he prepared the annual Forms 1065 for 63 Associates for 1997 and 1998, the year in which the decedent died and the year following, and that the decedent was not listed as an owner thereof. He also testified that during his tenure there were no changes in the identity of the partners of 63 Associates.[5] Ender testified that he never saw any document

[5] Prager transferred his 16.875% interest in 63 Associates to Elishis and Harvey, in equal shares, in 1988 .

reflecting, or heard anyone affiliated with 63 Associates indicate, that the decedent held an ownership interest therein.

Adelsberg also offered credible testimony regarding the ownership of 63 Associates in the years following Ender's service to the partnership. He testified that he prepared the annual Forms 1065 for 63 Associates from 1999 to 2007. He also testified that he prepared the decedent's U.S. personal income tax return in the year of his death, and that no interest in 63 Associates was indicated thereon. Adelsberg testified that during his nine-year tenure only Elishis, Harvey, Schwebel and Berger received K-1 forms reporting income distributed from 63 Associates.

Harvey also proffered the testimony of Berger and Schwebel, original partners in 63 Associates. Berger testified that he never saw a document of any kind which indicated that the decedent held an ownership interest in 63 Associates. He testified that, despite seeing the decedent at social occasions over the years, the decedent never discussed 63 Associates with him. Berger testified that subsequent to the transfer of Prager's interest,[6] no individual other than the remaining four named partners participated in the business of 63 Associates.

Consistent with Berger's entirely credible testimony, Schwebel testified that he had never met the decedent, that the original partners in 63 Associates had been Elishis, Prager, Berger, Harvey and himself, and that the decedent made no capital contributions to 63 Associates. Schwebel also testified that he never discussed with Harvey whether Harvey held his interest for the benefit of the decedent, and that he had never seen any document indicating that the decedent held any ownership interest in 63 Associates. Schwebel further testified that the decedent did not attend any partnership business meetings at which he was present, and that he had never heard anyone indicate that the decedent had an interest in 63 Associates.

Significantly, Harvey proffered further documentary evidence of the decedent's assets, in the form of the United States Estate Tax Return, Form 706 (the decedent's 706), prepared in 1998 by Harvey and the objectants as co-executors of the decedent's estate. Each of of the co-executors signed the decedent's 706, which is notable in its failure to identify any interest in 63 Associates as an asset owned by the decedent.

The testimony of the objectants regarding the circumstances of the preparation and signing of the 706 was singularly unconvincing. Jay testified that although he "flipped through"

---

[6] See fn. 5, *supra.*

the decedent's 706, "I am not familiar with tax returns even to this day." When queried whether the decedent's 706 listed an ownership interest in 63 Associates as an asset, Jay testified that "I have no idea" and " I can't answer your question." Upon the proffer of his 2007 deposition testimony, wherein he testified that he looked at each schedule of the decedent's 706 and that the asset was not included on any of the schedules, Jay testified evasively that "I assume that's what I said, yes."

George's testimony regarding the information set forth in the decedent's 706 was equally dissembling. George did acknowledge that the decedent's 706 was indeed a tax return and that he recognized his signature thereon; otherwise, his testimony was utterly inconsistent regarding the circumstances of signing.[7] George testified that he recognized his signature thereon, that he did not recall signing the return, that he did sign the return as co-executor of the estate, that he did not read the decedent's 706, and that he did not know what he had been signing. George was evasive when asked whether he had raised any objection to the contents of the decedent's 706, repeatedly answering "I didn't read it."[8]

The evidence of the decedent's 706, coupled with the credible and consistent testimony of Harvey, the partnership accountants, and two of the original partners in 63 Associates supports the court's finding that Harvey has made a *prima facie* demonstration that 63 Associates was not an asset of the decedent's estate.

The Objectants' Evidence in Opposition

In opposition, the objectants relied upon their own testimony, together with that of two attorneys, Wasser and Fein, as well as upon certain documentary evidence. The documentary evidence proffered was limited and of minimal weight, while the testimonial evidence was unpersuasive of the objectants' primary assertions.

Wasser testified that in August 1991, after the death of the decedent's spouse Elsie Heino (Elsie), he prepared the 1991 United States Estate Tax Return, Form 706, for her estate (the Elsie 706). The Elsie 706 was signed by the decedent, as Elsie's fiduciary, and listed therein is reference to a "17.986% interest in a one story commercial retail office building - 2927 - 2951

---

[7] George testified on one hand that he did not recall signing the return, and then in contrast that he did sign the return as co-executor of the estate. He further testified that he did not read the decedent's 706, and that he did not know what he had been signing.

[8] Ultimately, George invoked his privilege under the Fifth Amendment of the United States Constitution.

Avenue U, Brooklyn, New York."[9] Wasser testified that, upon reviewing the Forms 1065 for 63 Associates in the years preceding Elsie's death, none of such forms listed an ownership interest in 63 Associates as held by either the decedent or Elsie.

The objectants proffered a single document from Wasser's files, a handwritten note from Harvey (Harvey's note), in support of their assertion that either the decedent or Elsie owned an interest in 63 Associates. In relevant part, Harvey's note states, "63 Associates - my father & mother own 17.986% of the shares: outstanding mtg is $1,270,000." Wasser was unable to recall from whom he had received Harvey's note, but testified that he had relied upon the information in Harvey's note to complete the Elsie 706. Wasser testified that the Heino file contained no document other than Harvey's note to indicate that Elsie held any ownership interest in 63 Associates. Notably, neither counsel for the respective objectants inquired of Wasser whether he had on any occasion discussed with the decedent whether he or Elsie held an ownership interest in 63 Associates .

The objectants also offered their own testimony in support of their assertion that an interest in 63 Associates was wrongfully excluded from the accounting. Jay testified that he had no knowledge, independent of Harvey's note, that the decedent had possessed an ownership interest in 63 Associates, or of any agreement between the decedent and Harvey regarding any such interest. In contrast, George testified that on one occasion, at some unspecified date in the 1980's, the decedent told George that he owned an interest in 63 Associates. In response to the proffer of his 2007 deposition testimony, in which he testified that the interest in 63 Associates allegedly owned by the decedent was separate and unrelated to Harvey's ownership interest therein, George affirmed his deposition testimony and no objection to its proffer was raised by his attorneys.[10]

In response to the proffer of Harvey's note, Harvey testified that he was asked to prepare it by Wasser and the decedent, and that at the time he did so he knew the information he set forth

---

[9] Schedule E of the Elsie 706 reflects the Avenue U property as appraised at a value of $3,800,000.00, with an outstanding mortgage balance of $1,270,000.00. Based thereon, Elsie's interest in 63 Associates is set forth therein as $455,046.00.

[10] The original partnership interests were held by Elishis (27.5%), Harvey (27.5%), Schwebel (22.5%), Prager (16.875%) and Berger (5.625%). Upon transfer of the Prager ownership interest in 1988 to Harvey and Elishis in equal shares, their respective ownership interests in 63 Associates increased to 35.9375% each, leaving no proportion of ownership unaccounted for among the four remaining owners.

therein was neither true nor accurate. Harvey testified that the decedent had indicated to him that he wished to own an interest in 63 Associates, but neither Elsie nor the decedent had in fact ever owned any interest therein. He testified that the decedent was by nature tough, domineering and abusive, that the decedent was "obsessed" with the 63 Associates property, and that the decedent was "harping and demanding." Harvey testified that these characteristics were exacerbated by the fact that the decedent was "extremely depressed" over the death of Elsie and was suffering from leukemia. Harvey testified that he included the interest in 63 Associates to placate the decedent, and to make him "livable" and happy. Harvey's testimony regarding the decedent's character and disposition was wholly credible, and the objectants failed to proffer any testimony in contravention of his description of their father.

In further support of his objection, Jay proffered a letter dated in or about February 2004 from Marc Fein, Esq. (the Fein letter), an attorney previously associated with Harvey's counsel. The Fein letter had been sent to counsel for Jay in response to certain inquiries, and states, *inter alia*, that regarding the "Nostrand Avenue Property (sic): The decedent's 18% interest in said property has not been sold and is still part of the decedent's estate." Fein's testimony was of extremely limited probative value, as he testified that he had neither present knowledge nor recollection regarding information related to 63 Associates. Fein testified that he did not recall responding to Jay's counsel regarding assets of the decedent's estate, and he was unable to refresh his recollection upon review of the Fein letter regarding any work he might have performed in connection with the decedent's estate.

Discussion

Harvey has satisfied his burden of proof by demonstrating that the decedent held no ownership interest in 63 Associates at the time of his death. The testimonial evidence proffered by Harvey, including his own credible testimony and that of Ender and Adelsberg, the accountants for 63 Associates, and Berger and Schwebel, partners in 63 Associates, was substantial and convincing. The testimonial evidence proffered by Harvey presented a coherent history of 63 Associates, and raised no inconsistencies with respect to the identity of the partners thereof. Although Harvey is indeed an interested witness, the court found his testimony to be credible and convincing, particularly on cross-examination. Equally compelling was the proffered documentary evidence, including the decedent's 706 signed by the objectants as co-executors, under penalty of perjury. No mention of 63 Associates appears in any of the thirty-nine pages of the decedent's 706.

The proffered testimony presented no indication that the decedent had ever been a shareholder in either the corporation which first purchased the Avenue U property or in 63 Associates. The objectants wholly failed to respond to the evidence proffered by Harvey regarding the identity of the shareholders of the corporation, neglecting to proffer evidence of any sort to demonstrate that the decedent ever held shares therein or that he participated in the purchase of the Avenue U property by 63 Associates in 1984. The only evidence offered by the objectants in support of their assertions was George's less-than-credible testimony that on some unspecified date, almost thirty years ago, the decedent told him that he held an ownership interest in 63 Associates. No testimony at all was offered in support of the objectants' speculative assertion that Harvey had an arrangement with the decedent regarding 63 Associates, or that the decedent had advanced funds in support of Harvey's ownership interest therein.

Indeed, the testimonial evidence offered by the objectants was generally contradictory, insufficient and frequently implausible. Jay's overall demeanor throughout the trial was combative and reluctant, while George offered only vague and inconsistent testimony. Furthermore, the testimony proffered by Wasser, the decedent's lawyer and accountant, was of limited value, as the witness appeared frequently befuddled and confused. Similarly, the value of Fein's testimony was *de minimis*, as Fein too had no recollection of the circumstances surrounding the preparation of his letter or of details of the decedent's estate in general. In particular, the testimony offered by the objectants regarding the circumstances of the preparation and signing of the decedent's 706 was unconvincing in the extreme.

In addition, the documentary evidence offered by Harvey overwhelmingly demonstrated that the decedent at no time, either at his death or previously, held any ownership interest in 63 Associates. This evidence included, but was not limited to, i) the 63 Associates partnership agreement in which the decedent was not identified as a partner, ii) the June 1984 deed for the Avenue U property, on which the decedent is not named as an owner, iii) the closing statement for the transaction at which 63 Associates acquired the Avenue U property from the corporation, which does not identify the decedent as an owner thereof, iv) almost two decades of Forms 1065, the partnership tax returns, for 63 Associates, none of which indicate the decedent as a partner, v) a similar volume of K-1's for 63 Associates, none of which were issued to the decedent, vi) the closing statement from 63 Associates' re-financing of the Avenue U property in 1992, which does not reflect an ownership interest by the decedent, vii) the closing statement of the 1994 mortgage, which does not identify the decedent as a partner therein, and viii) the decedent's 706. The documentary

evidence, taken as a whole, compels the conclusion that the decedent never held any ownership interest in 63 Associates.

In contrast, the documentary evidence proffered by the objectants was limited to Harvey's note, the Elsie 706, and the Fein letter. Upon this negligible foundation, the objectants attempted to construct their assertion, largely implied, that Elsie must have held some interest in 63 Associates, and that such interest passed to the decedent by operation of law upon her death. The objectants rely primarily on Harvey's note, written seven years prior to the decedent's death, and apparently the sole basis for the information contained in Elsie 706. Indeed, Harvey's note is the sole document in Wasser's voluminous files, which also included five years of Forms 1065 for 63 Associates, that indicates any ownership interest by the decedent in 63 Associates.

The most credible evidence regarding the import of Harvey's note came from Harvey himself, who testified that although the information contained therein was in fact untrue, it was a product of his concern for the decedent's illness and depressed state, and of the decedent's obsession with 63 Associates. Surprisingly, neither of the objectants refuted Harvey's testimony regarding the decedent's state of mind or personal demeanor in any way. Harvey asserts that the failure of the objectants to refute this testimony in any way is an admission by silence. *See, e.g., Commissioner of Social Services v Philip De G*, 59 N.Y.2d 137 (1983) (failure to testify allows "the trier of fact to draw the strongest inference against [the party who has failed to give testimony] that the opposing evidence in the record permits"). Indeed, the court notes that the decedent's will, prepared in the year of Elsie's death, makes no reference to any ownership interest in 63 Associates, and further notes that no codicil thereto was executed which referenced any interest in 63 Associates. Given the uncontroverted testimony regarding the decedent's powerful personality and intense interest in 63 Associates, the failure of the decedent to make any disposition of, or reference to, a significant ownership interest therein would be most remarkable.

Jay and George also proffered the Elsie 706, which all evidence indicates to have been derived solely from Harvey's note. No other documents were located in Wasser's extensive files from which he might have derived the information regarding 63 Associates set forth in the Elsie 706. Notably, the objectants failed to inquire of Wasser whether he had engaged in any discussions with the decedent at the time the Elsie 706 was prepared regarding the purported ownership interest in 63 Associates. The final piece of documentary evidence offered by the objectants was the Fein letter, written in 2004, more than six years following the decedent's death. Jay asserts that the Fein letter operates as an admission by counsel as against his client, as it was written by Fein in his capacity as

counsel to the decedent. In *Bellino v Bellino*, 75 A.D.2d 630 (2nd Dep't 1980), the court held that statements by counsel are admissible against a party provided the statements were made by the attorney while acting in his authorized capacity, although such statements are not necessarily conclusive. The objectants have failed to establish that Fein was authorized to make any representation on his behalf regarding the assets of the decedent's estate, that Fein had no "personal, first-hand knowledge" and that the Fein letter was wholly inaccurate. The Fein letter is indeed replete with inaccurate statements, as well as purportedly factual statements which Jay directly disputes in his testimony, thus affirming the truth of only so much of the information in the Fein letter that supports his objection and denying the remainder.[11] Harvey argues that despite the admission of the Fein letter into evidence, over his objection, it merits no weight. After evaluating the questionable reliability of the letter, the court concludes that the letter is of limited probative value.

Accordingly, the court finds that Harvey has amply met his burden of proof that the decedent held no ownership interest in 63 Associates at the time of his death, and the objections interposed by Jay and George to the accounting for failure to include any ownership interest therein, as well as the failure to include a *pro rata* share of distributions of partnership income made by 63 Associates subsequent to the decedent's death, are hereby dismissed.

Failure to Sell Shares of First BanCorp Stock

Jay alone interposes an objection to the accounting which asserts that Harvey must be charged with $246,000.00, plus interest, for losses alleged to have been incurred as a result of the failure to sell shares of stock of First BanCorp (the First BanCorp stock). Notably, Jay does not seek any relief against George, his co-fiduciary.

At the time of the decedent's death, he owned a number of stocks, including 747 shares of First Bank of Puerto Rico. Upon subsequent merger and a number of stock splits, the decedent's holdings therein are now constituted of 4,482 shares of First BanCorp. A review of the accounting

---

[11] The Fein letter mistakenly states that Jay was invited by Harvey and George to be involved in the administration of the estate, despite Jay's testimony that he was shut out of estate affairs. The Fein letter states that Jay was fully aware that the bank account being used by the estate was a joint account, rather than one titled in the estate name, which assertion Jay denied at the hearing. The Fein letter also states that Jay received most of the personal belongings of the decedent, yet each of Harvey, Jay and George testified that the coin and stamp collections were never valued and were not distributed to Jay. The Fein letter also misstates the purported interest in 63 Associates as 18%, and misidentifies 63 Associates as "the Nostrand Avenue property."

reveals that an equal distribution, in kind, was made to each of the beneficiaries of all of the stocks owned by the decedent, with the exception of the shares of First BanCorp.[12]

In support of the treatment of the First BanCorp stock in the accounting, George testified that the co-fiduciaries each agreed that George would handle all transfers of stocks and mutual funds, due to his experience and expertise as well as his brokerage licenses. George testified, and Harvey presented documentary evidence to demonstrate, that in late 2001 George wrote to Jay seeking his signature on the documents necessary to effect transfer of Jay's *pro rata* share of the First BanCorp stock into his name. George testified that he did not receive the requested documentation from Jay, and that he was thus unable to effectuate the transfer. George testified that in April 2004 the co-fiduciaries signed an Agreement of Co-Executors (the 2004 agreement), pursuant to which the co-executors agreed that the First BanCorp stock was to be delivered to Jay's counsel, registered in the name of the estate or such other party as might be agreed, and sold "promptly" to pay the legal fees of Jay's counsel. Finally, George testified that at the time the shares were delivered to Jay's counsel, he advised the parties that he believed their value was rising, and recommended distribution in kind rather than sale.

Harvey confirmed George's testimony, asserting that the First BanCorp stocks were delivered to counsel for Jay in May 2004 and that he also had desired to have his *pro rata* share of the stocks distributed in kind, rather than sold to pay Jay's counsel. Harvey further testified that Jay's counsel has had possession of the First BanCorp stocks since May 2004.

Remarkably, Jay does not dispute that the shares of First BanCorp stock are, and have been for almost a decade, in the possession of his counsel. Jay offered his own testimony regarding the details of distribution of the decedent's stock, the 2004 agreement among the co-fiduciaries or the transfer of the First BanCorp stock to his counsel's custody, which evidence was generally unreliable and frankly evasive.[13] Jay acknowledged his refusal to sign the documents requested by George in 2001, testifying that "[a]t that point I didn't want to sign anymore." Despite his repeated insistence

---

[12] Harvey alleges that George distributed the Pace Fund A shares to the objectants only, and the accounting confirms this. He seeks a credit for his one-third interest therein. In the accounting, Harvey states that Jay received an extra share of AFLAC stock, though he does not seek reimbursement therefor.

[13] Jay repeatedly responded to queries regarding the transfers of the shares of stock, "I don't remember who the – who did the transfers," "I really don't remember," "I have no recollection of how much I received," "I remember receiving I guess a statement from AFLAC","I guess so. I really don't remember," "I don't remember," "I don't remember Templeton at all," "Sir, I don't remember," " I really don't remember conversing about AFLAC with either of them," "If you say so," and "I really don't remember that." (TR 131 - 134)

that he could not recall numerous and significant details of the stock transfers, Jay's testimony confirms in every significant aspect the testimony of George and Harvey. Notably, Jay testified that he had refused to transfer the shares of First BanCorp stock since 2001, and that his own counsel has held the shares since May 2004. Jay's counsel, Schwartz, also testified that the shares of First Bancorp stock are in his possession.

Jay's assertion that Harvey must be charged with the purported loss in value of the First BanCorp stock, which stock has been solely within control of Jay's own counsel for almost a decade, can only be characterized as sheer chutzpah. Jay is a co-fiduciary, together with his brothers George and Harvey, with an equal responsibility for the administration of the decedent's estate.[14] In the event that the shares of First BanCorp lost value, and the parties were at an impasse as to the manner of disposition, each co-fiduciary bears an equal responsibility for failure to act. "Where a fiduciary party has an obligation, he [or she] cannot prevail in a cause of action against co-fiduciaries for breach of the same obligation." *Matter of Bloomingdale* 48 A.D.3d 559, 561 (2nd Dep't 2008), citing *Zimmerman v Pokart*, 242 AD2d 202, 203 (1st Dep't 1997). Jay may not now seek to charge his co-fiduciary with a failure to act, which failure may have resulted in a loss to the estate, where the ability to so act was entirely within Jay's control.

Accordingly, the objection interposed by Jay alone, asserting Harvey's failure to charge himself with $246,000.00 for losses alleged to have incurred by failure to sell 4,482 shares of stock of First BanCorp., and seeking interest thereon and surcharge, is hereby dismissed.

The parties are directed to take all steps necessary to distribute the shares of First Bancorp stock to the beneficiaries in equal one-third shares. The co-fiduciaries shall execute with all deliberate speed any and all documents necessary to effectuate this distribution. Harvey shall bring his account down to date to reflect the distribution of the shares of the First BanCorp stock.

Failure to Satisfy Specific Bequests Under Article FOURTH of the Will

The objectants interpose objections[15] to the accounting which assert that Harvey failed to pay to each objectant his respective specific bequest pursuant to Article FOURTH of the decedent's will, and demand payment of nine percent (9%) interest thereon, calculated from seven

---

[14] They are also the sole beneficiaries of the decedent's estate.

[15] The instant objections are denominated as numbers 8 and 9 in George's papers, and numbers 9 and 10 in Jay's.

months from the decedent's date of death. The relevant provisions of Article FOURTH of the decedent's will provide that

> I give and bequeath to my son ... , an amount equal to FIFTY THOUSAND DOLLARS ($50,000.), plus twenty-five percent (25%) of the value at my death of the entire premises known by address 2401 Avenue U, Brooklyn, New York, using the value of the premises as finally determined for federal estate purposes, whether date of death value or alternate valuation date value, and if no part of said premises is included in my gross estate, using the value of the premises at the date of my death as determined by appraisal ...

Harvey proffered his own testimony regarding the specific bequests, which testimony was entirely credible. Harvey testified that he owned the real property referenced as a valuation benchmark in the decedent's will, and that he had obtained an appraisal of the property in September 1997, which reflected a value of $500,000.00. He did not deny that the specific bequests were not distributed, but instead testified that the three co-fiduciaries, as sole beneficiaries, agreed to distribute all of the decedent's assets in one-third equal shares. He further testified that neither objectant had ever requested distribution of his respective specific bequest.

In opposition, Jay and George offered their own testimony regarding the specific bequests. Jay testified that he met with Harvey and George and requested distribution thereof, and also testified that he had threatened to retain counsel for litigation in respect of the specific bequest. Nonetheless, Jay acknowledged that he had not objected to the distribution of certain interests in the decedent's real properties in one-third equal shares, and further acknowledged that he had received various shares of stock which had been distributed among himself, George and Harvey.

Astonishingly, George testified that he was unfamiliar with the provisions of Article FOURTH of the decedent's will, and that he did not object to the distribution of the proceeds of the real property equally among the three beneficiaries. Despite his admissions, George continued to maintain the instant objection.

The evidence proffered by Harvey in support of his decision to forego distribution of the specific bequests was credible and convincing. The objectants offered no meaningful evidence to dispute Harvey's characterization of the decision by the three co-fiduciaries to opt for distribution of the decedent's estate in three equal shares without regard to satisfaction of the specific provisions of the decedent's will. The evidence demonstrated a mutual understanding among the parties to that effect. Nonetheless, the objectants are entitled their specific bequests, and the plain language of the decedent's will sets forth a straightforward method for valuing these bequests.

Accordingly, the objections to the accounting for failure to include the specific bequests to the objectants, pursuant to Article FOURTH of the decedent's will, are hereby granted, although the request for payment of interest thereon is denied. Harvey is directed to make such distributions, utilizing the gross appraised value of the referenced real property as the benchmark therefor, and to bring the account down to date to reflect such distribution.

Failure to Account for Decedent's Personal Property

The objectants each interpose objections to the accounting which assert that Harvey failed to include "jewelry, clothing, collectibles, silver objects, gold objects, gold coins, and cash which, upon information and belief, Decedent owned at the time of his death in an unknown amount but upon information and belief worth more than $50, 000.00."

It is undisputed by the parties that, at the time of his death, the decedent maintained residences in Puerto Rico (the Puerto Rico residence) and in Brooklyn, New York (the Brooklyn residence). The testimony of all parties regarding the identification, marshaling and distribution of the personal property located in each residence reveals no meaningful dispute. Each of the parties testified that prior to the sale of the Puerto Rico residence, the objectants themselves traveled to Puerto Rico to secure any valuables which may have been located in the Puerto Rico residence. The parties also each testified that, other than certain of the decedent's papers of importance and a "couple of small appliances," the only valuables the objectants removed from the Puerto Rico residence were several coins of undetermined value, a stamp collection and a single five-hundred dollar ($500.00) bill. Jay testified that all other items of the decedent's personalty had been left in the Puerto Rico residence.

Harvey testified that the cash is currently "under his desk"and he acknowledged that it was not included in the accounting. George and Harvey both testified that the coins had been placed in a safe deposit box, while Jay testified that he took the stamp collection for safekeeping, where it remains. Regarding the decedent's personal assets located in the Brooklyn residence, Harvey offered credible testimony that all such property had been divided in equal shares among the three co-fiduciaries, as the sole beneficiaries, prior to the sale of the Brooklyn residence, each party selecting the items he desired. Neither of the objectants proffered any evidence whatsoever to refute Harvey's testimony that said distribution took place as he described.

The accounting lists the value of the decedent's personal property as $2,000.00, although no appraisal has been offered for the coins and the stamp collection. The objectants offered no

evidence, either testimonial or documentary, to demonstrate that the decedent possessed jewelry, clothing, collectibles, silver objects, gold objects or other personalty of significant value at the time of his death. The court further notes that no inventory of the decedent's personal property, whether located at the Puerto Rico residence or the Brooklyn residence, was offered by any of the co-fiduciaries, and no party has proffered evidence of any sort to establish the value of the personalty identified.

Accordingly, the objections interposed by each of the objectants pursuant to which they assert that Harvey failed to account for personal property of the decedent, including jewelry, clothing, collectibles, silver objects, gold objects and gold coins valued in excess of $50,000.00, are hereby dismissed.

Counsel for the three co-fiduciaries are directed to obtain appraisals of the coins and stamp collection, with all deliberate speed, and to determine whether these personal assets shall be sold or divided among the three parties in equal shares. Harvey is directed to bring his account down to date to reflect the value and manner of distribution of the coins, the stamp collection and cash in the amount of $500.00, which he acknowledges was omitted therefrom.

Objections to Payment of Brokerage Commissions to Heino Realty

The objectants interpose objections to the accounting which assert the impropriety of payment of real estate brokerage commissions to Harvey Heino Realty Corporation (Heino Realty) in connection with the sale of the Brooklyn residence and the Puerto Rico residence. The objectants seek return of the commissions, plus the payment of interest calculated at nine percent (9%) per annum.

It is undisputed that Heino Realty received commissions in the amount of $15,000.00 upon sale of the Brooklyn residence, and $3,300.00 upon sale of the Puerto Rico residence. Harvey offered convincing testimony that all parties agreed that he, as a licensed real estate broker with over thirty years of experience, would be responsible for the sale of the decedent's properties. Harvey testified, again credibly, that he had advised the objectants of his plans for marketing the Brooklyn residence and that he intended to do "[w]hatever was necessary in order to sell the house." Regarding the Puerto Rico property, Harvey testified that Heino Realty was paid commissions in connection with a co-brokerage agreement with a real estate broker licensed in Puerto Rico, although he admitted that he had not signed written brokerage agreements for either of the decedent's residences.

Again, the objectants failed to offer any meaningful evidence in opposition to Harvey's characterization of events. Jay testified that he had raised no objection to using Heino Realty as the broker, although he asserted that he had not expected Heino Realty to receive a commission on any sale. In fact, Jay testified less than credibly that Harvey had never advised him that commissions would be paid. In his testimony, Jay acknowledged that he attended the closing of the sale of the Brooklyn residence, and testified that all closing documents had been shown to him. Nonetheless, he testified unconvincingly that he had not seen the check for commissions payable to Heino Realty. Jay further asserted that any commissions due upon sale of the Brooklyn residence should have been paid by Harvey personally.

Once again, George offered testimony directly undermining his own objections. Indeed, George confirmed Harvey's testimony regarding the parties' agreement that Harvey would assume responsibility for the sale of the residences. George further testified that he also was present at the closing of the sale of the Brooklyn residence, and that as a co-executor he believed that the expenses incurred in marketing such residence were properly charged to the estate.

Notably, neither objectant refutes that the commissions received by Heino Realty for sale of the Brooklyn residence amounted to slightly more than four-and-a-quarter percent (4.25%), significantly less than the industry standard of commissions calculated at six percent (6 %) of the sale price. Neither do the objectants dispute that Heino Realty incurred significant costs related to the sale of such residence. Harvey's testimony that neither objectant opposed his handling of the sale of the real properties was entirely credible. In contrast, the court found unpersuasive the testimony of the objectants that they were somehow unaware that the commissions on the sale of the Brooklyn residence were paid at the closing, an occasion at which they were both present.

Nevertheless, approval of payment of commissions would be contrary to the public policy against self-dealing by fiduciaries, and opens the door for fiduciaries to seek additional compensation for extra services voluntarily supplied, even where, as here, such services benefitted the estate. Jay contends that the law in New York "is clear that a fiduciary may not under any circumstances receive a commission from an estate," relying on *Estate of Stalbe*, 497 NYS2d 237 (Surr. Ct. Queens County 1985). In *Stalbe*, the court held that an attorney - fiduciary in an estate of nominal value, who had paid himself commissions and legal fees without court approval and had then paid himself a real estate brokerage fee, maintained an inherent conflict of interest with respect to his obligations as executor, counsel to the executor (i.e., himself), and his anticipated reward as the real estate broker. Harvey would have been better advised to obtain a written

authorization from the objectants approving employment of Heino Realty in the sale of the residences and payment of commissions therefor.

Accordingly, the objections to the payment of brokerage commissions to Heino Realty in connection with the sale of the Brooklyn residence and the Puerto Rico residence are granted. Harvey is direct to reimburse the estate in the sum of $18,300.00, together with interest thereon calculated at six percent (6%) per annum from the date of the filing of the accounting petition until repayment thereof and payable to the objectants. Further, Harvey is directed to bring his account down to date to reflect the above mentioned reimbursements related to the brokerage commissions and the cost related to the Brooklyn residence, with proof thereof.

Objections to the Payment of Legal Fees to Counsel for Harvey, and for Failure to Provide for Payment of Jay's Legal Fees

Each of the objectants interposes objections asserting the accounting reflects the improper payment of legal fees to Katlowitz, Harvey's counsel, in the sum of $37,000.00, and further asserting that any payment of the outstanding legal fees thereto, in the amount of $30,000.00, is unwarranted. Jay interposes a further objection, asserting that the accounting fails to provide for payment of the sum of $137,387.36, "owed to Gallet Dreyer & Berkey, LLP for legal services rendered to [Jay], as co-executor of the estate which benefitted the Estate."

It is the general rule that, in an estate in which there is no adversarial action, a single attorney is retained to represent all co-fiduciaries. Nonetheless, each co-fiduciary of an estate has the right to employ his separate counsel. *See Matter of Mergentine*, 155 Misc.2d 502 (Sur. Ct. New York County 1992). In order to determine whether the requested fees are reasonable, the court must base its evaluation thereof on affidavits of legal services, ideally accompanied by contemporaneous billing records, submitted by the parties. 22 NYCRR § 207.45. No party herein has submitted the appropriate affirmations of counsel.

The court is unable to determine the propriety of any award of attorneys' fees to counsel for any of the three co-fiduciaries herein, including those fees already paid and reflected on the accounting. Accordingly, each co-fiduciary is directed to submit affirmations of counsel for legal services rendered herein, with appropriate supporting documentation including time-contemporaneous billing records, within thirty days of the date of this decision.

Objections to Payments for Certain Expenses of Administration and Fees to Professionals

The objectants interpose a hodgepodge of objections to the accounting which assert that Harvey improperly made payment of certain expenses of administration. In the first instance, the objectants assert that Harvey improperly made payment of the sums of $5,063.39, $2,546.47 and $2,516.92 for furniture for real property belonging to the decedent and located in Miami (the Miami real property). Notwithstanding their interposition of these objections, the objectants proffered absolutely no evidence relating thereto. The only evidence provided to the court relating to these claimed expenses was offered by Harvey, who testified credibly that the sums of $2,546.47 and $2,516.92, which total $5,063.39, were duplicate entries for the same purchases, and were entered onto the accounting in error. It is undisputed that Harvey has reimbursed to the objectants the sum of $5,063.39, plus interest thereon calculated at six percent (6%) per annum. Accordingly, the objections asserting the improper payment of expenses in the amount of $5,063.39, $2,546.47 and $2,516.92, are hereby dismissed.

The objectants also interpose an objection to payment of the sum of $816.66 to Joe Nevesh, a/k/a Joe Minsk (Minsk), as "upon information and belief" the payments did not result in a benefit to the estate. Harvey testified that as co-fiduciary of the estate he had borrowed funds from Minsk for the purpose of paying certain taxes due by the estate. He offered credible testimony that he discussed the amount owing with the objectants, and that he informed them that he would arrange to borrow the money. Harvey testified that he secured a loan from Minsk, which he used to pay the taxes due, and that the resulting interest thereon, in sum total of $816.66, is reflected on the accounting. Again, the objectants proffer no evidence, either documentary or testimonial, to refute Harvey's testimony or to demonstrate either the impropriety of such payments or the inaccuracy of the entries therefor. Accordingly, the objections to the payment of interest to Joe Nevesh a/k/a Joe Minsk, in the sum of $816.66, are hereby dismissed.

The objectants further interpose objections asserting the impropriety of a payment in the amount of $15,000.00 to Samuel Wietschner, a certified public accountant (Wietschner).[16] In support of this payment, Harvey testified that the co-fiduciaries retained the services of Wietschner in accordance with certain provisions of the 2004 agreement among the co-fiduciaries, which

---

[16] The accounting lists the sum of $15,000 due to Wietschner as an unpaid expense. However, since the filing of the account, Harvey has paid Wietschner's fees, and now seeks reimbursement.

document was offered in evidence. In relevant part, the 2004 agreement provided that, "[t]he Estate shall retain [Wietschner]...to prepare an accounting of the Estate's assets, liabilities, income and disbursements ('Accounting')." Pursuant thereto, the parties agreed to deliver to Wietschner any and all documents in their possession or control which related to the decedent's estate, including his assets, liabilities, income and disbursements, and further agreed to cooperate promptly and fully with Wietschner. Harvey testified that Wietschner in fact was recommended by Schwartz, counsel to Jay, and that he has paid Wietschner's fees from his personal funds.

In opposition, George testified that he signed the 2004 agreement, but, implausibly, he denied that its terms included any agreement to hire Wietschner. Incredibly, George continued to deny that he had agreed to hire Wietschner even upon reviewing the document and acknowledging his signature thereon. For his part, Jay acknowledged that his own counsel had recommended Wietschner as an accountant, that he had consented to engaging Wietschner, that he assumed that Wietschner would be paid for his services to the estate, and, astonishingly, that he was not aware that he had interposed an objection to the payment of Wietschner's fees.

All proffered evidence, both documentary and testimonial, supports a finding that the objectants agreed to retain the services of Wietschner on behalf of the estate. Accordingly, the objections which assert the impropriety of payment of Wietschner's fees in the amount of $15,000.00 , are hereby dismissed. Harvey is directed to bring his account down to date to reflect that he is seeking reimbursement of the $15,000.00 paid to Wietschner, and is authorized to reimburse himself therefor.

Finally, the objectants interpose objections in which they allege "on information and belief," that the six items listed in Schedule D of the accounting, "Claims Presented, Allowed and Not Paid" were not "properly presented or allowed." These objections are mere allegations, made upon information and belief, and utterly lacking in specificity. Furthermore, the objectants declined to proffer any evidence, whether testimonial or documentary, in support thereof. Accordingly, the objections to "Claims Presented, Allowed and Not Paid" are hereby dismissed.

Loans to Harvey and to Third Parties

The objectants interpose objections which assert that Harvey made improper loans to himself from the decedent's assets, and Jay seeks payment of interest on these loans, calculated at nine percent (9%) per annum.

Harvey does not dispute that he took personal loans from estate assets. He testified that the amounts and dates of these loans were (i) $10,000.00 disbursed on February 23, 2000, and repaid on September 21, 2000, (ii) $13,000.00 disbursed on April 16, 2000, and repaid on July 10, 2000, and (iii) $25,000.00 disbursed on January 28, 2000, and repaid on April 11, 2005. He further testified that he had repaid to the estate only the principal amounts of the loans, without calculation of interest thereon, but that in February 2011 his counsel wrote to counsel for Jay and to George directly, to provide them with the respective calculations of interest, at the rate of six percent (6%), for each loan through the date of repayment. Harvey further testified that he sent checks to each of the objectants for their share of the interest owed on the loans. Harvey acknowledges that the additional $35,000.00 distributions are in fact loans to himself which remain unpaid, and he asserts that he will reimburse the estate, with interest.

Accordingly, the objections asserting that certain distributions represent loans taken improperly by Harvey are hereby granted in part. Harvey is directed to return to the estate the sum of $35,000.00, with interest calculated at the rate of nine percent (9%) per annum commencing from the date the loans were taken until repayment, and which said payment shall be payable to the objectants.

The objectants also interpose objections asserting that a loan in the sum of $23,500.00 was made improperly from the estate to Stevan and Anita Adler. The only evidence proffered with respect to this objection was Harvey's testimony that the entry in the accounting which reflects a loan to Stevan and Anita Adler is erroneous. Neither objectant proffered any documentary or testimonial evidence to refute Harvey's testimony. Accordingly, the objections to the accounting for inclusion of a loan made to Stevan and Anita Adler, in the sum of $23,500.00, are hereby dismissed. Harvey is directed to bring his account down to date to reflect the directives herein.

Objections Asserting Improper Distributions

Jay alone interposes objections in which he alleges "on information and belief" that Harvey made certain improper distributions to George and to himself. Jay's first objection relates to distribution of the proceeds of dissolution of an entity known as the Avenue K partnership (the Avenue K partnership). Harvey proffered credible testimony that at the time of his death, the decedent was a partner in the Avenue K partnership. Although the decedent held a twenty percent (20%) ownership interest in the Avenue K partnership, Harvey testified that the decedent in fact

held half of that interest as a "nominee" for George. Harvey testified that the decedent told him that although the Avenue K partnership did not reflect George as an owner therein, the decedent held George's ten percent (10%) interest on his behalf and "everybody knew he [George] owned a piece." He testified that upon dissolution of the Avenue K partnership, Harvey received a check for $160,000.00, representing payment for the decedent's full ownership interest therein, and that he had deposited the check. He testified that thereupon he issued a check to George for $80,000.00, in payment for George's ten percent (10%) ownership interest which had been held by the decedent on George's behalf. Harvey further testified that he made no independent inquiry regarding George's interest in the Avenue K partnership. Interestingly, and consistent with his haphazard approach to the administration of his father's estate, George testified that although he received payment of $80,000.00 and cashed the check, he was not aware why he received the payment.

In support of this objection, Jay testified that he did not recall whether he knew that George was a partner in Avenue K, and that Harvey had not sought his permission to pay George for his purported ownership interest therein the Avenue K partnership. Notably, Jay testified that he had "... no clue" whether George was entitled to receive the $80,000.00 payment, stating that he was seeking to reclaim the payment "[i]f he wasn't entitled to it then, yes."

Jay offered no documentary or testimonial evidence to demonstrate that Harvey's payment of $80,000.00 to George, in recognition of George's purported ownership interest in the Avenue K partnership, was improper, and Harvey's testimony regarding the circumstances of such payment was entirely credible. Accordingly, Jay's objection to the payment of $80,000.00 to George upon dissolution of the Avenue K partnership, is hereby dismissed.

Jay also alleges that "on information and belief" certain amounts distributed to Harvey are improper, and that Jay's distributive share is less than Harvey's distributive share by the sum of $37,165.06. As discussed above, Harvey acknowledged in various statements contained within schedule E the additional loans to himself. When the accounting is brought down to date by Harvey, as has been directed, to correct the inaccuracies discussed herein, it should result in a near equal distribution among the beneficiaries.

Accordingly, Jay's objection which asserts that he did not receive a proper distribution of the decedent's assets, and seeking payment of interest calculated at nine percent (9%) per annum thereon, is dismissed. Harvey is directed to bring the account down to date to reflect accurately the distributions made. The sum of $5,130. 00 which was over-paid to George, shall be credited

to his specific bequest. The overpayment to the objectants of the shares of the Pace Fund CLA, together with the payment of interest calculated at the rate of six percent (6%) per annum running from the date of such overpayment until the date of repayment, shall be credited to the objectants' specific bequests.

Jay also asserts that a portion of his distributive share, in the amount of $39,456.59, was issued belatedly (the delayed distribution), approximately two-and-a-half years after equivalent distributions were made to each of George and Harvey. Jay asserts that as a consequence interest is due thereon in an amount calculated at nine percent (9%) per annum pursuant to CPLR §5004. Related to this assertion are the objections interposed by both objectants which asserts that Harvey improperly seeks payment of the sum of $8,002.60, to Joshua Mittenthal, Esq.

Harvey testified that the delayed distribution to Jay was his proportional share of the proceeds of a condemnation proceeding relating to the decedent's real property located in Staten island, New York (the condemnation distribution). It is undisputed that on August 22, 2000, each beneficiary, including Jay, received a $25,000.00 payment from the condemnation proceeds. Harvey offered credible testimony regarding his rationale for withholding from Jay the remaining amount due. Harvey testified that, pursuant to the 2004 agreement, he and George paid a total of $189,000.00 to Jay for his one-third interest in the Miami properties, but that Jay refused to execute the necessary quit claim deeds thereto. Harvey testified that he and George mutually agreed to withhold payment of the condemnation distribution in hopes that Jay would be motivated to execute the quit claim deeds to the Miami properties.

Harvey testified that as a result of Jay's refusal to execute the quit claim deeds, he and George retained Joshua Mittenthal, Esq. (Mittenthal), as Florida counsel. Harvey testified that in or about 2003, he and George filed a petition in Dade County Probate Court[17] seeking to compel Jay's compliance with the 2001 agreement, including execution of the documents necessary to transfer good title to the Miami property (the Florida litigation). By order dated March 8, 2006 (the Florida order), Judge Maria M. Korvick ordered Jay to "... quit-claim unto Harvey Heino forever all the right, title, interest, claim and demand which Jay Heino has in... Condominium Unit 1031 ... Condominium Unit No. 1415... not later than March 15, 2006. If Jay Heino fails to deliver the deeds...Joshua M. Mittenthal, Esq. shall be authorized and empowered to execute deeds on behalf of Jay Heino." The Florida order further directed that the proposed transaction of sale

---

[17] The petition was filed in the Eleventh Circuit, Dade County, Probate Division, and denominated File #00 4561 CP(03) KORVICK.

then pending before the court could proceed, with the provision that the net proceeds thereof be placed in escrow, while any further sales of the Miami properties remained subject to that court's approval.

George proffered his typically muddled testimony, first testifying that Harvey alone retained the services of Mittenthal, and then testifying that in fact the estate had retained Mittenthal. George initially acknowledged that as a result of the Florida litigation, he had received title to two of the Miami properties; however, he abruptly altered his testimony, stating that he did not recall receiving a quit claim deed to those properties. He then testified that he was unfamiliar with the entire Florida litigation, stating that he did not understand why the Florida litigation was necessary and asserting that he could not remember any litigation taking place. George's testimony at the hearing was refuted by his sworn affidavit, dated September 18, 2003, in support of the petition in the Florida litigation, as well as by his appearance therein as named co-petitioner. Furthermore, George testified that the signature on the affidavit in support of the Florida litigation was his own, as well as testified that the petition submitted therein had been filed on his and Harvey's behalf. The court found George's testimony on this issue to be deliberately evasive and dissembling.

In opposition, Jay again proffered evidence which in no meaningful way deviated from the particulars as stated by Harvey. Jay testified that he signed a release on November 15, 2001, which released George and Harvey from any claims Jay may have had to the Miami properties. Jay further testified that he accepted a check in the amount of $189,000.00 in consideration thereof, and that he either deposited or cashed the check. He further testified that he recalled being asked to sign additional documents relating to the Miami properties, stating, "I remember refusing to sign any more documents." When asked if the documents he had refused to sign specifically transferred title to the Miami properties from the estate of the decedent, he testified "I got the money and George and Harvey got the apartments."

Pursuant to EPTL §11-1.5(e), the court may direct the payment of interest at the rate fixed under CPLR §5004, where the court finds that a fiduciary's failure to make a distribution was unreasonable. All of the evidence proffered, both testimonial and documentary, supports a determination that Harvey's decision to delay payment of the condemnation distribution to Jay was not unreasonable, and that the payment of legal fees to Mittenthal in connection with the Florida litigation is a legitimate estate expense. Without retention of Florida counsel, the co-fiduciaries would have been unable to transfer clear title to the Miami properties, resulting in said properties

remaining in the estate of the decedent. Jay's refusal to execute a quit claim deed to the Miami properties continued for five years, despite his receipt and acceptance of consideration in the amount of $189,000.00 therefor. Furthermore, Harvey has not yet received title to the remaining two Miami properties. Finally, notwithstanding the Florida litigation and Jay's continuing refusal to execute quit claim deeds to said properties, Harvey did in fact complete the condemnation distribution, in the amount of $39,456.59, to Jay on March 14, 2004, more than nine years ago.

Accordingly, Jay's objections seeking interest, in the amount of nine percent (9%) on the delayed payment of the condemnation distribution, are dismissed. Furthermore, the objections interposed by both Jay and George which assert the impropriety of the payment of legal fees to Mittenthal, in the amount of $8,002.60, in connection with the Florida litigation are dismissed.

Miscellaneous Objections to Certain Valuations

Both objectants interpose objections by which they assert that the "values of the real properties received, upon information and belief, are not the values as of the dates of receipt by the executor," and that "the amount of gain realized upon the sale of land located in Staten Island, New York is less than the amount shown thereon."

The objections are nothing more than speculative allegations, made upon information and belief and utterly lacking in specificity. The objectants failed to proffer any evidence, whether testimonial or documentary, in support of these allegations, thus failing to demonstrate that the valuations are inaccurate in any way. Accordingly, the objections relating to the valuations of real property owned by the decedent and the amount of gain realized upon its sale are hereby dismissed.

In addition, the objectants interpose objections asserting the inaccuracy of the accounting "because the amount of losses from the sale of the properties is less than the amount shown thereon." Once again, the objectants have utterly failed to proffer any testimonial or documentary evidence in support of their allegation, failing even to address, much less prove, the inaccuracy of the accounting. Accordingly, the objections asserting the inaccuracy of the statement of losses reflected in the accounting are hereby dismissed.

Finally, Jay alone interposes an objection which asserts the inaccuracy of the balance of estate assets on hand. Jay asserts that the accounting should reflect a balance on hand in the amount of $3,930,171.00, rather than the amount of $37,638.10 as set forth therein. This objection appears to rest on the highly optimistic assumption of his success on each and every objection interposed, coupled with a hoped-for award of interest calculated at nine percent (9%) per annum

on each of the amounts he has asserted to be properly due. In modest contrast, George interposes an objection to the balance of estate assets on hand, simply asserting that the amount set forth therein is incorrect. In view of the adjustments to the accounting as a whole which will be required before a decree is settled herein, George is correct in asserting that the balance of estate assets on hand is subject to change.

Accordingly, Jay's objection that the balance of estate assets on hand is rightly $3,930,171.00 is hereby dismissed, while the objection interposed by George is granted only to the extent that Harvey is directed to correct the accounting to reflect the court's rulings herein.

Revocation of Harvey's Letters Testamentary and Denial of Commissions

The decedent, pursuant to his will, left his entire estate to his three children, Harvey, George and Jay, and appointed them as co-fiduciaries of his estate. Harvey has filed his account as fiduciary, while Jay and George, his co-fiduciaries, voluminous objections, thereto. The objectants have asserted, *inter alia,* that Harvey wrongfully omitted certain assets from his accounting, misstated losses, made improper payments and unequal or delayed distributions, failed to make specific bequests, wrongfully took loans from the estate and repaid them at an unacceptable rate of interest, caused real estate commissions to be paid to his own company for the sale of estate properties, and failed to reflect accurately the cash on hand. The objectants assert that these alleged failures and improper acts require Harvey's removal as fiduciary, as well as the forfeiture of his commissions.

A court is required to exercise its power to remove a fiduciary sparingly, and may nullify a testator's choice of fiduciary only upon a clear showing of serious misconduct that endangers the safety of the estate. Not every breach of fiduciary duty warrants removal. *See, e.g., Matter of Braloff*, 3 A.D.2d 912 (2nd Dep't 1957). Harvey acknowledged that he had made several loans to himself from the estate assets, all but one of which but one he demonstrated had been repaid, with interest, prior to trial. Harvey testified credibly that he would also immediately repay any theretofore unidentified loans to the estate, and the court has directed Harvey to return these sums to the estate, with interest. Furthermore, Harvey has been directed herein to pay the specific bequests as well as to repay brokerage commissions paid by the estate to Heino Realty, also with interest.

The above matters notwithstanding, the great majority of Harvey's actions as co-fiduciary operated to the benefit of the decedent's estate, and contrast starkly with the glaring inattention of the objectants. Indeed, the testimony revealed not only the failure of the objectants to prove the vast majority of their allegations, but also disclosed the objectants' wholesale neglect of their own fiduciary obligations. The objectants' insincere, inconsistent and implausible testimony over the course of this eight-day trial revealed little beyond their feigned ignorance of their own duties. Despite their allegations of numerous wrongdoings by Harvey, the objectants themselves, as co-executors, regularly failed to take any action to administer or preserve the decedent's estate. The objectants took no independent action to locate assets that they assert belonged to the decedent and remained unaccounted for by Harvey, despite their own authority to marshal such assets. Jay, a co-executor, held the First Bancorp stocks for almost ten years, and held the decedent's stamp collection for almost fourteen years. He failed completely to take any action respecting such asset, yet now seeks to punish Harvey for losses alleged to have been incurred by reason of his failure to act. While it may be that the co-executors initially failed to get clear instructions as to their duties from their earliest counsel, all three co-executors ultimately secured reliable and experienced counsel. The testimony offered by both objectants was oftentimes disingenuous and simply incredible in their assertions of ignorance as to their duties as co-executors, lack of understanding and subjugation to Harvey's will. The court finds unpersuasive in the extreme the objectants' evidence, including their testimony that they did not understand the import of the numerous documents they signed, that they were forced by Harvey to take certain actions, and that they signed the decedent's 706 without reviewing it.

Despite the myriad objections and allegations asserted against Harvey, the objectants were able to prove only three objections at the hearing. The evidence proffered demonstrates that Harvey alone made a good faith effort to administer the decedent's estate, and although he made several errors, his actions were not malicious, destructive or reckless, nor did the estate suffer any substantial harm as a result of his shortcomings.

It would indeed be ironic if the court were to determine it appropriate to revoke the letters testamentary of the single fiduciary who acted in any meaningful way to administer the decedent's estate. The court notes further that the co-executors are also the three sole beneficiaries of the estate, and despite their antagonism, conclusion of administration of this estate nears. Upon Harvey's compliance with the decision herein, the administration of the estate will reach an end.

Furthermore, whatever minimal financial benefit accrues to the estate as a result of this limited success is likely to be far counterbalanced by substantial legal fees incurred by the parties herein.

Accordingly, in consideration of the above and coupled with the court's obligation to show deference to wishes of the decedent in his selection of a fiduciary, the court declines to revoke the letters testamentary issued to Harvey. Furthermore, the objectants' request to deny commissions to Harvey is granted only to the limited extent that Harvey may not receive commissions on any amounts which he has been directed to return to the objectants or to the estate herein.

Punitive Damages

Jay and George, in their respective statements of interest, seek the imposition of punitive damages on Harvey, in their favor. An award of punitive damages rests in the discretion of the court, and is not mandatory. *Vecco Instruments, Inc., v Candidio,* 70 Misc.2d 333 (Nassau County 1972); *Binghamton Plaza Inc., v Gilinsky*, 32 A.D.2d 994 (3rd Dep't 1969). Punitive damages are recoverable for a breach of fiduciary duty where such breach demonstrates "a high degree of moral turpitude and ... such wanton dishonesty as to infer criminal indifference to civil obligations" *Walker v. Sheldon*, 10 N.Y.2d 401 (1961). The evidence demonstrates that Harvey's actions in administering the estate of the decedent were performed in good faith, and while admittedly less than perfect, were not malicious or reckless. Harvey's failures do not meet the high standard of moral culpability required to support the imposition of punitive damages. Accordingly, the objectants' request for imposition of punitive damages against Harvey is denied.

Proceed accordingly.

HON. MARGARITA LÓPEZ TORRES
Surrogate

Date: July 3, 2013
Brooklyn, New York