



In re Accounting by Shane

2008 NY Slip Op 50203(U) (2008) | Cited 0 times | New York Supreme Court | February 5, 2008

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This opinion is uncorrected and will not be published in the printed Official Reports.

In this contested accounting proceeding, the objectant has moved to strike the petitioners' demand for jury and the petitioners have cross-moved for an order directing objectant to expedite discovery. The motion and cross-motion are disposed of as hereinafter set forth.

The decedent died on October 14, 2000 survived by her son, Sheldon Shane, and her daughters, Francine Pickman and Toby Shakun and six grandchildren. Decedent's will dated September 5, 1995 was admitted to probate by decree of this court dated January 8, 2001. Letters testamentary and letters of trusteeship issued to Sheldon Shane and David Michael.

Insofar as relevant, petitioner Sheldon Shane filed his account and objections were filed by Toby Shakun dated September 25, 2007. Petitioners filed their "Demand for Trial by Jury" dated October 2, 2007. Objectant now moves to strike petitioners' jury demand and petitioners cross-move to expedite discovery. "In most cases parties are not entitled to a jury in an accounting proceeding. Generally speaking, an accounting is an equity matter for which a jury trial is not a matter of right" (7 Warren's Heaton on Surrogate's Court Practice §101.01[3], p 101-6). As the court stated in Matter of Hernandez (139 Misc 2d 137, 138 [Sur Ct, Bronx County]) "[i]f the relief requested is one traditionally cognizable in law and included among those causes where jury trial is historically mandated by the Constitution or by statute, a jury trial must be had on demand. On the other hand, if the relief sought is traditionally cognizable in equity, then no right to jury trial exists since none was available at common law."

The 25 objections by objectant are principally directed at the administration, management and business judgment of the fiduciaries and are essentially equitable in nature, not claims at law (see Matter of Nelson, 105 Misc 2d 747 [Sur Ct, Westchester County 1980]) and, as such, no jury trial is available under the Constitution or by statute (Matter of Luria, 63 Misc 2d 675 [Sur Ct, Kings County 1970]). The case relied upon by petitioner, (Matter of Garfield, 14 NY 251 [1964]), is inapposite as the claim for attorney's fees therein was made by a stranger to the estate against the fiduciary. Here, the objections involved in the accounting proceeding are equitable in nature as a fiduciary obligation is involved in this dispute (Matter of Nelson, 105 Misc 2d 74 [Sur Ct, Westchester County 1980]; Matter of Luria, 65 Misc 2d 675 [Sur Ct, Kings County 1970]; cf Matter of Petrocelli, 307 AD2d 358 [2d Dept 2008]; Matter of Sackler, 222 AD2d 9 [2d Dept 1996]).



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Accordingly, the motion to strike the jury demand is granted.

The cross-motion by petitioner for an order expediting discovery is denied as academic as a preliminary conference order scheduling discovery was signed on November 10, 2007.

This constitutes the decision and order of this court.

John B. Riordan Judge of the Surrogate's Court

