

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

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Petition by James P. Sullivan, the Co-Executor of the Estate of

JOHN V. SULLIVAN
a/k/a JOHN SULLIVAN

DECISION & ORDER
File No. 2015-1495/B

Deceased,

To Remove Judith Sullivan as Co-Executor of the Estate and
Related Relief.

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LÓPEZ TORRES, S.

In this miscellaneous proceeding, James P. Sullivan (James), co-executor of the estate of John V. Sullivan, a/k/a John Sullivan (decedent), seeks removal of co-executor Judith Sullivan (Judith), on the grounds that Judith has moved out of state without properly notifying the court of her change of address within 30 days; that Judith has thwarted efforts to administer the estate; that Judith has failed in her fiduciary duties to the beneficiaries of the estate; and that Judith is no longer physically or mentally capable of serving as co-executor.

BACKGROUND

The decedent died on January 24, 2015, leaving a last will and testament that was probated on June 25, 2015. James and Judith, the decedent's siblings and nominated executors in the will, were issued letters testamentary on that date. The decedent's will bequeathed tangible personal property to James and Judith, and of the residuary estate, 45% to Judith, 45% to James, 5% to Tuesday Thomas, and 5% to a church.

James alleges that Judith has hindered his ability as co-executor to administer the estate and has abdicated her fiduciary duties. James asserts that he was compelled to file a petition to sell a parcel of real property located at 502 Clinton Avenue, Brooklyn, New York, and was granted authority to do so by order dated September 6, 2016. However, Judith's failure to share information about the property with respect to the tenants therein and her failure to maintain organized records caused an 18-month delay in the sale of the property. James also claims that Judith failed to advise that one tenant had stopped paying rent and that her records of tenant information, including tenant leases, were in "utter disarray."

James alleges that Judith has also thwarted efforts to sell two adjacent real properties located at 414 and 414A Grand Avenue, Brooklyn, New York, by failing to empty the buildings of her belongings and by failing to come to an agreement regarding listing the properties for sale. According to James, he required Judith's participation as to whether it would be more cost effective to perform minor repairs or major renovations to maximize profits on the properties. However, Judith refused to engage in a meaningful manner. Accordingly, James' counsel contacted Judith in November 2016 to discuss these issues. However, Judith stated that she suffered from significant health issues, both physical and cognitive, and hung up on the attorney. No progress was made thereafter.

James further alleges that he attended a court conference on November 1, 2018, at which time it appeared that the co-executors would come to an agreement as to how to move forward. Accordingly, James' counsel drafted a stipulation with specific and detailed methods by which to proceed in the endeavor to sell the real properties, and forwarded same to Judith's counsel by email dated November 12, 2018. However, Judith's counsel never responded, allegedly due to Judith's failure to communicate with her own counsel.

Thereafter, at the request of James' counsel, another court conference was held on May 24, 2019 at which time James and Judith agreed only to remove their respective belongings from the real properties, but nothing else of substance to complete administration of the estate. The parties also stipulated to submit affidavits in support of, or in opposition to, the instant petition and for the court to decide the matter on the papers.

PARTIES' SUBMISSIONS

Following the May 2019 conference, James submitted an affidavit in support of the petition. First, James argues that Judith has moved to Virginia without notifying the court within 30 days as required and for that reason alone, Judith's letters should be revoked pursuant to SCPA 711(6). James further asserts that Judith is very rarely in New York, while substantial work is left to administer the estate. James states that it has been four years since the decedent's death and he "is not getting any younger." James also asserts that he wishes to finalize the administration of the estate and make distributions to the beneficiaries, however, it will not be possible so long as Judith remains co-executor. James states, "I love my sister, but, in order to

protect her and the interest of all parties, she must removed as a co-executor... because she is not physically or mentally capable of fulfilling her duties.”

Judith failed to submit an affidavit in support of her objections to the petition. Instead, Judith’s counsel submitted an attorney affirmation purporting to have personal knowledge of the history of the administration of the estate and essentially placing blame on James for the lack of progress by being “inconsistent, contradictory and rude.” Counsel also inexplicably attaches a letter dated October 2, 2018, that she wrote to her own client “summar[izing] the points that were addressed at court today” and the need to “work towards addressing the following matters....” The letter is addressed to Judith at an address in Virginia. With respect to the stipulation which was forwarded to counsel on November 12, 2018, counsel states that she forwarded the document with edits to Judith. However, counsel then went out on leave almost two months later with no response to James’ counsel as to the stipulation.

With respect to Judith’s failure to submit her own affidavit, counsel states that “[d]ue to my client being out of town, I have not yet received the original affidavit however, I have attached the proposed affidavit to this affirmation... [and] [w]e expect to receive the original affidavit within the week.” A copy of the proposed affidavit that was purportedly signed by Judith states, “I have read my attorney’s affirmation, dated July 9, 2019... [and] I hereby adopt and incorporate each statement made by my attorney, in her affirmation, as my own.” Otherwise, the proposed affidavit says nothing of substance except to admit that she resides in Virginia. In any event, an original of this proposed affidavit was never filed.

DISCUSSION

SCPA 711 sets forth the grounds for removal of a fiduciary and enumerates those grounds to include substance abuse, dishonesty, improvidence, want of understanding, or being otherwise unfit for the execution of the office. SCPA 711(8); *Matter of Rimland*, 205 A.D.2d 693 (2d Dep’t 1994). “The Surrogate may remove [a fiduciary] without a hearing only where the misconduct is established by undisputed facts or concessions....” *In re Duke*, 87 N.Y.2d 465, 473 (1996) (citations omitted).¹ Further, “removal of a fiduciary constitutes a judicial

¹ While generally a fiduciary may be removed only after a hearing, the parties herein stipulated to the court deciding this matter without a hearing and solely on papers. Further, Judith was given ample

nullification of the testator's choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established." *Id.* However, a fiduciary's letters may be revoked for the sole reason of failure without sufficient reason to notify the court of a change of address within 30 days. SCPA 711(6); *In re Drimmer*, 468 N.Y.S.2d 533, 535 (2d Dep't 1983).

An attorney affirmation not based upon personal knowledge has no evidentiary value. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980). While Judith's counsel purports to have personal knowledge of the facts, it is Judith who is the co-executor and who must answer to the allegations that she has abdicated her fiduciary duties, delaying and thwarting efforts to resolve this estate. To compound her failure to directly respond to the allegations in James' affidavit, Judith's objections to the petition are likewise sparse and evasive. For example, paragraph 12 of the petition states, "I learned that 414 Grand Avenue lacked heat and hot water. Judith originally told me that she had shut the heat voluntarily (which would have created the risk of bursting water pipers had it been true.) However, I learned that this was not true, and that the gas company shut it because it found leaks...." In response, Judith's objections state that she "lacks sufficient information to form a belief" as to the allegations and, therefore, denies them. The court notes that the objections were verified by counsel, not Judith herself. To date, Judith has not filed any sworn document verified by herself that specifically addresses James' allegations, despite being given the opportunity to do so.

One of the many undisputed allegations herein is that Judith failed without sufficient reason to notify the court of a change of address within 30 days. SCPA 711(6). Accordingly, the removal of Judith as co-executor is warranted for that reason alone. *Id.*; *Drimmer*, 468 N.Y.S.2d at 535. Moreover, while a testator's choice of fiduciaries must be given great deference, where a lack of cooperation between co-fiduciaries interferes with the proper administration of an estate or future cooperation seems improbable, a co-fiduciary may be removed. *Quackenboss v. Southwick*, 41 N.Y. 117, 122-123, (1869); *Duell v. Duell*, 258 A.D.2d 382 (1st Dep't 1999); *Estate of Levine*, 1994 NYLJ LEXIS 9199, *3-4 (Surr. Ct. NY County, June 21, 1994). Here, it is clear that allowing Judith to remain a co-fiduciary will only result in further intractable delay in administering the estate and wasting of the estate's assets. Lastly,

opportunity to dispute James' allegations on paper. Accordingly, a decision without a hearing is proper in this instance.

James' allegation that Judith is no longer physically or mentally capable of serving as a co-fiduciary has not been directly and clearly refuted by Judith. Accordingly, Judith's removal is also warranted by reason of her "want of understanding" of a fiduciary's duties or being "otherwise unfit for the execution of the office." SCPA 711(8).

CONCLUSION

Based upon the foregoing, the letters testamentary heretofore issued to Judith Sullivan are hereby revoked. Amended letters testamentary shall issue to James Sullivan, as the sole remaining executor of the decedent's estate.

Settle decree.

Dated: December 20, 2019
Brooklyn, New York



HON. MARGARITA LÓPEZ TORRES
Surrogate