

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 9
NASSAU COUNTY

KATE L. BERNSTEIN, M.D.,

Plaintiff(s),

INDEX No.: 12681/04

-against-

JOHN STACCONI, TRACY STACCONI, HELEN JACKSON and MARGARET JACKSON SALERNO,

Defendant(s).

By short form order of this court dated July 15, 2005 [Phelan, J.], plaintiff's complaint was dismissed. Thereafter, defendants were awarded a default judgment on their counterclaims referring the issue of damages on the counterclaims to inquest (short form order dated August 19, 2005 [Phelan, J.]). Plaintiff's subsequent application to vacate her default on the counterclaims was denied (short form order dated January 12, 2006 [Phelan, J.]).

By short form order of this court dated April 26, 2006 [Phelan, J.], the court acknowledged the death of plaintiff on April 7, 2006 and stayed this matter for a period of six months to allow substitution by the successors or representative of decedent in the ordinary course.

The court has now received correspondence from Myra G. Sencer, Esq., counsel for defendants, dated October 16, 2006 indicating that "[a]n executrix, Elinor Balka, has been appointed and the necessary letters have been issued to her by the [Nassau County] Surrogate's Court."

Moreover, counsel for defendants and counsel for decedent's estate have entered into a stipulation in the context of the Surrogate's Court proceeding which in relevant part provides as follows:

"1. Defendants shall cause the inquest on the judgment in the [Supreme Court] Action to be stayed pending resolution of the claims in the Surrogate's Court of Nassau County, File No. 342181;

2. The Estate hereby recognizes the claim of Defendants as a creditor with a judgment against the [E]state with only the actual dollar amount to be determined.

..."

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It is well settled that "'While the Supreme Court and the Surrogate's Court have concurrent jurisdiction in matters involving decedent's [sic] estates (NY Const art VI; Matter of O'Hara, 85 A.D.2d 669, 670, 445 N.Y.S.2d 201), it is the general rule that [w]henver possible, all litigation involving the property and funds of a decedent's estate should be disposed of in the Surrogate's Court' (citations omitted)" (Rosvold v. Rosvold, 29 AD3d 669).

Accordingly, the issues raised by defendants' claims in this action shall be addressed in the pending Surrogate's Court proceeding. The need for an inquest in the within Supreme Court proceeding is deemed academic and this court declines to exercise further jurisdiction (Id.).

This decision constitutes the order of the court.

Dated: 10-17-06

HON THOMAS P. PHELAN

[Handwritten signature]

J.S.C.

Myra G. Sencer, PC
Attorney for Defendants
250 Old Country Road
Mineola, NY 11501

Meaders, Duckworth & Moore
Attn: Richard Moore, Esq.
Attorneys for the Estate
551 Fifth Avenue, Suite 1501
New York, NY 10176

ENTERED

OCT 24 2006

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**