STATE OF NEW YORK
SURROGATE'S COURT : COUNTY OF ERIE

In the Matter of the Petition of Eleanor Dietz
as the Administratrix of the Estate of

DOMINIC SWALDI,
Deceased.

File #2012-3062/A & /B

ARCANGELO J. PETRICCA, ESQ.
Attorney for Administrator, Eleanor Dietz

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Attorney for Robert Swaldi

MEMORANDUM AND ORDER

BARBARA HOWE, J.

Decedent died intestate on June 2, 2012, survived by seven siblings and the three children of a pre-deceased sister. His sister, Eleanor Dietz [hereafter, "Eleanor"], was appointed administrator of the estate on October 1, 2012.

On January 29, 2014, Eleanor filed a petition pursuant to SCPA 2103, seeking discovery from decedent's brother and former attorney-in-fact, Robert Swaldi [hereafter, "Robert"]. The petition also seeks return to the estate of decedent's assets which Eleanor contends Robert improperly used and has retained (in whole or in part). Eleanor puts the amount of the estate's

claims against Robert at approximately $380,000[1], and she seeks interest against him from December 4, 2008. Robert filed an answer to the petition on June 23, 2014, essentially disclaiming any liability to the estate.

In September, 2014, Eleanor filed a motion for summary judgment, limiting her request to recovering the nearly $380,000 amount (at this time). Robert has filed answering papers opposing the motion, to which the estate ultimately replied. The motion is now finally submitted, and I find and decide as follows.

(I)

Decedent was admitted to the Erie County Medical Center [hereafter, ECMC] in November, 2008, "in an increasingly confused mental state." He was diagnosed with dementia, stabilized, and transferred to the Erie County Home (which was part of ECMC's operations). See September 8, 2009 petition of ECMC to have a guardian appointed for decedent [Supreme Court file #SF2009-902083, of which I take judicial notice (*see Schmidt v. Magnetic Head*, 97 AD2d 151, 158, fn 3 [1983])].

On December 4, 2008, while in an ECMC facility, decedent executed a statutory power of attorney [POA] appointing Robert as his

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[1] The petition actually has a range of improperly used assets, which go from roughly $380,000 to $517,000, and it also includes a request for $1,000,000 to be assessed against Robert for allegedly creating (or adding to) tax liabilities of decedent's.

attorney-in-fact. The POA granted Robert broad powers, including a power to make gifts.[2] On April 11, 2009, Robert cashed in a GMAC demand note owned by decedent in the amount of $517,906.08. Robert then deposited those funds into a Union National Bank [hereafter, "UNB"] checking account held jointly by him and decedent.[3]

It is undisputed that Robert made several gifts with the UNB checking account funds, as documented in an account ledger kept by him. On May 5, 2009, he gifted $25,000 to "Brian and Amber Swaldi." On May 7, 2009, Robert took a total of $339,583.98 to pay off his own mortgage.[4] On July 31, 2009, Robert gifted $9,200 to a "William Neilson," and on September 1, 2009, he gifted $5,500 to a "Mr. Seibert." These gifts total $379,283.98.

In September, 2009, ECMC filed a Mental Hygiene Law article 81 petition in Erie County Supreme Court seeking the appointment of a guardian

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[2] The gifting authority under the POA permitted gifts, in effect, to family members "not to exceed in the aggregate $12,000 to each of such persons in any year" (see paragraph M). That authority was modified under paragraph P to permit gifts in excess of $12,000 per person and to "mak[e] gifts to an acting agent".

[3] Robert's name was listed as "Robert J. Swaldi, POA" on the checking account.

[4] Two cashier checks were obtained for this purpose, one for $168,046.74 and the other for $171,537.24.

for decedent.[5] On September 10, 2009, Supreme Court [Sedita, Jr., J.] appointed Arcangelo Petricca, Esq. as temporary guardian of decedent's personal needs and property, and thereafter made the appointment permanent. Petricca requested an accounting of decedent's assets from Robert, but that was apparently never provided.

On October 20, 2009, Justice Sedita conducted a record proceeding, at which both Robert and decedent spoke. When Justice Sedita asked Robert about the location of decedent's money, the following exchange occurred:

> "Q. Where is the money, Mr. Swaldi. Mr. Robert Swaldi, where is this man's money? Cut right to the chase.
>
> A. I have a complete list here.
>
> Q. Mr. Swaldi, in a prior proceeding, Mr. Robert Swaldi, Mr. Dominic Swaldi told me he never gave permission to do the things that you did and, in fact, he asked you for the money back and you didn't give to him.
>
> A. My brother --
>
> Q. That's what he said last hearing."

Robert then stated that decedent had given him permission to use the money:

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[5] ECMC's petition discusses Robert's alleged improper use of the UNB checking account funds.

"A. He also said to help yourself, help your family.

Q. Help yourself out with his money.

A. He told me that. He said because he didn't want the lawyers and the state to get it."

At this point, decedent interjected and stated:

"No, I didn't say anything like that."

Robert was later asked again by the Court what he had done with decedent's money:

"Q. You took $500,000 from him?

A. I have a complete list here.

Q. Here is a complete list? . . . This is the list of what you paid?

A. Yes, Your Honor.

Q. Okay. You say you paid a -- a note on his car for $1,000? Is that right?

A. Yes.

Q. What happened to $33,918, what's that, Wachovia Bank, what's that all about?

A. That was a new account I started.

Q. Yeah, you took -- you sold Reynolds stock and you put $33,000 in your account.

A. Yes, sir.

Q. Then a checking account from Wachovia, these are the assets you took 5,000 bucks, right?

A. Right.

Q. Then Union National Bank there was $517,000.

A. Right.

Q. And what did you do with that $517,000?

A. I paid off my mortgages.

Q. You paid off the mortgage where?

A. On my home.

Q. Why would you pay off a mortgage - - that's the - - that's the bulk of his estate, right?

A. No, there's a little over - -

Q. Why would you take $517, 000 - -

A. He said - -

Q. - - pay the mortgage off on your home, how does that benefit him?

A. He says there's more than enough to help myself and still take care of his needs" (emphasis added).[6]

On May 10, 2010, Justice Sedita conducted an evidentiary hearing at which decedent testified:

"MR. WEBB: Mr. Swaldi, do you know why we're here today?

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[6] In reviewing the transcript of the October 20, 2009, proceeding, I can find nothing to indicate that either decedent or Robert had been placed under oath when being questioned by the Court (or otherwise).

THE WITNESS: Yes, I'll be blunt and firm and to the point. Your Honor, I'm here because my brother tried to swindle my lifetime savings. I -- that's all I -- Judge, I've got to say.

THE COURT: I'm here because someone swindled my lifetime savings, is that what you said?

THE WITNESS: He's trying to swindle my lifetime savings.

THE COURT: Who's trying to swindle your lifetime savings?

THE WITNESS: Robert Swaldi. Never worked in a factory, never done any employment.

THE COURT: You're talking about your brother, is that right?

THE WITNESS: Yeah, I'm talking about him.

THE COURT: Okay. Okay.

THE WITNESS: Yet he learned that I was -- when I was working at Chevrolet Tonawanda, I was depositing my paycheck being held by the company."

On September 10, 2010, Justice Sedita directed Robert to provide Petricca with an accounting of decedent's assets. Rather than a formal accounting, Robert provided copies of the UNB checking account ledger, copies of cashier's checks, and statements from decedent's other banking and investment accounts.

(II)

(a)

The legal standards for deciding a motion such as that pending before me are clear. Procedurally:

> "Summary judgment may be granted only where it is clear that no triable issues of material fact exists. *(see, e.g. Alvarez v. Prospect Hosp.*, 68 NY2d 320, [1986]; *Phillips v. Joseph Kantor & Co.*, 31 NY2d 307 [1972]). Because summary judgment is in derogation of the parties' right to a jury trial, the rubric applied to the court's analysis had always been 'issue finding' rather than 'issue determination' (*Stillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Therefore, it is incumbent on the Eleanor to make a prima facie showing that he or she is entitled to summary judgment as a matter of law' (CPLR 3213[b]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The papers submitted in support of and in opposition to the motion are scrutinized in a light most favorable to the party opposing the motion (*Robinson v. Strong Memorial Hosp.*, 98 AD2d 976 [1983]). If there is any doubt as to the existence of a triable issue of fact, then the motion must be denied. (*Id.*)
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> To defeat a motion for summary judgment, the opponent must assemble and lay bare affirmative proof to demonstrate the existence of a genuine triable issue of fact. *(Stainless, Inc. v. Employers Fire Ins. Co.*, 69 AD2d 27 [1979], *aff'd* 49 NY2d 924 [1980]). Allegations must be specific and detailed, substantiated by evidence in the record; mere conclusory assertions will not suffice. (*Matter of Neuman*, 14 AD3d 567 [2005]). Moreover, the

> court is required to search the record when it is engaged in the process of issue finding. (*Fullan v. 142 E. 27th St. Assocs.*, 1 NY3d 211 [2004]; *Insurance A.G. v. Moor-Jankowski*, 77 N.Y.2d 235 [1991])." (*Matter of Zirinsky*, 10 Misc. 3d 1052[A] [2005], emphasis added, *aff'd* 43 AD3d 946 [2007]; *see also Matter of Colverd*, 52 AD3d 971 [2008]).

The issue, thus, is whether Eleanor has established her *prima facie* entitlement to a summary judgment as a matter of law, and, if so, whether Robert has raised one or more triable issues of material fact which would require denial of the motion.

(b)

Whether Robert can be found to have misappropriated, illegally converted, fraudulently misappropriated, and/or negligently managed and disbursed decedent's funds, as Eleanor alleges, is, in essence, determined by whether he breached his fiduciary duties as decedent's attorney-in-fact. General Obligations Law [GOL] §5–1505[2][a] currently in effect[7] provides that:

> "An agent acting under a power of attorney has a fiduciary relationship with the principal. . . . [An agent must] act according to any instructions from

[7] The POA statutory provisions were completely revised by the laws of 2008 and made effective in 2009. However, GOL §5-1505, containing general standards of care to be observed by an attorney-in-fact, was expressly made applicable to any POA entered into prior to the effective date of the new statute. Thus, these new standards apply to the December 4, 2008 POA given to Robert by decedent.

> the principal or, where there are no instructions, in the best interest of the principal and to avoid conflicts of interest . . . The agent may not make gifts [of] the principal's property to himself or herself without specific authorization in a power of attorney."

In considering the exercise of an attorney-in-fact's authority to make gifts under section "M" of a pre-2009 POA similar to the one before me, our Court of Appeals, in *Matter of Ferrara*, 7 NY3d 244, 252-254 [2006], explained that:

> "Section 5–1502M construes this gift-giving authority 'to mean that the principal authorizes the agent . . . [t]o make gifts . . . either outright or to a trust for the sole benefit of one or more of [the specified] persons . . . only for purposes which the agent reasonably deems to be in the best interest of the principal, specifically including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes' (General Obligations Law §5–1502M [1] [emphasis added]). . . . Thus, section 5–1502M unambiguously imposes a duty on the attorney-in-fact to exercise gift-giving authority in the best interest of the principal. . . . Section 5–1502M, the constructional section governing gift giving, explains at subdivision (1) that authority to make gifts in the best interest of the principal includes 'minimization of income, estate, inheritance, generation-skipping transfer or gift taxes.' As this language shows, the purpose of the gift-giving authority is to allow an attorney-in-fact to carry out the principal's intentions to use gifts as part of a financial or estate plan, which will often involve taking advantage of certain tax provisions. . . . In short, the Legislature sought to empower individuals

> to appoint an attorney-in-fact to make annual gifts consistent with financial, estate or tax planning techniques and objectives—not to create gift-giving authority generally . . . . Finally, the best interest requirement is consistent with the fiduciary duties that courts have historically imposed on attorneys-in-fact. '[A] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal' (*Mantella v. Mantella*, 268 AD2d 852, 852 [3d Dept. 2000] [internal quotation marks and citation omitted]). Because '[t]he relationship of an attorney-in-fact to his principal is that of agent and principal . . . the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing' (*Semmler v. Naples*, 166 AD2d 751, 752 [3d Dept.1990] [internal quotation marks and citations omitted])" (emphasis added).

Thus, the law is clear that an attorney-in-fact must act in the principal's best interest even when he or she is given gifting authority in a POA. There is no dispute that the December 4, 2008 POA gave Robert broad powers, including the power to make gifts, and there is likewise no dispute that Robert made gifts to others and to himself. The central question is whether Robert acted in decedent's best interest when he made those gifts.

In Eleanor's verified SCPA 2103 petition, she alleges the following in paragraph 14:

> "Attached as Exhibit 'F' are copies of two cashier's checks dated May 7, 2009, one in the amount of

> $168,046.74 and one in the amount of $171,527.24 which went to pay [Robert's] mortgage and funds came from Union National Bank Account 114803201. Decedent derived no benefit from these payments" (emphasis added).

Robert's June 23, 2014 verified Answer to the petition states, *inter alia*, that he "[a]dmits the allegations contained in paragraph . . . 14". Thus, Robert has admitted under oath that he used $339,583.98 in decedent's monies to pay off his own mortgages, and he has also admitted that "[d]ecedent received no benefit from these payments."

Eleanor has established *prima facie* that Robert's use of decedent's funds for himself provided no benefit to decedent. Indeed, no benefit to decedent is even alleged by Robert. Rather, Robert's contention here is (a) that the POA gave him unlimited gifting power, and (b) that decedent told him to use the money for Robert himself and for Robert's family.

Robert relies solely on inadmissible hearsay about what decedent allegedly told him. Moreover, to the extent Robert attempts to justify his use of $339,583.98 in decedent's assets to pay off his own mortgage, he does so only by statements from decedent which are barred by the so-called Dead Man's Statute (see CPLR 4519). No other "proof" in this regard has been submitted by Robert. Finally, I note that nothing Robert advances as to what decedent

told him has been submitted in sworn fashion, and, thus, cannot be considered for any purpose.

In *Matter of Ferrara*, *supra*, at 254, our Court of Appeals explained that an attorney-in-fact's claim that he made gifts "[i]n furtherance of [decedent's] wishes" to give him "all of his assets to do with [it] as [he] pleased" is not enough to meet the "best interest" requirement. *Ferrara* elaborated by saying:

> "The term 'best interest' does not include such unqualified generosity to the holder of the power of attorney" (at 254).

I further find that Robert has provided no proof that his gift-making pertained to financial, estate or tax planning for decedent's estate, or that it provided any benefit to decedent. I conclude, therefore, that Robert has failed to raise any triable issue of material fact.

Accordingly, I conclude that Robert breached his fiduciary duties as decedent's attorney-in-fact, and that he misappropriated decedent's funds in the amount of $379,283.98.

(c)

Turning now to the issue of whether Robert must return funds to the estate, fiduciaries are accountable for breaching their duties and courts have

issued money judgments against them in the amount of the improperly used funds. *See, e.g., Matter of Babb*, 36 Misc 3d 1209(A) [2012] [directing an attorney-in-fact to pay decedent's estate all monies she withdrew from the decedent's bank accounts and placed into her personal banking accounts], *Matter of Francis*, 19 Misc 3d 536 [2008] [setting aside an attorney-in-fact's transfers of a decedent's assets where the attorney-in-fact failed to offer any evidence that decedent derived any benefit from the transfers], and *Matter of Zielinski*, 208 AD2d 275, 280 [1995] [affirming a money judgment against an attorney-in-fact in the amount of savings bond redemption proceeds improperly gifted to herself].

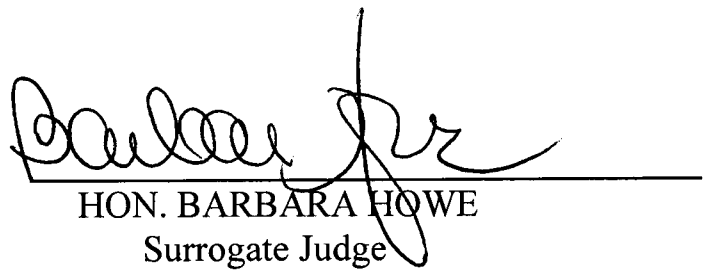
I conclude, therefore, that Robert must repay the funds misappropriated by him.

(III)

Accordingly, and for the reasons stated, I conclude that Eleanor's motion for summary judgment must be, and it hereby is, granted, and Robert is directed to pay the estate the sum of $379,283.98, together with interest thereon from the date each payment out of decedent's funds which total to that amount was made, at the statutory rate of interest.

This decision shall constitute the Order of this Court and no other or further order shall be required.

DATED: BUFFALO, NEW YORK
March 25, 2015



HON. BARBARA HOWE
Surrogate Judge