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

----------x

Petition by Errol Rappaport to Remove Michael Rappaport and Eleanor Burton as Co-Executors of the Estate of

DAVID RAPPAPORT, File No. 2010-2371/F

Deceased.

----------x

Petition by Michael Rappaport and Eleanor Burton, Co-Executors of the Estate of

DAVID RAPPAPORT, File No. 2010-2371/I

Deceased,

for Judicial Settlement of their Account.

----------x

G I N G O L D , S .

The following papers were read in determining the motion and cross-motion in these proceedings:

	Papers Numbered
Notice of Motion dated September 22, 2023 – Affirmation Exhibits	1-3
Notice of Cross-Motion dated October 19, 2023 – Affidavit Exhibits	4-6
Reply Affirmation – Exhibits	7
Reply Affidavit	8

In these consolidated removal and accounting proceedings, Michael Rappaport (Michael), as a surviving co-executor of decedent's estate, and Richard Rappaport (Richard), as surviving trustee of the trust created for the benefit of Errol Rappaport (Errol), move to enforce the settlement agreement reached in open court on July 11, 2023 between Michael, Richard and Errol. Errol and

non-party Rey Olsen (Olsen), who are each self-represented, oppose the motion and move to set aside the settlement agreement and for additional relief.

Background

Decedent died on April 5, 2010, survived by his wife, Frances Rappaport (Frances), and their three sons, Michael, Errol and Richard. In his will and codicil, decedent named Michael, Errol and Eleanor Burton[1] (decedent's niece) as co-executors of his estate. At the time of decedent's death, the estate consisted primarily of his ownership interest in a cooperative apartment where he and Frances had lived together. Decedent's residuary estate is bequeathed to four testamentary trusts for the benefit of Errol (36.56%), Richard (36.56%), Richard's children (13.44%), and Michael's children (13.44%).

Over the years, decedent's estate has been the subject of extensive litigation stemming from the acrimony between Errol and his brothers. As of July 11, 2023, there were three matters pending before this court and the Supreme Court, New York County: (1) a final accounting of the decedent's estate brought by co-executors Michael and Eleanor Burton (File no. 2010-2371/I); (2) a removal proceeding brought by Errol seeking revocation of the letters testamentary and surcharges (File no. 2010-2371/F); and (3) an Article 81 guardianship proceeding for Frances in Supreme Court (Index no. 500103/2014).

On July 11, 2023, Michael, Richard and Errol appeared in court for a settlement conference. Michael and Richard were represented by Frank W. Streng, Esq. of McCarthy Fingar LLP, and Errol was represented by Charles Capetanakis, Esq. and Ashwani Prabhakar, Esq. of Davidoff Hutcher & Citron, LLP. The parties engaged in extensive settlement talks with the

[1] Eleanor Burton died on December 21, 2022.

assistance of the court and ultimately reached a settlement agreement which was put on the record in open court (Affirmation of Frank W. Streng dated September 21, 2023, Exh. A).

The terms of the settlement were as follows: (1) the trust established for the benefit of Errol would be terminated and Michael and Errol, as co-executors of the estate, would distribute the sum of $495,000 to Errol; (2) McCarthy Fingar LLP, the firm representing Michael and Richard, would be paid $250,000 for the fees and services it rendered to the estate; (3) the estate of Eleanor Burton would be paid $64,401.71 for her executor commissions; (4) Michael would be paid $182,836 as reimbursement for certain estate expenses; (5) the trust established for the benefit of Richard would be terminated and distributed outright to Richard; (7) the balance of the estate would be distributed to Richard, his two children, and Michael's two children pursuant to the will with an increase in the allocated percentages due to Errol receiving the sum of $495,000 (Streng Aff., Exh. A at 9-11). In exchange for these payments, the parties would discontinue the proceedings in this court and exchange general releases (Streng Aff., Exh. A at 11-12).

After the terms of the settlement were put on the record, the court allocuted Michael, Richard and Errol to ensure that they understood and agreed to the settlement. With regard to Errol, the court asked him, in pertinent part, to describe in his own words what he thought was going to happen next and he stated that "[h]opefully we'll settle this case and it's going to be over completely and we never have to see [each] other again, my brothers" (Streng Aff., Exh. A at 16). The parties agreed to formalize the terms of the settlement with a written agreement.

Soon after the court appearance on July 11, Errol refused to sign the draft settlement agreement presented to him and advised his attorneys and the court that he could no longer agree to the settlement. As a result, Errol's attorneys filed an order to show cause to withdraw as counsel, which was granted on August 23, 2023. The order provided Errol with a 30 day stay in order to

permit him to retain new counsel, which he did not do, opting instead to proceed *pro se* in this matter.

Thereafter, on October 2, 2023, Michael and Richard filed the instant motion to enforce the parties' settlement agreement. Errol and Olsen filed a joint cross-motion opposing the motion and seeking to set aside the settlement agreement, and seeking various other relief, including an order allowing Olsen to intervene in these proceedings.

Discussion

It is well-settled that stipulations of settlement are favored by the courts and, when they are complete and definite, they will be enforced unless there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]). Generally, a signed writing is required for the agreement to be enforceable, however, under CPLR 2104, a stipulation entered in open court is binding on the parties without the need for a signed writing. In the case of open court stipulations, the policy favoring settlements is strictly enforced as it not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process (*Id*).

Here, it is evident from the transcript of the July 11 court appearance that the parties resolved their claims against each other in open court. The transcript contains all of the essential terms of the parties' agreement and these terms, which outlined the payment of the estate's bequests, claims and expenses, were sufficiently specific and well-defined so as to bind the parties to the agreement (*Matter of 166 Mamaroneck Ave Corp v 151 East Post Rd Corp*, 78 NY2d 88, 91-92 [1991] [contract is binding where the agreement manifests the parties' intent to be bound and sets forth all material terms]; *Shah v Wilco Systems, Inc*, 81 AD3d 454, 455 [1st Dept 2011]; *Samonek v Pratt*, 112 AD3d 1044, 1045 [3d Dept 2013]). Moreover, there can be no dispute that

the parties consented to these terms. Not only were all of the parties represented by an attorney (*Matter of Abu-Regiaba*, 21 Misc3d 1106[A], at 2 [Sur Ct, Nassau County 2008] [stipulations of settlement are especially favored where parties are represented by counsel]), the court specifically allocuted each of the parties to ensure that they understood and agreed to the terms of the settlement (Streng Aff., Exh. A at 16).

Finally, while some of the interested parties in the proceedings were not present at the settlement conference, their consent is not necessary in order to bind Errol to the agreement. Nevertheless, all of these parties, namely the children of Michael and Richard and the legal representatives of the estate of Eleanor Burton, submitted affidavits approving the July 11 settlement agreement and supporting the motion to enforce the agreement (Streng Aff., Exhs. B-G). Thus, movants Michael and Richard have demonstrated that the July 11 settlement agreement is enforceable.

In opposition to the motion, Errol first argues that the settlement agreement should be set aside because he could not hear the terms of the agreement. However, the transcript does not indicate that either Errol or his attorneys had any problem with the acoustics in the courtroom. Indeed, the colloquy between the court and Errol during the allocution, in which Errol states his understanding of the settlement agreement on the record, plainly belies this argument (Streng Aff., Exh. A at 16-17).

Next, Errol argues that the settlement agreement entered into on July 11 was "without prejudice." While it is true that the parties intended to memorialize the settlement agreement in a signed writing after the conference, the settlement reached in open court contained all material terms. Thus, it stands on its own, independent of any writing contemplated by the parties (*Birches at Schoharie, LP v Schoharie Senior Gen Partner LLC*, 169 AD3d 1192, 1194-95 [3d Dept 2019]

[enforcing open court settlement which contained all material terms even though parties intended to memorialize the settlement in a written agreement]; *Oppenheim v Ultimate Services for You, Inc*, 30 Misc3d 1206[A], at *5 [Sup Ct, Kings County 2011] [enforcing settlement reached in open court]; *see also Acot v New York Medical College*, 99 Fed Appx 317, 318 [2d Cir 2004] ["The fact that parties to an oral agreement contemplate memorializing their agreement in a subsequently executed document will not prevent them from being bound by the oral agreement."]).

Next, Errol argues that the settlement reached on July 11 was procured through fraud. Towards this end, Errol first argues that the elective share paid to his now-deceased mother, Frances, for the sale of the cooperative apartment was based upon fraud. However, all of the information regarding the elective share was set forth in the accounting proceeding filed in 2016 (2010-2371/I, Accounting, Exh. J). Errol failed to appear and did not file objections in that proceeding and thus consented to the relief sought. Similarly, Errol argues that the settlement was fraudulent because it included the payment of certain expenses to Michael. While Errol now disputes the legitimacy of these expenses, he clearly agreed to these terms during the July 11 conference, and the agreement cannot be deemed fraudulent simply because it is not as favorable as he anticipated (*Servider v City of New York*, 212 AD3d 475, 476 [1st Dept 2023]). Moreover, these expenses were also set forth in the accounting proceeding, to which he did not object (2010-2371/I, Suppl. Citation dated July 26, 2017). Thus, the arguments to set aside the settlement agreement based on fraud are meritless.

Next, Errol argues that the general releases in the July 11 settlement agreement cannot be enforced by the Surrogate's Court because they contemplate claims outside the court's jurisdiction. While it is true that the Surrogate's Court is a court of limited jurisdiction, it is equally well-settled that the parties to a lawsuit are free to chart their own course through stipulations. Thus, Errol's

argument regarding subject matter jurisdiction is misplaced because the court is not adjudicating any claims. Rather, the court's only role here is to enforce the parties' settlement agreement, which includes the execution of general releases (*see Matter of Hyra*, 81 AD3d 730, 731 [2d Dept 2011] [upholding grant of motion to direct parties to execute general release pursuant to settlement agreement]). Accordingly, this argument must be rejected.

Turning to the cross-motion, Errol and Olsen make various claims for affirmative relief, including a request for Olsen to intervene in these proceedings pursuant to CPLR 1012 and 1013. Olsen's request to intervene is based on a purported assignment of Errol's ten percent interest in the estate to Olsen (Affidavit of Rey Olsen and Errol Rappaport sworn to October 17, 2023, Exh. 4). The purported assignment dated August 30, 2023, "confirms" Errol's alleged assignment of his interest in the estate to Olsen on May 1, 2023.

Olsen's belated request to intervene in these proceedings based on the purported assignment is a transparent attempt by Errol and Olsen to derail the parties' settlement agreement. As an initial matter, the purported assignment is suspect on its face as it was executed four months after Errol allegedly assigned his interest in the estate to Olsen. Errol and Olsen do not offer any explanation for this delay. Moreover, as reflected in the transcript of the July 11 proceedings, neither Errol, nor his attorneys, mentioned this purported assignment at the settlement conference before the court. Nor was the purported assignment filed with the court until August 31, 2023 (*see* EPTL § 13-2.2[a] [requiring acknowledged writing for an assignment of interest in an estate]; *Matter of Ingberman*, NYLJ, July 24, 2015, at 37 [Sur Ct, NY County] [statute's purpose is to ensure notice of assignment to third persons]). Taken together, the unexplained delay in executing the purported assignment and the parties' failure to disclose the assignment until well after the July

11 court appearance, tend to prove only one thing – that the assignment simply did not exist at the time of settlement.

Even if the assignment did exist as of May 1, 2023, as Errol and Olsen now argue, this is still insufficient to support a motion to intervene. Pursuant to EPTL § 7-1.5(a)(1), income interests in a trust are not alienable unless the grantor expressly makes them alienable (*see Sarver v Towne*, 285 NY 264, 270 [1941] [income of trust is not assignable by beneficiary under New York statute]). Here, under decedent's will, Errol's entire interest in the estate pours over into a testamentary trust of which he is an income beneficiary. The trust does not expressly provide that the income interest for the subject trust is assignable. Upon Errol's death, the principal of his trust is to be distributed to his brothers' trusts. Since Errol's interest in the estate consists entirely of an income interest in a trust, this interest is unassignable under EPTL § 7-1.5(a)(1). Thus, Olsen has no right to enforce his purported assignment against the trust and has no basis to intervene in these proceedings.

Finally, in their moving papers, Michael and Richard seek an assessment of attorneys' fees against Errol's share of the estate. Under SCPA 2110, the court has discretion to allocate responsibility for payment of attorneys' fees which the estate is obligated to pay either from the estate as a whole or from shares of individual estate beneficiaries (*Matter of Hyde*, 15 NY3d 179 [2010]). In determining the sources from which legal fees are to be paid, the court must consider various factors, including, whether the unsuccessful party acted solely in his own interest and whether he acted in good faith (*Id* at 186-87). Upon consideration of these factors, it is evident that Errol's conduct in failing to abide by the terms of the settlement agreement negotiated by the parties was frivolous and did not serve the interests of the estate. Thus, his share of the estate must be surcharged for the attorneys' fees incurred to enforce the settlement in the sum of $31,095.

The court is also compelled to address Errol's propensity for repeatedly filing defective and frivolous applications. These motions have needlessly taxed the resources of the court, prolonged this litigation, and generated unnecessary legal fees for the estate and the parties who have been compelled to respond. The court cautions Errol, and Olsen, that, if such conduct continues, the court will entertain a motion for sanctions.

Accordingly, it is

ORDERED that the motion to enforce the settlement is granted and the cross-motion is denied; and it is further

ORDERED that the Clerk of the Court shall send a copy of this decision to all parties who have appeared; and it is further

ORDERED that the parties shall settle decree in conformity with this decision and order and the transcript of the July 11, 2023 proceeding which will be so-ordered and filed contemporaneously herewith.

Dated: December 1ST, 2023

SURROGATE

To:
Frank W. Streng, Esq.
McCarthy Fingar LLP
711 Westchester Avenue, Suite 405
White Plains, New York 10604
fstreng@mccarthyfingar.com
Attorneys for Michael Rappaport, as a Surviving co-executor under the Will of David Rappaport, and Richard Rappaport, as Trustee of the Trust created for the benefit of Errol Rappaport under the Will of David Rappaport

Errol Rappaport, *pro se*
P.O. Box 7022
New York, New York 10150-7022
errolrappaport@gmail.com

Rey Olsen, *pro se*
430 East 86th Street
New York, New York 10028
wsgny@aol.com

Sabrina E. Morrissey, Esq.
708 Third Avenue, Suite 1305
New York, New York 10017
Interim Guardian for Frances Rappaport

Andrew Rappaport
14 Rugby Road
Rockville Centre, New York 11570

Scott Rappaport
12 Forsythia Court
Lafayette, Pennsylvania 19444

Jordan Rappaport
40 East 53rd Terrace,
Kansas City, Missouri 64112

Jill Rappaport
139 22nd Street
Brooklyn, New York 11232
Todd Burton
3377 Alginet Drive
Encino, California 91436
Co-trustee of the Eleanor Burton Revocable Trust