

TRUSTS AND ESTATES

Expert Analysis

Asserting Affirmative Defenses To Objections in Accounting Proceedings

Surrogate's Court procedure is often considered confusing and counter-intuitive by some practitioners who are unfamiliar with it. Surrogate's Court procedure has developed over time and it is beyond the scope of this article to get into a discussion about how and why its procedure is what it is today. Suffice it to say that something as simple as raising affirmative defenses has complexities not found in Supreme Court practice. This is especially true in accounting proceedings, the procedural vehicle where parties often litigate a whole panoply of claims. So why should asserting affirmative defenses in an accounting proceeding be any different than a Supreme Court action?

To answer this we have to go back to the basic difference in the pleadings in a normal civil action under the CPLR and pleadings permitted

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in Surrogate's Court. Pursuant to the Surrogate's Court Procedure Act (SCPA) 302, unless otherwise provided for elsewhere in the SCPA, the only pleadings permitted are a

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petition, answer or objections and account. Indeed, the act specifically states that there "shall be no other pleading unless directed by the court." SCPA 302(b); see also *Matter of Rothschild*, 251 A.D. 639 (3d Dept. 1937); *Matter of Kilborn*, 232

A.D. 580 (1st Dept. 1931); *Matter of Gerbereux*, 148 Misc. 461, 266 N.Y.S. 134 (Sur. Ct. Westchester Cty. 1933).

So what is the problem? On its face, it looks like a petition is akin to a complaint and an answer or objections are the same as a CPLR answer. Wouldn't it then stand to reason that a litigant could simply assert an affirmative defense in his or her answer or objections? In some proceedings, the answer is yes. For example, if an estate fiduciary brings a proceeding by petition for turnover of assets based on a conversion claim, the respondent can simply file an answer raising whatever affirmative defenses are available.

However, in an accounting proceeding, it is not so simple. It is true that the petition and account are the initiating pleadings and, thus, they are procedurally analogous to a complaint. It is equally true that the objections are procedurally analogous to an answer. However, the objections are substantively a hybrid of an answer and a complaining pleading like a complaint. In other words, if a respondent in an accounting proceeding wishes

to assert claims against the estate or its fiduciary, the respondent does so in the form of an objection to the account. The question is then, how does the fiduciary raise an affirmative defense if the only pleadings are a petition/account and an answer? The fiduciary will often not have notice of the claim until the objectant serves the objections. Under such circumstances, the fiduciary will usually not be able to assert the defenses in the petition anticipatorily.

The answer is to file a reply to the objections. However, because a reply is not a pleading permitted by SCPA 302, the accounting fiduciary must move the court for leave to file a reply. In general, permitting a reply is within the court's discretion. See *Matter of Davis*, 29 Misc.2d 471 (Sur. Ct. Westchester County 1961); *Matter of Rosenfield*, 213 N.Y.S.2d 1009 (Sur. Ct. Westchester County 1961), order aff'd, 18 A.D.2d 718 (2d Dept. 1962); *Matter of Brown*, 9/4/84 N.Y.L.J. 14, col. 4 (Sur. Ct. Suffolk Co.). Courts liberally exercise such discretion if to permit the reply is necessary to plead affirmative defenses. *Matter of Foote*, 1 A.D.2d 671 (2d Dept. 1955); *Matter of Unger*, 259 A.D. 823 (2d Dept. 1940); *Matter of Bisordi's Will*, 229 N.Y.S.2d 805 (Sur. Ct. Westchester County 1962); *Matter of Davis*, 29 Misc.2d at 471-72 ("there is ample authority for the court to permit parties to a proceeding to serve and file a reply where the same is necessary in order to properly frame issues or affirmatively plead a defense as in the instant case").

Accordingly, where a petitioner in an accounting proceeding wishes to raise affirmative defenses to any claims presented by the objections, it is incumbent on the petitioner to move the Surrogate's Court for leave to file a reply for the express purpose of asserting affirmative defenses.

The petitioner must take care however. The unique procedure of SCPA accounting proceedings reveal another layer of complexity. The initiation of an accounting proceeding under SCPA 2208 is "voluntary", but a recalcitrant fiduciary cannot be expected to

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simply comply with a request to voluntarily account. As such, an interested party may initiate a separate proceeding under SCPA 2205 to compel the fiduciary to account. The fiduciary must commence such a proceeding by petition. If the fiduciary has grounds to oppose the petition, he or she can file an answer in opposition.

This begs the question as to whether the fiduciary should or must raise any affirmative defenses (lest they be waived) in the answer to the petition to compel an accounting or whether the fiduciary may wait until she accounts to see what claims a respondent may

raise in his objections. The answer is logically straightforward, but it is procedurally a bit confusing and depends on the circumstances as illustrated by two cases. The first is *Matter of Singer*, 30 A.D.3d 211 (1st Dept. 2006) and the second is a recently decided Queens County Surrogate's Court case, *Matter of Spolan*, 2021 N.Y. Slip Op. 21238 (Sur. Ct. Queens Cty).

In *Matter of Singer*, the First Department affirmed the Surrogate's denial of an accounting fiduciary's motion to dismiss objections to an accounting as time barred. For context, it is important to note that the six year statute of limitations on a fiduciary's duty to account does not begin to run until the fiduciary openly "repudiates" her office as fiduciary.

In *Singer*, the court held that the accounting fiduciary (a trustee) waived the defense of the statute of limitations by failing to raise it in her answer in opposition to the compulsory accounting petition. The rationale specific to that case was that petitioner asserted she had repudiated her office more than six years prior to the time in which a beneficiary had filed a compulsory accounting petition and had no further responsibility to account for the property subject to the objections. In other words, the "trust relationship is 'repudiated' where the putative fiduciary denies having had, or having retained, any fiduciary obligation with respect to the property in question, including the duty to account." *Matter of Singer*, 12 Misc.3d 621, 624-25 (New York County Sur. Ct.

2006) (emphasis added), citing *Roediger v. Kraft*, 169 A.D. 304 (1st Dept. 1915); *Matter of Ashheim*, 111 A.D. 176 (1st Dept. 1906), aff'd 185 N.Y. 609 (1906).

As such, the statute of limitations had already run on the fiduciary's duty to account for all of the property to which the underlying claims within the objections related. Under such limited circumstances, the court held that petitioner waived the defense by failing to raise it in her answer to the compulsory accounting petition.

Spolan on the other hand demonstrates the distinction between *Singer* and a case in which there had been no repudiation and a beneficiary commenced a timely compulsory accounting proceeding, but where the underlying claims interposed in the objections were arguably time barred.

In *Spolan*, petitioner (a fiduciary of a deceased fiduciary) did not oppose a beneficiary's petition to compel an accounting, recognizing it as timely. The beneficiary filed objections asserting various claims against the deceased fiduciary sounding in conversion and fraud. Petitioner moved for leave to file a reply to assert affirmative defenses of the statute of limitations and laches as to those specific claims. Objectant opposed arguing waiver and citing *Singer* for support.

The Queens County Surrogate's Court granted petitioner's motion finding that there had been no waiver of the defense. In so holding, the court distinguished the case before it with *Singer*, stating:

What the Surrogate's Court and the Appellate Division [in *Singer*] did not opine on, however, is the procedural and factual scenario presented at bar. Namely, if an accounting is compelled well within the applicable six year period, whether the accounting fiduciary can raise, by reply, statute of limitations defenses that may apply to certain individual objections.

Singer is of little precedential value in resolving this query. Nor has the court's research revealed any other appellate authority squarely on point. While in *Singer* the fiduciary moved to dismiss the objections to the account based upon expiration of the six-year statute of limitations as set forth in CLR 213, in this matter there is no dispute that the underlying accounting was timely sought. Petitioner now is seeking leave in her cross motion to file a reply pleading to some of [objectant's] particular objections. To accept [objectant's] legal theory that such relief is time barred would endorse a procedural mechanism that would compel an accounting party to blindly assert specific statute of limitations defenses in a petition without knowing what particular objections might be filed. In essence, this would twist pleading procedure into an illogical knot. Contrary to objectant's contention, *Matter of Singer* does not compel such a result. There is nothing in that case, or simple rationale for that

matter, that can be construed to prohibit a reply pleading in a timely filed accounting from containing affirmative defenses to objections sounding in conversion or fraud or any other alleged breach that may be time barred. In fact, an accounting fiduciary is duty-bound to raise available affirmative defenses such as the statute of limitations, if appropriate, under penalty of surcharge, since an objectant would be prohibited from obtaining turnover of personal property and assets if its claim is time-barred (internal citation omitted).

Matter of Spolan, 2021 N.Y. Slip Op. 21238 at 7.

At bottom, these cases demonstrate that the procedural complexities of an accounting proceeding require careful thought and planning for an accounting fiduciary as to how and when to assert affirmative defenses.