UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re

J. Anthony DiGiulio, aka Gioacchino Anthony DiGiulio, fdba formerly an office of Maziarz-DiGiulio Insurance Agency, Inc.

Debtor

Case No. 06-3973 K

The requests to amend or correct the August 19, 2008 Order of the Court are granted in part and denied in part. The following is the Amended Order.

AMENDED OPINION AND ORDER

The question before the Court is whether a creditor - the decedent's estate of Frances Conigliaro - is or is not foreclosed from attempting to establish (by trial if necessary) an enforceable claim of ownership of an asset that is currently being administered by the bankruptcy estate by virtue of a stipulation between the Trustee and others who at one time claimed an interest in the asset. (The Decedent's Estate's adverse claim has at all times been preserved for argument and decision.)[1] The asset is a $100,000 pre-paid annuity policy which is producing a stream of income. The decedent's estate alleges that half of the $100,000 payment was misappropriated from the decedent's estate by the Debtor as a fiduciary of the decedent.

The decedent's estate is seeking to assert its claim against all of the stream of payments the annuity is producing.

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[1] Consequently, the Decedent's Estate's argument that the stipulated order was in error because it did not join in it, is specious.

The decedent's estate seeks to impose a constructive trust on the asset.[2] If the decedent's estate is foreclosed from attempting to do so, then the decedent's estate is simply a general unsecured creditor of the Debtor. If it is not so foreclosed, then it may attempt to establish that half of that asset is a separate fund, not part of the § 541 estate, available to the decedent's estate alone, to the exclusion of the Debtor's other creditors.

Every document produced for this Court by the decedent's estate asserts that the asset belongs to the Debtor, but asserts that it is available to the decedent's estate in satisfaction of a certain money judgment rendered (in other regards) against the Debtor by the Surrogate Court presiding over the decedent's estate.

The decedent's estate asserts that at no time before the bankruptcy intervened and the Trustee asserted ownership of the asset was it necessary for the decedent's estate to lodge an adverse claim of ownership. Certainly, if one believes that a judgment debtor is solvent, there is no reason to pursue property of the judgment debtor in a manner other than by traditional enforcement of the money judgment, rather than attempting to establish constructive ownership of the asset purportedly owned by the judgment debtor.

The Trustee has asserted various "preclusion" theories by which decedent's estate ought not now to be permitted to attempt to establish constructive ownership of the asset. The briefs and responding briefs have ranged far and wide, but the Court believes that the answer is far simpler.

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[2]See *Howards Appliances,* 874 F.2d 88 (2nd Cir. 1989) as to constructive trusts in bankruptcy, generally. See also *Religa*, 157 B.R. 54 (Bankr. W.D.N.Y. 1993) as to the New York Law of Constructive Trusts.

The origin of the $50,000 at issue was a certain Fleet Bank Account. The Court knows of only one account at Fleet. Both sides of this matter have represented to the Court that a certain decision by the Surrogate rendered on January 5, 2006 did not address the Fleet account, but rather established the monetary basis for the judgment in favor of the decedent's estate against the Debtor.[3]

It is the view of this Court that both parties have misread the Surrogate's January 5, 2006 decision. The Surrogate made the following statement which seems, to this Court, to be dispositive of the matter currently at bar:

> The Petition references various bank accounts and certificates of deposit. However, the proofs at trial focused **primarily** upon three accounts: an M & T Securities Account closed by Dean DiGiulio, a CNB bank account and a CNB Certificate of Deposit closed by J. Anthony DiGiulio. *With regard to the checks written from the Fleet Money Market Account, the closed HSBC accounts and the liquidated M & T Certificate of Deposit, there was no proof submitted which showed that these other accounts were improperly accessed by the respondent.* This opinion, **therefore**, will discuss only the three accounts which were the focus of the trial. [Emphasis added.]

Furthermore, it is not surprising that the decedent's estate did not submit proof that the Fleet account was improperly accessed by the respondent, given that earlier, on September 10, 2004, the decedent's estate's counsel alleged in an affidavit filed with the Surrogate Court that when the Debtor bought the annuity, he funded it in part with a check for $50,000 "drawn on [the decedent's] checking account at Fleet Bank payable to the issuer of the annuity. That affidavit was captioned "Proceeding for an Order Directing Respondent,

[3] The decedent's estate denies that that decision was a money judgment. This Court finds otherwise, in light of a certain transcript of judgment filed in Surrogate's Court, County of Monroe, filed against the Debtor based upon that January 5, 2006 judicial decision.

Presidential Life Insurance Co., to Return an Asset ($50,000) to the Estate of Frances A. Conigliaro." The decedent's estate's effort was premised on the fact that the power of attorney named two attorneys-in-fact, and the argument that both signatures were required in order to draw down the account.

Ten weeks later, the Surrogate rejected this argument completely, and dismissed the estate's "petition" seeking to "return" the $50,000.

It thus seems that by the time the bench trial occurred leading to the January 5, 2006 decision of the Surrogate Court, the decedent's estate had already lost the argument. This was simply reaffirmed when the Surrogate said that "there was no proof submitted which showed that these other accounts [including the Fleet account in question] were improperly accessed by the respondent [the Debtor].

If one views the prayer for "return" of the money to be an effort to establish ownership of the annuity that was purchased with proceeds from the Fleet account, then the Surrogate's judgment, being final, cannot be collaterally attacked. If the decedent's estate is viewed only as having launched an effort to obtain a money judgment with regard to the Fleet account, rather than seeking to establish a constructive trust on the fruits of the proceeds of that account, then the present effort to establish ownership of the fruits of the proceeds of that account is foreclosed by the case of *O'Brien v. City of Syracuse,* 54 N.Y.2d 353 (1991) and its progeny.

This is because the sole basis for the current claim of constructive ownership is the legitimacy of the draw-down from the Fleet account. What the Debtor did or did not do with the money thereafter, and whether the Debtor did or did not later file for relief under the

Bankruptcy Code, neither adds nor detracts from that issue. When squarely presenting that issue to the Surrogate court, the only necessary respondents were DiGiulio and the annuity company. All theories of recovery should have been presented then. The decedent's estate cannot rest in one court solely upon the scope of the power of attorney, and having lost that argument, later argue in a different court, against persons who later acquired interests in that property (specifically the Trustee who represents all creditors of the Debtor *pari passu*), that "Well, we should have argued thievery or trickery or fraud, etc. as well."

Such is the law under *O'Brien*, as this Court understands it.

The Motion for Turnover is denied, as are any other motions premised on an ownership claim asserted by the decedent's estate against the annuity or its proceeds.[4]

All other matters pending in this case will remain on the Court's calendar for September 3, 2008, as previously scheduled, for discussion of further scheduling.

SO ORDERED.

Dated: Buffalo, New York
September 17, 2008

/s/ Michael J. Kaplan

U.S.B.J.

[4]The Decedent's Estate's claim that it and it alone had or has the right to set aside the Maziarz/ZAR transfer is now rejected under the Doctrine of *Moore v. Bay.*