UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

**NOT FOR PUBLICATION**

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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

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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 a particular asset of the bankruptcy estate. 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.

(It is unclear to the Court whether the decedent's estate is seeking to assert its claim against half of the annuity, or only against half of the stream of payments the annuity is producing.)

The decedent's estate seeks to impose a constructive trust on the asset.[1] 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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[1]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.[2]

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,

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[2]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 decedent had not yet passed away and that pursuant to the power of attorney, her signature was required as well as that of the Debtor, 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.

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.

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
August 19, 2008

s/Michael J. Kaplan

U.S.B.J.