

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

LINDA CHRISTO

v.

TONI SILK, EXECUTRIX OF THE ESTATE OF E. ALLEN HOLBROOK, JR.

313-2018-EQ-00407

ORDERS

On January 15, 2019, the Court held a hearing to entertain argument on the Petitioner's, Linda Christo's ("Ms. Christo"), *Objection to Respondent Silk's Oral Motion to Dismiss*, see Index #15, and *Motion to Allow Cross Claims*. See Index #16.¹ Respondent Toni Silk, Executrix of the Estate of E. Allen Holbrook, Jr. ("Ms. Silk"), has filed a *Verified Objection to Linda Christo's Motion to Allow Cross-Claims*, see Index #18, to which Ms. Christo has filed a *Reply*. See Index #23. Marjorie Swenson and Oliver Robling ("Swenson & Robling"), petitioners in a related matter, see Marjorie Swenson & Oliver Robling, as Trustees and Beneficiaries of the Nancy R. Holbrook Exempt Trust v. Toni Silk, Executrix of the Estate of E. Allen Holbrook, Jr. and Linda Christo, No. 313-2018-EQ-00240 (the "Equity Matter")², and creditors of the Estate, submitted both a *Reply to Objection to Motion to Dismiss*, see Index #20, to which Ms.

¹ Ms. Christo filed her pleadings as directed in this Court's Order dated October 31, 2018, see Index #14, where it deferred ruling Ms. Silk's oral motion to dismiss pending an opportunity for Ms. Christo to formally respond. See id. at 18.

² Unless otherwise indicated, all index number references apply to the case at hand, Linda Christo v. Toni Silk, Executrix of the Estate of E. Allen Holbrook, Jr., No. 313-2018-EQ-00407.

Christo has replied, see Index #25, and an *Objection to Linda Christo's Motion to Allow Cross Claims*, see Index #19, to which Ms. Christo has also replied. See Index #24. Attending the hearing were: Attorney Catherine Cosgrove on behalf of Marjorie Swenson and Oliver Robling; Attorney Roy S. McCandless and his client, Ms. Christo; and Attorney Ralph F. Holmes, and his client, Ms. Silk. For the reasons that follow, the *Oral Motion to Dismiss*, see Index #14, is GRANTED; and the *Motion to Allow Cross-Claims*, see Index #16, is DENIED.

In ruling on a motion to dismiss, this Court must determine "whether the [petitioners'] allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, Inc., 148 N.H. 101, 104 (2002) (quotation omitted). In doing so, the Court must "assume the truth of the facts alleged in the [petitioners'] pleadings and construe all reasonable inferences in the light most favorable to [them]." Id. (quotation omitted). "Although the trial court's decision on a motion to dismiss is normally based solely on the allegations in the pleadings, if additional evidence is submitted, without objection, the trial court should consider it when making its ruling." Delaney v. State, 146 N.H. 173, 175 (2001)(quotations omitted); Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 712 (2010).

In this matter, Ms. Christo separately filed her *Cross-Claim* against the Estate on July 5, 2015, along with her *Answer* to Swenson & Robling's *Complaint for Damages* the Equity Matter, see Equity Index ##1 &14, asserting four counts, namely: (1) quantum meruit; (2) breach of contract; (3) promissory estoppel; and (4) equitable estoppel. See Index #1. In her *Answer*, Ms. Silk asserted, inter alia, that Ms. Christo's claims are time barred pursuant to RSA 556:2 and RSA 556:3, since Ms. Christo failed

to serve her with a notice of claim and demand for payment within six months of the grant of estate administration. See Executrix's Answer ¶¶ 64, 69, 78, 87 & Defenses ¶5 (Index #6). At the pretrial conference, counsel for Ms. Silk made an oral motion to dismiss, arguing that since the *Petition for Estate Administration* was granted on October 31, 2017, see Estate of E. Allen Holbrook, No. 313-2017-ET-00487 (Index #1), her claims against the estate, filed on July 5, 2018, see Index #1, are late. In essence, Ms. Silk contends that the *Cross-Claim* is simply a contingent demand for payment that should have been filed in accordance with the six-month period to file claims.

In its Order dated October 31, 2018, this Court agreed, however, since the *Motion to Dismiss* was submitted orally, it deferred dismissal of the *Cross-Claim* pending formal response by Ms. Christo.³ In response, Ms. Christo filed her *Objection to Respondent Silk's Oral Motion to Dismiss*, see Index #15, contending that her *Cross Claim* was defensive in nature and was not late because it did not arise until the *Petition for Damages* was filed. She stated that since Mr. Holbrook had fulfilled his end of the bargain when she was deeded his property, she had no claim against the Estate to file until after Swenson & Robling's *Petition for Damages* in the Equity Matter was filed. She claims that she could not have filed them sooner, and accordingly, her claim should not be dismissed.

Ms. Christo also filed a *Motion to Allow Claims*. She asserts that even if RSA 556:3 acts as a bar, the Court should allow her to pursue the *Cross Claim* pursuant to RSA 556:28 which would allow for an extension of time to file a claim if justice and

³The Court also noted that a court may sua sponte dismiss an action as untimely. See Exeter Hosp. v. Hall, 137 N.H. 397, 400 (1993). It held, however that it is most fair to allow the potentially dismissed party an opportunity to respond and instruct the Court as to the law and facts supporting continued viability of their action, id. at 399-400, and therefore allowed for further briefing.

equity require and there has been no culpable neglect. The Court will address the *Oral Motion to Dismiss and Objection* and the *Motion to Allow Claims* in turn.

I. Dismissal Pursuant to RSA 556:2 and RSA 556:3

Ms. Silk asserts that the *Cross Claim* should be dismissed because Ms. Christo "failed to provide [her] with a notice of claim and demand for payment within six months of the grant of administration as required by RSA 556:2 and RSA 556:3." See Executrix's Answer ¶¶ 64, 69, 78, 87 & Defenses ¶5 (Index #6). RSA 556:1 provides: "[n]o action shall be sustained against an administrator if begun within six months after the original grant of administration, nor unless the demand has been exhibited to the administrator and payment has been demanded." RSA 556:3 directs that no "action shall be sustained unless the demand was exhibited to the administrator within six months after the original grant of administration." RSA 556:2 provides: "[a] notice sent to the administrator or his agent by registered mail, setting forth the nature and amount of the claim and a demand for payment, shall be deemed a sufficient exhibition and demand."

The Court recites the following facts based upon the pleadings and undisputed exhibits⁴ attached in the pleadings submitted in this matter. It also incorporates by reference its factual observations in the Order dated October 31, 2018 to the extent it sets forth the relevant terms of the E. Allen and Nancy Holbrook Family Trust and subsequently created "Survivor Trust" and "Exempt Trust." See Index #14. E. Allen Holbrook died on August 13, 2017. Ms. Silk was appointed Executrix of his estate on

⁴ At the hearing, the Court inquired whether any party objected to the authenticity of certain exhibits, including emails and a copy of a deed, attached to the pleadings referenced in this Order. No party objected. See Delaney v. State, 146 N.H. at 175.

October 31, 2017. As such, pursuant to RSA 556:1-:3, the six-month period for submission of a demand ended on May 1, 2018.

Shortly after her appointment, Ms. Silk endeavored to notify Ms. Christo that the distribution of property she was entitled to pursuant to the terms of the Survivor Trust may be subject to claims against the Estate if the Estate's assets were inadequate to satisfy those claims. On December 7, 2017, Ms. Silk informed Ms. Christo's lawyer that:

I thought I should let you know that because we've been notified by Oliver Robling and Marjorie Swenson. As Co-Trustees of Nancy's Exempt Trust . . . that they intend to file a claim against Allen's Probate and Allen's Trust for what they consider to be a breach of the provisions of Nancy's Trust. . . . We'll keep you . . . advised of developments regarding the claim, and will provide you with the details if, and when, a claim is actually filed. In the meantime, we intend to distribute the real estate to you as planned.

Verified Objection to Linda Christo's Motion to Allow Cross-Claim's Exh. A (Index #18).

Indeed, Ms. Christo and her lawyer were informed of Swenson & Robling's intent to file a creditor claim on at least two occasions in December 2017, see id., and Ms. Christo mused: "Why should I accept a transfer of property if there is a potential of it being taken away later?" Id. Her counsel affirmed that he understood that "if Mr. Holbrook's probate estate is inadequate the real estate will remain subject to (1) claims of creditors . . . " Id. Moreover, counsel further assured Ms. Silk that: "[i]n other words, if Mr. Holbrook's estate doesn't have money enough, Linda will have to pay . . . if she wants to keep the real estate. I believe Linda understands that and she wants the real estate anyway." Id.

The final *text* of the deed included a condition that:

to the extent that the assets in the Probate Estate of E. Allen Holbrook are inadequate to satisfy the following, the premises are conveyed subject to claims of the creditors of E. Allen Holbrook . . . The time limits for filing claims against the Estate of E. Allen Holbrook, and the dates when such claims are barred, are governed by RSA 556. . . .

Swenson & Robling's Reply to Objection to the Executrix's Motion to Dismiss, Exh. A

(Index #20). On February 8, 2018, counsel for Swenson & Robling sent Ms. Silk notice indicating that they believed that assets, possibly equaling \$1,000,000, of the Exempt Trust may have been "improperly transferred" from it by Mr. Holbrook. The letter stated:

Please also consider this to be a notice of claim as against the trustee of the E. Allen Holbrook Trust. Because it appears from our documentation that close to \$1,000,000 may have been improperly removed from the Exempt Trust, and because the Exempt Trust and its trustees believe they have a valid claim to recover these funds from either or both the E. Allen Holbrook Estate or the Survivor's Trust, please confirm that the assets of the Estate and the assets of the Survivor's Trust shall not be depleted in any way and shall otherwise be preserved.

Affidavit of Roy S. McCandless, Esq., In Support of Linda Christo's Objection to

Respondent Silk's Oral Motion to Dismiss and Linda Christo's Motion to Allow Cross

Claims Exh. A (Index #17). On February 21, 2017, Ms. Silk sent a letter, in her capacity as Executrix and Trustee of the Survivor Trust, to the beneficiaries/legatees/devisees of each that she had received "a formal notice of claim against the Estate and Survivor's Trust," and that:

[t]o the extent that a Court may find Allen improperly transferred or distributed funds from the Exempt Trust, the amount determined by the Court to have been improperly transferred or distributed will become a debt payable by Allen's Estate. Under New Hampshire law (RSA 564-B:5-505), if the assets in Allen's Estate are not adequate to

satisfy Allen's debts, then the assets of the Survivor's Trust are subject to claims for those debts. There are nominal assets in Allen's Estate. The assets of the Survivor's Trust are, therefore subject to claims against Allen's Estate.

Id. Exh. B. Ms. Silk also specifically stated that the real property already distributed to Ms. Christo "remains subject to claims pursuant to the provisions of RSA 564-B:5-505."

Id. She also gave notice that she intended to defend against Swenson & Robling's claims, however, if they succeed, distributions to the beneficiaries/legatees/devisees may be adversely affected. Id.

Ms. Christo did not submit a notice of claim to Ms. Silk before May 1, 2018. On April 16, 2018,⁵ Swenson & Robling filed their *Complaint for Damages* in the Equity Matter. See Equity Matter Index #1. However, Ms. Christo did not file her *Cross Claim* against the Estate until July 7, 2018. See Index #1.

It has long been recognized that: "[t]he object of the [non-claim] statute is to bring the claim to the knowledge of the administrator, that he may be enabled to judge whether or not to apply for a decree of insolvency, and also that he may make enquiry into it with a view to furnish himself with the necessary information for its proper adjustment." Little v. Little, 36 N.H. 224, 229 (1858); see, e.g., Saurman v. Liberty, 116 N.H. 73, 76 (1976)(collecting cases)("The purpose of the six-month rule is not to

⁵ The Court observes that at the hearing, Ms. Christo asserted that pursuant to RSA 556:1, because the *Complaint for Damages* was filed before the six months had passed from the appointment of the Executrix, the *Complaint* was rendered a "nullity." However, it has long been established that since RSA 556:1 is designed to protect the administrator, its provisions may be waived by her inaction if the purposes of the statute are not served. See e.g., Saurman, 116 N.H. at 76. In this matter, the administratrix has not endeavored to seek dismissal of the remaining claims in the Equity Matter pursuant to RSA 556, despite a hearing and dismissal on Count IV. She therefore can be held to have waived her objection on the basis that the Equity Matter was filed approximately two weeks early. See id. ("The purpose of the six-month rule is not to deprive creditors of their rights but to allow the administrator a sufficient amount of time to examine the estate, to gather the assets, and to pay just claims and thus be spared from unnecessary suits").

deprive creditors of their rights but to allow the administrator a sufficient amount of time to examine the estate, to gather the assets, and to pay just claims and thus be spared from unnecessary suits"). It also has been long held that because the purpose of the non-claim statutes are to allow the administratrix "to judge in what manner the estate may be settled," Libby v. Hutchinson, 72 N.H. 190, 194 (1908), "[u]nless so presented, contingent claims, even if accruing before the estate is settled, cannot be here prosecuted against the executor" Id.; see, e.g., Cummings v. Farnham, 75 N.H. 135 (1908)(collecting cases).⁶

This matter presents a textbook example of a contingent claim that should have been noticed, and demand made, before expiration of the six-month notice period. It is undisputed that Ms. Christo and/or her counsel knew of the potential claim by Swenson and Robling, and that it would likely impact her ownership of the property deeded to her by the administrator. Not only were there conversations to that effect, and a demonstration of a complete understanding by Ms. Christo and her counsel, language was included in the deed transferred to her that the property was subject to creditor claims. In addition, after notice and demand was made upon Ms. Silk by Swenson & Robling, including the fact that they would seek approximately \$1,000,000 in damages, she promptly informed Ms. Christo that: (1) she had received that notice; (2) if the claim is successful, the assets in the estate would not be adequate to "satisfy Allen's debts;" and accordingly, (3) "[t]he assets of the Survivor's Trust are, therefore subject to claims against Allen's Estate." Accordingly, as of February 21, 2017, Ms. Christo had notice

⁶ Notably, Ms. Christo contends that contingent claims are not subject to the non-claim statute, relying on an earlier decided matter, Judge of Probate v. Lane, 51 N.H. 342, 349 (1871). That case, however, concerned a suit on a bond – hence the probate court as plaintiff – based upon mismanagement by that executor after the start of administration. It was not of the substance of the instant matter, namely, a claim against the administrator premised upon services provided to the testator prior to his death.

that the assets she had derived from the Survivor Trust may be clawed back to the Estate. On that date, she also was aware of key elements of the allegations in her *Cross Claim*, namely, that: (1) she "provided substantial household, domestic and nursing services" to the testator; *Cross-Claim* ¶¶ 59, 71, 80; see id. ¶67; and (2) certain promises were made by Allen, and/or Nancy, to reimburse or take care of her because she provided those services. See id. ¶¶60-62; 67, 72-76, 81-85. Although whether Swenson & Robling's claims would be pleaded to the court, or even successful, was not, and is not clear, she was made aware, in no uncertain terms, that retention of the full value of the real estate transferred, and any other cash transfers made to her by Allen before his death,⁷ may be "subject to claims against Allen's Estate." *Verified Objection to Linda Christo's Motion to Allow Cross-Claims* Exh. A (Index #18). Accordingly, she had an obligation to make a timely exhibition and demand of her contingent claims before the expiration of the six-month period.

At the hearing, counsel for Ms. Christo, relying on Lunderville v. Morse, 112 N.H. 6, 8-9 (1972)("the statute is to be applied with reference to the substance and realities of the situation, and in determining whether the purpose of the statute has been achieved, questions of form and technical exactness are of little consequence." (quotations omitted)), contended that dismissal of her claims pursuant to RSA 556 would be elevating form over substance and ignore the "realities of the situation." However, courts must always endeavor to give recognition to the purpose of the statute, namely allowing an executrix/administratrix, the opportunity to conduct "an orderly and expeditious adjustment and settlement" of claims. Here, the reality of the situation was

⁷ Ms. Christo alleges in her *Cross-Claim* that on June 12, 2017, approximately two-months before his death, ninety-eight-year-old Allen transferred \$100,000 to her savings account, and made her an account holder on his checking account. See id. ¶56.

that Ms. Christo was in possession of all the information necessary to submit her exhibition and demand, including: (1) an understanding of the services she allegedly provided in exchange for payment from Allen or his estate; (2) notations on her deed of potential claims against that real estate; (3) possession of Swenson & Robiling's demand, and (4) knowledge of the potential claw back of assets given to her. She simply failed to follow through on her duty as a contingent creditor to submit an exhibition and demand to Ms. Silk so that she could expeditiously plan resolution of the estate. Accordingly, the Court determines that based upon the facts alleged in her *Cross Claim*, and the documentation submitted in the record and discussed by all parties at the hearing, Ms. Christo's claims, as a matter of law, were late and barred by the provisions of RSA 556:1-3. Cf. Beane, 160 N.H. at 711-12 (court properly dismissed matter after engaging in a legal analysis based on the facts asserted by the plaintiff and undisputed documents in the record).

II. Extension of Time Pursuant to RSA 556:28

In her *Motion to Allow Cross Claims*, Ms. Christo asserts that if the notice provisions of RSA 556:1-3 act to bar the *Cross Claim*, the Court may nonetheless, pursuant to RSA 556:28, allow them to continue. See id. (Index #16) RSA 556:28 provides:

Whenever any person has a claim against the estate of a deceased person, which has not been prosecuted within the time limited by law, such person may apply to the court having subject matter jurisdiction over the nature of the claim, by petition setting forth all the facts; and if the court shall be of the opinion that justice and equity require it, and that the claimant is not chargeable with culpable neglect in not bringing or prosecuting his or her suit or claim within the time limited by law, it may extend the time for filing and prosecuting the claim to a date certain; however, no such

extension or judgment entered upon the claim shall affect any payments or compromises made before the beginning of the proceedings.

Ms. Christo contends that the failure to file a notice of claim is not the result of culpable neglect, and that justice and equity require this Court to grant an extension. The Court disagrees.

RSA 556:28 gives a court discretion to allow a claim despite the party's failure to comply with the other statutory requirements of RSA 556. See, e.g., In re Estate of Bennett, 149 N.H. 496, 498 (2003). By its terms, the statute creates an equitable remedy in the absence of "culpable neglect" and if "justice and equity require" the extension. Id. The Supreme Court has

long defined culpable neglect as follows:[i]t is less than gross carelessness, but more than the failure to use ordinary care, it is a culpable want of watchfulness and diligence, the unreasonable inattention and inactivity of 'creditors who slumber on their rights.' It exists if no good reason, according to the standards of ordinary conduct, for the dormancy of the claim is found.

Cass v. Ray, 131 N.H. 550 (1989)(quotations and brackets omitted). The term "culpable neglect" therefore "convey[s] the idea of neglect for which the claimant was 'to blame'; that is, the neglect which exists where the loss can fairly be ascribed to his own carelessness, improvidence or folly." In re Will and Estate of Bourassa, 159 N.H. 344, 348-49 (2009). The petitioner-creditor has the burden of demonstrating lack of culpable neglect. See, e.g. id. at 348. "In determining what justice and equity require, the . . . court should take into account both that the right to recover for personal injuries is an important substantive right, and that the purpose underlying relevant sections of RSA

chapter 556 is to secure the speedy settlement of estates." Stewart v. Farrel, 131 N.H. 458, 461-62 (1989)(quotations, ellipses and citations omitted).

Finally, probate courts are instructed not to find culpable neglect where:

There was no evidence of a mistake of law or fact or some circumstance beyond the plaintiff's or her counsel's control of the kind we usually understand to provide good reason for the dormancy of a claim. If there is no good reason, according to the standards of ordinary conduct, for the dormancy of the claim, it must be disallowed, although otherwise 'justice and equity' sustain it.

Id. 159 N.H. at 349–50 (quotations and citations omitted); see Stewart, 131 N.H. at 461 (plaintiff must set forth sufficient facts sufficient to demonstrate "both that 'justice and equity' require an extension and that delay was not the result of the plaintiff's own 'culpable neglect'").

The Court determines, on the facts as set forth supra, Ms. Christo has not demonstrated that the failure to serve Ms. Silk with a notice of claim and demand for payment within six months of the grant of administration was not the result of culpable neglect. As observed supra, she was made aware, in detail and on multiple occasions, of all facts necessary to discern that she had a contingent claim against the estate. There was no mistake of fact or law, or circumstance beyond her control, not to have complied with RSA 556. To put it another way, it is apparent that Ms. Christo, despite having all requisite knowledge to understand that she possessed a contingent claim against the estate, slumbered on her rights. Ms. Silk made it clear multiple times before the end of the six-month period that she may have to claw back assets distributed to

Ms. Christo if Swenson and Robling's claims against the Estate were realized.⁸ Having so determined, the Court need not reach the issue of whether justice and equity requires an extension pursuant to RSA 556:28. See *In re Will and Estate of Bourassa*, 159 N.H. at 350.

Accordingly, the Court DENIES the *Motion to Allow Cross-Claims*. See Index #16.

III. Mediation

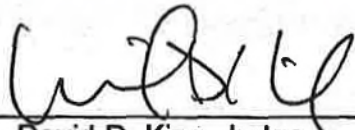
In her pleadings and at the hearing, Ms. Silk again noted that Allen's estate will likely be insolvent given the claims against it. All parties indicated a willingness to engage in court-sponsored mediation. Accordingly, the Court ORDERS the parties to schedule mediation and attempt a non-judicial resolution of their disputes as soon as practicable. If the parties elect to use a mediator from the Trust Docket roster, they shall contact Denise Pearl, Court Assistant Specially Assigned to the Trust Docket, to make the necessary arrangements.

IV. Scheduling

Finally, the parties are also DIRECTED to confer and submit a proposed scheduling order for resolution of the claims remaining in the Equity Matter, including the timeframe for mediation as ordered above, within **fourteen (14) days** of the date of this order. The Court will then issue further orders as necessary.

SO ORDERED

Dated: 1/29/2019



David D. King, Judge

⁸ It is of no practical moment that Ms. Silk indicated that she would defend against those claims, as Ms. Silk also notified Ms. Christo that in the event not successful, the assets may need to be returned to the Estate.