SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of	:	
THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), Petitioner,	:	Index No.
for an order, pursuant to CPLR § 7701, seeking judicial instructions and approval of a proposed settlement.	:	

EXHIBIT J TO THE AFFIRMATION OF MATTHEW D. INGBER

APPENDIX OF UNREPORTED CASES CITED IN THE BANK OF NEW YORK MELLON'S MEMORANDUM OF LAW IN SUPPORT OF ITS VERIFIED PETITION SEEKING JUDICIAL INSTRUCTIONS AND APPROVAL OF A PROPOSED SETTLEMENT

MAYER BROWN LLP
1675 BROADWAY
NEW YORK, NEW YORK 10019
(212) 506-2500

Attorneys for Petitioner The Bank of New York Mellon

Index of Unreported Cases

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1.	*Dlugaski v. Port Auth. of N.Y. and N.J.*, No. 307484/09, 2010 WL 2610649 (N.Y. Sup. Ct. Bronx County June 30, 2010)
2.	*In re Application of IBJ Schroeder Bank & Trust Co.*, 101530/1998 (Sup. Ct. N.Y County Aug. 16, 2000)
3.	*In re Bankers Trustee Co.*, Index No. 114077/1998 (Sup. Ct., N.Y. County Mar. 8, 1999)
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5.	*In re Judicial Settlement of The First Intermediate Accounts of Proceedings of Central Hanover Bank and Trust Co.,* 2008 N.Y. Slip Op 50342U (Sup. Ct. N.Y. County Jan 3, 2008)
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7.	*Mayo v. GMAC Mortg.*, No. 08-00568-CV-W-DGK, 2011U.S. Dist. LEXIS 3349 (W.D. Mo. Jan. 13, 2011)
8.	*Sterling Federal Bank, F.S.B. v. DLJ Mortg. Capital, Inc.*, No. 09 C 6904, 2010 WL 3324705 (N.D. Ill. Aug. 20, 2010)
9.	*Steves & Sons, Inc. v Pottish*, 2011 NY Slip Op 50864U (Sup. Ct. Suffolk County May 11, 2011)

TAB 1

Slip Copy, 28 Misc.3d 1203(A), 2010 WL 2610649 (N.Y.Sup.), 2010 N.Y. Slip Op. 51133(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2010 WL 2610649 (N.Y.Sup.))

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, Bronx County, New York.
Kenneth DLUGASKI, Plaintiff,
v.
The PORT AUTHORITY OF NEW YORK AND NEW JERSEY, 1 World Trade Center LLC and Tishman Construction Corporation of New York, Defendants.

No. 307484/09.
June 30, 2010.

Segal McCambridge, Singer & Mahoney, Ltd., by Simon Lee, New York, Attorney for Defendant The Port Authority of New York and New Jersey, 1 World Trade Center LLC, Tishman Construction Corporation of New York.

Sacks and Sacks LLP, by Devon Reiff, Esq., Attorney for Plaintiff Kenneth Dlugaski.

KENNETH L. THOMPSON, J., JR.

***1** Defendants' THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, 1 WORLD TRADE CENTER LLC and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK ("The Port Authority") motion for an Order pursuant to CPLR § 510(3) changing the venue of this action from Bronx County to New York County is denied.

Plaintiff claims that he sustained injuries "at the premises under construction at the Freedom Towers located at the World Trade Center, Borough of Manhattan, City and State of New York," (*Ver. Bill. Part.* at ¶ 6), when "he was struck by a bundle of rebar that was improperly hoisted and improperly secured" (*id.* at ¶ 5). Plaintiff was a Richmond County resident when this action was commenced, however, he placed venue in the Bronx based on the Port Authority's residence. (*NOC* at ¶ 1; *see also* S & C.) The Port Authority is now seeking to change the venue of this action "upon the grounds that the ends of justice will be promoted by having the place of trial in New York County." (*Not. Mot.* at ¶ (a)). Plaintiff opposes the motion on the grounds that McKinney's Unconsolidated Laws of New York § 7106 entitles him to maintain venue here in Bronx County.

The Port Authority is adamant that its "motion is not based on the convenience of material witness,' but upon a lack of nexus with the Bronx." (*Def. Reply* at ¶ 20.) Therefore, it supposes, it is not required to "ma[k]e a showing of inconvenience of witnesses, including but not limited to the identity of witnesses, the materiality of anticipated testimony, and how they would be inconvenienced." (*Id.* at ¶ 19.) Rather, the Port Authority's stance that the "ends of justice would be promoted" by a change to New York County relies on two basic arguments. This cause of action should be tried in New York County where it arose since it is a transitory action. (*Def. Aff. Supp.* at ¶ 15.) And Bronx County "bears absolutely no relationship" to the alleged accident since none of the parties resided there when the action was commenced. (*Id.* at ¶ 16.) The Port Authority alludes to four specific facts in support of its arguments, that: 1) Plaintiff is a Richmond County resident; 2) the cause of action arose in New York County; 3) none of the Defendants maintain a principal place of business in the Bronx; and 3) none of Plaintiff's medical providers are located in the Bronx (*id.* at ¶¶ 13 & 24).

The Court finds that both of Defendants' contentions are insufficient to justify a discretionary change of venue based on the facts as provided. First, the Port Authority may not rely on the "ends of justice" component of § 510(3), without addressing the "convenience of material witnesses." Second, the Port Authority—for all intents and purposes—is a resident of Bronx County as per McKinney's Unconsolidated Laws of New York § 7106.

Applicable Venue Statutes

"Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff." CPLR § 503(a). "Generally. The place of trial of an action by or against a public authority constituted under the laws of the state shall be in the county in which the authority has its principal office or where it has facilities involved in

the action." CPLR § 505. In actions regarding "consent to liability for tortious acts," "venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings." McKinney's Uncons Laws of N.Y. § 7106. "The court, upon motion, may change the place of trial of an action where: ... the convenience of material witnesses and the ends of justice will be promoted by the change." CPLR § 510(3).

***2** Plaintiff is entitled to venue this action in Bronx County based on McKinney's Uncons Laws of N.Y. § 7106, which overrides CPLR § 505 in this instance. *See Bollman v. Port Auth.*, 17 AD3d 182–83 (holding that "[a] special statute which is in conflict with a general act covering the same subject matter controls the case and repeals the general statute insofar as the special act applies"). And since Defendants are seeking discretionary relief under CPLR § 510(3), the fifteen-day time limit enunciated in CPLR 511 is inapplicable. *See Tesfaye v. Swett*, 227 A.D.2d 150.

The issue that arises is whether the "ends of justice" will be promoted by a move to New York County based on the facts posited by Defendants. Although this term lacks an "ordinary and unambiguous meaning," *Butcher's Union Local No. 498 v. SDC Invest., Inc.*, 788 F.2d 535, 538–39, and "cannot be finely particularized," *Sanders v. U.S.*, 373 U.S. 1, 17, the word "justice" means "[t]he fair and proper administration of laws," Black's Law Dictionary (7th ed 1999), at 869. Next, "judicial discretion," which the Port Authority is asking the Court to exercise in consideration of its application, is "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law." Black's Law Dictionary (7th ed.1999), at 479. Conversely, "[d]iscretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the court." *People v. S.*, 87 Misc.2d 951, 955.

Finally, there is a constitutional obligation that courts determine the expressed will of the Legislature, and such legislative intent must be first sought in the language of the statute under consideration. Where the terms of the statute are plain and unambiguous, the statute must be construed in accordance with its expressed terms, and should be construed so as to effectuate the plain meaning of the words used. In construing a given statutory enactment, a court should not by construction extend such statute beyond its express terms or the reasonable implications of its language.

Drelich v. Kenlyn Homes, Inc., 86 A.D.2d 648, 649.

The Court realizes that the venue determination in this action requires a balancing of interests—Plaintiff's entitlement to have this action heard in Bronx County versus Defendants' right to have it moved to New York County—and that a just outcome relies on a fair and reasonable interpretation of applicable legal statutes, principles and precedents. The Court finds that based on its analysis of the above, the Port Authority has failed to show that it would be unfair or inconvenient to maintain the venue of this action in the Bronx. Furthermore, the Court finds that absent this showing, Plaintiff is entitled to maintain venue of this action in the Bronx.

convenience of material witnesses

***3** As stated earlier, § 510(3) mandates that change of venue is warranted where "the convenience of material witnesses *and* the ends of justice will be promoted by the change." (emphasis added). Given that this Court's discretion must be guided by the plain meaning of the statute at issue, it cannot ignore the conjunctive contained therein. Simply stated, the Court cannot examine what would promote the ends of justice without also considering the convenience of material witnesses in its equation. Indeed, although "in general, the venue of a transitory action lies in the county where the cause of action arose, that rule is predicated upon the concept of convenience for witnesses who are to be present at trial." *Iassinski v. Vassiliev*, 220 A.D.2d 372–73; *see also Leopold v. Goldstein*, 283 A.D.2d 319, 320; *Chimarios v. Duhl*, 152 A.D.2d 508, 509; *Boriskin v. Long Island Jewish–Hillside Medical Ctr, South Shore Div.*, 85 A.D.2d 523.

The Court finds that the underlying basis of the statute is that a fair trial is contingent on each party being able to present witnesses in support of its case. And by placing venue in a county that would inconvenience such witnesses would not promote the "fair and proper administration of laws." For example, the court in *Henry v. Cent. Hudson Gas & Elec. Corp.*, 57

AD3d 452, changed venue because the police officers and EMT workers who responded to the scene and prepared reports detailing their response averred that they were willing to testify but would be inconvenienced "by having to take a day off of work from their public service jobs to travel to Bronx County to testify." The court in *Austin v. DaimlerChrysler Corp.*, 294 A.D.2d 182, changed venue "to Suffolk County, where the liability witnesses either work or live, many of whom, namely, police, fire and ambulance personnel who responded to the accident, have submitted affidavits stating that they would be inconvenienced by having to testify in New York County." The court in *Groos v. New York Tel.*, 216 A.D.2d 103, changed venue "to Westchester County, where the cause of action arose, the majority of material witnesses work or reside, the police records are located, and plaintiff received most of his medical treatment."

This approach is consistent with how the First Department has handled the instant issue of retaining venue of actions against the Port Authority in the Bronx. *Rodriguez v. Port Auth. of N.Y. & N.J.*, 293 A.D.2d 325, 326 (finding that "[w]ithout this showing of inconvenience, the IAS court improvidently exercised its discretion in granting a change of venue that had been properly laid by statute"); *Bollman v. Port Auth.*, 17 AD3d 182, 183 (finding that "[d]efendants failed to identify proposed witnesses who were located in Queens County, to detail the nature and materiality of any anticipated testimony, or to describe how the parties and the witnesses would be inconvenienced by placing venue in the Bronx").

***4** Consequently, the Port Authority's failure to address the "convenience of material witnesses" prong of CPLR § 510(3) alone warrants the denial of its application. *See Chimarios*, 152 A.D.2d at 509 (holding that "the movant has the burden of showing that the convenience of material witnesses would be better served by such a change"); *see also Leopold*, 283 A.D.2d at 320 (holding that "the proponent of a change in venue in a transitory action must comply with CPLR § 510(3) and is required to provide: (1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case") (citations omitted).

As above-stated, the Port Authority labors under the misunderstanding that it may seek a change in venue without showing inconvenience, thus, it made no attempt to do so. The fact that Plaintiff is a Richmond County resident, the cause of action arose in New York County, none of the Defendants maintain a principal place of business in the Bronx, and none of Plaintiff's medical providers are located in the Bronx, does not speak to any witness—material or otherwise, regarding liability or damages—being inconvenienced by having to testify at a Bronx trial. Thus, the Court finds that the "ends of justice" would no more be promoted by moving the trial to New York County than would be by maintaining the *status quo.*

§ 7106

Despite the Honorable Judge Nelson S. Roman's finding that McKinney's Uncons. Laws of N.Y. § 7106 allows the Port Authority to be sued in the Bronx without conferring Bronx residency status on that entity, *see Tarpey v. Port Auth. of N.Y. & N.J.*, 7 Misc.3d 1006A, *3, other learned Bronx Jurists have found otherwise, *see, e.g., Caamano v. Port Auth.*, 188 Misc.2d 321, *6 (finding that "the Port Authority has a place of residence in Bronx County pursuant to McKinney's Unconsolidated Laws of N.Y. § 7106"); *Espada v. Port Auth. of N.Y. & N.J.*, 22 Misc.3d 1136A, *3, (finding that "[p]ursuant to Unconsolidated Laws § 7106, the Port Authority is *de jure* deemed to be a resident of each county in New York City and therefore qualifies as a Bronx County resident") (emphasis in opinion); *O'Connor v. Port Auth. of N.Y. & N.J.*, 12 Misc.3d 1181A, *3 (citing to *Caamano*).[FN1] Regardless of the legal fiction [FN2] created by § 7106, that statute "deems" that the Port Authority is—in actuality—a Bronx resident for the purposes of suits such as this. So, contrary to the Port Authority's understanding of the statute, it is, in fact, a Bronx resident. Thus, it cannot reasonably sustain the attitude that Bronx County "bears absolutely no relationship" to the alleged accident.

FN1. In siding with those Courts that have deemed the Port Authority to be a Bronx resident pursuant to McKinney's Uncons. Laws of N.Y. § 7106, this Court is not intimating that either the Honorable Judge Roman's or the Honorable Judge Salman's con-

clusions were erroneous, *see* *McDaniel v. Port Auth.*, 202 A.D.2d 222. Rather, this Court simply reached a different result based upon the circumstances of the situation presented and its own evaluation of "well-regulated equity principles and precedents." *Dexter v. Beard,* 1889 N.Y. Misc. LEXIS 913, * *18.

FN2. *See* Black's Law Dictionary (7th ed 1999), at 425 (stating that " '[d]eem' is a useful word when it is necessary to establish a legal fiction either positively by deeming' something to be something it is not or negatively by deeming' something not to be something which it is").

***5** The foregoing shall constitute the decision and order of this Court.

N.Y.Sup.,2010.
Dlugaski v. Port Authority of New York and New Jersey
Slip Copy, 28 Misc.3d 1203(A), 2010 WL 2610649 (N.Y.Sup.), 2010 N.Y. Slip Op. 51133(U)

END OF DOCUMENT

TAB 2

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Beatrice Shainswit PART 10
Justice

In Re IBJ Schroder Bank & Trust

INDEX NO. 101530/98

MOTION DATE

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

on remand, pursuant to the order of the Appellate division, First department dated April 20, 2000

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

OCT 03 2000

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED:

Dated: 8/16/00

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

CDISP

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 10

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In the Matter of the Application of

Index No. 101530/98

IBJ SCHRODER BANK & TRUST COMPANY (not in its individual capacity but in its capacity as Trustee under a Trust Agreement dated as of December 21, 1985 among Resources Satellite Corp., J. Henry Schroder Bank & Trust Company and the Beneficiaries thereunder),
Petitioner,

for an order, pursuant to CPLR § 7701, for a Construction of an Indenture and Approval of a Settlement.

----------X

SHAINSWIT, J.:

In this special proceeding, brought pursuant to CPLR Article 77, petitioner-trustee seeks a declaratory judgment concerning the construction of an Investor Trust Agreement, together with approval of the trustee's proposed settlement of another action presently pending in this Court, involving assets of the Trust, entitled IBJ Schroder Bank & Trust Co. v GE Capital Spacenet Services, Inc., Index No. 601299/96 (the "Spacenet" action).

The Trust was established in 1985 to facilitate investments by more than 400 beneficiaries in a project involving the launching and operation of a communications satellite during the years 1985 through 1994. The Trust involved a complex series of financial transactions involving the development and placement in space of the communications satellite.

The Spacenet action involves a certain master lease relating to the lease of 24 satellite transponders carried on a satellite which was launched into orbit in 1985.

The satellite earned money for the Trust through receipt of sums from television and radio broadcasters for the use of electronic signals transmitted for television and radio broadcasting by the satellite's "transponders." A transponder automatically transmits a broadcasting signal upon reception of such a signal from another transmitter.

Because adequate supply of fuel was crucial to the operation of the satellite, the trustee and the satellite owner executed the Agreement Regarding Fuel ("Fuel Agreement"), whereby the satellite owner agreed to make certain stipulated fuel shortfall payments, entitled "Stipulated Loss Value" payments, in the event of a fuel shortage. It is alleged that such a fuel shortage occurred, thereby triggering the trustee's rights to demand payment from the satellite owner under the terms of the Fuel Agreement. Accordingly, in the Spacenet action, the trustee seeks to recover from the satellite owner the sum of $40,785,455, representing a "Stipulated Loss Value" payment set forth for in the Fuel Agreement.

The satellite owner served its answer in the Spacenet action, denying all liability and pleading defenses and counterclaims, including, among other things, that: (a) the provision in the Fuel Agreement as to Stipulated Loss Value was an unenforceable penalty under New York law; (b) the satellite's failure resulted from a catastrophic event or mechanical failure and not from a lack of fuel; and (c) the satellite in fact had sufficient fuel on the applicable date.

In September 1997, the trustee and the defendants in the Spacenet litigation conditionally agreed to a proposed settlement which provides for the satellite owner to pay $8.5 million, of which $6.97 million would be paid to the Trust.

The trustee thereupon commenced this action by "Verified Petition For Construction of Trust and Approval of Proposed Settlement," seeking, among other things: (a) a declaration that it had the authority to commence the Spacenet action; (b) a declaration that it had the authority to settle the Spacenet action; and (c) judicial approval of the proposed settlement of the Spacenet action. 186 trust beneficiaries, jointly represented by one law firm, have submitted opposition to the trustee's application for a declaratory judgment and approval of the proposed settlement.

The trustee predicates his commencement of the Spacenet action, vis-a-vis the beneficiaries of the Trust, upon section 5.02 of the Investor Trust Agreement. That section provides that, in the event of an event of a default under the master lease:

> the Trustee shall give prompt written notice of such event of default to the Lessee, the Grantor and the Beneficiaries by certified mail, postage prepaid. In the event that such event of default has not been cured within 30 days after mailing of such notice, the Trustee shall take such action or shall refrain from taking such action, not inconsistent with the provisions of the Agreements, with respect to such event of default as the Trustee shall be directed in writing by all of the Beneficiaries, or, if no such direction has been received from all of the Beneficiaries within 30 days after the mailing of such notice to the Beneficiaries, the Trustee shall, in its sole discretion ... take such action as shall be necessary to terminate the Master Lease, to obtain the benefits of the Master Collateral Assignment Agreement and to cause the Lessee thereunder to perform all of its obligations upon such termination.

(emphasis supplied).

Prior to commencing the Spacenet action, the trustee sent the requisite notice under Section 5.02 of the Investor Trust Agreement to the proper parties, including the beneficiaries, and did not, in return, receive any "directions" from the beneficiaries.

By decision and judgment dated October 21, 1998, this Court held that the Trust Agreement did not confer upon the trustee authority to settle the action in question.[1] Having decided that such authority to settle the Spacenet action was lacking, the Court never reached the trustee's further request for judicial approval of the proposed settlement. The trustee appealed from the October 21, 1998 decision and judgment.

The Appellate Division reversed (__ AD2d __ , 706 NYS2d 114 [First Dept 2000]). The Appellate Division held that the trustee was, in fact, vested with the authority to settle the Spacenet action, stating that:

> It is settled that the duties and powers of a trustee are defined by the terms of the trust agreement and are tempered only by the fiduciary obligation of loyalty to the beneficiaries (see, United States Trust Co. of N. Y. v First Nat. City Bank, 57 AD2d 285, 295-296 affd 45 NY2d 869; Restatement [Second] of Trusts § 186, comments a, d). In this matter, the same provision of the trust agreement which, the parties do not dispute, gave the trustee the power to commence the underlying action, also vests the trustee with the power to "take such action as shall be necessary" with respect to the subject matter of the underlying action. We now find that this provision includes the power to settle that action. We take no position on whether the settlement agreement, in its present form, should be approved and remand the matter to the IAS court to consider all relevant factors in determining whether such approval is warranted.

(Id.).

Thus, this matter is now before this Court on remand to determine

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[1] On a motion seeking, inter alia, reargument and clarification of the October 21, 1998 decision and judgment, this Court held that the trustee had the authority, pursuant to section 5.02 of the Investor Trust Agreement, to "take such action" as might be necessary under the circumstances, including commencing the Spacenet action (Decision and Order dated April 12, 1999).

whether or not approval of the proposed settlement is warranted.

As set forth in the Petition, the trustee maintains that the proposed settlement of the Spacenet action is reasonable and prudent, and the best way to conserve and protect the Trust's assets. In support, the trustee argues that: (a) there is a serious risk that the Spacenet defendants may prevail on one or more of the defenses asserted by them in the Spacenet action, thereby precluding any recovery by the trustee in the Spacenet action; and (b) prosecution of the Spacenet action would be very costly and time consuming, because such cases are extremely expert-intensive and technically complex.

The opposition offered by the 186 trust beneficiaries goes primarily to their belief that the settlement amount is too low. They claim that the proposed settlement is unreasonable and contrary to their best interests, arguing that: (a) the plain terms of the Fuel Agreement require payment of the "Stipulated Loss Value" of approximately $40 million (now over $60 million with interest); (b) the proposed settlement would substantially compromise that amount to $8.5 million; and (c) the trustee has not in any way tested any of the defenses raised in the Spacenet litigation, but rather agreed to that substantial compromise despite having failed to take any discovery or to file any dispositive motions in the Spacenet litigation.

Since the objecting beneficiaries have not submitted any evidence to show that the trustee's actions may have been based on some ulterior motive or that the trustee is somehow itself interested in the transaction other than in its fiduciary capacity, the trustee submits that the dispute comes down to whose view as to the

wisdom of the proposed settlement should prevail - - that of the trustee or that of the objecting beneficiaries.

Here, the trustee is the entity to whom the Investor Trust Agreement gives sole power to "take such action as shall be necessary" with respect to the subject matter of the underlying action. While there is some question as to whether the applicable standard of review here is the business judgment rule or the prudent man standard, the conclusion is the same under either standard - - the trustee's decision to compromise the Spacenet action is within the scope of the trustee's powers, is reasonable and prudent, and is entitled to judicial deference. Thus, in view of the trustee's showing of the reasonableness of the proposed settlement herein, and in the absence of any evidence tending to show a breach by the trustee of its fiduciary duties, the trustee's view must prevail. The Court will not invalidate the proposed settlement merely because certain beneficiaries believe a greater recovery might be obtained if the Spacenet action is submitted to an expensive and unpredictable litigation.

CONCLUSION

Accordingly, on remand, the Court holds that approval of the proposed settlement of the Spacenet action is warranted, and grants the trustee's motion to that extent. Settle order/judgment.

Dated: August 16, 2000

ENTER:

J.S.C.

TAB 3

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. IRA GAMMERMAN Justice PART 27

Bankers Trustee Company

- v -

X

INDEX NO. 114077/98

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION

FILED

MAR 22 1999

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: MAR 8 1999

IRA GAMMERMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

(3974)

[redacted]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27
----------X

In the Matter of the Application of

BANKERS TRUSTEE COMPANY LIMITED

(not in its individual capacity but in its capacity as Indenture Trustee under a Trust Indenture dated as of December 29, 1993, as supplemented by a First Supplemental Indenture, dated as of December 10, 1996, among Fifth Mexican acceptance Corporation, S.A., as Issuer, Grupo Sidek, S.A. de C.V. and Grupo Situr, S.A. de C.V., as Guarantors, Bankers Trustee Company Limited, as Trustee, Bankers Trust Company, London Branch, as principal Paying Agent, and Bankers Trust Company as Registrar),

Index No. 114077/98

P.C. No. 13974

Petitioner,

for an order, pursuant to CPLR Section 7701, for Judicial Instructions.

----------X

GAMMERMAN, J.:

Petitioner Bankers Trustee Company Limited ("BT") commenced this proceeding seeking judicial instructions with respect to its service as Indenture Trustee under a Trust Indenture dated December 29, 1993, as supplemented by a First Supplemental Indenture, dated December 10, 1996. Fifth Mexican Acceptance Corporation ("5MAC") is named as issuer, Grupo Sidek, S.A. de C.V. ("Sidek") and Grupo Situr, S.A. de C.V. ("Situr") as guarantors, BT as trustee, Bankers Trust Company, London Branch as principal paying agent, and Bankers Trust Company is named as registrar.

[redacted]

Notes $75,000,000 (the "5MAC Notes" totaling) were issued. Sixty million dollars of the total are 8% Class A Guaranteed Securitized Notes due 1998 ("5MAC Class A Notes"). Fifteen million dollars are 9% Securitized Subordinated Notes due 1998 ("5MAC Class B Notes"). Sidek and the Guarantors have been in default under the Notes and guaranties since mid-1996.

In May 1997, the Majority shareholders of 5MAC, BEA Associates ("BEA"), issued a "Direction to the Trustee by a Holder Holding in Excess of the Majority of the Outstanding Principal Aggregate Amount of Class A Notes of Fifth Mexican Acceptance Corporation, S.A." (the "Direction"). The Direction irrevocably directed BT to sell some of the collateral, for $2,260,000, deposit the proceeds in an interest bearing escrow account, and pay the "holders of Class A Notes tendering their Class A Notes pursuant to an offer to purchase up to $4,520,000 aggregate principal amount of Class A Notes for a cash payment equal to 50% of the outstanding principal amount of the Class A Notes tendered." If the offer were not consummated, payment of the sale proceeds were to be in accordance with Paragraph 8 of the Direction. Paragraph 8 provides that if the offer was not consummated by September 15, 1997, "the Sale Proceeds shall remain in the escrow account to be applied exclusively for the redemption of Class A notes on terms and conditions substantially identical to the terms and conditions of the Offer."

[redacted]

Approximately a year later, BEA, together with Smith Management LLC ("Smith Management"), another holder of 5MAC Class A Notes, issued what is titled "Direction Letter Regarding the Allegro/Solitaire Proceeds" (the "Letter"). The Letter purports to direct BT to dispose of the $2,260,000 received as proceeds of the sale of collateral (the "Allegro/Solitaire Proceeds"), in accordance with section 6.08 of the Indenture. That section provides for payment of 100% of the outstanding principal. The Letter makes no mention of the Direction, and authorizes BT to file any necessary pleadings to obtain a decree that the proceeds are available in accordance with section 6.08.

This proceeding ensued, in which BT seeks instruction as to the proper disposition of the Allegro/Solitaire proceeds. BT contends that since the exchange offer was never consummated, the funds should be disposed of in accordance with section 6.08 of the Indenture. Smith Management and BEA also contend that section 6.08 should govern, and maintain that BEA was permitted to issue new directions without the consent of Sidek or Situr because they are in default, and that the Letter now controls.

Neither the majority shareholders nor BT address the fact that the Direction explicitly states that it is irrevocable, and provides for disposition of the funds in the event that the exchange offer were not consummated. They also have not offered any basis to avoid the clear, unambiguous terms of the Direction.

[redacted]

BEA and Smith Management contend that, a year after the Direction, Sidek and Situr made a different exchange offer, which demonstrates that they abandoned any intent to proceed with the exchange offer in the Direction, and commenced a different transaction which irrevocably altered the rights of the parties. BEA and Smith failed to provide any evidence to support this contention. Further, 5MAC, Sidek and Situr presented evidence that the subsequent transaction not only did not demonstrate an intent to abandon the prior understanding, but assumed that the Allegro/Solitaire Proceeds would be distributed in accordance with the Direction. Thus, this argument, too, is unavailing. Accordingly, BT is to distribute the proceeds in accordance with paragraph 8 of the Direction.

BT contends that it is entitled to obtain reimbursement for its fees and expenses as provided in the Indenture. BEA and Smith argue that BT is not entitled to charge the proceeds for fees and expenses, other than those incurred in making this motion, because BEA and Smith have a lawsuit pending against BT for damages arising out of BT's alleged failure to perform its duties under the Indenture. BEA and Smith also maintain that BT should not be allowed to charge the proceeds for any costs incurred in defense of the lawsuit.

The fact that BEA and Smith have commenced a lawsuit against BT does not mean that BT cannot recover it fees and expenses to which it would otherwise be entitled. However, since BT is a

foreign entity, the fees should be placed in escrow, in an American bank to be agreed upon by the parties, pending the outcome of that lawsuit.

Accordingly, the petition is granted to the extent that Bankers Trustee Company Limited is directed to dispose of the Allegro/Solitaire Proceeds, as provided in paragraph 8 of the May 1997 Direction to the Trustee by a Holder Holding in Excess of the Majority of the Outstanding Aggregate Principal Amount of Class A Notes of Fifth Mexican Acceptance Corporation, S.A. In addition, any fees or expenses to be paid to Bankers Trustee Company Limited from the Allegro/Solitaire Proceeds are to be held in escrow, in an American bank to be agreed upon by the parties, pending the outcome of *BEA Associates v Bankers Trustee Co. Ltd.*, index no. 603900/1998.

This constitutes the decision and judgment of the court.

Dated: March 8, 1999

ENTER:

J.S.C.

IRA GAMMERMAN

FILED

MAR 22 1999

COUNTY CLERK'S OFFICE
NEW YORK

Norman Goodman
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

114077/98

In the Matter of the Application of

BANKERS TRUSTEE COMPANY LIMITED

(not in its individual capacity but in its capacity as Indenture Trustee under a Trust Indenture dated as of December 29, 1993 as supplemented by a First Supplemental Indenture, dated as of December 10, 1996, among Fifth Mexican Acceptance Corporation, S.A., as Issuer, Grupo Sidek, S.A. de C.V. and Grupo Situr, S.A. de C.V., as Guarantors, Bankers Trustee Company Limited, as Trustee, Bankers Trust Company, London Branch, as Principal Paying Agent, and Bankers Trust Company as Registrar),

Petitioner,

for an order, pursuant to CPLR Section 7701, for Judicial Instructions.

~~ORDER TO SHOW CAUSE SEEKING JUDICIAL INSTRUCTIONS~~

Judgment

FILED
MAR 22 1999
AT 10:10 AM
N.Y., CO. CLK'S OFFICE

FILED
~~MAR 2 2 1999~~
~~COUNTY CLERK'S OFFICE~~
~~NEW YORK~~

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Attorneys for Petitioner, Bankers Trustee Company Limited
One Battery Park Plaza
New York, NY 10004-1490
212-858-1000

TAB 4

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Ira Gammerman Justice PART 27

Bankers Trust Co, Ltd as Indenture Trustee -v-

INDEX NO. 604336/96
MOTION DATE 7/24/97
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

So recvd for decision. I. Gammerman
It is so ordered
Enter

FILED
JUL 31 1997
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED: J.S.C.

Dated: 7/24/97

Ira. Gammerman J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

(11580) CASE DISP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

IN RE BANKERS TRUST CO. LTD.

604/336-96

----------x

60 Centre Street
New York, N.Y.
July 24, 1997

B E F O R E: HON. IRA GAMMERMAN, JSC

APPEARANCES:

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Attorneys for Petitioner
One Battery Park Plaza,
New York, N.Y.
10004
BY: Joe Owens, Esq.
Jon G. Filipek, Esq.

Theodore Custer,
Official Court Reporter

[redacted]

THE COURT: This case is 11580. This is a special proceeding brought pursuant to Article 77 in which the Petitioner, Bankers Trust Company, seeks judicial instructions with respect to its service as an indenture trustee under four separate indentures. The indentures were issued between October of 1991 and August of '94 by a special purpose Mexican corporate entity known as Mexican Acceptance Corporation.

There are four issues, as I indicated, referred to as First MAC, Third MAC, Fifth MAC and Seventh MAC. Each of the MAC entities issued both Class A and Class B notes which collectively totalled approximately $400 million. The notes were issued to finance certain real estate and vacation resort development activities of a company called Grupo Sidek, S.A. de C.V., and its subsidiary , Grupo Situr, S.A. de C.V. and their wholly owned or majority owned subsidiaries, all of which are Mexican companies, and I will refer to

them all as the Sidek Group. Repayment of principal and interest on certain, but not all of the classes of notes was guaranteed by Sidek, Situr, or, I guess, a bank in Mexico, Nacional Financera S.A, a national development bank of the United Mexican states. As a result of financial difficulties faced by the Sidek group, events of default have occurred under the indentures and further events of default are anticipated. The petitioner asserts that it may therefore find it necessary to take enforcement action on the notes. It claims that it faces potential conflicts of interest in its capacity ; that is, actions it might take in furtherance of the interests of one class of noteholders against the limited assets of the guarantors, may have a potential conflict with the interests of one or more other classes of noteholders.

In the petition , Bankers Trust sets forth a specific set of principles which, assuming it could obtain judicial approval

of those principles, it intends to follow with regard to its duties with respect to the indentures. They include that the Bankers Trust will remain as trustee under the indentures; the formation, if desired, by each class of noteholders of committees; the retention by each committee of independent counsel; the possible formation of a steering committee composed of representatives of the individual committees; efforts by the petitioner to insure the professional representation of each class. This would include treating similarly situated noteholders equally, and identifying and realizing upon all collateral, enforcing the provisions of the indentures and strictly enforcing the subordination and priority provisions of each of the indentures.

The sole objection to the petition is made by three MAC Class B noteholders: a company called Argonaut Partnership, L.P., a company called - or partnership, I guess or entity called Gabriel Capital , L.P., and the third is the Gerstenhaber Investments,

L.P. I will refer to them as collectively the Argonaut noteholders. These notes were purchased on the secondary market and obtained by assignment rights- under two put agreements entered into between Sidek as guarantor of the three MAC notes and the original purchaser of those notes. These put agreements permit the holders of the notes to put the notes to Sidek on March 15, 1996, two years before the notes mature under the indenture.

Thus, the Argonaut noteholders have been able to bring suit against Sidek in the federal court for violation of the put agreements. The petitioner contends that practically speaking, the result of a successful action in the federal court would be to reverse the priority of payment on the Class A and Class B notes from that provided under the terms of the indenture and Sidek guarantees. The Argonaut noteholders have also sued Bankers Trustee and a company called Bancomer, who is the receivables trustee under the

three MAC indenture on the grounds that they have impaired the collateral pledged to secure the repayment of those three MAC npotes.

I am going to grant the petition. Section 7701 of the CPLR specifically provides for a special proceeding to determine a matter relating to any express trust. And it seems to me that sound policy dictates that the practice of permitting a trustee to voluntarily petition the court should be encouraged so the courts may keep some degree of control or supervision over the work of trustees. Here, both the note-holders and the trustees will benefit from judicial instructions regarding the recovery of assets. The judicial instructions will permit conflicts relating to priorities among noteholders to be resolved in one proceeding instead of in piecemeal in a number of proceedings. And it seems to me it will result in a more equitable distribution of the available assets.

The Argonaut noteholders, the objectors,

contend that this is a trust for the benefit of creditors and is therefore excluded from the provisions or the coverage of Article 77. A trust for the benefit of creditors is a term used to refer to a specific type of trust implied by law in order to protect a corporation's creditors following its dissolution. This trust provides in its granting clauses that it was created to secure the payment of the principal and the interest on the notes; that is, the Sidek reimburseable accounts and the payment of the other reimburseable accounts, the payment to the trustee and the payment and performance of all the obligations and the liabilities under notes. Thus, it is not, in my opinion, a trust created solely for the benefit of creditors but rather in varying degrees to protect the rights of all parties involved in the loan transactions.

So I am granting the petition and I am directing the petitioner to proceed in accordance with the principles which are

set forth in the petition.

This constitutes my decision, and to the extent that it is appropriate under Article 77 to issue a judgment, it's a judgment. If Article 77 calls for an order, it's an order. What you do is get a copy, bring it to me, I'll write so ordered on it. Then you can file it as a judgment or an order.

CERTIFIED, that the foregoing is a true and correct transcript.

Theodore Custer,
Official Court Reporter

8/7/97 So ordered

dsz

FILED
AUG 8 1997
COUNTY CLERK'S OFFICE
NEW YORK

FRA GAMMERMAN

Clerk

Index No.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In re BANKERS TRUSTEE COMPANY LIMITED, as Indenture Trustee under the following Trust Indentures: First Mexican Acceptance Corporation, S.A., dated as of October 9, 1991; Third Mexican Acceptance Corporation, S.A., dated as of April 23, 1993; Fifth Mexican Acceptance Corporation, S.A., dated as of December 29, 1993; and Seventh Mexican Acceptance Corporation, S.A., dated as of August 30, 1994.

JUDGMENT

FILED

AUG 08 1997

AT 12:00 P.M.

N.Y. CO. CLK'S OFFICE

WINTHROP, STIMSON, PUTNAM & ROBERTS

ATTORNEYS FOR

One Battery Park Plaza
New York, NY 10004-1490
(212) 858-1000

TAB 5

18 Misc.3d 1138(A), 859 N.Y.S.2d 895, 2008 WL 498090 (N.Y.Sup.), 2008 N.Y. Slip Op. 50342(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 18 Misc.3d 1138(A), 2008 WL 498090 (N.Y.Sup.))

H

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.
In the Matter of the JUDICIAL SETTLEMENT OF the FIRST INTERMEDIATE ACCOUNTS OF PROCEEDINGS OF CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under those six agreements of trust dated September 16, 1927, and under that certain agreement of trust dated October 5, 1927, made by Elizabeth L. De Sanchez.
In the Matter of the Judicial Settlement of the Second Intermediate Account of Proceedings of Manufacturers Hanover Trust Company, as Trustee under Trust Agreement dated September 16, 1927, made by Elizabeth L. de Sanchez, as Grantor, for the benefit of Emilio Sanchez.
In the Matter of the Judicial Settlement of the Second Intermediate Account of Proceedings of Manufacturers Hanover Trust Company, as Trustee under Trust Agreement dated October 5, 1927, made by Elizabeth L. de Sanchez, as Grantor, for the benefit of Emilio Sanchez.
In the Matter of the Judicial Settlement of the Second and Final Account of Proceedings of Manufacturers Hanover Trust Company, as Trustee under Trust Agreement dated September 16, 1927, made by Elizabeth L. de Sanchez, as Grantor, for the benefit of Jorge Sanchez and for a construction of said Agreement and a determination of the disposition of property thereunder.
In the Matter of the Judicial Settlement of the Second Intermediate Account of Proceedings of Manufacturers Hanover Trust Company, as Trustee under Trust Agreement dated September 16, 1927, made by Elizabeth L. de Sanchez, as Grantor, for the benefit of Marcelo Sanchez and for a construction of said Agreement and a determination of the disposition of property thereunder.

No. 9650/1952.
Jan. 3, 2008.

CAROL ROBINSON EDMEAD, J.

***1** In 1927, just two years before the Great Depression, Elizabeth Laurent de Sanchez, whose family owned a sugar plantation in pre-Castro Cuba, set up seven trusts to benefit her six children. After her death, in 1953, this court settled and approved the trustee's intermediate accounts for the trusts. Thereafter, Ms. Sanchez's family emigrated to the United States. In 1974 and 1975, the court settled the trustee's accounts for three of the trusts. Now, some 50 years after the first judicial settlement and 30 years after the final two judicial settlements, her many descendants seek to vacate the judgments settling these accounts.

Specifically, income beneficiaries/remainder beneficiaries Pedro and Adolfo Arellano Lamar (hereinafter referred to as the movants [FN1]) move, by order to show cause, pursuant to CPLR 5015(a)(3) and (4), to vacate the 1953 and 1975 judgments settling these accounts. Income beneficiaries/remainder beneficiaries Eugenio J. Silva, Julieta C. Silva, Julieta Cadenas, Felipe G. Silva, Estate of Flora Lamar de Fanjul, Justo Lamar Sanchez, Emilio Jose Lamar, Peter Lamar, Diana Puccetti, Marcelo Lamar, Luis Lamar, Maria Elizabeth Lamar, Ann Maria Lamar de Cesares, Elisa Gloria Lamar, Maria Luisa Suarez Rivas, Beatriz Diego, Flora M. Suarez Fanjul, Jorge B. Fanjul, Julio A. Fanjul, Justo E. Fanjul, and Marcelo E. Fanjul (collectively referred to as the cross movants) cross-move to vacate the judicial settlements, in addition to the 1974 judicial settlement. Movants and cross movants assert that these judicial settlements should be vacated because the trustee engaged in constructive fraud on them, and because the court did not obtain personal jurisdiction over them.

FN1. Both movants and cross movants refer to themselves as "petitioners." However, pursuant to CPLR 401, "[t]he party commencing a special proceeding shall be styled the petitioner." Movants and cross movants did not commence these special proceedings in 1952 and 1974, but rather, are seeking to vacate the judgments rendered in these proceedings.

FACTUAL BACKGROUND

The Trusts

On September 16, 1927, Elizabeth Laurent de Sanchez (the settlor) established six irrevocable *inter vivos* trusts for the benefit of each of her six children:

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(Table, Text in WESTLAW), Unreported Disposition
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Emilio Sanchez (Emilio), Jorge B. Sanchez (Jorge), Julio Sanchez (Julio), Marcelo Sanchez (Marcelo), Maria Sanchez de Lamar (Maria), and Gabriela Sanchez de Cadenas (Gabriela). Thereafter, on October 5, 1927, the settlor established a second trust for Emilio. The principal amount in the seven trusts was approximately $498,944.

Central Union Trust Company of New York, the predecessor in interest to petitioners and JP Morgan Chase Bank, N.A. (the Bank), was named as the trustee for all seven of the trusts. The law firm Larkin Rathbone & Perry, the predecessor to Kelley, Drye & Warren LLP (the Bank's current counsel), drafted the trust instruments.

Movants are the great-grandchildren of the settlor, the grandchildren of Maria, and the children of Elizabeth Sanchez de Lamar. Cross movants are all the descendants of Maria or Gabriela.

The 1952 Accounting Proceeding

The settlor died on March 15, 1951. By order to show cause dated July 21, 1952 and petition dated July 18, 1952, the Bank commenced an accounting proceeding in Supreme Court (Index No. 9650/1952), seeking a judicial settlement of its first intermediate accounts for the trusts, which were filed with the County Clerk. The court directed service of the order to show cause and petition on nonresident interested persons by registered mail. In addition, the court appointed Eugene J. Keefe, Esq. ("Keefe") as a guardian ad litem to receive service of the order to show cause and petition on behalf of certain infant interested persons.

***2** An affidavit of mailing dated July 31, 1952 indicates that, on that date, the order to show cause and petition were sent via registered mail to the interested persons. All of the interested parties lived in Cuba, except for two individuals with addresses in Miami, Florida. Thereafter, on September 10, 1952, after the infants had not appeared through a guardian, the court appointed Keefe to represent the infants. The guardian ad litem appeared on behalf of the infants and filed a report with the court, in which he concluded that, after a thorough review of the proof of service, the court had proper jurisdiction over the infants that he represented. He also concluded that the seven accounts "clearly appear to [him] as being proper and correct and [he had] no objection to their judicial settlement as filed."

Having received no objections to the accounts, on February 25, 1953, the court entered a "final order" approving the Bank's first intermediate accountings with respect to the trusts. The court judicially settled the acts by the Bank for the period from September 16, 1927 through March 15, 1951 for the seven trusts, and awarded the Bank commissions for the period. The Bank was "fully and finally relieved and discharged of and from any further responsibility, liability or accountability respecting said Trusts or the administration thereof as embraced in said accounts or occurring during the periods covered by said accounts or in this proceeding."

The 1974 Accounting Proceedings

Jorge Sanchez died in 1967, survived by neither a wife nor any children. Emilio Sanchez died shortly after Jorge that same year, survived by one son, Emilio Sanchez Fonts. Marcelo Sanchez died in 1970, survived by his wife, Helen Sanchez, and no children. Elizabeth and movants each had contingent income and remainder interests in the Jorge and Marcelo trusts.

By orders to show cause dated March 27 and 29, 1974 and petitions dated March 21, 1974, the Bank commenced two accounting proceedings in Supreme Court. The first proceeding (Index No. 4574/1974) sought a judicial settlement of Emilio's September 1927 and October 1927 trusts. The second proceeding (Index No. 4573/1974) sought a judicial settlement of: (1) the Bank's second and final accounts for Jorge's trust, for the period from March 15, 1951 through December 8, 1970, as supplemented for the period from December 8, 1970 through July 25, 1972; and (2) the Bank's second and final accounts for Marcelo's trust, for the period from March 15, 1951 through December 8, 1970, as supplemented for the period from December 8, 1970 through July 25, 1972.

The court directed service of the orders to show cause and petitions on certain nonresident interested persons by registered mail, but not on certain beneficiaries who were "virtually represented" pursuant to CPLR 7703. Four affidavits of service state that, in April 1974, the interested persons were served by registered mail. A guardian *ad litem* appeared but withdrew after it was determined that his wards had attained the age of majority.

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(Table, Text in WESTLAW), Unreported Disposition
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*3 After receiving no objections to the accounts, on August 30, 1974, the court approved and judicially settled the Bank's accounts for the relevant period with respect to the Emilio trusts, and awarded the Bank commissions. The Bank was "fully, finally and forever released and discharged of and from any and all liability, responsibility or further accountability for each and all of its acts and proceedings as set forth in said second intermediate account and supplement thereto."

The Bank also sought a construction of provisions of the Jorge and Marcelo trusts because of a possible violation of the Rule Against Perpetuities (Personal Property Law x 11 [currently EPTL x 9-1.1]). Under the terms of the trust for Jorge, one-fifth of his trust became distributable to Marcelo's trust upon Jorge's death. After Marcelo's death, that part would violate the Rule Against Perpetuities since it would have been held for two lives in being (Jorge and Marcelo). On July 17, 1975, the court determined that the one-fifth share received from Jorge's trust rested absolutely in Marcelo's estate.

On September 11, 1975, after receiving no objections to the accounts, the court issued a judgment which judicially settled and approved the acts of the Bank with respect to the Marcelo and Jorge trusts. The judgment states, in pertinent part, that the Bank was "fully, finally and forever released and discharged of and from any and all liability, responsibility or further accountability for each and all of its acts and proceedings as set forth in said second and final account and said supplement thereto."

Procedural History

By order to show cause dated June 15, 2005, movants moved to vacate the 1953 and 1975 judicial settlements. Cross movants thereafter made a cross motion to vacate the 1953, 1974, and 1975 judicial settlements, and in the alternative, requested that the motions be transferred to Surrogate's Court, New York County, to be consolidated with pending accounting proceedings in that court under Index No. 3187/2001. On November 10, 2005, the court (Wetzel, J.) granted the cross motion to the extent of transferring the motions to Surrogate's Court. However, after the Surrogate's Court questioned its jurisdiction to vacate prior judgments of this court, the parties entered into a so-ordered stipulation dated August 28, 2006 transferring the motions back to this court. By interim decision dated September 13, 2007, the court denied the branch of cross movants' motion seeking removal pursuant to SCPA 501 to Surrogate's Court.

DISCUSSION

Lack of Personal Jurisdiction

The court may relieve an aggrieved party from a judgment "upon the ground of ... lack of jurisdiction to render the judgment" (CPLR 5015[a][4]). Under this subdivision, if the court lacked jurisdiction over a defendant, vacatur is not discretionary (*see Cipriano v. Hank*, 197 A.D.2d 295, 298 [1st Dept 1994]; *Boorman v. Deutsch*, 152 A.D.2d 48, 51 [1st Dept 1989], *appeal dismissed* 76 N.Y.2d 889 [1990]; *Shaw v. Shaw*, 97 A.D.2d 403, 404 [2d Dept 1983]). A motion to vacate a judgment for lack of jurisdiction may be made at any time (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:3, at 206).

*4 Movants and cross movants deny receiving notice for the 1952 accounting proceeding.[FN2] Movants and cross movants also claim that jurisdiction was invalid because the Bank sent notice in 1952 to incorrect addresses. For example, Pedro Arellano Lamar and Justo Lamar Sanchez, Maria's son, state that the address for Maria Calle 22, No. 67 esq. Ave., Reparto Miramar, Havana, Cuba was not her current address at the time and should have been Calle 16, No.701 Esquina a 7a Avenida, Reparto Miramar, Marianao, Havana, Cuba (Arellano Lamar 6/13/05 Aff., ¶ 10; Lamar Sanchez Aff., ¶ 7). According to Pedro Arellano Lamar, the notices should have been sent to him and his sister care of his parents at Calle 20 # 515, Reparto Miramar, Marianao, Havana, Cuba, rather than Calle 20, No. 59, Miramar, Havana, Cuba (Arellano Lamar 6/13/05 Aff., ¶ 11). However, in subsequent affidavits, Arellano Lamar states that in 1951, "Elizabeth Lamar, Pedro R. Arellano, and the Arellano Lamars lived at Calle 20 # 515, *formerly known as Calle 20 # 59* " (Arellano Lamar 7/31/06 Aff., ¶ 10; Arellano Lamar 1/19/07 Aff., ¶ 20). Julieta Cadenas Silva states that the family summered primarily in Varadero Beach, Cuba from June through September each year, and occasionally traveled to Santa Cruz del Sur, near Camaguey, during these months, and did not have mail forwarded to either location (Cadenas Silva Aff., ¶ 12).

FN2. Specifically, Pedro Arellano Lamar

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> avers that neither his "mother, father nor [he] had, or have, any recollection or record of ever having received any of the required notices" for the 1952 accounting proceeding (Arellano Lamar 6/13/05 Aff., ¶ 10). Similarly, Julieta Cadenas Silva, Gabriela's daughter, states that she has no recollection of either her mother or her receiving notice of the 1952 proceeding (Cadenas Silva Aff., ¶ 12). Justo Lamar Sanchez also submits an affidavit in which he states that he has no recollection of receiving notice of the proceeding (Lamar Sanchez Aff., ¶ 5).

Due process does not require actual receipt of notice before issues concerning a person's property interests may be adjudicated (*Orra Realty Corp. v. Gillen*, AD3d, 2007 WL 4328437, *2, 2007 N.Y.App.Div. LEXIS 12554, * *5 [2d Dept, Dec. 11, 2007]). Rather, it mandates only "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [1950]). In *Mullane,* the Supreme Court held that notice of a settlement proceeding by publication to beneficiaries of a trust fund, whose names and addresses were "at hand," was insufficient, and that notice by ordinary mail was required (*Kennedy v. Mossafa*, 100 N.Y.2d 1, 9 [2003], citing *Mullane*, 339 U.S. at 318).

An affidavit of service attesting to proper service creates a rebuttable presumption that process was properly mailed and received (*Kihl v. Pfeffer*, 94 N.Y.2d 118, 122 [1999]; *News Syndicate Co. v. Gatti Paper Stock Corp.*, 256 N.Y. 211, 214, *rearg. denied* 256 N.Y. 678 [1931]; *Dokoudovsky v. 21043 Corp.*, 189 A.D.2d 618, 619 [1st Dept 1993]). "[S]ervice by mail is complete regardless of delivery where the mailing itself complies with all of the requisites of the rule" (*Anthony v. Schofeld*, 265 App.Div. 423, 425 [4th Dept 1943]). However, the presumption can be overcome by evidence that the papers were mailed to the wrong address (*Northern v. Hernandez*, 17 AD3d 285, 286 [1st Dept 2005]; *Matter of Holland v. New York City*, 271 A.D.2d 609, 610 [2d Dept 2000]).

***5** Here, movants and cross movants have failed to rebut the presumption of proper service. The Bank provides a properly executed affidavit of service showing that, on July 31, 1952, the interested parties, including Maria and Gabriela and their children and grandchildren, were served by registered mail for the 1952 accounting proceeding (*see* Lelen Aff., Exh. A). The affidavit of service shows that process was sent to Maria to "Calle 22, no. 67 esq. Ave., Reparto Miramar, Havana, Cuba," and to Gabriela at "Klo 15, Arroyo Arena, Havana, Cuba" (*id.*).

The Bank's records reflect that it sent correspondence to Maria at that same address in 1949, 1950, and three months before in 1952 (*id.,* Exhs. C, D). It was not until seven years later, in 1959, that the Bank learned that her address had changed, after a 1959 statement was returned to the Bank (*id.,* Exh. D). As conceded by Arellano Lamar in his July 2006 and January 2007 affidavits, Calle 20 # 515 was formerly known as Calle 20 # 59, and thus was a correct address for his family. There is also no evidence that the mailing to Calle 20 # 59 was ever returned to the Bank. Further, Cadenas Silva does not deny that the family lived at the Havana address that the Bank sent process to in 1952. That the family lived away from their Havana address for four months of the year does not establish that the Bank sent process to an incorrect address (*see Ortiz v. Santiago*, 303 A.D.2d 1, 5 [1st Dept 2003] [defendant, who claimed she was served at an incorrect address, failed to rebut presumption of proper service where she did not deny living at that address]). Accordingly, the proof of proper service is unrebutted [FN3] (*see Mei Yun Li v. Qing He Xu*, 38 AD3d 731, 732 [2d Dept 2007]; *General Motors Acceptance Corp. v. Grade A Auto Body, Inc.*, 21 AD3d 447 [2d Dept 2005]; *Matter of State Farm Mut. Auto Ins. Co. [Kankam]*, 3 AD3d 418, 419 [1st Dept 2004]). Moreover, the guardian was appointed to receive service on behalf of the infants.

> FN3. Notably, movants and cross movants do not argue that the Bank failed to follow proper procedures in sending notice. A denial of receipt coupled with a failure to follow proper procedure may be sufficient to rebut the presumption that notice was properly received (*see Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 830 [1978]; *Matter of Connolly [Allstate Ins. Co.]*, 213 A.D.2d 787, 788 [3d Dept 1995]).

Additionally, movants' assertions that they did not receive notice of the 1974 proceedings are equally

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without merit in view of the affidavits of service that the Bank sent process to 4259 S.W. 69th Avenue, Miami, Florida 33155 (Lelen Aff., Exh. B), which was the address that Elizabeth gave the Bank for her and her children that same year (*id.*, Exh. C).

Movants also claim that the court improperly allowed their mother, Elizabeth Sanchez Lamar, to "virtually represent" their interests in the Jorge and Marcelo accounting proceeding in 1974.

The doctrine of "virtual representation" allows one who is a party (the representor), to represent persons or a class of persons (representees) who have future (remainder) interests in the estate (*Buechel v. Bain*, 97 N.Y.2d 295, 308 [2001], *cert denied* 535 U.S. 1096 [2002]; *Matter of Goldstick*, 177 A.D.2d 225, 233-234 [1st Dept 1992]; *Matter of Putignano*, 82 Misc.2d 389, 390 [Sur Ct, Kings County 1975]). Underlying this doctrine is the theory that the representor, in pursuing his or her own economic interests, must necessarily protect the rights of representees having the same interest (*Matter of Putignano*, 82 Misc.2d at 391). If the doctrine applies, the representees need not be served with process or made actual parties because they are virtually represented (*id.* at 390). However, if virtual representation is improperly applied, the resulting judgment may be subject to direct or collateral attack (*id.*; *Matter of Silver*, 72 Misc.2d 963, 966 [Sur Ct, Kings County 1973]).

***6** In 1974, CPLR 7703, the virtual representation statute for Article 77 proceedings, provided as follows:

> (a) Potential member of class. Where an interest in the trust property has been limited in any contingency to the persons who shall compose a certain class upon the happening of a future event, it shall be sufficient to make parties to the proceeding the persons in being who would constitute such class if such event happened immediately before the commencement of the proceeding; and the final order in the proceeding shall be binding and conclusive on all present and future members of the class.

Movants cite *Matter of Blake* (208 Misc. 22 [Sup Ct, New York County 1955]) for the proposition that only remainder interests may be virtually represented. In that case, the court considered whether persons having dual interests of presumptive income interests and remainder interests could represent subsequent contingent remainder interests (*Matter of Blake*, 208 Misc. at 23). The court held that income beneficiaries were not permitted to represent subsequent estates, because the heading of section 1311 of the Civil Practice Act (the predecessor to CPLR 7703) only referred to remainder interests (*id.* at 24).

However, other courts interpreting SCPA 315 (the virtual representation statute for proceedings in Surrogate's Court, which was borrowed from section 1311) did not follow *Matter of Blake's* analysis in determining who could be virtually represented under that statute. In *Matter of Schwartz* (71 Misc.2d 80 [Sur Ct, Nassau County 1972]), the court followed the criterion set forth by the Commission on Estates, i.e., "whether the interests of the class to be represented are likely to be adequately safeguarded. If so, then there would be little reason for denying representation merely because the remainder interest is coupled with an income interest" ' (*id.* at 81-82; *see also Matter of Putignano*, 82 Misc.2d at 392). And, in *Matter of Putignano*, the court noted that "[i]t is illogical to exclude from beneficial purposes of the virtual representation statute, the substantial number of estates where the potential representors and representees have in addition to remainder interests also income interests in the trust" (*Matter of Putignano*, 82 Misc.2d at 393).

Under the "adequacy of representation" test, a secondary income beneficiary is permitted to represent a successor income beneficiary (whether or not either interest is coupled with a remainder interest) because both parties are interested in the principal of a trust, not its income (*see Matter of Leyshon*, 67 Misc.2d 492, 494-495 [Sur Ct, New York County 1971]). Their interests conflict with the interests of the current income beneficiary, but not with each other (*id.*).

The court does not find movants' focus on the label of their interests, rather than the adequacy of representation, to be persuasive. In the instant case, movants' interests in the Jorge and Marcelo trusts were through the Maria trust, and were contingent on the deaths of their grandmother, Maria Lamar, and their mother, Elizabeth Sanchez Lamar. The parties do not dispute that Elizabeth was a secondary income beneficiary and was a presumptive remainder beneficiary. Elizabeth's children, including movants, were successor income beneficiaries and contingent remainder