THE STATE OF NEW YORK
SURROGATE'S COURT : COUNTY OF NEW YORK

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In the Matter of the Application of DAVID SHAMASH by his attorney in Fact, RUTH SHAMASH, Petitioner, for a Compulsory Accounting and Related Relief

-AGAINST-

SUAD STARK and VIVI SHEFF, individually, and as Co-trustees of the SELIM D. SHAMASH Revocable Trust, u/a dated March 22, 2000, SELIM D. SHAMASH, GRANTOR, Deceased.

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JUN 2009

File No. 4489-2008

GLEN, S.

Suad Stark and Vivi Sheff are co-trustees of a lifetime trust established by their father, Selim D. Shamash, under an instrument dated March 22, 2000. They move to dismiss the compulsory accounting proceeding brought by their sibling, David Shamash, by his attorney-in-fact. Selim, creator of the trust, died on February 2, 2004, survived by seven children. The trust primarily, but not exclusively, benefits five of his issue to the exclusion of petitioner. Among other relief, petitioner seeks removal of the co-trustees, an accounting, a construction, and the appointment of a "special master" to continue in place of the co-trustees in administering the trust. Respondents seek dismissal of the petition claiming that petitioner has no standing.

To have standing, one must have a "sufficiently cognizable stake in the outcome" of the proceeding (*Community Bd 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1995]). Accepting petitioner's statements as true as the court must on a motion to dismiss (*Matter of Finkle*, 90 Misc 2d 550 [Sur Ct NY Co 1977]), the motion should nonetheless be granted (CPLR § 3211[a]).

The trust instrument at issue has a broad "no contest" clause that was triggered by petitioner's filing a "Petition to Contest and Revoke Will and Revocable Trust" in Florida, where decedent's will was offered for probate. Petitioner filed a subsequent complaint in Florida against the co-trustees contesting the trust and for relief similar to the current proceeding; that complaint recites that it is

related to an "adversary probate proceeding . . . to *inter alia* contest and invalidate the purported Last Will and Testament of Selim D. Shamash, deceased . . . ."[1]

The "no contest" provision in the trust reads:

> "If any beneficiary of this trust hereunder, in any manner, directly or indirectly, contests or attacks this trust or any of the provisions hereof, or the will of Grantor, or any provision thereof, or conspires to do so, or fails to cooperate in good faith in the defense of any attack or contest, than any share or interest in the Trust Estate given to that contesting beneficiary under this Instrument is revoked, and such property shall be managed and distributed in the same manner provided herein as if that contesting beneficiary had died without issue before the establishment of this Trust . . ."

Petitioner does not deny that he contested the will in Florida nor that he filed actions there seeking to contest the trust. Instead, petitioner asserts that under Florida law "no contest" or *in terrorem* clauses are not enforceable, that the trust proceeding in Florida was dismissed only for lack of jurisdiction, and thus was a nullity, and that EPTL § 3-3.5 "allows considerable discovery to a petitioner, including construction proceedings, without triggering the *in terrorem* clause." None of these grounds preclude application of the trust's "no contest" provision in this instance.

As the trust instrument provides, and petitioner concedes, New York law governs this trust, but he has offered no authority for limiting the application of New York law based on another state's law prohibiting the enforcement of "no contest" clauses. New York, though it strictly construes them, permits their use (*see* EPTL § 3-3.5; *Matter of Ellis*, 252 AD2d 118, 127 [2d Dept 1998]). Although the trust contest proceeding brought in Florida was ultimately dismissed for lack of jurisdiction, petitioner has not demonstrated how this fact takes this case outside the clear language of the clause that prohibits a contest "in any manner, directly or indirectly." Even if dismissal for

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[1]Petitioner's current application does not seek to rescind or invalidate the trust, in whole or in part (*compare Oakes v Muka*, 31 AD3d 834 [3d Dept 2006]).

lack of jurisdiction were an excuse, petitioner has not argued that he did not contest the will, which is likewise a basis for revocation of his interest under the *trust* (*see Tumminello v Bolten*, 59 AD3d 727 [2d Dept 2009]).

EPTL § 3-3.5 provides a safe harbor for certain activities that do not trigger a "no contest" provision, but petitioner only claims that the current petition falls within the safe harbor provision of EPTL § 3-3.5. That is not the question here as respondents contend that it is the Florida proceedings that have triggered the application of the clause. The trust and will contests in Florida were not limited to these safe harbor activities (*see Matter of Stralem*, 181 Misc 2d 715 [Sur Ct, Nassau County 1999]). Petitioner's pleadings from the Florida proceedings provided in support of the motion plainly show that petitioner sought to "contest and invalidate" both the trust at issue here and decedent's will on grounds of undue influence, mistake, and lack of capacity.[2] As a result, whatever interest petitioner may have had in the trust was revoked pursuant to the "no contest" clause.

Accordingly, the motion to dismiss is granted and the petition is dismissed.

This decision constitutes the order of the court.

Dated: June 5, 2009

SURROGATE

[2]Petitioner first brought the will and trust contests in the same proceeding in Florida. However, Florida procedure prohibited joining the two causes in the same proceeding, and an order of the Probate Division of the Broward County Circuit Court for the Seventeenth Judicial Circuit required the "filing [of] a separate trust action," which petitioner then filed in Florida (*See* Order Dismissing Claims, *Shamash v Stark et al*, File No. 04-4820, Div.: 60, Sept. 12, 2007, Circuit Ct, 17th Jud. Circuit, Broward County, Probate Div., Grossman, J.).