COURT OF CHANCERY
OF THE
STATE OF DELAWARE

SELENA E MOLINA
MASTER IN CHANCERY

LEONARD L. WILLIAMS JUSTICE CENTER
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DE 19801-3734

Final Report: December 15, 2020
Date Submitted: November 12, 2020

Kathleen DeLacy, Esquire
Reger Rizzo & Darnell, LLP
1521 Concord Pike, Suite 305
Wilmington, DE 19803

Carla Cowan
2 Curlew Circle
Newark, DE 19702

Gwendolyn M. Pollard
11417 Hermitt Street
Clinton, MD 20735

Renita M. Thomas
8875 Krewstown Rd, Apt. C-9
Philadelphia, PA 19115

Jacqueline Martin
1419 Edgefield Hwy.
Aiken, SC 29801

Herman Thomas
1231 W. Northern Lights Blvd.
Anchorage, AK 995003

Robert Thomas
6345 Lebanon Street
Philadelphia, PA 19151

Re: *Cowan v. Furlow*
C.A. No. 2018-0915-SEM
IMO the Real Estate of Alvin David Smith, Jr., deceased
C.A. No. 2019-1038-SEM

Dear Parties and Counsel:

Through this report, I attempt to address all outstanding matters in the above-captioned actions, both of which relate to the estate of Alvin David Smith, Jr. Herein, I provide my recommendations on the pending motions to consolidate, dismiss, and for inspection and the petition for attorneys' fees. Coordinated

schedules to move both actions toward a final resolution will be issued once this report becomes a final order of the Court. This is my final report.

I. Background

These actions stem from the administration of the estate of the late Alvin David Smith, Jr. (the "Decedent") who passed on November 5, 2017.[1] Through Civil Action No. 2018-0915-SEM (the "Removal Action"), Carla Cowan, the Decedent's niece, challenges the administration of the estate by James Furlow, the appointed personal representative, and seeks his removal, an accounting of his actions, and other relief.[2]

Mr. Furlow was appointed as the personal representative of the Decedent's estate on March 12, 2018 and the Register of Wills docket reflects that he was a friend of the Decedent.[3] Ms. Cowan has raised serious concerns about Mr. Furlow's motivations, conduct as personal representative, and continued service in that role. But her claims have not been teed up for final resolution. Ms. Cowan, who has filed a number of ancillary motions in the Removal Action, has not proposed a schedule

[1] C.A. No. 2018-0915-SEM ("Removal Action") Docket Item ("D.I.") 1.
[2] *See id.*
[3] *See In the Matter of Alvin David, Smith, Jr.*, 168416 FC ("ROW") D.I. 4. "Because the Register of Wills is a Clerk of the Court of Chancery, filings with the Register of Wills are subject to judicial notice." *Arot v. Lardani*, 2018 WL 5430297, at *1 n.6 (Del. Ch. Oct. 29, 2018) (citing 12 *Del. C.* § 2501; D.R.E. 202(d)(1)(C)).

toward final resolution and has filed letters both seeking expedited consideration of her petition and, conversely, more time to build her case.[4]

Through Civil Action No. 2019-1038-SEM (the "Sale Action"), Mr. Furlow seeks to sell the Decedent's pre-death real estate to pay debts of the estate.[5] The real estate at issue is located at 406 S. Gerald Avenue in Newark, Delaware (the "Property"). The Property was wholly owned by the Decedent and passed, at his death, to his intestate heirs: Gwendolyn M. Pollard (50%), Ms. Cowan (10%), Renita M. Thomas (10%), Jacqueline Martin (10%), Herman M. Thomas (10%), and Robert M. Thomas (10%).[6]

The Sale Action was quickly teed up—as most petitions to sell property to pay debts of an estate are—and was heard on September 3, 2020, with notice provided to all intestate heirs (the "Sale Hearing"). At the Sale Hearing, Mr. Furlow presented evidence in support of his petition, Ms. Cowan and Ms. Thomas voiced their objections to the proposed sale, and Ms. Pollard and Ms. Martin voiced their support. Neither Herman M. Thomas nor Robert M. Thomas appeared, nor have

[4] *See, e.g.*, Removal Action D.I. 33 (motion for preliminary injunction), 42 (motion to compel discovery), 51 (motion for contempt and perjury), 60 (motion for recusal), 66 (motion to consolidate), 73 (objection to proposed scheduling order). It is unclear to me how Ms. Cowan proposes to move forward on her claims, though, most recently, she declined Mr. Furlow's proposed schedule and requested additional time to conduct discovery. Removal Action D.I. 73 (rejecting Removal Action D.I. 72 proposing a fact discovery cut off of October 23, 2020).
[5] C.A. No. 2019-1038-SEM ("Sale Action") D.I. 1.
[6] ROW D.I. 27. *See also* ROW D.I. 14 (Moiety Chart).

they submitted anything to the Court regarding their positions. Importantly, I learned at the Sale Hearing that Mr. Furlow will be seeking approval of a different contract with a new buyer; Mr. Furlow was to provide updated information to the Court after the Sale Hearing but has yet to do so. I direct interested readers to the dockets of the Removal Action and the Sale Action, which contain various ancillary filings and prior rulings not integral to today's recommendations.

II. Analysis

Four requests are ripe for my consideration: (1) Ms. Cowan's motion to consolidate the Removal Action and the Sale Action, (2) Ms. Cowan's motion to dismiss the Sale Action, (3) Ms. Cowan's motion to inspect the Property, and (4) Reger Rizzo & Darnall LLP ("Counsel")'s petition for payment of attorneys' fees from the estate. I address each in turn.

A. The Motion to Consolidate Should Be Denied.

Ms. Cowan seeks to consolidate the Removal Action and the Sale Action.[7] She contends the claims in both actions are based on the same set of operative facts and present common questions of fact or law. Mr. Furlow opposes consolidation, arguing the exact opposite and that there would be no benefit (and only added

[7] Removal Action D.I. 66.

burdens) from consolidation.[8]

"[C]onsolidation of separately commenced actions [is authorized under Court of Chancery Rule 42] in narrowly defined circumstances[.]"[9] Rule 42(a) provides:

> When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Under this rule,

> [t]he prerequisite for consolidating multiple actions is a finding of common issues of law, common issues of fact, or both. The inquiry is whether justice can be administered between the parties without a multiplicity of suits. When determining the merits of a proposed consolidation, I must exercise certain discretion and weigh the possible saving of time and effort that consolidation would advance against any inconvenience, delay, or expense that it would occasion.[10]

I find that the Removal Action and the Sale Action should not be consolidated but I will coordinate scheduling for both actions.

Although the Removal Action and the Sale Action both relate to the estate of the Decedent, the actions present materially distinct issues of law and fact. In the Removal Action, Ms. Cowan bears the burden of proving that Mr. Furlow should be removed as the personal representative and that she is entitled to the further relief

[8] Removal Action D.I. 70.
[9] *Mirarchi v. Picard*, 2002 WL 749164, at *1 (Del. Ch. Apr. 22, 2002).
[10] *Id.* (citations omitted).

she seeks. In assessing Mr. Furlow's conduct, I will need to review evidence submitted by both sides and make credibility determinations. In the Sale Action, Mr. Furlow must meet the statutory standard for sale of property to pay debts of an estate. The test for whether property should be sold is, largely, a mathematical one (*i.e.*, do the debts of the estate exceed the available assets?) with minimal factual issues or credibility determinations required. As such, the Sale Action can and should be resolved without undue delay.

I appreciate Ms. Cowan's concerns about moving forward with a sale of the Property before the Removal Action is decided. She is adamant that Mr. Furlow should not be allowed to take further action on behalf of the estate and he should be removed from his role. But the Property and the estate will be adequately protected during the sale process by the many court-attached strings (*e.g.*, court approval of the proposed sale contract, posting of a bond, and return of sale). It matters little who is representing the estate during that process. On the other hand, if the Property should be sold under the statute, a delay in that sale risks loss of property value and accumulation of additional debts and expenses. If sale of the Property is necessary, it should move forward without delay, regardless of who stands in the role of the representative of the estate.

This is particularly true in light of the procedural posture of the two actions—

although the Removal Action was filed first, the Sale Action has already been presented to the Court and a full evidentiary record developed. I find that delayed resolution of the Sale Action until the Removal Action is ready would not be fair or equitable. "[C]onsolidating the two cases would provide no judicial economy and would actually impede the efficient processing of the cases[.]"[11] Nonetheless, coordinating the two matters to minimize the burden on the overlapping parties is warranted. Once this order becomes a final order of the Court, I will issue coordinated schedules for both actions.

B. The Motion to Dismiss Should Be Denied.

Ms. Cowan moved to dismiss the Sale Action under Court of Chancery Rule 12(b)(6) arguing (1) the Property is not in jeopardy of foreclosure as suggested by Mr. Furlow, (2) the heirs can work together to pay the debts of the Property and repair it as necessary, (3) the proposed buyer is not reputable, (4) the petition fails to disclose additional debts of the estate, and (5) the Sale Action was initiated in bad faith.[12] Mr. Furlow filed a response in opposition arguing the motion should be denied because it raises fact issues and the petition states a plausible claim for which

[11] *Sunrise Ventures, LLC v. Rehoboth Canal Ventures,* LLC, 2010 WL 363845, at *13 n.76 (Del. Ch. Jan. 27, 2010). *See also The Library, Inc. v. AFG Enterprises, Inc.*, 1998 WL 474159, at *1–2 (Del. Ch. July 27, 1998).

[12] Sale Action D.I. 31. The motion to dismiss also references a "statue 2.2" and Rule 44(b). As best I understand these citations, they do not provide any basis on which to dismiss the Sale Action.

relief can be granted.[13]

> The standard of review on a Rule 12(b)(6) motion is settled:
>
> > (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and ([iv]) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.[14]

Under this standard, I find the motion to dismiss should be denied.

Mr. Furlow's petition sets forth the factual predicate required in Title 12, Chapter 27 of the Delaware Code and it is reasonably conceivable that the Property should be sold to pay debts of the Decedent's estate. Ms. Cowan's arguments for dismissal are better understood as factual disputes; Ms. Cowan had ample opportunity to present her objections at the Sale Hearing and I will continue to consider and weigh her objections in making my final recommendation on whether the Property should be sold.

With Ms. Cowan's motion to dismiss denied, the Sale Action should be resolved without undue delay. Mr. Furlow will need to submit the proposed agreement for sale, all interested parties shall be served with the submission and have an opportunity to respond, and I will then take the matter under advisement and

---

[13] Sale Action D.I. 34.
[14] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002) (citations and quotations omitted).

issue my recommendation. Deadlines for these final steps will be specified in the forthcoming coordinated schedules.

C. The Motion for Inspection Should Be Granted.

Ms. Cowan has also asked for access to the Property, so that she may inspect it and gain a better understanding of its current condition. It is regrettable that Ms. Cowan has to make this request of the Court; as a part owner of the Property, she should, at the least, have reasonable access to the Property.

"It is well settled in Delaware that the title to real estate descends to the heirs or vests in the devisees immediately upon the death of the testator subject to be divested if it be necessary to sell it for the payment of debts of the deceased."[15] Real property, like the Property, is not a probate asset and title has already passed to the Decedent's heirs. This includes Ms. Cowan who, at the time of the Decedent's death, became a 10% owner of the Property.

Mr. Furlow argues that he may exclude Ms. Cowan from the Property because the Decedent's personal property is vested in him as the administrator of the estate.[16] I find, however, that the limited vesting principle invoked by Mr. Furlow does not apply to the Property and, even if it did, any limited rights of Mr. Furlow cannot be

[15] *In re Harris' Estate*, 44 A.2d 18, 19 (Del. Orphans' Ct. 1945).
[16] Removal Action D.I. 83 (citing *Kojro v. Sikorski*, 267 A.2d 603, 606 (Del. Super. 1970)).

invoked to "defeat the interests of the heirs of the [P]roperty."[17] The interests of the heirs may be divested only after a finding by this Court that the Property should be sold to pay debts of the estate.[18] No such finding has been made and unless and until that occurs, Mr. Furlow, personally or in his capacity as the personal representative of the estate, may not exclude Ms. Cowan from the Property. Ms. Cowan should be permitted to inspect the Property and Mr. Furlow should do whatever is necessary to facilitate that inspection.

D. The Petition for Attorneys' Fees Should Be Denied Without Prejudice.

On October 14, 2020, Counsel filed a petition for payment of attorneys' fees in the Sale Action.[19] In support, Counsel invokes the general proposition that attorneys' fees incurred by a personal representative are expenses of the estate and alleges that Ms. Cowan has caused (and will continue to cause) additional expenses to be incurred. Ms. Cowan disagrees and seeks dismissal of the petition, arguing she will prevail in the Removal Action and Mr. Furlow and Counsel have engaged in bad faith litigation tactics precluding any entitlement to attorneys' fees.[20]

---

[17] *Id.*
[18] *Cf. In re Harris' Estate*, 44 A.2d at 19 (explaining that "during the interval between the testator's death and the sale by the Executor, the devisees had title" to real property devised to them in the decedent's will but ultimately ordered to be sold to pay debts of the estate).
[19] Sale Action D.I. 37.
[20] Removal Action D.I. 84.

I decline to address the merits of Counsel's request at this time. It appears Counsel is trying to bypass the estate accounting process, where attorneys' fees paid by the estate are disclosed to all beneficiaries, who then have the right to review and, should they choose to do so, challenge the fees by filing exceptions to estate accountings. Or, perhaps, Counsel is seeking fee shifting related to these civil actions; if so, the request is premature.

Unless and until he is removed, Mr. Furlow may decide how best to administer the estate, including whether and how much to pay in attorneys' fees. The fees incurred will then be reflected on the accounting(s) Mr. Furlow is required to file with the Register of Wills and subject to review and potential challenge by the estate heirs. Fee shifting related to the Sale Action or the Removal Action, if sought by either side, may be requested at the conclusion of the proceeding(s).

III. Conclusion

For the foregoing reasons, I recommend that the motion to consolidate be denied but that the scheduling in these actions be coordinated to reduce any burden on the common parties. I further recommend that the motion to dismiss the Sale Action be denied and the request from Mr. Furlow to sell the Property be considered on its merits, in light of the record developed at the Sale Hearing and as supplemented by the post-hearing submissions that will be required in the

forthcoming coordinated schedules. I recommend that the motion for inspection be granted. Finally, I recommend that the petition for attorneys' fees be denied as premature, without prejudice to renew at the appropriate time and in the appropriate forum.

This is my final report and exceptions should be taken in accordance with Court of Chancery Rule 144.

Respectfully,

/s/ Selena E. Molina

Master in Chancery