UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 4168 / September 19, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17387

In the Matter of DONALD F. ("JAY") LATHEN, JR., EDEN ARC CAPITAL MANAGEMENT, LLC, and EDEN ARC CAPITAL ADVISORS, LLC	ORDER DENYING LEAVE FOR SUMMARY DISPOSITION

Respondents have asked for leave to move for summary disposition. The Division of Enforcement opposes Respondents' motion. Because Respondents have not shown a likelihood that they will be able to demonstrate the absence of a "genuine issue with regard to any material fact," 17 C.F.R. § 201.250(b), their motion is denied.

Background

The Securities and Exchange Commission instituted this proceeding in August 2016. The order instituting proceedings (OIP) alleges the following. Respondent Donald F. Lathen, Jr., owns, controls, and occupies all corporate offices of Respondent Eden Arc Capital Management, LLC (the Adviser). OIP ¶ 3. The Adviser allegedly serves as the investment adviser to Eden Arc Capital Partners, LP (the Fund). *Id.* ¶ 4. Respondent Eden Arc Capital Advisors, LLC (the General Partner), serves as the general partner to the Fund. *Id.* ¶ 5.

Briefly stated, the Division alleges that Respondents defrauded issuers of bonds and certificates of deposit. Lathen allegedly identified "terminally ill individuals," referred to as "Participants," who, for $10,000 were willing to become joint owners with Lathen or his relative of brokerage accounts. OIP ¶¶ 12, 19, 20, 23-24. Using money supplied by the Fund, Lathen and each Participant would purchase, at a discount to par, securities containing a survivor option. *Id.* ¶¶ 9-10, 31-32. On the death of the Participant, Lathen, as the joint account survivor, exercised the option and sold the security back to the issuer at par plus interest. *Id.* ¶¶ 9, 11, 36-37.

Respondents allegedly engaged in fraud when Lathen opened the accounts (the opening fraud) and when he exercised the options (the exercising fraud). The opening fraud allegedly occurred because although the forms used to open the accounts listed Lathen and the Participants as the joint owners, they were actually nominees of the Fund. OIP ¶¶ 24-25. The Fund could

not have been a joint owner because corporate entities do not have survivorship rights. *Id.* ¶ 30. The exercising fraud allegedly occurred when Lathen exercised the survivor option, falsely claiming to be the surviving joint owner and not disclosing the General Partner's or the Adviser's "relationship to the investments" or the nature of their involvement with the investments.[1] *Id.* ¶¶ 37-38.

After Respondents answered the OIP, they asked for leave to move for summary disposition.[2] They agree that the Fund financed the "brokerage accounts that Mr. Lathen and Participants had opened together." Mot. at 1. They also agree that all the accounts "contained . . . a 'survivor's option,'" which Lathen exercised on the death of each Participant. *Id.* at 2. Respondents contend that in exercising the option, Lathen made two "true and accurate" representations: "(1) the Participant was a 'joint owner' or 'joint and beneficial owner' on the . . . account . . . ; and (2) he was the surviving joint owner." *Id.*

Respondents contend that each account was a valid joint tenancy with rights of survivorship because the accounts were opened "using the relevant survivorship language." Mot. at 3. According to Respondents, as a matter of New York law, a joint tenancy in an account "is presumed valid and legally effective." *Id.* They assert that "any party challenging the validity of a [joint tenancy with rights of survivorship] must establish by 'clear and convincing' evidence that it is not valid." *Id.* And the only bases for invalidating a joint tenancy "are fraud, undue influence, lack of capacity or a determination that the joint tenancy is a so-called 'convenience account.'" *Id.* (citing *In re Estate of Grancaric*, 936 N.Y.S. 2d 723, 726 (N.Y. App. Div. 2012)).

Respondents assert that Lathen and the Participants established valid joint tenancies and nothing suggests a basis to reach any other conclusion. Mot. at 4. They argue that because each joint tenancy was valid, Lathen was the "true" surviving joint tenant. *Id.* His assertions to the issuers were therefore "true and accurate." *Id.* Respondents assert that they will be entitled to summary disposition because the Division has failed to "plead facts sufficient to overcome the statutory presumption under New York law that the [joint tenancies with rights of survivorship] that Mr. Lathen formed with Participants were valid and legally effective and that he was a true 'survivor.'"[3] *Id.*

Discussion

Commission Rule of Practice 250 governs motions for summary disposition. *See* 17 C.F.R. § 201.250. The version of Rule 250 applicable to this proceeding provides that an

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[1] The Division also contends that, because the investments and money in the accounts actually belonged to the Fund, Respondents are liable for not maintaining the securities and money in an account in the Fund's name or in an account that contained only the Fund's money and securities. OIP ¶ 73.

[2] Prior to the hearing, a party must seek leave before filing a motion for summary disposition. 17 C.F.R. § 201.250(a).

[3] Respondents also argue that because the money and securities in question did not belong to the Fund, Respondents did not violate any custody requirements. Mot. at 4-5.

administrative law judge "may grant [a] motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law."[4] 17 C.F.R. § 201.250(b). Although Rule 250 provides a mechanism for seeking summary disposition, summary disposition is disfavored in cases like this one, in which the Commission has ordered that an initial decision be issued within 300 days of service of the OIP. Rules of Practice, Exchange Act Release No. 35833, 60 Fed. Reg. 32738, 32768 (June 23, 1995); *see Jay T. Comeaux*, Securities Act of 1933 Release No. 9633, 2014 WL 4160054, at *4 n.30 (Aug. 21, 2014). Unlike under Federal Rule of Civil Procedure 56, when a respondent moves for summary disposition in a Commission proceeding, the administrative law judge must "take[] as true" the facts alleged in the OIP, "except as modified by stipulations or admissions made by [the Division], by uncontested affidavits, or by facts officially noticed pursuant to Rule 323." 17 C.F.R. § 201.250(a); *see* Fed. R. Civ. P. 56(c)(1), (e) (requiring a party to support an assertion with evidence and providing consequences for the failure to do so). The procedure contemplated under Rule 250 is thus more limited than that governed by Rule 56. *See* 60 Fed. Reg. at 32768 ("[T]he circumstances when summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare."). And leave for summary disposition is inappropriate where "a genuine issue as to material facts clearly exists as to an issue." *Id.* at 32767.

Bearing in mind the Commission's direction that summary disposition is disfavored and considering Respondents' arguments, their request for leave must be denied.

Respondents' argument is that under New York law, the accounts were presumptively valid joint tenancies with rights of survivorship and that there is no evidence to overcome that presumption. Absent such evidence, Respondents assert that it is a fact that Lathen was the true surviving joint tenant and that he was entitled to exercise the survivor options and receive the resulting funds. Whether he or the Participants were nominees of the Fund is, in Respondents' view, irrelevant. *See* Preh'g Tr. 11-12.

Assuming that Respondents are correct that the only issue is whether Lathen and the Participants established valid joint tenancies in the accounts—in other words, assuming the issuers would not have cared that their securities were purchased with capital supplied by the Fund and that the Participants' terminal conditions made near-term exercise of the survivor options likely—Respondents' motion for leave shows that they will not be able to demonstrate that material facts are not in dispute.

As Respondents note, in New York the creation of a joint account with rights of survivorship raises a presumption that the joint tenancy is valid. N.Y. Banking Law § 675(b). This presumption may be rebutted by "clear and convincing" evidence "sufficient to support an inference that the joint account had been opened in that form as a matter of convenience only." *In re Estate of Coddington*, 391 N.Y.S.2d 760, 761-62 (N.Y. App. Div. 1977). "In a true joint account, each party has the right to withdraw one half of the funds during the lifetime of both

[4] The parties previously elected to proceed under the Commission's pre-amendment Rules of Practice. *See Donald F. ("Jay") Lathen, Jr.*, Admin. Proc. Rulings Release No. 4149, 2016 SEC LEXIS 3416, at *1 & n.1 (ALJ Sept. 13, 2016).

tenants." *In re Estate of Zecca*, 544 N.Y.S.2d 40, 41 (N.Y. App. Div. 1989) (internal citation omitted). This means that "at the time the account was opened, there must have been a present gift from the original donor to the cotenant of one half of the account which each could withdraw unilaterally while both were alive." *Id.*; *see In re Estate of Stalter*, 703 N.Y.S.2d 600, 602 (N.Y. App. Div. 2000) ("the key underlying issue" is "decedent's intent at the time that the account . . . was created"). It is thus "well settled that the presumption" of validity "may be rebutted by evidence showing" that the funding joint tenant did not "inten[d] . . . [to] confer[] a present beneficial interest on the" other joint tenant at the time the account was opened. *In re Friedman*, 478 N.Y.S.2d 695, 696 (N.Y. App. Div. 1984), *aff'd*, 475 N.E.2d 454 (N.Y. 1984); *see Fischedick v. Heitmann*, 699 N.Y.S.2d 508, 509 (N.Y. App. Div. 1999); *Cinquemani v. Cinquemani*, 346 N.Y.S.2d 875, 877-78 (N.Y. App. Div. 1973). If such evidence is presented, the party asserting the existence of the presumption must do more than simply rely on the fact of the statutory presumption. *Phelps v. Kramer*, 477 N.Y.S. 2d 743, 745 (N.Y. App. Div. 1984); *see Brezinski v. Brezinski*, 463 N.Y.S.2d 975, 977 (N.Y. App. Div. 1983) (explaining that if the presumption of validity is rebutted, the burden shifts to the joint tenant claiming the presumption's benefit to show there was an "inten[t] to make a gift of the funds").

For purposes of adjudicating Respondents' motion for summary disposition, I would be required to accept as true the facts alleged in the OIP. 17 C.F.R. § 201.250(a). Most relevant to the issue Respondents pose, the OIP alleges, and Respondents concede, that some Participants agreed "that they '[would] not be permitted to pledge, borrow against, withdraw *or exercise any right of ownership* with respect to the Investments or other assets in the Account(s) without the express written permission of Lathen, which permission may be withheld in Lathen's sole discretion.'" OIP ¶ 57 (emphasis added); Answer ¶ 57. This concession suggests that before the accounts were opened, neither Lathen nor the Participants intended that the Participants would have unilateral access to funds or securities in the accounts. Under the precedent discussed above, evidence that some Participants could never unilaterally withdraw funds or securities from the accounts raises a material factual dispute about whether Lathen and the Participants entered into a valid joint tenancy in the accounts. *See In re Estate of Zecca*, 544 N.Y.S.2d at 41.

The OIP also alleges that neither Lathen nor the Participants were the owners of the accounts. OIP ¶ 25. The Participants neither funded nor paid any costs associated with the accounts. *Id.* ¶¶ 33-34. Respondents considered the assets in the accounts to be the Fund's assets and the Fund "earn[ed] all income associated with the ownership of the . . . investments in the . . . accounts." *See id.* ¶¶ 43, 49. Finally, Participants do not pay taxes on gains in the accounts, *id.* ¶ 52, which raises an inference that the money or securities in the accounts did not belong to them. These allegations further suggest that no one "inten[ded] . . . [to] confer[] a beneficial interest" in the accounts on the Participants. *Plotnikoff v. Finkelstein*, 482 N.Y.S.2d 730, 732 (N.Y. App. Div. 1984). These allegations, which would be taken as true for purposes of a summary disposition motion, are "sufficient to support an inference that the joint account had been opened in that form as a matter of convenience only." *In re Estate of Coddington*, 391 N.Y.S.2d at 761-62; *see Wacikowski v. Wacikowski*, 461 N.Y.S.2d 888, 889 (N.Y. App. Div. 1983) (finding the presumption rebutted on the basis of evidence that one joint tenant "always had exclusive possession of the account passbook" and the other "never made any deposits to or withdrawals from the account"). Respondents have therefore failed to show a likelihood that they will be able to demonstrate the absence of a "genuine issue with regard to any material

fact." 17 C.F.R. § 201.250(b). As a result, they have failed to demonstrate that they should be granted leave to move for summary disposition on this issue. *See* 60 Fed. Reg. at 32767 (stating that it is inappropriate to grant leave to move for summary disposition "[w]here a genuine issue as to material facts clearly exists as to an issue"); *cf. Harrington v. Brunson*, 12 N.Y.S.3d 696, 698 (N.Y. App. Div. 2015) (finding summary judgment inappropriate where, among other things, evidence showed "that decedent was the sole depositor of the joint accounts, and that plaintiff never withdrew funds from the joint accounts during decedent's lifetime").

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James E. Grimes
Administrative Law Judge