

60 A.D.3d 763, 875 N.Y.S.2d 191, 2009 N.Y. Slip Op. 01799
(Cite as: **60 A.D.3d 763, 875 N.Y.S.2d 191**)

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Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Lester FEINNE, deceased.

Lilia Feinne, etc., petitioner-respondent;

Intercounty Associates, respondent;

New York State Department of Taxation and Finance, nonparty-appellant.

March 10, 2009.

Background: Executrix commenced proceeding against a partnership to discover property and information withheld from an estate. The Surrogate's Court, Suffolk County, Czygier, S., granted her motion for summary judgment dismissing an answer filed by non-party New York State Department of Taxation and Finance. Department appealed.

Holding: The Supreme Court, Appellate Division, held that settlement of proceeding rendered academic question of whether Department had standing to assert affirmative defenses.
Appeal dismissed.

West Headnotes

Action 13

13 Action

13I Grounds and Conditions Precedent

13k6 k. Moot, Hypothetical or Abstract Questions. **Most Cited Cases**

Settlement of executrix's proceeding against partnership to discover property and information withheld from an estate, which resulted in a voluntarily discontinuance with prejudice, rendered academic the question of whether non-party New York State Department of Taxation and Finance had standing to assert affirmative defenses in an answer. [McKinney's SCPA 2103](#).

****192 Andrew M. Cuomo**, Attorney General, New York, N.Y. (Benjamin N. Gutman and [Richard](#)

[Dearing](#) of counsel), for nonparty-appellant.

Weinstein, Kaplan & Cohen, P.C., Garden City, N.Y. ([Danielé D. De Voe](#) of counsel), for petitioner-respondent.

[REINALDO E. RIVERA](#), J.P., [ANITA R. FLORIO](#), [THOMAS A. DICKERSON](#), and [CHERYL E. CHAMBERS](#), JJ.

***763** In a proceeding pursuant to [SCPA 2103](#), inter alia, to discover property and information withheld from an estate, the New York State Department of Taxation and Finance appeals, as limited by its brief, from so much of an order of the Surrogate's Court, Suffolk County (Czygier, S.), dated July 30, 2007, as granted that branch of the petitioner's motion which was for summary judgment dismissing its answer to the petition for lack of standing.

ORDERED that the appeal is dismissed as academic, without costs or disbursements.

The petitioner, as executrix of the decedent's estate, commenced this proceeding pursuant to [SCPA 2103](#) to require Intercounty Associates, a partnership, to show cause why it should not deliver, to the decedent's estate, certain proceeds from the sale of real property. The New York State Department of Taxation and Finance (hereinafter the appellant) served an answer to the petition asserting, as affirmative defenses, that the disputed proceeds belonged to the petitioner individually and not in her capacity as the fiduciary of the estate, and should consequently be turned over to the appellant in partial satisfaction of tax liens imposed against her.

The petitioner moved, inter alia, for summary judgment dismissing the appellant's answer on the ground that it lacked standing to appear in the discovery proceeding since it was not a creditor of the

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estate. The appellant cross-moved to dismiss the proceeding for lack of subject matter jurisdiction. In the alternative, the appellant argued that the Surrogate had jurisdiction to determine its rights to the disputed proceeds.

The Surrogate granted that branch of the petitioner's motion which was for summary judgment dismissing the appellant's answer on the ground that it lacked standing to appear in the discovery proceeding since it was not a creditor of the estate, and denied the appellant's cross motion to dismiss the proceeding for lack of subject matter jurisdiction.

The proceeding was never stayed, and while the appeal was *764 pending, the petitioner and Intercounty Associates settled the proceeding, which was voluntarily discontinued with prejudice.

Since the proceeding has been discontinued with prejudice, the question of whether the appellant had standing to assert affirmative defenses in an answer has been rendered academic. Moreover, the appellant asserted no counterclaims which may be severed from the main proceeding (*see Friends of Avalon Preparatory School v. Ehrenfeld*, 6 A.D.3d 658, 775 N.Y.S.2d 560).

N.Y.A.D. 2 Dept.,2009.

In re Feinne

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