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

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Brenda Beacher, Individually and Derivatively,
as a Shareholder and on behalf of B.B.E. Realty Corp., File No. 335107/H
Plaintiff,

-against- Dec. No. 29166

the Estate of

FRED M. BEACHER,

Decedent,

and Harry Helfeld as the Executor of the Estate of
Fred. M. Beacher, Defendant.

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Before the court is a cross-motion filed by Brenda Beacher to amend her complaint in the present proceeding to add as party defendants the Jeffrey Beacher Testamentary Trust and the law firm of Hopkins & Kopilow. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

As briefly reviewed in Decision No. 28162, issued by this court on October 16, 2012,[1] Fred M. Beacher died on November 10, 2004, survived by his two children, Jeffery Beacher and Mindy Beacher Nirenberg ("Jeffrey" and "Mindy"). The decedent left a Last Will and Testament which was admitted to probate by this court. On January 12, 2005, letters testamentary and letters of trusteeship under the will issued to Harry Helfeld ("Helfeld"), who has since filed his account as executor. Objections to the account were filed. A trial commenced in connection

[1]In Decision No. 28162, this court determined that if the Supreme Court, in the exercise of its discretion, deemed a transfer of the present proceeding from Supreme Court, Nassau County to Surrogate's Court, Nassau County, warranted, then this court would consent to receive the action for trial. The proceeding was subsequently transferred.

with the account but it has not yet been concluded.

On or about March 30, 2005, a lawsuit was brought by decedent's sister-in-law, Brenda Beacher ("Brenda"), against the estate and against Helfeld in the United States District Court for the Eastern District of New York (Case No. 05 CV 1625). At issue was whether the estate of Fred M. Beacher ("the estate") owned all of the shares of B.B.E. Realty Corp. ("BBE"), as Helfeld maintained, or whether the estate owned 50% of BBE, with the other 50% owned by Brenda (the "BBE Ownership Litigation"). While the decision was pending, the estate acted as the sole manager of BBE. By a decision and order dated December 21, 2010, the Honorable Arthur D. Spatt of the United States District Court for the Eastern District of New York entered a judgment in favor of Brenda, declaring that the estate and Brenda each owned 50% of BBE.[2]

Brenda then brought a suit in the Supreme Court of Nassau County, both in her individual capacity as well as derivatively as a shareholder of BBE, against the estate and against Helfeld, as executor. In the lawsuit, Brenda asserted that the estate misappropriated and/or misapplied BBE assets and utilized funds belonging to BBE to pay its legal fees in connection with the BBE Ownership Litigation. Counsel for Helfeld moved to transfer the proceeding to the Surrogate's Court of Nassau County, and it was transferred to this court by order of the Supreme Court of Nassau County which was entered on January 24, 2013.

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[2]BBE was created in 1986 by the decedent, his brother (and Brenda's husband) Robert Beacher ("Robert"), and Melvin Epstein, who each had a one-third interest. Robert transferred his interest to Brenda, and subsequently BBE bought out Melvin Epstein's interest, leaving the decedent and Brenda with 50% each. BBE's main asset is commercial real estate located at 116-22 Metropolitan Avenue, in Queens County, New York. During his lifetime, the decedent managed BBE. In Article Third (c) of his will, decedent devised the real property located at 116-22 Metropolitan Avenue to Jeffrey, in trust. All parties have treated this bequest as a bequest in trust of decedent's interest in BBE, which owns this real property.

THE CROSS-MOTION

In the present cross-motion, Brenda seeks leave to amend her original complaint to add two additional parties: (1) the Jeffrey Beacher Testamentary Trust, created under the will of the decedent for the benefit of his son, Jeffrey ("the trust"); and (2) Helfeld's counsel, the law firm of Hopkins & Kopilow ("H&K").

(1) Leave to amend to add the trust as a party

In support of her cross-motion to add the trust as a party, Brenda asserts that documents which she received through discovery indicate that the trust benefitted from BBE monies which were collected by the estate. She notes that although Helfeld has taken the position that the 50% of BBE not owned by Brenda is an estate asset, it is, in fact, a trust asset, having passed to the trust pursuant to the terms of decedent's will. Brenda argues that Helfeld, in his dual capacities as executor of the estate and trustee of the trust, failed to differentiate between the estate and the trust with respect to decedent's interest in BBE. She asserts that documents filed by Helfeld in this court show that BBE revenues were used to pay the expenses of the trust and/or the estate, including payment of legal fees in defense of the BBE Ownership Litigation. Accordingly, she now asks the court for leave to amend her pleadings to add the trust, in addition to the estate, as a party.

While counsel for Helfeld maintains that the trust has not and cannot be funded without court authorization following the settlement of the executor's judicial accounting, counsel for Brenda maintains that the transfer of BBE from the estate to the trust was recognized by this court upon the issuance of letters of trusteeship to Helfeld on January 12, 2005. Because decedent left his interest in BBE to Jeffrey in trust, counsel for Brenda asserts that BBE is not

part of the estate. Counsel for Brenda argues that because Helfeld has demonstrated a failure to distinguish between estate assets and trust assets, Brenda has no choice but to seek to add the trust as a party to the present action. As an example, counsel notes that Exhibit E of the executor's account reflects rents received from tenants of the BBE real estate, even though the interest in BBE is a trust asset. The rents shown on Schedule E were then commingled with other estate assets and used to pay expenses. It is argued that until discovery has been completed, it will be difficult, if not impossible, to determine whether any BBE funds were converted by the estate or by the trust.

(2) Leave to amend to add H&K as a party

Brenda also seeks leave to add the law firm of H&K as a party, arguing that any party who knowingly receives diverted corporate funds may be subject to a shareholders' derivative action for the waste of the assets of the corporation. In support, counsel for Brenda cites the dissenting opinion of Justice Levine in *Blank v Schafrann*, (129 AD2d 830, 832 [1987, Levine, J., dissenting], *revd* 70 NY2d 887 [1987]), which was adopted by the Court of Appeals (*Blank v Schafrann*, 70 NY2d 887 [1987]), and which states that a shareholders' derivative action is the proper vehicle for relief against attorneys who knowingly and wrongfully accept diverted corporate funds and who thus benefit from the misconduct of corporate officers (*Blank v Schafrann*, 129 AD2d 830, 832 [1987, Levine, J., dissenting]).

OPPOSITION TO THE MOTION

In opposition to the motion, H&K argues the following:

1. The cross-motion is procedurally defective, in that Brenda failed to cross-move pursuant to CPLR 3025 (b) for an order granting leave to serve and file a supplemental citation,

instead filing only a claim for relief to amend the complaint.

2. Any claim against the trust would be premature at the present time, as the trust has not yet been funded, and may not be funded, without the approval of the Surrogate after the judicial settlement of the executor's account.

3. There is no evidence that H&K knowingly received BBE funds. An affidavit filed by Helfeld's counsel in the accounting proceeding notes that even if it could be shown that funds used to pay H&K were derived from BBE funds, no reasonable counsel could have known that, absent a forensic accounting.

4. Every check paid to H&K for legal services was paid out of an estate account and not out of a BBE corporate account.

5. The opinion cited by counsel for Brenda in support of the present cross-motion to add H&K as a party involves checks drawn on corporate accounts for personal expenses. The present facts involve checks drawn on estate accounts for legal work provided on behalf of the estate.

6. Almost all of the claims against H&K are barred because there is a three-year statute of limitations for "an action to recover damages for malpractice" (CPLR 214 [6]).

Counsel concludes by asserting that this court can determine, as a matter of law, that the proposed amendments to the cross-motion to add the trust and H&K as parties are "palpably insufficient, prejudicial and patently devoid of merit," citing *Lucido v Mancuso* (49 AD3d 220 [2d Dept 2008]).

ANALYSIS

The court has broad discretion whether to grant or deny leave to amend under CPLR § 3025 (b), which provides that "[a] party may amend his pleading . . . at any time by leave of

court." "Leave to amend a pleading pursuant to CPLR § 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend" (*Seidman v Industrial Recyling Props., Inc.*, 83 AD3d 1040 [2d Dept 2011]; *see also Matter of Pinto*, 2012 NY Misc Lexis 5391, 2012 NY Slip Op 52200 [U] [Sur Ct, Richmond County 2012]). The court will consider: (1) how long the amending party knew the facts raised in the amendment and whether a reasonable excuse is offered for the delay (*Matter of Goggins*, 231 AD2d 634 [2d Dept 1996]); (2) whether the amendment plainly lacks merit (*Matter of Carvel*, NYLJ, Apr. 16, 2002 at 23 [Sur Ct, Westchester County]; *Seaman Corp v Binghamton Sav. Bank,* 243 AD2d 1027 [3d Dept 1997]; and (3) whether the amendment would cause prejudice to the other party (*Matter of Carvel*, NYLJ, Apr. 2, 2002, at 23 [Sur Ct, Westchester County]; *Seaman Corp v Binghamton Sav. Bank*, 243 AD2d 1027 [3d Dept 1997]; *Matter of Goggins*, 231 AD2d 634 [2d Dept 1996]; *Wyso v City of New York*, 91 AD2d 661 [2d Dept 1982]; *Matter of Sabha*, 65 AD2d 917 [4th Dept 1978]). Typically, denial of a motion for leave to amend might occur after a lengthy delay following the filing of the original petition or just before commencement of a trial (*Gallo v Aiello*, 139 AD2d 490 [2d Dept 1988]).

In connection with Brenda's request to add as parties (1) the trust and (2) H&K, the court has carefully considered the arguments made in support of the cross-motion, as well as the opposing arguments raised by H&K.

(1) Leave to amend to add the trust as a party

As discussed above, Brenda maintains that Helfeld commingled estate assets and trust assets. Although Helfeld treated decedent's interest in BBE as an estate asset, it is argued that

the asset was, in fact, a trust asset, pursuant to the terms of decedent's will, under which decedent bequeathed his interest in the real property held by BBE to Jeffrey in trust. Brenda asks to be allowed to add the trust as a party since it remains unclear which entity, the estate or the trust, may have converted funds which were properly payable to Brenda as a 50% shareholder of BBE.

In opposition to the motion, H&K asserts that Brenda should have cross-moved for an order granting leave to serve and file a supplemental citation, and that her cross-motion is therefore procedurally defective. This court, however, permits the filing of a motion for leave to amend a complaint. In the event the motion is granted, the cross-movant will be directed to serve and file a supplemental pleading.

H&K also asserts that Helfeld is prohibited by law from funding the trust without the authorization of the Surrogate, and not before settlement of Helfeld's judicial account as executor. No case law is cited in support of this position. It is possible that Helfeld has not yet funded the trust but once letters of trusteeship are issued by the court, the trust can be named as a party in a court action.

(2) Leave to amend H&K as a party

Brenda has asked for leave to add H&K as a party, citing one dissenting opinion, adopted by the Court of Appeals, which states that a third party beneficiary who knowingly benefits from corporate funds which were wrongfully diverted by corporate officers may be named as a party in a shareholders' derivative suit brought against the officers. H&K points out that even if it can be proven that the checks drawn on the estate account which were used to pay for legal services were funded by BBE assets, no evidence has been introduced to show that H&K knew or could have known that. H&K argues that the present circumstances may be distinguished from the

facts found in the dissenting opinion cited by counsel for Brenda, which involved corporate, not estate, checks that were used to pay personal, not legal, expenses, and in which the attorneys accepted the payments knowing that the payments were being made from funds that had been wrongfully diverted from another corporate entity. In the case cited, the complaint stated that an officer of a corporation caused that corporation to pay expenses and legal fees for services which were rendered in the personal defense of the officer, another individual and corporate entities other than the corporation paying the fees and expenses. Furthermore, the attorneys being paid accepted the payments from the corporation with full knowledge that the payments were not for services rendered to the corporation but were, in fact, in payment for services rendered to other corporations and individuals (*Blank v Schafrann*, 70 NY2d 887 [1987]).

The court finds the distinctions persuasive. The fees accepted by H&K were paid from estate accounts for services rendered on behalf of the estate. There is no evidence to support the assertion that as a result of accepting payment from the estate for the firm's legal defense of an asset that arguably belonged to the estate, H&K can be characterized as a third party beneficiary who knowingly benefitted from wrongfully diverted corporate assets.

The final argument presented by H&K in opposition to the cross-motion to include the firm as a party is that the statute of limitations has run as to most of the claims raised against H&K. However, H&K does not assert that all of the claims are time-barred, nor does it clearly specify which claims are not barred. The applicability of various statutes of limitations will be determined at trial (*see Singer v State Laundry, Inc.*, 188 Misc. 583 [Sup Ct, New York County 1947]).

The court also considered the following factors in reaching a determination as to whether

to grant the cross-motion to amend the pleading:

(A) In *Matter of Goggins* (231 AD2d 634 [2d Dept 1996]), the court stated that one factor to be considered is when the party moving to amend discovered the underlying facts, and whether that party can explain the delay in raising additional pleadings. In the present case, Brenda maintains that she did not know that estate and trust funds were commingled until she received documents produced in response to discovery demands.

(B) In *Matter of Carvel* (NYLJ, Apr. 2, 2002, at 23 [Sur Ct, Westchester County]), the court considered whether the proposed amendment is clearly lacking in merit. Based upon the facts reviewed above, it cannot be said that the proposed amendment clearly lacks merit.

(C) In *Seaman Corp v Binghamton Sav. Bank* (243 AD2d 1027 [3d Dept 1997]), one of the factors to be considered is whether the amendment will prejudice the opposing party. There is no indication that Helfeld or H&K would be prejudiced by the delay, in the event that the cross-motion to name them as parties is granted.

CONCLUSION

Leave to amend is generally exercised freely (*Matter of Bender*, 18 Misc 3d 1109A, 2007 NY Slip Op 52478 [U] [Sur Ct, Nassau County 2007]).

The court grants leave to amend the complaint to add the trust as a defendant.

The court denies that portion of the motion seeking leave to amend to add H&K as a party, with leave to renew in the event that: (1) evidence is introduced to show that the funds used to pay H&K's fees were corporate funds, and that this was known to H&K when they accepted payment; or (2) there is a judicial determination by this court that damages are payable to Brenda by the estate or the trust, and there are insufficient funds remaining in the estate or the

trust, or otherwise recoverable, to pay the damages. In any event, all fees paid to the executor's attorney are subject to review by the Surrogate.

The amended pleading, adding the trust as a party, is to be served on all parties within 30 days of the date of this decision.

A conference in this matter has been scheduled for January 6, 2014 at 3:45 p.m.

This is the decision and order of the court and no further order need be submitted.

Dated: December 11, 2013

EDWARD W. McCARTY III
Judge of the
Surrogate's Court