Matter of Sanchez
2017 NY Slip Op 32685(U)
December 28, 2017
Surrogate's Court, New York County
Docket Number: 2001-3187/G
Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Application for a Compulsory Accounting for a Trust Established by

ELIZABETH L. de SANCHEZ,

Grantor.

File No. 2001-3187/G

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A N D E R S O N , S.

This is a motion by Trustee JPMorgan Chase Bank to dismiss a petition to compel it to account for a 1927 inter vivos trust created by Elizabeth L. DeSanchez ("Grantor") for her primary benefit. Although no original or copy of the trust indenture is known to exist, the Trustee bank produced discovery documents in the course of related litigation which showed the existence of the trust in 1940. Having found no further records, the bank concluded that Grantor must have revoked this trust during her lifetime.

Petitioner, as fiduciary of the Grantor's estate, filed the instant proceeding to compel the bank to account. The bank defaulted on the initial return date. A decision and order directed the bank to account within 45 days (*Matter of DeSanchez*, NYLJ, February 27, 2012, at 22, col 5). Thereafter, the bank moved 1) to vacate its default and the court's order compelling it to account, 2) for leave to respond to the petition *nunc pro tunc*, and 3) to dismiss the petition. The bank argued several

grounds for vacating its default: inadequate service of the petition; the likelihood that Grantor had revoked the trust during her lifetime, thus purportedly obviating the Trustee's duty to retain trust records or to account to her successor-in-interest; a statute of limitations bar; and laches. This court declined to vacate its decision and order (*Matter of DeSanchez,* Decision and Order, Oct. 19, 2012, NYLJ, Oct. 31, 2012, at 23), and the bank appealed.

The Appellate Division First Department modified the order and set aside the bank's default (*Matter of DeSanchez,* 107 AD3d 409 [1st Dept 2013]) concluding that the bank had demonstrated a reasonable excuse for the default. As to the merits of the motion, the Appellate Division decision was mixed. It rejected the bank's position as to improper service, statute of limitations, and laches (*id.* at 410). However, the decision directed this court to allow the Trustee the opportunity to oppose the petition *nunc pro tunc,* ruling that the bank had made a prima facie showing that Grantor had revoked the trust before her death. The court observed, however, that the showing of revocation "was not so overwhelming that the petition should be dismissed; rather, JPMorgan may file objections, after which the matter can take whatever course is required (*e.g.*, discovery and a trial)" (*id.*).

Upon remand, the bank filed its answer *nunc pro tunc,*

objecting to the petition and again arguing that it should be dismissed.

It is well-established that a fiduciary has an absolute obligation to account and, in order to meet this obligation, it must maintain adequate records of its fiduciary transactions (7 Warren's Heaton, Surrogate's Court Practice § 91.01 at 91-2 [7th ed 2017]; *Matter of Anolik*, 274 AD2 515 [2d Dept 2000]). Although the interested parties may informally release the fiduciary from its obligation to account formally (*In re Gilchrist*, 206 Misc 687 [Sup Ct, Westchester County 1954], *mod* 286 AD 869 [2d Dept. 1955]), the record here is devoid of any assertion that the Trustee was in any way released from its obligation to account for the trust. Instead, the bank offers the specious argument that the very absence of records regarding the trust demonstrates that it must have satisfied its accounting obligation to Grantor or it never would have destroyed the relevant records. However, trustees generally, and corporate trustees in particular, have an obligation to retain records of the estates for which they are responsible, and, if they are released by trust beneficiaries from any further responsibility, it is in their interest to obtain and retain written releases and a record of the disclosure they made to secure such releases. A fiduciary's failure to maintain records results in doubts and presumptions being resolved against the fiduciary (*Matter of*

Carbone, 101 AD3 866, 869 [2d Dept 2012]; *Matter of Shulsky*, 34 AD2 545, 547 [2d Dept], *appeal dismissed, 27 NY2 743 [1970]*); *Matter of Sakow*, 21 AD3 849, 850 [1st Dept 2005]). To rule otherwise would be to license fiduciaries to insulate themselves from inquiry by negligently or intentionally disposing of records relating to their conduct.

The bank next argues that since the Appellate Division concluded that the bank had made a prima facie case of revocation, the burden of proof of non-revocation shifts to Petitioner and that this burden must be met before the bank may be compelled to account. Because no proof one way or the other will be available on this issue (no records on this point having been maintained), the bank speculates that Petitioner will inevitably fail to meet its burden and that it is thus against the interests of the trust to require it to prepare a pointless account. Alternatively, the bank argues that, if the court does not agree to dismiss the petition outright at this juncture, it must hold a hearing to determine whether it is in the trust's best interests to require it to account.

However, by remanding this case after determining that the bank had made out a prima facie case of revocation, the Appellate Division specifically rejected the argument that dismissal was necessarily merited. Further, the possibility that Grantor might have revoked the trust, even if revocation cannot be

disproved, does not settle the question of whether the Grantor expressly or implicitly released the fiduciary and under what terms or conditions, if any.

Nor does a ruling on this motion require a hearing as to the trust's best interests. Although the court has the discretion to deny a petition to compel an accounting based on the best interests of the estate in question (*see, e.g.. Matter of Kennedy*, #2010-0037/A [Sur Ct, NY County June 12, 2013]), the Trustee offers no authority for a blanket requirement that a party with standing to demand an accounting, whose pleading is facially sufficient, meet any such preliminary test. Nor do we read in the Appellate Division's decision any mandate to conduct such a hearing in this case. The remand decision offers discovery and a hearing only as an example of how this court might proceed to a determination on the merits. It does not set out any mandatory course. Rather, the decision leaves it to this court to determine the petition as it sees fit. With respect to factual questions concerning trust administration, it is not the practice of this and other Surrogate's Courts to resolve them in the context of a compel-account proceeding. Rather, such questions can better be addressed within the context of the contested accounting proceeding which follows, in an orderly fashion through discovery, summary disposition and/or trial (*see, e.g., Matter of Schnare*, 594 NYS 2d 827 [3d Dept], *appeal den'd,*

82 NY2 653 [1993]; *Matter of Carbone*, 101 AD2 544 [2d Dept 2012]). It serves the interests of judicial economy to proceed in this manner here.

Finally, the bank argues that this case falls under an exception to a fiduciary's general obligation to account as set forth in *Matter of Reckford*, 307 NY 165 (1954). In order to consider this argument, it is necessary to review the details of that very fact-specific case. In *Reckford*, a wife left a life estate in her assets to her surviving husband along with a testamentary power to appoint them to any of their children he wished. Although the wife's will contained no language regarding a trust, the court ruled that her bequest made her husband a de facto trustee over her assets for the benefit of those to whom he ultimately appointed. When the husband died, he left his entire estate to his son, who was the only person with an interest in the trust assets. The son post-deceased his father and the couple's two disinherited daughters objected to the probate of the son's will. Their dispute was settled by an agreement that the two daughters would receive those assets of their mother's estate which passed to the son through the husband's exercise of the power of appointment. As a result of the terms of the settlement, the son's estate did not have sufficient funds to satisfy a $75,000 legacy under his will. The son's disappointed legatee then sought to compel the husband's fiduciary to account

for the husband's conduct as de facto trustee of his wife's assets. No records had been retained by the husband from which an account could be prepared, and it was impossible to determine whether the son had been satisfied with the way the father had handled the assets which constituted the corpus of the de facto trust. The court suggested that the son, who was in business with his father and was familiar with his financial affairs, might well have been aware of his father's dealings with the assets passing under the wife's will and had been satisfied as to his conduct. In a decision explicitly limited to these facts, the court ruled that, although a trustee bears the burden of proving that it has accounted, where the trustee was a trusted family member who had the full confidence of the sole beneficiary, and both trustee and beneficiary were deceased, a third party seeking to compel an account must make some preliminary showing that the trustee had not accounted to the beneficiary before being entitled to an account. The *Reckford* decision did not purport to establish a general exception to a fiduciary's obligation to account, nor has it ever been so applied in the many years since it was decided. And, although the facts of the instant case have some similarities to the facts in *Reckford,* (in that the relevant events occurred many years ago and the individuals best positioned to know the facts have died) there are profound differences between the two cases which make

Reckford inapplicable here. Unlike the deceased family member who served as trustee in *Reckford*, the Trustee here is a professional corporate trustee which succeeded to the interests and obligations of its corporate predecessors and has thus in effect been in place without interruption from the initiation of the trust to the present. Unlike the third party claimant in *Reckford*, whose interest in the estate in question was attenuated (at best), Petitioner here is the fiduciary of the estate of the trust's primary beneficiary. Further, in this case there was no personal relationship between Trustee and beneficiary from which one could infer that disclosures had been made as a matter of course and satisfaction obtained. Time and death have destroyed neither the professional nor fiduciary obligations of the Trustee to account nor its concomitant obligation to retain records evidencing whether it fulfilled its obligations in this regard. *Reckford*, accordingly, is not applicable here.

On the basis of the foregoing, JP Morgan Chase Bank, N.A., is directed to account for the proceedings of its predecessors and itself as Trustee within 45 days of the service of notice of entry of this decision upon it.

This decision constitutes the order of the court.

NSA

S U R R O G A T E

Dated: December 27th, 2017