Levien v Johnson
2014 NY Slip Op 30995(U)
April 15, 2014
Surrogate's Court, New York County
Docket Number: 1983-3059/D
Judge: Rita M. Mella

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

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PHILIP LEVIEN, BARRY LEVIEN and
KENNETH LEVIEN, as Trustees of the Trust Under
Article SEVENTH under the Will of

ARNOLD LEVIEN,
Deceased,

-against-

PARVIN JOHNSON, JR., KENNETH IVES, HARLAN
LEVIEN and STEPHEN LEVIEN.

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DECISION and ORDER

File No. 1983-3059/D

M E L L A, S.

The following papers were considered in deciding this motion to dismiss pursuant to CPLR § 3211(a)(7):

PAPERS	NUMBERED
Notice of Motion to Dismiss dated May 15, 2013	1
Affidavit of Respondent Harlan Levien, date June 6, 2013	2
Affidavit of Respondent Stephen Levien, dated June 14, 2013	3
Affidavit of Respondent Parvin Johnson, Jr., dated June 6, 2013, with Exhibit A	4
Affidavit of Respondent Kenneth Ives, dated June 6, 2013, with Exhibit A	5
Affidavit of Anne C. Lefever, Esq., dated June 7, 2013, with Exhibits A to D	6
Respondents' Memorandum of Law in Support of Motion to Dismiss, dated May 15, 2013	7
Supplemental Affidavit of Harlan Levien, dated June 13, 2013, with Exhibit A	8
Affidavit of Petitioner Philip Levien, dated May 31, 2013	9
Affidavit of Seymour D. Reich, Esq., dated May 29, 2013	10
Affirmation of Kimberly J. Linkletter, Esq., dated June 3, 2013, with Exhibits 1 and 2	11
Petitioners' Memorandum of Law in Opposition to Respondents' Motion to Dismiss, dated June 3, 2013	12
Respondents' Reply Memorandum of Law in Further Support of Motion to Dismiss, date June 7, 2013	13
Letter from Edward Flanders, Esq., dated July 2, 2013, noting a correction to Respondents' Reply Memorandum of Law	14

The will of decedent Arnold Levien established a trust under Article SEVENTH that, as relevant here, benefited his grandchildren, including Stephen and Harlan Levien ("Stephen and Harlan"). By its terms, this trust terminated on February 24, 2013, triggering distribution of the remainder, not to decedent's grandchildren, but to his "great grandchildren" per capita. The trustees' petition now before the court seeks, among other things, a declaration that two adult individuals, Kenneth Ives and Parvin Johnson, Jr. ("Ives and Johnson"), whom Stephen and Harlan respectively adopted in Texas in October of 2012, are not members of the class of decedent's great grandchildren entitled to share in its remainder. Respondents, Stephen, Harlan, Ives and Johnson, prior to answering the petition, have moved to dismiss it for failure to state a claim. This motion arises in the following context.

Stephen and Harlan both suffer from facioscapulohumeral (literally, face, shoulders and upper body) muscular dystrophy and have no natural children of their own. In July of 2010, Stephen and Harlan, because of their ailments, sought to compel the trustees to invade and make certain distributions from the trust's principal, as, in addition to being income beneficiaries (since their parents' death), they were also beneficiaries of "such portion of the then principal of said trust as [the] trustees, in their absolute discretion, shall determine and deem advisable, in the event of any serious illness, misfortune or other emergency affecting any such beneficiary." The trustees and the other beneficiaries there argued that Stephen's and Harlan's medical condition is a chronic one, not an "emergency" covered by the language of the trust, and that the trustees could not be compelled to invade principal to provide routine medical care associated with an ongoing illness. Stephen and Harlan also sought to have the trustees set aside a reserve for their future medical needs and to remove the trustees due to a claimed conflict of interest, since the

trustees' issue were also remainder beneficiaries of the trust.

In the end, that proceeding seeking invasion of the principal and a related accounting proceeding for the $17.5 million trust, which holds interests in Long Island City real estate, settled pursuant to a July 20, 2012 stipulation. In return for receiving $350,000, Stephen and Harlan agreed that they would "relinquish all rights as beneficiaries of income and/or principal of the Trust." They further agreed that they would "make no further requests of the Trustees for income or principal" of the Trust. The stipulation also contained a confidentiality provision:

> "Except in response to a valid subpoena, the Parties hereby agree that they shall not directly or indirectly communicate or disseminate information concerning the Invasion Proceeding, the Accounting Proceeding, or any matter relating to the administration of the Trust or the Estate of Arnold Levien to:
> a. Any person or entity who hereafter may assert a claim against the Trustees in any related or unrelated proceeding, or advisors or consultants . . . ."

Also at the time that Stephen and Harlan executed the stipulation, they, according to petitioners, "did not have any biological children and neither individual indicated a desire or intention to adopt." It is not disputed that the question of their adopting, however, was never discussed at the time the parties reached the settlement of those proceedings.

The Article SEVENTH trust was to terminate when "the youngest of [decedent's] great grandchildren living at the time of [decedent's] death [which occurred on May 14, 1979] shall attain the age of thirty-five (35) years," at which time, "[decedent's] trustees shall pay over and distribute the then principal of the trust to [his] then living great grandchildren in equal shares per capita." This happened, as noted, on February 24, 2013, and the trust has terminated.

By an October 3, 2012 order of County Court at Law of Bastrop County, Texas, grandson Harlan legally adopted an adult, Parvin Johnson, Jr., and by an October 4, 2012 order of District Court, 423rd Judicial District, Bastrop County, Texas, grandson Stephen legally adopted an

adult, Kenneth Ives. By virtue of these adoptions, respondents claim that Ives and Johnson are two of decedent's 16 great grandchildren, as of the time the trust terminated, and that they should be paid their per capita share of the trust's remainder. Johnson and Ives notified the trustees of the adoptions in December of 2012, but the trustees have refused to recognize them as beneficiaries of the trust.

The current petition followed, seeking a decree declaring that Ives and Johnson "are not entitled to receive class distributions" of the remainder from the trust. The trustees further claim breach of the June 20, 2012 stipulation of settlement, in addition to costs, attorney's fees, and no less than $10 million in punitive damages.[1] The four respondents, Stephen, Harlan, Ives and Johnson, have moved, pursuant to CPLR § 3211(a)(7), to dismiss the petition in its entirety.

Governing Law

No party here argues that another jurisdiction's law conflicts with New York and properly governs this dispute. While decedent was domiciled in Florida, Article FOURTEENTH of his will expressly provides that "all testamentary dispositions of property situated in the State of New York shall be governed by the laws of the state of New York." There is no indication that the trust property is other than in New York, and, by the explicit terms of EPTL § 3-5.1(h), such a statement by the testator in his will requires that the court apply local, that is, New York, substantive law (*see also* EPTL § 7-1.10).

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[1]A related petition, essentially a cross-petition, by Ives and Johnson pursuant to EPTL § 11-1.5 and SCPA § 2102, seeking distribution of their remainder interests, has been stayed on consent of the parties pending resolution of the proceeding currently before the court brought by the trustees.

Motion to Dismiss Standards

Motions under CPLR § 3211(a)(7) for failure to state a claim require the court to liberally construe the petition, accept the factual allegations therein as true, and afford the petitioner the benefit of all favorable inferences therefrom; the court must then decide whether the facts alleged fall under any recognized theory for recovery or relief (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Molina v Phoenix Sound*, 297 AD2d 595, 596 [1st Dept 2002]). In general, "[w]hether a [petitioner] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). However, where allegations consist of bare legal conclusions or factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to consideration as "true" on a motion to dismiss (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691 [1st Dept 1994]; *see also 1455 Washington Ave. Assoc. v Rose & Kiernan*, 260 AD2d 770, 771 [3d Dept 1999]; *Matter of Crawford,* 207 Misc 145, 149 [Sur Ct, Orange County 1955]).[2]

[2]Movants cite the decision in *Newell v Atlantic Express Transportation Corp.* (35 Misc 3d 1240[A], 953 NYS2d 551 [Sup Ct, Bronx County 2012]), which states "[c]onclusory allegations . . . made only 'upon information and belief' are insufficient to overcome a motion to dismiss." *Newell* cites to *Angel v Bank of Tokyo–Mitsubishi, Ltd.* (39 AD3d 368, 370 [1st Dept 2007]), which demonstrates that this isolated quotation from *Newell* does not support movants' proposition that allegations made only "upon information and belief" cannot withstand a motion to dismiss for failure to state a claim. This proposition is directly contradicted by the holding of *Roldan v Allstate Insurance Company* (149 AD2d 20, 40 [2d Dept 1989] [allegations that insurer had an unvarying policy of denying coverage made on information and belief were to be considered true on motion to dismiss]).

I. PROPOSED DECLARATION THAT IVES AND JOHNSON ARE NOT ENTITLED TO TRUST DISTRIBUTIONS

The petition does not challenge the validity of the adoptions,[3] but instead, makes five principal arguments in support of its proposed declaration excluding Ives and Johnson as trust beneficiaries: first, that distributions to them, based on their status as a result of these adoptions would violate the terms of the will and the decedent's intent; second, that under the "unique and unforeseeable" circumstances of this case, the court should determine that Ives and Johnson do not qualify as decedent's intended beneficiaries; third, that distribution should be denied because Stephen and Harlan had a duty to disclose the proposed adoptions to the trustees while negotiating the prior settlement agreement; fourth, that the trustees have the explicit power to determine who is entitled to a trust distribution and the court should not interfere with the exercise of this discretion; and fifth, that distributions to Ives and Johnson would circumvent the terms of the settlement agreement. These claims are examined below.

The Will and Decedent's Intent As To Adoptees

Decedent explicitly directed that, upon termination, the trust's remainder is to be distributed to his great grandchildren per capita.[4] The will does not mention adoptions at all, nor is there any statement in it indicating that trust beneficiaries were to be limited to blood relations.

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[3]The trustees are seeking to do that in Texas, where thy have begun an action to unseal the records of the two adoptions and to contest their validity. After submission of the present motion, the parties informed the court that the Texas proceeding has been stayed by the Texas court, on consent of the parties, in light of the New York proceedings.

[4]Article SEVENTH, subsection (d), provides that upon termination, "my trustees shall pay over and distribute the then principal of the trust to my then living great grandchildren in equal shares per capita . . . ."

New York law has provided since 1963[5] that, "[u]nless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another, includes: (1) Adopted children and their issue in their adoptive relationship. . . ." (EPTL § 2-1.3[a]).

No party to the current motion argues that the term "great grandchildren" as used by the decedent was not a "term of like import," and the trustees have presented no evidence of a "contrary expression" by the decedent himself.

While it is beyond question that the intent of the testator is paramount in construing wills (*Haug v Schumacker*, 166 NY 506, 513 [1901]; *Matter of Ellis*, 252 AD2d 118, 128 [2d Dept 1998]), it is also elementary to their interpretation that extrinsic evidence cannot be used to contradict the terms of an otherwise unambiguous will (*Matter of Emmons*, 59 NYS2d 264 [Sur Ct, Broome County 1946]; *see also Matter of Larkin*, 9 NY2d 88, 91 [1961] ["[i]f the testator's intention is not clear . . . it 'must be gleaned . . . from a sympathetic reading of the will *as an entirety* . . . .'" [internal quotation omitted]]). Absent an ambiguity, the source of ascertaining the decedent's intent is the will itself and the words used therein. This is supported by the case on which the trustees rely, *Matter of Fabbri* (2 NY2d 236 [1957]), which clarifies that when "the language employed is so clear and unmistakable as to convey only one meaning even when read in its proper setting[,] . . . the intent evidenced by the language is given effect without reference to external circumstances or rules of construction." (*Id.* at 244.)

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[5]This provision was first enacted by the Laws of 1963, chapter 310, and codified in Decedent Estate Law § 49, which is now embodied in EPTL 2-1.3(a)(1). Decedent executed his will in 1975.

There is nothing within the will at issue that indicates or even suggests an intent on the part of the decedent to exclude those who may be considered his great grandchildren by virtue of adoption. The trustees do not argue otherwise. Decedent's silence on the topic of adoptions, however, does not somehow commute his use of the term "great grandchildren" into an ambiguity requiring resort to extrinsic evidence in aid of its interpretation. The dictates of EPTL § 2-1.3 are clear and require the inclusion of adoptive children unless the decedent "expresses a contrary intention." Since decedent did not express an intention to exclude adopted children as beneficiaries, his use of the term "great grandchildren" includes "adopted children" (*see Matter of Rockefeller*, 12 NY2d 124, 134 [1962]).[6] Consequently, this attempt by the trustees to create an ambiguity in the term "great grandchildren" fails to state a legally cognizable claim.[7]

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[6]In this regard, the court notes that it is the "fundamental concept and policy of this State . . . that adopted children stand equal with biological children within their adoptive families, with all incidental property rights" (*Matter of Gardiner*, 69 NY2d 66, 73 [1986]; *see Matter of Grupe*, 222 AD2d 675, 676 [2d Dept 1995]).

[7]The trustees have simply provided no evidence of a contrary expression by the decedent to exclude adoptees as beneficiaries. Instead, they provide the speculation of the attorney-drafter of the will, Seymour Reich, who states that "[b]ased on my personal interactions with the Decedent, he was a family-oriented individual, and I do not believe he would have intended for these individuals [the adoptees], who are complete strangers to the family, to receive distributions under the Trust and deprive the other great-grandchildren of their rightful shares." Speculation of this sort by a third party, unlike the expressions of the decedent, is not cognizable under EPTL § 2-1.3. Indeed, the attorney-drafter candidly admits that he "cannot state whether or not the Decedent intended to provide for adopted individuals . . . ."

The only other evidence offered on this issue is third-party speculation too. Petitioner Philip Levien avers that he simply does not "believe that, under the circumstances known to the Trustees, the decedent would have intended that the Adoptees receive Trust fund distributions as great-grandchildren of the Decedent."

The Claim That The Adoptions Were "Unique and Unforeseeable" or a "Sham"

The trustees characterize the adoptions as "unique and unforeseeable"[8] in yet another attempt to admit extrinsic evidence on the question of decedent's intent, when it would otherwise not be available to interpret the will. This is also meritless. The claim appears to be grounded on a theory that there must, in "unique" circumstances, be recourse to some objective standard in determining what a reasonable testator would have intended. However, no authority supports such an argument and, indeed, it is contradicted by the authority mandating that a testator's intent as expressed in the words used in the will controls (*see, e.g.*, *Matter of Larkin*, 9 NY2d at 91). The one case cited by the trustees on this issue, *Matter of Svenningsen* (105 AD3d 164 [2d Dept 2013]), is not remotely analogous.[9] The court, in any event, is bound to interpret the "expressions" actually made by the decedent, which placed no limitation on the term "great grandchildren."

Moreover, the trustees' assertion that adoptions are not foreseeable does not pass muster. Adoption has long been statutorily recognized in New York as a means of creating a parent-child

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[8]The trustees argue that "no one (much less Decedent) could have anticipated that five months after inducing the Trustees to execute the Settlement Agreement and just two months before the Trust's termination, the Cousins [Stephen and Harlan] would suddenly reveal that they had adopted adult 'children,' . . . who live hundreds of miles away from their 'fathers' and who are now claiming a per capita share of the Trust's remainder as 'great-grandchildren' of the Decedent." Under such circumstances, the trustees claim that it "would be preposterous and unreasonable to conclude that the Decedent intended to include these individuals in the class distributions of the Trust's principal."

[9]There, the decedent and his spouse had agreed that the child adopted by them would not be re-adopted by another family, but some seven years after the decedent's death, the surviving spouse permitted the child to be re-adopted. The proper application of Domestic Relations Law ("DRL") § 117 in the circumstances with which that court was confronted in that case does not present a situation analogous to the one here, and, in any event, the issue of the admission of extrinsic evidence was not determinative in *Svenningsen*.

relationship as a matter of law (*see* DRL § 110; *see generally Matter of Frost*, 192 App Div 206, 208-210 [1st Dept 1920], *aff'd sub nom Matter of Kingsbury*, 230 NY 580 [1920]).

The issue of adoptions affecting the rights of remainder beneficiaries is likewise not new. For many years in New York, from 1887 to 1964 to be precise, the Domestic Relations Law included what has become known as the "precautionary addendum."[10] Under this statutory proscription, an adopted child was "not deemed the child of the [adoptive] parents so as to defeat the rights of remaindermen" (*see* L 1961, ch 147 [re-numbering it as DRL § 117[1]]). This provision was repealed as of March 1, 1964, but for decedents dying before that date, which is not the case here, the provision still applies. The precautionary addendum, however, is strictly construed (*see Matter of Gardiner*, 69 NY2d 66), and even if it were in effect at decedent's death, it would not be applicable because the adoptions here did not defeat the rights of remainder beneficiaries, but instead purported only to add members of the class of possible remainder beneficiaries (*see Matter of Boehner*, 94 AD3d 477 [1st Dept 2012]). The trustees' claim that the adoptions here presented a unique and unforeseeable circumstance requiring some specialized analysis of the decedent's intent apart from his intent as to adoptions generally is without merit, and these claims are likewise dismissed.

The trustees further claim that these were sham adoptions for the purposes of obtaining trust funds and that there must be enhanced scrutiny of the adopters' intent under the circumstances here, specifically, that they chose to adopt adults who are close in age, if not older

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[10]The precautionary addendum was codified in various statutes over the years (*see* L 1887, ch 703; L 1896, ch 272, as amended by L 1897, ch 408 [DRL § 64]; L 1909, ch 19, as amended by L 1915, ch 352 and L 1931, ch 562 [former DRL § 114]; L 1938, ch 606 [re-enacted as DRL § 115]; L 1961, ch 147 [re-numbered as DRL § 117[1]]). It was repealed effective March 1, 1964 (L 1963, ch 406).

than them, and that the adoptions occurred shortly after the settlement of the petition seeking a principal invasion for their benefit.

To the extent the trustees claim fraud existed in these adoptions, they also recognize that, if such is the case, it must be addressed by the courts which ordered the adoptions in Texas. This court agrees since it must accord the Texas adoption orders full faith and credit unless they were obtained by fraudulent misrepresentations or the absence of jurisdiction (*Matter of Osborne*, 284 App Div 143, 145 [3d Dept 1954]). The trustees do not allege that respondents made misrepresentations to the Texas courts that entered the adoption orders, or that the Texas courts lacked jurisdiction to enter the orders, and even if they did, by the trustees' own admission, those challenges are more properly made in the Texas courts that issued them.[11]

The allegations that Ives and Johnson are not entitled to distributions because the adoptions were a sham, done solely for the purposes of conferring financial benefits on Stephen and Harlan – members of the class of decedent's grandchildren and thus not entitled to share in the remainder – also fail to state a claim. The only way the adopters would benefit from distributions made to Ives and Johnson is if the adoptees voluntarily share their assets with the

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[11]The court notes that there is no exception on public policy grounds which would permit a New York court to deny recognition of another State's order of adoption (*Finstuen v Crutcher*, 496 F3d 1139, 1152–1153 [10th Cir 2007]; *see Matter of Sebastian*, 25 Misc 3d 567, 584-585 [Sur Ct, NY County 2009]; *see also Matter of Doe*, 7 Misc 3d 352 [Sur Ct, NY County 2005]; *see generally Baker v General Motors Corp.*, 522 US 222 [1998]). As a result, to the extent that the trustees attempt to articulate a claim that there is some equitable limitation on the ability of the New York courts to recognize a sister state's order of adoption, it must be dismissed pursuant to CPLR § 3211(a)(7). The court notes further that there can be no argument that adoptions should not be recognized in New York because they were of adults since the Domestic Relations Law provides no such limitation and, indeed, permits such adoptions (*see* L 1915, c 352, amending DRL § 110 [for the first time providing for adoption of a person 21 years or older]).

adopters, a circumstance the court has no power to restrict.[12] That the adoptions might have been preceded by an agreement in which Stephen and Harlan would profit from the adoptions is a claim that sounds in fraud and one that, again, should be made in the Texas courts.

Alleged Duty to Disclose Anticipated Adoptions Before the Prior Settlement

At the time of the settlement negotiations that resulted in the July 2012 settlement agreement, no one raised the issue of adoption, and the agreement does not prohibit Stephen and Harlan from adopting. The parties to the agreement, who were represented by counsel, did not discuss the issue, despite adoption's having long been statutorily authorized as the means to create parent-child relationships as a matter of law, even between adults. The trustees assert that, had they known, they "would have not executed the settlement agreement in the current form" and, at a minimum, "would have included provisions expressly addressing the alleged status of any such post-settlement adoptees" under the trust.

Relying on what has become known as the special facts doctrine (*P.T. Bank Central Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373 [1st Dept 2003]), the trustees claim that Stephen and Harlan were required to disclose their anticipated adoptions prior to the conclusion of those settlement negotiations. This claim does not require extended analysis because even if there were a duty to disclose under the circumstances, a breach of that duty, while it may be a defense to the enforcement of the settlement agreement or grounds for its breach, would not provide a basis for the declaratory judgment that the trustees seek regarding the status of Ives and

[12]The acknowledgments that Stephen and Harlan respectively executed in conjunction with the Texas adoptions state that each was "choosing to adopt . . . in order to help me in the future as I age and continue to deal with my health challenges." Each of these statements also provides that the respective adoptee, either Ives or Johnson, "will likely be under no legal obligation to provide me with anything."

Johnson as remainder beneficiaries of the testamentary trust (*see Sager v Friedman*, 270 NY 472 [1936]). The trustees' claimed loss flows not from the contract or its breach, but instead from the decedent's will, which does not exclude adopted children as beneficiaries. This claim must be dismissed for this reason. Moreover, and in any event, the petition is devoid of allegations that would give rise to a duty to disclose.

Trustees' Claimed Power to Determine Trust Beneficiaries

The trustees' other claim premised on the language of the will is a power given to them to determine the trust's beneficiaries under Subsection Y of Article TWELFTH:[13]

> "On the payment of any legacy or devise, or on termination of any trust hereunder, to determine who are the persons entitled to receive distributive shares and the proportions of their shares, and in so doing to act upon such information as on reasonable inquiry they may deem reliable with respect to identity, relationship or other fact relative to the distributees."

However, the language of Subsection Y is not the sole provision of the will relevant to understanding this enumerated power. The prefatory limitation applicable to all the powers enumerated in Article TWELFTH, which makes Subsection Y, "subject . . . to any express and specific restrictions and directions herein set forth" must also be considered and negates the trustees' argument. As explained, Article SEVENTH, subsection (d) expressly and specifically

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[13]The court notes that the failure to include these allegations in the petition is not fatal, because a petitioner may submit "affidavits . . . serving normally to remedy defects in the complaint [here, the petition], although there may be instances in which a submission by [petitioner] will conclusively establish that he has no cause of action" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]; *see M &B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 NY3d 798 [2009]). In opposition to the motion, petitioner Philip Levien's affidavit makes the argument premised on Article TWELFTH, Subsection Y, and petitioners attach to an attorney's affidavit the decedent's will in its entirety, including the provisions on which they rely for this claim. Because it rests on the text of the will and not on factual allegations that would otherwise be missing from the petition, and given that the parties have had the opportunity to brief the issue, this claim will be considered within the *Rovello* holding that allows affidavits submitted by petitioners in opposition to a motion to dismiss to remedy the deficiencies of the petition.

directed that, upon termination, the trust remainder is payable to decedent's great grandchildren, which did not exclude those considered as such by virtue of an adoption. Were the court to credit the trustees' position, it would be as if the testator gave the trustees the power to amend the dispositive provisions of the trust, but that is not what Subsection Y actually states (*see Kemp v Paterson*, 4 AD2d 153, 155 [1st Dept 1957] [exercise of power of trustees must be consonant with trust's dispositive provisions]; *see also Matter of Van Zandt*, 231 App Div 381 [4th Dept 1931]; *Matter of Bins*, 48 Misc 2d 921, 923 [Sur Ct, Albany County 1966]).

Furthermore, the Subsection Y language to "determine" beneficiaries must be read in context, which includes the language, "and in so doing to act upon such information as on reasonable inquiry they may deem reliable with respect to identity, relationship or other fact relative to the distributees." In this light, it becomes clear that Subsection Y is a limited administrative power and does not authorize the trustees to exercise a dispositive function or give them a general power to change beneficiaries of the trust. Instead, it is a power authorizing the trustees to act on the best information reasonably available in making distributions. The trustees' attempt to read Article TWELFTH, Subsection Y as a general discretionary power to determine beneficiaries is thus without merit, and the allegations that it empowered trustees to exclude the adoptees as beneficiaries, given the Texas orders of adoptions, fail to state a claim.

That Distributions to Ives and Johnson Would Circumvent the Settlement Agreement

Given that there is no provision addressing adoptions in the July 2012 settlement agreement, it is unclear from the trustees' submissions on what basis this agreement with Stephen and Harlan provides a remedy against Ives and Johnson, who were not signatories to it. The affirmation in opposition by petitioner Philip Levien notes that the settlement agreement is binding upon Stephen's and Harlan's "heirs, executors, successors, and assigns," but no

explanation or authority is offered to conclude that this provision implicates the signatories' capacity to adopt or the consequences of an adoption. Ives and Johnson are not Stephen's or Harlan's heirs, which are determined at death, and they are not executors, which are only appointed after death. They are neither successors nor assignees.

Moreover, to the extent that this claim may be based on the covenant of good faith and fair dealing implied in every contract, this covenant does not create independent contractual rights (*Phoenix Capital Invs. LLC v Ellington Mgt. Group, LLC*, 51 AD3d 549 [1st Dept 2008]), and cannot substitute for an otherwise non-viable breach of contract claim (*Skillgames, LLC v Brody*, 1 AD3d 247 [1st Dept 2003]). Which is to say that, since nothing in the agreement spoke to adoptions, the court is not at liberty to imply that it did.

Finally, with regard to this claim, and similar to the one made regarding an alleged duty to disclose the adoptions during the prior settlement negotiations, the petitioning trustees have provided no authority that a "circumvention" of the settlement agreement, or its breach, by Stephen and Harlan, even if it occurred, would support a determination that Ives and Johnson were not trust remainder beneficiaries. The trustees' allegations in this regard are, once again, an attempt to use contract breach as a basis for the forfeiture of a right on the part of Ives and Johnson that derives not from the contract but from decedent's will. These allegations provide an insufficient basis for the declaration the trustees seek, and they too fail to state a claim.

II. BREACH OF THE SETTLEMENT AGREEMENT'S CONFIDENTIALITY PROVISIONS

Apart from allegations in support of a declaratory judgment, the petition also seeks damages at law for breach of contract, specifically, that Stephen and Harlan willfully violated the settlement agreement by communicating confidential information to the adoptees regarding the

"administration of the Trust." The petition contends that "the only way that the Adoptees could have knowledge of the Trust and the upcoming [termination and remainder] distribution is through communications with Harlan and Stephen."

The trustees have stated a claim for breach of contract by alleging (1) the existence of an agreement, the prior July 2012 settlement agreement, (2) the petitioners' performance under the contract, the payment of $350,000 to Stephen and Harlan, (3) the respondents' breach of the contract, that Stephen and Harlan disclosed the terms of the trust and the settlement to Ives and Johnson, and (4) proximately caused damages, that, but for these prohibited disclosures, Ives and Johnson would not have asserted claims to a portion of the remainder, which resulted in a decrease in the distributions to the trust's remainder beneficiaries (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011] [elements of breach of contract]).

Having stated a claim in the first instance and under the standards the court must apply on a motion to dismiss, the only remaining question is whether respondents have provided unassailable evidence that unequivocally refutes one or more of the necessary elements of the breach claim, such that the court can conclude that the allegations are inherently incredible as a matter of law (*see Ullmann*, 207 AD2d 691). No such evidence has been provided in this case. Respondents' submissions, instead, come in the form of affidavits from Ives and Johnson themselves, and although they state that they had long known about the trust's provisions before the 2012 settlement was executed and never discussed the settlement with Stephen and Harlan, personal affidavits stating a particular version of the facts are not to be considered on a motion to dismiss for failure to state a claim (*Miglino*, 20 NY3d at 351). Petitioners are entitled to test the veracity of these statements in discovery, and a motion to dismiss is not the proper vehicle for

determining whether Ives' and Johnson's statements in this regard are credible.

III. PUNITIVE DAMAGES

In opposition to the motion to dismiss, the petitioners have not sought to support their claim of punitive damages, and that claim is deemed abandoned by them (*Krupnik v NBC Universal, Inc.*, 37 Misc 3d 1219[A], 2010 NY Slip Op 52462[U] [Sup Ct, NY County]; *see Wilmington Trust Co v Burger King Corp.*, 10 Misc 3d 1053[A], 2005 NY Slip Op 51943[U] [Sup Ct, NY County]).

CONCLUSION

Accordingly, the motion to dismiss the petition for failure to state a claim is granted as set forth in this decision; all claims are dismissed with the exception of the alleged breach of the confidentiality provision of the 2012 settlement agreement.

This decision constitutes the order of the court.

Dated: April 15, 2014

SURROGATE