

<b>Matter of Sinzheimer</b>
2017 NY Slip Op 31379(U)
June 28, 2017
Surrogate's Court, New York County
Docket Number: 2015-1418
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: June 28, 2017

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Petition of Andrew Sinzheimer and Marsha Sinzheimer  
to Enforce the Removal of U.S. Trust as Trustee of  
the Credit Shelter Trust under the Agreement of

DECISION and ORDER

RONALD SINZHEIMER and MARSHA SINZHEIMER,

Settlors,

File No.: 2015-1418

dated January 27, 1997.

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Petition of Bank of America, N.A., to Compel Trustees of the  
Credit Shelter Trust under the Agreement of

RONALD SINZHEIMER and MARSHA SINZHEIMER,

Settlors,

File No.: 2015-1418/A

dated January 27, 1997, to Comply With Directions of the  
Court.

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M E L L A, S. :

These companion proceedings present the issue of whether a corporate co-trustee that has been "removed" pursuant to the terms of a trust agreement is required to deliver the trust's assets to the sole individual trustee, where the individual has defied the instruction in the trust instrument to appoint a successor corporate co-trustee. The court concludes that delivery of the assets in these circumstances is not required.

The cases concern an irrevocable trust (the Trust) created by Ronald Sinzheimer and Marsha Sinzheimer, husband and wife, dated January 27, 1997. Ronald Sinzheimer (Ronald) died tragically in 1998.

Income and principal from the Trust are currently payable to Marsha Sinzheimer (Marsha) in the discretion of the trustees for her "health, support, maintenance and education." On her death, the Trust remainder is payable to a further subtrust, which terminates after the

death of the last surviving issue of the parents of the settlors, or as sooner required by the rule against perpetuities. The remainder of the subtrust is payable to certain named individuals or their estates.

The Trust instrument establishes mechanisms for the appointment and resignation of individual trustees, and for the removal of the corporate trustee with or without cause. Pursuant to these procedures, a corporate co-trustee was appointed at Ronald's death, was subsequently removed, and was replaced by Merrill Lynch Trust Company, a division of Bank of America, N.A. (the Bank); and Andrew Sinzheimer (Andrew), the son of Ronald and Marsha, has been appointed in place of a resigning individual trustee. Before his resignation, Andrew's predecessor exercised his power to remove the Bank, but no corporate co-trustee has been appointed to serve in its place. Andrew maintains that the appointment of a corporate co-trustee is not required and has declined to appoint one. The issue is consequential because Andrew has announced his intention to exercise his discretion to distribute all principal to Marsha if permitted to serve alone, thereby terminating the Trust.<sup>1</sup>

Andrew and Marsha (Petitioners) commenced the instant proceeding "for the enforcement of the removal of" the Bank<sup>2</sup> and to compel the Bank to transfer the Trust assets to

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<sup>1</sup>It is noted that after Andrew became a trustee but before his refusal to appoint a corporate co-trustee, he and Marsha requested a discretionary distribution for Marsha of all the assets in the Trust. In a February 6, 2015 email to Andrew, an officer of the Bank asked for their "standard documentation (budget, tax return)" in order to initiate their discretionary request process. Andrew and Marsha refused to provide the information.

<sup>2</sup> Petitioners named U.S. Trust Company as the respondent in their proceeding. U.S. Trust Company is also a division of Bank of America, N.A. For purposes of this decision, the court will refer to each of Merrill Lynch Trust Company, U. S. Trust Company, and Bank of America, N.A., as "the Bank."

Andrew, as sole trustee, or, alternatively, for damages in the amount of the value of the Trust, with interest from the date of the Bank's "removal." They also seek damages in the amount of trustee's commissions charged after the purported removal of the Bank, plus costs and expenses. Lastly, they ask for \$400,000 in punitive damages. Their petition does not articulate a specific cause of action to support the request for punitive damages, but they have maintained that the Bank's failure to deliver the assets constitutes a conversion. The Bank has counterclaimed for an unstated amount of damages resulting from Marsha's alleged violation of a confidentiality agreement reached in the settlement of a prior, unrelated arbitration proceeding by Marsha against the Bank.

The second of these proceedings was commenced by the Bank against Andrew for an order directing Andrew to appoint a successor corporate co-trustee, or, in the alternative, for an order authorizing the Bank to transfer the Trust assets to Andrew as sole trustee.

Resolution of both proceedings requires construction of Article Sixteen of the Trust, which governs the appointment of successor trustees. Article Sixteen states in relevant part:

"B. On the death of Ronald, the individual Trustee shall appoint a bank or trust company (either within or without New York) as co-trustee. Before Ronald's death, the individual Trustee serving any trust hereunder at any time and from time to time may appoint a bank or trust company (either within or without New York) to serve as an additional Trustee of such trust. At all times, the individual Trustee serving such trust shall have the right to remove the corporate Trustee then serving such trust. If after the death of Ronald, the individual Trustee removes the corporate Trustee or there is otherwise no corporate Trustee, the individual Trustee shall appoint another bank or trust company (either within or without New York) to serve in its place.

"C. It is Settlers' intention that at all times there shall be at least one individual Trustee serving each trust hereunder. Accordingly,

if at any time no individual Trustee is serving a trust hereunder, whether by reason of renunciation, resignation, disability or death, the vacancy shall be filled by appointment made by a majority of the then income beneficiaries of such trust who are of age and able to give or withhold consent, or, if no such successor is appointed as aforesaid within three (3) months of any vacancy, by appointment made by the corporate Trustee serving such trust.

“D. Any individual Trustee may resign at any time without need for court approval.”

Andrew’s interpretation of the Trust—that he need not appoint a successor corporate fiduciary—is based on his reading of the first sentence of Article Sixteen (C): “It is Settlor’s intention that at all times there shall be at least one individual Trustee serving each trust hereunder.”

In *Matter of Matthews Trust No. 1* (61 AD3d 511, 512 [1st Dept 2009]), the Appellate Division enforced a direction in the trust agreement regarding the choice of successor trustee, applying what it described as the “well established” principle that “unless ambiguous, the plain language of the trust document must be given full force and effect.” Giving full force and effect to the Trust terms here, the court rejects Andrew’s interpretation. The language on which he relies does not support his position or even imply that a corporate co-trustee is unnecessary.

To the contrary, it is clear that the settlors intended and assumed that a corporate trustee would serve at all times after Ronald’s death. The terms are unambiguous: “On the death of Ronald, the individual Trustee *shall* appoint a bank or trust company (either within or without New York) as co-trustee”; “If after the death of Ronald, the individual Trustee removes the corporate Trustee or there is otherwise no corporate Trustee, the individual Trustee *shall* appoint another bank or trust company (either within or without New York) to serve in its place” (emphasis added). These directions are in contrast to the immediately preceding text: “Before

Ronald's death, the individual Trustee . . . *may* appoint a bank or trust company . . . to serve as an additional Trustee" (emphasis added), a clear indication that the settlors made a distinction between "may" appoint, during the period before Ronald's death, and "shall" appoint, for the period thereafter.

The last sentence of Article Sixteen (C) also supports this conclusion, providing as it does for appointment of a successor individual trustee by "*the* corporate Trustee serving such trust" (emphasis added). The Trust does not require a resigning individual to appoint a successor to himself or herself. The last sentence of subparagraph C provides a fail-safe method for fulfilling the settlors' stated intent of having at least one individual trustee. It confirms that an individual is to serve with the corporate trustee; it does not contradict or supersede the clear instructions for appointment of a corporate trustee, after Ronald's death, if a corporate trustee is removed "or there is otherwise no corporate Trustee."

The cases Andrew submits in support of his position do not involve a direction to replace a corporate trustee with another corporate trustee, a significant difference because the professional management and independence uniquely afforded by a bank could affect a court's analysis of such a provision. The cases may be distinguished on other grounds as well.

*Matter of Palmer* (6 Misc 2d 180 [Sup Ct, NY County 1957]) held that the provisions for appointment of a successor trustee were "not mandatory but permissive." There, the instrument provided that a certain individual "may" appoint successor trustees to fill vacancies occurring during his lifetime, and thereafter gave "the authority to appoint" successor trustees to another individual. After the death of both of these individuals, the instrument stated that any subsequent vacancies "shall be filled" by certain other individuals. By contrast, the Sinzheimer Trust has no

“permissive” language that might affect the interpretation of its clear mandate for the appointment of a corporate trustee after Ronald’s death. Further, information adduced from the public court file in *Palmer* establishes that the first named individual was alive when the order was entered, and therefore any mandatory language concerning the appointment of a successor was not yet applicable.

In *Lane v Hustace* (154 App Div 636 [1st Dept 1913]), the trust directed the appointment of a substitute trustee when the total number serving was reduced below three, but the appointment required the approval of the adult trust beneficiaries. The court determined that the direction for appointment was not absolute, but conditional, and when the beneficiaries withheld approval, the court found the direction inoperative. By contrast, the mandate in the Sinzheimer Trust is subject to no condition. Andrew has simply refused to obey it.

In *Matter of Einstein* (161 Misc 760 [Sur Ct, NY County 1936]), although the trust language included a direction for a sole remaining trustee to appoint a successor co-trustee if the other ceased to act, the court ruled that such appointment was not mandatory. Construing the phrase, “It is my desire that there shall always be two trustees,” the court said the language was merely precatory. The Sinzheimer trust agreement contains no such precatory language.

Andrew also cites *Holmes v Holmes* (73 NYS2d 842 [Sup Ct, NY County 1947]), where the issue was whether the terms of the trust required administration by three trustees. Although the trust instrument provided for the appointment of a third trustee to fill a vacancy, it also expressly allowed for the exercise of all powers by any two trustees, or by the settlor’s son acting alone. In these circumstances the court determined that the instrument showed “no definite intent” and “no unequivocal requirement” that three trustees serve at all times. The Sinzheimer

Trust, by contrast, unequivocally requires the appointment of a corporate trustee after Ronald's death and has no provision suggesting that an individual may act without a corporate co-fiduciary.

Finally, in the *Ziegler* case that Andrew cites (125 NYS2d 341 [Sur Ct, Kings County 1953]), the trust had terminated, and the appointment of a successor co-trustee was not required to wind up its affairs.

#### *Request for Damages*

As stated above, Marsha and Andrew have maintained that their allegations as to the Bank's conduct amount to a claim for conversion of the Trust assets, and seek compensatory and punitive damages as a result. The court decides here, consistent with its conclusion in its April 14, 2016 decision,<sup>3</sup> as a matter of law, that Marsha and Andrew have not stated a claim for conversion.

As detailed in that decision, the Bank has not asserted title to the account, an essential element of a claim for conversion in these circumstances. The issue is rather one of the Bank's right under these particular facts to temporarily withhold delivery of the Trust assets to Andrew. The Court of Appeals explained in *Bradley v Roe* (282 NY 525, 531 [1940]), a case involving narrow circumstances similar to these, "Where a person is rightfully in possession of property, continued custody of the property and refusal to deliver on demand of the owner until the owner proves his right, constitutes no conversion." (See also *Mehlman Mgt. Corp. v Fong May Fan*, 121 AD2d 609, 610 [2d Dept 1986] ["Where one is rightfully in possession of property, one's

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<sup>3</sup> That decision denied petitioners' motion for an order to accept their jury demand. The motion was denied again on reargument by order dated March 31, 2017.



continued custody of the property and refusal to deliver it on demand of the owner until the owner proves his right to it does not constitute a conversion”]; *Hill v Severn*, 23 AD2d 902, 903 [3d Dept 1965] [finding no conversion where attorney retained client funds pending determination of fees owed, “since [attorney’s] retaining of that sum was for a reasonable purpose”]; *United Credit Corp. v J.L.E. Indus., Inc.*, 251 AD2d 69, 70 [1st Dept 1998] [finding no conversion or wrongdoing by attorney for retention of client’s escrowed funds “in light of [client’s] failure to provide the promised documentation in support of its claim”].)

In this case, the Bank has never unequivocally denied that Andrew, in his capacity as trustee, has a right to the assets. It asked only that Andrew first appoint a corporate co-trustee to serve with him, or await a court order determining his right to serve alone. Particularly given Andrew’s stated intent to terminate the Trust without regard to the rights of the remainder beneficiaries—a class that does not include himself, a measuring life—the Bank’s position was reasonable. Nor has the Bank’s possession of the assets been unduly prolonged. It was not until January 2015 that Andrew made formal demand for distribution of the Trust assets. Prior to then, there is no indication that Andrew or his predecessor opposed appointing a new corporate trustee, and in fact they communicated with the Bank about their efforts to do so. The Bank commenced a proceeding on May 8, 2015, seeking directions from the court (SCPA 2102[6]) regarding its authority to transfer the assets, just four months after Andrew made clear he had abandoned any plans to appoint a new corporate trustee.<sup>4</sup> The Bank’s uncontroverted conduct

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<sup>4</sup> The proceedings have been protracted as a result of the handling of related litigation as well as the need to join necessary parties (the presumptive Trust remainder beneficiaries) as directed by the court. Petitioners had incorrectly maintained that they were the sole beneficiaries.

here was prudent and appropriate in the circumstances, particularly in consideration of its fiduciary duty to the remainder beneficiaries, and could not support an award for compensatory damages.

### *Punitive Damages*

Because New York does not recognize an independent cause of action for punitive damages, Marsha and Andrew must allege facts to support a separate cause of action against the Bank in order to prevail on their request for such an award. As the Court of Appeals explained in *Rocanova v Equitable Life Assur. Soc. of U.S.* (83 NY2d 603, 616-617 [1994]):

“A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud (*see, Hubbell v Trans World Life Ins. Co.*, 50 NY2d 899, 901 [‘absent a valid claim for compensatory damages, there could be none for punitive damages’]; *Lee Mfg. v Chemical Bank*, 186 AD2d 548, 550 [‘a demand for punitive damages does not amount to a separate cause of action’]; *Goldstein v Winard*, 173 AD2d 201, 202-203 [‘there can be no separate cause of action for punitive damages’] ).”

Petitioners have failed to assert an underlying, independent claim against the Bank and are therefore not entitled to punitive damages.

Even if punitive damages were otherwise allowable, the conduct of the Bank does not approach the standard for such an award. Punitive damages are normally reserved for an intentional wrongdoing that “evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations . . . The misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . .” (*Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489 [2007] [alteration in original, citations and internal quotation

marks omitted]; see *Wilson v City of New York*, 7 AD3d 266, 267 [1st Dept 2004] [noting requirement of “spite, malice or evil motive” to sustain a claim for punitive damages]; cf *Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 82 [2d Dept 2007] [punitive damages may be awarded in absence of evil intent where issue arises outside context of intentional tort, but conduct must nevertheless be “wantonly negligent or reckless”]).

*Conclusion*

In accordance with the foregoing, the Bank’s application for an order directing Andrew to appoint a corporate co-trustee is granted. Petitioners’ application to direct the Bank to deliver the Trust assets to Andrew is denied, until such time as Andrew complies with this order or until further order of the court upon his demonstrating to the court’s satisfaction that compliance is impossible. The requests for compensatory and punitive damages are denied.

The Bank’s counterclaim for damages for the alleged breach of a confidentiality agreement, reached in connection with the settlement of an action prosecuted in another venue, is outside the scope of this court’s subject matter jurisdiction, and is therefore dismissed, without prejudice. In accordance with the foregoing, the Bank’s alternate request for an order directing it to distribute the Trust assets to Andrew as sole trustee is denied, subject to the further order of the court as stated above.

This decision constitutes the order of the court.

Clerk to notify.

Dated: June 28, 2017

  
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