Matter of Baxter
2017 NY Slip Op 31623(U)
June 28, 2017
Surrogate's Court, Nassau County
Docket Number: 2016-389771/B
Judge: Margaret C. Reilly

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

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Petition for Compulsory Accounting and Related Relief for

THE JOAN K. BAXTER 2008 REVOCABLE TRUST

DECISION
File No. 2016-389771/B
Dec. No. 32938

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Petition for Compulsory Accounting and Related Relief for

THE JOAN K. BAXTER 2009 REVOCABLE TRUST

File No. 2016-389771/C
Dec. No. 32940

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PRESENT: HON. MARGARET C. REILLY

In connection with each of two petitions for a compulsory accounting, the following papers were considered in the preparation of this decision:

Motion to Dismiss Petition. 1
Affirmation in Support of Motion to Dismiss Petition. 2
Memorandum of Law in Support of Motion to Dismiss..... 3
Affirmation in Opposition. 4
Reply Affirmation in Further Support of Motion to Dismiss. 5

PROCEDURAL HISTORY

Before the court are two motions to dismiss filed by respondent, Raymond S. Baxter, III. The motions were filed in response to two parallel petitions filed by John Hanley Baxter, Jr., Diana L. G. Baxter and Theodora M. Baxter to compel accountings and for related relief in connection with two lifetime trusts created by Joan K. Baxter. The sets of papers filed by each party in connection with each of these motions are

substantially the same for each trust, with some differences reflecting the differing terms of the trusts.

BACKGROUND

Joan K. Baxter (the decedent) died on March 24, 2016. The decedent was the grantor, lifetime beneficiary and co-trustee of the Joan K. Baxter 2008 Revocable Trust (the 2008 trust) and the Joan K. Baxter 2009 Revocable Trust (the 2009 trust) (collectively, the trusts or both trusts), which were in existence at the time of her death. Raymond S. Baxter, III, also referred to as Raymond S. Baxter, who is a son of the decedent, was a co-trustee of both trusts during the decedent's lifetime; upon the death of the decedent, he became the sole trustee.

The 2008 trust was amended and restated in 2009, and both trusts were amended and restated on August 7, 2013 and December 20, 2014.

On October 21, 2016, John Hanley Baxter, Jr., Diana L. G. Baxter, and Theodora M. Baxter (the petitioners), who are the children of John H. Baxter, a son of the decedent, filed two petitions to compel accountings by the respondent in his capacities as the trustee of both trusts. The present motions to dismiss were filed by the respondent on March 9, 2017.

MOTION TO DISMISS AND SUPPORTING PAPERS

Respondent seeks an order, pursuant to CPLR 3211 (a) (3) and (7), dismissing the petitions, on the grounds that the petitioners lack standing to compel these accountings.

The 2008 Trust

With respect to the 2008 trust, counsel for the respondent filed an affirmation stating that as amended, Article III of the 2008 trust provides that upon the death of the decedent, a sum equal to the following formula shall be distributed in four equal shares among the respondent and each of the petitioners: $600,000.00 minus the fair market value of the assets of the trust created by the decedent for the benefit of the respondent and the petitioners under an agreement dated December 29, 2006 (the 2006 trust). The respondent is also the trustee of the 2006 trust. In June 2016, the respondent distributed the assets of the 2006 trust, totaling $286,825.72, in accordance with its terms, and the respondent and the petitioners executed a receipt and release agreement. Using that valuation, the sum to be distributed under Article III of the 2008 trust is $600,000.00 minus $286,825.72, leaving a difference of $313,174.28. Section 3.2 of Article III of the 2008 trust provides that the amount payable to the respondent will be paid outright, while the amounts payable to the petitioners will be held in a separate trust for each of them. Accordingly, 75% of $313,174.28, or $234,880.71, will be divided and transferred into three separate trusts for the benefit of the three petitioners. Respondent's counsel states that because funds in excess of the amount required to discharge the respondent's obligation to the petitioners are being held in a Morgan Stanley account, the petitioners are not entitled to a trust accounting.

According to counsel for the respondent, Article IV of the 2008 trust provides that the remaining trust balance is payable to the respondent if he survives the decedent. If the

respondent had not survived the decedent, then one-half of the trust balance would have become payable to the trustees of the 2006 trust and one-half would have become payable to the trustees of a trust created by the decedent for the benefit of two of her other grandsons (the 2007 trust). However, since the respondent survived the decedent, the contingent remainder beneficiaries are not entitled to receive any share of the remaining trust balance, and have no interest in the 2008 trust beyond the formula amount calculated under Article III.

The 2009 Trust

With respect to the 2009 trust, counsel for the respondent filed an affirmation stating that as amended, Articles III and IV of the 2009 trust provide how the trust will be distributed after the death of the decedent. Article III provides for cash bequests to: the decedent's son, John H. Baxter; the decedent's friend, Polly Guerin; and the decedent's aide, Mahani Harlall. Article IV provides that the remaining trust balance is payable to the respondent, if he survives the decedent. Had the respondent not survived the decedent, the trust balance would have been payable in equal shares to the trustees of the 2006 trust and to the trustees of the 2007 trust. Since the respondent survived the decedent, the petitioners have no interest in the trust. They are not disributees, and although they are beneficiaries of the 2006 trust that was named as a contingent beneficiary, the fact that the respondent survived the petitioner eliminated the interest of the 2006 trust beneficiaries in the 2009 trust.

Memoranda of law in support of respondent's motions to dismiss the petitions reiterate that the petitioners' only interests in the 2009 trust are: (1) a specific cash bequest; and (2) the petitioners' status as beneficiaries of the 2006 trust, which was named as a contingent beneficiary of the 2009 trust. With respect to the cash bequest, an amount that is more than sufficient to satisfy the trustee's obligation has been set aside, and the petitioners' interest as beneficiaries of the 2006 trust did not and cannot vest because the contingency on which it depended, which is the respondent predeceasing the decedent, did not occur. It is argued that the petitioners cannot compel an accounting for the 2009 trust by the respondent because the petitioners lack standing. They have no interest in the 2009 trust that would be addressed or protected by the filing of an accounting, and the court must dismiss their petition.

AFFIRMATION IN OPPOSITION

The same arguments are raised in both of the affirmations in opposition to the motions. Counsel for the petitioners argues that his clients are entitled to accountings in connection with both trusts because: (1) the respondent was the trustee of the trusts, exercised significant influence over the decedent and controlled her financial affairs; (2) the respondent admitted to acting improperly with respect to certain assets of the decedent; (3) although the petitioners were originally residuary beneficiaries of the 2009 trust, subsequent amendments reduced their interest and increased the interest of the respondent; and (4) a beneficiary of a revocable trust has standing to compel the trustee to account for trust assets during the decedent's lifetime.

Counsel presented a chart showing the amendments to both trusts:

The 2008 Trust Amendments

The 2008 trust originally provided for: (a) $10,000 to the decedent's son, John H. Baxter; (b) $1,200,000 minus the balance of the 2006 trust, to be distributed equally among the respondent and the petitioners; and (c) the residue to the respondent if he survived the decedent.

When the 2008 trust was amended in 2009, the petitioners were removed as beneficiaries, bequests of $20,000.00 to two of the decedent's grandsons, Kevin Baxter and Todd Baxter, were added. The respondent was still the beneficiary of the residue.

When the 2008 trust was amended in 2013, John H. Baxter was removed as a beneficiary, and once again the 2008 trust provided for $1,200,000, minus the balance of the 2006 trust, to be distributed equally among the respondent and the petitioners, with the residue to the respondent if he survived the decedent.

The 2008 trust was amended again in 2014, and it then provided for $600,000.00, minus the balance of the 2006 trust, to be distributed equally among the respondent and the petitioners, with the residue to the respondent if he survived the decedent.

The 2009 Trust Amendments

As originally executed, the 2009 trust provided for the residue to be distributed equally among the respondent and the petitioners.

The 2013 amendment added John H. Baxter as a beneficiary of $10,000.00, and removed the petitioners as residuary beneficiaries, leaving the respondent as the sole residuary beneficiary.

In 2014, the 2009 trust was again amended, this time to provide three cash bequests, of $100,000.00 to John H. Baxter, $10,000.00 to Polly Guerin, and $20,000.00 to Mahani Harlall. The respondent was named as the sole residuary beneficiary if he survived the decedent.

Counsel for the petitioners notes that after the decedent created the 2009 trust, any amendment made by the decedent to either the 2008 trust or the 2009 trust was always paired with a corresponding change to the other trust. Counsel concedes that under the terms of the amended 2008 trust the petitioners are beneficiaries of a pecuniary formula and contingent beneficiaries, and that under the terms of the 2009 trust the petitioners are only contingent beneficiaries, but counsel also points out that from 2009 through 2013, the petitioners were non-contingent residuary beneficiaries of the 2009 trust, and they never received an explanation for the amendment that reduced their interests. Counsel alleges that in the respondent's capacity as co-trustee, and as the decedent's attorney-in-fact, the respondent exercised significant control over the assets of both trusts, and in those capacities he owed a fiduciary duty to the beneficiaries of both trusts, including the petitioners, not to engage in self-dealing or to make decisions that only benefitted himself. As evidence of the respondent's control over both trusts, counsel annexed an undated letter dated from the respondent to the beneficiaries, explaining the decedent's

creation and amendments of both trusts, in which the respondent indicates that he was involved in certain investment decisions pertaining to the 2008 trust. In addition, counsel notes that the respondent paid the decedent's bills from both trusts, determining which trust to draw from. It is posited that the accountings will show that the respondent may have drawn funds to pay bills from one trust over another to benefit himself, to the detriment of the petitioners, and may have even made improper withdrawals. Finally, the petitioners' assert that accountings by the respondent may reveal information that could show whether the respondent acted improperly as trustee and whether the respondent influenced the decedent to amend both trusts.

Counsel for the petitioners makes the following specific arguments:

1. The respondent created an atmosphere of suspicion by refusing to provide copies of the trust amendments and by admitting to taking money from the 2006 trust.

2. The petitioners have standing to seek accountings because:

a. A beneficiary of a trust whose interest was reduced or eliminated by a subsequent instrument has standing to compel an accounting.

b. A beneficiary of a revocable trust has standing to compel an account by the trustee.

c. Regardless of standing, the court can order the respondent to account.

REPLY AFFIRMATIONS IN FURTHER SUPPORT OF MOTION TO DISMISS

The parallel affirmations submitted on behalf of the respondent in connection with the 2008 trust and the 2009 trust raise the same facts and arguments and will be discussed together.

Counsel for the respondent argues that the petitioners lack standing for the relief they seek, and have not presented facts or evidence sufficient to defeat the motions to dismiss. The petitioners' interests as contingent remainder beneficiaries ended when the respondent survived the decedent, and the amount of their cash bequest under the 2008 trust, which is determined by a pecuniary formula, is being held for them. The petitioners have no possible interest in any other assets in either of the trusts.

In support of the motions, counsel for the respondent characterizes the arguments raised by the petitioners concerning the influence of the respondent over the decedent as challenges to the validity of the trusts and the trust amendments. Counsel then questions how trust accountings would address these allegations. The petitioners have provided no facts or evidence to support their claim that the respondent may have influenced the decedent or otherwise acted improperly during her lifetime. The chart submitted by the petitioners showing the corresponding amendments to both trusts does not support the accusations made against the respondent.

Responding to the specific points made in the affirmation in opposition to the motion, counsel for the respondent asserts that an alleged climate of suspicion does not entitle parties without standing to compel an accounting. The petitioners' standing would

depend upon their having viable interests in the trusts, and their contingent interests have already been conclusively defeated. Counsel asks the court to exercise its discretion and dismiss the petitions, as no accountings of the trusts will affect the pecuniary amount due to the petitioners or change their status as contingent remainder beneficiaries whose interests were defeated when the respondent survived the decedent.

ANALYSIS

Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211, all inferences must be viewed in the light most favorable to the challenged pleading (*Held v Kaufman,* 91 NY2d 425 [1998]; *Matter of Schwartz,* 44 AD3d 779 [2d Dept 2007]). The present motions were brought under subsections (a) (3) and (a) (7) of CPLR 3211.

"A motion to dismiss pursuant to CPLR §3211[a][3], is based on lack of legal capacity to sue. To have standing a plaintiff must establish, 'an injury in fact that falls within the relevant zone of interests sought to be protected by law'" (*Matter of Realuyo v Realuyo*, 2013 NY Slip Op 33974 [U], *4 [Sup Ct, New York County 2013]).

> "Limitations on standing are . . . designed to assure that only persons having a practical concern for the outcome of an issue--as opposed to one 'resting on sentiment or sympathy'--be allowed to have their day in court with respect to it. Thus, what differentiates the 'interest' that affords standing from the 'interest' that does not is the former's pecuniary or financial nature" (*Matter of Morse*, 177 Misc 2d 43, 45-46 [Sur Ct, New York County 1998] [citations omitted]).

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, all allegations contained in the pleading must be assumed true, and the court must determine whether the alleged facts fit within any cognizable legal theory (*Morone v Morone,* 50 NY2d 481 [1980]).

> "Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim" (*Matter of Realuyo v Realuyo*, 2013 NY Slip Op 33974 [U], *4 [Sup Ct, New York County 2013]).

The first question which must be addressed is whether the petitioners have standing to demand an accounting. SCPA § 2205 (2) lists the persons who may petition the court to compel an accounting, including "(b) a person interested." Under SCPA § 103 (39), a person interested is "[a]ny person entitled or allegedly entitled to share as beneficiary in the estate . . . ." Thus, the standing of petitioners to compel the respondent to account is dependent upon their having an entitlement or interest in the trusts, or "a tangible stake in the matter which would confer standing to challenge the fiduciary's actions" (*Matter of Bassen*, 6 Misc 3d 1012 [A], 1012A [Sur Ct, Westchester County 2004] [citations omitted]).

Although at different points in time, the petitioners were residuary beneficiaries of the 2008 trust, these interests were terminated by amendments made to the trust by the decedent, which amendments have not been challenged directly by the petitioners. In a

proceeding to challenge a lifetime trust, or amendments to a trust, the burden of proof on all issues rests on the parties who seek to invalidate the trust or the trust amendments (see this court's decision in *Matter of Gold*, 2016 NY Slip Op 32037 [U], [Sur Ct, Nassau County 2016]). The present proceedings, however, do not seek to challenge the trusts but rather, seek an order directing the respondent to account.

The petitioners were also named as contingent residuary beneficiaries of both trusts. The petitioners' contingent residuary interests in the trusts were dependent upon the respondent predeceasing the decedent, a contingency that did not occur. Thus, once the respondent survived the decedent, the petitioners had no further interests in the 2009 trust, and any interests that the petitioners had in the 2008 trust became limited to the cash bequest to be determined in accordance with the formula contained in the 2014 amendment to that trust.

CONCLUSION

Having failed to establish that they have interests in the trusts that fall within the definition provided by SCPA § 2205 (2), apart from the pecuniary bequests that were set aside and which have not been challenged, the petitioners have failed to establish their standing to compel an accounting by the trustee of the trusts.

The motions to dismiss pursuant to CPLR 3211 (a) (3) and (7) are **GRANTED**.

This constitutes the decision and order of the court.

Dated: June 28, 2017
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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