Matter of Hoppenstein
2017 NY Slip Op 32113(U)
October 10, 2017
Surrogate's Court, New York County
Docket Number: 2015-2918/A
Judge: Rita M. Mella

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

---x

In the Matter of the Accounting by the Trustees of the Trust u/a dated December 20, 2004, by

REUBEN HOPPENSTEIN,

Settlor.

---x

DECISION and ORDER
File No.: 2015-2918/A

M E L L A, S.:

Papers considered	Numbered
Notice of Motion to Reargue, Renew, and Set Aside Judgment, Memorandum of Law in Support, and Affidavit of Andrew M. La Bella, Esq., in Support of Motion, with Exhibits	1, 2, 3
Memorandum of Law in Opposition to Respondents' Motion to Reargue, Renew and Set Aside Judgment	4
Third Report of Jennifer F. Hillman, Esq., guardian ad litem	5
Reply Memorandum in Support of Motion to Reargue, Renew and Set Aside Judgment	6

Movants seek leave to renew and reargue their motion for partial summary judgment, in the underlying proceeding for settlement of the account of the trustees of a 2004 irrevocable trust. Movants objected in the accounting proceeding to the distribution of a life insurance policy from the 2004 trust to a new trust which eliminated them as beneficiaries. In its decision dated March 31, 2017 (NYLJ, Apr. 5, 2017, at 28, col 1), this court denied the prior motion and granted summary judgment dismissing the objections in favor of the accounting trustees, pursuant to CPLR 3212 (b).

Motion for Leave to Renew

As relevant here, CPLR 2221 (e) (2) provides that a motion for leave to renew "shall be

based upon new facts not offered on the prior motion that would change the prior determination." Movants assert that the trustees raised new facts when they stated in their papers opposing the prior motion that certain additions to the trust, reflected as contributions in the accounting, were actually loans. The prior decision, however, includes the following in footnote 6:

> "The trustees now maintain that the cash transferred to the 2004 Trust in 2005, 2006, and 2007 was in the form of a series of loans, evidenced by promissory notes, and therefore not 'additions' to the trust requiring Crummey notices. The court need not determine whether the transfers were loans in view of the determination reached here."

Clearly, the alleged "new facts" were before the court when it decided the prior motion, and, just as clearly, the court addressed this issue and indicated that it would not affect its determination. Movants have thus not met either statutory requirement to justify renewal.

Movants' position is flawed for another reason. They place great emphasis on the trustees' assertion that they planned to seek leave to amend their account to recharacterize the contributions as loans. The court's decision, movants allege, deprived them of the opportunity to respond to the "as yet unamended accounting."

Movants, however, have not been deprived of any such opportunity because: (1) no amendment has been made, nor is it required; and (2) if the account were amended to the detriment of any party in any way, due notice of that amendment would be given to such party or parties, who would then have a full opportunity to object to the amendment.

As indicated in its prior decision, the court is not concerned with whether the transfers were gifts or loans for purposes of the accounting proceeding. Movants argue that if the contributions were loans, the policy transfer would be improper because it would have left the trust without assets to satisfy the loans. But, even if movants could show that the transfer left the

trust without means of repayment,[1] this would be the concern of the lender, and not of the trust beneficiaries, who would have no standing to raise the issue.

Accordingly, the motion for leave to renew is denied.

Motion for Leave to Reargue

Movants also contend that the court overlooked matters of law in granting summary judgment in favor of the trustees, a basis for leave to reargue under CPLR 2221(d). In particular, movants contend that the court failed to consider each of their objections to the underlying account. The court grants movants' motion for leave to reargue and, upon reargument, clarifies its ruling and adheres to its original decision for the reasons set forth below.[2]

Movants' objections #1 (that the transfer was void under EPTL 7-2.4 and 10-6.6), #2 (that the transfer was not authorized by common law or by court order), and #5 (again complaining that the transfer did not comply with EPTL 10-6.6) were all considered and thoroughly discussed in the court's prior decision. Movants' submissions on this motion do not persuade the court that it overlooked any issue of law with respect to these objections, and the court adheres to its original ruling dismissing these objections.

Objection #3 claimed that the transfer of the policy was "a breach of fiduciary duty by Nathan Davidovich and for it [sic] being self-dealing by trustees Charles Hoppenstein and Ava Hoppenstein Shore." This objection was disposed of by the court's express ruling that the distribution of the policy was valid. The court modifies its prior opinion, however, to make the

---

[1]The trustees maintain that the loans were forgiven.

[2] Contrary to movants' assertion, the court reiterates that it searched the entire record as indicated in its enumeration of the "Papers considered" in the prior decision.

following supplemental observations.

CPLR 3016 (b) requires that a claim of breach of fiduciary duty be supported by statements detailing the alleged wrong. Movants attempt to detail their claim, first, by alleging "self-dealing" on the part of the two family trustees. This claim is unsupportable because the family trustees had no power to make the disputed distribution of the policy. Article 9(h) of the trust agreement disqualifies any trustee who is an income beneficiary from participating in the exercise of any discretionary power to distribute property to himself or herself.[3] When the policy in question was transferred, there were three trustees: Charles Hoppenstein and Ava Hoppenstein Shore, who are income beneficiaries of the 2004 trust and beneficiaries of the newer trust, and therefore subject to the disqualification; and Nathan Davidovich, who is not a beneficiary of either trust. It was therefore Nathan Davidovich and only Nathan Davidovich — the independent trustee— who could and did distribute the policy. The court disagrees that correspondence from the independent trustee indicating that he would be "willing" to transfer the policy "if the other Trustees agree with my decision" raises a triable issue of fact. The trust did not prohibit the independent trustee from consulting with the family trustees about what he clearly described as *his* decision.

A court will not interfere with the exercise of discretion by a trustee unless the trustee "acted dishonestly, or with an improper even though not a dishonest motive, or failed to use his judgment, or acted beyond the bounds of reasonable judgment" (*Matter of Prankard*, NYLJ, Mar. 21, 1996, at 29, col 3 [Sur Ct, Westchester County], *affd* 241 AD2d 525 [2d Dept 1997], citing Restatement [Second] of Trusts § 187, Comment *e*; *Matter of Spear*, 146 Misc 2d 1046,

[3] The trust instrument includes a distribution to a trust for a person's benefit in its definition of a distribution to that person.

1048 [Sur Ct, NY County 1990] ["As a general rule, except in a case of abuse or unreasonable judgment, our courts do not interfere in a fiduciary's exercise of discretionary powers"] [internal citations omitted]; *Matter of Stillman*, 107 Misc 2d 102, 110 [Sur Ct, NY County 1980]).

Here, the trust instrument authorized the trustees to distribute income to the settlor's descendants, during his lifetime, in their "absolute discretion," and to pay his descendants "such sums out of the principal of the trust (even to the extent of the whole thereof) . . . in equal or unequal amounts, and to any one or more of them to the exclusion of the others, as the Trustees, in their absolute discretion, shall determine. . . ." (Article 2 [a], [c].) Given the broad "absolute" discretion granted by the trust, and the settlor's clear authorization for the contested distribution (allowing principal invasion "even to the extent of the whole thereof," "in equal or unequal amounts," "to any one or more of [his descendants] to the exclusion of the others"), the distribution clearly complied with the terms of the trust and with the settlor's intent as stated in the instrument.

Further, the record includes uncontroverted evidence of extreme discord between the settlor and his daughter Cheryl, in the form of a handwritten letter from him to her, and from the settlor to the independent trustee indicating the settlor's intention to let the policy lapse if Cheryl and her descendants remained as beneficiaries. The letters mention the settlor's displeasure with Cheryl's litigiousness and describe what he perceived as her excessive demands for money, her restricting his contact with her children (the settlor's grandchildren), and her failure to express gratitude for the substantial assets he had already given her. Movants do not dispute the authenticity of these letters or the discord between Cheryl and her father, but claim, rather, that the settlor's letter about his plan to let the policy lapse was a "sham" because he wanted the

insurance proceeds to be available to pay estate taxes. But movants' speculation and skepticism about the settlor's intent have no bearing on the propriety of the decision of the independent trustee to distribute the policy to the new trust. The trustee's July 26, 2012 letter to the settlor recites in detail the factors the trustee considered in making his decision, and demonstrates his prudence and diligence. Movants have not alleged facts to show that the trustee acted from an improper motive or beyond the bounds of reasonable judgment. The court has no basis to interfere with the trustee's exercise of discretion and adheres to its decision dismissing the objection for breach of fiduciary duty.

Dismissal of objection #4, that the transfer was not made for fair consideration, follows implicitly from the court's express determination that the transfer of the policy was a permissible discretionary distribution from the trust to another trust. No consideration was required, nor would consideration have been appropriate, for this distribution of trust property. The court adheres to its original ruling dismissing objection #4.

The remaining objection, #6, alleges that the disposition of the policy was "unreasonable, imprudent, non-diligent, a fraud, a misleading trick to deceive, the result of a conflict of interest, a violation of EPTL Sec. 10-6.6, a violation of the terms of the trust, a violation of the EPTL Sec. 11-2.3 Prudent Investor Act, a breach of fiduciary duty, an improper transfer without legal authority and diversion of the life insurance policy taking into account the purpose and terms of the alleged trust." Each of these allegations is duplicative of other objections, as specifically discussed and disposed of in the prior decision and further explained above, or implicitly and necessarily dismissed as part of the court's prior conclusion that "[t]he transfer was in full compliance with the trust provisions." The court adheres to its original ruling with respect to

Objection #6.

In summary, the court adheres in all respects to its original decision dismissing each of movants' objections to the account.

This decision constitutes the order of the court.

Clerk to notify.

Dated: October 10, 2017

SURROGATE