Friedrich v Klaristenfeld
2019 NY Slip Op 30554(U)
February 25, 2019
Supreme Court, Kings County
Docket Number: 523653/18
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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SARAH FRIEDRICH,

Plaintiff, Decision and order

- against - Index No. 523653/18

mS # 1,2 & 3

RIFKA KLARISTENFELD, individually and in her capacity as trustee of THE AMENDED AND RESTATED GISELLA STERN TRUST DATED DECEMBER 1, 2006,

Defendant, February 25, 2019

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a preliminary injunction. The defendant has moved seeking to dismiss the lawsuit and also seeking to disqualify plaintiff's counsel. The motions have been opposed respectively. After reviewing all the arguments this court now makes the following determination.

The plaintiff and the defendant are sisters. The parents of the two litigants established a trust on December 1, 2006 and the defendant was made the trustee of such trust. Upon the passing of Mrs. Stern the mother of the parties a life insurance policy was tendered to their father. The proceeds of that policy was forwarded to the defendant as trustee. The plaintiff alleges the defendant failed to deposit the proceeds into a trust account and initiated the instant action. The complaint alleges four causes of action. First, the complaint seeks a declaratory judgement that such proceeds is the property of the trust. The complaint also alleges causes of action for breach of fiduciary duty, an

accounting and a permanent injunction.

The plaintiff has moved seeking a preliminary injunction restraining the defendant from disbursing the proceeds of that insurance check, from disbursing any other trust assets and for an accounting. The defendant has opposed the motion arguing that the plaintiff has no standing to proceed in this action and that in any event the motion seeking an injunction is moot.

Conclusions of Law

It is well settled that to obtain a preliminary injunction the moving party must demonstrate (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]). In this case the basis for the injunction is grounded in the fact it is alleged the failure to grant such relief will cause harm to the plaintiff since she is a beneficiary of the trust and will suffer financial harm if the funds of the trust are disbursed during their father's lifetime. Of course, the defendant opposes the request and has indeed cross-moved seeking to dismiss the complaint on the grounds the plaintiff has no standing to initiate this lawsuit. Thus, the standing issue must first be addressed.

"[A] motion to dismiss made pursuant to CPLR §3211[a][7]

will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that a beneficiary has no standing to challenge a trust where the terms of the trust are revocable (In Re Kalik, 117 AD3d 590, 986 NYS2d 109 [1st Dept., 2014]). Article VII of the Trust Agreement states "the Trust Agreement shall be irrevocable" (see, Amended and Restated Gisella Stern Trust Dated December 1, 2006 Article VII). Thus, notwithstanding the fact the plaintiff is a contingent beneficiary and must await the death of the grantors, since the trust is irrevocable she may maintain standing to proceed with the lawsuit. This is surely true at this stage of the litigation where the allegations of the complaint are deemed true. Thus, the motion seeking to dismiss

the complaint is denied without prejudice.

Turning to the motion seeking an injunction, there is no dispute the specific basis for the injunction, namely the insurance proceeds, has been deposited in the trust account. In Reply the plaintiff notes there are two reasons the injunction should be granted, namely because she possesses standing and because the plaintiff is entitled to an accounting. However, those reasons, which the court has affirmed by denying the motion to dismiss, do not explain why any injunction must be obtained. The plaintiff further argues that even though the insurance proceeds have been deposited the request is not moot because the defendant as trustee "has exclusive control over the funds received from the subject life insurance policy" and "no one knows what she is doing with the trust's money" (see, Memorandum of Law in Reply, page 6). However, that is not a demonstration of any irreparable harm based upon undisputed facts (Gagnon Bus Company Inc., v. Vallo Transportation Ltd., 13 AD3d 334, 786 NYS2d 107 [2d Dept., 2004]). Indeed, a request seeking an injunction cannot be based upon speculation (Petro Inc., v. Serio, 9 Misc3d 805, 804 MNYS2d 598 [Supreme Court New York County 2005]). Therefore, at this juncture based upon the evidence submitted the motion seeking an injunction is denied.

However, the defendant is ordered to provide monthly accountings of the trust assets and the failure to do so will

permit the plaintiff to re-file a motion for an injunction.

The next issue that must be addressed is defendant's motion to disqualify plaintiff's counsel.

It is well settled that a party in a civil action maintains an important right to select counsel of its choosing and that such right may not be abridged without some overriding concern (Matter of Abrams, 62 NY2d 183, 476 NYS2d 494 [1984]). Therefore, the party seeking disqualification of an opposing party's counsel must present sufficient proof supporting that determination (Rovner v. Rantzer, 145 AD3d 1016, 44 NYS3d 172 [2d Dept., 2016]).

The former client conflict of interest rule is codified in the New York Rules of Professional Conduct, Rule 1.9 (22 NYCRR §1200.0 et. seq.). Specifically, Rule 1.9(a) provides: "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client..." (Id). Although a hearing may be necessary where a substantial issue of fact exists as to whether there is a conflict of interest (Olmoz v. Town of Fishkill, 258 AD2d 447, 684 NYS2d 611 [2d Dept., 1999]) mere conclusory assertions are insufficient to warrant a hearing (Legacy Builders/Developers Corp., v. Hollis Care Group, Inc., 162 AD3d 649, 80 NYS3d 59 [2d Dept., 2018]).

Thus, a party seeking disqualification of counsel must demonstrate that: (1) there was a prior attorney client relationship; (2) the matters involved in both representations are substantially related; and (3) the present interests of the attorney's past and present clients are materially adverse (Moray v. UFS Industries Inc., 156 AD3d 781, 67 NYS3d 256 [2d Dept., 2017]; see, also, Falk v. Chittenden, 11 NY3d 73, 862 NYS2d 869 [2008]; Jamaica Pub. Serv. Co. v. AIU Ins. Co., 92 NY2d 631, 684 NYS2d 459 [1998]). Once the moving party demonstrates that these three elements are satisfied "an "irrebuttable presumption of disqualification follows" (McCutchen v. 3 Princesses and A P Trust Dated February 3, 2004, 138 AD3d 1223, 29 NYS3d 611 [2d Dept., 2016]).

Thus, in interpreting the prior rule DR 5-108(A)(1) which is substantially the same in import, disqualification would be proper where it is established that there is a substantial relationship between the current litigation and the prior one (Kuberzig v. Advanced Dermatology, P.C., 260 AD2d 548, 688 NYS2d 596 [2d Dept., 1999]).

Indeed, for the two matters to be viewed as substantially related they must be 'identical to' each other or 'essentially the same' (Lightning Park, Inc., v. Wise Lerman Katz, P.C., 197 AD2d 52, 609 NYS2d 904 [1st Dept., 1994]).

In this case there has been no evidence presented the

matters are the same in any significant way. The prior matter concerns a grandson of the grantors Yoel Weisshaus who submitted an affidavit that he had retained plaintiff's current counsel in 2011 and interviewed counsel "to assist my work in helping my grandparents in various matters and discussed with Mr. Storch intimate details of my grandparent's legacy, which directly affect the merits of this case" (see, Affidavit of Yoel Weisshuas, ¶ 14).

However, the defendant does not explain how the prior representation has any bearing upon this case. This case concerns allegations against the defendant trustee and has no bearing upon the legacy of the grantors in any significant way. Thus, this lawsuit is not about the formation or creation of any wills or trusts, it is about whether the defendant has breached her duties as trustee. The tangential connection to unspecific details of a conversation regarding the grantor is too attenuated to create any conflict. The case of Sessa v. Parrotta, 116 AD3d 1029, 985 NYS2d 128 [2d Dept., 2014] is instructive. In that divorce case the court denied the wife's motion to disqualify the husband's attorney on the grounds that attorney had prepared the wife's will. The court held the subject matter of both cases were not related thus there was no substantial relationship between the two representations. Again, in Altungeyik v. Ayknat, 49 Misc3d 1209(A), 26 NYS3d 212 [Supreme Court Suffolk County

2015] the court denied plaintiff's motion to disqualify the defendant's counsel. In that derivative shareholder action the defendant's counsel had previously represented the plaintiff in preparing a pre-nuptial agreement, an immigration application and the shareholder agreement of defendant Euro Planet Inc. The court held the current lawsuit concerned the value of the defendant Euro Planet Inc. The court noted the formation of the corporation years before was not substantially similar to its value in the current action and thus denied the motion for disqualification.

These cases demonstrate that a party seeking disqualification of opponent's counsel "bears a heavy burden" (Mayers v. Stone Castle Partners, LLC, 126 AD3d 1, 1 NYS3d 58 [ast Dept., 2015]) and the court must examine the evidence presented and determine whether in its discretion such disqualification is proper (id). As noted, the defendant has failed to present any specific basis to conclude there is a substantial relationship between this litigation and the conversation regarding the grantors that took place years ago. Therefore, the two matters are not substantially related and the motion to vacate the plaintiff's counsel is denied.

The defendant filed a further motion holding a discovery order in abeyance pending resolution of the above noted motion. The motions have been decided and now the defendant's motion

seeking to hold discovery in abeyance is denied. The order dated December 19, 2018 required the defendant to produce documents and records of the trust to the plaintiff's attorney. The defendant shall have ten days from receipt of this decision to comply with that order.

So ordered.

ENTER:

DATED: February 25, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC