

<b>Matter of Weinstein</b>
2019 NY Slip Op 33828(U)
November 22, 2019
Surrogate's Court, New York County
Docket Number: 1970-5171/CD
Judge: Nora S. Anderson
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

New York County Surrogate's Court  
DATA ENTRY DEPT  
Date: November 22, 2019

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In the Matter of a Proceeding to Revoke or Suspend Letters of  
Trusteeship and to Appoint a Successor Trustee in the Estate of

File No. 1970-5171/CD

HILDA WEINSTEIN,

Deceased.

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In the Matter of a Proceeding to Compel Final Distribution of  
the Remainder of a Trust under the Will Of

File No. 1970-5171/A

HILDA WEINSTEIN,

Deceased,

f/b/o Lois Weinstein.  
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ANDERSON, S. :

Presently before the court is a motion for summary determination (CPLR 3212) in two related proceedings concerning a testamentary trust created by Hilda Weinstein for the sole benefit of her youngest daughter, who is the petitioner and movant in both proceedings. One petition seeks removal of the trustee, another of testator's daughters, and appointment of the beneficiary as successor to allow her to wind up the trust. The other petition seeks an order compelling the trustee to make final distribution to the beneficiary.

Testator died in August 1970, and her will was admitted to probate in 1974 after her third daughter withdrew objections pursuant to a 1994 compromise agreement which reallocated interests in certain closely held corporations between testator's estate, on the one hand, and, on the other hand, a trust created by testator's father, over which testator had a power of appointment. The reallocation significantly departed from the terms of the testator's will, which left the properties, either outright or in trust for the benefit of her daughters. The agreement did not alter the testator's choice of fiduciaries in the second codicil to her will, in which she

designated the trustee as a co-fiduciary of the trust to serve with an individual who has since died.

The foregoing represents the only material allegations in the petition that are not disputed in the trustee's answer. To all other material allegations, the trustee raises a very broad range of defenses, including, among many others, that the beneficiary does not have standing to seek relief; that she is incompetent; that under the will and the compromise agreement the trustee "has the right ... to determine the distribution of the trust assets"; and that "the relief requested – *i.e.*, replacement of the fiduciary who has not to date wound up the trust – is not in the best interest of [the beneficiary] and the trust ...." To support the last assertion, the trustee's answer avers that just before he died the parties' father "knew [the trustee] would protect and watch over [the beneficiary] until at least she was capable of managing her own assets (including those of the trust) independently and caring for her financial needs, which has not occurred." The record indicates that the beneficiary was 15 years old when the father allegedly expressed such concern, some five decades ago. The record also discloses two central facts. The first is that the will directed that the trust remainder be distributed to the beneficiary "when she reach[ed] the age of thirty years" (she is now 64 years old). The second is that the compromise agreement in no way alters the will's provision for the trust's termination date.

In addition to this myriad of defenses, the trustee asserts four "Counterclaims." One does not qualify for that label (seeking "Continuation of Trust with [the trustee remaining in office]," *i.e.*, the "counterclaim" amounts to mere opposition to the petition). A second seeks leave to distribute the trust remainder in the trustee's discretion. The other two counterclaims are essentially duplicative of one another (*i.e.*, seeking leave to "repay [the trustee for] loans") and

leave to “pay [the trustee for] ... moneys owed”..

The motion at bar asks the court not only to remove the fiduciary, but also to do so summarily. Summary removal of a fiduciary is a type of relief that a court must be particularly wary of granting. The need for caution is all the more pressing where, as here, the fiduciary was appointed on the basis of a designation by the testator. As our Court of Appeals has observed, “courts are required to exercise the power of removal sparingly and to nullify the testator’s choice [of fiduciary] only upon a clear showing of serious misconduct that endangers the safety of the estate” (*Matter of Duke*, 87 NY2d 465, 473 quoting *Matter of Israel*, 64 Misc 2d 1035, 1043 [Sur Ct, Nassau County 1970]). It is fundamental that a court must not remove a fiduciary summarily if there are material questions of fact as to whether such extraordinary relief is warranted (*see Matter of Duke, supra*).

The record in this case presents the very exceptional circumstance in which summary removal of the fiduciary is warranted.

This is not to overlook that the beneficiary, as movant, has a threshold burden, *i.e.*, to make a primary *facie* case, with admissible evidence, for the summary ruling that she seeks (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). This is also not to determine presently whether the beneficiary has sufficiently supported all of her pleading’s disputed allegations as to serious wrongdoing by the trustee, including many specific acts of self-dealing, deceit, and mismanagement of the trust. There is no need to make such determinations in view of another part of the record that makes the beneficiary’s case for her: the trustee’s own pleadings. Those pleadings, echoed by the trustee’s papers on this motion, contain the trustee’s assertion that she is free to be the arbiter of when the trust remainder is distributed. They also reflect the trustee’s

intention to continue to withhold the presently entrusted property from the beneficiary. In view of the will's plain expression of testator's intention that the trust terminate more than three decades ago (a provision that the compromise agreement did not alter), the trustee's insistence that the trust continue can only arise from thinking that is confused and wishful (to the extent that it is not merely self-serving). As authority for the proposition that testator nevertheless gave the trustee "discretion" as to when to make distribution, the trustee points to a boilerplate provision of the will that merely allows the fiduciary the choice to make distribution in cash or in kind or partly in each. Such provision obviously relates to the method of funding a distribution rather than to the timing of distribution. Those aspects of the trustee's pleading stand as prima facie evidence of the trustee's "want of understanding ... or ... other[] unfit[ness] for office," each of which is a ground for removal (SCPA 711[8]). In view of such disqualification, issues raised in the trustee's answer, including estoppel, consent, waiver, undue influence of the beneficiary by unidentified third persons, statute of limitations, and laches, are moot, since a fiduciary unfit for office cannot be allowed to retain the office on the basis of such defenses.

There remains the question as to whether the beneficiary has made a prima facie case that she is competent to serve as successor trustee, a competence that the trustee's pleading disputes (despite the concession in the trustee's pleadings that the beneficiary "has worked as a travel agent for years" and, although sometimes unemployed, "works hard when employed"). As to the competency issue, the beneficiary's pleading and affidavit in support of her motion are prima facie evidence that she is competent to understand and satisfy the demands of the office of a trustee.

When, as in this case, a movant for summary determination has made a prima facie case

for relief on the merits, the burden shifts to the adversary to submit proofs establishing that there is nevertheless a genuine and material factual issue requiring an evidentiary hearing (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On this motion, the affirmation of the trustee's counsel – the trustee's only submission in opposition to the motion – does not constitute probative evidence as to the material facts, since counsel does not purport to have personal knowledge of the facts relating to the beneficiary's competence (*see Columbia Ribbon & Carbon Mfg. Co. v A-I-A Corp.*, 42 NY2d 496, 500 [1977]). As a precaution against the possibility that there might be substance to the trustee's allegations as to the beneficiary's eligibility to serve, the court invited the trustee's counsel to provide such proof. In writing, counsel declined to do so.

There being no genuine question that the trustee is unfit to serve and that the beneficiary, by contrast, is fit to do so, the beneficiary's motion for summary removal of the trustee and appointment of the beneficiary as her successor is granted. The trustee's pleading, including its counterclaims that are mere duplicates of counterclaims raised in the related proceeding (as discussed below), is dismissed, the trustee's letters are revoked, and letters of successor trusteeship in the trust for the benefit of Lois Weinstein shall issue to Lois Weinstein, upon her duly qualifying according to law.

As noted at the outset, the beneficiary commenced a companion proceeding for an order compelling the trustee to make final distribution to the beneficiary. The foregoing rulings of removal and appointment have rendered the request academic, since the trustee no longer can act in a fiduciary capacity and the beneficiary, upon issuance of successor letters to her, will be in a position to take all appropriate steps to wind up the trust, including final distribution.

Accordingly, the petition to compel, and the portions of the trustee's answer that are only responsive to that petition, are dismissed as moot.

The disposition of the trustee's counterclaims in the proceeding to compel remains to be considered. The petition to compel having been dismissed, the "counterclaim" merely opposing the petition is moot. For the reasons discussed above, the counterclaim seeking confirmation that the trustee has been and should remain free to determine when the trust terminates is dismissed on the merits. The other two counterclaims consist of allegations that, without any specificity, allude to the purported entitlement of the trustee, in her individual capacity, to a variety of payments from the trust in respect of commissions and reimbursement for the trustee's personal outlays for the trust over the years. By this point, such claims should have been disclosed in the account that, in a decision entered on February 1, 2019, this court ordered the trustee to file by April 1, 2019. The trustee has failed to make such filing to date. The two counterclaims are therefore dismissed, without prejudice to a motion by the trustee for leave to renew, as sufficiently particularized (*see* SCPA 302[2]), on an accounting.

This decision constitutes the order of the court.

Dated: November 22, 2019

  
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