Matter of Posner
2020 NY Slip Op 33280(U)
October 1, 2020
Surrogate's Court, New York County
Docket Number: 1990-2705/F
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Final Accounting
Of Robert A. Posner, as Executor of the
Estate of

HARRY POSNER,

Deceased.

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File No. 1990-2705/F

A N D E R S O N, S .

Pending in this contested accounting in the estate of Harry Posner are cross-motions for partial summary judgment by both the objecting residuary beneficiaries and the Executor, decedent's son Robert Posner. The objections at issue relate only to the Executor's treatment of a $606,000 promissory note that he, in his individual capacity, "Robert"), had issued to decedent in June 1984 (the "Note").

The Note, which did not include a prepayment provision, was payable in twenty-nine annual installments of $10,448.28 (plus interest at 9% on the outstanding principal balance), with a final installment of $303,000 (plus interest) payable on June 13, 2014. In the event of a late payment, the holder could issue a notice of acceleration and declare immediately payable the entire unpaid balance, plus interest to the date of payment.

Decedent died on June 1, 1990, six years after the Note was issued. He was survived by Robert and decedent's other son, Stuart Paul ("Paul"). Under his probated will, decedent left his tangible personal property equally to Robert and Paul, with the residuary

estate distributable as follows: half to Robert, whom he nominated executor, and one-sixth to each of Paul's three sons (the "Grandsons").

In October 2015, the Executor judicially settled his interim account for the period June 1, 1990, to May 8, 1995. Thereafter, he filed the instant final account for the period May 9, 1995, to April 29, 2016 (the "Account").

According to the Account, Robert made annual payments of principal and interest on the Note for the years 1995 through 2002. The Account further shows that, on December 30, 2003 (ten years before the Note's maturity date), the Executor accepted payment from Robert's individual funds as satisfaction of the then principal indebtedness on the Note ($204,786.14), with interest accrued to that point ($57,605.77) (the "Prepayment"). It is undisputed that the transaction resulted in the loss of future interest at a rate favorable to the estate.

The Account also reflects the accelerated payment of another note, one executed on the same day in the same amount and with identical provisions. The issuer was the S. Paul Posner 1976 Irrevocable Family Trust, a trust established for the primary benefit of Paul (the "Trust"). This note (the "Trust's Note") was paid off in April 2003, some six months earlier than the Note, after the Executor prevailed in a lawsuit seeking accelerated

payment based on the Trust's default (*see Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177 [1st Dept 2004]).

Paul and the Grandsons filed separate objections to the Account. The instant cross-motions for partial summary judgment relate to the Grandsons' objections to the Executor's acceptance of the Prepayment. Those objections are as follows:

> "2. Object to Schedule G [Statement of Personal Property Remaining on Hand], in that it omits [the Executor's] liability to the Estate for interest on [the Note], from December 30, 2003, the date that he made a purportedly 'Final Interest Payment' (Schedule A-2, p. 26), until the due date on June 13, 2014, in accordance with the tenor of the note and applicable law, together with statutory interest on such unpaid interest payments.
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> 3. Object to Schedule C [Funeral and Administration Expenses and Taxes], insofar as [the Executor's] improper prepayment of the Note required payment of substantial capital gains taxes for the year 2003, which taxes would not have been incurred until the years 2004 through 2014. [The Executor] should be surcharged for said premature tax obligations.
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> . . .
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> 5. Object to Schedule G in that it omits the Estate's claim against Robert for additional Note interest, together with statutory interest on such additional interest, on the payment made on December 30, 2003. Interest was due on June 13, 2003, 200 days before the date of payment, together with $10,448.28 of principal. Robert paid some additional interest, but less than the amount due.

The Grandsons ("Objectants") seek summary judgment only as to Objection 2. They request a surcharge "for the interest due on the Note [for the balance of its term], with statutory interest on the missed interest payments." The Executor asserts that, as a matter of law, he is not surchargeable for the interest that would have

accrued on the Note. On his cross-motion, he seeks dismissal of Objection 2, as well as Objections 3 and 5.

Discussion

Summary judgment is available only where no material issues of fact exist (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*id.* at 324 [citations omitted]). If such a showing is made, the party opposing summary judgment must then come forward with proof establishing a genuine issue of material fact or must provide an acceptable excuse for the failure to do so (*see e.g. Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The threshold issue on these motions is whether the Note gave Robert an option to prepay. If the terms of the Note allowed Robert to prepay, then the Executor was obliged to accept the Prepayment, and, as a matter of law, he cannot be surcharged for doing so. If the Note did not so provide, however, then the issue becomes whether the Executor's decision to accept the Prepayment and forgo the estate's receipt of continuing interest payments was a breach of fiduciary duty.

There is no dispute that the Note did not include an express prepayment provision. Significantly, the Executor does not argue that Robert nonetheless had a right to prepay under the terms of

the Note. The reason is clear. There is no legal basis to read such a provision into the Note. It is well established that "[w]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). Courts "may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital Inc.*, 30 NY3d 572, 581 [citations omitted]).

Given that Robert did not have a right to prepay the Note, Objectants' only argument requiring discussion concerns whether the Executor breached his fiduciary duty as a matter of law when he accepted the Prepayment. Objectants' other arguments are either belied by the plain language of the Note or support the unremarkable proposition that Robert had no legal basis to force a prepayment upon the estate in the absence of a prepayment provision (*see e.g. Arthur v Burkich*, 131 AD2d 105 [3d Dept 1987]; *Trinity Constr. Inc. v John R. Mott, Inc.*, 145 AD2d 720 [3d Dept 1988]).

Objectants seize on the Executor's personal interest as debtor

on the Note as a basis for their breach of fiduciary duty argument.[1] However, although it is generally true that a fiduciary may not engage in acts of self-dealing because of the potential that his personal interest may conflict with his duty of undivided loyalty (*see e.g. Meinhard v Salmon*, 249 NY 458 [1928]), the rule is not absolute. There is no per se prohibition on self-dealing where, as here, the instrument contains an exculpatory provision that permits the fiduciary to engage in transactions in which he may have a conflict (*see e.g. Matter of* Jastrzebski, 97 AD3d 819 [2d Dept 2012]). In this circumstance, as long as the fiduciary does not engage in "acts of bad faith and purposeful malfeasance," he will not be held liable (*Cary v* Cunningham, 191 AD2d 336, 336 [1st Dept 1993] [citations omitted]); *see also Matter of Jastrzebski*, 97 AD3d 819; *Matter of Mankin*, 88 AD3d 717 [2d Dept 2011]).

Here, the motion papers raise fact issues regarding whether the Executor acted in good faith in connection with the Prepayment. Central to the Executor's narrative is his contention that there was a risk of future default and that he accepted the Prepayment to secure "full payment of the outstanding principal of what was an unsecured debt" and to "clean up" the estate's balance sheet. However, although Robert had been late making some Note payments

[1] Objectants also claim that the Executor breached his fiduciary duty because he invested the proceeds from the Prepayment in a way that returned substantially less than the 9% interest rate on the Note. However, Objectants, who cite no authority for this proposition, fail to demonstrate how investing for such a high rate of return would not have required the Executor to violate the standards of conduct set forth in the Prudent Investor Act (EPLT § 11-2.3).

between 1995 and 2002, it is undisputed that in 2003, the year at issue, Robert had the financial wherewithal to pay the estate more than $260,000 or almost six years of principal and interest payments. In addition, as Objectants point out, Robert stood to inherit a substantial sum from decedent's estate - one that would likely be sufficient to pay what he would owe on the Note. The Executor's reply papers, which are devoid of any evidence as to Robert's financial condition at the time in question, only serve to highlight the issues of fact concerning whether the Executor acted for the benefit of the estate or of himself when he allowed the Note to be prepaid in December 2003.

Under these circumstances, it cannot be determined as a matter of law that the executor acted in good faith in accepting the Prepayment, *i.e.*, that he was not acting to advance his personal interests over the estate's (*see Matter of Jastrzebski*, 97 AD3d 819 [affirming Surrogate's determination that issues of fact concerning the executor's good faith in the sale of an insurance policy to a family business in which the executor had an interest precluded summary judgment]).

The fact that the Executor may have relied on the advice of counsel in accepting the Prepayment does not change this result. The Executor ignores that the attorney who purportedly advised him to accept the Prepayment is dead. As a result, the only evidence of the specific advice the Executor received and the circumstances

under which he received it comes from the Executor himself. For this reason alone, summary judgment would be inappropriate (*see e.g. Deephaven Distressed Opportunities Tradings, Ltd. v 3V Capital Master Fund Ltd*, 100 AD3d 505, 506 [1st Dept 2012] [a "self-serving affidavit, without more, is insufficient to demonstrate defendants' entitlement to judgment as a matter of law" (citations omitted)]).

Moreover, although reliance on the advice of counsel may insulate a fiduciary from claims of bad faith, it is not an absolute defense. *Matter of Rothko* (43 NY2d 305 [1977]) illustrates this point. There, the Court of Appeals specifically rejected an executor's effort to shield himself from surcharge by claiming he had relied on the advice of counsel in assenting to the sale of decedent's paintings in transactions that personally benefited his co-fiduciaries. The court found him negligent in carrying out his fiduciary duties and surcharged him, noting that "[a]lleged good faith on the part of a fiduciary forgetful of his duty is not enough" (*see id.* at 320 [citations omitted]; *see also Matter of Demmerle*, 130 Misc 684, 691 [Sur Ct Bronx County 1927] [noting that "advice of counsel alone would not protect [the fiduciary] for an action obviously against the interests of the estate or for one upon which they should have been able to form a judgment themselves" [citation omitted]]).

Also without merit is the Executor's plea that the court not create "dangerous precedent" by failing to rule that advice of

counsel provided the Executor with a complete defense in the circumstances here. Among other things, the Executor ignores that the legislature has seen fit to provide fiduciaries with an avenue to insulate themselves from claims that they breached their duty of care where they have a conflict of the type here. Thus, a fiduciary may seek advice and direction from the court under SCPA § 2107, which is available when "extraordinary circumstances" exist, such as when there is a "conflict among interested parties."[2] Here, the Executor elected to accept the Prepayment without seeking court approval. Having failed to avail himself of a protective remedy, the Executor should not be surprised that, upon presenting the Account, the propriety of his conduct has become an issue and that such issue cannot be determined as a matter of law.

The Executor also posits that the court should grant summary judgment in his favor because "it would be inequitable for Objectants to benefit from their father Paul's default and subsequent prepayment of Paul's Note upon acceleration yet deem Robert liable for accepting prepayment of Robert's Note, given that [the Executor] could have intentionally defaulted and accelerated [his own] Note." Putting aside the numerous factual inaccuracies in

[2] Under the particular circumstances here, the Executor could also have sought relief under SCPA § 1813, which offers a fiduciary the opportunity to ask in advance for the court's approval of a proposed settlement of a debt or claim.

this argument,[3] the Executor offers no authority for his contention that the court can grant summary judgment "as a matter of equity and justice." In fact, summary judgment "is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law" (*Andre v Pomeroy*, 35 NY2d 362, 364 [1974]).

Moreover, it is worth noting that the Executor's position regarding the fairness of accepting the Prepayment is, at its core, completely antithetical to his fiduciary responsibilities. In essence, what the Executor is claiming is that he, in his individual capacity, should be able to obtain the same benefit from the estate that he contends Paul did through the Trust, *i.e.*, the ability to prepay and forgo future interest payments. Apart from the fact that the circumstances of the prepayment of the Trust's Note and the Note are entirely different, the Executor's attempt to justify his conduct based on his personal interests only underscores why the propriety of his actions cannot be determined as a matter of law.

The court has considered the parties' other arguments and finds them to be without merit.

[3] Among the inaccuracies are the Executor's characterization of Paul as the debtor on the Trust's Note and his reference to Paul as a defaulter. Paul was, as it happens, a creditor of the Trust, having lent the Trust funds to make its annual payments under the Trust's Note (*see Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177).

Based upon the foregoing, Objectants' motion seeking summary dismissal of Objection 2 and the Executor's cross-motion seeking dismissal of Objections 2, 3, and 5 are denied. This decision constitutes the order of the court.

Dated: October 1, 2020

SURROGATE