

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MANUFACTURERS & TRADERS TRUST COMPANY,

Plaintiff,

DECISION AND ORDER

v.

Index # 2003/07867

VIRGINIA A. MERTZ, as executrix of
the Estate of Fredrick J. Mertz,
FRANK INSERO, CPA, as Trustee of
the Trust created under the Last
Will and Testament of Fredrick J.
Mertz, VIRGINIA A. MERTZ, STEVEN
C. MERTZ, SANDRA F. McCABE, and
PAUL J. MERTZ,

Defendants.

Plaintiff has moved for partial summary judgment on its second and third causes of action. Plaintiff is an alleged creditor of the estate of the decedent Frederick J. Mertz, who died in August 1995. Defendant Virginia A. Mertz is the executrix of the estate, and defendant Frank Insero is the trustee of a trust under the will. In June 2003, plaintiff served a demand upon the estate for the payment of an alleged \$2.7 million obligation of the decedent under a reimbursement agreement signed by the decedent shortly before his death. After the demand was rejected, plaintiff commenced this action in July 2003 for money damages. The second cause of action is brought against the executrix personally for breaching her fiduciary duty under SCPA 1802 to distribute the estate in good faith. The third cause of action is brought against the trustee in his

representative capacity pursuant to EPTL 12-1.1. The motion is supported by an attorney affidavit only, to which are attached several exhibits (exhibits A thru J).¹

In moving for partial summary judgment on the second and third causes of action, plaintiff has the initial burden of establishing entitlement to judgment as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Failure to meet that burden requires denial of the motion, regardless of the sufficiency of the opposing papers. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985).

Under the second cause of action, plaintiff seeks to hold the executrix personally liable under SCPA 1802 for distributions allegedly not made in good faith. See, Matter of Gill, 199 N.Y. 155, 157 (1910). SCPA 1802 provides that, where - as here - a claim has not been made within seven months of the issuance of the letters testamentary, the fiduciary is not personally liable for any assets that have been distributed in good faith before the claim is presented. Warren's Heaton on Surrogate's Court, § 71.02(2)(b), at 71-9 (6th ed rev.). A distribution is not made in good faith within the meaning of the statute if, at the time,

¹ It is noted that the only pleading attached to the affidavit is a copy of the summons and complaint. Nor are the answers of the defendants incorporated by reference. However, plaintiff enclosed copies of the answers with the motion when plaintiff served the motion on the court and the other parties. See Mahone v Washington, ___ AD3d ___, 2005 WL 1005078 (4th Dept. April 29, 2005).

the fiduciary "knew or should have known of the existence of a claim (by a creditor)." Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 1802, at 130. SCPA 1802 is the latest codification of the long-standing rule in New York that: "Where ... the fiduciaries have notice that a beneficiary has a claim against the estate they cannot distribute assets in satisfaction of legacies and to distributees without paying the debts which have first claim on the assets." Matter of Segall's Will, 287 N.Y. 52, 58 (1941).

In her answer, the executrix has asserted the Statute of Limitations as an affirmative defense. The executrix contends that the breach of fiduciary duty alleged in the second cause of action is subject to the three-year limitations period set forth in CPLR 214(4). Plaintiff contends that it is subject to the six-year limitations period set forth in CPLR 213(1).

The choice of the Statute of Limitations applicable to a cause of action for breach of fiduciary duty "depends on the substantive remedy which the plaintiff seeks." Loengrad v. Santa Fe Indust., 70 N.Y.2d 262, 266 (1987). Where the relief sought is equitable in nature, the applicable Statute of Limitations is six years. Kaufman v. Cohen, 307 A.D.2d 113, 118 (1st Dept. 2003). For example, a cause of action seeking an accounting is subject to the six-year period of limitations. Matter of Estate of Rodken, 270 A.D.2d 784, 785 (3d Dept. 2000). The three-year

period of limitations applies, however, where monetary relief is sought. Carlingford Center Point Assocs. v. MR Realty Assocs., 4 A.D.3d 179, 180 (1st Dept. 2004); Tatko v. Sheldon Slate Prods. Co., 2 A.D.3d 1030, 1031 (3d Dept. 2003); Matter of Kaszirer v. Kaszirer, 286 A.D.2d 598, 599 (1st Dept. 2001). Because the second cause of action seeks monetary damages, it is subject to the shorter, three-year period of limitations.

Plaintiff contends that a previous determination by the court granting it summary judgment on the fourth cause of action of the complaint is the law of the case on this issue inasmuch as the court indicated in connection with that determination that:

There is no statute of limitations. The rights under the Reimbursement Agreement to deposit cash collateral in the stated amount of the Letter of Credit was exercised by a demand made June 10th 2003 and is within the statute of limitations. Exhibit D, oral decision July 30, 2004, at 3-4.

The court disagrees.

The law of the case doctrine is "designed to limit relitigation of issues." People v. Evans, 94 N.Y.2d 499, 502 (2000). The doctrine is considered "an articulation of the sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of coordinate jurisdiction are concerned." Martin v. City of Cohoes, 37 N.Y.2d 162, 165 (1975).

The fourth cause of action was brought against five individual testamentary beneficiaries under EPTL 12-1.1, which

provides a remedy to creditors who have been unable to satisfy their claim against the estate "[b]ecause there is insufficient property of the estate available for such purpose." Potential liability is limited to "the value of any property received by [the testamentary beneficiaries]." EPTL 12-1.1 (a). Right or wrong, the court previously determined that this cause of action against these testamentary beneficiaries was "within the statute of limitations." The court did not determine, as the issue was not before it, whether the breach of fiduciary duty alleged in the second cause of action is time-barred. Thus, the court's previous determination on the issue whether the fourth cause of action is time-barred is not the law of the case binding on the court here for the discrete question now presented.

This action was commenced in July 2003. Because the applicable limitations period is three years, any challenge under the second cause of action to distributions made by the executrix prior to July 2000 is time-barred. See Tatko, 2 A.D.3d at 1031 ("Because plaintiff's claim effectively seeks only money damages through recoupment of past bonuses, the applicable limitations period is three years, precluding plaintiff's challenges to corporate expenditures made prior to November 14, 1997."); Carlingford, 4 A.D.3d at 180 ("[T]he shorter, three-year limitations period ... bars plaintiffs' breach of fiduciary duty claims arising before 1998.") As a result, whether plaintiff is

entitled to partial summary judgment on its second cause of action depends in part on whether it has established as a matter of law that there were distributions from the estate after July 2000.

In his supporting affidavit, plaintiff's counsel avers the following:

9. Attached as Exhibit F is the response of the Executrix to an information subpoena issued on the judgment against the Executrix (on the first cause of action). In response to Question 1, she acknowledges having distributed \$500,000 to the marital trust under the Will for her benefit. A true copy of the Will is attached as Exhibit G. In addition, the receipts attached as Exhibit H, the Decision and Order attached as Exhibit D (granting plaintiff summary judgment on the fourth cause of action), and the judgment attached as Exhibit E., establish that the Executrix distributed an additional \$615,363 to the beneficiaries of the credit shelter trust created by the Will.

Based on that allegation, and that allegation alone, plaintiff seeks partial summary judgment under the second cause of action against the executrix personally for \$1,115,363.

In her answers filed in connection with the information subpoena, however, the executrix swore that the \$500,00, referred to by plaintiff's counsel in his affidavit, was distributed in 1997. Furthermore, while the receipts attached as Exhibit H establish that a total of \$615,363 was distributed to certain persons by the estate, the receipts do not establish when those distributions were made. There are five receipts in all, all of

which are dated after July 2000. By signing the receipts, each person acknowledged having received, either as legatees under the will or as trust beneficiaries, \$123,072.60 in distributions under the estate, "including previous distribution of \$100,000." None of the receipts indicate when the distributions actually were made and, in particular, none of the receipts indicate when the previous \$100,000 distributions were made. On the state of this record, the court concludes that plaintiff has not sufficiently established the amount of alleged distributions after July 2000 as to justify an award of partial summary judgment in that amount under the second cause of action.

The court rejects plaintiff's contention that the previous determination granting plaintiff summary judgment on the fourth cause of action is the law of the case on this issue. After making that determination, the court granted judgment to plaintiff against each of the testamentary beneficiaries in the amount of \$123,072.60, representing the extent of the value of the property received by each of them under the will (or the trust created by the will). See EPTL 12-1.1 (a). Whether or not the court properly made that determination, it was not asked to determine, nor did it determine, exactly when each of those distributions were made.

In any event, to establish a prima facie case under the second cause of action, plaintiff must establish as a matter of

law with proof in admissible form that particular distributions were not made in good faith. See SCPA 1802. As already indicated, a distribution is not made in good faith within the meaning of SCPA 1802 when it is made with actual or constructive notice of an outstanding claim by a creditor against the estate. As the Court of Appeals indicated in Matter of Segall's Will, 287 N.Y. at 58: "Where ... the fiduciaries have notice that a beneficiary has a claim against the estate they cannot distribute assets in satisfaction of legacies and to distributees without paying the debts which have first claim on the assets."

In moving for partial summary judgment here on the second cause of action, plaintiff has failed to establish as a matter of law that the executrix knew or should have known when she distributed the estate that plaintiff had a "first claim on the assets" arising under section 11.03(d) of the reimbursement agreement. Obligations under section 11.03 are conditioned upon the occurrence of an "Event of Default," as defined in section 11.01. Moreover, the specific obligation of the estate under section 11.03(d) does not accrue until there has been a demand by plaintiff. Until the occurrence of these conditions, any claim by plaintiff under section 11.03(d) was contingent, thereby rendering "liability uncertain and indeterminable." Matter of Baldwin's Will, 157 Misc. 538, 542 (Surrogate's Ct., Westchester Co. 1935). Plaintiff did not establish as a matter of law in

support of its motion that the executrix distributed the estate when she knew or should have known that the estate's liability under section 11.03(d) had ripened.²

Under the third cause of action, plaintiff seeks recovery from the trustee pursuant to EPTL 12-1.1. In moving for partial summary judgment under this cause of action, plaintiff seeks specific recovery of the balance of the trust as of December 31, 2004 in the amount of \$208,083.22 (Exhibit J). In support of the motion, plaintiff has established that there was a \$2.6 million

² It must be pointed out that plaintiff did not avail itself of the procedure granted to it in SCPA §1804 to create a reserve for this contingent claim. There is authority, principally in the context of pending negligence claims against the decedent, that a reservation of estate assets is mandatory, subject to the "broad discretion of a surrogate to fashion a remedy which will strike a proper balance between the respective rights of a decedent's beneficiaries and his contingent creditors." Matter of Biel, 103 A.D.2d 287, 293 (2d Dept. 1984). See generally, 41 N.Y. Jur.2d, Decedent's Estates §1962. Even within the context of a §1804 proceeding, however, it would have been open to the surrogate, faced with a complex 20 year financial arrangement such as this one, which appeared at the time successful in its objectives and supported by a thriving business, to disallow a reservation upon the grounds that "recovery appeared speculative in relation to the claim" and that "to hold up the administration of an estate until a highly speculative action is resolved would cause delays in administration that are unconscionably unfair to other persons interested in the estate." Estate of Vasquez, 122 Misc.2d 479, 481-82 (Surr. Ct. Bronx Co. 1984) (Gelfund, J.) See Matter of Baldwin's Will, 157 Misc. at 545 (claimants asserting such contingent liability "do not fall within the class of debtors so that the estate need be held up in order to determine the claim"). The problem is described well in R. Rosenberg, Purchasing the Deceased Guarantor, 113 Banking L. J. 1018, esp. 1023-24 (1996), which the parties would be well advised to take in. The important point is that plaintiff never gave the Surrogate the chance to make a determination under §1804.

judgment entered against the estate in May 2004 (Exhibit C) and that there was a subsequent judgment entered in September 2004 against five testamentary beneficiaries pursuant to EPTL 12-1.1 "[b]ecause there is insufficient property of the estate available [to pay the judgment against the estate]." Subd. (b)(1); See, Exhibit D, decision dated July 30, 2004, at 3 ("In this case, the documentation shows that there is insufficient property in the hands of the Executrix of the Estate to satisfy the judgment of M&T. The Plaintiff has met its burden under EPTL Section 12-1.1[b].")³ Plaintiff contends that these prior determinations are the law of the case, entitling it to judgment as a matter of law against the trustee also under EPTL 12-1.1.

It is not enough, however, for plaintiff to show that as of July 30, 2004 there was insufficient property of the estate to satisfy the judgment against the estate. To satisfy its initial burden on its present motion, plaintiff must show that there are still insufficient assets to satisfy the judgment even after the September 2004 judgment against the testamentary beneficiaries. There is no proof in admissible form establishing that requisite element of liability, particularly in view of the fact that the determination of the court on July 30, 2004 did not establish the amount of the alleged shortfall. It is noted in this regard that proof submitted by plaintiff in support of its present motion

³ These judgments are on appeal and have not been stayed.

indicates that the value of the estate's assets was \$3.7 million as of May 24, 2001(Exhibit I) and in excess of \$6 million on July 15, 2004 (Exhibit F).

The court, therefore, denies plaintiff's present motion in its entirety. Although the executrix has not cross-moved for summary judgment here, the court has the authority on plaintiff's motion to search the record and to grant summary judgment to a non-moving party (CPLR 3212 [b]) "with respect to a cause of action or issue that is the subject of the motions before the court." Dunham v. Hilco Constr. Co., 89 N.Y.2d 425, 430 (1996). The court exercises its authority under CPLR 3212(b) to grant partial summary judgment to the executrix on the second cause of action barring any breach of fiduciary duty claim arising before July 2000.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: May 9, 2005
Rochester, New York