

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

RICHARD BOLES,

Plaintiff,

-against-

HALCYONE LANHAM as Trustee of the
Estate of GLORIA M. BOLES, Revocable
Living Trust,

Defendant,

Index No: 17059/06

Motion Date:6/13/07

Motion Cal. No: 1

Motion Seq. No: 2

The following papers numbered 1 to 17 read on this motion by
defendant for summary judgment dismissing the complaint; and
cross-motion by plaintiff for summary judgment

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits ..	5 - 9
Answering Affidavit-Exhibits.....	10 - 14
Replying Affidavits.....	15 - 17
Defendant's Additional Submission.....	18
Plaintiff's Additional Submission.....	19

Upon the foregoing papers and after a conference and the
additional written submissions of the parties it is ordered that
this motion and cross-motion are determined as follows.

The defendant's motion pursuant to CPLR 3211 to dismiss the
complaint is denied.

The plaintiff's cross-motion for summary judgment is granted
to the extent that the defendant, trustee shall, within 30 days
of service of this motion with notice of entry distribute to the
plaintiff his share of the proceeds of the trust funds in an
amount equal to that which was distributed to Anthony C. Bullen
and the Trustee, together with any accrued interest thereon from
May 10, 2006. The branch of the plaintiff's cross-motion for the
imposition of punitive damages is denied.

On or about February 26, 2003 GLORIA M. BOLES executed an irrevocable living trust and named her daughter, HALCYONE LANHAM, as trustee. On September 15, 2004, Ms. Boles died. At the time of her death, the only asset of the trust was one parcel of real property. In accordance with her powers under the trust, the trustee sold the property for \$450,000.00 on February 22, 2006. When plaintiff found out that the house was sold, his attorney, by letter dated April 24, 2006, requested payment of the "plaintiff's share of the net proceeds" from the sale. Although two trust beneficiaries received their share of the proceeds of the sale, i.e \$96,000.00 to the trustee and \$96,425.55 to Anthony C. Bullen, the trustee did not distribute plaintiff's share despite repeated demands to do so. The plaintiff commenced this action to compel the defendant, HALCYONE LANHAM, as Trustee of the Estate of GLORIA M. BOLES, Revocable Living Trust to perform her duties as trustee and distribute plaintiff's share of the trust together with accrued interest and for punitive damages.

The defendant moves, pursuant to CPLR 3211, to dismiss the complaint on the ground that the plaintiff may not maintain this action since the Trust provides at section 6.01 that any controversy arising from the trust between the trustee and a beneficiary must be submitted to arbitration. Plaintiff cross-moved for summary judgment in his favor directing the defendant to distribute his share of the trust.

The defendant's motion to dismiss this action on the ground that the controversy raised in this action must be resolved by arbitration is denied. While the Trust Agreement at section 6.01 provides that any controversy "...involving the construction or application of any terms, provisions, or conditions, ..." of the trust shall be submitted to arbitration, this action does not involve a controversy over the construction and application of any term of the trust, but rather seeks to enforce the trust in accordance with its terms. Accordingly, the defendant's motion to dismiss is denied.

The plaintiff's cross-motion for summary judgment in his favor directing the Trustee to distribute his share of the Trust is granted.

Pursuant to Estates, Powers and Trusts Law (EPTL) § 1-2.7 a trustee is a fiduciary. As a fiduciary, a trustee bears the unwavering duty of complete loyalty to the beneficiaries of the trust (see In re Hubbell's Will, 302 NY 246, 254 [1951]; Meinhard v. Salmon, 249 N.Y. 458, 464 [1928]). A trustee must act in good faith in the administration of a trust, with honesty and undivided loyalty to the beneficiaries and avoid any

circumstances whereby the trustee's personal interest will come in conflict with the interest of the beneficiaries (see Pyle v. Pyle, 137 AD 568 [1910], aff'd, 199 NY.538 [1910]). The purpose of this rule is to ensure that the trustee's acts are above suspicion and that the trust receives the trustee's best services and unbiased and uninfluenced judgment (see Pyle v. Pyle, supra).

The plaintiff established, prima facie, his entitlement to summary judgment by submitting his affidavit and the Trust Agreement which demonstrate that the Trustee distributed portions of the Trust to two beneficiaries (see affidavit of HALCYONE LANHAM dated August 22, 2007) and refused to distribute to the plaintiff his rightful share without justification. Where, as here, the plaintiff has established his entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v City of New York, 49 NY2d 557, 562 [1980]).

In opposition to the motion, the defendant submitted her affidavit claiming, among other things, that she withheld plaintiff's share because he always demanded \$112,500.00 as his share of the trust, that he failed to sign off on the informal accounting and has neither accepted nor rejected all or any portion of the informal accounting. Defendant further maintains that plaintiff has failed to submit any evidence of her "bad faith". The plaintiff's arguments are without merit.

Contrary to defendant's claim sufficient "proof" of her bad faith exists. In her affidavit, dated August 22, 2007 the Trustee admitted that between April, 2006 and June, 2006, she distributed \$96,000.00 to herself and \$96,425.55 to Anthony C. Bullen and refused to distribute any amount to the plaintiff. Her excuse that she did not distribute to plaintiff because he demanded more than he is entitled to is not only flatly contradicted by plaintiff's counsel's letter dated April 24, 2006 (annexed as Exhibit G to the defendant's moving papers) but is, in any event, irrelevant. The Trust Agreement provides in pertinent part at sections 3.01 and 3.03 that upon the death of the Trustor, the Trustee shall distribute the principal of the Trust in accordance with the terms therein. The Trust further provides that the beneficiaries, the Trustor's four children, receive an equal share of the net proceeds of the Trust. Once the Trustee determined the amount to be distributed to herself and Anthony C. Bullen, and made the distribution, she was obligated to make an equal distribution to the plaintiff. Nor is defendant's claim that plaintiff failed to approve the informal accounting a

reasonable excuse. In the absence of a reasonable excuse, the Trustee's failure distribute to the plaintiff constitutes "bad faith" and a breach of her fiduciary duty.

The Trust Agreement provides in relevant part at section 5.03 that the determination of the Trustee will be conclusive and binding upon all of the beneficiaries and will be liable only for "lack of good faith". Section 8.04 further provides that the Trustee will be liable for "...such trustee's own negligence, neglect, default or willful wrong." Based upon all of the above the Court finds that the Trustee's willful and unjustified refusal to make the distribution to the plaintiff in accordance with the Trust Agreement constitutes " bad faith" and a breach of her fiduciary duty which necessitated this action. Accordingly and pursuant to section 8.04 of the Trust Agreement she is not entitled to recover from the Trust principal the attorney's fees, or any costs she incurred in defending this action for which she is personally liable (see also Trust Agreement section 5.03).

The branch of the plaintiff's cross-motion for summary judgment and imposition of punitive damages is denied. Punitive damages are not available to remedy a private wrong, but to vindicate public rights and only where a defendant's conduct was "aimed at the public generally" and evinces a "high degree of moral turpitude" which demonstrate "such wanton dishonesty as to imply a criminal indifference to civil obligations" (Walker v. Sheldon, 10 NY2d 401, 404-405 [1961]; see, also Rocanova v. Equitable Life Assur. Soc., 83 NY2d 603, 613 [1993]). While the defendant's conduct is unjustifiable and should not be condoned, it does not rise to such a level as to warrant the imposition of punitive damages.

Dated: September 25, 2007
D# 31

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J.S.C.