

Matter of Mankin

2010 NY Slip Op 31745(U)

May 26, 2010

Sur Ct, Nassau County

Docket Number: 330328

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 In the Matter of the Application of Beth Sirchio, as
 Co-Executrix of the Estate of

File No. 330328

JANEY MANKIN,

Deceased.

To Compel a Turnover of the Property of the Estate
 Pursuant to SCPA 2103 and 2104.
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Submitted for decision is the motion of the third-party respondent for an order: (1) granting summary judgment to the third-party respondent and dismissing the third-party petition in its entirety; and (2) directing the payment of legal fees of third-party respondent by the co-executors of the estate of David Mankin and the estate of Janey Mankin. There are other motions for summary judgment pending, but because of the importance of this application, it is being dealt with in this initial decision.

The initial third-party action for indemnification sounds in breach of fiduciary duty. The original petition of Beth Sirchio arises out of the administration of a decedent's estate and the administration of an *inter vivos* trust. The original petition alleges several causes of action against Howard Mankin, brother of the petitioner, concerning each of their respective shares of the estate of their mother, Janey Mankin, and a trust estate arising under an indenture executed by their father in 1995. Howard Mankin commenced a third-party proceeding against his co-trustee alleging that this co-trustee breached his fiduciary duty arising under the April 21, 1995, *inter vivos* trust. The third-party proceeding seeks indemnification from the co-trustee for any liability that attaches to Howard Mankin.

The third-party respondent now moves for an order granting summary judgment and

dismissing the third-party petition. For the reasons that follow, the motion is denied in its entirety.

The issue before the court concerns the common law duties of a fiduciary as affected by exculpatory language in the governing instrument. The third-party respondent relies on language in the trust document that would render him liable only for acts of bad faith.

The third-party respondent is a lawyer and for several decades prior their death provided legal services to David and Janey Mankin which involved estate planning and miscellaneous issues concerning the family business. On April 21, 1995, David Mankin created a trust for the benefit of his wife, Janey, and his children, Beth Sirchio and Howard Mankin. Paragraph FIFTH (E) of said trust provides as follows:

“No trustee shall be liable or responsible in any way or manner unless he shall have acted in bad faith. In no event shall any trustee be liable on account of any default of any other trustee unless liability may be imposed upon him for his own misconduct.

When David Mankin died on November 26, 1998, the ownership of the family business was effectively transferred over to his surviving spouse, Janey. As noted, Janey served as co-trustee with the third-party respondent of the April 21, 1995 trust. In that capacity, Janey on several occasions used trust assets to fund loans to the family business. The total amount of said loans is said to be approximately \$1,216,064.50. These loans are part of the reason that Beth Sirchio challenges the administration of the trust and the actions of her brother who allegedly used said loans to keep his now-inherited business afloat and diminish Beth’s share of her parents’ estate through the trust. The family business is now defunct.

EPTL 11-1.7 is a statutory expression of New York policy prohibiting a testamentary

trustee from enforcing a testamentary provision exonerating “such fiduciary from liability for failure to exercise reasonable care, diligence and prudence.” A more liberal rule applies to exoneration clauses that are contained in *inter vivos* trusts. In *O’Hayer v de St. Aubin* (30 AD2d 419 [2d Dept 1968]), the court permitted the exoneration of an *inter vivos* trustee of acts and omissions that do not involve bad faith or reckless disregard to the interests of the beneficiaries. The rationale for this difference between the testamentary and *inter vivos* trust is said to be the nature of an *inter vivos* transaction and the contracting freedom of the settlor and trustee to define the scope of the latter’s powers and liabilities. Whatever merit this logic may possess, the courts have always subjected language that operates in exoneration of fiduciaries’ acts and omissions to very close scrutiny and there has been a noticeable limiting of the *O’Hayer* rule over the years (*see e.g. Bauer v Bauemschindt*, 187 AD2d 477 [2d Dept 1992], where the court stated that such a clause was valid in *inter vivos* trusts “so long as there is some accountability, at least, to the settlor.”) The court found in *Bauer* that the trustee acted in good faith and “with the requisite degree of diligence and prudence” (emphasis supplied); *see also Matter of Amaducci*, NYLJ, Jan. 12, 1998 (Sur Ct, Suffolk County); *Matter of Shore*, NYLJ, 19 Misc 3d 663 [Sur Ct, New York County 2008]). “Courts may not read exculpatory language broadly, lest they unwittingly permit erosion of the fiduciary duty itself” (*see Wendt v. Fischer*, 243 NY 439, at 443-44 [1926]).

The third party respondent represented himself to be a specialist in the field of trusts and estates with many years of experience in the field and many years of relationship with the Mankin family. In fact, he represented David and Janey Mankin in their business affairs and continued to do so after David died and when he was co-trustee as well. This higher degree of expertise must be considered in the analysis as to what might constitute bad faith and reckless disregard. It also implicates a potential conflict of interest on his part. The court cannot state as a

matter of law where the boundary is that separates ordinary negligence from “bad faith and reckless disregard” but it can safely conclude that the alleged acts and omissions of the third-party respondent are not of sufficient quality to merit summary judgment in his favor. Indeed, by his own words, the third-party respondent admitted to a shocking insouciance with regard to his duties as a co-trustee. Here is a sample from his depositions:

Q. Did you ever get a legal opinion as to whether she (Janey Mankin) could exercise her discretion, given the limitations of article “I” on page ten, or paragraph “I” on page ten [of the Trust instrument]?

A. No.

Q. Did you ever look into her income from other sources before distributions were made?

A. No.

Q. Did you ever participate in a distribution to Janey?

A. No.

Q. Did you know distributions were made to her?

A. No.

Q. I’m going to show you a general ledger . . . Did you ever see this document before?

A. I have no recollection

Q. Do you know who maintained this document?

A. No, I do not.

Q. Did you think as Trustee, you had an obligation to review what was going on in a Trust in which you were a co-Trustee?

A. Yes.

Q. With that in mind, did you ever ask to look at any of the books and records of the Trust?

A. *No.*

The third party respondent was charged with protecting the interests of the trust estate and all its beneficiaries, including the one member of the cast of characters who most needed a voice in the affairs of the trust's administration, Beth Sirchio. Whether his admitted omissions constitutes "bad faith," "reckless indifference," or "the requisite degree of diligence and prudence" is a question of fact. If the court were to accept the argument of the third-party respondent, then no acts of omission would ever constitute bad faith or reckless indifference. In effect, the movant asks the court to approve a years-long inattentiveness while Howard was alleged to be self-dealing on behalf of his control of the family business and taking advantage of his mother, the co-trustee, Janey Mankin and while Janey Mankin was allowed to make distributions to her from the trust despite the strictures of EPTL 10-10.7 and despite the questionable soundness of putting more cash into the failing business. If Beth Sirchio was a mute partner to her detriment in Howard's efforts to keep his business afloat then it was because the third party respondent made her so.

The movant argues that he was always acting within the intention of the settlor, as expressed to him by David Mankin while he was still alive. Such communications are in contravention of the Deadman's Statute (CPLR 4519) and are incompetent to support an application for summary judgment (*Philips v. Joseph Kantor & Co.*, 31 NY2d 307 [1972]).

The motion is denied in its entirety. This is the decision and order of the court.

Dated: May 26, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court