

Evans v Perl

2006 NY Slip Op 30415(U)

December 5, 2006

Supreme Court, New York County

Docket Number: 602898/05

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE
J.S.C.

PRESENT: _____
Justice

PART 10

MARTIN EVANS

INDEX NO. 602898/05

MOTION DATE _____

- v -

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

Andrea Peel

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

**motion(s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

DEC 12 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/05/06

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

Martin Evans, as guardian of the property of SHARI PERL, Individually and on behalf of SHARI PERL as Trustee of the SHARI PERL FAMILY TRUST, and derivatively on behalf of PERL PROPERTIES, INC.,

Plaintiffs,

-against-

ANDREA PERL, Individually and as a Trustee of the SHARI PERL FAMILY TRUST, GERALD SHALLO, 145-147 MULBERRY REALTY CO., LLC, MINERVA 54 REALTY CO., L.L.C., PERL PROPERTIES, INC., 495 BROADWAY REALTY CO., LLC, 256-258 WEST 36TH STREET REALTY CO., LLC, 223-227 WEST 36TH STREET REALTY CO., LLC, PERLROSE REALTY CO., LLC, MULBERRY REALTY CO., LLC, and CONRAD RONCATI,

Defendants,

BRIDGET HANNAH HERMAN, a minor, and REBECCA PERL,

Nominal Defendants.

-----X

Decision/Order

Index No.: 602898/05
Seq. No. : 009

Present:
Hon. Judith J. Gische
J.S.C.

FILED
DEC 12 2006
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf Evans OSC#9 w/ME affid in support, exhs	1
Pltf Shari affid in support (SP)	2
Pltf affid in support (MS), exh	3
Rosen x-motion (BM) w/SR affirm in opp and in support, exhs	4
Pltf affirm (CDM) w/exhs	5

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

Before the court is a motion by Martin Evans ("Guardian Evans"), as guardian for Shari Perl, for a preliminary injunction against named co-plaintiff Stephen H. Rosen ("Trustee Rosen" or "Rosen"), prohibiting him from acting with respect to assets he holds as trustee of two entities known as the HAT Trust and the East End Avenue First trust ("First Trust"). Rosen has cross-moved to dismiss the cross-complaint interposed by Guardian Evans against him. In the alternative, he seeks to sever the cross-complaint from the main action.

This case has a complicated history which informs the unusual procedural posture of the motions presently before the court.

This action was originally commenced by Shari Perl, individually and as trustee of the Perl Family trusts. Rosen was a named co-plaintiff in his capacity as trustee of the HAT Trust. Both Shari Perl and Rosen were represented by David Abramson, Esq. ("Abramson Law Firm") at the time this action was commenced. The underlying action was, at its core, a claim by one sister (Shari) against another (Andrea) that certain assets owned by the Perl Family trusts for both their benefit were being misappropriated.

From the inception of the action, defendant Andrea Perl claimed that her sister Shari, was addicted to prescription drugs and that she was being manipulated by Rosen, who had improperly taken control of Shari's substantial assets. It is undisputed that Shari transferred millions of dollars to the First trust and then to the HAT trust, over which Rosen exercised exclusive control. It is also undisputed that Shari executed a general durable power of attorney in favor of Rosen. Shari's capacity to have executed

documents conferring such authority on Rosen was very much disputed from the commencement of this action.

A series of motions were submitted to this court which resulted in a decision and order dated December 23, 2005. Insofar as relevant to this present motions the court decided that issues regarding Shari Perl's competence should be raised in an article 81 proceeding. In addition, the court decided that Rosen had no standing to continue as a plaintiff in this action since the HAT trust did not and could not legally own the assets which were the subject of the controversy. The court further held that Rosen proceeding as a plaintiff pursuant to the power of attorney was unnecessary, since Shari had brought the case in her own name.

Rosen, still represented by the Abramson law firm at the time, appealed the court's decision. That appeal was never perfected, but up until the time these motions were submitted, it was never withdrawn either.

In the meantime, Shari's family did bring an article 81 proceeding. In that proceeding, which is before another Justice of this Court, Shari conceded her drug dependency and the need for a guardian of the property. Martin Evans was appointed her property guardian. Thereafter, on May 26, 2006 Guardian Evans was substituted in as plaintiff in this action for Shari.

Shari also came to believe that Rosen had taken advantage of her and misused her property to benefit himself and others through the guise of the trusts. Guardian Evans obtained information showing that while over \$2.5 million dollars was transferred by Shari Perl to the trusts, by June 2006 there was a little more than \$1 million dollars remaining, with disbursements of hundreds of thousands of dollars going directly to

Rosen himself. Consequently, in early June 2006, Guardian Evans interposed a cross-complaint directed to co-plaintiff Rosen, which seeks an accounting, injunctive relief, and to set aside the two trusts. The cross-complaint was served upon the Abramson law firm.

Guardian Evans now moves for a preliminary injunction to prevent Rosen from taking any action in his capacity as trustee of the First Trust or the Hat Trust and from spending, transferring or using any assets of those trusts other than as directed by the Court. Rosen, now represented by new counsel, cross-moves to dismiss the cross-complaint against him.

The court first addresses the cross-motion for dismissal because, if granted, it will render moot the relief requested in the motion in chief. Rosen argues in favor of dismissal because: [1] this court lacks subject matter jurisdiction, [2] this court lacks personal jurisdiction over him, and [3] he was not properly served with the cross-complaint. He additionally argues that there is no authority under the CPLR to serve a cross-complaint against a co-plaintiff.

In general, Rosen's arguments that the court lacks jurisdiction are based upon the fact that the trusts were created in New Jersey; drafted by New Jersey counsel; that he, as trustee; and he has always been a resident of and employed in the State of New Jersey. Rosen claims also that all of the trust assets are located in New Jersey. Guardian Evans does not expressly refute these facts. He claims instead that Rosen subjected himself to the jurisdiction of the New York Courts by bringing an action here in his capacity as trustee. Guardian Evans further asserts that, in any event, Rosen is subject to the court's jurisdiction because he has conducted purposeful trust activity

within this state.

The court rejects at the outset Rosen's claim that this court does not have subject matter jurisdiction. Clearly the New York State Supreme court has jurisdiction to determine issues of both law and equity relating to trust matters. McKinney's, NY State Const. Article 6, §7; Gould v. Gould, 108 Misc. 42 (NY Co. Sup. Ct. 1919) affd 203 AD 807 (1st dept 1922) app withdrawn 237 NY 592 (1924).

The remaining jurisdictional arguments by Rosen are really different aspects of personal jurisdiction. In general, the court has jurisdiction to remove a trustee and/or compel the trustee to render an accounting whenever either the trust property is located within the state or the trustee is personally present. These are separate jurisdictional basis and jurisdiction over the trustee, even where the trust assets are located out of state, is sufficient for the court to exercise jurisdiction over issues that pertain to the trustee's actions. O'Hayer v. St. Aubin, 44 Misc.2d 786 (Sup. Ct. West. Co. 1964).¹

A trustee may be found personally present within the State based upon his or her domicile, citizenship, consent to the jurisdiction through acts done or events caused

¹Under certain circumstances the presence of a grantor in the state is itself a sufficient basis for the court to exercise jurisdiction. See: SCPA §207. At bar, Shari Perl, the grantor of both trusts, lived in New York at all relevant times. SCPA § 207, however, does not provide a jurisdictional predicate in this case because, by its terms, it only applies to life time trusts. Neither trust in this case is a lifetime trust. SCPA § 207 is an exception to the common law of this state, that the presence of a grantor in itself, will not confer jurisdiction. In re Saddy, 129 NYS2d 163 (Nass. Co. Sup. Ct. 163). It is worth mentioning in this case, however, only because it confirms that there is no constitutional impediment to exercising jurisdiction over trust matters, even where the trust res is not located in the State and the trustee is a non-domiciliary, as long as there is otherwise a sufficient nexus with the State.

in the State. Bogart's Trusts & Trustees, Chptr 25, §523, Jurisdiction of the Court (2005). New York's long arm statute may serve as a basis for jurisdiction. CPLR § 302. Jurisdiction may be found even where another State also has jurisdiction over the matter. O'Hayer v. St. Aubin, 44 Misc.2d 786 (Sup. Ct. West. Co. 1964).

Guardian Evans argues that as a party plaintiff in this action, Rosen has voluntarily submitted himself to the court's jurisdiction. A trustee can voluntarily put him/herself before the court and be subject to its jurisdiction by asking the court for affirmative relief. Textile Technology Exch., Inc. V. Davis, 81 NY2d 56 (1993).

Guardian Evans claims this is just what Rosen did when he brought this case in his capacity as Trustee. Rosen claims that although he originally brought this action, the court granted Andrea Perl's motion to dismiss him as a party before Guardian Evans interposed his cross-complaint. Thus, Rosen argues, this action was no longer pending against him when the Abramson Law firm was served on his behalf.

The parties' arguments turn on whether the court order dismissing Rosen from the case was a "final" order or not. Guardian Evans claims that because there was no judgment and further because Rosen had filed a Notice of Appeal, Rosen was still a party to this action and subject to the jurisdiction of the court.

The order dismissing Rosen from the case, was certainly final as to him. No further judicial action is required to give it effect, and there are no further issues left to adjudicate between the parties. No judgment is necessary to make the order of dismissal "final." Burke v. Crosson, 85 NY2d 10 (1995); Slater v. American Mineral Spirits Co., 33 NY2d 443 (1974).

The filing of a Notice of Appeal, however, is another matter. It is not a ministerial

document, but a filing necessary to invoke the appellate court's appellate jurisdiction. Hecht v. City of New York, 60 NY2d 57 (1983); Malik v. Coughlin, 127 AD2d 948 (3rd dept. 1987). Once filed, the notice permits an appeal to be perfected within nine months, unless the Notice is withdrawn or there is a court order otherwise dismissing the appeal. See: 22 NYCRR §600.11. Some affirmative action has to be undertaken by the appellant or respondent within the nine month period in order for the appeal to be dismissed. See: Busby v. 150th Street Garage Corp., 93 AD2d 718 (1st dept. 1983).

This court thus concludes that when the cross-complaint was served while Rosen's Notice of Appeal was still pending (and before the expiration of the nine month period to perfect), this court still had jurisdiction over Rosen. Consequently, when Guardian Evans served Rosen with the cross-complaint by serving the Abramson law firm, Rosen was still represented by that firm and the service was sufficient. Indeed, the Abramson law firm only moved after the cross-complaint was served to be relieved as Trustee Rosen's counsel.

Guardian Evans also argues that Trustee Rosen's purposeful activity as trustee in this state, makes him amenable to jurisdiction here. CPLR § 302(a)(1). While Trustee Rosen claims that none of his trust activities were carried out in New York, this is demonstrably false. At the very least, Rosen, in his trustee capacity, had at least one meeting in New York State, retained New York counsel, availed himself of the New York courts and wrote letters of direction to people in New York in furtherance of his duties. He undertook all of the acts for the sole purpose of collecting and controlling assets that he claimed were part of the trust corpus. This is purposeful activity, in which the trustee availed himself of the benefits and privileges of New York State, in order the further

what he claimed were the interests of the trusts. Hanson v. Deckla, 357 US 235, 253 (1958).

Moreover Rosen's claim that his trustee activity in this state is not the trustee activity that is being challenged in the cross-complaint, is too crabbed an interpretation of what has occurred in this state and the claims that are being made. The claims are against him as a trustee improperly taking control of and using Shari Perl's property, including pursuing this action and paying himself and others to proceed in this action.

The court also rejects Rosen's hyper technical argument that the matter should be dismissed because the CPLR does not permit cross-complaints between plaintiffs. CPLR Article 77 certainly permits an action to challenge a trustee and the causes of action asserted for an accounting, permanent injunction and to set aside a trust are ones that are well recognized in New York. Re v. Re, 39 AD2 760 (2nd dept. 1972); Kazaras v. Manufacturers Trust Co., 4 AD2d 227 (1st dept 1957). Whatever label is given to the pleading, as long as it complies with due process by giving Rosen notice and an opportunity to be heard, it should be allowed to withstand dismissal. Page v. Cerisia, 265 AD2d 730 (3rd dept. 1999); Koshbin v. Ruiz, 6 Misc3d 1029(A); 2005 WL 147269 (NYCiv. Ct. NY co. 2005).

The court also rejects Rosen's arguments that the claims against him should be severed to protect Shari Perl. In the procedural posture of this action, Rosen's interests are adverse to Shari Perl's interest. Guardian Evans has indicated that he does not seek severance. Since the rights to be protected belongs to Shari Perl, they may be waived by her representative.

Since the court has jurisdiction over Rosen in his capacity as trustee, the court is

further considering whether, in the interim, a preliminary injunction is necessary to protect the assets of Ms. Perl. A preliminary injunction requires a showing of: [1] a likelihood of success on the merits; [2] irreparable harm and [3] a balancing of the equities in the movant's favor. CPLR § 6301; Coinmach Corp. V. Alley Pond Owners Corp., 25 AD3d 642 (2nd dept. 2006). Guardian Evans has made such a showing. His three claims are directed to setting aside the two trusts and to have Trustee Rosen account for the monies he has already expended. He has shown a likelihood of success on the merits. Shari Perl, the grantor and primary trust beneficiary, claims that she was addicted to prescription drugs at the time she signed the trust instruments which gave trustee Rosen control over millions of dollars of her assets. There has been a showing that over one million dollars has been expended from the trust in the short time that it has been in existence, and Ms. Perl states that most of the money was not used for her benefit. A large portion of the monies were disbursed to Rosen. Some of the monies went to his relatives for services that Ms. Perl disputes needing or receiving.

Guardian Evans has also shown irreparable harm and a balancing of the equities. Clearly if Rosen is permitted to control the remaining monies in the trust without supervision, there is a high risk that monies will be used for reasons other than Ms. Perl's benefit. Once the monies are disbursed, they may never be recoverable. On the other hand Rosen is not harmed by the injunction because he can obtain court approval for any and all appropriate disbursements that the trusts must make.

The court therefore grants the preliminary injunction.

Conclusion

In accordance herewith it is hereby:

ORDERED that Rosen's cross-motion to dismiss the cross-complaint against him is denied and he is permitted 20 days from the date of this order to interpose an answer, and it is further

ORDERED that Guardian Evans motion for a preliminary injunction is granted and it is further

ORDERED that pending determination of the underlying cross-claim or further court order, whichever is first, Stephen Rosen is hereby restrained and barred from taking any further actions in his capacity as Trustee of either the East End Avenue First Trust or the HAT trust, other than as directed by the court and from spending, transferring or using any of the assets of such trusts except as directed by the court and it is further

ORDERED that any requested relief not expressly addressed herein is denied and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
December 5, 2006

So Ordered:

J. Gische
HON. JUDITH J. GISCHE, J.S.C.

FILED
DEC 12 2006
NEW YORK
COUNTY CLERK'S OFFICE