

Pelliccia v Amalgamated Life Ins. Co., Inc.
2006 NY Slip Op 30801(U)
August 17, 2006
Supreme Court, New York County
Docket Number: 115000/05
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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GLADYS I. PELLICCIA, Individually, and as
Legal Custodian of Jonathan Matthew
Pelliccia and Andrew Jon Pelliccia, her minor
children,

Plaintiff,

-against-

AMALGAMATED LIFE INSURANCE
COMPANY, INC., NILDA GONZALEZ a/k/a
NILDA PELLICCIA, Individually, and as
Administrator of the Estate of John Pelliccia
and VIVIAN ROLON, Individually, and as
Administrator of the Estate of John Pelliccia,

Defendants.
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Decision/Order

Index No.: 115000/05
Seq. No. : 003

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

FILED
AUG 24 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Papers	Numbered
Pltf's OSC#3 [amend] w/PAA affid in support, exhs	1
Def's Pelliccia and Rolon affirm in opp (ADG) w/exh	2
Pltf's affid in further support (PAA) w/exhs	3

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

This is plaintiff's motion for permission to serve a second amended complaint in this action that was commenced in October 2005. CPLR § 3025. She seeks to assert a cause of action for the imposition of a constructive trust upon the proceeds of any life insurance policies insuring the life of John Pelliccia, Jr. who is deceased (the "deceased), as well as upon any retirement or death benefits payable to Nilda Gonzalez a/k/a Nilda Pelliccia and/or Vivian Rolon, individually, or as the administrators of his

estate. Ms. Gonzalez is the deceased's mother and Ms. Rolon his sister (collectively hereinafter the "the administrators" or "defendants") to assert a cause of action for the imposition of a constructive trust against the named defendants and a claim for legal fees.

The motion is opposed in all respects by the administrators. Defendant Amalgamated Life Insurance Company ("Amalgamated") takes no position on this position, though proof of service has been filed.

Background

The deceased was married to the plaintiff in this action. They were divorced in October 2003. There are two children of the marriage and this lawsuit has been brought by plaintiff on their behalf as well as on her own behalf. As per their divorce agreement so-ordered by Hon. Joseph J. Risi on September 28, 2004 ("divorce settlement"), the parties stipulated plaintiff would have legal custody of their two children and the deceased would pay child support and other expenses. The parties also stipulated that the deceased would "provide a life insurance policy in the amount of no less than two hundred thousand (\$200,000.00) dollars with the children as the irrevocable beneficiaries and the Mother [plaintiff herein] as the Trustee of the policy."

It is undisputed that at the time of his death (July 21, 2005) the deceased did not have a policy naming the children as his beneficiaries or plaintiff as the custodian of the funds. He did, however, have a policy in a lesser amount (\$110,000) with Amalgamated naming his mother (defendant Ms. Gonzalez) as the beneficiary.

In this action, plaintiff seeks (among other relief) to enforce the separation agreement, by having Amalgamated pay the insurance proceeds to her, not the

defendants, either in their individual capacity or in their capacity as administrators.

Plaintiff seeks to have other benefits or payouts that have passed outside the estate to either or both defendants restrained so that the deficiency between the insurance proceeds and the divorce settlement can be satisfied at the conclusion of this action.

Plaintiff contends that a constructive trust should be imposed on the insurance proceeds and the retirement and death benefits because the deceased's contractual obligations to her (and the children) under the divorce agreement are superior to the rights of the named beneficiaries who stand to receive benefits without any consideration. Simonds v. Simonds, 58 AD2d 305 *aff'd* 45 NY2d 233 (1978). She contends further that the deceased's mother and sister stand to be enriched unjustly, at the children's expense, and to their detriment since they will no longer be financially supported by their father. Simonds v. Simonds, *supra*.

The administrators present two arguments for why the amended pleading should not be permitted. First, they argue it is too late for the complaint to be amended and they would be prejudiced. This argument is considered, but immediately rejected by the court because this case has not languished. It was commenced in October 2005 and thereafter adjourned for defendants to obtain counsel. The preliminary conference was held on February 2, 2006. Though claiming they will be prejudiced by the introduction of this new cause of action, it is based largely on facts that have been alleged by plaintiff from the outset.

The defendants next oppose the amendment on the grounds that the claim is totally without merit since divorce agreement does not identify a specific policy, let alone the Amalgamated policy. They contend further that the policy with Amalgamated

did not exist at the time of the divorce agreement, but was obtained thereafter. Thus, defendants claim plaintiff cannot assert a claim against a policy that was not in effect at the time of the divorce agreement.

Finally, defendants contend that plaintiff did nothing to enforce the divorce settlement sooner and therefore should stand to gain nothing after the deceased's death.

Discussion

A constructive trust may be imposed when property has been acquired under such circumstances that the holder of legal title may not in good conscience retain the beneficial interest therein. Scivoletti v. Marsala, 97 AD2d 401 (2nd dept. 1983); *aff'd* 61 NY2d 806 (1984). Generally, four elements must be present for the court to find that such a trust exists: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer in reliance thereon; and (4) unjust enrichment. Sharp v. Komalski, 40 NY2d 119 (1976). This is not an unyielding formula, however. Simonds v. Simonds, 58 AD2d 305 *aff'd* 45 NY2d 233, 236 (1978). Rather it is elastic to meet the needs of the individual case. Goodman v. Goodman, 84 AD2d 344 (1st dept. 1982).

Such a trust will be imposed where, for example, someone agrees to continue his children as the beneficiaries of his life insurance policy, but changes the beneficiary and designates someone else. Markwica v. Davis, 64 NY2d 38 (1984) (new wife named beneficiary); Bankers Security Life Insurance v. Shakeridge, 70 AD2d 852 *aff'd* 49 NY2d 939 (1980) (spouse designated his brother, though still married to his wife).

A constructive trust has also been imposed where, as here, under a separation agreement a party is required "to maintain" a policy of life insurance naming the former spouse as beneficiary as trustee of the parties' children, but at the time of the divorce agreement there is no policy in place. Gallo v. Gallo, 6 Misc2d 628 (Sup. Ct., Nassau Co. 2004). A life insurance policy is commonly used to secure a parent's child support obligations to the surviving parent in the event of his or her death before the children become emancipated. DRL § 236 (B) (9) (c). Thus, defendants' argument, that because the policy was not in existence when the divorce agreement was entered into, it cannot be the subject of a constructive trust, is without merit.

Under the circumstances the claim for a constructive trust will be allowed to be plead. DRL § 237 (c) allows a creditor spouse to recover legal fees s/he incurs in connection with enforcement proceedings. Although defendants contend that plaintiff cannot prevail on that cause of action, that is beyond the scope of this motion. Plaintiff has alleged facts that would support this cause of action and the court will permit her to assert them in an amended complaint.

Plaintiff's motion, for permission to serve a second amended complaint in the form proposed is hereby granted. Plaintiff may serve her amended complaint upon the defendants within 20 days of this order. Defendant's shall then serve their answer as provided for in the CPLR.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
August 17, 2006

So Ordered:



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

FILED
AUG 24 2006
COUNTY CLERK'S OFFICE
NEW YORK