

Matter of Edward Kaplan
2007 NY Slip Op 30161(U)
March 8, 2007
Surrogate's Court, Nassau County
Docket Number: 0321837
Judge: John B. Riordan
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SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of Penny Kaplan, income beneficiary of the QTIP trust established under the Last Will and Testament of Edward Kaplan, deceased, to convert said trust to a four percent (4%) unitrust; compelling the sale of the family business interests for fair market value, or, alternatively, demanding that the family business interests are properly managed so that they show income produced; removing Deborah Kaplan-Brooks as co-Trustee; and disqualifying Robert Kaplan as successor co-Trustee and immediately appointing an independent corporate-fiduciary to succeed as co-Trustee.
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File No. 321837

Dec. No. 914

In this proceeding, petitioner, Penny Kaplan, moves pursuant to CPLR 3212 for an order granting summary judgment: (1) converting the QTIP trust to a unitrust; (2) compelling the sale of the Kaplan family business interests for fair market value; (3) removing Deborah Kaplan-Brooks as co-trustee and requiring her to file her account; and (4) disqualifying Robert Kaplan as successor co-trustee and immediately appointing an independent corporate fiduciary to succeed as co-trustee. For the reasons that follow, the motion is denied, except to the extent that Deborah is directed to file an intermediate account of her acts as co-trustee of the QTIP trust as set forth below.

BACKGROUND

Decedent Edward Kaplan died testate on December 7, 2001, leaving his wife, Penny, who is now forty-six years old, and two children, Heather and Lee, who are now twenty and nineteen, respectively. Penny and Deborah are sisters-in-law, the latter having been decedent's sister. Robert is decedent's father. Apparently, the close family relationship that existed between Penny and the Kaplan family while decedent was alive has deteriorated.

Decedent's last will and testament dated October 28, 1998 was admitted to probate by

this court in April 2002. Letters testamentary and letters of trusteeship for the QTIP trust established in the will were granted on the same date to Deborah and Penny. They qualified as such and have acted and are still acting in those capacities.

Pertinent Provisions of the Will

Decedent's estate consisted of four main assets: his personalty, which he bequeathed to Penny under Article SECOND of the will; his Old Westbury residence, which passed to Penny under Article THIRD; his interest in the Kaplan family businesses; and an investment portfolio at UBS Paine Webber consisting mostly of tax-free municipal bonds. The business interests and bond portfolio passed under Article FIFTH, the residuary clause to two trusts. Article FIFTH A created a credit shelter trust and Article FIFTH B created a QTIP trust. Penny is the income beneficiary of the QTIP trust. She and Deborah are the co-trustees, and Robert is named as successor co-trustee.

By its terms, during Penny's lifetime, the co-trustees are directed to "pay to [Penny] or apply for her benefit the entire net income of this trust, in quarter-annual or more frequent installments as may be convenient to [the] trustees" (Will, Article FIFTH B[1]). Additionally, the co-trustees have the discretion to pay to or apply for Penny's benefit as much of the principal as they, in their discretion,

"shall deem advisable in order to provide for emergency expenses relating to her health, support and maintenance. In determining the amounts of principal, if any, to be paid or applied for the benefit of [Penny], I request (but do not direct) that my trustees take into consideration any income or resources of my said wife apart from this trust. My wife shall have the right to require my trustees to make productive any unproductive property of this trust or to convert such property into productive property within a reasonable period of time." (Will, Article FIFTH B[2])

The QTIP trust terminates upon Penny's death. At that time, any remaining principal is

to be distributed in equal shares to Lee and Heather, if they are then living, and to any living issue per stirpes of Lee or Heather if he or she is deceased when Penny dies, provided that any property distributable to either of them if they are younger than thirty-five-years old at the time is to be held by the co-trustees in a separate trust for that child's benefit, in accordance with the terms and conditions set forth in Article SIXTH of the will, the terms of which are irrelevant to this motion (Will, Article FIFTH B[3]).

Article SEVENTH of the will authorizes the trustee or the trustees, by unanimous agreement, to appoint "another individual, or successive individuals in a named order, or a qualified bank or trust company as co-trustee or . . . as successor trustee" with respect to each trust created by the will (Will, Article SEVENTH C). If Penny were to be the sole trustee of any trust created under the will, Article SEVENTH directs her to "appoint an individual or qualified bank or trust company to serve with her as co-trustee of such trust."

The Funding of the Trusts

According to decedent's federal estate tax return, the QTIP trust was funded in the amount of \$14,310,091.85, with \$8,369,930 attributable to decedent's interests in Kaplan family businesses and the rest with assets from decedent's UBS Paine Webber accounts. The credit shelter trust was funded with \$675,000 from the UBS Paine Webber accounts.

Decedent's Interests in the Kaplan Family Businesses

According to schedule F of the decedent's federal estate tax return, at his death, decedent owned interests in Kaplan family businesses, totaling \$8,369,930, as follows: (1) one-third membership interest, valued at \$2,416,667, in Brush Hollow Realty, LLC; (2) one-third membership interest, valued at \$1,266,667, in Stewart Avenue Realty, LLC; (3) one-third membership interest, valued at \$1,470,000, in Whitestone Expressway Realty, LLC; (4)

one-third membership interest, valued at \$150,000, in R.K. Associates, LLC, and \$1,200,000 due on a loan he made to that entity; (5) one-third membership interest, valued at \$1,393,333, in Golfers World, LLC; (6) one-third membership interest, valued at \$86,232, in All-Care Pharmacy, Inc.; (7) one-third membership, valued at \$0, in Westbury Seniors, Inc.; (8) twenty-five percent interest, valued at \$298,028, in Nalpak, Inc.; (9) twenty-five percent interest, valued at \$72,790, in Fona, Inc.; (10) twenty-five percent interest, valued at \$14,751, in Storage Quarters, Inc; and (11) twenty-five percent interest, valued at \$1,462, in Whitestone Storage Quarters, Inc.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], quoting *Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). Failure of the moving party to make a prima facie showing of entitlement to summary judgment requires denial of the motion "regardless of the sufficiency of the opposing papers" (*Weingrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The papers submitted in connection with a motion for summary judgment are always reviewed in a light most favorable to the nonmoving

party (*Marine Midland Bank, N.A. v Dino & Artie's Transmission Co*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his or her burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge. Co., Inc. v Cermele*, 226 AD2d 357 [2d Dept 1996]).

REQUEST FOR CONVERSION TO UNITRUST

Decedent's federal estate tax return reflects \$14,310,091.85 as the value of the assets in the QTIP trust, including the interests in the various Kaplan family businesses of \$8,369,930. During her deposition, Deborah admitted that the assets listed on schedule F have not paid any money to the QTIP trust. Deborah claims that the reason is that no income has been produced is because the entities have had "only losses. These are all new business." However, she claims that, since decedent died, Penny has received substantial amounts of income from the QTIP trust, of approximately \$360,000 annually, primarily in tax-free income from the estate accounts. Deborah asserts that "[t]his represents a tax-free return in excess of five percent per year on the cash invested in the UBS account, which conservatively translates into a pre-tax return in excess of seven percent per year." Deborah also asserts that Penny has benefitted to the detriment of the credit shelter trust by withdrawing, with Deborah's "reluctant consent," all of the previously

unswept interest, dividends and realized capital gains from the inception of the estate UBS account to the May 2004 inception of the segregated QTIP and credit shelter UBS accounts.

Penny asserts that the admitted failure of the business assets in the QTIP trust to pay any income to the trust since decedent died in 2001 necessitates the conversion of the QTIP trust to a unitrust pursuant to EPTL11-2.4.

EPTL 11-2.4[e][2][B] provides that a court having jurisdiction over a trust to which EPTL 11-2.4 “otherwise would not apply, upon the petition of the trustee or any beneficiary of a trust, and upon notice to all persons interested in the trust, may direct that this section shall apply to the trust” In this instance, jurisdiction has been obtained all over interested parties. In turn, EPTL 11-2.4[e][5][B] states that “[i]n any proceeding brought pursuant to subparagraph (e)(2), there shall be a rebuttable presumption that this section should apply to the trust.”

That does not mean, however, that the court must grant the petition to convert to unitrust, even in the absence of rebuttal evidence. Because the statute provides that the court “may” direct that the trust be administered as unitrust, the decision to grant a petition seeking an order converting a trust to a unitrust rests in the discretion of the court (*Matter of Ives*, 192 Misc 2d 479, 481 [Sur Ct Broome County 2002]; EPTL 11-2.4[e][2][B]; McKinney’s Cons Laws of NY, Book 1, Statutes §177; *see also* SCPA 103 [38]). As Surrogate Peckham held in *Matter of Ives* (192 Misc 2d 479 [Sur Ct Broome County 2002]), an uncontested application to convert to unitrust, the court’s inquiry does not end with the presumption. While that is certainly a factor to be considered, the court must also consider “all of the factors relevant to the trust and its beneficiaries,” including the following factors, to the extent they are relevant:

- “(i) the nature, purpose, and expected duration of the trust;
- (ii) the intent of the creator of the trust;
- (iii) the identity and circumstances of the beneficiaries;
- (iv) the need for liquidity, regularity of payment, and

preservation and appreciation of capital; [and]
(v) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the creator of the trust” (EPTL 11-2.4[e][5]).

Thus, neither Penny nor the court can rely solely on the presumption afforded by the statute without considering the other statutory criteria. Furthermore, this is a motion for summary judgment; to prevail the movant must establish her right to judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Here, Penny has not established her right to judgment as a matter of law on the statutory criteria which the court must consider. Even if she had, the opposing papers raise triable issues of fact regarding, among other things, the decedent’s intent with regard to the trust; the need for liquidity and the preservation and appreciation of capital; and the likelihood of the assets soon becoming income producing.

Accordingly, that branch of the motion for summary judgment on the conversion of the trust to unitrust is denied.

REQUEST FOR SALE OF KAPLAN FAMILY BUSINESS

Penny requests that the court summarily order the sale of the Kaplan family businesses on the ground that they have not generated a “penny of net income to the QTIP trust in five years and have admittedly been unprofitable.” In support, Penny quotes the language of Article FIFTH B[2] of the will, which states, in part, “My wife shall have the right to require my trustees to

make productive any unproductive property of this trust or to convert such property into productive property within a reasonable period of time.” Penny claims that Deborah, who holds a controlling interest in these entities in both her individual and representative capacities, has breached her fiduciary duty as trustee (*see Matter of Schulman*, 165 AD2d 499, 502 [3d Dept 1991]).

Penny likens the facts in this proceeding to those in *Matter of Hubbell* (302 NY2d 246 [1951]) where the Court of Appeals stated, “[t]he conclusion is unavoidable, therefore, that the trustees, in failing to take any steps toward converting the corpus into income-producing assets within five years of the testatrix’ death . . . were guilty of gross negligence as a matter of law (*Matter of Hubbell*, 302 NY2d 246, 259 [1951]). However, the facts here are distinguishable for two reasons. In *Hubbell*, unlike here, the trustees were the sole owners, in their individual and representative capacities, of the entire outstanding stock of the corporation. In this case, according to the chart annexed to the Affidavit of Harold L. Deiters, III, submitted by Penny, the Estate of Barton Kaplan, which is not a party to this proceeding, owns twenty-five percent of All- Care Pharmacy, Inc., Nalpak Construction Co., Inc. and Westbury Seniors, Inc., as well as twenty percent of Fona, Inc. and R.K. Associates, Inc. (except in 2002 the ownership of capital of the marital trust in R.K. Associates, Inc. was fourteen-and-one-half percent, but shares of profit is twenty percent). Further, unlike in *Hubbell*, Deborah claims she and Robert have made “prudent business efforts since [decedent’s] death to increase the income-producing potential of the businesses” including

“(a) entering into a long-term ground lease for the Brush Hollow Road property [owned by Brush Hollow Realty, LLC] to insure that the family receives a stable annual income for the next forty-plus years; (b) undertaking yeoman’s efforts to market the mini-storage properties in Whitestone, Garden City, and Rockville Centre [owned by

various of Kaplan family businesses]; (c) [Deborah and Robert] investing their own money in the business to stabilize operations; and (d) when it became apparent that the Rockville Centre facility would never turn a profit, they sold that facility with Penny's consent, to cut losses."

It is unclear from the papers submitted whether Penny seeks to compel the sale of all the Kaplan family businesses, in toto, or only the trust's interests in those businesses. It also does not appear that the court has jurisdiction of the individual business entities nor all of their individual owners. In any event, Deborah has raised material issues of fact regarding the prudence of any sale at this time, and the motion to sell the family business interests is therefore denied.

**REQUEST FOR REMOVAL OF DEBORAH KAPLAN-BROOKS
AS TRUSTEE AND FOR THE DISQUALIFICATION**

OF ROBERT KAPLAN AS SUCCESSOR TRUSTEE

Penny also asks the court to remove Deborah as trustee and disqualify Robert as successor trustee on the following grounds: (1) according to Deborah's deposition testimony, the Kaplan family businesses were managed after decedent's death just as they were before his death; (2) no income was paid to the QTIP trust from any of the Kaplan family businesses in the last five years; (3) Deborah and Robert failed to distribute income to the QTIP trust on the few occasions in which one of the Kaplan family businesses made a profit; instead, any such profits were utilized to offset losses in other Kaplan family businesses, even if the percentage owned by the QTIP trust in the transferee was less than that in the transferor's business; (4) a conflict of interest exists based on (a) the alleged failure to include property located on Maple Avenue, Westbury, New York, as an asset of the QTIP trust; (b) the failure to repay a \$1,200,000 loan decedent made to one of the Kaplan family businesses; and (c) personal animosity between Penny and Deborah and Robert; and (5) self-dealing by Deborah in operating a business she

owns at locations owned in part by the QTIP trust with “questionable rental deals.” On those grounds, Penny asserts that Deborah has violated SCPA 711[2] &[10] as a matter of law. In particular, Penny relies on that portion of SCPA 711[2] that allows the court to suspend, modify or revoke the letters of a fiduciary who is deemed “unfit for the execution of his office” by having “improvidently managed or injured the property committed to his charge” and on SCPA 711[10] which provides for suspension, modification or revocation of letters when a “testamentary trustee . . . has violated or threatens to violate his trust . . . or is for any other cause deemed an unsuitable person to execute the trust.”

Although Deborah admits that no money has been paid to the QTIP trust from the Kaplan family business, she asserts that this is attributable to the fact that the businesses have sustained losses because they are “start up” businesses. Deborah claims that the QTIP as a whole has generated substantial income in the average amount of \$360,000 per year. She also states that any profit made by one of the businesses is used to “make up for the losses at the other facilities and support a distribution to the family business principals.” However, Deborah does not explain if the losses to the businesses are offset in the same percentages as ownership of the profitable entities.

In response to Penny’s allegation that Deborah failed to include the Maple Avenue property as an asset of the QTIP trust, Deborah asserts that shortly after decedent’s death, the contract he and Robert had to purchase that property expired and, months later, Robert entered into a new contract to acquire the property. The factual dispute cannot be resolved in this motion for summary judgment, even with the documents submitted by Penny.

Deborah does not offer a viable explanation as to why the \$1,200,000 loan has not been repaid, despite the passage of more than five years since decedent’s death. Deborah states that

the loan was not repaid because Penny never asked for repayment. Also, the record provides no explanation why Penny, in her capacity as co-trustee, did not seek, until now, to have the loan repaid. Finally, Deborah denies any animus toward Peggy or that she is self-dealing and, instead, claims that she and Robert have personally invested \$1,500,000 to keep the Kaplan family businesses afloat.

There is no doubt that a fiduciary has the duty of undivided loyalty and good faith in the administration of a trust and must refrain from self-dealing (*see generally Meinhard v Salmon*, 249 NY458, 464 [1928]; *Matter of Hunter*, 6 AD3d 117, 133 [2d Dept 2004]). The decision to remove a trustee is in the discretion of the Surrogate (SCPA 713; *Matter of Simon*, 44 AD2d 570 [2d Dept 1974]). The power should be exercised sparingly (*Matter of Israel*, 64 Misc 2d 135 [Sur Ct Nassau County 1970]), since the decision to do so is a serious one (*Matter of Braloff*, 2 AD2d 912 [2d Dept 1957], *affd* 4 NY2d 847 [1958]; *Matter of Kaufman*, NYLJ, July 28, 1989, at 23, col 2 [Sur Ct Nassau County] (removal not warranted where actions of fiduciary do not imperil the estate). “Only such conduct as jeopardizes the fund will induce the court to remove a trustee, particularly one in whom special confidence has been reposed by the creator of the trust” (*Matter of Berri*, 130 Misc 527, 536 [Sur Ct New York County 1927]). The claim that a trustee has a conflict of interest with the trust is insufficient to warrant removal. “[I]t is actual misconduct, not a conflict of interest, that justifies the removal of a fiduciary” (*Matter of Shaw*, 186 AD2d 809, 810 [2d Dept 1992]). Thus, the party seeking to remove a fiduciary under SCPA 711 must meet a heavy burden (*Matter of Krom*, 86 AD2d 689 [3d Dept 1982], *appeal dismissed* 56 NY2d 505 [1982]), especially when seeking summary relief.

Viewing the record in the light most favorable to Deborah and Robert, as this court must (*Marine Midland Bank, N.A. v Dino & Artie's Transmission Co*, 168 A.D.2d 610 [2d Dept

1990]), the court finds that Penny has failed to establish her right to judgment as a matter of law. Although the court does not take these allegations lightly, they are insufficient to remove Penny as co-trustee or disqualify Robert as successor co-trustee without the benefit of a fact-finding hearing (*see Matter of Duke*, 87 NY2d 465, 473 [1995]). Further, even if she had, the opposing papers raise material issues of fact, including whether the Maple Avenue property should be included as an asset of the QTIP trust and whether Deborah has engaged in self-dealing. Accordingly, Penny's motion for summary judgment on the issues of removal and disqualification is denied.

The court does find that Penny is entitled to an intermediate account of Deborah's acts as co-trustee of the QTIP trust under SCPA 2205 and directs Deborah to commence an accounting proceeding within sixty date after notice of entry of the order to be settled.

CONCLUSION

For the reasons set forth above, Penny's motion for summary judgment is denied, except to the extent that Deborah is directed to file an intermediate account of her acts as co-trustee of the QTIP trust.

The court notes that the proceeding is scheduled for trial commencing on March 26, 2007, at 9:30 a.m., with the pre-trial conference on March 19, 2007, at 10:00 a.m.

This constitutes the decision of the court.

Settle order on five days' notice.

Dated: March 8, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court