

Matter of Unterman

2007 NY Slip Op 33229(U)

September 13, 2007

Surrogate's Court, Nassau County

Docket Number: 0337203/2007

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

GAIL SHEINKOPF,

Beneficiary of the Estate of, and
Remainderman of the Testamentary Trusts of

File No. 337203

SEYMOUR UNTERMAN,

Deceased,

Dec. No. 482

for a Decree Revoking Letters Testamentary and
Letters of Trusteeship Heretofore Issued to

THOMAS UNTERMAN,

as Executor/Trustee, and Granting Additional Relief.

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In this proceeding for revocation of letters testamentary and letters of trusteeship, respondents, Thomas Unterman and Patricia Leffler, have made a pre-answer motion to dismiss and for sanctions against the petitioner. The petitioner, Gail Sheinkopf, has cross-moved for sanctions against Thomas and Kaye Scholer LLP, the firm that represents Thomas in this proceeding.

Factual Background

The facts alleged in the petition include the following and are deemed true for purposes of this motion to dismiss (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The decedent died testate in March 2005, leaving his spouse, Lillian, and their two adult children, Gail and Patricia. Lillian died six months later, in September 2005. Thomas is the decedent's nephew.

The decedent's will provides, in pertinent part, that his residuary estate be divided into two

parts, termed in the will as the “nonmarital part” and the “spouse’s part,” each of which was to be placed into a separate trust. Lillian was the designated income beneficiary of both trusts, and the trustee was accorded the discretion in both trusts to distribute principal to provide for Lillian’s health, support and maintenance. Upon Lillian’s death, any accrued or undistributed income from the trusts was to go to Lillian’s estate and the trusts’ principal was to be distributed equally to the decedent’s daughters, Gail and Patricia, in accordance with Article SIXTH of the will.

On May 3, 2005, the will was admitted to probate and letters testamentary and letters of trusteeship were issued to Thomas and Lillian. After Lillian’s death, the court issued an order revoking the letters testamentary and letters of trusteeship issued to her and amending the letters to continue with Thomas acting as the sole executor and sole trustee of both trusts.

The decedent’s residuary estate is primarily comprised of the stock in Supreme Oil Company, a Delaware corporation of which the decedent was the founder and sole proprietor. The value of Supreme Oil Company is between \$70,000,000 and \$100,000,000.

The petitioner raises numerous grounds that she alleges warrants Thomas’s removal. Included among them are Thomas’s alleged: (1) failure to distribute the trusts’ assets in disregard of Article SIXTH of the will; (2) conflict of interest between his fiduciary duty as executor and trustee and the position he created for himself days before Lillian’s death as chairman of the board of directors of Supreme Oil Company; (3) retention of Kaye Scholar LLP to represent both himself as trustee and Supreme Oil Company in transferring sole control to him over all the voting stock of the corporation; (4) manipulating the petitioner into agreeing to a recapitalization of Supreme Oil Company, which facilitated Thomas’s plan to wrest control of the corpus of the trusts from petitioner; (5) plan to continue to operate Supreme Oil Company rather than distribute

the shares of stock to the petitioner and Patricia in conformance with the terms of the decedent's will; and (6) mismanaging and wasting the estate and Supreme Oil Company by, among other things, (a) employing all three of Patricia's children at exorbitant salaries, (b) appointing Patricia's son, Michael Leffler, as president of Supreme Oil Company (he formerly was a manager of the corporation), (c) paying for Patricia's health insurance, car insurance, car payments and other benefits with corporate funds even though she does not work for Supreme Oil Company, (d) failing to maintain adequate insurance causing unnecessary losses to the corporation, (e) failing to provide the petitioner with information about the operation and finances of the corporation, (f) adding approximately \$2,000,000 to Supreme Oil Company's payroll by hiring unnecessary employees and (g) permitting Patricia to convert more than \$2,500,000 and millions of dollars in jewelry and other intangibles from the estate. The petitioner alleges that Thomas's actions demonstrate that he is unfit to continue to serve as executor and trustee.

Based on these allegations, the petitioner seeks an order and decree directing Thomas to distribute the corpus of the trusts; removing him as trustee pursuant to EPTL 7-2.6, SCPA 719 (7), SCPA 711 (2), (5), (8) and (10), and SCPA 1505 and compelling him to account pursuant to SCPA 720. The petitioner also seeks an order and decree pursuant to SCPA 1414 and 1502 appointing Bradley Shorser as the sole successor executor and sole successor trustee, as nominated in the decedent's will, to wind up the estate and trusts in accordance with Article SIXTH of the will.

The Motion to Dismiss

Thomas moves to dismiss the petition under CPLR 3211 (a) (7) for failure to state a cause of action.

“In the context of a CPLR 3211 (a) (7) motion, directed at the sufficiency of the pleadings, the pleadings are to be afforded a liberal construction, and the court must accept the allegations as true, according the plaintiff the benefit of every reasonable inference to determine whether they come within the ambit of any cognizable legal theory (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]; *Hirschhorn v Hirschhorn*, 194 AD2d 768 [2d Dept 1993]). A CPLR 3211 motion should be granted only when, even viewing the allegations as true, the plaintiff still cannot establish a cause of action. The standard is not whether the plaintiff has stated a cause of action, but whether the plaintiff has a cause of action (*McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660 [2d Dept 2005]). ‘The motion must be denied if from the pleadings’ four corners, “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]).’ (*Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc 3d 926, 930 [Sup Ct, New York County 2006]).

In the papers filed in support of Thomas’s motion, he argues that the allegations against him, even if true, do not rise to the level of serious misconduct required for removal and that the petition is premature since the estate is still open. Thomas also asserts that the decedent’s will does not require him to distribute the trusts at this time, but rather grants him broad powers, including running Supreme Oil Company, pursuant to Article FIFTEENTH of the will, rendering meritless the allegations of conflict of interest. Thomas contends that all of his actions have been in keeping with his fiduciary duties as executor and trustee and have been designed to maximize

the value of the trusts' assets that will ultimately be distributed to the petitioner and to Patricia.

Using the standard for CPLR 3211 (a) (7), the court denies Thomas's motion to dismiss. Deemed true for purposes of the motion, the allegations contained in the petition sufficiently state a cause of action for removal and for the related relief petitioner requests.

The court recognizes that "[r]emoval of a fiduciary constitutes a judicial nullification of the testator's choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established" (*Matter of Duke*, 87 NY2d 465, 473 [1996] [citation omitted]). Accordingly, Thomas is directed to serve and file an answer within twenty days of service of notice of entry of the order to be made herefrom, after which the court will schedule a conference for the purpose of establishing a discovery schedule and a hearing date.

The Motion and Cross-Motion for Sanctions

Thomas and Patricia also have moved for attorney's fees, costs, and sanctions pursuant to 22 NYCRR § 130-1.1 against the petitioner. Having denied their motion to dismiss the petition, the court also denies their motion for sanctions. There is no indication that the petitioner engaged in frivolous conduct.

The petitioner's cross-motion for sanctions against Thomas and his attorneys is also denied, there being no indication of frivolous conduct. The petitioner has made certain allegations against the firm representing Thomas, including that the firm has a conflict of interest in representing Thomas in this proceeding when it has previously represented the estate, the decedent and the petitioner. In affidavits submitted in connection with Thomas's motion, the firm denies the allegations. The court does not make any determination as to the petitioner's allegations in this decision. Rather, if the petitioner chooses, she can make a motion for relief

she thinks appropriate.

Conclusion

Respondents' motion to dismiss the petition is denied, as are their motion and the petitioner's cross-motion for sanctions. Respondents are directed to serve and file answers within twenty days of service of notice of entry of the order to be made herefrom.

Settle order on notice.

Dated: September 13, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court