

**Hannah v Hannah**

2007 NY Slip Op 33682(U)

November 8, 2007

Supreme Court, Nassau County

Docket Number: 5265-07/

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 7  
NASSAU COUNTY

JOHN HANNAH and MARY HANNAH,

Plaintiff(s),

-against-

NATALIJA HANNAH,

Defendant(s).

ORIGINAL RETURN DATE: 09/17/07  
SUBMISSION DATE: 10/10/07  
INDEX No.: 015265/07

MOTION SEQUENCE #1

The following papers read on this motion:

|                          |   |
|--------------------------|---|
| Order to Show Cause..... | 1 |
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Plaintiffs John Hannah and Mary Hannah bring this action seeking, *inter alia*, to recover a money judgment in the amount fifty percent of the Estate of Quentin Hannah; directing the sale of the real property located at 22 Seymor Lane, Hicksville, New York ("the subject residence") and remitting one-half of the proceeds therefrom to plaintiffs; and impressing a constructive trust and declaring defendant a Trustee of one-half of the assets, property and pension/retirement survivor benefits of Quentin Hannah. By Order to Show Cause dated August 29, 2007 [Phelan, J.], plaintiffs move for an Order pursuant to CPLR 6311, enjoining and restraining defendant, Natalija Hannah, from transferring, assigning, conveying, mortgaging, encumbering, pledging or otherwise disposing of one-half of the monies, proceeds, assets, accounts or personal property comprising the estate of Quentin Hannah including the subject residence and the survivor benefits and/or death benefits remitted by or from the pension plans, IRAs or retirement accounts of Quentin Hannah, pending the hearing and determination of this action.

Plaintiffs are the children of Quentin Hannah and Rita Scover Hannah. On August 21, 1987, Quentin and Rita entered into a Separation Agreement resolving all of their rights and obligations arising out of their marriage. The Separation Agreement was incorporated in a Judgment of Divorce between the parties dated December 14, 1987. Article VIII of the Separation Agreement entitled "Support and Maintenance of the Wife and Children" provides, in pertinent part, as follows:

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- (d) The children, John and Mary Hannah, shall be provided for in the Husband's Last Will and Testament, and shall be the recipient of at least 50% of the Husband's estate.
- (e) In the event the Husband maintains any insurance on his life, through his employment or otherwise, the children, John and Mary Hannah, shall be the beneficiaries of any life insurance policies held by the Husband, up to an aggregate amount of at least \$50,000.00.
- (f) Upon the Husband's death, the children, John and Mary Hannah, shall be the beneficiaries of at least 50% of the Husband's pension funds and/or retirement accounts which provide for the survivor benefits.  
(*Motion*, Ex. A, Article VIII).

Quentin Hannah died on July 24, 2007. His will did not make any bequest or provision for either plaintiff. At the time of his death, Quentin was married to his third wife, defendant, Natalija Hannah and they resided at the subject residence. Prior to his death, on August 16, 2004, Quentin conveyed a deed for the subject residence to "Quentin Hannah and Natalija Hannah, his wife" (*Aff in Opp.*, Ex. A). The genesis of plaintiffs' claim is that their father breached the Separation Agreement with their mother by designating defendant as the beneficiary of all of the survivor benefits of his retirement and pension accounts; the sole beneficiary of his estate; and the co-owner, as tenants by the entirety, of an undivided one-half interest of the subject residence.

As third-party beneficiaries of the Separation Agreement (see, *Goodman-Marks Assoc. v Westbury Post Assoc.*, 70 AD2d 145 [2<sup>nd</sup> Dept. 1979]; *Silvers v. Silvers*, 267 AD2d 298 [2<sup>nd</sup> Dept., 1999]), this Court finds that plaintiffs are entitled in their own right and name to enforce the promises made by decedent for their benefit even though they are strangers to both, the contract and the consideration (see, *State of California Public Employees' Retirement System v. Shearman & Sterling*, 95 NY2d 427 [2000]; *Simonds v. Simonds*, 45 NY2d 233 [1978]).

Defendant, Natalija Hannah, states that as Quentin Hannah did not leave behind any assets which are subject to probate, decedent's will is not being offered for probate to the Surrogate's Court.

In establishing their right to a preliminary injunction, plaintiffs further claim that defendant, a permanent resident of the United States, no longer has strong ties to Nassau County. Natalija Hannah, born and raised in Lithuania, has an adult daughter who lives in Chicago. Plaintiffs fear that she may relocate to Chicago or Lithuania thereby taking her out of the jurisdiction of this Court.

A preliminary injunction is a drastic remedy (*Uniformed Firefighters Ass'n of Greater New York v. City of New York*, 79 NY2d 236 [1992]; *Hoeffner v. John F. Frank, Inc.*, 302 AD2d 428 [2<sup>nd</sup> Dept. 2003]). The purpose of the injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*Ying Fung Moy v. Hohi Umeki*, 10 AD3d 604 [2<sup>nd</sup> Dept. 2004]).

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The burden of establishing a clear right to the preliminary injunction rests with plaintiffs. On a motion for a preliminary injunction, the burden of proof is on the movant to show that success on the merits is likely in the action, that irreparable injury will occur unless the injunction is granted, and that the balance of the equities is in movant's favor (*Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; *Doe v. Axelrod*, 73 NY2d 748 [1988]; *Grant v. Srogi*, 52 NY2d 496 [1981]; *Hightower v. Reid*, 5 AD3d 440 [2<sup>nd</sup> Dept. 2004]). To sustain this burden, movant must demonstrate a clear right to relief which is "plain from the undisputed facts" (*Family Affair Haircutters v. Detling*, 110 AD2d 745 [2<sup>nd</sup> Dept. 1985]). Where the facts are in sharp dispute, a temporary injunction will not be granted (*Family Affair Haircutters v. Detling*, supra; *Jurlique v. Austral Biolab Pty.*, 187 AD2d 637 [2<sup>nd</sup> Dept. 1992]). However, even when the facts are in dispute, a court may find a likelihood of success on the merits and grant an injunction in its discretion; conclusive proof is not required (*Ying Fung Moy v. Hohi Umeki*, supra, at 605; *Terrell v. Terrell*, 279 AD2d 301, 303 [1<sup>st</sup> Dept. 2001]).

As a general rule, a party seeking monetary relief is not entitled to a preliminary injunction because it has an adequate remedy at law (*Haulage Enterprises Corp. v. Hempstead Resources Corp.*, 74 AD2d 863 [2<sup>nd</sup> Dept. 1980]; *Cliff v. RRS, Inc.*, 207 AD2d 17, 20 [3<sup>rd</sup> Dept. 1994]). Thus, generally, injunctive relief may not be ordered to secure recovery in what amounts to a breach of contract action (*Halmar Distribs. v. Approved Mfg. Corp.*, 49 AD2d 841 [1<sup>st</sup> Dept. 1975]; *Fair Sky v. International Cable Ride Corp.*, 23 AD2d 633 [1<sup>st</sup> Dept. 1965]).

However, in this case, in light of defendant's intention not to probate Quentin Hannah's will, plaintiffs have no effective remedy against the "estate" of decedent. The undisputed facts surrounding the nature of decedent's assets are that all of his assets will pass to defendant by either operation of law or by beneficiary designation. Thus, plaintiffs, as third party beneficiaries, have no effective remedy against their father's insolvent estate for breach of contract (see, *Simonds v. Simonds*, supra).

In *Simonds*, the Court of Appeals found that a promise in a separation agreement to maintain an insurance policy designating a spouse as beneficiary vests in the spouse an equitable interest in the policy specified, and that spouse will prevail over a person in whose favor the decedent executed a gratuitous change in beneficiary. The decedent in *Simonds* failed to specifically perform the terms of a separation agreement to name his first wife as the beneficiary on life insurance policies, and instead, named his second wife and child as beneficiaries thereof. The Court found that decedent breached his contractual obligation, but noted that since decedent's estate was insolvent, an action against the estate would be fruitless. The Court observed that the Separation Agreement gave a vested right to plaintiff and that equity would enforce that right and not permit a forfeiture thereof. Thus, the Court of Appeals granted plaintiff the right to impress a constructive trust on proceeds which rightfully belonged to her, and prevented the unjust enrichment of defendant.

In this case, plaintiffs have also successfully demonstrated that a legal remedy is inadequate and a constructive trust is essential to prevent unjust enrichment (compare, *Evans v. Winston & Strawn*, 303 AD2d 331, 333 [1<sup>st</sup> Dept. 2003]; *Bertoni v. Catucci*, 117 AD2d 892, 894 [3<sup>rd</sup> Dept. 1986]).

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Defendant's arguments are unavailing. While it is true that New York's Retirement and Social Security Law §§60[c] and 74[b] do not permit the payment of New York State pension benefits to anyone other than the named beneficiary, New York Retirement and Social Security law §803-a provides, in pertinent part, as follows:

Notwithstanding any other provision of law, rule or regulation to the contrary, if, pursuant to a settlement agreement or court order arising out of a matrimonial or custody action, a member of the New York state and local employees' retirement system . . . agrees or is ordered to select or change a retirement option or beneficiary and such member or retiree fails to comply with such agreement or order, the comptroller is hereby authorized, at his or her discretion, to change or correct such retirement option or beneficiary consistent with a subsequent order by a court of competent jurisdiction directing the member or retiree to comply with the original agreement or order.

Finally, defendant's argument that any provision in the Separation Agreement requiring Quentin Hannah to name plaintiffs as beneficiaries of the pre-retirement death benefits is void and unenforceable as an impermissible assignment prohibited by Retirement and Social Security Law §110(3), is also unavailing. This provision of the law is intended to prevent any attachment, assignment, garnishment or execution by creditors so as to invade the future security or diminish the fund during the lifetime of the pension member. However, an assignment, ". . . for the benefit of the wife and children is consonant with the spirit of the rule and in effect supports its purpose" (*Crowley v. New York State Retirement System*, 58 Misc. 2d 788 [Sup. Ct. Albany 1968]). Defendant's restrictive interpretation of the statute is unsupported by law and equitable considerations. *Crowley*, which recognizes that exceptions to an absolute prohibition against assignment to effect the purpose and intent of the law are appropriate in certain circumstances, is compelling.

Under these circumstances, this Court finds that plaintiff has adequately established a likelihood of success on the merits in seeking 50% of the death benefits of Quentin Hannah.

#### Life Insurance

Insofar as plaintiffs concede in their complaint that their father named them as beneficiaries on his life insurance policies aggregating \$65,000.00, defendant has fulfilled his obligations under Article VIII (e) of the Separation Agreement to name his children as beneficiaries (*Motion*, Ex. C, VIII [e]).

#### Subject Residence

Plaintiffs, relying on Article VIII (d) of the Separation Agreement, also seek a preliminary injunction to restrain defendant from, *inter alia*, transferring or encumbering the subject residence. In opposition, defendant submits that plaintiffs have failed to sustain their burden of establishing likely success on the merits of their claim that they are entitled to one-half interest in the subject residence based upon the language of Article VIII(d) of the Separation Agreement. This provision, *supra*, entitles plaintiffs to 50% of the Estate of Quentin Hannah. Defendant submits that plaintiffs have failed to show that the subject residence is even a part of the Estate of Quentin Hannah.

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It is true that the August 16, 2004 deed is very clear in creating a tenancy by the entirety (*Aff. in Opp.*, Ex. A) whereby, upon decedent's death, defendant clearly became the sole owner of the entire subject residence. However, while there was no transfer of the residence to defendant, plaintiff's claim of a constructive trust to allow equity to intervene and have done what ought to be done satisfies this Court that a preliminary injunction is appropriate to preserve the status quo in this case.

Based upon the deed submitted by defendant, decedent was the sole owner of the subject residence prior to his marriage to defendant. A plain and simple reading of the deed confirms that there is no statement of consideration in the deed. Plaintiffs claim of having been unjustly and unfairly deprived of their beneficial interests herein passes muster on the tripartite test for a preliminary injunction.

Irreparable Injury and Balancing of Equities

Finally, defendant's argument that plaintiffs are not entitled to a preliminary injunction, likening plaintiffs' interest to unsecured creditors, is entirely meritless and inapplicable to this case. Plaintiffs are not seeking the collection of a debt, nor payment for an outstanding account, nor a pre-emptive attachment of defendant's property as a creditor, secured or unsecured. Plaintiffs are seeking to prevent defendant from being unjustly enriched and receiving property to which plaintiffs are equitably entitled.

Under the circumstances of this case, this Court herewith grants plaintiffs' motion for a preliminary injunction.

All parties are reminded that this action is scheduled for a Preliminary Conference on November 28, 2007 at 9:30 A.M.

This decision constitutes the order of the court.

Dated: 11-08-07

HON THOMAS P. PHELAN

*Thomas P. Phelan*

J.S.C.

**ENTERED**

NOV 15 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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