

Matter of Roberts v Borg

2009 NY Slip Op 30563(U)

March 6, 2009

Surrogate's Court, Nassau County

Docket Number: 312558

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of Alice Roberts, as Administratrix of
the Estate of

File No. 312558

STEPHEN M. ROBERTS,

Dec. No. 754

Deceased,
Petitioner,

-against-

NATHAN BORG,

Respondent.

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In a proceeding by the decedent's executor to recover the proceeds of a life insurance policy, this court, by decision dated September 30, 2008 (Dec. No. 509), impressed a constructive trust on the proceeds of the policy in the hands of the respondent for the benefit of the decedent's estate. The respondent now moves for an order pursuant to CPLR 4404 and 4406 to set aside the decision, or in the alternative, pursuant to CPLR 2221 for leave to reargue and upon reargument vacating the decision to the extent it impressed a constructive trust on the policy proceeds.

The facts of the case are set forth at length in the court's prior decision (Dec. No. 509, 2008). Succinctly, the decedent Stephen M. Roberts and the respondent Nathan Borg had been business partners. Each owned and was the beneficiary of a life insurance policy on the life of the other in the face amount of \$1 million. When the partnership dissolved, the parties agreed, among other things, that each would assign to his former partner the life insurance policy on the other's life. It is undisputed that Roberts completely complied with this provision and that Borg did not. In fact, after Roberts's death, Borg collected the one million dollar policy proceeds. In the court's prior decision, the court concluded that there had been no material breach of the

contract by Roberts and that Borg's retention of the insurance policy on Roberts's life was unjustified. The court thereupon impressed a constructive trust on the policy proceeds in favor of Roberts's estate. The instant motion was filed timely thereafter.

The two bases upon which Borg makes the instant motion are: (1) the constructive trust should be vacated because the petitioner never asserted a claim for constructive trust; and (2) the constructive trust should be vacated because there was no fiduciary relationship between the parties during the relevant time period.

Regarding Borg's first argument, while it is true that the petition did not expressly pray for the impressing of a constructive trust, there can be no question that Borg was aware the proceeding was to recover the policy proceeds from him on either of several theories, one of which was unjust enrichment, which is "the heart of the constructive trust doctrine" (*Bolla v Bolla*, 10 Misc3d 906 [Sur Ct, Bronx County 2005]). Thus, Borg can not be heard to argue that he was unaware that the gravamen of the petitioner's case is that Borg would be unjustly enriched were he permitted to retain the policy proceeds where it was only by his unilateral breach of the contract that he remained the owner and beneficiary of the policy.

Borg places great reliance on the Court of Appeals decision in *Consumers Union of U.S., Inc. v State*, 5 NY3d 327 (2005) for the proposition that the estate's failure to pray for the imposition of a constructive trust must prevent the court from impressing one; the court disagrees. The portion of the *Consumers Union* decision upon which Borg relies is contained in a single footnote in a 37-page decision. The Court recites the oft-cited requirements¹ for the

¹ The requirements are: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment. See *Sharp v Kosmalski*, 40 NY2d 119 [1976].

imposition of a constructive trust and then states, tellingly, “plaintiff did not allege any of them in the original complaint” (*Consumers Union of U.S., Inc. v State*, 5 NY3d 327, 347 n. 14 [2005]). Here, petitioner alleged not only unjust enrichment, but also the fact that the parties had promised in their contract to transfer the insurance policies and that Roberts had transferred his policy to Borg. Thus, even if the footnote in the *Consumers Union* case can be considered binding precedent, the facts of the case before this court are clearly distinguishable.

In an Arizona case brought upon a fraud claim, the court awarded judgment to the plaintiff on a constructive trust theory, which was not pled. On appeal, the defendant argued that the trial court erred in impressing a constructive trust because the theory pled was fraud. The Arizona Supreme Court held that “plaintiffs are entitled to and the court should award them any relief which the evidence legitimately admitted under the pleadings allows under any theory, whether [or not] this be the theory advanced by the plaintiffs in their complaint. A complainant will not be denied legitimate relief merely because he might have misjudged the proper theory. If facts legally proven under the pleadings entitle plaintiffs relief under any theory, the court should award the same” (*Mackey v Spangler*, 81 Ariz. 113, 301 P2d 1026 [1956]). The procedural rule under which the Arizona court rendered its decision is Fed. R. Civ. Proc. 54(b) which provides, in pertinent part, that every judgment, other than a default judgment, “should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” The corollary provision in our own rules of procedure is CPLR 3017(a), which provides that “the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just.”

In a case in which the term “constructive trust” is not even mentioned until the decision in

the Court of Appeals, the Court held that “[a] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee...A court of equity in decreeing a constructive trust is bound by no unyielding formula...The equity of the transaction must shape the measure of relief” (Cardozo, C.J., *Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386, 389 [1919]).

Accordingly, the court finds unconvincing Borg’s argument that this court’s prior decision must be vacated because petitioner did not expressly pray for the imposition of a constructive trust in the original petition.

The court finds equally unconvincing Borg’s second argument that the court’s impressing of a constructive trust must be vacated because no confidential or fiduciary relationship existed between the parties at the relevant time. As the Court in *Beatty v Guggenheim* made clear, “a court of equity in decreeing a constructive trust is bound by no unyielding formula” (*Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386 [1919]). While the four elements set forth in *Sharp v Kosmalski*, (40 NY2d 119 [1976]) are often cited as requirements for the imposition of a constructive trust, “these elements are simply guidelines and are not to be applied rigidly in pursuing the goal of preventing unjust enrichment” (*Heness v Hunt*, 272 AD2d 756, 757 [3d Dept. 2000]). “The true rule is as expressed in the Restatement: ‘where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.’ To accomplish the beneficent purpose of the constructive trust doctrine it cannot be (and never has been) limited to cases of confidential relationship” (*Sutton v Sandler*, 13 NY2d

1007 [1963]).

The decedent Roberts and the movant Borg in dissolving their partnership each promised the other to transfer the insurance policy on the other's life to his former partner. Borg breached that agreement by retaining the policy with himself as the beneficiary. Only by breaching the agreement was Borg able to obtain the \$1 million policy proceeds that would otherwise have been paid to Borg's wife and daughter as the beneficiaries of his estate. It is difficult to imagine a clearer case of unjust enrichment justifying the equitable remedy of a constructive trust.

Accordingly, the motion is denied in all respects. The cross-motion to conform the pleadings to the proof is denied as moot.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: March 6, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court