

Matter of Greta Rosenberg Trust

2010 NY Slip Op 32796(U)

September 24, 2010

Surrogate's Court, Nassau County

Docket Number: 315291/A

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 the Administration of the

File No. 315291/A

GRETA ROSENBERG TRUST

Dec. No. 26548

Created Under Agreement Dated July 30, 1988.

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Before the court are two petitions filed by Leslie H. Katz and Sharon Drexler as discretionary beneficiaries of the Greta Rosenberg Trust: (1) a petition requesting modification of a stipulation and decree; and (2) a petition to compel an accounting by trustees Marion Katz, Peter Katz and Regions Morgan Keegan Trust. The petition requesting modification is denied; the petition to compel an accounting is granted. While these petitions are substantively connected to each other and emanate from the same trust document, the court will consider each petition separately.

(1) Petition to modify a stipulation executed and a decree issued in 2003

The Greta Rosenberg Trust (the Rosenberg Trust) was created under an agreement dated July 30, 1988 between Greta Rosenberg as grantor and three trustees: (i) Greta’s daughter, Marion Katz; (ii) Marion’s husband, Peter Katz; and (iii) Larry Sokoloff. Greta died on February 19, 1999; Larry resigned as trustee in January 2000. Marion and Peter are alive and continue to serve as trustees.

The Rosenberg Trust provides that upon Greta’s death, discretionary distributions of income may be made to any one or more of a designated group of people consisting of the grantor’s issue and their spouses. Upon the deaths of Greta, Marion and Peter, the Rosenberg Trust is to be divided into two shares, the first to be paid outright to Marion and Peter’s son,

Richard Katz, and the second to be held in trust for Marion and Peter's son, Leslie Katz, with income payable to him at least annually. Upon Leslie's death, his trust continues for his issue, with the remainder payable to Leslie's issue upon their attainment of designated ages.

In August 2000, Leslie and his wife, Sharon Drexler, filed a petition to compel the trustees of the Rosenberg Trust to account. The trustees filed an accounting on November 21, 2000, covering the period July 30, 1988 through September 30, 2000 and showing charges of \$2,360,336.74, with \$1,415,000.00 remaining on hand as of the closing date. Leslie and Sharon filed objections to the account. Objections were also filed by Jules Haskel in his capacity as the guardian ad litem who had been appointed to represent the interests of the minors.

Subsequently, all parties entered into a stipulation dated January 31, 2003 (2003 stipulation) which settled all disputes concerning the trustees' account and the administration of the Rosenberg Trust. The 2003 stipulation provided for the withdrawal of objections and the payment of legal fees and the fee of the guardian ad litem, after which the Rosenberg Trust would be divided into two equal shares, one share for the benefit of Richard and his issue, and one share for the benefit of Leslie and his issue. The 2003 stipulation also provided for the reformation of paragraph 5(b) of the trust to ensure compliance with the rule against perpetuities.

The share set aside for Richard would be divided into three separate trusts, (i) the first containing 25% of the corpus to be set aside for Richard's daughter, Rachel; (ii) the second containing 25% of the corpus to be set aside for Richard's son, Julian; (iii) and the remaining 50% to be held in trust for Richard. Peter, Marion and the Regions Morgan Keegan Trust would serve as trustees, and the trusts would be administered in accordance with paragraph 4 (A) and (B) of the original trust agreement except that Richard will be deemed to have predeceased Peter

and Marion for purposes of the administration of the trusts for the benefit of Rachel and Julian.

As to the share set aside for Leslie, the 2003 stipulation provided that Peter and Marion would resign as trustees and Bank of New York and Leslie would succeed them. In the event of a disagreement between the trustees, the investment decisions of Bank of New York would prevail. A unitrust election would be made for Leslie's trust, paying 4% annually in equal shares to Leslie and his only child, Raven. The 2003 stipulation provided that Raven's interest may be paid to her parents. Upon the death of Peter and Marion, the full unitrust amount will be payable to Leslie for life, in accordance with the provisions of the original trust agreement. Upon Leslie's death, the full unitrust amount will be payable to Raven until the trust terminates. Leslie and Sharon renounced fees and commissions, and Peter and Marion renounced their interest in this trust.

On May 21, 2003 this court issued decision 183 approving the 2003 stipulation and fixing the legal fees and the fee for the guardian ad litem. A final accounting decree, with the 2003 stipulation attached, was issued on June 10, 2003. It directed that 50% of the trust corpus would be paid to Bank of New York for the trust for the benefit of Leslie and his issue and 50% of the trust corpus would be paid to Peter, Marion and Regions Morgan Keegan Trust for the trusts for the benefit of Richard and his issue. One half of all of the monies earned by the trust corpus after November 6, 2002 would be paid to trusts for the benefit of Richard and his issue, and one half would be paid to the trust for Leslie and his issue. The reformation in connection with the rule against perpetuities was approved, and Peter and Marion were discharged as trustees.

The distributions set forth in the final decree had not yet been made when the parties became aware that the federal generation skipping transfer tax (GST tax) might be imposed on

distributions made from the trusts to any beneficiary who is two or more generations below that of the decedent. This category includes Richard, Leslie, their wives and their children. The GST tax is computed using the value of the bequest or gift received, after the subtraction of any allocated GST tax exemption. The executors of decedent's estate did not allocate any GST tax exemption to the Rosenberg Trust. The GST tax is assessed at a flat rate, which is the maximum estate tax rate for the year in which the transfer is made. In the year 2010, the rate is 0%; unless the current law is changed, the rate will be 55% on transfers made in 2011 (Internal Revenue Service Publication 950).

The application of the GST tax would have a substantial impact on distributions made from the trust for the benefit of Leslie's family, due to the mandatory nature of the unitrust distributions payable to Leslie and Raven in accordance with the 2003 stipulation; the trust for the benefit of Richard's family would only be impacted in the event that the trustees choose to make discretionary distributions. The parties agreed to suspend implementation of the 2003 stipulation pending the filing of a petition with the court for modification of the 2003 stipulation to avoid the unforeseen tax consequences.

In 2005, all of the adult parties interested in the trust then entered into an amended stipulation of settlement (2005 amended stipulation). The most significant change provides that Peter and Marion agree to pay a surcharge of \$621,922.20 (equal to one-half of the trust corpus on the date of the agreement) to a trust created by Sharon in October of 2004 (Katz Trust), in exchange for which Leslie and Sharon agree to waive all their rights to the Rosenberg Trust. The parties apparently hoped that by labeling this payment of \$621,922.20 a surcharge, rather than a distribution, they could avoid triggering a GST tax on the transfer. The so-called surcharge was

to be paid in two or more installments but was to be fully paid by February 28, 2005, with the first installment of no less than 20% to be paid within 30 days of the date on which the 2005 amended stipulation is so ordered by the court. The 2005 amended stipulation further reflects that Leslie and Sharon each indemnify the trustees.

The signature lines found on page 6 of the 2005 amended stipulation reflect the parties' mistaken belief that Jules Haskel was still empowered to represent the interests of the infant Raven in connection with the 2005 amended stipulation. Only later did the parties learn that the appointment of a guardian ad litem terminates with the issuance of a decree; a new guardian ad litem would have to be appointed to represent any infant with an interest in the trust and the proposed 2005 amended stipulation. Finally, the 2005 amended stipulation states, in paragraph 15, that the agreement is subject to the approval of the Surrogate and the issuance of a decree incorporating its terms.

The parties agreed that Leslie would file the 2005 amended stipulation with a petition seeking its approval by the court. Although counsel for Leslie submitted the 2005 amended stipulation to the court on September 9, 2005, he did not concurrently file a petition. Consequently, no petition having been filed, the court (i) did not appoint a guardian ad litem to represent the interest of Raven, who was an infant; and (ii) did not approve the 2005 amended stipulation or issue a decree.

Leslie and Sharon hired a new attorney who filed a petition in December of 2006 seeking to: (i) vacate the 2003 decree; (ii) withdraw the 2003 stipulation; (iii) obtain court approval of the 2005 amended stipulation as further amended by a revised amended stipulation; and (iv) have the court appoint a guardian ad litem for infants. The referenced revised amended stipulation

became irrelevant and the issue mooted by Leslie's withdrawal of this petition in June of 2007, following eight settlement conferences held at the court.

In the interim, beginning on December 4, 2005, at the request of Leslie and Sharon, and apparently in reliance upon Leslie's assurances that he would file a petition to obtain court approval of the 2005 amended stipulation, the trustees made distributions for Raven's education from the \$621,922.20 that was to have been transferred to the Katz Trust pursuant to the 2005 amended stipulation. These multiple distributions on behalf of Raven reached a combined total of \$160,027.00 by July 16, 2009. In August of 2009, the trustees informed Leslie that they would not make any further distributions until such time as Leslie filed his request to amend or vacate the original 2003 stipulation and court order. The trustees further advised Leslie that if his application were not filed by December 31, 2009, the trustees would distribute all of the funds due to the Katz Trust pursuant to the court order and would pay the GST tax due upon the distribution.

On December 21, 2009, Leslie and Sharon filed: (i) an authorization for a third attorney to replace their prior attorneys and appear in this matter; (ii) the petition presently before the court to modify the 2003 stipulation and decree; (iii) an order to show cause with a temporary restraining order to prevent the trustees from making any distributions from the Rosenberg Trust that would trigger the GST tax; and (iv) a petition to compel an accounting by the trustees. On February 3, 2010, counsel for Leslie and Sharon filed an authorized notice of appearance on behalf of Raven, who had reached the age of majority on December 28, 2009.

The petition requesting modification of the original 2003 stipulation and decree filed by Leslie and Sharon, as amended by counsel's letter, asks the court to modify the original 2003

stipulation to avoid the imposition of GST tax upon distribution of income or principal to any interested party, and “by this Petition, seek[s] to resolve the issues raised herein” (Petition, page 17, paragraph 61). Yet the petitioners acknowledge that they “do not suggest any particular mechanism or plan for achieving their goal, believing that the proper course of action will manifest itself during discussions with counsel for the Trustees and Court personnel . . .” (Petition, page 19, paragraph 70). While the court appreciates the confidence shown by petitioners in the ability of court personnel to resolve difficult issues, it must be noted that a multitude of lengthy court conferences to date have not been able to end the acrid stalemate in which this trust has been mired since 2003, when the original stipulation and decree were signed. The relief requested is too vague; without detailed recommendations for the resolution of the disputed issues and the legitimate minimization of potential tax consequences, it is impossible for the court to grant the relief requested by the petitioners. The petition is dismissed, without prejudice to renew at such time as the petitioners are ready to present the court with specific proposals.

The trustees maintain that the parties are bound by the 2005 amended stipulation of settlement, executed by the adult parties and submitted to the court in 2005. They argue that based upon Leslie and Sharon’s promises to file their petition in support of the 2005 amended stipulation, and subsequent agreements and indemnifications, they made withdrawals from the funds allocated to the Katz Trust for the payment of Raven’s educational expenses, as requested by Leslie and Sharon. They have submitted copies of correspondence and emails which support their contention that the petitioners as well as the trustees acted in reliance upon the 2005 amended stipulation, which limited the petitioners’ interest in the Rosenberg Trust to

\$621,922.20, to be transferred to the Katz Trust, which trust does not appear to have been created. On this basis, the trustees also argue that the petitioners are therefore not entitled to an accounting of the Rosenberg Trust.

Petitioners raise various arguments against enforcement of the 2005 amended stipulation: (i) the petitioners repudiate the 2005 amended stipulation; (ii) the trustees concede that the 2005 amended stipulation was abandoned by the petitioners' second attorney; (iii) it lacked the approval of a guardian ad litem for the infant Raven; (iv) it was never filed with the court; and (v) it was subject to the approval of the court and the issuance of a decree incorporating its terms.

The law is clear that a party to a written agreement cannot unilaterally repudiate it (*see e.g. Accenture LLP v Computer Sciences Corp*, 288 AD2d 124 [1st Dept 2001]; *York Agents, Inc. v Bethlehem Steel Corp.*, 36 AD2d 62 [1st Dept 1971]). As to petitioners' second argument, it is unclear to the court why an assertion that petitioners' counsel abandoned an executed agreement amounts to a concession that the agreement was abandoned by all parties. The third argument pertains to the representation of Raven. While SCPA 403 (2) provides that an infant who does not appear by his guardian shall appear by a court appointed guardian ad litem if the court deems it necessary to protect the infant's interests, the lack of a guardian ad litem would make the 2005 amended stipulation voidable, not void (*see McMurray v McMurray*, 21 Sickels 175 [Ct App, New York 1876]). Alternatively, the court could find that the 2005 amended stipulation is binding except as to Raven (*see Matter of Barbosa*, 4 Misc 3d 1010[A] [Sur Ct, New York County 2004]; *Matter of Muccini*, 118 Misc 2d 38 (Sur Ct, Queens County 1983). "The procedural consequences of improper representation of an infant will depend on whether the infant has been prejudiced" (Alexander, Practice Commentaries, McKinney's Cons Laws of

NY, Book 7B, CPLR C1201:1).

However, the reason that the 2005 amended stipulation cannot be upheld is that the agreement was not properly filed with the court and the terms of the agreement require court approval and issuance of a decree, neither of which was ever achieved. A condition may be precedent to an obligation to perform a contract (*James H. Merritt Plumbing Corp. v New York*, 121 AD2d 990 [1st Dept 1986]). To make a provision in an agreement a condition precedent, it must appear from the agreement itself that the parties intended the provision to so operate (*David Fanarof, Inc. v Dember Constr. Corp.*, 195 AD2d 346 [1st Dept 1993]). Moreover, the power to vacate or modify a decree rests with the court (SCPA 209), and it is far from certain that an agreement amending a decree in order to avoid the imposition of an applicable federal tax by labeling a taxable distribution a surcharge would have received court approval. As the petition was not filed, the court need not address that particular issue. The court finds that the parties intended court approval of the 2005 amended stipulation and the incorporation of its terms in a decree to be conditions precedent.

Accordingly, the court finds that despite reliance upon the 2005 amended stipulation by the parties, including payments made by the trustees of the Rosenberg Trust for Raven's education, the agreement is not binding. Thus, Leslie's interest in the trust is not limited to \$621,922.20 but is, in accordance with the 2003 stipulation and decree, one-half of the Rosenberg Trust corpus.

The parties are thus returned to the status of the Rosenberg Trust in 2003, when the 2003 stipulation was signed and decree issued. "Strict enforcement of stipulations of settlement serves the interest of efficient dispute resolution and is essential to the management of court calendars

and the integrity of the litigation process (*Hotel Cameron, Inc. v Purcell*, 35 AD3d 153, 155 [1st Dept 2006] [internal citation omitted]). Parties will not be relieved of their obligations pursuant to a stipulation simply because they subsequently decide that they made a bad deal (*see e.g., Velazquez v St. Barnabas Hosp.*, 57 AD3d 251 [1st Dept 2008]). The trustees are directed to divide the Rosenberg Trust in accordance with the 2003 stipulation and decree, except that the distributions made on behalf of Raven shall be credited against the ½ payable to Leslie and the Bank of New York as trustees of the trust for the benefit of Leslie's family, and all distributions made to or on behalf of Richard and his children shall be credited against the ½ payable to Peter, Marion and the Regions Morgan Keegan trust as trustees of the trusts for Richard's family.

(2) Petition to compel an accounting

The petition filed by Leslie and Sharon seeks a judicial accounting by the trustees beginning on the closing date of prior account. As noted above, the court has determined that the parties are not bound by the 2005 amended stipulation, which limited the interest of Leslie's family to \$621,922.20. The trustees continue to hold all of the assets of the Rosenberg Trust, which was never divided into two shares and distributed pursuant to the 2003 stipulation. The petition for an accounting is granted. The trustees are directed to file their account and move for its judicial settlement no later than December 15, 2010.

This is the decision and order of the court.

Dated: September 24, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court