Matter of Quatela
2010 NY Slip Op 33078(U)
September 30, 2010
Surrogate's Court, Nassau County
Docket Number: 355511
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 Petition of Charles R. Quatela to Compel payment of an interest in a Trust by Richard Edmundson, as Trustee of the Amelia M. Barca Irrevocable Family Trust, dated March 30, 2006.	File No. 355511 Dec. No. 266103

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This is a miscellaneous proceeding commenced by the petitioner, Charles Quatela, to compel payment of an interest in a trust by Richard Edmundson, as trustee of the Amelia M. Barca Irrevocable Family Trust dated March 30, 2006. The petitioner now moves for summary judgment. The motion is unopposed. For the reasons that follow, the motion is granted.

Amelia M. Barca died on August 29, 2006, a resident of Nassau County. By instrument dated March 30, 2006, the decedent created the Amelia M. Barca Irrevocable Family Trust with her nephew, Richard Edmundson, as trustee. The trust agreement provides that the trust principal shall be distributed one-third (1/3) each to of Robert Edmundson and Richard Edmundson (the decedent's nephews) and Charles Quatela (the decedent's nephew-in-law).

FACTUAL BACKGROUND

According to Charles, he never received a copy of the trust, but the decedent had told him about the trust and that he was a beneficiary. In September of 2006, however, Charles was advised by his brother-in-law, Richard, that the decedent has executed a trust and that Richard was named as trustee and had retained an attorney to handle the trust. Thereafter, Charles received another telephone call from Richard telling him that the decedent's real property located at 51 Bayview Avenue, Port Washington, was a part of the trust's assets. He further advised that an appraisal had valued the real property at $575,000.00.

Charles states that Richard advised him that he believed the property could be more marketable if certain improvements and renovations were made. Richard stated that a mortgage would be required to fund the renovations. Since Richard was a mortgage broker, Charles relied on Richard's expertise and believed him.

On or about September 20, 2006, Charles received correspondence from Richard's attorney requesting that he sign a document described as an "authorization and release of trustee affidavit." The document provides, in part, as follows:

> "I am a residuary beneficiary, entitled to one-third (1/3) of the assets contained in the Amelia M. Barca Irrevocable Living Trust dated March 30, 2006.
>
> That I hereby authorize my brother [sic] and the trustee of the aforementioned trust, Richard Edmundson, to transfer my one-third interest to himself, individually."

Upon receiving this document, Charles contacted Richard and was told that as a result of the death of Charles' wife, Margaret, it would "take months" to obtain a mortgage. Richard explained to Charles that he "needed to sign the document so that he could obtain a mortgage sooner through the banks he deals with." Richard assured Charles that he would not be giving up his interest in the trust. Accordingly, Charles signed the document.

Thereafter, on October 11, 2006, Richard conveyed the property to himself, individually. In mid-November of 2006, Charles was told by Richard that the trust had a bank account, some stocks and a small life insurance policy. Sometime thereafter, Charles received a check for $30,000.00 representing one-third (1/3) of those assets. Richard also told Charles that renovations on the home had been delayed.

During 2007 and 2008, Richard and Charles spoke a number of times. Richard told Charles that renovations were being done on the house, but that a certificate of occupancy had not issued. On December 8, 2008, the day after a family wedding, Charles went to Richard's office and Richard told Charles that he would not be receiving his share. He also learned that the house had been sold for $617,500.00. Robert, Richard's brother and the other one-third beneficiary, had received his share of the proceeds even though he had signed the same document as Charles.

Accordingly, Charles commenced the instant proceeding seeking an order directing Richard to distribute Charles' one-third share of the trust to him and to provide an accounting of his activities as trustee. Charles also asked that Richard be surcharged and fees and costs be imposed. Richard filed an answer denying the allegations and raising seven affirmative defenses: (i) failure to state a cause of action; (ii) defense of satisfaction and accord; (iii) lack of standing; (iv) no subject matter jurisdiction; (v) release; (vi) statute of limitations; and (vii) unjust enrichment. Richard's deposition was held on July 22, 2009.

By motion returnable June 30, 2010, Charles moved for summary judgment for an order (i) directing Richard to immediately pay over to Charles the sum of $111,460.12, representing his one-third (1/3) share of the net proceeds from the sale of the real property known as 51 Bayview Avenue, Port Washington, New York, plus legal interest at the rate of nine (9%) per cent from July 12, 2007; and (ii) surcharging Richard in a sum totaling $31,915.25, which is comprised of the $1,125.00 he personally received as a result of using his own company, Radcliffe Credit Corporation, to place a mortgage on the premises, the sum of $1,080.25, representing the costs and disbursements occasioned by this proceeding, and legal fees of $29,710.00.

In support of the motion, Charles annexed the transcript from Richard's deposition. Richard testified as follows:

> Q. Did you ever have a discussion shortly after Amelia died with Mr. Quatela telling him that in order for the mortgage to be obtained quicker, the deed needed to be in your individual name?
>
> A. I won't say quicker, but I wouldn't say at all, because it was an irrevocable trust, and with an irrevocable trust, you can't mortgage properties. So I believe that was discussed with both Robert and Charlie at the time.
>
> Q. And you knew that, as the trustee of the Irrevocable Trust, that could you not obtain a mortgage on the home, is that correct?
>
> A. Yes.
>
> Q. Because, I guess you've had clients prior to that who have tried to do it?
>
> A. Yes. I don't remember how I knew it.
>
> . . .
>
> Q. What did you tell him to obtain the release?
>
> A. The three of us brain stormed, and Charlie said he no longer has any income, that he already retired, and said that his debt is basically more than - - his debt ratio, he owed more than he was making, because obviously he was making nothing, and my brother was just coming off a bankruptcy, and so I was the only candidate to do it.

Richard also testified that after the releases were signed he obtained a mortgage against the premises in the amount of $225,000.00. The net proceeds of the loan were $213,332.96 and a check was issued to Richard for that amount. Richard also testified that the mortgage broker of record on the financing transaction was his very own company, Radcliffe Credit Corporation. He

further admitted that he personally profited from the loan as his company received a $1,1250.00 fee for placing the loan. Moreover, Richard then deposited the net loan proceeds into his own personal account.

Richard further testified that he did not disclose the sale to Charles until December 2008, some seventeen months after the closing. Richard further testified that the net proceeds of the sale totaled $332,112.72 and an additional escrow deposit of $2,267.64 was returned to him after the closing. An additional $20,000.00 is being held in escrow as security for payment of the cost of work necessary to obtain a certificate of occupancy.

Thereafter, Richard distributed one-third (1/3) of the net proceeds to Robert and retained the balance of the proceeds to himself.

ANALYSIS

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party"(CPLR 3212 [b]).

Summary judgment "is designed to expedite civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law" (*Andre v Pomeroy*, 35 NY 2d 361, 364 [1974]). Although it is considered a "drastic remedy" which should "only be employed when there is no doubt as to the absence of triable issues "when there is no genuine issue to be resolved at trial, the case should be summarily decided, since an "unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated" (*id.*). Although a genuine factual issue compels

denial of summary judgment, only a genuine and material issue raised by evidentiary facts will suffice to defeat the motion.

It is well established that courts should grant summary judgment where the moving party can established that there is no genuine issue as to any material fact and that, based on the facts presented, the moving party is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Lynch v Aer Lingus/Irish Intl. Airlines*, 81 AD2d 508 [1st Dept 1981]).

The New York courts have insisted that once the movant has established a prima facie entitled to summary judgment, the motion will not be defeated by a "feigned" issue (*Garvin v Rosenberg*, 204 AD2d 388 [2d Dept 1994]); a "speculative" one (*Andre v Pomeroy,* 35 NY2d 361, 364 [1974]); the "illusion of a factual issue" (*Marlow v Bd. of Educ.*, 182 AD2d 889 [3d Dept 1992]); the "shadowy semblance" of an issue (*Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Jeffcoat v Andrade*, 205 AD2d 374 [1st Dept 1994]); or by surmise, conjecture, suspicion or mere allegation" (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975]).

Pursuant to EPTL 1-2.7 a trustee is a fiduciary. As a fiduciary, a trustee "owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989], citing *Meinhard v Salmon*, 249 NY 458 [1928]); *see also Matter of Hubbell's Will*, 302 NY 246, 254 [1951] [trustee bears the unwavering duty of complete loyalty to the beneficiaries of the trust]).

A trustee is duty-bound to act in good faith in the administration of a trust, with honesty and undivided loyalty to the beneficiaries and avoid any circumstances whereby the trustee's personal interest will come in conflict with the interest of the beneficiaries (*Pyle v Pyle*, 137 AD

568 [1st Dept 1910], *affd* 199 NY 538, 92 NE 1099 [1910]). The purpose of this rule is to ensure that the trustee's acts are above suspicion and that the trust receives the trustee's uninfluenced judgment. As Chief Judge Cardozo stated in *Meinhard v Salmon* (249 NY 458, 464 [1928]), "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

Thus, a trustee is liable if the "commits a breach of trust in bad faith, intentionally, or with reckless indifference to the interests of the trust beneficiaries, or if he has personally profited through a breach of trust" (*O'Hayer v De St. Aubin*, 245 AD 22 [2d Dept 1935]).
In *Boles v Lanham* (55 AD 3d 647 [2d Dept 2008]), such liability was imposed upon a trustee by the Second Department. The petitioner there commenced an action to enforce the terms and conditions of a trust agreement and to impose personal liability upon the trustee for all costs and expenses incurred by the trust as a result of the trustee's breach of fiduciary duty. Summary relief was granted to petitioner since he established that the trustee acted in bad faith when she made distributions of net income and principal of the trust to two beneficiaries, including herself, and refused to distribute to the plaintiff his beneficial share without justification.

The documentary evidence herein, as well as Richard's sworn deposition testimony, amply demonstrates that sufficient proof of his bad faith exists. At his deposition on July 22, 2009, the trustee admitted that he distributed one-third (1/3) of the net proceeds of the sale of the subject premises to the third trust beneficiary, his brother Robert Edmundson, and that he retained the balance of the proceeds for himself, which balance included petitioner's one-third (1/3) share.

Although Richard has not opposed the motion, he has raised a number of affirmative defenses. First, Richard claims that Charles is not entitled to his share of the trust because he mistreated his wife, Richard's sister, which Charles denies. The bequest is not conditioned upon the manner in which Charles' treated his wife. Accordingly, Richard's assertions on this point are irrelevant and unavailing.

Second, Richard argues that the trust "ended" when Charles and Robert signed the "authorization and release of trustee" affidavit, and that the premises and the proceeds of any sale belong solely to him. The court finds this argument equally unavailing.

In *Birnbaum v Birnbaum* (117 AD2d 409, 416 [4th Dept 1986]), the Court held that the purported "release" at issue therein was unenforceable and that the conveyance of the estate's interest in various properties to the trustee should be voided. The Court explained that:

> "One of the most stringent precepts in the law is that a fiduciary shall not engage in self-dealing and when he is so charged, his actions will be scrutinized most carefully. When a fiduciary engages in self-dealing, there is inevitably a conflict of interest: as fiduciary he is bound to secure the greatest advantage for the beneficiaries; yet to do so might work to his personal disadvantage. Because of the conflict inherent in such transaction, it is voidable by the beneficiaries unless they have consented. Even then, it is voidable if the fiduciary fails to disclose material facts which he knew or should have known, if he use the influence of his position to induce the consent or if the transaction was not in all respects fair and reasonable."

The Court held further:

> "In the case of releases, as in other instances of dealing between a fiduciary and the person for whom he is acting, there must be proof of full disclosure by the trustee of the facts of the situation and legal rights of the beneficiary, and there must be adequate consideration paid. In addition, the trustee must negate fraud by positive misrepresentation or concealment, or duress or undue

> influence, or by other unfairness. The mere absence of misrepresentation, fraud, or undue influence in the obtaining of a release is not sufficient to insulate the release from a subsequent attack by the beneficiaries; the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transactions in all its particulars. Any acquisition of the shares of the beneficiaries by one of the fiduciaries must be dealt with as presumptively void unless affirmative proof is made by the fiduciaries that their dealings with each beneficiary was in every instance aboveboard and fully informative. The fiduciaries in such circumstances have the obligation to show affirmatively not only that they acted in good faith but that they volunteered to the beneficiaries every bit of information which personal inquiry by the beneficiaries would have disclosed"

(*Birnbaum v Birnbaum*, 117 AD2d 409, 416-417 [4th Dept 1986] [internal citations omitted]; *see also Matter of Lifren*, 36 AD3d 1042 [3d Dept 2007] [where validity of release is challenged, "the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars"]; *Matter of Leo Grande*, 13 Misc 3d 1070 [Sur Court, Nassau County 2006] [fiduciary cannot rely solely on release and bears the burden of establishing that the beneficiary was dealt with fairly in obtaining the release - - "[f]ailure to make full disclosure will nullify the release"]).

In the case at bar, Richard's testimony confirms that the sole reason why the trust beneficiaries executed the proffered "authorization and release of trustee" affidavits was so that Richard could obtain financing to improve the property and sell it at a greater return for the benefit of all of the trust's beneficiaries.

Richard's representations that Charles would not be giving up his one-third (1/3) interest in the trust is further corroborated by the fact that no money or any form of consideration was given by Richard in order to obtain the proffered "releases." Moreover, Richard did not pay any

money or consideration to the trust to have the subject premises conveyed to him individually.

Richard's claim that the trust "ended" when the trust beneficiaries executed the proffered "release" is further belied by the fact that he made distributions of trust assets to Robert and Charles even after they executed the proffered "authorization and release of trustee" affidavits.

The disingenuousness of the Richard's claim that Charles is barred from any recovery because of the affirmative defense of "release" is further highlighted by the fact that he distributed one-third (1/3) of the proceeds of the sale of the subject premises to Robert, notwithstanding the fact that he too executed an "authorization and release of trustee" affidavit identical to the one signed by Charles.

Richard also argues that by accepting interim distributions totaling $34,927.21, he reached an "accord and satisfaction" with Charles and that, therefore, Charles is entitled to nothing further. This argument is similarly without merit.

The documentary evidence herein contradicts Richard's claims of "accord and satisfaction." More specifically, there is nothing written in the "memo" section, nor anywhere on either the $30,000.00 check or the $4,927.21 checks issued to Richard that such payments constituted "payment in full," or any words to similar effect.

Moreover, an accord and satisfaction between the parties requires that there be a "real and genuine contest between the parties" and that a "settlement is had without fraud or misrepresentation for an amount determined upon as a compromise between the conflicting claims (*Matter of Leckie*, 54 AD2d 205, 214 [4th Dept 1976]).

The trustee's claim of accord and satisfaction is devoid of any merit legally, factually or otherwise. Said defense is clearly undermined by Richard's own sworn testimony wherein he

admitted that the first time he advised Richard that he was not going to receive his one-third (1/3) share of the net proceeds of the sale of the subject premises was December 2008, approximately seventeen (17) months after the sale. Thus, when Charles accepted interim distributions of trust assets, even after he executed the purported "release," he had no reason to doubt that he would also receive his one-third (1/3) share of the proceeds of the sale of the subject premises when the property was eventually sold. There was never any controversy, genuine or otherwise, as to the amount due to Charles. Nor were there any discussions had or settlement reached that the interim payments totaling of $34,927.21 were in full and final satisfaction of Charles's claims against the trust.

Thus, Charles could not possibly be considered to have compromised his entire share of the trust assets when he received interim distributions totaling $34,927.21 when Richard, admittedly, never advised Charles that he had no intention of distributing the proceeds of the sale of the subject premises to petitioner until nearly two years after the sale. Morever, Richard's distribution of one-third (1/3) of the proceeds of the sale of the subject premises to Robert, notwithstanding the fact that he signed the exact same "authorization and release of trustee" affidavit and received the exact same interim trust distributions as Charles.

The other defenses raised in the answer, failure to state a cause of action, lack of standing, lack of subject matter jurisdiction and unjust enrichment are equally unavailing. Accordingly, Charles has established entitlement to summary judgment by demonstrating that Richard Edmundson, trustee of the Amelia Barca Irrevocable Family Trust, acted in bad faith when he made distributions of the trust to two beneficiaries, including himself, and refused to distribute to Charles his beneficial share without justification.

With respect to the branch of the motion which seeks a surcharge, surcharges have been imposed by the courts of this state for breaches of fiduciary duties far less serious than those present in the instant case (*see e.g. Matter of Welling*, 26 Misc 2 182 [Sur Ct, New York County 1960] [surcharges imposed where fiduciary kept funds uninvested]; *Matter of Newhoff*, 107 Misc 2d 589 [Sur Court, Nassau County 1980]; *affd* 107 AD2d 417 [2d Dept 1985], *appeal denied*, 66 NY2d 605 [1985] [surcharge imposed against fiduciary who filed late tax returns]; *Matter of Fales*, 106 Misc 2d 419 [Sur Ct, New York County 1980] [surcharges imposed where fiduciary made a disadvantageous tax election]; *Matter of Smith*, 82 NYS2d 468 [Sur Ct, Queens County 1948]) [surcharges imposed against fiduciary who improperly computed and overpaid commissions]; *Cooper v Jones*, 78 AD2d 423 [4th Dept 1981]).

Given the undisputed facts in this case, the imposition of a surcharge against the trustee, Richard, for his willful and deliberate breach of the fiduciary duty owed to Charles is warranted. Further, the surcharge should include the amount of legal fees and costs expended by Charles in establishing Richard's wrongdoing. As this court made clear such a result may be warranted as a matter of equity.

> "As an exception to the general rule that a party to a lawsuit cannot require his opponent to pay his legal expenses, the courts permit an errant fiduciary to be surcharged the amount of expense incurred by the party in establishing his wrongdoing and obtaining recoupment. This rule ordinarily has been applied where beneficiaries of an estate suffer loss as a result of the fiduciary's misconduct"

(*Matter of Tadeusz Walkowicz*, NYLJ, Oct. 19, 1992, at 37, col 4 [Sur Ct, Nassau County] [determining that the petitioners were entitled to the return of $66,337.28 in legal fees from the executor personally as a result of the executor's abuse of her fiduciary objections] [internal

citations omitted]; *see also Matter of Garvin's Will*, 256 NY 518 [1931] [citing the Surrogate's power to impose costs and allowances personally upon the executor as an expense caused by their wrong]; *Birnbaum v Birnbaum*, 555 NYS2d 982 [4th Dept 1990] [holding that a fiduciary may be liable for attorney's fees and costs incurred in exposing his misconduct as an element of damages]).

Charles argues that Richard should be surcharged for his gross misconduct, his commingling of trust assets and flagrant violation of fiduciary duty. Specifically, Richard (i) transferred a trust asset into his own name, (ii) personally profited from the refinance of the mortgage by utilizing his own company to procure the loan for which is company was paid a fee; (iii) failed to establish a segregated trust account or procure a federal tax identification number for the trust, (iv) deposited the mortgage refinance proceeds into his own personal account and commingled the proceeds; (v) cannot fully account for the disposition of the loan proceeds; (vi) deposited the proceeds of the sale into his own personal account, further commingling-trust assets and (vii) converted Charles one-third (1/3) share of the sale proceeds to his own use. In support of this prayer for relief, Charles' attorneys have submitted an affirmation of legal services detailing their efforts in this proceeding which amounted to $29,710.00.

Here, the trustee acted in complete and total disregard of his fiduciary duties. He converted Charles' share of the trust corpus to his own use. Accordingly, a surcharge is imposed in the amount of $31,915.25, which is comprised of the $1,125.00 the trustee personally received as a result of using his own company to place a mortgage on the premises, the sum of $1,080.25, representing the cost and disbursements of this proceeding, and legal fees of $29,710.00.

In conclusion, the unopposed motion is granted in its entirety. The trustee is directed to

distribute to petitioner $111,460.12, representing his one-third (1/3) share of the sale of the subject premises, plus legal interest at the rate of 9% from July 12, 2007; together with surcharges totaling $31,915.25, comprised of the $1,125.00 personally received by the trustees as a result of using his own company, Radcliffe Credit Corporation, to place a mortgage on the subject premises, the sum of $1,080.25, representing the costs and disbursements occasioned by this proceeding, and legal fees of $29,710.00 incurred to date by the petitioner.

This constitutes the decision of the court.

Settle decree.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court