

Matter of Ehrlich v Wolf
2011 NY Slip Op 30085(U)
January 11, 2011
Sup Ct, New York County
Docket Number: 113413/10
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Dina Ehrlich

INDEX NO. 113993/10

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

DAVID WOLF, ET AL.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JAN 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 1/11/11


HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
ESTATE OF DINA EHRLICH, deceased,

Petitioner,

Index No.: 113413/10

DAVID WOLF and MICHAEL C. WIMPFHEIMER,
ESQ.,

DECISION/
ORDER
FILED
MAY 13 2011
Seq. No.: 001

Respondents.

-----X
EILEEN A. RAKOWER, J.S.C. NEW YORK
COUNTY CLERK'S OFFICE

Petitioner, the Estate of Dina Ehrlich ("the Estate"), brings this Order to Show Cause for a Preliminary Injunction, with a verified Petition alleging breach of contract, unjust enrichment, and fraud. Petitioner seeks to compel respondents to turn over the balance of a joint bank account, in the amount of \$35,574.70, and to reimburse the Estate for "unauthorized withdrawals," in the amount of \$156,000, allegedly made by Mr. Wolf. Respondents oppose, and provide an answer with two affirmative defenses.

Mr. Wolf is the son-in-law of Ms. Ehrlich's second husband, Martin Blumenthal. Ms. Ehrlich was diagnosed with lung cancer on, or about, July 5, 2009, and died on December 21, 2009, four days after her husband died. On or about July 20, 2009 a joint checking account titled Mr. David Wolf and Dina Ehrlich-Blumenthal had been opened with a \$7000 deposit transfer from "Chk Xxxxx8865." During the time that Ms. Ehrlich was alive, Mr. Wolf asserts that she asked him to write checks on her behalf. The statements of the account reveal large transfers of funds into the checking account from unidentified sources. Indeed, \$185,000 was transferred into the account only 11 days prior to Ms. Ehrlich's death, the source being the same as the original \$7000 which was used to open the account. A series of transfers were effected at ATM machines using two different ATM access cards. Two such transfers, one for \$25,000 and the other for \$15,000, were effected at the same bank branch using two different ATM cards on the very day of Ms. Ehrlich's

death. Again, the source of the transferred funds is not identified. Ms. Ehrlich left a Last Will and Testament, in which she left money to Mr. Wolf's children and nephews, but did not name Mr. Wolf. Mr. Wimpfheimer is Mr. Wolf's attorney, who, as admitted in his answer, holds the balance of the joint account.

The Estate, in support of its application, submits: a "Certificate of Letters of Testamentary;" banking records for Chase account number 000000840815492 ("the Chase account"); the Last Will and Testament of Dina Ehrlich; a letter from Michael C. Wimpfheimer to the Estate, dated January 18, 2010; several email correspondences; several checks and banking records from the Chase account; several release forms; and several letters of correspondence and emails sent between the Estate's attorney and Mr. Wolf's attorney. The Estate argues that Ms. Ehrlich opened the joint account for her convenience, and that she did not intend that Mr. Wolf have an interest in the account, or a right of survivorship in the funds after she died.

Mr. Wolf, in opposition, asserts that, pursuant to Banking Law §675 a joint deposit is presumptively the property of the surviving joint tenant. Wolf asserts that he is entitled to keep the funds because "the decedent wished to benefit [Mr. Wolf] and his family because he was very helpful to her at a difficult time . . ."

Although a joint bank account vests in each named tenant a present unconditional property interest in an undivided one-half of the monies deposited, regardless of the source of the funds, and although Banking Law §675 establishes a presumption that the funds are held in joint tenancy as joint property of the account owners, the presumption of a joint tenancy may nevertheless be rebutted by clear and convincing evidence that the account was opened only as a matter of convenience. (*Pinasco v. Ara*, 219 AD2d 540[1st Dept. 1995]).

"The heavy burden of rebutting the presumption [created by Banking Law §675] rests upon the challenger . . . and for the [challenger] to prevail there must be direct proof or *substantial circumstantial proof*."(*Coddington v. Coddington*, 56 AD2d 697,698[3rd Dept. 1971] citing to *Mitchiner v. Bowery Sav. Bank*, 31 AD2d 803[1st Dept. 1969])(emphasis added).

The Estate, in support of its argument that the account was opened merely for the convenience of Ms. Ehrlich, submits an agreement entered into on January 18,

2010; signed by Mr. Wimpfheimer, and agreed to by Joel Mitchell Krinitz, attorney for the Estate. The agreement states, in relevant part:

Mr. Wolf will not issue any checks on any account jointly held with Dina Ehrlich . . . unless previously authorized in writing by the Executors or yourself, except that he may write checks to the four grandchildren of Martin Blumenthal in the amounts indicated for them under the Last Will of Dina Ehrlich . . . the “balance of all joint accounts naming David Wolf as joint tenant . . . will be transferred and paid over to the Estate of Dina Ehrlich Blumenthal.”

Pointing to the agreement, the Estate asserts that:

the fact that the bequests were, in fact, paid from the Joint Account, and that Wolf agreed to turn over the balance of the Joint Account to the Estate, is a clear indication that the funds in the Joint Account constitute an asset of the Estate and that Wolf always considered the Joint Account to be for convenience only, and in no way felt that the assets in the Joint Account were his.

Competent evidence must establish “that the tenancy created at the opening of the account was in truth something different from the tenancy defined by the presumption.” (*Walsh v. Keenan*, 293 NY 573 [1944]). In *Pinasco*, the court found that the presumption was rebutted where the challenging plaintiff:

made all management and investment decisions relating to the account . . . he exclusively possessed the check book . . . issued in connection with the joint account, and that the plaintiff made all withdrawals from the account . . . (*Pinasco* at 541).

There is no showing that Ms. Ehrlich retained control of the account such that she did not intend that Mr. Wolf have access without her permission. Indeed, the address listed on both the checks and the bank statements is that of David Wolf, not of Ms. Ehrlich. Further, although some disbursements were made at the request of Ms. Ehrlich, such as payment of bequests from her will, several withdrawals were made by Mr. Wolf on his own accord, and prior to Ms. Ehrlich’s death, which appear

to be explained simply as "cash." Additionally, there was more than one ATM card used in connection with this account.

The Estate has failed to rebut the presumption of joint ownership by clear and convincing evidence in this petition. However, the January 18, 2009 agreement creates issues of fact specifically regarding Mr. Wolf's obligations in relation to the transfer of the balance of the joint Chase account, as well as any transactions which occurred subsequent to the date of the agreement.

Wherefore it is hereby

ORDERED that the petition is denied without prejudice; and it is further

ORDERED that the petition shall be converted to a plenary action pursuant to CPLR 103(c), and the pleadings submitted herein shall function as the pleadings in the action hereby converted.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: January 11, 2011



EILEEN A. RAKOWER, J.S.C.

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