

Kaufman v Kaufman

2011 NY Slip Op 32159(U)

August 4, 2011

Supreme Court, New York County

Docket Number: 105401/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

ALLEN M. KAUFMAN,

Petitioner,

-v-

KENNETH C. KAUFMAN,

Respondent.

INDEX No. 105401/11

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1+2

Answering Affidavits- Exhibits 3

Replying Affidavits 4+5

CROSS-MOTION: YES NO

FILED
AUG - 8 2011
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 8/4/11

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58

ALLEN M. KAUFMAN,
Petitioner,

-against-

KENNETH C. KAUFMAN,
Respondent.

INDEX NUMBER 105401/2011
Mot. Seq. 001
DECISION & ORDER

DONNA MILLS, J.:

Petitioner Allen M. Kaufman (Allen or Petitioner) moves, by order to show cause, for an accounting of four trust funds and all other accounts over which respondent Kenneth C. Kaufman (Kenneth or Respondent) is a trustee or holds a power of attorney as an agent for Hyman Kaufman (Hyman). Respondent opposes and cross-moves to unfreeze three Merrill Lynch accounts.

FILED

AUG - 8 2011

Background

The parties are brothers, the sons of Ruth Kaufman (Ruth), who died on January 29, 2010, and Hyman, who suffered a traumatic brain injury on August 3, 2009 and has been in a nursing home since September 2009. Allen is a physician and Kenneth has worked at Newport Tire and Rubber, Co., Inc. (Newport Tire), his father's business, since 1977.

CLERK OF THE COURT
NEW YORK

Hyman appointed Ruth as his health care agent by a health care proxy signed on April 14, 2005. Ex. 1 attached to Petition. Allen was appointed as the First Alternate Agent and Kenneth appointed as Second Alternate Agent.¹ On June 22, 2005, Hyman executed a durable power of attorney, appointing Ruth as his attorney-in-fact, with Allen and Kenneth as "back-up attorneys-

¹Petitioner claims to have certified Hyman as incapacitated, in a writing dated January 29, 2010, pursuant to the health care proxy. A. Kaufman Support Aff., ¶ 6. No copy of such a document is contained in the papers, but Respondent does not dispute this claim.

in-fact, to ACT SEPARATELY” in regard to the enumerated powers. Ex. 2 attached to Motion.

The parties are co-trustees of three trusts (the Trusts) established by either Hyman or Hyman and Ruth:

- Ruth Kaufman 1998 Irrevocable Trust
- Kaufman Family Trust
- Hyman Kaufman New York Qualified Personal Residence Trust.²

On May 6, 2011, Allen filed the instant petition requesting that Kenneth (1) be removed as Hyman’s attorney-in-fact for failing to observe the prudent person standard of care and violating his fiduciary duty, (2) provide Allen with an accounting of all funds Kenneth expended from the Trusts, (3) pay Allen no less than \$200,000 damages, (4) be removed as trustee of the Trusts for violating his fiduciary duty, or, in the alternative, (5) cease and desist from interfering with Allen’s use of Hyman’s assets to fund Hyman’s health care.

Legal Standards

“An agent acting under a power of attorney has a fiduciary relationship with the principal. The fiduciary duties include but are not limited to each of the following obligations:

To keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and to make such record and power of attorney available to the principal or to third parties at the request of the principal. The agent shall make such record . . . available within fifteen days of a written request by any of the following: . . . a co-agent or successor agent acting under the power of attorney.”

General Obligations Law (GOL) § 5-1505 (2) (a) (3) (ii). “An allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief.”

Morgulas v J. Yudell Realty, Inc., 161 AD2d 211 213-214 (1st Dept 1990). “Fundamental to the fiduciary relationship is the duty to account. Such duty extends to an attorney-in-fact acting

²Petitioner treats this as two trusts, because it benefits the parties equally.

pursuant to a power of attorney.” *Matter of Francis*, 19 Misc 3d 536, 543 (Sur Ct, Westchester County 2008).

Discussion

Petitioner claims that Respondent has prevented him from fulfilling his duties as trustee and co-agent by, among other things, refusing to share financial information, failing to provide a complete record of financial transactions, and using Hyman’s assets for personal and business purposes. *A. Kaufman Aff.*, ¶ 7. He alleges that his father’s den, in the Kings Point, New York home that was Newport Tires’ business headquarters in later years, containing bookshelves, filing cabinets, a credenza and desk that, in aggregate, held “financial records compris[ing] thousands of pages of documents” was empty when he visited in August 2010. *Id.*, ¶¶ 14-15. When a search of the house did not uncover any of the missing documents, his brother “refused to acknowledge that anything was missing, refused to admit that he was responsible for or had transferred to his own possession the missing records, or offer any credible explanation for their disappearance.” *Id.*, ¶¶ 16-17. Petitioner does not identify when he had last seen the material in place prior to August 2010. Respondent repeats his denial of knowledge about holding his father’s papers, but claims that, at Petitioner’s orders, a carting company cleared out the attic and other locations containing documents when the Kings Point home was sold. *K. Kaufman Opp. Aff.*, at 10. Kenneth also states that his brother filed a complaint with the Nassau County Police Department and an insurance claim about items missing from the house, both proving fruitless.

Petitioner apparently made several written requests to Respondent for financial information pertaining to the Trusts. He submits letters and e-mail messages dated January 19, 2010, January 20, 2010, February 15, 2010, March 12, 2010, April 2, 2010, June 29, 2010, July 22, 2010, July 26, 2010, August 4, 2010, August 11, 2010, November 19, 2010, December 1,

2010, March 21, 2011, April 7, 2011, April 11, 2011, and April 26, 2011. Exs. 6-22 attached to Motion. Petitioner alleges that, in response, over time, he has received only an acknowledgment that Hyman was receiving \$1,866 monthly Social Security payments, HSBC checking account statements for March-June 2010, one year's annual report for Hyman's money purchase (defined contribution) pension plan, incomplete 2008 Federal tax returns for Newport Tires, the location of a safe deposit box in Hyman's name, a list of estimated expenses for Hyman's homes in Kings Point and Palm Beach, Florida, and, most recently, the 2010 tax return for the Ruth Kaufman 1998 Irrevocable Trust, Ruth's 2010 Federal and state income tax returns,³ and Hyman's 2009 and 2010 Federal income tax returns. Petition, ¶ 46, A. Kaufman Aff., ¶ 53. The last four items, Petitioner asserts, were accompanied by Respondent's request that he pay the balances due. A. Kaufman Aff., ¶ 53.

Considering the record of requests for information laid out by Petitioner, it is disingenuous of Respondent to insist that his brother "fails to identify a single thing in particular that I have refused to disclose or to share with him." Under these circumstances, Petitioner's motion for an accounting is granted.

In light of the allegations Petitioner makes about Respondent's mishandling of funds as trustee and/or attorney-in-fact, the court will await the outcome of the accounting ordered herein, before considering whether to unfreeze the Merrill Lynch accounts, as requested by Respondent. His cross motion, therefore, is denied without prejudice.

Accordingly, it is

ORDERED that Petitioner's motion for an accounting, pursuant to GOL § 5-1505

³Ruth died early in 2009, but it is unclear whether these are her estate's 2010 returns.

(2) (a) (3) (ii), is granted; and it is further

ORDERED that an accounting by Respondent Kenneth Kaufman occur within 15 days from the date this order is served upon him, with notice of entry, and be reported to the court, of all trusts established by either Hyman Kaufman or Hyman Kaufman and Ruth Kaufman over which Respondent is a trustee, and of all accounts over which Respondent holds a power of attorney as an agent for Hyman Kaufman; and it is further

ORDERED that Respondent's cross motion to unfreeze certain accounts is denied; and it is further


ORDERED that counsel are directed to appear for a [preliminary] [compliance] [status] conference in Room 574, 111 Centre Street, on October 28, 2011, at 10

AM/PM.

Any relief not otherwise granted is denied.

DATED: August 4, 2011

ENTER:



DONNA M. MILLS, J.S.C. J.S.C.

FILED
AUG - 8 2011
COUNTY CLERK'S OFFICE
NEW YORK