

Matter of Evans v Perl
2011 NY Slip Op 32187(U)
July 12, 2011
Sup Ct, NY County
Docket Number: 115839/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT:

PART 10

Index Number : 115839/2009

PERL, SHARI

vs

PERL, ANDREA

Sequence Number : 004

STRIKE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION

FILED

JUL 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/12/11


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Supreme Court of the State of New York
County of New York: IAS 10

-----X
In the Matter of the Application of Martin Evans
and Herbert Rubin, as Trustees of the Shari Perl
Family Trust,

Petitioners,

Decision/Order

For a Judgment Pursuant to Article 77 of the CPLR
compelling Andrea Perl to account for her proceedings
as trustee of the Shari Perl Family Trust and
settling the intermediate account of Martin Evans and
Herbert Rubin as trustees of the Shari Perl Family Trust.

Index # 115839/09
Mot. Seq. # 004

-against-

Andrea Perl, Bridget Herman and Shari Perl,

FILED

Respondents.

JUL 14 2011

-----X
Gische, J.:

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Pursuant to CPLR 2219(A) the numbered papers considered on this motion are
as follows:

PAPERS	NUMBERED
Notice of Motion, ELB affirm, exhibits.....	1
JVH affirm. In opp., exhibits.....	2
CDM affirm. In opp.....	3
ME reply affd. To JVH.....	4
ME reply affd. To CDM.....	5

Upon the foregoing papers the decision and order of the court is as follows:

Martin Evans and Herbert Rubin (collectively "current trustees") are presently
co-trustees of a trust entitled the Shari Perl Family Trust ("SPFT").¹ Martin Evans has

¹ Andrea Perl and Shari Perl had been co-trustees of the SPFT from January 12,
2000 through September 21, 2006. Thereafter, Shari Perl was replaced by Martin
Evans and through January 31, 2008, Andrea Perl and Martin Evans served as co-

separately been appointed the guardian of Shari Perl's (sometimes "SP") property. As part of their underlying petition, they seek court approval of their interim accounting for the period February 1, 2008 through August 31, 2009 ("interim accounting"). Andrea Perl ("AP") has submitted an answer to the petition and raised specific objections to the interim accounting. Bryan Herman ("Herman"), as the natural guardian of respondent Bridget Herman (a minor), has also filed objections to the interim accounting.

The current trustees move, pre-hearing, to strike certain objections raised by both AP and Herman. Specifically, the current trustees moves to strike AP's objections numbered 5, 7, 8, 9, 12 and 29 ; and Herman's objections denominated FIFTH, SEVENTH, EIGHTH, TENTH and ELEVENTH. The current trustees claim that there is documentary evidence which definitively disposes of the objections. The motion is opposed only by AP and Herman.

The objections fall into two categories. One category of objections concerns payments made from the SPFT to pay Shari Perl's Federal and New York State income taxes. The current trustees argue that these payments are authorized under the trust instrument.

The second category of objections concerns the current trustees listing, as part of their interim accounting, ownership interests in three entities respectively known as: 143 Mulberry Realty Co, LLC; 145-147 Mulberry Realty Co., LLC and 494 Broadway Realty Co., LLC ("collectively "LLCs"). The current trustees argue that, as a matter of law, the interest the SPFT derived in these entities from the CalPerl Trust vested

trustees. As of February 1, 2008 Herbert Rubin replaced Andrea Perl and since that time, Herbert Rubin and Martin Evans have served as co-trustees of the SPFT.

immediately upon the death of Calvin Perl, notwithstanding that no actual distribution has yet been made.

Payment of SP's Income Taxes

The interim accounting reflects that on April 9, 2009 the current trustees made two payments, respectively for \$272,000, to New York State Income Tax, and \$301,000, to the United States Treasury. The current trustees' attorney claims, in his affirmation, that "[t]hese substantial taxes were due because property in which Shari Perl had an interest was sold."

AP and Herman generally claim that these payments were made in violation of the current trustees' fiduciary duties, and, specifically, they claim that the duty was breached because, Martin Evans, in his capacity as guardian of the property of SP, had sufficient funds outside of the SPFT to pay the taxes.²

The current trustees rely on the following provisions of the SPFT instrument in arguing that the payment of SP taxes was completely within their discretion and cannot be challenged:

At any time during the existence of the [SPFT], the trustees may, in their sole and absolute discretion, elect to invade all or a portion of the principal of the Trust for the benefit of [Shari Perl] and/or any of the Grantor's issue in such amounts as the Trustees may deem advisable in their sole and absolute discretion. The Trustees shall not be required to consider the extent of the income or resources of any beneficiary for whom principal may be invaded, and may favor any such beneficiary to the detriment or exclusion of other potential beneficiaries having prior, simultaneous or subsequent interests in

²Herman also claims that the distributions, even if properly paid, should have been accounted for as distributions of principal in the interim accounting. The current trustees expressly provide that they are not addressing that part of Herman's objection.

the [SPFT]. An invasion shall be authorized even though it may have the effect of greatly reducing or completely exhausting the principal for the Trust.
¶3(B)(5)

The Trustees shall have the widest possible latitude and discretion in the administration of the Trust. To the extent permitted by law, no Trustee shall be held liable for any loss to the Trust or its beneficiaries resulting from his or her exercise or non-exercise of any power, duty or discretion granted to him or her hereunder or by law, or for any error of judgment, not constituting gross negligence or fraud. ¶9.

The current trustees argue that these provisions give them the absolute discretion to have paid SP's income taxes from the Trust, even if she had other assets, outside the trust, to satisfy that obligation.

AP and Herman both argue, and the current trustees acknowledge, that the discretionary power of invasion by the trustees is limited when the "actions or determinations on the part of the trustees amount to an abuse of discretion, bad faith, arbitrary action or fraud." AP also cites to the following additional provision in the trust instrument, which she claims was violated:

Notwithstanding anything to the contrary elsewhere provided herein (including provisions authorizing delegation of duties and powers of Trustees), in no event shall any Trustee be eligible to vote or exercise discretion with respect to any matters involving invasions of principal or distributions of income in favor of herself, her estate, her creditors, the creditors of her estate, or in discharge of satisfaction of any of her legal obligations (including support obligations), but such matters shall be completely within the discretion of and determined by the vote of the other eligible Trustee, if any. ¶9

AP first claims that based upon the above cited provision, only Herbert Rubin, and not Martin Evans, could have made the decision to use trust monies to pay SP's income tax obligations. She argues that Martin Evans, as SP's guardian stands in SP's

shoes in connection with his trusteeship of the SPFT and, therefore, he cannot vote to use trust assets to pay SP's legal obligations, such as income taxes. She then goes on to argue, based upon the deposition testimony of Herbert Rubin, that he did not vote to approve the subject distributions.

This argument fails. Although an affirmative representation by current trustee Herbert Rubin, that he authorized the disputed payments, would have been helpful, the mere fact that Trustee Rubin has submitted this interim accounting for approval by the court indisputably demonstrates that he agrees to the use of the monies. In addition, the deposition testimony demonstrates that trustee Rubin was aware that the payments were being made at or about the time they were actually made. This further demonstrates his tacit approval.

AP and Herman otherwise argue that Evans acted in bad faith, due to his conflict of interest in acting as both a trustee of the SPFT and guardian of SP's property. AP argues that there was bad faith because the current trustees should have preserved the trust property to benefit the grantor's heirs and used SP's assets to pay her tax obligations. The trust language, however, gives the trustees the express discretion to pay debts of the beneficiaries without regard: [1] to whether there are other assets available to pay such debts and [2] the effect on the other beneficiaries. The fact that other beneficiaries may have been adversely affected by the payment of SP's debts is, therefore, not a basis for a finding of bad faith.

Herman claims that the current trustees acted in bad faith because the effect of making such payments from the SPFT, as opposed to SP's other property, was to maximize the pot of money available to pay guardianship fees and legal fees. This

argument is far too speculative to form the basis for a finding of bad faith. As detailed in the current trustee's reply papers, the amount of fees payable to the guardian is actually somewhat reduced on account of the source of the payment. As to the argument of available funds, there is simply no basis to conclude that there would otherwise be no assets from which to pay legitimately earned guardianship fees and legal expenses, if other than SPFT assets had been used to pay the taxes. Consequently, the conflict identified by Herman in this context, has no discernable economic effect.

Listing of LLC's in Interim Accounting

The motion to strike objections with respect to including the three LLCs in the interim accounting is denied without prejudice. The current trustees argue that title to a percentage of the LLCs vested in the SPFT upon Calvin Perl's death, as a matter of law, and that they are within their right to include it on their interim accounting. Title and possession of the LLCs, however, remains with the CalPerl Trust. AP and Herman claim that legally and for tax purposes the CalPerl Trust is permitted to retain title for a reasonable period of time.

The matter presently before the court is the issue of an interim accounting. Nobody addresses, and the court is unclear, how a fiduciary can account for assets that they do not yet have, even if they are otherwise entitled to them. The parties also need to address whether the court has the right to resolve this title dispute in the context of an accounting proceeding. These issues must first be addressed, before the court will consider the issue of who owns the LLCs.

Conclusion

In accordance herewith it is hereby:

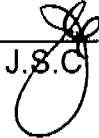
ORDERED that the motion to strike is granted only to the extent that Andrea Perl's objections numbered 5 and 29 are stricken and Bryan Herman's objection numbered FIFTH is stricken, and it is further

ORDERED that the motion to strike is otherwise denied without prejudice, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
July 12, 2011

SO ORDERED:



J.G. J.S.C.

FILED

JUL 14 2011

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