

McKeever v Dudonis

2012 NY Slip Op 32396(U)

September 12, 2012

Supreme Court, Suffolk County

Docket Number: 08-42037

Judge: Daniel Martin

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SHORT FORM ORDER

INDEX No. 08-42037
CAL No. 11-02587CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 3-20-12
ADJ. DATE 5-1-12
Mot. Seq. # 003 - MD
004 - XMD

-----X
MICHELLE MCKEEVER, as Administratrix of
the Estate of BRIAN MCKEEVER, Deceased,

Plaintiff,

- against -

VALERIE MCKEEVER DUDONIS, COLLEEN
MCKEEVER PARISI and ROSARIO PARISI,

Defendants.
-----X

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Upon the following papers numbered 1 to 36 read on this motion for partial summary judgment; cross motion for dismissal; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers 34 - 36; Answering Affidavits and supporting papers 26 - 29; Replying Affidavits and supporting papers 30 - 33; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for an order granting summary judgment in her favor as against defendant Valerie McKeever Dudonis on the first cause of action is denied; and it is further

ORDERED that the unopposed cross motion by defendant Colleen McKeever Parisi for an order dismissing the action against her is denied.

In September 2004, Kevin McKeever created a revocable living trust, naming himself as the trustee and his mother, defendant Valerie McKeever Dudonis, and his sister, defendant Colleen McKeever Parisi, as successor trustees.¹ At the time of the trust's creation, Kevin McKeever was divorced from his wife, plaintiff Michelle McKeever, and was the custodial parent of their child, Brian McKeever (hereinafter Brian), who was born in July 1989. The trust document states that the trust property, "listed in Schedule A," was to be disposed after the settlor's death to his sister, Colleen, and his son, Brian, and that his personal property was to be distributed in accordance with the "Personal Property List." More particularly, as relevant to the instant controversy, Article XXI of the trust document states that the real property known as 53 Clarke Street, Brentwood shall be distributed by the successor trustees "one-half to my sister . . . and one-half to my son," provided his son was 18 years or older at the time of such distribution. It states that if Brian had not yet attained the age of 18 years at the time of the Kevin McKeever's death, "my trustee(s) shall not distribute said property but shall hold his one-half interest, IN TRUST," and shall have all the powers set forth in Article XII of the trust agreement, including the power to sell the property. It states upon Brian becoming 18 years old, the trust shall terminate and the trustees shall distribute one-half of the interest in such real property to him. Article XXI also states as follows:

All the rest and residue of the property held by the Trust at the time of my death and all property transferred to this trust before or after my death shall be distributed to my son . . . unless he has not attained eighteen (18) years of age in which case it shall be held by my Trustee(s), IN TRUST, for his benefit until he attains eighteen (18) years of age at which time my Trustee(s) are directed to pay over to him the principal and undistributed income.

In addition, Article XIX of the trust agreement, entitled Provisions Relating to Policies of Insurance, states that upon proof of death, "the Trustee shall use reasonable efforts to collect all sums payable on such [insurance] policies for which the settlements as received by the Trustee shall become principal of the Trust Estate, except interest paid by the insurer, which shall be classed as income."

Simultaneous with the execution of the trust documents, Kevin McKeever executed a will. It is noted both the will and the trust document were drafted by Kevin McKeever's attorney, William J. Eppig (hereinafter Eppig). The will states that all property owned by Kevin at the time of his death or which shall become payable to his estate "shall be distributed to the trustees of the Kevin McKeever Living Trust." It further nominates Valerie McKeever and Colleen McKeever as the testamentary co-guardians of Brian, and Valerie McKeever as the executrix of the estate. Shortly thereafter, in November 2004, Kevin McKeever passed away.

In February 2007, Colleen McKeever Parisi (hereinafter Colleen), as successor trustee, with the consent of Valerie McKeever Dudonis (hereinafter Valerie), sold the property known as 53 Clark Street,

¹Following the death of her first husband, Edward McKeever, defendant Valerie McKeever Dudonis married Robert Dudonis.

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Brentwood. Approximately \$106,338 of the net sale proceeds allegedly were given to Colleen for the purchase of real property located in Farmingville, New York. The balance of \$73,242 from the sale of the Brentwood property allegedly was given to Colleen to hold in trust for her nephew. Approximately two months later, Colleen allegedly transferred her interest in the Farmingville property to her husband, defendant Rosario Parisi, whom she had married after her brother's death. Sadly, Brian passed away in September 2007, just two months after his eighteenth birthday.

Subsequently, Michelle McKeever, in her capacity as administratrix of Brian's estate, commenced this lawsuit against defendants. The complaint alleges, in part, that Valerie and Colleen refused a request made by Brian after his 18th birthday for his share of the trust proceeds. The first cause of action alleges Valerie and Colleen are liable for breach of their fiduciary duties as successor trustees of the Kevin McKeever Living Trust, and seeks damages of at least \$89,816, as well as legal fees and expenses. The second cause of action seeks an accounting, and the third and fourth causes of action seek compensatory and punitive damages under the legal theories of conversion and fraudulent conveyance.

Plaintiff now moves for an order granting summary judgment in her favor as against Valerie on the first cause of action. Plaintiff alleges that Valerie breached her fiduciary duties as a trustee by taking life insurance proceeds in the sum of \$47,000 which were part of the trust estate and using them for her own purposes, and by failing to prevent Colleen from wasting and dissipating assets of the trust estate totaling \$89,815. Plaintiff's submissions in support of the motion include copies of the pleadings, the trust document, the will, and the transcripts of the deposition testimony of Valerie, Colleen, and Eppig. Valerie opposes the motion, arguing, among other things, that she was the designated primary beneficiary of the life insurance policy Kevin McKeever had from his employer. She did not consent or even know she was a co-trustee and that she did not know her daughter wasted or misappropriated assets held in trust for Brian.

Colleen cross-moves for an order dismissing the complaint against her on the ground that plaintiff's claim against her was discharged in a bankruptcy proceeding filed in the United States Bankruptcy Court, Eastern District of New York. In support of the motion is a copy of an order, dated January 24, 2011, issued by United States Bankruptcy Judge Dorothy Eisenberg discharging the debts of Colleen McKeever under Section 727 of Title 11 of the Bankruptcy Code.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Plaintiff's motion for summary judgment in her favor against Valerie on the first cause of action is denied. A trust instrument is to be construed as written and the settlor's intention is to be determined solely from the unambiguous language of the instrument creating the trust (*Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 267, 557 NYS2d 851 [1990]; *see Central Union Trust Co. v Trimble*, 255 NY 88, 174 NE 72 [1930]; *Whitehouse v Gahn*, 84 AD3d 949, 922 NYS2d 546 [2d Dept 2011]). A court may resort to extrinsic evidence to determine the intention of the settlor only when it is determined that the words used in the trust instrument are ambiguous (*see Matter of Piel*, 10 NY3d 163, 855 NYS2d 41 [2008]; *Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 557 NYS2d 851).

As a fiduciary, a trustee owes the beneficiaries of a trust an undivided duty of loyalty (*see Birnbaum v Birnbaum*, 73 NY2d 461, 541 NYS2d 746 [1989]; *Matter of Jastrzebski*, 97 AD3d 819, 948 NYS2d 689 [2d Dept 2012], *Matter of Mankin*, 88 AD3d 717, 930 NYS2d 79 [2d Dept 2011]), and must act with prudence in the manner in which he or she manages trust assets (*see Matter of Janes*, 90 NY2d 41, 659 NYS2d 165 [1997]). A trustee "must administer the trust for the benefit of the beneficiaries and cannot compete with the beneficiaries for the benefits of the trust corpus" (*Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 270, 557 NYS2d 851; *see Matter of Heller*, 6 NY3d 649, 816 NYS2d 403 [2006]). Thus, a trustee will be held liable if he or she "commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he [or she] has personally profited through a breach of trust" (*O'Hayer v de St. Aubin*, 30 AD2d 419, 423, 293 NYS2d 147 [2d Dept 1968], *quoting* 3 Scott, Trusts [3d ed.], § 222.3, p. 1777; *see Matter of Jastrzebski*, 97 AD3d 819, 948 NYS2d 689; *Boles v Lanham*, 55 AD3d 647, 865 NYS2d 360 [2d Dept 2008]). A trustee will not be liable for a breach of the fiduciary duty owed by a co-trustee if he or she was not negligent and did not aid or participate in the breach (*cf. Bruen v Gillet*, 115 NY 10, 14, 21 NE 676 [1889]). However, a trustee who knows and assents to the misapplication of trust assets by another co-trustee, or who negligently permits a co-trustee to receive and waste the trust estate when he or she has the means to prevent such misapplication or waste of assets by proper care, may be held liable to the beneficiaries for a resulting loss (*see Matter of Durston*, 297 NY 64, 74 NE2d 310 [1947]; *see also Wilmerding v McKesson*, 103 NY 329, 8 NE 665 [1886]).

Plaintiff's motion is denied. Firstly, as a copy of Schedule A to the trust document was not included with the moving papers, an issue exists as to the property actually transferred into the living trust by Kevin McKeever. Contrary to the conclusory assertions by plaintiff's counsel, there is no evidence in the moving papers showing that the life insurance policy provided to Kevin McKeever by his employer was placed in a trust for Brian's benefit. Further, while deposition testimony shows Colleen knew she was a successor trustee for the living trust created by her brother, and while Valerie apparently executed an affidavit consenting to the February 2006 sale of the Brentwood property, the deposition testimony of Colleen, Valerie and Eppig shows triable questions exist as to when Valerie learned that she, too, was a successor trustee, and as to the value of the trust assets. Colleen and Valerie's deposition testimony also shows a triable issue as to whether Valerie breached a duty owed to Brian by negligently permitting Colleen to misappropriate trust assets (*see Matter of Mankin*, 88 AD3d 717, 930 NYS2d 79; *see also Capital Heat, Inc. v Michael R. Blatner Family Trust*, 64 AD3d 1228, 882 NYS2d 632 [4th Dept 2009]). Although plaintiff's attorney argues that Valerie's affidavit is inconsistent with other testimony, such issues of credibility are not to be determined by a court on a

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motion for summary judgment.

The operative standard on a motion for summary judgment is issue-finding, not issue-determination (**Sillman v Twentieth Century-Fox**, NYS2d 395, 404, 165 NYS2d 498, 144 NE2d 387; **Esteve v Abad**, 271 App.Div. 725, 727, 68 NYS2d 322).

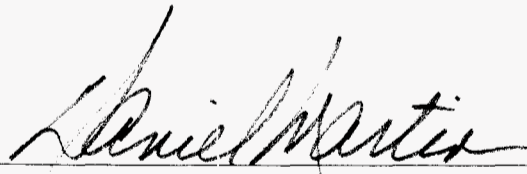
Finally, the cross motion by Colleen is denied. 11 USC § 727 states that “except as provided in section 523 of this title, a discharge under . . . this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter.” However, 11 USC § 523 (a) of the Bankruptcy Code provides, in relevant part, that a discharge under section 727 does not discharge a debtor from any debt

- (3) neither listed nor scheduled under section 521 (a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit - -
- (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
- (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt . . . unless the creditor had notice or actual knowledge of the case in time for such timely filing and request.

The debts specified in 11 USC § 523 (a) (2), (4) and (6) are intentional tort debts, namely debts obtained by “false pretenses, false representation or actual fraud,” by “fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny,” or by “willful and malicious injury by the debtor to another entity or to the property of another entity” (*see* 11 USC § 523 [a][2], [4], [6]). The evidence submitted in support of the cross motion is insufficient to show that the debt that is the subject of this action was, in fact, listed by Colleen on the schedule of debts submitted with the bankruptcy petition and discharged by operation of law under 11 USC § 727.

Dated:

SEPT. 12, 2012.



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION