

Katz v Fortgang

2012 NY Slip Op 34001(U)

August 10, 2012

Surrogate's Court, New York County

Docket Number: File No. 2008-0479

Judge: Kristin Booth Glen

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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

DATA ENTRY

Date: AUGUST 10, 2012

-----X
JEFFREY I. KATZ,

Plaintiff,

-against-

File No. 2008-0479

BARBARA FORTGANG,

Defendant.
-----X

G L E N, S .

These are cross-motions for summary judgment in an underlying proceeding for conversion of assets, relating to an account held by decedent Reva Katz in joint name with her son and daughter. For the reasons detailed below, the motion to dismiss the conversion action is granted, and the cross-motion is denied.

FACTS

Reva Katz opened a mutual fund account with Sentinel Investments in March 1987, while she was residing and domiciled in Florida. She titled the account in her name jointly with her daughter, Barbara A. Fortgang, and her son, Jeffrey I. Katz. Reva used her own assets to fund the account. She did not file gift tax returns in connection with the account. Over the following years, Reva managed, paid all income taxes on, and periodically withdrew funds from the account.

In January 2005, after brief stays with Jeffrey and with Barbara, Reva permanently relocated from Florida to a New York City assisted living facility. Jeffrey had held Reva's power of attorney since 1990, but in April 2005, following several months of discord between Reva and Jeffrey, she executed a new power of attorney naming Barbara as her sole attorney-in-fact. In July 2005, Barbara called Sentinel, representing that she was Reva (allegedly in Reva's

presence), and requested the redemption of shares in the Sentinel fund. In accordance with Barbara's instructions, Sentinel sent two checks to Reva's home address payable to Reva, Jeffrey, and Barbara, one in the amount of \$249,985 and the other in the amount of \$15,000. Both checks were endorsed with Reva's and Barbara's signatures (but not Jeffrey's), and Barbara deposited the checks in Reva's checking account or accounts at the Bank of America. Barbara thereafter drew on the transferred funds.¹ She alleges that she used all these funds solely for Reva's benefit.

Jeffrey filed suit against Barbara in December 2006 in New York County Supreme Court, alleging breach of fiduciary duty and conversion to her own use of the \$264,985 in (total) redeemed Sentinel assets. Among other relief, he sought an award of one-third of this amount based on his claim that their mother's registration of the account in triple joint names immediately vested him with ownership of one-third of the funds. Reva died in October 2007, and the supreme court transferred the case to this court by order dated July 31, 2008. This court subsequently granted Barbara's motion to dismiss all but the cause of action for conversion, for the reasons stated on the record at the call of the calendar on March 25, 2011.² She now moves for summary judgment to dismiss Jeffrey's remaining claim of conversion, and Jeffrey cross-moves for summary judgment compelling Barbara to restore the funds to the account.

¹ The evidence is conflicting as to the exact title of the checking account or accounts where the Sentinel proceeds were deposited. The parties have assumed that Barbara used a power of attorney to draw on the accounts, and Jeffrey has not contested her right, per se, to access the funds.

² Barbara's additional request for a stay of proceedings until the completion of certain proceedings in New Jersey was rendered moot by the dismissal of that action in 2007.

DISCUSSION

Applicable Law

New York adopts a “grouping of contacts” test when determining the law that governs contracts, in the absence of an express selection by the contracting parties of a particular jurisdiction; relevant contacts include the place where the contract was formed, the situs of the subject matter of the contract, and the domicile of the contracting parties (*Lazard Freres & Co. v Protective Life Ins. Co.*, 108 F 3d 1531, 1539 [2nd Cir 1997] [“Under (the grouping of contacts) approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties”]; *see generally* 19A NY Jur2d Conflict of Laws § 38). All the significant contacts in this case were with Florida, where Reva was living and where she was domiciled when she opened the account, and where she transacted in the account for most of the period prior to her death. There is no indication that Reva’s Sentinel account agreement contained a provision for adopting the law of a particular jurisdiction. Accordingly, Florida law controls the inter vivos transfers at issue here (*see also Matter of Kugel*, 192 Misc 61 [Sur Ct NY County 1948]) (observing, with respect to a joint checking account in a Florida bank, “It is conceded that since the contract was made in the State of Florida concerning property having its situs there the law of that State governs the determination of the question”).

Jeffrey’s reliance on EPTL 3-5.1 (b) (2) for application of New York law is misplaced. That statute concerns the transfer of personal property having a relation to another jurisdiction, but applies only to testamentary dispositions or “the manner in which [personal] property devolves when not disposed of by will.” It is clear from the context that the statute addresses

only the succession of a decedent's personal property at death, and has no relevance to inter vivos transfers such as the initial creation of the account at issue here.

Motion for Summary Judgment

To obtain summary judgment, the movant first "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the party opposing the motion to show there are material issues of fact that require a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To withstand the motion, the opponent "must assemble and lay bare its affirmative proof to demonstrate the existence of genuine, triable issue" (*Corcoran Group v Guy Morris et al.*, 107 AD2d 622, 624 [1st Dept 1985], *affd* 64 NY2d 1034 [1985]).

Effect of Establishing the Account in Joint Name

Under Florida case law, title alone is not determinative of the rights of joint account holders during the life of the party who established the account. Instead, Florida courts look for evidence of donative intent, with no presumption of a gift of a present interest to the non-depositing party.³ As a Florida District Court of Appeal stated in *Mulato v Mulato* (705 So 2d 57 [Fla 1997]), "[T]he presumption that a gift was intended by the depositor of funds into a joint account applies only to the funds remaining at the depositor's death."

The court in *Mulato* delineated the following requirements for a non-depositing party to

³ The presumption under New York law is generally the opposite (*see* 2 Harris NY Estates: Probate Admin & Litigation § 26:159 [6th ed]).

demonstrate inter vivos rights to joint account funds: “(1) that the depositor/donor had a *clear intention* to transfer a present interest; (2) delivery by surrender of dominion and control to the donee; and (3) acceptance of the gift by the donee” (*id.* at 61[emphasis added]; *see also Williams v Williams*, 255 So 2d 273, 275-6 [Fla 1971]; *Kuebler v Kuebler*, 131 So 2d 211, 218 [Fla 1961] (noting “a clear and unmistakable intention on the part of the donor” as “an essential requisite of a gift inter vivos”). Contrary to Jeffrey’s contention, Florida Statutes Annotated §655.7 does not provide otherwise. That statute applies by its terms to transfers at death and has no relevance to gifts of a present interest.⁴

Jeffrey, therefore, bears the burden of establishing that he acquired an immediate interest in the account when his mother placed her own funds in joint name. To defeat the motion, he must “lay bare his proof” to establish the absence of any question whether Reva had the necessary “clear and unmistakable intention” to make a gift. This he has failed to do. In fact, the evidence is to the contrary.

Prior to the commencement of the instant proceeding, Reva filed a complaint against Jeffrey in the Superior Court of New Jersey seeking dissolution of the Sentinel joint investment account as well as others that she created, expressly citing her “lack of intention to make an *inter vivos* gift.” Her verified pleading states:

“I had transferred various accounts containing monies deposited solely by my deceased husband and myself in the names of myself, my son and my daughter as

⁴ The statute reads, “[A] deposit account in the names of two or more persons shall be presumed to have been intended by such persons to provide that, upon the death of any one of them, all rights, title, interest, and claim in, to, and in respect of such deposit account. . . vest in the surviving person or persons.”

joint tenants with rights of survivorship while I was still living in Florida. At the time it was my intention to have full use of all of these assets during my lifetime and for whatever remained of them, if anything, to become joint and equal property of my Defendant-son and my daughter *only* at the time of my death . . .

“Had I known that he [Jeffrey] would claim a present ownership during my lifetime of my money and assets I would never have put these sums into joint name, which I thought I was doing for convenience, and ironically, my own protection” (Reva Katz complaint ¶¶ 4, 18; emphasis added).

Reva’s commencement of the lawsuit is itself evidence of her lack of donative intent.

Jeffrey himself acknowledges that the Sentinel account was to be used exclusively for Reva’s benefit during her lifetime. In his deposition in the proceeding in this court for probate of Reva’s will, Jeffrey testified as follows:

“ Q: And the money in the Sentinel Fund was to be used solely for your mother to her benefit during her lifetime; isn’t that correct?

“A: Yes. ”⁵

The only evidence Jeffrey presents on the question of Reva’s donative intent is her statement in her 2006 deposition that “all of us owned it equally the three of us.”⁶ At the same deposition, however, Reva expressed frustration with Jeffrey’s attempts to obstruct her access to the account,⁷ and when asked why she titled the Sentinel account in three names, responded simply, “Because if I go I wanted the two children to have it.”⁸ Viewed most favorably to Jeffrey, Reva’s deposition testimony is at best ambiguous. It is insufficient to meet his burden,

⁵ Jeffrey Katz March 4, 2009 deposition, transcript at 145.

⁶ Reva Katz October 24, 2006 deposition, transcript at 56.

⁷ *Id.* at 38.

⁸ *Id.* at 39.

which is not merely to raise a triable issue as to Reva's intent, but to show there is *no* triable issue that her "clear" and "unmistakable" intent was to grant him a present interest in one-third of her assets.

Having determined that Jeffrey fails to raise an issue of fact as to the first element of the *Mulato* test, the court need not address the other two requirements.⁹

Claim for Conversion

To sustain a claim of conversion, Jeffrey must demonstrate (1) his superior right to possession of the property, and (2) Barbara's exercise of unauthorized dominion over the property in derogation of that right (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]). Because Jeffrey's interest is limited to one-half the funds *remaining* at Reva's death, a conversion occurred only to the extent, if any, that Barbara made unauthorized use of funds that would otherwise have remained in the account and, therefore, would have been subject to Jeffrey's survivorship interest.

Barbara alleges in her pleadings that all the funds she withdrew from the Sentinel account were deposited in Reva's checking account and used solely for Reva's living expenses (answer, ¶ 22).¹⁰ Evidence adduced by Jeffrey's forensic accountant during disclosure proceedings tends to confirm, rather than refute, Barbara's claim. Despite full discovery, including his taking

⁹ The court observes, however, that Jeffrey's contention that the signatures of Reva, Barbara, and himself were all required to transact in the jointly titled funds implicitly concedes that Reva did not surrender complete dominion over the assets.

¹⁰ *See also* deposition of Reva Katz, New Jersey Superior Court proceeding, at 60 ("And my daughter has all the receipts and everything to show that she never touched anything from the account").

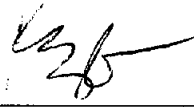
Barbara's deposition, Jeffrey has offered no affirmative proof to create an issue of fact on his cause of action for conversion.

Jeffrey also cites *Joseph v Chanin* (940 So 2d 483 [Fla 2006]) in support of his claim. The *Joseph* case, however, is authority for precisely the opposite. It concerned a checking account which held the pooled funds of the joint holders, and from which both owners deposited and withdrew funds. The court in *Joseph* stated, "[F]unds in the account belong to the parties in proportion to the net contributions by each to the sums on deposit. . . One joint tenant may bring a conversion action against another joint tenant who wrongfully appropriates *more than his share* of the money from a joint tenancy account" (emphasis added). It is undisputed that Jeffrey and Barbara contributed nothing to the Sentinel account and, as Jeffrey himself concedes, the funds belonged to Reva during her lifetime. Jeffrey was entitled to *no* share of the account prior to Reva's death; Reva was entitled to use the *entire* account during her life (which, indeed, she did, either acting herself or through Barbara, as her de facto agent). Although given the opportunity, Jeffrey has raised no issues to contradict Barbara's sworn statement and other evidence that the funds were used solely for Reva.

CONCLUSION

For these reasons, this decision constitutes the order of the court granting the motions of

Barbara A. Fortgang for summary determination, denying the cross-motion of Jeffrey A. Katz,
and dismissing the amended complaint in its entirety.



S U R R O G A T E

Dated: August 10, 2012