

Seligman v Atlas

2013 NY Slip Op 32137(U)

September 5, 2013

Supreme Court, New York County

Docket Number: 157645/12

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

Application of STEVEN SELIGMAN,
Petitioner,

INDEX NO. 157645/12

-against-

MOTION SEQ. NO. 001

NANCY ATLAS,
Respondent.

The following papers, numbered , were read on this motion by petitioner for a preliminary injunction.

PAPERS NUMBERED

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

Answering Affidavits — Exhibits (Memo)

Reply Affidavits — Exhibits (Memo)

Cross-Motion: Yes No

Motions sequences 001 and 002 are consolidated for purposes of disposition.

This is a proceeding brought pursuant to CPLR Article 4 and NY General Obligations Law (GOL) §5-1510. In motion sequence number 001, petitioner, Steven Seligman (petitioner), moves, by Order to Show Cause (OSC) for a preliminary injunction seeking to enjoin respondent, Nancy Atlas (respondent), from taking certain actions during the pendency of this special proceeding. In motion sequence number 002, respondent opposes the motion for injunctive relief and moves to dismiss the petition, pursuant to CPLR §§ 404, 3211(a)(1), (3), (5) and (7).

BACKGROUND

Petitioner and respondent are siblings and the only children of Muriel Cantor (the Principal), a 92-year old widow. Petitioner commenced this special proceeding, pursuant to CPLR Article 4 and GOL §5-1510, seeking, inter alia, to remove respondent as agent under certain powers of attorney executed by the Principal on November 7, 2007. The gravamen of the petition is that respondent breached her fiduciary duties under the Powers of attorney by taking certain actions that were not in the Principal's best interest.

According to the petition, the Principal owns two apartments, apartment 13B in the Ritz Towers, 465 Park Avenue, New York, New York (the New York apartment), valued at approximately \$2 million, and an apartment at 200 Bradley Place, Palm Beach, Florida (the Florida apartment). The Principal's husband passed away in June 2006. Also in 2006, the principal was afflicted with the onset of Alzheimer's disease.

Petitioner asserts that prior to 2007, the Principal executed various estate planning documents, which clearly demonstrate her intent to have both parties participate equally in the management of her affairs and benefit equally upon the distribution of her assets. Specifically, petitioner states that on September 28, 1993, the Principal executed a last will and testament appointing petitioner and respondent as co-fiduciaries and dividing the property of the estate equally between them. Petitioner also states that on October 18, 1994, the Principal executed a health care proxy appointing her husband, now deceased, as primary health care proxy, petitioner as successor, and respondent as second successor. Petitioner further states that on June 12, 1995, the Principal executed a life insurance trust naming petitioner, respondent, and the Principal's attorney Sanford Schlesinger co-trustees, and authorizing the distribution of the trust property to petitioner and respondent upon her death.

However, petitioner also asserts that on November 7, 2007, after the Principal began to suffer the effects of Alzheimer's disease, respondent unilaterally and surreptitiously arranged for the Principal to execute powers of attorney and estate planning documents limiting or eliminating petitioner's role in the management of the Principal's affairs and his ability to benefit upon the distribution of the Principal's assets. In particular, petitioner claims that on November 7, 2007, respondent took the Principal from her New York apartment to the New York offices of Sanford Schlesinger, Esq. for the purpose of executing powers of attorney, a New York Short Form Power of Attorney New York and a duplicative Florida instrument. The powers of attorney named respondent as agent and petitioner as successor agent. Petitioner further claims that respondent caused the Principal to execute a new living will and health care proxy. Petitioner

asserts that his status changed from co-fiduciary to successor fiduciary under the new living will, and from primary health care proxy to successor health care proxy. It is petitioner's position that respondent took advantage of the Principal's declining health in causing her to execute new, self-serving documents, and that the documents were in direct contravention of the Principal's obvious intentions as evidenced by the previous documents.

In addition, petitioner claims that respondent, armed with the new documents, breached her fiduciary duties under the powers of attorney by embarking on a course of conduct that did not conform with the Principal's obvious intention, namely, that the parties participate equally in the management of her affairs and benefit equally upon the distribution of her assets.

Petitioner accuses respondent of making extravagant gifts of the Principal's property to herself, her children, and friends. Specifically, petitioner claims that respondent permitted her daughter and a friend to occupy the New York apartment, rent-free, thereby foregoing monthly rent of approximately \$5,000 to \$14,000. Petitioner also claims that respondent removed valuable jewelry and artwork from the New York and Florida apartments, and made gifts of these items to herself and others. Petitioner further asserts that respondent authorized the transfer of \$40,000 from the Principal's JP Morgan Chase bank and brokerage accounts to an account belonging to respondent's son. In addition, petitioner claims that respondent used the Principal's funds, approximately \$5,000 per month, to continue the Principal's membership at the Palm Beach Country Club for respondent's own use. Petitioner asserts that respondent's actions were not in the Principal's best interests.

Petitioner also points to other alleged conduct by respondent, which, petitioner maintains, demonstrates a scheme to change the Principal's testamentary documents and withhold significant medical information concerning the Principal. Petitioner asserts that while visiting his mother in March 2009, he observed new draft documents and a cover letter from the Principal's attorney. The draft documents reportedly included a revocable trust, living will, health care proxy, powers of attorney, and last will and testament. Petitioner claims that the

proposed documents removed him as successor agent under the powers of attorney, added respondent's children as successor health care proxy, and eliminated him as a beneficiary under the revocable trust and last will and testament. In addition, petitioner asserts that the proposed last will and testament channeled all of the Principal's property into a proposed revocable trust, and that the proposed revocable trust entitled respondent to receive the New York and Florida apartments, and jewelry, and left him only a share of the Principal's personal property.

Petitioner further asserts that respondent withheld important information regarding the Principal's health and dietary restrictions, and declined petitioner's written request for records of all receipts, disbursements, and transactions entered into by respondent as agent for the principal.

Petitioner states that he informed the Principal of the contents of the proposed documents, and that the Principal objected to the proposed changes. Petitioner also states that on March 11, 2009, he drafted a letter on behalf of the Principal, and addressed to her attorney, objecting to the proposed changes and requesting that the Principal's bank statements be sent to him. The letter states, in part:

"This will confirm our phone conversation ... wherein I advised that it has always been my intention and continues to be my intention that my children Nancy Atlas and Steven Seligman share equally in my estate, after my death. Any action by anyone having any power of attorney ... that is contrary to my stated intention of equal distribution to my children, shall be deemed a substantial breach of fiduciary duty owed to me and my estate. Nancy's recent action of obtaining a letter from me was an attempt on her part to divest Steve of his rightful share

I am deeply troubled. I thought the person who had my power of attorney was supposed to act in the best interest of me and my estate. Nancy is not doing that. You will recall I asked you to send documents to me to give Steve and Nancy joint powers of attorney, etc. which you did. Those documents were never signed because they were thrown out by Nancy or at her direction If Nancy cannot abide by my wishes, she needs to be removed as attorney in fact" (Seligman Affidavit, exhibit I).

The Principal signed the letter, and petitioner sent it to Sanford Schlesinger, Esq. by certified mail.

Petitioner states that in light of respondent's actions, he made a written request for records of all receipts, disbursements, and transactions entered into by respondent as agent for the Principal. Respondent reportedly declined the request, and this special proceeding ensued.

The petition seeks (1) to remove respondent as agent for the Principal under the powers of attorney; (2) to compel respondent to produce a record of all receipts, disbursements, and transactions entered into as agent for the principal; (3) to invoke petitioner's powers as successor agent under the powers of attorney; and (4) for injunctive relief pending the resolution of this special proceeding.

Petitioner now moves, by order to show cause, for a preliminary injunction and temporary restraining order enjoining respondent from acting as agent for the Principal under the powers of attorney pending the outcome of this special proceeding.

On November 12, 2012, the parties appeared on the motion for injunctive relief. This Court signed the temporary restraining order, *inter alia*, enjoining respondent:

- "a. From gifting or otherwise transferring Muriel Cantor's property to any of Muriel Cantor's children or more remote descendants;
and
- b. From engaging in the spoliation of any documents, records, or correspondence, including electronically stored materials, relating to Muriel Cantor's property and/or health and/or Atlas's actions as agent for Muriel Cantor" (Temporary Restraining Order [TRO], Proposed Order to Show Cause).

The Court also preserved petitioner's right to seek leave to obtain disclosure (*id.*). Respondent sharply disputes the allegations in the petition, opposes the request for injunctive relief, and moves to dismiss the petition.

DISCUSSION

Motion to Dismiss the Petition

Respondent seeks to dismiss the petition on the ground that the allegations either fall outside the scope of this special proceeding, pursuant to CPLR Article 4 and GOL §5-1510, or are insufficient to show that she breached her fiduciary duties under the powers of attorney.

In reviewing a motion to dismiss, the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez, supra*).

Construed in the light most favorable to petitioner, the petition adequately alleges a claim under GOL §5-1510. The statute permits certain specified individuals to commence a special proceeding under Article 4 of the CPLR to test the validity of powers of attorney (*see also Wright v Stam*, 37 Misc 3d 1212[A][Sup Ct, Kings County 2010]). Section 5-1510(2) states, in part:

A special proceeding may be commenced pursuant to this section for any of the following ... purposes:

- (a) to determine whether the power of attorney is valid;
- (b) to determine whether the principal had capacity at the time the power of attorney was executed;
- (c) to determine whether the power of attorney was procured through duress, fraud or undue influence ...;
- (e) to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal.

Section 1510(3) states that a special proceeding may be commenced pursuant to subdivision two of this section by anyone identified in § 5-1505[2][a][3]), as well as “the agent, the spouse, child or parent of the principal, the principal’s successor in interest, or any third party who may be required to accept a power of attorney.”

The petition alleges at length that respondent took advantage of the Principal's declining health in causing her to execute the powers of attorney and, thereafter, used the documents to engage in a course of conduct that was contrary to the Principal's intentions and best wishes. As such, the petition sufficiently alleges a claim concerning the validity of the November 7, 2007 powers of attorney so as to survive a motion to dismiss.

Furthermore, the petition amply alleges that respondent exceeded her authority under the powers of attorney. The relationship between an attorney-in-fact and its principal is that of agent and principal (*Matter of Ferrara*, 7 NY3d 244, 254 [2006]). As such, an agent acting under a power of attorney has a fiduciary duty to act with the utmost good faith and undivided loyalty toward the principal (see GOL §5-1505[2][a]; *Matter of Ferrara*, *supra*). The fiduciary duty includes the obligation:

- “(1) To act according to any instructions from the principal or, where there are no instructions, in the best interest of the principal and to avoid conflicts of interest.
- (2) To keep the principal's property separate and distinct from any other property owned or controlled by the agent The agent may not transfer the principal's property to himself or herself without specific authorization.
- (3) To keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal ...” (General Obligations Law §5-1505[2]).

A power of attorney is given with the intent that the agent will utilize the power for the benefit of the principal (see *Matter of Ferrara*, 7 NY3d at 254). The agent must act in accordance with the highest principles of morality, fidelity, loyalty, and fair dealing (*id.*).

The petition alleges that respondent breached her fiduciary duties under the powers of attorney, among other things, by making extravagant gifts of the Principal's property to herself, her children, and friends. As stated, the alleged gifts include permitting respondent's daughter and a friend to occupy the New York apartment, rent-free, foregoing monthly rent of approximately \$5,000 to \$14,000; removing valuable jewelry and artwork from the New York and Florida apartments, and making gifts of those items to herself and others; authorizing the

transfer of \$40,000 from the Principal's JP Morgan Chase bank and brokerage accounts to an account belonging to respondent's son; and using \$5,000 from the Principal's account each month to continue the Principal's membership at the Palm Beach Country Club for respondent's own use.

"In 1996, the Legislature amended [s]ection 5-1501 of the General Obligations Law to add lettered subdivision (M), authorizing the attorney-in-fact to 'mak[e] gifts to [the principal's] spouse, children and more remote descendants, and parents, not to exceed the aggregate \$10,000 to each of such persons in any year'" (*Matter of Ferrara*, 7 NY3d at 252, quoting L 1996, ch 499, §1).

"Section 1502(M) construes this gift-giving authority 'to mean that the principal authorizes the agent ... [t]o make gifts ... either outright or to a trust for the sole benefit of one or more of [the specified] persons ... only for purposes which the agent reasonably deems to be in the best interest of the principal, specifically including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes'" (*id.*).

"Such gifts may not exceed \$10,000 'unless the statutory short form power of attorney contains additional language pursuant to section 5-1503 of the general obligations law authorizing gifts in excess of said amount or gifts to other beneficiaries'" (*id.*) Thus, §5-1502(M) unambiguously imposes a duty on the attorney-in-fact to exercise gift-giving authority in the best interest of the principal (*id.*).

Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship (*see Semmler v Naples*, 166 AD2d 751, 752 [3d Dept 1990]). Such gift carries with it the presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest showing of intent on the part of the principal to make the gift (*Mantella v Mantella*, 268 AD2d 852, 852-853 [3d Dept 2000]).

Respondent attempts to overcome the apparent presumption of impropriety and self-dealing with respect to the above-stated extravagant gifts to herself, her children, and others by

offering alternative scenarios for the execution of the powers of attorney and transfer of the Principal's assets. Respondent insists that the Principal intended to execute the 2007 powers of attorney. She asserts that the 2007 documents are similar to previous documents that were drafted by the Principal in 2006. Those documents reportedly named respondent as attorney-in-fact. Respondent states that the only difference between the 2006 and 2007 powers of attorney is that Principal named another party as successor attorney-in-fact in 2006, and then substituted petitioner as successor attorney-in-fact in 2007.

Respondent also maintains that the New York apartment, as well as the Principal's artwork and jewelry, are owned by the Muriel B. Cantor 2007 Revocable Trust (the "Cantor Trust"), of which she succeeded as trustee in 2008, and that any actions she took in relation to the apartment and other items were taken by her as trustee, not as agent under the New York power of attorney.

The Cantor Trust, which was executed on June 26, 2007, names the Principal as trustee, with respondent as first successor, and petitioner as second successor (Notice of Motion to Dismiss, exhibit D, p. 15, ¶ 9). The Trust document clearly refers to the New York apartment, jewelry, and works of art held by the Trust (*see id.*, pp. 4-5). Respondent succeeded as trustee when the Principal resigned in 2008 (*see* Cantor Trust Resignation of Trustee, Notice of Motion to Dismiss, exhibit G). To the extent that the petition alleges that respondent breached her fiduciary duty with respect to the apartment, jewelry and artwork after she succeeded as Trustee, this conduct cannot form the basis of a proceeding, pursuant to §5-1510 of the GOL, to challenge the validity of powers of attorney.

However, respondent's attempt to use her authority under the power of attorney to justify continuing the Principal's Palm Beach Country Club membership so that she and her children may use the facilities is problematic. General Obligations Law §5-1502I states, in part:

"In a statutory short form power of attorney, the language conferring general authority with respect to 'personal and family

maintenance' must be construed to mean that the principal authorizes the agent:

...
7. To continue payments incidental to the membership or affiliation of the Principal in any church, club, society, order or other organization or to continue contributions thereto."

A power of attorney proffered by a principal is clearly given with the intent that the attorney-in-fact will utilize the power for the benefit of the Principal (*Moglia v Moglia*, 144 AD2d 347, 348 [2d Dept 1988]). The attorney-in-fact is only authorized to make gifts to himself and others insofar as these gifts are in the Principal's best interest, interpreted in GOL §5-1502M as gifts to carry out the principal's financial, estate or tax plans (*Matter of Ferrara*, 7 NY3d at 254).

Here, respondent fails to show how her arrangement benefitted the Principal or served her best interests. Furthermore, the assertion that respondent discontinued the membership in October 2012, more than a year after the Principal stopped using the facilities, does nothing to overcome the presumption of impropriety and self-dealing. By respondent's own admission, the annual dues for membership at the country club were approximately \$18,000.00.

Similarly, respondent fails to make a clear showing that the Principal intended to give respondent's son \$40,000 in 2008, so as to overcome the presumption of impropriety and self-dealing. The assertion that the doctrine of laches bars petitioner's challenge to the transfer, since he learned about it around the time that it was made and waited more than four years to object, is unsubstantiated. This special proceeding seeks to examine the validity of the powers of attorney, and whether respondent breached her fiduciary obligations to the Principal under said documents through impropriety and self-dealing. The allegation in the petition that respondent gave her own son \$40,000 from the Principal's assets, property that is the subject of the agency relationship, raises valid questions as to the propriety of respondent's conduct.

Furthermore, contrary to respondent's position, petitioner has standing to request that respondent produce for judicial review all receipts, disbursements, and transactions entered into as attorney-in-fact for Principal. Petitioner brings this proceeding under CPLR Article 4 and

GOL §5-1510. As noted §5-1510 expressly permits the agent, the spouse, child or parent of the principal, the principal's successor in interest, or any third party who may be required to accept a power of attorney to commence a special proceeding to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal, a disclosure of records and a judicial review of those records. Thus, the motion to dismiss the petition is denied.

Motion for Injunction

Turning to the request for injunctive relief, CPLR 6301 states that a preliminary injunction may be granted”

“[i]n any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.”

The purpose of a preliminary injunction is to preserve the status quo pending trial (see *Schlosser v United Presbyt. Home at Syosset*, 56 AD2d 615 [2d Dept 1977]).

The party seeking a preliminary injunction must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in its favor (see *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). In addition, the movant bears the burden of establishing each of these elements by clear and convincing evidence (see *Multi Media Entertainment, Inc. v National Telefilm Assocs., Inc.*, 58 AD2d 785 [1st Dept 1977]).

As to likelihood of success on the merits, the movant must make a prima facie showing of a clear right to the relief sought based upon the undisputed facts (see *McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc.*, 114 AD2d 165, 172-173 [2d Dept 1986]). The movant's showing need not be conclusive (*Terrell v Terrell*, 279 AD2d 301, 302 [1st Dept 2001]). The

mere demonstration of a prima facie case is sufficient for provisional relief (*id.*). Actual proof of the case should be left to further court proceedings (*id.*).

As stated, the petition essentially alleges that respondent breached her fiduciary duty to the Principal under the powers of attorney. In order to state a claim for breach of fiduciary duty, the pleading must allege the existence of a fiduciary relationship and misconduct by respondent, resulting in injury (*see Cavaliere v Plaza Apartments, Inc.*, 84 AD3d 712, 713 [2d Dept 2011]). Petitioner amply demonstrates a likelihood of success on his claim that respondent breached her fiduciary duty to the Principal by engaging in self-dealing and other actions adverse to the best interests of the Principal.

Petitioner also demonstrates irreparable injury in the absence of an injunction. The alleged harm, an opportunity for respondent to shift management and control of the Principal's assets, and deprive petitioner of the opportunity to participate and share equally with respondent the management of the Principal's affairs, may properly be viewed as irreparable injury (*see Vanderminden v Vanderminden*, 226 AD2d 1037, 1041 [3d Dept 1996]).

In addition, petitioner shows that a balance of the equities favors the issuance of a preliminary injunction. Petitioner adequately shows that the harm he would suffer in the absence of an injunction is greater than the harm the injunction would cause (*see Kings Mall v Wenk*, 42 AD3d 623, 625 [3d Dept 2007]).

CONCLUSION

Due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of petitioner and against respondent and that petitioner is entitled to a preliminary injunction on the ground that petitioner has demanded and would be entitled to a judgment restraining respondent from the commission or continuance of an act, which, if committed or continued during the pendency of this proceeding, would produce injury to petitioner, as set forth in the aforesaid decision; it is

ORDERED that the undertaking is fixed in the sum of \$20,000 conditioned that petitioner, if it is finally determined that he is not entitled to an injunction, will pay to respondent all damages and costs which may be sustained by reason of this injunction; and it is further

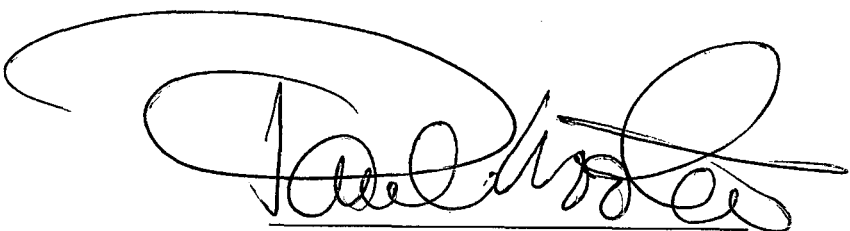
ORDERED that respondent, her agents, servants, employees and all other persons acting under the jurisdiction, supervision or direction of respondent, are enjoined and restrained, during the pendency of this proceeding, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of respondent or otherwise, any of the following acts:

- (1) acting as agent for the principal under New York and Florida powers of attorney executed on November 7, 2007; and
- (2) withholding records of all receipts, disbursements, and transactions entered into as agent for the principal; and it is further

ORDERED that counsel are directed to appear for a Preliminary Conference in Room 341, 60 Centre Street, New York, New York, on October 30, 2013, at 11:00 AM.

This constitutes the Decision and Order of the Court.

Dated: Sept. 5, 2013



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE