

Matter of Wellington Trusts

2013 NY Slip Op 32569(U)

September 26, 2013

Surr Ct, Nassau County

Docket Number: 117708

Judge: Edward W. McCarty III

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Judicial Settlement of the Final Account
of Proceedings of the

WELLINGTON TRUSTS.

File No. 117708
File No. 167490
File No. 329415
File No. 329418
File No. 329419

Dec. No. 28975
Dec. No. 28976
Dec. No. 28977
Dec. No. 28978
Dec. No. 28979

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Before the court is a motion filed by trustee JPMorgan Chase Bank, N.A., to strike
objectant Sarah P. Wellington's jury demands and for leave to supplement pleadings.

Subsequent to the filing of the motion, Sarah P. Wellington agreed that she has no right to a jury
trial under New York law.¹ Consequently, the sole issue presently before the court is the
trustee's motion for leave to supplement its pleadings to assert an affirmative defense for a credit
pursuant to the New York General Obligations Law or, in the alternative, to assert a cross-claim
against the estate of its co-trustee, Herbert G. Wellington, Jr. The court heard oral argument on
the motion on July 3, 2013.

BACKGROUND

As noted in prior decisions issued by this court, Sarah P. Wellington ("Sarah"), is the
daughter of Thomas D. Wellington, who is deceased ("Tom"), as well as the paternal
granddaughter of Herbert G. Wellington, Sr., ("Herbert, Sr.") and Elizabeth Wellington
("Elizabeth"), both also deceased. The trusts herein referred to as the Wellington Trusts, or the

¹See Counterclaim Plaintiff Sarah P. Wellington's Memorandum of Law in Opposition to
Petitioner JPMorgan Chase Bank, N.A.'s "Motion to Strike Jury demand and for Leave to
Supplement Pleadings" at p. 3.

Trusts, were created pursuant to four instruments: (1) an inter vivos trust agreement executed by Herbert, Sr. on August 15, 1961 (the “1961 Trust Agreement”); (2) Herbert Sr.’s Last Will and Testament (“Herbert Sr.’s Will”); (3) the Last Will and Testament of Herbert’s wife, Elizabeth (“Elizabeth’s Will”); and (4) the Last Will and Testament of Herbert Sr.’s younger son, Tom (“Tom’s Will”).

Prior to Tom’s death, JPMorganChase Bank, N.A. (“JPMorgan”), served as co-trustee for the Trusts for almost forty years. Herbert, Sr. had appointed his older son, Herbert Wellington, Jr. (“Herb”), as co-trustee, while Elizabeth had appointed Herbert Sr.’s and Herb’s business partner, Robert Merrill, as co-trustee. While Tom was alive, there were three trusts for his benefit, under the 1961 Trust Agreement (“Tom Trust #1”)², under Herbert Sr.’s Will (“Tom Trust #2”)³ and under Elizabeth’s Will (“Tom Trust #3”)⁴. Under the 1961 Trust Agreement, upon Tom’s death, one-fourth of Tom Trust #1 flowed into a trust for the benefit of Sarah (“Sarah Trust #1”)⁵ (and the other three-fourths to trusts for her half-siblings).

Upon Tom’s death, Tom exercised powers of appointment granted to him under Herbert Sr.’s Will and under Elizabeth’s Will and created four new trusts, one for each of his four children, funded with the assets from Tom Trust #2 and Tom Trust #3. Sarah’s trust is known as “Sarah Trust #2”⁶. Following Tom’s death, JPMorgan continued, along with Herb, to serve as

²Tom Trust#1 corresponds to this court’s file no. 329418.

³Tom Trust#2 corresponds to this court’s file no. 117708.

⁴Tom Trust#3 corresponds to this court’s file no. 167490.

⁵Sarah Trust#1 corresponds to this court’s file no. 329419.

⁶Sarah Trust#2 corresponds to this court’s file no. 329415.

co-trustee under the 1961 Trust Agreement until Herb's resignation by decree of this court dated April 4, 2005. Herb died on August 15, 2005.

THE ACCOUNTS

In August 2003, JPMorgan and its co-trustees filed petitions seeking approval of their Accounts for Tom Trust #1, Tom Trust #2, Tom Trust #3, Sarah Trust #1 and Sarah Trust #2. The petitions were served on all interested parties, including but not limited to Sarah and her half-siblings. Objections were filed by Sarah but by no other parties.

THE OBJECTIONS

Sarah filed objections to the accounts filed in connection with Tom Trust#1, Tom Trust#2, and Sarah Trust #1. Sarah alleges that JPMorgan breached its fiduciary duties to her by (1) causing substantial losses in the trusts by allegedly failing to diversify the trusts' assets; and (2) failing to make appropriate distributions to her from the income and/or principal of the trusts. More specifically, the expert report filed in support of Sarah's objections alleges that JPMorgan failed to sell certain assets, failed to diversify among different classes of assets, and failed to diversify within classes of assets. Sarah seeks equitable and monetary damages in the form of restitution, retroactive distributions, return of commissions, surcharges, attorneys' fees, diversification, removal of the fiduciary and appointment of a successor trustee or co-trustee. Although Sarah objected to the conduct of both co-trustees, JPMorgan and Herb, she only sought affirmative relief from JPMorgan.

THE SETTLEMENT AGREEMENT

In December 2012, Sarah entered into a settlement agreement concerning Tom Trust #1, Tom Trust #2, and Sarah Trust #1 with Herb's estate (the "settlement agreement"). Pursuant to

the settlement agreement, Herb's estate paid \$100,000.00 to Sarah in exchange for a full release. Sarah agreed to indemnify Herb's estate against any claims for contribution.

THE MOTION TO SUPPLEMENT PLEADINGS

In light of the settlement agreement between Sarah and Herb's estate, JPMorgan argues that since JPMorgan and Herb are jointly and severally liable for their actions as co-trustees, JPMorgan must be permitted to supplement its pleadings to (1) assert an affirmative defense for a credit for Herb's equitable share of the trustee's total liability pursuant to New York's General Obligations Law or, in the alternative, (2) assert a cross-claim against Herb's estate for contribution.

JPMorgan maintains that neither Sarah nor Herb's estate will be prejudiced by supplemental pleadings, as both parties were aware of the co-trustees' joint and several liability from the inception of the proceedings. No delay occurred in filing the motion to supplement the pleadings as the settlement agreement between Sarah and Herb's estate was only recently executed and was not provided to JPMorgan until January 22, 2013.

The first pleading which JPMorgan seeks to add is an affirmative defense for a credit pursuant to New York General Obligations Law.

Section 15-108 of the General Obligations Law provides as follows:

“§ 15-108. Release or covenant not to sue

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the

damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

(d) Releases and covenants within the scope of this section. A release or a covenant not to sue between a plaintiff or claimant and a person who is liable or claimed to be liable in tort shall be deemed a release or covenant for the purposes of this section only if:

- (1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar;
- (2) the release or covenant completely or substantially terminates the dispute between the plaintiff or claimant and the person who was claimed to be liable; and
- (3) such release or covenant is provided prior to entry of judgment.”

In the alternative, JPMorgan argues that it should be permitted to supplement its pleadings to assert a cross-claim for contribution against Herb’s estate, based upon the joint and several liability of the co-trustees. The relevant section of the CPLR, § 3019 (b), provides:

“(b) Subject of cross-claims. A cross-claim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more defendants, a person whom a defendant represents or a defendant and other persons alleged to be liable. A cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.”

OPPOSITION TO THE MOTION

Counsel for Sarah filed opposition to the present motion, noting that Sarah originally sought damages from Herb as well as from JPMorgan, but that she deleted that request for relief in 2006, after Herb’s death, based upon information Sarah received concerning Herb’s diminished mental capacity. Counsel further asserts that Herb had successfully petitioned this court to resign as co-trustee retroactive to January 2001, prior to the funding of Sarah Trust #1,

pursuant to a decree dated April 11, 2005. It is argued that JPMorgan unduly delayed amending its pleadings; the settlement agreement between Sarah and Herb's estate did not change the underlying facts, which had been known to JPMorgan for at least 10 years. Counsel asserts that having not raised these issues until now, it would be unfair to allow JPMorgan to assert them only after Sarah released and agreed to indemnify Herb's estate.

Further, counsel for Sarah maintains that the timing of the motion demonstrates bad faith by JPMorgan and that the proposed amendment would significantly prejudice Sarah. Moreover, counsel argues that the affirmative defense would ultimately be futile because New York General Obligations Law § 15-108 (a) will not apply to limit the liability of JPMorgan. Counsel maintains that the cross-claim which JPMorgan wishes to assert against the estate of Herb is actually a third-party complaint for contribution, since Sarah is not seeking damages from Herb's estate. No matter which way the complaint is framed, counsel argues that it is barred by the co-fiduciary liability rule, which provides that a fiduciary under an obligation cannot prevail against a co-fiduciary for breaching the same obligation. In support, he cites *Matter of Knox* (96 AD3d 1652, 1654 [4th Dept 2012]).

ANALYSIS

The court has broad discretion whether to grant or deny leave to amend under CPLR § 3025 (b). "Leave to amend a pleading pursuant to CPLR § 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend" (*Seidman v Industrial Recycling Props., Inc.*, 83 AD3d 1040 [2d Dept 2011]; *see also Matter of Pinto*, 2012 NY Misc Lexis 5391, 2012 NY Slip Op 52200 [U] [Sur Ct, Richmond

County 2012]). The court will consider: (1) how long the amending party knew the facts raised in the amendment and whether a reasonable excuse is offered for the delay (*Matter of Goggins*, 231 AD2d 634 [2d Dept 1996]); (2) whether the amendment plainly lacks merit (*Matter of Carvel*, NYLJ, Apr. 16, 2002 at 23 [Sur Ct, Westchester County]; *Seaman Corp v Binghamton Sav. Bank*, 243 AD2d 1027 [3d Dept 1997]; and (3) whether the amendment would cause prejudice to the other party (*Matter of Carvel*, NYLJ, Apr. 2, 2002, at 23 [Sur Ct, Westchester County]; *Seaman Corp v Binghamton Sav. Bank*, 243 AD2d 1027 [3d Dept 1997]; *Matter of Goggins*, 231 AD2d 634 [2d Dept 1996]; *Wyso v City of New York*, 91 AD2d 661 [2d Dept 1982]; *Matter of Sabha*, 65 AD2d 917 [4th Dept 1978]). Typically, denial of a motion for leave to amend might occur after a lengthy delay following the filing of the original petition or just before commencement of a trial (*Gallo v Aiello*, 139 AD2d 490 [2d Dept 1988]).

The court has carefully considered the arguments made on behalf of JPMorgan as well as Sarah's opposition to the motion. Sarah chose to delete her request for damages against Herb's estate based upon her understanding of Herb's diminished capacity, and subsequently entered into a settlement agreement with Herb's estate. However, her decision to not seek damages against Herb's estate, and ultimately to release and indemnify Herb's estate, cannot impact upon JPMorgan's right to raise an affirmative defense or seek contribution from its co-trustee. Whether Herb bears liability for trust losses, if any, or is liable for a failure to make distributions to Sarah, are questions which will not be decided in the context of this motion. As to Sarah's argument that JPMorgan delayed amending its pleadings, the court notes that the present motion was filed only weeks after Sarah reached a settlement agreement with JPMorgan's co-fiduciary. Leave to amend is generally exercised freely (*Matter of Bender*, 18 Misc 3d 1109A, 2007 NY

Slip Op 52478 [U] [Sur Ct, Nassau County 2007]). Finally, counsel for Sarah cites *Matter of Knox* (96 AD3d 1652 [4th Dept 2012]) for the proposition that a fiduciary cannot prevail against a co-fiduciary for breaching an obligation owed by both fiduciaries, arguing that this proposition bars the cross-claim which JPMorgan seeks to assert against Herb's estate. In fact, the essence of the co-fiduciary liability rule is that all co-trustees are jointly liable for any damages, and that one co-fiduciary cannot evade liability by claiming that the other co-fiduciary bears sole liability (*id.* at 1654).

CONCLUSION

The court grants leave to JPMorgan to supplement its pleadings to assert an affirmative defense for a credit pursuant to New York's General Obligations Law or to assert a cross-claim against the estate of Herbert G. Wellington, Jr. with respect to each of the three trusts which are the subject of the objections and the settlement agreement within thirty (30) days of the date of the decision.

This is the decision and order of the court and no further order need be submitted.

Dated: September 26, 2013

EDWARD W. McCARTY III
Judge of the
Surrogate's Court