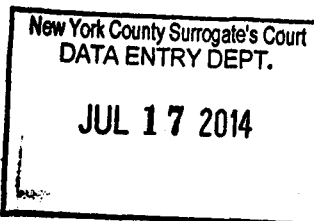


Matter of Modell
2014 NY Slip Op 31881(U)
July 17, 2014
Surrogate's Court, New York County
Docket Number: 2001-1730
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY



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In the Matter of the Petition of
Abby Modell, as Co-Trustee and Income
Beneficiary of the Testamentary Trusts
Established by

MICHAEL MODELL,

File No. 2001-1730

Deceased,

for a Decree Revoking Letters of
Trusteeship Issued to Mitchell Modell
and Joel Goldberg and Other Relief
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A N D E R S O N, S .

This is a proceeding brought by Abby Modell to remove Mitchell Modell and Joel Goldberg as her co-trustees of the three trusts established under the will of her husband, Michael Modell. Before the court is a motion by Mitchell and Joel to dismiss the petition, as amended, on the grounds that it fails to state a claim for removal (CPLR 3211[a][7]) and, in any event, is barred by the statute of limitations (CPLR 3211[a][5]).

Michael Modell died at the age of 48 on April 28, 2001, survived by Abby and their three children. Under Articles SECOND, THIRD and SIXTH of his will, which was admitted to probate in this court, decedent established trusts for the benefit of Abby and their children. Letters testamentary issued to Abby, and letters of trusteeship issued to her along with decedent's brother, Mitchell, and Joel, who is described as a "friend" in the will.

At his death, decedent had a one-half ownership interest

in retailer Modell's Sporting Goods ("Modell's"). Such ownership interest became the primary asset of the trust established under Article SIXTH of the will (the "Marital Trust"). Mitchell owns the other half of Modell's and manages its operations as the company's Chief Executive Officer.

For a number of years, the administration of these trusts proceeded without litigation. However, in early 2010, Abby commenced this proceeding to remove her co-trustees and, in a separate proceeding, also sought to compel them to account. The court directed the trustees, including Abby, to account for all three trusts. The court also directed that this removal proceeding be held in abeyance and then consolidated with the accountings when jurisdiction was complete (*Matter of Modell*, NYLJ, Nov. 4, 2010, at 26, col 5 [Sur Ct, NY County 2010]).

Mitchell and Joel filed their joint accountings first. Abby then filed a "zero accounting" for each of the three trusts, i.e., an account that indicates that she was not, as a practical matter, involved in the trusts' administration and lists on each schedule a value of zero. The basis for Abby's accounting in this manner was her contention that Mitchell and Joel had excluded her from the "decision-making process" and had given her "no notice or opportunity for input into any trustee decisions." Abby's three children, as remainder beneficiaries of the trusts, filed waivers and consents to their mother's accounts, but did not do so as to those of her

co-trustees. Jurisdiction is now complete in the accounting proceedings. SCPA § 2211 examinations were requested and, after the resolution of six discovery-related motions (*Matter of Modell*, NYLJ 1202622777524 [Sur Ct, NY County 2013]), the parties are proceeding with pre-objection discovery.

Before turning to the merits of the instant motion, the court notes that movants did not attach to their motion papers a copy of Abby's amended petition. Although this is a technical defect which could be viewed as a basis to deny the motion (see e.g. *Alizio v Perpignano*, 225 AD2d 723 [2d Dept 1996]), the court will consider the motion, since the pleading has been filed with the court and thus is available for review. However, as this court noted recently, "filing a motion which requires the court to search its records to obtain a pleading upon which the motion is based is not an advisable litigation practice" (*Matter of Terian*, NYLJ 1202646597731, at *3 [Sur Ct, NY County 2014], citing *Sheedy v Pataki*, 236 AD2d 92 [2d Dept 1997]; *Loeb v Tanenbaum*, 124 AD2d 941 [3d Dept 1986]). Further, such practice affords a respondent a basis to argue for dismissal, thus engendering more litigation and potential for delay in resolving the ultimate issues.

First at issue on this motion to dismiss is whether the allegations in the amended petition state grounds for movants'

removal as trustees under SCPA § 711.¹ On a motion to dismiss for failure to state a claim (CPLR 3211[a][7]), the court must "'accept the facts as alleged in the [pleading] as true, accord [petitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Respondent on the motion may submit affidavits, but they "will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that [petitioner] has no [claim or] cause of action'" (*Matter of Lawrence*, 11 NY3d 588, 595 [2008], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). The issue of "[w]hether a [petitioner] can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

As an initial matter, the pleading does not specify the applicable subsections of § 711 pursuant to which removal is sought. The omission, however, is not fatal to the pleading, since courts "look to the substance [of the pleading] rather

¹ For reasons that are unclear, movants argue as their first ground for dismissal that Abby's removal claim is time-barred (CPLR 3211[a][5]). However, such argument assumes that the pleading states a claim for removal, which movants clearly do not concede. The court will therefore address first movants' argument that the pleading fails to state a claim (CPLR 3211[a][7]). Only if the pleading states a claim will it be necessary to determine if the claim is time-barred.

than to the form" (*Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964]). The court's task is to determine whether the petition states any ground for removal under the statute. Reference to the statute establishes that three subsections are arguably relevant.

SCPA § 711(2) provides that a fiduciary's letters may be revoked,

"[w]here by reason of his having wasted or improperly applied the assets of the estate, ... or otherwise improvidently managed or injured the property committed to his charge or by reason of other misconduct in the execution of his office or dishonesty, drunkenness, improvidence or want of understanding, he is unfit for the execution of his office."

Section 711(8) provides a further ground for removal in circumstances where a fiduciary "does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or ... is otherwise unfit for the execution of the office." Finally, section 711(10), which applies specifically to testamentary trustees, provides that removal is appropriate, "where [the fiduciary] has violated or threatens to violate his trust ... or is for any other cause deemed an unsuitable person to execute the trust."

Here, the conduct alleged (and assumed to be true) in Abby's 19-page pleading details a disturbing course of conduct by the fiduciaries and the total exclusion of Abby as co-trustee. With regard to Mitchell, Abby alleges that, by virtue

of his control of Modell's through his personal ownership of 50% of its stock, his position as a trustee of the Marital Trust, and his position as an officer and director of the company, Mitchell has furthered "his own interests to the detriment of the trust beneficiaries." Several examples of alleged conduct are illustrative, but two in particular warrant highlighting.

According to Abby, after her husband died, Mitchell increased his annual compensation at Modell's by more than \$4.4 million dollars to an amount well in excess of what executives at comparable companies are paid. As a result of such conduct, the amount of income available to distribute as dividends to Modell's shareholders, i.e., the Marital Trust, necessarily has been significantly reduced. Abby further alleges in detail that Mitchell has caused Modell's to make improper payments to fund "his lavish personal lifestyle" and has allowed family members, who allegedly perform no services for Modell's, to receive substantial salaries and to charge travel and entertainment expenses to the company, all to the detriment of the Marital Trust. According to Abby, the expenses of Mitchell and his family have been so excessive that a federal income tax audit of Modell's tax returns for 2006 and 2007 resulted in the disallowance of almost \$1.5 million in travel, meal and entertainment tax deductions.

With regard to the management of the trusts, Abby contends

that Mitchell has excluded her from any meaningful role as a fiduciary, notwithstanding that all of the co-trustees should be involved in making decisions affecting the trusts. In addition, Abby maintains that Mitchell has improperly exercised exclusive control over Modell's. For example, Mitchell does not hold formal shareholder meetings and, if informal meetings are held, Abby is not informed of them even though she is a co-trustee of the Marital Trust, which owns a 50% interest in Modell's.

Abby also claims that Mitchell's conduct has violated decedent's clear direction in the will that "the trustees shall have no power to invest in or retain non-income producing property [in the Marital Trust] without the consent of [Abby]." According to Abby, Mitchell has violated this provision by retaining the Marital Trust's interest in Modell's for his personal benefit and then by failing to make significant distributions of income from Modell's to the Marital Trust. Based upon all of Mitchell's alleged conduct, Abby contends that he is unfit to act as trustee not only of the Marital Trust, but also, of the trusts established under Articles SECOND and THIRD.

With regard to Joel, Abby alleges that, although he receives annual trustee commissions in excess of \$130,000, he has "wholly abdicated his duties as co-trustee." Abby contends that Joel acts solely at the behest of Mitchell, and that not

only has he facilitated Mitchell's efforts to exclude Abby from her role as co-trustee, but he has also allowed Mitchell to render Modell's a non-income-producing asset of the Marital Trust in violation of the will's directive. According to Abby, Joel, who is a psychologist with "no expertise in financial matters, trust matters, or the retailing of sporting goods or any other aspect of Modell's business," continually sides with Mitchell on every issue related to the trusts because he is " beholden to Mitchell" as a "paid consultant" at Modell's. Under these circumstances, Abby contends that Joel is unfit to be a trustee, that his continued service presents a danger to all three trusts and that he should therefore be removed as well.

In opposition, movants first contend that the allegations in the amended pleading fail to meet the "high standard for removal of a trustee." Although removal of a fiduciary is a drastic remedy to be exercised "sparingly" (*Matter of Duke*, 87 NY2d 465, 473 [1996]), movants' suggestion that there is a heightened pleading requirement in a removal proceeding is simply incorrect. Where, as here, some of the allegations upon which removal is sought are based upon a breach of trust, the "circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]). However, Abby's pleading has given movants notice of the specific acts which she alleges are breaches of the trustees' fiduciary obligations (see *Eurycleia*

Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009], stating that "the purpose underlying [CPLR 3016(b)] is to inform a defendant of the complained-of incidents").

Movants' contention that Abby's allegations of misconduct are "vague and conclusory" and therefore insufficient as a matter of law also does not withstand scrutiny. A fair reading of the pleading (as opposed to movants' self-serving and selective one) demonstrates that its allegations of misconduct by both fiduciaries provide more than sufficient grounds for their removal under SCPA § 711. Notably, none of the cases cited by movants in this regard (or in support of their other arguments addressed to the sufficiency of the allegations) involves motions to dismiss in a removal proceeding and most are decisions on motions for summary judgment or after a hearing, which simply have no bearing on the issue here.

Nor is dismissal warranted on the basis of movants' assertion that the corporate operations of Modell's are "irrelevant" to the issue of removal. Among other things, such argument ignores Abby's allegations concerning the losses to the Marital Trust caused by Mitchell's overreaching as CEO. Under movants' theory of irrelevancy, Mitchell would be insulated as a matter of law from any wrongdoing as a trustee even if he engaged in conduct as CEO that an independent trustee would have challenged.

Movants' other arguments simply have no place in a motion

to dismiss. For example, movants' attempt to cast the petition as insufficient as a matter of law because Abby has only an income interest in the trust is without basis. Movants cannot, at this stage of the litigation, establish that their duty to balance the interests of the income and remainder beneficiaries (Abby's three children) shields them from Abby's allegations of wrongdoing in relation to income distributions. Further, movants' argument that the remainder beneficiaries may have defaulted, but did not actually "consent" to the removal of Mitchell and Joel and the appointment of two proposed successor trustees has no bearing on the issues before the court. In any event, such argument is unsupported by the record. All three remainder beneficiaries signed a "Waiver and Consent" and have appeared by counsel in this proceeding.

Likewise, the fact that movants were decedent's chosen fiduciaries is not fatal to the petition. Although courts give great deference to a testator's choice of fiduciary (see *Matter of Duke*, 87 NY2d 465, 473 [1995], citing *Matter of Leland*, 219 NY 387 [1916]), such principle cannot insulate a fiduciary from allegations of wrongdoing on a motion to dismiss. Nor is Mitchell exempted from removal for self-dealing by the fact that decedent understood when he nominated Mitchell as trustee that Mitchell would have dual roles. Decedent's awareness of such conflict cannot be deemed to have given Mitchell a license to overreach as alleged. Moreover, since Abby is not seeking

removal based upon the mere fact that Mitchell holds positions in which his interests might be conflicted, the cases cited by movants in this regard, *Hoopes v Bruno* (128 AD2d 991 [3d Dept 1987]) and *Matter of Foss* (282 App Div 509 [1st Dept 1953]), are inapposite.

Finally, movants' argument that the pleading should be dismissed because "there has been no allegation of any harm to the trust estate" ignores Abby's allegations that Mitchell has kept more than his fair share of the income generated by Modell's for himself and his family. That Modell's may be a successful entity, that its value may have increased over time under Mitchell's stewardship, and that Mitchell has an interest in the company's prosperity is irrelevant if he is reaping benefits of the company's success to the exclusion of a 50% shareholder of Modell's, namely the Marital Trust.

Accordingly, the motion is denied to the extent it seeks dismissal of the amended pleading for failure to state a claim (CPLR 3211[a][7]).

Since Abby has stated a claim for removal against both Mitchell and Joel, we now turn to movants' argument that the pleading is barred by the six-year statute of limitations applicable to claims in equity, such as for breach of fiduciary duty (CPLR § 213[1]; see e.g. *Loengard v Santa Fe Industries, Inc.*, 70 NY2d 262 [1987]). However, even if the court were to assume that all of the allegations in the amended petition

would, in fact, be barred under such limitations period, movants' argument fails because it ignores the true nature of this proceeding. This is a proceeding **to remove** a fiduciary pursuant to SCPA § 711, based upon, among other things, allegations of breach of fiduciary duty. In a removal proceeding, there is no statute of limitations period (see *Matter of D'Onofrio*, 97 Misc 2d 250 [Sur Ct, Bronx County 1978]; see also 1 Warren's Heaton, Surrogate's Court Practice, § 4.02, at 4-6 [7th ed]); 2 Warren's Heaton, Surrogate's Court Practice, § 33.10[3][c], at 33-77 [7th ed]).

The reason the statute of limitations does not apply is clear. The purpose of a removal proceeding "is not to punish the fiduciary as an individual, but to protect the estate" (*Matter of D'Onofrio*, 97 Misc 2d at 252). It would be directly counter to such purpose if a time-bar prevented removal of a fiduciary whose conduct could be proved to be a present danger to an estate or trust. Such a result would also be inconsistent with the court's ongoing responsibility to ensure the protection of the estate as reflected SCPA § 719, which sets forth the circumstances in which the court can remove or suspend a fiduciary *sua sponte*.

In *Matter of D'Onofrio* (97 Misc 2d 250), the court discussed at length this very issue when it declined to apply the statute of limitations in a proceeding to remove an administrator:

"The fiduciary's authority is always subject to close scrutiny by the court issuing his letters. The scope of this continuing scrutiny is embodied in the express statutory authority stated in SCPA 719 (subd 10) which allows the court on its own initiative to revoke letters of administration, '[where] any of the facts provided in 711 are brought to the attention of the court.' This statutory scheme suggests an intent on the part of the Legislature never to circumscribe a court in revoking a fiduciary's authority where the circumstances justify such action. Clearly, if the court may always revoke letters based upon facts being presented to it, even informally, it was not intended that, as a matter of law, a time limit be placed when the same information could be presented in a formal proceeding."

(*Id.* at 253). Movants attempt to distinguish *Matter of D'Onofrio* by arguing that its holding is limited to a situation where the court seeks to rectify a fraud on the court when the appointment was made. Such argument, however, finds no support in the court's reasoning and, indeed, is belied by the court's statement below, which is fully applicable to the situation here:

"A contrary finding [one that would allow invocation of the statute of limitations] would require concluding that it was the intent of the Legislature that a court, after a period of time, is not able to dismiss a fiduciary who has wrongly obtained his authority, who may possibly have no interest in the estate, who might possibly possess no status justifying his appointment or **who may have committed grossly improper acts at some early point of a prolonged administration**"

(*Id.* [emphasis added]).

Similarly, movants' argument that there is binding Appellate Division authority for the proposition that a six-year statute of limitations applies is based on a misreading of the cases they cite. *Matter of Coons* (161 AD2d 930 [3d Dept

1990]) did not purport to analyze, much less determine, whether a statute of limitations applies in a removal proceeding. Movants' reliance on *Matter of Picillo* (19 AD3d 1087 [4th Dept 2005]) is equally misplaced. That case does not stand for the proposition that a petition seeking removal of a fiduciary under SCPA § 711 may be dismissed on statute of limitations grounds. Rather, the court discussed the application of the statute of limitations in a wholly different type of proceeding, the "gravamen" of which was "the breach of trust or fiduciary duty by **decedent** or an actual or constructive fraud perpetrated by **him**" (*id.* at 1088 [emphasis added]). In other words, the court analyzed a statute of limitations argument not with respect to allegations that an acting fiduciary had engaged in wrongdoing, but rather, where petitioner sought relief from a decedent's estate "in the nature of restitution of converted funds or the imposition of a constructive trust upon their traceable proceeds" (*id.*).

For these reasons, the motion is denied to the extent it seeks dismissal of the amended petition on the ground of statute of limitations (CPLR 3211[a][5]).

In a related argument, movants assert that dismissal of the pleading is warranted under the equitable doctrine of laches. Unlike the defense of statute of limitations, laches may be pleaded as a defense in a removal proceeding (see e.g. *Matter of De Belardino*, 77 Misc 2d 253 [Sur Ct, Monroe County

1974], *affd* 47 AD2d 589 [4th Dept 1975]). However, movants have failed on their motion to dismiss to establish a laches defense as a matter of law. Assuming for argument's sake that a laches defense can be adjudicated on a motion to dismiss, movants here have failed to offer a factual affidavit demonstrating prejudice, which is a necessary element of laches (*Matter of Linker*, 23 AD3d 186 [1st Dept 2005]). Under these circumstances, the motion is also denied to the extent it seeks dismissal based upon the doctrine of laches.

This decision constitutes the order of the court.

Dated: July 17, 2014

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