

Matter of McIntosh

2014 NY Slip Op 32523(U)

October 1, 2014

Supreme Court, Surrogate's Court

Docket Number: 2009/3816/A

Judge: Nora S. Anderson

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New York County Surrogate's Court
DATA ENTRY DEPT.
OCT 01 2014

SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Petition to
Determine the Validity of a Claim in
the Estate of

File No. 2009/3816/A

JACK MCINTOSH,

Deceased.

-----X
A N D E R S O N , S .

This proceeding was brought pursuant to SCPA § 1809 to determine the validity of various claims asserted against the estate of Jack McIntosh ("decedent"). The executor of decedent's estate ("respondent") moves for summary judgment dismissing all claims.

Decedent, who died on June 15, 2009, was the income beneficiary and a co-trustee of a trust (the "Trust") established under the will of his pre-deceased wife, Mary. The Trust consists of an IRA account (the "IRA"), valued at approximately \$500,000 as of Mary's date of death, and her Manhattan cooperative apartment (the "Apartment"). Petitioner, in his capacity as sole surviving trustee of the Trust, asserts several claims against decedent's estate which arise from: (1) decedent's allegedly excessive and unauthorized withdrawals from the Trust; (2) respondent's withholding of tax refunds due to the Trust; and (3) decedent's alleged negligence in administering the Trust.

Decedent and petitioner are named as co-trustees, and petitioner (Mary's son and decedent's stepson) is a remainder beneficiary. The Trust directed that decedent receive all the

Trust income, and authorized the trustees to make distributions from principal, even to the extent of terminating the Trust, if they deemed such distributions "advisable for [decedent's] health, welfare, comfortable maintenance and support." The trustees were instructed to bear in mind that Mary's "primary concern is the comfortable maintenance, health and support of [decedent]." Upon decedent's death, the Trust was to terminate with the remaining principal to be distributed equally to petitioner, his brother and their issue.

In a codicil, Mary directed the trustees to pay decedent the annual required minimum distribution ("RMD") from the IRA.¹ If the RMD was less than the annual income generated by the Trust, decedent could "compel" the trustees to distribute the amount by which the annual income exceeded the RMD.

Mary's will provided that none of the trustees "shall in any way be liable for the act, omissions or defaults of any other." It further provided that only petitioner could exercise discretionary power to make a distribution above and beyond the required minimum distribution.

The parties do not dispute that, shortly after the Trust was created, petitioner provided decedent with written authorization to withdraw funds from the IRA without petitioner's consent. Nor

¹ The "required minimum distribution" is the minimum annual distribution from an IRA required by the Internal Revenue Code in order to avoid the statutory penalty.

do they dispute that decedent withdrew a total of \$445,158.51 between 2004 and 2009.

After decedent's death, petitioner presented respondent with a list of verified claims against decedent's estate, all of which were rejected by respondent. Petitioner thereafter brought the instant proceeding.

Legal Standard for Summary Judgment

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, and tender sufficient evidence in admissible form to show the absence of any disputed material facts (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]; *Westhill Exports, Ltd v Pope*, 12 NY2d 491 [1963]). If the proponent makes such a showing, the burden shifts to the party opposing summary judgment, who must submit evidence in admissible form which demonstrates the existence of a genuine issue of material fact (*see Alvarez, supra*, at 324; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). The court will apply this standard separately to each of the claims asserted in the instant proceeding.

Claim No. 1 - Decedent's IRA Withdrawal in 2004

Petitioner claims that decedent's estate must reimburse the Trust for decedent's allegedly excessive withdrawal from the IRA in 2004. Decedent withdrew \$58,823.53, an amount which petitioner claims exceeded the RMD by \$19,819.93. However, petitioner undercuts his own allegation by acknowledging that the

RMD for 2004 was \$76,576.29; basic arithmetic dictates that \$58,823.53 is less than \$76,576.29.

Respondent has undoubtedly made a prima facie showing that decedent's 2004 withdrawal was less than the applicable RMD. Petitioner has failed to rebut respondent's showing and, therefore, the court grants summary judgment in favor of respondent on this claim.

Claim No. 2 - Decedent's IRA Withdrawal in 2009

Acting under decedent's power of attorney, respondent withdrew \$30,000 from the Trust in 2009, an amount which petitioner claims constituted an unauthorized and improper discretionary distribution for which decedent's estate must reimburse the Trust.

In 2009, the federal government implemented a one-year suspension of the penalty for failure to withdraw the RMD from an IRA (see note 1, *supra*). Petitioner claims that on account of the suspension, the RMD was zero that year; therefore, any distribution to decedent in excess of the IRA's 2009 income was necessarily discretionary and thus could be authorized only by petitioner. Respondent, on the other hand, calculates the RMD in 2009 as \$29,391.40, and thus asserts that the \$30,000 distribution exceeded the RMD by only \$608.60.

The amount of income earned by the IRA in 2009 is not in the record. Consequently, the court cannot determine to what extent, if any, the codicil's provision allowing decedent to "compel" the

co-trustee to distribute the amount of actual income earned by the IRA may have justified distributions in 2009. For this reason alone, summary judgment should be denied.

Respondent argues that, as a matter of law, Mary's will allowed decedent to receive as much as he needed for his "comfortable maintenance and support." However, this argument ignores the trust provision, which precluded decedent, as trustee, from "participat[ing] in the exercise of any discretionary power" to make distributions to himself. Any distribution which was in excess of the higher of RMD or the realized income from the Trust was discretionary and, as such, could have only been authorized by petitioner.

Respondent attempts to overcome this obstacle by alleging that petitioner and decedent reached an "express agreement" as co-trustees, whereby petitioner gave decedent blanket permission to make distributions to himself without petitioner's prior consent as to each individual withdrawal. Petitioner denies such an agreement, although he concedes that he authorized decedent to withdraw funds without having to obtain his signature. Even assuming there was such an agreement, it would not insulate decedent from liability for having made a discretionary distribution to himself. It is elemental that, in disputes involving trusts, the language of the trust instrument is controlling as to the powers and duties of the trustees (see *Matter of Farley*, 186 Misc 2d 355, 356 [Sur Ct Onondaga Cty

2000]. As a general rule, trustees and beneficiaries cannot, by unanimous agreement, deviate from the unambiguous terms of the trust instrument (see *Matter of Runals*, 68 Misc 2d 967, 979 [Sur Ct Cattaraugus Cty 1972]; *Matter of Simon*, NYLJ, Feb. 28, 2002, at 20 [Sur Ct NY Cty]). Here, there is no ambiguity; the terms of the Trust clearly prohibited decedent from participating in any decision to make discretionary distributions to himself, much less from unilaterally making such distributions.

Respondent has failed to make a prima facie showing that he is entitled to judgment as a matter of law, and his motion for summary judgment as to this claim is denied.

Claim No. 3 - Tax Refunds Retained by Respondent

Petitioner claims that respondent improperly listed himself as the executor on Mary's estate's tax returns, and that he received the corresponding federal and state tax refunds, but failed to return the funds to Mary's estate. Respondent does not deny the allegation and admits that he received refunds totaling \$15,796.95, which he deposited in an escrow account. Respondent does not offer any explanation for his failure to return the refunds to Mary's estate.

Respondent has not provided any argument, much less evidence, in support of the dismissal of this claim, and his motion for summary judgment on this claim is denied.

CPLR 3212(b) provides that, "if it shall appear that any party other than the moving party is entitled to a summary

judgment, the court may grant such judgment without the necessity of a cross-motion." The court can "search the record and grant judgment where appropriate, regardless of which party is the movant" (*Matter of Gerard*, NYLJ, Nov. 3, 1998, at 27, col 5). In light of respondent's admission that he retained tax refunds attributable to Mary's estate, and his failure to provide any justification for doing so, the court awards summary judgment to petitioner on this claim.

**Claim No. 4 - Excessive Taxes
Paid by Trust for 2004 - 2005**

The parties agree that the Trust overpaid its federal and state income taxes for the 2004 and 2005 tax years by a total of \$37,447, and that the failure to file amended returns before the three-year deadline deprived the Trust of the refunds to which it would have been entitled. Petitioner asserts that the overpayments -- and the delayed discovery thereof -- were due to decedent's negligence, arising from decedent's erroneous attribution of income to the Trust instead of to himself.

Respondent counters that petitioner, as co-trustee, is equally culpable for the error, relying on the proposition that a fiduciary cannot prevail in a claim against his co-fiduciary for breach of a fiduciary obligation shared by both (*see Matter of Zimmerman*, 242 AD2d 202, 203 [1st Dept 1997]; *Matter of Bloomingdale*, 48 AD3d 559, 561 [2d Dept 2008]).

Petitioner and decedent, as co-trustees, were both obligated

to pay the correct amount of taxes for the Trust (see, e.g., *Matter of Zimmerman*, 242 AD2d at 203 [dismissing plaintiff fiduciary's claim against his co-fiduciary for the latter's failure to take advantage of a tax exemption, and holding that plaintiff's obligation to familiarize himself with the relevant tax issues, based on information available to both parties, was equal to that of the defendant co-fiduciary's]). The record establishes that petitioner chose to delegate this duty to decedent; he cannot now assert a claim premised on decedent's negligence in failing to satisfy the duty.

Respondent has made a prima facie case that he is entitled to summary judgment on this claim. Since petitioner has not provided any evidence to demonstrate the existence of an issue of material fact, summary judgment is granted and this claim is dismissed.

Claim No. 5 - Excessive Taxes
Paid by Trust for 2006 - 2008

Petitioner claims that the Trust again overpaid its taxes for 2006, 2007 and 2008 by a total of \$80,007. However, he concedes that the Trust recouped the \$80,007 from both the State and federal government. He nevertheless argues that the Trust is entitled to reimbursement of \$80,007 from decedent's estate because he needed to hire an accountant in order to file claims to recoup the overpayments. Such claim is wholly without merit. Petitioner cannot demonstrate any actual damage to the Trust

based on decedent's alleged negligence, apart from the fees paid by the Trust to the accountant to recoup the overpayments, which is the subject of a separate claim (Claim No. 7, *infra*). Thus, petitioner is, in essence, arguing for the imposition of punitive damages, for which he cites no precedential support, particularly where, as here, there are no credible allegations that decedent acted fraudulently in filing the incorrect tax returns or benefitted therefrom.

Summary judgment is granted in favor of respondent and this claim is dismissed.

Claim No. 6 - Fees regarding Apartment

In 2007, decedent invited petitioner's son to live in the Apartment without obtaining prior approval from the co-op's board of directors. The co-op took steps to evict petitioner's son and charged the Trust \$6,787.25 for legal fees and late fees. Petitioner contends that decedent's estate should incur the cost of these charges, since only decedent -- and not petitioner -- was aware of the co-op's rules pertaining to unauthorized occupancy of apartment units.

The record establishes that petitioner was in fact aware of his son's occupancy of the Apartment. Petitioner concedes that he deferred to decedent on all issues relating to the Apartment. Notwithstanding his attempt to justify his deference, petitioner cannot assert a claim against decedent for breach of an obligation they both shared (see *Matter of Zimmerman*, 242 AD2d

202, 203 [1st Dept 1997]; *Matter of Bloomingdale*, 48 AD3d 559, 561 [2d Dept 2008]).

Respondent has made a prima facie case for summary judgment with respect to this claim, and petitioner has not provided any admissible evidence demonstrating the existence of a material fact. Therefore, summary judgment is granted and this claim is dismissed.

Claim No. 7 - Fees and Costs

Petitioner seeks reimbursement of \$16,272.50 "for all of the accounting and legal fees and disbursements" incurred in the instant proceeding.

A. Legal Fees

Petitioner cites several cases to support the proposition that the Trust should not have to bear any expense, including legal fees, which resulted from decedent's alleged "misconduct."²

Respondent counters by citing the "American Rule," which requires each party to pay his or her own legal fees regardless of who wins or loses (see *Matter of Hyde*, 15 NY3d 179, 185 [2010]; *A.G. Ship Maint. Corp. v Lezak*, 69 NY2d 1 [1986]).

However, "courts sitting in equity have carved out an exception" to the American Rule in cases where a fiduciary has been surcharged for causing harm to the estate they are charged

² Petitioner also cites CPLR § 8110 in support of this proposition. However, that statute only pertains to "costs" as set forth in Article 82 of the CPLR, which do not exceed \$300 (see CPLR § 8201[1]-[3]).

with protecting (*Matter of Lasdon*, NYLJ, Nov. 19, 2010, at 36 [Sur Ct NY Cty]; see also *Matter of Rose* BB, 35 AD3d 1044 [3d Dept 2006]; *Parker v Rogerson*, 49 AD2d 689 [4th Dept 1975]). However, as the Surrogate noted in *Matter of Lasdon*, courts do not automatically charge the fiduciary with the prevailing party's legal fees in each and every case in which such fiduciary is surcharged, and indeed the court declined to do so in *Matter of Lasdon*.

With the exception of the claim for reimbursement of tax refunds (Claim No. 3, *supra*), petitioner has not established the merits of his underlying claims against decedent's estate, much less demonstrated that decedent's conduct rose to the level of malfeasance justifying deviation from the general rule against awarding legal fees. There is no evidence in the record supporting petitioner's conclusory statements as to decedent's fraudulent intent. With respect to the claim for reimbursement of tax refunds (Claim No. 3), the court finds that respondent's conduct does not warrant the imposition of any portion of petitioner's legal fees against him.

B. Accounting Fees

Petitioner contends that, due to decedent's filing of incorrect tax returns for 2006, 2007 and 2008, the Trust required the services of an accountant to recoup the payment of excessive taxes paid in those years.

As with Claim No. 4, *supra*, petitioner's claim for the

accountant's fee fails as a matter of law because petitioner himself had the same fiduciary obligation to the Trust as did decedent with respect to payment of the Trust's taxes (see *Matter of Zimmerman*, 242 AD2d 202, 203 [1st Dept 1997]; *Matter of Bloomingdale*, 48 AD3d 559, 561 [2d Dept 2d Dept]).

Thus, respondent's motion for summary judgment is granted as to petitioner's claims for reimbursement of legal and accounting fees, and such claims are dismissed.

Conclusion

In sum, the court awards summary judgment in favor of respondent on Claim Nos. 1, 4, 5, 6 and 7, and such claims are hereby dismissed. On Claim No. 3, the court awards summary judgment in favor of petitioner. Summary judgment on Claim No. 2 is denied. A trial on this claim is scheduled for Thursday, November 13, 2014, at 11:00AM.

This decision constitutes the order of the court.


SURROGATE

Dated: *October 1*, 2014