

Campbell v Bank of Am., N.A.
2014 NY Slip Op 32542(U)
September 24, 2014
Supreme Court, Suffolk County
Docket Number: 28268/2013
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Gracia E. Campbell, Clarissa L. Vaida
and Heather B. Byrne,

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Plaintiffs,

Attorneys [See Rider Attached]:

-against-

Bank of America, N.A., Hazard K. Campbell, Sr.,
HSBC Bank, U.S.A., N.A., John White and
Richard Black, said last two names being fictitious
and the true names being unknown to the plaintiff
and being intended to designate individuals who
aided and abetted in the causes of action
complained herein,

Defendant.

Motion Date (11/25/13): 002; MD ✓
Motion Date (01/08/14): 003; MD ✓
Motion Date (01/15/14): 004; MG ✓
Motion Date (01/15/14): 005; MG ✓
Motion Date (02/26/14): 006; MD; CD ✓
Motion Date (03/05/14): 007; MD ✓
Motion Date (03/12/14): 008; MD ✓
Motion Date (05/07/14): 009; MD ✓
Motion Date (05/07/14): 010; MD ✓
Motion Date (06/11/14): 011; MD ✓

All Motions Submitted: 06/18/14

Upon the following papers numbered 1 to 250 read upon these motions and cross motions to remove and join for trial, to dismiss, to vacate decree, and other relief: Notice of Motion/Order to Show Cause and supporting papers, 1 - 40; 67 - 82; 139 - 145; 150 - 156; 180 - 189; 191; Notice of Cross Motion and supporting papers, 90 - 98; 100, 106 - 116, 121 - 133, 192 - 215, 217 - 230; Answering Affidavits and supporting papers, 41 - 46, 48 - 57, 83 - 85, 101 - 102, 117 - 118, 135 - 136, 146 - 149, 158 - 164, 172 - 173, 232, 233 - 238; Replying Affidavits and supporting papers, 58 - 65, 86 - 89, 103 - 104, 120, 174 - 177, 178 - 179, 240 - 246, 247 - 248; Other, Memorandum of Law, 33, 47, 56, 66, 99, 103, 105, 115, 119, 134, 137 - 138, 157, 165 - 171, 190, 216, 231, 239; Correspondence, 249 - 250; it is

RR

ORDERED that all requests for oral argument are denied; and it is further

ORDERED that the motion (#002) by the plaintiffs for an order pursuant to CPLR 602 (a) and (b) removing four proceedings in Surrogate's Court Erie County to Suffolk County and joining for trial those four proceedings with this action is denied; and it is further

ORDERED that the motion (#003) by the defendants Bank of America, N.A. and Hazard K. Campbell, Sr. for an order staying this action pending a decision by the Surrogate Judge in Erie County regarding her recusal in the aforesaid proceedings in Erie County is denied as academic; and it is further

ORDERED that the cross motion (#004) by the defendant HSBC Bank, U.S.A., N.A. for an order pursuant to CPLR 3211 dismissing the complaint against it is granted; and it is further

ORDERED that the cross motion (#005) by the defendants HSBC Bank, U.S.A., N.A. and Hazard K. Campbell, Sr. for an order pursuant to CPLR 3211 dismissing the complaint against them is granted; and it is further

ORDERED that the cross motion (#006) by the defendants Bank of America, N.A. and Hazard K. Campbell, Sr. for an order pursuant to CPLR 3211 dismissing the complaint against them is granted; and it is further

ORDERED that the motion (#007) by the nonparty Emilio L. Colaiacovo, as guardian ad litem for two infants with an interest in the proceedings in Surrogate's Court Erie County, for an order pursuant to CPLR 1012 (a) (3) and CPLR 1013 granting leave to intervene in this action is denied as academic; and it is further

ORDERED that the motion (#008) by the plaintiffs for an order pursuant to CPLR 5015 (a) (3) and (4) vacating a certain decree issued in a proceeding in Supreme Court Erie County is denied; and it is further

ORDERED that the motion (#009) by the plaintiffs for an order pursuant to CPLR 602 (a) and (b) removing five proceedings in Supreme Court Erie County to Suffolk County and joining for trial this action with those five proceedings is denied; and it is further

ORDERED that the motion (#010) by the defendants HSBC Bank, U.S.A., N.A. and Hazard K. Campbell, Sr. for an order imposing sanctions against the plaintiffs and counsel for the plaintiffs pursuant to NYCRR 130-1.1 and prohibiting the plaintiffs from commencing any further proceedings until the determination of the instant motions is denied, and it is further

ORDERED that the cross motion (#011) by the plaintiffs for an order imposing sanctions against counsel for the defendants HSBC Bank, U.S.A., N.A. and Hazard K. Campbell, Sr. in motion

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#010 pursuant to NYCRR 130-1.1 and disqualifying said counsel from representing said defendants is denied.

This Suffolk County action seeks to challenge the activities of various trustees of a number of family trusts as well as the judicial determinations, if not the good faith of the judges rendering those determinations, previously made in the Surrogate's Court and the Supreme Court in Erie County, regarding those trusts. The plaintiffs are the great-grandchildren of Grace Knox (Knox), whose husband was a co-founder of both F. W. Woolworth Company and the predecessor to Marine Midland Bank. Knox and her husband had three children, one of whom was the plaintiffs' grandmother, Marjorie Knox Campbell Klopp (Klopp or Grandmother).¹ Klopp had three children, one of whom was the plaintiffs' mother, Gracia M. Campbell (Campbell or Mother). Campbell had five children, including the three plaintiffs in this action. Knox and Klopp created inter vivos or testamentary trusts naming their children as income beneficiaries with directions as to how to apply the remainder. In addition, Klopp created a trust for the benefit of the issue of Campbell, that is to say Klopp's grandchildren, the plaintiffs herein.

It is undisputed that the various trustees and co-trustees of the enumerated trusts have previously filed petitions for judicial settlements in the intermediate or final accounts of the relevant wills and trusts in the Surrogate's Court or Supreme Court in Erie County. In a number of instances those courts have issued rulings governing the prosecution of those proceedings and made binding determinations therein and, in at least one instance, issued a decree disposing of the matter. In their amended complaint herein, the plaintiffs set forth 15 causes of action seeking accountings or further accountings in the enumerated trusts and two other trusts for the benefit of the plaintiff Heather B. Byrne (Heather), as well as causes of action sounding in abuse of process, breach of good faith, breach of fiduciary duty, fraud, conversion and unjust enrichment against the various trustees or co-trustees of said trusts, and a single cause of action against two fictitious defendants for aiding and abetting the trustees and co-trustees of said trusts in the causes of action complained of in the complaint. The parties now move or cross move for relief as noted above.

#002 - The Plaintiffs' Motion For Removal and Joinder

The plaintiffs now move (#002) for an order removing four Erie County accounting proceedings to Suffolk County, and setting all matters down for joint trial with this action. Said proceedings involve petitions for judicial settlement of accounts of Campbell's (Mother's) will, the testamentary trust created under Klopp's (Grandmother's) will, and the inter vivos trusts that Klopp created for the benefit of Mother and the issue of Mother (collectively Campbell Family Trusts). The entire thrust of the plaintiffs' motion for removal is that the Surrogate Judge in Erie County has, among other things, exhibited extreme bias against the plaintiffs, has ruled against them regarding

¹ Due to the complexity of the family tree, the Court will only focus on the direct line of descendants to the plaintiffs.

legitimate discovery requests, engaged in ex parte communications with opposing counsel, and improperly appointed guardians ad litem for contingent beneficiaries of the trusts. In considering this motion, and the other motions before the Court, it is appropriate to set forth some background information regarding the issues raised by the plaintiffs in this action and the matters before the courts in Erie County.

It is undisputed that the individual and institutional trustees reside in Erie County, and that the only connection to Suffolk County is that one plaintiff, Gracia E. Campbell (Gaye), resides here. The individual trustees are blood relatives of the plaintiffs, who serve as trustees or co-trustees of one or more of the trusts at issue in this action.² For decades the extended family of the plaintiffs, including their mother and themselves, used a facility known as the Knox Office located in Erie County to manage the affairs of the beneficiaries of the Campbell Family Trusts, including the receipt of correspondence and account statements. Upon the death of their mother, the trustees and co-trustees filed petitions for accountings regarding the Campbell Family Trusts in Erie County, and the plaintiffs appeared as respondents in those proceedings.

The plaintiffs contend that Surrogate Judge Barbara Howe has engaged in inappropriate behavior and made biased rulings against them. The plaintiffs have not appealed any of Judge Howe's rulings or determinations. Based on the allegations against Judge Howe made in the submissions before this court, at least some of which have been filed in the Erie County proceedings, the petitioners in Erie County moved for relief and requested that Judge Howe consider the submissions herein to be a motion for recusal. By memorandum and order dated January 30, 2014, Judge Howe denied the plaintiffs' request that she recuse herself from adjudicating the proceedings in Surrogate's Court, Erie County. It does not appear that the plaintiffs have appealed Judge Howe's order. Although the instant motion was made prior to Judge Howe's order, it remains a fact that they have asked this Court to make a determination regarding the recusal of a judge of coordinate jurisdiction.

It is well settled that, absent a legal disqualification pursuant to Judiciary Law 14 or SCPA 2604, a trial judge is the sole arbiter of recusal and a court's decision in this respect may not be overturned unless it was an abuse of discretion (*Affinity Elmwood Gateway Props. LLC v AJC Props. LLC*, 113 AD3d 1094, 978 NYS2d 565 [4th Dept 2014]; *Sassower v Gannett Co., Inc.*, 109 AD3d 607, 972 NYS2d 41 [2d Dept 2013]; *Daniels v City of New York*, 96 AD3d 895, 946 NYS2d 510 [2d Dept 2012]; *Schreiber-Cross v State of New York*, 31 AD3d 425, 819 NYS2d 530 [2d Dept 2006]). In addition, a judge may not vacate, overrule, modify, reconsider, or disturb the determination of a fellow judge of coordinate jurisdiction (*Grossman v Composto-Longhi*, 96 AD3d 1000, 948 NYS2d 95 [2d Dept 2012]; *Nong Yaw Trakansook v 39 Wood Realty Corp.*, 18 AD3d 633, 796 NYS2d 367 [2d Dept 2005]; *Public Service Mut. Ins. Co. v McGrath*, 56 AD2d 812, 392 NYS2d 659 [1st Dept 1977]). The correct procedure is a motion pursuant to CPLR 2221 to the

² By notice dated November 27, 2013, the plaintiffs withdraw that branch of their motion (#002) to remove and join the Erie County proceeding involving an accounting by the executrix of Mother's will.

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judge who made the determination, or an appeal of the determination (*see Affinity Elmwood Gateway Props. LLC v AJC Props. LLC, supra; Sassower v Gannett Co., Inc., supra; Matter of Barney v Van Auken*, 97 AD3d 959, 949 NYS2d 509 [3d Dept 2012]; *Daniels v City of New York, supra*).

The Supreme Court and the Surrogate's Court have concurrent jurisdiction to compel executors and trustees to account, and where complete relief can be obtained in the Surrogate's Court, the Supreme Court will refuse to exercise its equitable powers (*Matter of Smith*, 120 AD 199, 105 NYS 223 [1st Dept 1907]; *Bushe v Wright*, 118 AD 320, 103 NYS 410 [1st Dept 1907]; *Matter of Fogarty*, 117 AD 583, 102 NYS 776 [1st Dept 1907]). Here, the Court may not vacate or disturb Judge Howe's determination to continue to adjudicate the proceedings commenced in the Surrogate's Court, Erie County.

In addition, this Court determines that the Surrogate's Court in Erie County can render complete relief to the parties in said proceedings. The plaintiffs set forth a list entitled "Common Issues of Law and Fact" which enumerates issues in the Erie County proceedings and this action which they contend supports a finding that these proceedings should be jointly tried in Suffolk County. The list notes, inter alia, the following issues as important:

The defendants failure to disclose the existence of most of the Campbell Family Trusts and/or to provide information, annual trust statements, copies of the decedent's financial statements and documents to the plaintiffs;

Whether a trustee who breaches his fiduciary duty as trustee in one or more of the Campbell Family Trusts can be qualified to be a trustee of any of the Campbell family trusts;

The trustees of each trust exercise discretion with due consideration given to the financial needs of the plaintiffs. This includes a review of income from all the Campbell Family trusts;

The collaboration between the institutional trustees and the individual trustees and the use of the individual trustees' office, (i.e. the "Knox Office") to prevent disclosure to the plaintiffs as beneficiaries of the Campbell Family Trusts.

SCPA 201 (3) governs the jurisdiction of the Surrogate's Court and provides that: "[t]he court shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party and any other person having any claim or interest therein, over whom jurisdiction has been obtained as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order

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or decree as justice requires.” None of the issues raised, whether noted herein or not, requires the exercise of the Supreme Court’s concurrent jurisdiction in the subject proceedings.

Moreover, a motion pursuant to CPLR 602 to consolidate actions or to join separate actions for trial rests within the sound discretion of the trial court (*see Alizio v Perpignano*, 78 AD3d 1087, 912 NYS2d 132 [2d Dept 2010]). The general rule is that, absent special circumstances, the county where jurisdiction was first invoked will become the county for joint trial of separate actions (*Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 845 NYS2d 414 [2d Dept 2007]; *Moor v Moor*, 39 AD3d 507, 835 NYS2d 593 [2d Dept 2007]; *TT Enters. v Gralnick*, 127 AD2d 651, 511 NYS2d 878 [2d Dept 1987]; *Leung v Sell*, 115 AD2d 929, 496 NYS2d 589 [3d Dept 1985]). Here, it is determined that the circumstances dictate that the proceedings remain in Erie County. The undisputed facts regarding the residence of the trustees and the Knox Office alone indicate as much. Accordingly, the plaintiffs’ motion for removal of the subject proceedings to Suffolk County and for a joint trial with this action is denied.

#003 - Motion By The Defendants Bank Of America, N.A. and Hazard K. Campbell, Sr. for an Order Staying This Action.

This motion, brought on by order to show cause dated December 9, 2013, seeks a stay of this action pending a decision from Judge Howe on the plaintiffs’ motion for Judge Howe to recuse herself in the proceedings in Erie County. In light of the fact that, in the interim, Judge Howe has rendered her decision as noted above, the motion is denied as academic.

#004 - Cross Motion To Dismiss Pursuant to CPLR 3211 by the Defendant HSBC Bank, U.S.A., N.A. and #008 - The Plaintiffs’ Motion To Vacate Decree Issued In Erie County.

The defendant HSBC Bank, U.S.A., N.A. (HSBC) cross-moves for an order pursuant to CPLR 3211 dismissing the complaint on the grounds that the Supreme Court, Erie County (Devlin, J.) has issued a decree releasing and discharging the trustees from any and all liability as trustees for the trust created by Knox (Great-Grandmother) for the benefit of Klopp (Grandmother) for the period December 26, 1934 through August 15, 1971. Said trust was created by Knox on December 26, 1934 (hereinafter 1934 Knox Trust). In addition, HSBC moves on the ground that a proceeding for an accounting for the Campbell Family Trust created for the benefit of Mother from Mother’s share of the remaining property from the 1934 Knox Trust is currently before the Hon. Diane Y. Devlin in Erie County.

It is undisputed that HSBC is the sole remaining trustee of the 1934 Knox Trust as well as the resulting trust created for the benefit of Mother upon Klopp’s death on August 15, 1971 (Mother’s Campbell Trust). Under the 1934 Knox Trust, Mother’s five children, including the plaintiffs, were remainder beneficiaries of the Mother’s Campbell Trust. On September 14, 2012, HSBC commenced a proceeding in Erie County to obtain a judicial discharge as described above.

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On December 18, 2012, Justice Devlin granted HSBC's petition and entered a decree dispensing with service upon Mother's children, including the plaintiffs, and discharging the trustees from any liability and accountability for the 1934 Knox Trust from December 26, 1934 through August 15, 1971. On September 14, 2012, HSBC also commenced a proceeding in Erie County to obtain a judicial settlement of the Mother's Campbell Trust for the period August 15, 1971 through June 15, 2012. This proceeding is currently pending before Justice Devlin.

The plaintiffs commenced this action by filing a summons and complaint on October 22, 2013 setting forth 16 causes of action. Thereafter, as of right, the plaintiffs served an amended complaint dated February 28, 2014 setting forth 15 causes of action. HSBC and the other defendants herein made their motions to dismiss prior to the service of the amended complaint and have elected to have their motions applied to the amended pleading (*Toikach v Basmanov*, 31 Misc 3d 615, 918 NYS2d 844 [Sup Ct, Kings County 2011]; *D'Addario v McNab*, 73 Misc 2d 59, 342 NYS2d 342 [Sup Ct, Suffolk County 1973]; *see also Livadiotakis v. Tzitzikalakis*, 302 AD2d 369, 753 NYS2d 898 [2d Dept 2003]). Accordingly, all references herein are to the amended complaint dated February 28, 2014.

In their complaint, the plaintiffs set forth four causes of action against HSBC. In their fourth cause of action, the plaintiffs seek an accounting from HSBC as trustee of the 1934 Knox Trust for the period of December 26, 1934 through August 15, 1971. In their 12th, 13th, and 14th causes of action, the plaintiffs respectively set forth causes of action for unjust enrichment, fraud and conversion. HSBC now moves to dismiss the complaint against it pursuant to CPLR 3211.

In part, the plaintiffs oppose HSBC's motion by incorporating the arguments made in their motion to vacate the decree of Justice Devlin (#008). The Court will address the plaintiff's motion (#008) before it reviews HSBC's motion to dismiss (#004).

The plaintiffs move to vacate Justice Devlin's decree pursuant to CPLR 5015 (a) (3) and (4) on the grounds, among other things, that said decree dispensed with service upon them in error, and that the Erie County court lacked jurisdiction to render its decree. CPLR 5015, entitled "Relief from judgment or order," provides:

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

* * *

3. fraud, misrepresentation, or other misconduct of an adverse party; or
4. lack of jurisdiction to render the judgment or order; or

“The procedure for seeking the vacatur—vacatur is what CPLR 5015(a) has primarily in mind when it speaks of allowing a court to “relieve” a party of a judgment or order—is a motion made to the court that rendered it” (Siegel, NY Prac § 426 (5th ed 2011)). It has been held that a court does not have subject matter jurisdiction over a collateral attack on personal jurisdiction in a prior action, and that a party’s remedy is to move to vacate the judgment in that action (*Mazzei v Kyriacou*, 98 AD3d 1088, 951 NYS2d 557 [2d Dept 2012]; *Weinstock v Citibank*, 289 AD2d 326, 734 NYS2d 210 [2d Dept 2001]).

Here, despite the plaintiffs’ objections regarding the release obtained by the trustees of the 1934 Knox Trust from Mother and her siblings which forms a basis for Justice Devlin’s decree, and despite the numerous objections to the merits of the actual accounting provided by those trustees, it is determined that this court may not vacate, overrule, modify, reconsider, or disturb the determination of a fellow judge of coordinate jurisdiction (citations above omitted). This is true regardless of the plaintiffs’ allegations that the trustees either failed to reveal or misrepresented certain facts involving the trust.

Accordingly, the plaintiffs’ motion (#008) to vacate the decree of Justice Devlin dated December 18, 2012 is denied. In rendering this determination, the undersigned makes no findings as to the merits of the plaintiffs’ allegations.

The Court now turns to HSBC’s motion (#004) to dismiss the complaint against it. For the reasons set forth above, Justice Devlin’s decree remains binding on this Court and requires dismissal of the plaintiffs’ fourth cause of action which seeks an accounting by HSBC as trustee of the 1934 Knox Trust for the period December 26, 1934 to August 15, 1971. To the extent that the plaintiffs’ fourth cause of action can be read to involve allegations against HSBC regarding the Mother’s Campbell Trust it is dismissed pursuant to CPLR 3211 (a) (4). The plaintiffs’ 12th, 13th, and 14th causes of action for unjust enrichment, fraud and conversion are likewise dismissed pursuant to CPLR 3211 (a) (4). Until such time as Justice Devlin’s decree is vacated by her or is reversed on appeal, the plaintiffs’ remaining causes of action can only apply to the Mother’s Campbell Trust, and those claims are more properly litigated in the action pending before Justice Devlin in Erie County.

It is well settled that courts have broad discretion regarding the dismissal of an action on the ground that another action is pending where there is a substantial identity of the parties and causes of action (*Whitney v Whitney*, 57 NY2d 731, 454 NYS2d 977 [1982]; *Scottsdale Ins. Co. v Indemnity Ins. Corp. RRG*, 110 AD3d 783, 974 NYS2d 476 [2d Dept 2013]; *Matter of Willnus*, 101 AD3d 1036, 957 NYS2d 229 [2d Dept 2012]; *DAIJ, Inc. v Roth*, 85 AD3d 959, 925 NYS2d 867 [2d Dept 2011]; *Simonetti v Larson*, 44 AD3d 1028, 845 NYS2d 369 [2d Dept 2007]). A court may exercise its authority to dismiss one of two pending actions if both suits arise out of the same subject matter or series of alleged wrongs (CPLR 3211 [a] [4]; *Whitney v Whitney*, *supra*; *Scottsdale Ins. Co. v Indemnity Ins. Corp. RRG*, *supra*; *Matter of Willnus*, *supra*; *DAIJ, Inc. v Roth*, *supra*; *Simonetti v Larson*, *supra*). Here, it is determined that the factual allegations in the complaint regarding the wrongs of the defendants are at issue in the pending proceedings.

Nonetheless, the plaintiffs contend that the Surrogate's Court does not have subject matter jurisdiction over their remaining causes of action, including the fifth cause of action for abuse of process. To the extent that the plaintiffs' contentions are correct, it is determined that said causes of action should be dismissed without prejudice to renewal in Erie County as they are dependent, in whole or in part, on many of the factual issues properly before Judge Howe in Erie County. This is especially true, considering the possibility of inconsistent rulings (*Diaz v Philip Morris Cos., Inc.*, 28 AD3d 703, 815 NYS2d 109 [2d Dept 2006]) and in the interest of judicial economy. Accordingly, HSBC's motion to dismiss the complaint against is granted.

#005 - Cross Motion To Dismiss Pursuant to CPLR 3211 by the Defendants HSBC Bank, U.S.A., N.A. and Hazard K. Campbell, Sr.

The defendants HSBC Bank, U.S.A., N.A. (HSBC) and Hazard K. Campbell, Sr. were co-trustees of an inter vivos trust created by Campbell (Mother) for the benefit of the plaintiff Heather B. Byrne (Heather) dated July 8, 1965 (Heather's 1965 Trust). Said trust provided for the payment of principal and income to Heather until she reached the age of 21, at which time the trust would terminate and the property of the trust was to be paid over and distributed to her. On June 10, 1986, Heather attained the age of 21 and the trust terminated. On August 27, 1986, the co-trustees rendered an account of their proceedings as trustees for the period July 8, 1965 to June 10, 1986, and obtained a signed receipt and release from Heather (1986 Release). On the same day, August 27, 1986, Heather created a trust for her own benefit (Heather's 1986 Trust). HSBC is the successor to the corporate co-trustee for said trust. Heather's 1986 Trust included a provision permitting her to revoke the trust which she exercised in writing in April 2006. On July 5, 2006, Heather executed a notarized receipt and release (2006 Release), which included an account of the co-trustees' proceedings as trustees.

In their original complaint, the plaintiffs set forth a fifth cause of action seeking accountings regarding Heather's 1965 Trust and Heather's 1986 Trust, as well as causes of action for breach of fiduciary duty, unjust enrichment, fraud and conversion against the subject defendants. In his affirmation dated March 3, 2014, counsel for the plaintiffs states that all of the causes of action except that seeking the accountings have been omitted from the amended complaint. A review of the amended complaint reveals that it no longer contains a cause of action for breach of fiduciary duty against these defendants, and that the eleventh, thirteenth and fourteenth causes of action which involve the remaining claims do not include any allegations involving the actions of these defendants as trustees of the subject trusts.

HSBC and Hazard K. Campbell, Sr. cross-move for an order pursuant to CPLR 3211 dismissing the complaint on the grounds, among other things, that the sixth cause of action in the amended complaint seeking accountings is barred by the statute of limitations. A movant seeking to dismiss a complaint insofar as asserted against it as time-barred pursuant to CPLR 3211 (a) (5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (*see Tsafatinos v Wilson Elser Moskowitz Edelman & Dicker*,

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LLP, 75 AD3d 546, 903 NYS2d 907 [2d Dept 2010]; *Morris v Gianelli*, 71 AD3d 965, 897 NYS2d 210 [2d Dept 2010]; *Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 872 NYS2d 144 [2nd Dept 2009]; *Sabadie v Burke*, 47 AD3d 913, 849 NYS2d 913 [2d Dept 2008]). Thereafter, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely (*Symbol Technologies, Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]; *Lessoff v 26 Ct. St. Assoc., LLC, supra*; *Gravel v Cicola*, 297 AD2d 620, 747 NYS2d 33 [2d Dept 2002]).

It is well settled that where a beneficiary seeks an accounting from a fiduciary, the proceeding is governed by the six-year statute of limitations set forth in CPLR 213 [1] (see *Matter of Meyer*, 303 AD2d 682, 757 NYS2d 98 [2d Dept 2003]; see also *Murray v Medina*, 306 AD2d 452, 761 NYS2d 526 [2d Dept 2003]; *Matter of Estate of Winne*, 232 AD2d 956, 649 NYS2d 210 [3d Dept 1996]; *Matter of Behr*, 191 AD2d 431, 594 NYS2d 314 [2d Dept 1993]). A cause of action for an accounting does not accrue until there is either an open repudiation of the fiduciary's obligation or a judicial settlement of the account (*Matter of Barabash*, 31 NY2d 76, 334 NYS2d 890 [1972]; *Matter of Rodken*, 270 AD2d 784, 705 NYS2d 429 [3d Dept 2000]; *Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 691 NYS2d 502 [1st Dept 1999]; *Matter of Winne, supra*; *Matter of Behr, supra*). It has been held that six-year statute of limitations for an accounting of a trust commences to run when the fiduciaries openly repudiate any further obligations by presenting their final account to the beneficiaries and obtaining a release (*Matter of Goldstick*, 177 AD2d 225, 581 NYS2d 165 [1st Dept 1992], mod on other grounds, 183 AD2d 684, 586 NYS2d 490 [1st Dept 1992]).

Here, the movants have established their prima facie entitlement to dismissal pursuant to CPLR 3211 (a) (5). It is undisputed that Heather executed the 1986 Release on August 27, 1986 and the 2006 Release on July 5, 2006, and that this action was commenced by the filing of the summons and complaint on October 22, 2013, more than six years later in each instance.

In opposition to the motion, the plaintiffs submit the affidavit of their attorney, who contends, among other things, that the accounting statements accompanying the 1986 Release do not account for a certain life insurance policy making the releases ineffective to that extent, and that the statute of limitations has not begun to run as the subject defendants have not repudiated their obligations under the trusts. A review of the account statements indicates that the subject life insurance policy was disclosed to Heather, and that it was accounted for to the extent that it reflects its delivery to the Knox Office. Counsel's remaining contentions are without merit.

Accordingly, HSBC and Hazard K. Campbell, Sr.'s motion to dismiss the complaint against them is granted.

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#006 - Cross Motion To Dismiss Pursuant to CPLR 3211 by the Defendants Bank of America, N.A. and Hazard K. Campbell, Sr.

The defendants Bank of America, N.A. (BOA) and Hazard K. Campbell, Sr. are co-trustees of the inter vivos trusts created by Klopp (Grandmother) for the benefit of Campbell (Mother) and the issue of Mother mentioned above. The Marjorie K.C. Klopp Trust under agreement dated May 8, 1957 for the benefit of Gracia M. Campbell (Klopp Trust for Mother) provided Mother with a power of appointment which, in her will, she executed in favor of her daughters, the plaintiffs Gracia E. Campbell (Gaye) and Clarissa L. Vaida. On July 2, 2012, the co-trustees filed a petition for judicial settlement of their account for the Klopp Trust for Mother in the Erie County Surrogate's Court which is pending before Judge Howe. The Marjorie K.C. Klopp Trust under agreement dated May 8, 1957 for the benefit of the issue of Gracia M. Campbell (Klopp Trust for Issue) grants discretion to the trustees to distribute income and principal for the support, maintenance, education, comfort or general welfare of Mother's issue. On September 21, 2012, the co-trustees filed a petition for judicial settlement of their account for the Klopp Trust for Issue in the Erie County Surrogate's Court which is pending before Judge Howe.

In their complaint, the plaintiffs set forth nine causes of action against BOA and Hazard K. Campbell, Sr., as co-trustees. In their first and second causes of action, the plaintiffs respectively seek an accounting from said defendants as co-trustees of the Klopp Trust for Mother and the Klopp Trust for Issue. As set forth above, said causes of action involve allegations against the co-trustees regarding the two trusts which are directly and indirectly involved in the proceedings pending before Judge Howe in Erie County. Accordingly, the plaintiffs' first and second causes of action are dismissed pursuant to CPLR 3211 (a) (4).

In their eighth³, ninth, tenth, eleventh and twelfth causes of action, the plaintiffs respectively set forth causes of action for breach of fiduciary duty, fraud, conversion and unjust enrichment. The plaintiffs' tenth cause of action sets forth allegations regarding the co-trustees allegedly fraudulent activities regarding the Klopp Trust for Mother only, and it is dismissed outright pursuant to CPLR 3211 (a) (4) for the reasons set forth above. Furthermore, the plaintiffs' causes of action are dismissed to the extent that the allegations therein involve the subject co-trustees' actions regarding the Klopp Trust for Mother or the Klopp Trust for Issue, as the facts bearing on those issues are directly or indirectly before Judge Howe in Erie County. In addition, dismissal of those allegations regarding an alleged trust dated January 21, 1957 is warranted under CPLR 3211 (a) (1), as defendants BOA and Hazard K. Campbell, Sr., have demonstrated through submission of the affidavit of Theodore J. Petrakos dated February 13, 2013, that while they serve together as trustee of two trusts created by Klopp on May 8, 1957, the purported trust dated January 21, 1957 does not

³ The plaintiffs' amended complaint contains two causes of action titled "eighth." Both are counted within the total of nine causes of action asserted against these defendants. However, because the two "eighth" causes of action are for the same relief, and essentially involve the same factual issues, they are treated as one for the purposes of this motion.

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exist (see *Gherardi v Burke*, 144 AD2d 339, 534 NYS2d 866 [2d Dept 1988]). The conclusory allegations in the complaint, without more, are insufficient to establish a viable cause of action as to the purported January 21, 1957 trust (see *Panzer v Johnny's II*, 253 AD2d 864, 678 NYS2d 336 [2d Dept 1998]).

#007 - Guardian Ad Litem's Motion To Intervene

Emilio L. Colaiacovo, appointed by Judge Howe as guardian ad litem for Alexander Makai Moses and Forrest Samuel Moses regarding the 1934 Knox Trust and Klopp Trust for Mother, moves pursuant to CPLR 1012 (a) (3) and 1013 to intervene in this action. The motion is denied, without prejudice, and the plaintiffs' objections to the appointment of Emilio L. Colaiacovo as guardian ad litem in the Erie County proceedings are more properly raised in Erie County.

#008 - The Plaintiffs' Motion To Vacate Decree Issued In Erie County.

The motion is denied, as discussed above.

#009 - The Plaintiffs' Motion For Removal and Joinder of Five Additional Proceedings.

The plaintiffs now move (#009) for an order removing five Erie County accounting proceedings to Suffolk County, and setting all matters down for joint trial with this action. By notice dated April 21, 2014, counsel for the plaintiffs withdrew the motion with respect to two of the five proceedings. The three remaining proceedings involve petitions for judicial settlement of accounts involving the 1934 Knox Trust, a trust created by Klopp for the benefit of all three of her children (including Mother), and a trust created by Klopp for the benefit of Mother dated October 11, 1961. The first enumerated proceeding requests a judicial settlement of HSBC's account as trustee of the 1934 Knox Trust for a period subsequent to the period included in Justice Devlin's decree dated December 12, 2012. It is undisputed that the three proceedings are pending before Justice Devlin in the Supreme Court, Erie County.

In his affirmation in support of the motion, counsel for the plaintiffs contends, among other things, that Justice Devlin is biased against his clients, and that the motion is necessary to avoid the "likelihood" of an unfair trial. He does not indicate whether the plaintiffs have filed a motion asking Justice Devlin to recuse herself in any of the subject proceedings, stating instead that "[t]he plaintiffs are entitled to avail themselves of the removal provisions of CPLR 602 rather than appeal to the Appellate Division Fourth [D]epartment." Regardless of the merits of counsel's contention, the issue whether Justice Devlin should or should not recuse herself in any matter should be decided by Justice Devlin, who is aware of all of the facts impacting on the issue (*Affinity Elmwood Gateway*

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Props. LLC v AJC Props. LLC, supra; Sassower v Gannett Co., Inc., supra; Daniels v City of New York, supra; Schreiber-Cross v State of New York, supra).

Here, circumstances dictate that the proceedings remain in Erie County.⁴ The undisputed facts regarding the residence of the trustees and the Knox Office alone indicate as much. In light of the determination that these proceedings should not be removed to Suffolk County, that branch of the motion which seeks a joint trial is properly denied without prejudice.

#010 - Cross Motion For Sanctions and Other Relief by the Defendants HSBC and Hazard K. Campbell, Sr.

Due to the number of pending Erie County proceedings, the complexity of litigating issues involving multi-generational trusts, and the fact that certain law firms appear as counsel for an individual trustee regarding one trust and not in another, the following information becomes important in the context of this motion. The movants herein are represented by the law firm of Phillips Lytle LLP in the three proceedings discussed in the plaintiffs motion (#009) to remove and join. Said firm represents HSBC only in this action. Nonetheless, Phillips Lytle LLP cross moves in this action on the behalf of both defendants for an order sanctioning the plaintiffs pursuant to 22 NYCRR § 130-1.1, denying the plaintiffs' motion to remove and consolidate, and prohibiting the plaintiffs and their counsel from "instituting or initiating different or further proceedings or motions against [Hazard K. Campbell, Sr.] or HSBC until this Court has made a determination as [to] the multiple motions already before this Court" in the Suffolk County action.

In light of the determinations herein, the latter two branches of the instant motion are denied as academic. In support of their motion for sanctions, the movants submit the affirmation of their attorney who contends, among other things, that the plaintiffs motion (#009) for removal and consolidation is "baseless," and that the plaintiffs and their counsel "have engaged in extensive, vexatious and to date unsuccessful motion practice" in this action. The court has considered that portion of the motion seeking sanctions against the plaintiffs and their counsel pursuant to 22 NYCRR 130-1.1. To the extent that the movants base their request on the extensive motion practice herein, it is denied. It is determined that the plaintiffs' motions based, in part, upon legal theory, clearly do not rise to the level of "frivolous conduct" as contemplated by court rules (*see* Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [a]; CPLR 8303-a; *Agostini v Sobol*, 304 AD2d 395, 757 NYS2d 555 [1st Dept 2003]; *Juron & Minzner v State Farm Ins. Co.*, 303 AD2d 463, 756 NYS2d 428 [2d Dept 2003]; *Matter of Christopher*, 280 AD2d 546, 720 NYS2d 391 [2d Dept 2001]). To the extent that the movants base their request on the actions of counsel for the plaintiff which

⁴ The defendants directly affected by this motion indicate in correspondence with the Court that Justice Devlin has issued decrees settling the accounts in the three proceedings and contend that this motion is moot. The plaintiffs' correspondence acknowledges the issuance of said decrees and asks this Court to grant the motion or deny it without prejudice. In light of the determinations herein, the plaintiffs' request appears academic. However, it is determined that a denial without prejudice is the more conservative course.

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allegedly resulted in unnecessary appearances before the courts in Suffolk County, it is determined that the conduct was not frivolous. Accordingly, the motion is denied.

#011 - The Plaintiffs' Cross Motion For Sanctions and to Disqualify Phillips Lytle LLP As Attorneys or the Defendants HSBC and Hazard K. Campbell, Sr.

In support of the motion, the plaintiffs submit the affirmation of their attorney who sets forth a long list of complaints regarding the actions of Phillips Lytle LLP in the proceedings in Erie County, allegations of conflicts of interest regarding its simultaneous or successive representation of trustees and beneficiaries of certain trusts, and breaches of fiduciary duty. The Court has considered that portion of the plaintiffs' motion seeking sanctions against Phillips Lytle LLP pursuant to 22 NYCRR 130-1.1 based upon those complaints and finds that they are not sanctionable. Accordingly, the plaintiffs' motion is denied.

Dated:

September 24, 2014

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION _____ NON-FINAL DISPOSITION

RIDER

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