

Matter of Bosboom Family Trust (Gordon)
2016 NY Slip Op 32644(U)
December 5, 2016
Surrogate's Court, Nassau County
Docket Number: 2016-389666
Judge: Margaret C. Reilly
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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 Bosboom Family Trust dated
February 15, 2008, made by LISA B. GORDON, as
Settlor and Trustee and Jeffrey A. Bosboom, as
Successor Trustee of the Trust.**

DECISION

**File No. 2016-389666
Dec. No. 32084**

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition to Compel Accounting..	1
Objections to Petition to Compel Accounting with Exhibits.	2
Reply to Objections with Exhibits.	3

Before the court is a petition by David Bosboom seeking to compel Lisa B. Gordon and Jeffrey A. Bosboom to render and judicially settle their accounts as trustees of the Bosboom Family Trust. Objections to the petition have been filed by Lisa B. Gordon, who asserts that petitioner does not have standing to compel an accounting on the basis that a proceeding he commenced in Florida triggered the trust's no contest clause, thereby forfeiting his right to share in the trust assets.

The petitioner and the respondents are siblings, the children of Herman D. Bosboom and Barbara Bosboom. On December 19, 2007, both Herman D. Bosboom and Barbara Bosboom were found to be incapacitated by reason of dementia and the respondents were appointed plenary guardians for their parents pursuant to the order of the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Florida. In early 2008 the respondents moved their parents to New York as they were no longer able to care for themselves in

Florida. On February 15, 2008, the Bosboom Family Trust was created by Lisa B. Gordon as settlor and trustee; Jeffrey A. Bosboom was appointed successor trustee. The trust provides for distribution of the trust principal and any accumulated income equally to the petitioner and respondents free of trust upon the death of the second to die of Herman and Barbara Bosboom. Herman Bosboom died on April 25, 2008; Barbara Bosboom died on November 5, 2014.

The trust's no contest clause is found in Paragraph 33 and provides as follows:

33. NO CONTEST

To any devisee, legatee or other beneficiary, either direct or contingent, under this Trust, who in any manner, directly or indirectly, contests the administration or the execution of any of the provisions of this Trust indenture or who objects to any of its provisions or attempts in any manner, directly or indirectly, to thwart Settlor's intentions as in this will set out, the Trustees will distribute the sum of one (\$1) dollar and no more; and Settlor hereby directs that, save and except the sum of one (\$1) dollar, such devisee, legatee or beneficiary shall forfeit his or her interest under this Trust indenture and distribution of the Trust Estate will be made as though such person had predeceased HERMAN D. BOSBOOM and BARBARA BOSBOOM. It is expressly understood that any attempt by any beneficiary under this Trust indenture, to hinder or delay, either directly or indirectly, the administration of this Trust indenture, or who precipitates directly or indirectly any legal proceeding in any Court of competent jurisdiction by utilizing any pre-trial proceedings as defined under New York State Surrogate's Court Procedure Act, or the Estate Powers and Trust Laws of New York State including, but not limited to, document production, objections to fiduciaries' conduct, or for any other basis whatsoever, the Trustees will distribute the sum of one (\$1.00) dollar as herein prescribed under this paragraph of this Trust indenture.

After several unsuccessful attempts to have the respondents voluntarily account, on December 1, 2015, petitioner David Bosboom filed an amended motion in the Circuit Court for the Fifteenth Judicial District, Palm Beach County, Florida, ostensibly in connection with

the Barbara Bosboom guardianship proceeding, in which he sought to require the respondents Lisa B. Gordon and Jeffrey A. Bosboom to file a complete accounting for all assets of the Bosboom Family Trust and well as a declaration that the trust was null and void for failure to comply with certain Florida statutes governing the respondents' conduct as guardians of Barbara Bosboom. On January 12, 2016, the Florida court granted Lisa B. Gordon's motion to dismiss the proceeding. Although the short form order issued by the Florida court does not explain the basis for granting the motion, the basis asserted by the movant was that the Florida court did not have subject matter jurisdiction to consider the matter because the guardianship had terminated with Barbara Bosboom's death, there were no assets in the guardianship estate, and the trust was a New York trust, executed in New York. Paragraph 15 of the motion to dismiss provides: "David Bosboom is attempting to litigate trust claims which venue is New York, in the former Guardianship case in the State of Florida."

Equity abhors a forfeiture (*Fifty States Management Corp. v Pioneer Auto Parks, Inc.*, 46 NY 2d 573, 577 [1979]) and while no-contest clauses are enforceable in New York, they are not favored and must be strictly construed (*Matter of Singer*, 13 NY3d 447, 451 [2009]; *Matter of Fairbairn*, 46 AD3d 973, 974 [3d Dept 2007]). Here, the no-contest clause is triggered by certain conduct "in any Court of competent jurisdiction." Respondent Lisa B. Gordon successfully argued in the Florida court that it could not act on petitioner's motion there because it lacked subject matter jurisdiction to determine the issue. It was, therefore, not a court of competent jurisdiction and the no-contest clause was not triggered.

“Fundamental to the fiduciary relationship is the duty to account” (*Matter of Francis*, 19 Misc3d 536, 543 [Sur Ct, Westchester County 2008]). The petitioner is a one-third beneficiary of the subject trust and therefore has standing to compel the trustee to account. The court notes that while the petition seeks an accounting from both Lisa B. Gordon and Jeffrey S. Bosboom, Lisa B. Gordon is the only trustee currently serving in that capacity. The petition is therefore granted to the extent that Lisa B. Gordon is directed to file her account as trustee of the Bosboom Family Trust dated February 15, 2008 and cause citation to issue thereon within 45 days of service upon her of a court or attorney-certified copy of the decree to be entered.

Settle decree.

Dated: December 5, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate’s Court

cc: Patricia A. Harold, Esq.
Co-Counsel for Petitioner David H. Bosboom
350 Old Country Road, Suite 101
Garden City, NY 11530-1701

Daniel A. Seigel, Esq.
Co-Counsel for Petitioner David H. Bosboom
1800 North Military Trail, Suite 120
Boca Raton, FL 33431

William P. Nolan
Attorney for Respondents
Lisa B. Gordon and Jeffery A. Bosboom
1103 Stewart Avenue, Suite 200
Garden City, NY 11530