

Hennessy v Miller

2016 NY Slip Op 32838(U)

April 11, 2016

Supreme Court, Suffolk County

Docket Number: 15E-603733

Judge: Daniel Martin

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SHORT FORM ORDER

E-FILE

INDEX No. 15E-603733

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 6-26-15

ADJ. DATE 9-22-15

Mot. Seq. #002 - MD

SUSAN MILLER HENNESSY,

Plaintiff,

- against -

HOWARD MILLER and ARTHUR MILLER,

Defendants.

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Upon the following papers numbered 1 to 47 read on this motion for preliminary injunction; Notice of Motion/Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 7 - 37; Replying Affidavits and supporting papers 38 - 41; Other 42 - 47; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for a preliminary injunction removing defendant Howard Miller as trustee of the Miller Irrevocable Trust dated December 15, 1995, and installing herself as substitute trustee in his stead, is denied.

This is an action for, among other things, breach of fiduciary duty, breach of duties of loyalty, good faith, fair play and impartiality, and conversion. Plaintiff Susan Miller Hennessy is the daughter of Jacob Miller (Father) and Florence Miller (Mother), and the sister of defendants Howard Miller and Arthur Miller. It is undisputed that Father, by agreement dated December 15, 1995, created the Miller Irrevocable Trust which possesses an interest in certain real property located in New York City (the Trust). The Trust names defendant Howard Miller as the trustee of the Trust, and provides that the trustee shall collect any income derived from the Trust property and pay or apply all of the net income for the benefit of plaintiff and, upon the death of Father and Mother, to distribute the proceeds of the Trust to the three siblings equally. Father, as Grantor of the Trust, died on March 13, 2001, and is survived by Mother, his wife. In her complaint, plaintiff alleges that defendant Howard Miller "diverted and/or misappropriated earned income of the Trust from the date of its creation to date."

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By order to show cause dated June 12, 2015, plaintiff moves for a preliminary injunction removing defendant Howard Miller as trustee of the Trust, and installing herself as substitute trustee. In her affidavit in support of her application, plaintiff sets forth a list of checks from the Trust made payable to Father, defendant Howard Miller, and defendant Arthur Miller, and an entity entitled Millerockhill LLC beginning in February 1999 and ending in June 2014, and she alleges that said funds were improperly allocated pursuant to the terms of the Trust.¹ Plaintiff further alleges that defendant Arthur Miller substantially assisted and/or encouraged his brother to breach his fiduciary duties. In her complaint, plaintiff sets forth seven causes of action seeking monetary damages, an eighth cause of action seeking an accounting, and a ninth cause of action for a permanent injunction removing defendant Howard Miller as trustee of the Trust.

To be entitled to a preliminary injunction, the moving party has the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; *Aetna Insurance. Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 [1990]; *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see Dixon v Malouf, supra; Ruiz v Meloney*, 26 AD3d 485, 810 NYS2d 216 [2d Dept 2006]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (*see Dixon v Malouf, supra; Ruiz v Meloney, supra*). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (*Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]; *see also Hoeffner v John Father. Frank, Inc.*, 302 AD2d 428, 756 NYS2d 63 [2d Dept 2000]).

In opposition to the application, the defendants submit the affidavits of defendant Howard Miller, Mother and Mother's attorney. In his affidavit, defendant Howard Miller swears that plaintiff knew the specific terms of the Trust from the date of its creation, that she was aware that Father began to distribute the Trust income to himself and his three children in 1999, and that Father controlled the Trust from the date of its creation until his death. He states that plaintiff acquiesced in the arrangement because she was aware of her parents' "gift and estate planning philosophy" to treat their children equally, and because she received substantial assets from Mother, Father and the defendants. He indicates that these assets include Mother's gifting to plaintiff of Mother's one-third interest in Millerockhill LLC, which owns a family vacation home in upstate New York purchased by Mother and the defendants, the creation by Mother of "529 college plans" for all her grandchildren, as well as direct distributions to plaintiff, from funds received as the result of the defendants inclusion of their parents as employees in a corporation owned solely by them, and their hiring of plaintiff's husband to work for said corporation. Defendant Howard Miller further swears that Father instructed him to distribute the income of the Trust equally amongst the siblings, that he has always acted in a transparent manner regarding the

¹ The defendants contend that plaintiff removed the Trust records from their parents' home where they were stored, and that she has failed to provide them access to said records despite the service of demands for their discovery. Plaintiff has not addressed the issue in her submissions.

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distribution of the Trust income, and that distributions to Millerockhill LLC are appropriate as the siblings share equal interest in said property.

In her affidavit, Mother swears that, despite defendant Howard Miller being named as trustee, Father administered the Trust and issued all checks until his death, that two years prior to his death he began distributing the Trust income to himself and his children, and that all three children, including plaintiff, were aware of this arrangement and happy to receive whatever monies Father deemed fit to distribute. She states that Father told defendant Howard Miller to continue the equal distribution of trust income after his death, and that “our children were aware of our plan and philosophy” to treat them equally. She indicates that, as part of that plan, she and Father “bestowed tremendous benefits upon plaintiff and her family, much of which came from monies received from ... Arthur and Howard’s company.” Mother further swears that she was “distracted” when Susan demanded that Howard and Arthur return all of the monies not paid to her personally, that plaintiff refused to listen when she emphasized that Howard had followed Father’s instructions exactly, and that as a result she conferred with her attorney. She states that, after consultation with her attorney, she executed the Florence Miller Grandchildren’s Trust on June 10, 2015 (Grandchildren’s Trust), which provides that the income should be paid to plaintiff, but differs from the Trust in that it provides that upon her death both principal and income passes to trusts for the benefit of her grandchildren. She indicates that, upon the creation of her trust, defendant Howard Miller assigned the Trust’s assets to the Grandchildren’s Trust on June 10, 2015, pursuant to Article Sixth (e) of the Trust. Mother further swears that, to avoid and to mitigate any further disputes among her children, she has appointed her attorney as trustee of the Mother’s Trust.

In his affidavit dated June 2015, Louis P. Karol, Esq. swears that he was retained by Mother in September 2014 to help resolve the issues herein amicably, to assist Mother’s possible creation of a trust for her grandchildren, and regarding the assignment to that trust of the Trust’s assets. He states that he consulted with Mother in regard to Article Sixth (e) of the Trust, and assisted in preparation of a letter dated March 20, 2015 from Mother to defendant Howard Miller advising him that she had paid particular attention to Article Sixth (e) of the Trust, that she believed it inadvisable to continue the Trust, and asking Howard to carefully consider the proposed Grandchildren’s Trust in light of her discretion in said article.

Article Sixth (e) of the Trust provides, in pertinent part that “[i]f in the opinion of the Trustee, in his sole and absolute judgment, it shall at any time and for any reason be inadvisable, unnecessary or uneconomic to continue any trust created herein, then, anything to the contrary notwithstanding, the entire principal and accumulated income of such trust may be paid over and distributed, in the Trustee’s sole discretion, to the beneficiaries ... or to the Trustees of any other trust created by ... the GRANTOR’s said wife ... having the same income beneficiaries.”

In her affidavit in reply, plaintiff swears that she did not acquiesce or ratify the actions of defendant Howard Miller, that the affidavits submitted in opposition to this application contain “material misrepresentations of fact” or otherwise rely on hearsay evidence, and that the Trust must be construed as written. In addition, plaintiff contends that her brothers intentionally circumvented the undersigned’s order dated June 12, 2015 which granted a temporary restraining order restraining the defendants from “performing any act and/or exercise as Trustee of [the Trust].”

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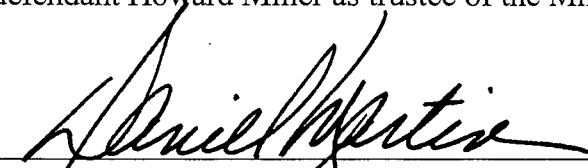
Initially, it is determined that plaintiff's claim that defendants intentionally circumvented the court order dated June 12, 2015 is without merit. The adduced evidence reveals that Mother initiated the process of forming the Grandchildren's Trust well before the commencement of this action, and that defendant Howard Miller acted before the signing of said order and without notice as to the relief sought in the subject order to show cause. As plaintiff notes in her reply affidavit, she has commenced a separate action, entitled *Hennessy v Miller*, Supreme Court, Suffolk County, Index No. 15-609665, to challenge the transfer of the Trust's assets to the Grandchildren's Trust. In effect, defendant Howard Miller is no longer involved in the administration of the assets and income at issue herein. In addition, by order dated April 11, 2016, the undersigned granted the motions to dismiss the complaint made in said separate action and disposed of the action, making this application for preliminary injunction less important herein, if not academic.

Regardless, plaintiff has not sufficiently demonstrated her entitlement to injunctive relief pending the determination of the action by showing a likelihood of success on the merits, irreparable injury in the absence of a preliminary injunction, and a balance of the equities in her favor (*see* CPLR 6301). A clear legal right to preliminary injunctive relief which is plain from undisputed facts must be established (*see Gagnon Bus Company, Inc. v Vallo Transportation, Ltd.*, 13 AD3d 334, 786 NYS2d 107 [2d Dept. 2004]; *see also 1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 AD3d 18, 924 NYS2d 35 [2d Dept 2011]). The burden of showing an undisputed right to the injunction rests with the movant (*see Doe v Poe*, 189 AD2d 132, 595 NYS2d 503 [2d Dept 1988]).

A review of the record indicates that plaintiff has not shown a likelihood of success on the merits. The Court does not address the merits of the competing claims made by the parties but, instead, notes that there is sufficient competing evidence to call into question plaintiff's ability to succeed on the merits of her claims. In addition, the record does not reveal irreparable harm in the absence of a preliminary injunction. Plaintiff has not established that she does not have an adequate remedy at law to recover any alleged misappropriation of the trust funds should she be successful in her actions against the defendants (*see White Bay Enterprises v Newsday, Inc.*, 258 AD2d 520, 685 NYS2d 257 [2d Dept 1999]). Neither has plaintiff demonstrated that the equities are balanced in her favor.

In addition, a party is not entitled to a preliminary injunction when the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action and effect an alteration, rather than a preservation of the *status quo* (*see McIntyre v Metropolitan Life Insurance Company*, 221 AD2d 602, 634 NYS2d 180 [2d Dept. 1995]; *Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218 AD2d 793, 631 NYS2d 167 [2d Dept. 1995]). In view of the foregoing, the instant application for an order directing the removal of the defendant Howard Miller as trustee of the Miller Irrevocable Trust dated December 15, 1995 is denied.

Dated: April 11, 2016


A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION