Matter of Buchanan
2017 NY Slip Op 30017(U)
January 10, 2017
Surrogate's Court, New York County
Docket Number: 2001-3879/B
Judge: Rita M. Mella

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Accounting by Ronald B. Buchanan, as Limited Administrator of the Estate of

BRANDON J. BUCHANAN,

Deceased.

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CHARILYN BUCHANAN,

Plaintiff,

-against-

RONALD B. BUCHANAN, individually and as Administrator of the Estate of Brandon Buchanan,

Defendant.

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DECISION

File No.: 2001-3879/B

File No.: 2001-3879/C

M E L L A , S. :

The following papers were considered in deciding these competing motions for summary judgment pursuant to CPLR 3212:

Papers Considered	Numbered
Amended Notice of Ronald Buchanan's Motion for Summary Judgment	1
Affidavit of Ronald Buchanan in Support, with Exs. 1 - 29	2
Memorandum of Law in Support	3
Affirmation of Robert Harper, Esq. in Opposition, with Exhs. A - NN	4
Memorandum of Law in Opposition to Ronald Buchanan's Motion	5
Reply Memorandum of Law in Further Support of Ronald Buchanan's Motion	6
Reply Affidavit of David J. Clark, Esq., in Further Support of Ronald Buchanan's Motion, with Exs. 1 - 2	7
Amended Notice of Charilyn Buchanan's Motion for Summary Judgment	8
Affirmation of Robert Harper, Esq., in Support, with Exs. A - VV, and Affidavit of Charilyn Buchanan in Support	9,10
Memorandum of Law in Support	11
Affidavit in Opposition by Ronald Buchanan, with Exs. 1 - 16	12
Memorandum of Law in Opposition	13
Reply Affirmation of Robert Harper, Esq., in Further Support, with Exs. 17 - 18	14
Reply Memorandum of Law in Further Support	15

Presently before the court are cross-motions in a contested estate accounting and cross-motions in a related action transferred from the Supreme Court (Monroe County). The accounting was commenced by Ronald B. Buchanan (hereafter "Ronald") as administrator of the estate of his son, Brandon Buchanan (decedent), who died in the World Trade Center terrorist attacks on September 11, 2001.[1] The transferred action was commenced against Ronald by Charilyn Buchanan ("Charilyn"), who is decedent's mother and Ronald's former wife.[2] In the accounting, Ronald moves for partial summary judgment dismissing those of Charilyn's objections to his account that relate to an award from the September 11th Victim Compensation Fund of 2001 (the "VCF").[3] Charilyn in turn seeks partial summary judgment in the accounting on her objection relating to the VCF award and three other objections. In the transferred action, both parties seek summary judgment on Charilyn's claims against Ronald in relation to the VCF award.

Background of These Cross-Motions

Brandon Buchanan was a 24-year-old equities trader working for Cantor Fitzgerald in the World Trade Center when he died on September 11, 2001. Brandon died intestate. Charilyn and

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[1]The account purports to commence from November 28, 2001. However, the administrator is accountable from the date of decedent's death, and the court therefore deems September 11, 2001, as the starting date of the accounting period.

[2]Although Charilyn's papers on these motions appear to assert that the transferred action was brought against Ronald in his capacity as estate administrator, the caption and paragraph 2 of Charilyn's complaint identify Ronald as defendant only in his individual capacity. Nor is it clear from the substance of the complaint – including its request for a "constructive trust" – that the suit was intended to be against Ronald as fiduciary of the estate.

[3]The VCF was established on September 22, 2001, under the Air Transportation Safety and System Stablization Act (49 USC § 40101).

Ronald are his sole distributees. By Decree dated November 15, 2001, Ronald was appointed administrator of his son's estate.[4]

The record reflects the following undisputed facts. After his appointment by this court, Ronald filed an application with the VCF, in which he identified himself as fiduciary of decedent's estate. By a letter dated April 30, 2004, the VCF advised that it had approved a final award of $2,666,189. The letter also advised that, before the funds could be remitted, Ronald would have to submit "proof of a final distribution plan . . . consistent with [New York] law." In pertinent part, the letter further advised:

> "The amount, if any, that a parent may be entitled to under New York law is a fact based decision that depends on the unique family circumstances of each case. As a result, the . . . economic award may be deposited in the estate's account and overseen by surrogate's court to be distributed according to New York law. Any dispute would be settled by the surrogate's court where the letters of administration were issued. *To expedite payment, you may also send the Fund proof of a plan of distribution that has been consented to by the victim's parent or parents. The Fund may approve direct payments of the entire award after receiving a written consensual plan signed and notarized by both [the personal representative] and the decedent's parent(s)*" (emphasis added).

In response, Ronald submitted to the VCF, among other things, a signed and notarized letter dated May 7, 2004, in which Charilyn stated:

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[4] Under the terms of Ronald's letters, as amended on May 16, 2002, he was restrained from compromising any claim until further order of the court. However, such restriction must be read in light of the provisions of EPTL 11-4.7(e)(3), effective as of May 21, 2002, which in relevant part reads as follows: "Notwithstanding any other provision of law to the contrary, or any restrictions set forth in letters relating to any decedent who dies as a result of . . . injury incurred as a result of the terrorist attacks on September [11, 2001], . . . compromise of any cause of action pursuant to the act [establishing the VCF] shall not violate any restriction on the powers granted to the personal representative [of the estate of such decedent] relating to the . . . compromise of any action [or] the collection of any settlement . . . ."

> "I hereby consent to payment of the September 11th Victim Compensation Fund award for the above-referenced claim to my husband, Ronald Buchanan, to be distributed by him in accordance with the laws of the State of New York."

On May 24, 2004, the VCF notified Ronald that its Special Master had approved Ronald's plan for distribution of the VCF award to himself pursuant to Charilyn's consent and that Ronald would receive $2,666,189. The letter advised that Ronald would "receive [that sum] . . . as a direct distribution or from the Personal Representative." On June 11, 2004, Ronald received the promised sum via three checks payable to him in his individual name, which he thereupon deposited into a credit union account in Charilyn's and his names. On June 16, 2004, Ronald transferred $2,666,000 from the credit union account into an account at UBS ("No. RA-XX418-08 (the "the 418 joint account"), also in the names of Charilyn and Ronald.

Some five years later, in August 2009, Charilyn commenced divorce proceedings against Ronald in Supreme Court, Monroe County (the "matrimonial action"). Among the allegations in her complaint, as amended, were her charges that Ronald had "spen[t] marital savings recklessly on frivolous and costly home improvement projects"; that, in 2006, he had purchased a house for her, but had "refused to assist [her] financially . . . forc[ing her] to . . . sell the house"; and that he had looted the 418 joint account, which "originally held $2,666,000.00, the source being the Victims' Compensation Fund, . . . received by the parties as a result of the death of their son, Brandon, killed in the World Trade Center disaster on September 11, 2001." Charilyn's complaint in the matrimonial action sought, among other things, damages from Ronald for conversion of the 418 joint account, dissolution of the marriage, and equitable distribution under the Domestic Relations Law.

Ronald and Charilyn eventually reached a settlement of the matrimonial action (the

"Stipulation") that was placed on the record in open court on June 17, 2010,[5] after negotiations that were, as Charilyn's then counsel put it, "extensive" and that, the same counsel noted, had included discussions in which the Judge assigned to their case had participated. The tangible assets that they had acquired during their marriage were divided between them, and they agreed that each of them would retain sole ownership of certain checking and retirement accounts in their respective names (including Charilyn's savings and loan account with a then balance of $140,000). The parties also agreed that Charilyn, having received $50,000 as her share of the net proceeds of sale of the house that Ronald had bought for her individually, would receive an additional $400,000 as payment for her surrender of her one-half interest in the equity in the marital home; that Ronald would also give her $442,500 (half of the then value of his SEP IRA at UBS); that he would also give her half of his after-tax distributions from his UBS Partner Plus Compensation Plan account, which had a then balance of approximately $405,000; that she would receive the sum of $100,000 in lieu of maintenance; and that she would also receive half of the date-of-distribution value of a securities account (which share was then worth approximately $368,700) established by Ronald at UBS (under account number X0389) in his sole name. This latter account held the VCF funds previously held in the 418 joint account.[6]

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[5]It is noted that the transcript of the June 17, 2010 hearing and Judgment of Divorce refer to a second amended complaint in the matrimonial action. Such a pleading, however, was not submitted by either party as part of the present record; nor has either of the parties mentioned such a pleading in the papers now before the court. This court therefore assumes that such change as the second amended complaint made to the amended complaint was not significant for present purposes.

[6]A handwritten document signed by Ronald and Charilyn and dated January 29, 2009, authorizes UBS "to transfer all cash and securities from our joint account number 0418 to account number 0389." It is undisputed that all the VCF funds had been deposited in UBS account 418 on June 16, 2004.

On June 9, 2011, the Monroe County Supreme Court issued a Judgment of Divorce dissolving the parties' marriage and incorporating, but not merging, the Stipulation. Some four months later, with new counsel, Charilyn returned to the court, asking the Judge who had presided over the matrimonial action for two forms of relief. On the one hand, she asked the Judge to enforce certain aspects of the settlement in her favor. On the other hand, she sought to increase her share of the settlement to the extent of assets purportedly omitted from the Stipulation, asking the Judge to issue an order for discovery in that connection. But, at a hearing on November 9, 2010, her motion was denied, the Judge noting that,

> "Quite frankly, the Court's intent wasn't to allow all of the assets that these parties had to be readdressed. It was for anything that absolutely was forgotten about. There was a very extensive list of assets that [Charilyn] and her attorney were discussing in exchange for the ultimate stipulation that was placed on the record. There was nothing inadvertent in anything. Perhaps it might have been clearer to have [Charilyn's former lawyer] put all of that on the record, but the negotiations went back and forth and those items specifically were discussed. So I'm not allowing that to be opened.
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> Furthermore, the mon[ies] that comprised the estate of the parties' deceased son[] were subject to proceedings in Surrogate's Court . . . [and] were addressed at least on two separate occasions in this action . . . ."

The presiding Judge then added that, if Charilyn nonetheless wished "to rescind or reform" the Stipulation, it would "need[] to be done by a plenary action and it [would have] to be on the grounds there was some sort of fraud, duress, et cetera . . . ."

On the same date as the post-Judgment hearing in Monroe County, a petition to compel Ronald to account as estate fiduciary was filed in this court on Charilyn's behalf. That petition was eventually granted, and, in November 2011, Ronald commenced the instant accounting proceeding here. On January 23, 2012, Charilyn objected to Ronald's account alleging, as relevant here, that Ronald failed to account for the VCF funds in Schedule A (Objection No. 4),

that the account was incomplete because Schedule E did not provide the exact dates of distributions of funds (other than VCF funds) (Objection No. 7), that distributions of assets as shown in Schedule E to joint bank accounts titled on Ronald's and Charilyn's names were not received by Charilyn because Ronald controlled those accounts (Objection No. 8), and that each distribution to a joint account shown in Schedule E was, in any event, followed shortly thereafter by a transfer from the joint accounts to Ronald's personal accounts, and that therefore Charilyn was not distributed any of the assets (Objection No. 9).

In August 2012, some seven months after filing her objections in this court, Charilyn filed her complaint against Ronald in the action ultimately transferred from Monroe County to this court, alleging abuse of a confidential relationship and breach of a fiduciary duty and seeking a constructive trust and damages. As aforementioned, a significant objection by Charilyn in the accounting and the heart of her complaint in the transferred action was that Ronald had failed to distribute to Charilyn her share of the VCF award.

In addition to moving for summary judgment in the transferred action and with respect to the VCF award in the accounting proceeding, Charilyn moves for summary determination sustaining her Objections Nos. 7, 8 and 9 in that proceeding. Ronald opposes Charilyn's motions and, as aforementioned, moves for summary judgment dismissing the transferred action in its entirety and for partial summary determination of Charilyn's objection to his account concerning the VCF funds.

Legal Standard for Summary Judgment

A summary adjudication may be made only where it is clear that there is no open issue of material fact requiring trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Phillips v*

Kantor & Co., 31 NY2d 307 [1972]). It is incumbent upon the movant for a summary determination to make a prima facie showing, by admissible evidence, that there is no such open factual issue (CPLR 3212[b]; *see Zuckerman v City New York*, 49 NY2d 557 [1980]). If the movant is able to make such a showing, the opposing party must present evidence establishing that, notwithstanding the movant's proofs, a material question of fact remains open and thus prevents a summary ruling in favor of the movant (*Zuckerman*, 49 NY2d at 562).

DISCUSSION

The Claims and Objections Relating to the VCF Funds

Ronald's position on his motions in the accounting proceeding and in Charilyn's action is that Charilyn has already received her full share of the VCF funds. According to Ronald, Charilyn received these funds in part between the time of the award's deposit to the couple's joint accounts and the couple's divorce, and in part through the settlement memorialized by the Stipulation.

As indicated above, Ronald has submitted evidence showing that, pursuant to Charilyn's written consent, the VCF funds had been sent to him to be distributed to him and Charilyn in accordance with New York law, and that he did so distribute as shown by his deposits of those funds to accounts in his and Charilyn's names as Brandon's sole distributees. He has submitted further evidence in support of his contention that, by the time Charilyn commenced the matrimonial action against him, much of the VCF award had been used to cover various family expenses. These proofs, coupled with the subsequent division of assets between Ronald and Charilyn embodied by the Stipulation -- which included such portion of the VCF award as

remained at that point in the marital pot[7] – establish Ronald's prima facie case for dismissal of Charilyn's pleadings in the accounting proceeding and in the transferred action to the extent that she claims that she has yet to receive the VCF funds.

In view of the prima facie case made by Ronald, Charilyn cannot successfully resist a summary determination against her without evidence demonstrating that there is at least some material issue of fact requiring a trial as to whether she received all of the VCF funds due her (*Romano v St Vincent's Med Ctr. of Richmond*, 178 AD2d 467, 470 [2d Dept 1991]). Charilyn's effort to carry that burden, although strenuous, is in the end unavailing. This is not to overlook or to discount Charilyn's contention that at no point prior to the settlement did she have more than theoretical control over the VCF funds put into her name as well as Ronald's. Nor is this to assess whether Charilyn's evidence raises some genuine doubt as to any of Ronald's proofs that he had applied for Charilyn's individual benefit a significant portion of the funds in their 418 joint account and, in any event, had devoted most of the balance of such funds for the family's benefit as a whole. Simply put, such questions are immaterial for present purposes, in view of the settlement effectuated by the Stipulation. For there can be no dispute as to two critical and dispositive facts. First, as is clear from the complaint that Charilyn filed in the matrimonial action in December 2009, she by such time was aware that the VCF award had been fully distributed to joint accounts for her and Ronald.[8] Charilyn was further aware that Ronald had

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[7] In relevant part, section 236 of the Domestic Relations Law (the "DRL") defines "marital property" as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held" (*see* DRL § 236[B][1][c]).

[8] If Ronald was thereby in technical violation of the restrictions on his letters (notwithstanding federal law's special allowances to personal representatives of the estates of

eventually put the remaining funds into an account in his own name. Second, as to the VCF funds (as well as all other assets held in their joint or individual names and all transactions that affected the size and make-up of the marital pot), the matrimonial action had afforded her the opportunity to obtain disclosure and to negotiate for purposes of arriving at an equitable distribution. The Stipulation into which she entered – and the Judgment of Divorce incorporating it -- reflected her agreement as to what constituted her fair share of the remaining VCF funds as well as all of the other contents of the marital pot. In this connection, it is noted, her pleadings do not allege on Ronald's part any fraud or other settlement-vitiating factor in the discovery process or the negotiations leading to the Stipulation. Indeed, the absence of such an allegation is understandable, given her past efforts to enforce the Stipulation.

Charilyn proposes that the Stipulation be viewed as a settlement from which the VCF funds were, as she and her counsel have put it in their respective submissions, "separately carved out" for disposition by this court rather than for disposition in the matrimonial action. She presents no evidence, however, to refute what is otherwise clear from the record, *i.e.*, that the VCF award was a major subject of the matrimonial action, both its prosecution (as witness her complaint) and its settlement (as witness her receipt thereunder of one half of what then remained of the VCF funds). The transcript of the November 9, 2010 hearing is hardly evidence to the contrary. That transcript is, instead, enough to show that neither the presiding Judge nor Charilyn's then counsel viewed the VCF funds as a subject for disposition outside the matrimonial action (indeed, the major impetus for the hearing on that date was the theory of

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victims of the September 11, 2001 attacks [*see* footnote 4, *supra*]), Charilyn's pleadings do not identify any injury that she suffered as a result of such infraction.

Charilyn's counsel that the VCF funds had been inadvertently omitted from equitable distribution of the marital pot, and the presiding Judge's references to the proceedings in this court were clearly meant only to debunk such theory by pointing out that the VCF funds were not likely to have been forgotten, having been repeatedly mentioned in this court as well as her own). Moreover, it may be noted, if so substantial a carve-out from the Stipulation had been intended, it can safely be assumed that Charilyn and her then counsel could and would have expressed it as readily for the matrimonial record as she and her current counsel have done for purposes of the present motions.

For the foregoing reasons, the court grants Ronald's motion for partial summary determination in the accounting proceeding as to Objection No. 4, and for summary judgment dismissing the complaint in the transferred action.[9] Accordingly, Charilyn's motions for partial summary judgment in the accounting and for summary judgment in the transferred action are denied.

Charilyn's Motion for Summary Determination of Objections Nos. 7, 8 and 9

Charilyn has presented sufficient evidence to establish her entitlement to a determination in her favor, as a matter of law, concerning her objections to the accuracy and completeness of the account as it refers to distributions of assets allegedly made to Charilyn through deposits to accounts held jointly in Ronald's and her names. That is, she has shown that the exact dates of the distributions listed on Schedule E are not provided in the account, and that after depositing funds into the joint accounts, the administrator proceeded to transfer those funds to accounts

[9]In view of the foregoing, there is no need to consider Ronald's statute of limitations defense to Charilyn's claims for breach of fiduciary duty and constructive trust.

controlled solely by him.

In opposition, Ronald successfully argues that the statements for each of the relevant joint accounts, showing the exact dates of distributions, were produced by the parties during discovery and thus the information is in Charilyn's possession. Ronald also submits proof that the monthly statements for these accounts, addressed to Charilyn and Ronald, were mailed to the parties' home and that, therefore, Charilyn should not be heard to complain about her lack of control of those accounts. Finally, Ronald has produced evidence that after being transferred to accounts held in his name alone, the funds were used to cover household and other expenses of the parties with Charilyn's knowledge and acquiescence. In the end, the proof produced by Ronald is sufficient to create a material issue of fact requiring a trial as to these objections.

Accordingly, Charilyn's motion for summary determination as to objections Nos. 7, 8 and 9 in the accounting proceeding is denied.

This decision constitutes the order of the court.

Dated: January 10, 2017

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