

Matter of Sinzheimer
2017 NY Slip Op 30968(U)
March 31, 2017
Surrogate's Court, New York County
Docket Number: 2015-1418
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

MARCH 31, 2017

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In the Matter of the Trust under the Agreement of

RONALD SINZHEIMER and MARSHA SINZHEIMER,

Settlers,

DECISION and ORDER

File No. : 2015-1418

dated January 27, 1997.
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M E L L A, S. :

The following papers were considered in deciding this motion:

<u>Papers</u>	<u>Numbered</u>
Motion of Marsha Sinzheimer and Andrew Sinzheimer, Esq., by Order to Show Cause dated July 7, 2016, for, inter alia, leave to renew and reargue prior motion regarding jury demand, and to reinstate claim for conversion, with exhibits 1 through 7	1
Memorandum of Law of Andrew Sinzheimer, Esq., in support of motion, dated June 23, 2016	2
Affidavit of Andrew Sinzheimer, Esq., in support of motion, sworn to June 25, 2016, with exhibits A through O	3
Affidavit of Marsha Sinzheimer in support of motion, sworn to June 22, 2016, with exhibits A through C	4
Memorandum of Law of Bressler, Amery & Ross, P. C., in opposition to motion, dated August 8, 2016	5
Supplemental affirmation of Jordan S. Weitberg, Esq., in opposition to motion, dated January 17, 2017, with exhibits A and B	6

Petitioners Marsha Sinzheimer and Andrew Sinzheimer have moved for leave to renew and reargue their prior motion to accept filing of their jury demand¹ and to reinstate their cause of action for conversion, based on newly discovered evidence. In a decision dated April 14, 2016, the court ruled that petitioners' jury demand had been timely filed, but denied the request to accept the demand. The court held that there was no right to a jury trial because petitioners' claims were based in equity. The parties have agreed to have the current motion determined on the papers submitted.

The underlying proceeding involves an inter vivos trust (Trust) created by Ronald Sinzheimer and Marsha Sinzheimer dated January 27, 1997. The dispute is between the individual co-trustee, Andrew Sinzheimer (Andrew), and the corporate co-trustee, Bank of America, N.A. (Bank), as to whether the trust instrument requires appointment of a successor corporate trustee before the Bank, as outgoing co-trustee, is required to deliver the trust assets to Andrew, as the sole remaining trustee. Petitioners in the underlying proceeding ask for delivery of the trust assets to Andrew, or, in the alternative, for damages for conversion. They also seek damages in the amount of trustee's commissions, and \$400,000 in punitive damages. The court's prior decision determined that petitioners' allegations did not state a claim for conversion because, among other reasons, the corporate trustee did not unequivocally refuse to deliver the assets to Andrew and never exerted control over the assets in its corporate, rather than fiduciary, capacity. Andrew states in this motion that he learned after the prior motion was submitted that

¹ Petitioners' motion, brought by order to show cause, refers to renewal and reargument of a "cross-motion to strike petitioners' jury demand," but in fact there has been no such cross-motion. The court treats the application as a motion for leave to renew and reargue petitioners' own motion to accept their jury demand.

the Bank had withdrawn funds from the Trust for payment of its legal fees – incurred in defense of its actions as trustee – in the total amount of \$21,145.91 during the period July 1, 2015 to May 31, 2016. He argues that his discovery has brought to light “new facts” that would change the court’s prior determination, entitling him to renew his motion under CPLR 2221(e)(2).

It is questionable whether movants have shown “reasonable justification” for the failure to present the Trust’s payment of the Bank’s attorneys fees on the prior motion, as required by CPLR 2221(e)(3). The transaction statements reflecting these payments were in petitioners’ possession when they made the motion. The court nevertheless grants the motion for leave to renew, in the exercise of its discretion, but adheres to its previous decision on renewal.

As stated in the prior decision, “a proceeding for delivery of allegedly converted assets involves a determination of title for which the New York Constitution historically guarantees the right to a jury [internal citation omitted].” It is the need to determine title, and not the action for conversion per se, that is the basis for the right to a jury. The Bank’s withdrawal of trust funds for attorneys fees does not raise any question of title, and the “new facts” alleged have no effect on the prior decision.²

More fundamentally, Petitioners have not identified any facts in contention for a jury to decide.

Petitioners’ motion for leave to reargue is apparently directed to their request that the court reinstate their cause of action for conversion. Petitioners maintain that it was improper for

² A trustee may use trust funds for “any reasonable counsel fees he may necessarily incur” (EPTL 11-1.1[b][22]). As the Bank acknowledges, amounts paid for legal fees are subject to review by the Surrogate’s Court and to refund to the extent directed by the court (SCPA 2110[3]). Payment of fees in advance of such approval where the fiduciary is a non-attorney is not improper, however, and not an act of conversion.

the court to observe that “[p]etitioners have not stated a cause of action for conversion” because the issue was not before the court and they did not have an opportunity to brief the law of conversion as it applies to this case.

The court grants leave to reargue, but adheres to its prior determination on reargument. The issue of conversion was germane to the determination of petitioners’ request for a jury trial and necessarily and appropriately addressed in the decision. Regarding petitioners’ claim that they did not have an opportunity to brief the issue – despite their treatment of the question in their reply memorandum of law on the prior motion, dated January 5, 2016 – they have now unquestionably had such opportunity, but make no new argument. The court holds that it did not overlook or misapprehend any matter of fact or law requiring modification of its prior order (CPLR 2221[d][2]).

It is noted that the court did not dismiss any allegations in the underlying petition, and the relief petitioners are seeking does not depend on a finding of conversion. Petitioners may well be entitled to a decree directing the turnover of trust assets based on a theory other than conversion, but whether such is the case is a determination that will be made in the context of the underlying proceeding.

This decision constitutes the order of the court.

Dated: March 31, 2017



SURROGATE