

Kluge v Subotnick

2019 NY Slip Op 30919(U)

March 26, 2019

Supreme Court, New York County

Docket Number: 656325/2017

Judge: Andrea Masley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREA MASLEY

PART

IAS MOTION 48EFM

Justice

-----X

JOSEPH KLUGE,

Plaintiff,

- v -

STUART SUBOTNICK, DAVID FINKELSTEIN

Defendant.

-----X

INDEX NO. 656325/2017

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for

DISMISS

In motion sequence number 002, defendants Stuart Subotnick and David Finkelstein move to dismiss plaintiff Joseph Kluge's amended complaint on the ground that a forum selection clause contained in the trust agreement at issue provides Delaware courts with exclusive jurisdiction over this dispute.

Background

On May 30, 1984, plaintiff's father, John W. Kluge, created a trust; he was both grantor and trustee along with trustee Manufacturers Hanover Trust Company (now J.P Morgan Chase Bank, N.A.) (1984 Trust). Decades later, on March 26, 2010, John W. Kluge entered into a restatement of the 1984 Trust, the "Seventeenth Restatement of Trust Agreement Dated May 30, 1984 between John W. Kluge, as grantor, and John W. Kluge and Manufacturers Hanover Trust Company (now J.P Morgan Chase Bank, N.A.)", with defendants Stuart Subotnick and David Finkelstein, as trustees (Defendant Trustees), and J.P. Morgan Trust Company of Delaware, as administrative trustee (2010 Trust Agreement) (NYSCEF Doc. No. 40, 2010 Trust Agreement). Pursuant to

Article III (C) of the 2010 Trust Agreement, if plaintiff survived his father, the Defendant Trustees were authorized to appropriate up to \$5 million to be held by them as trustees in a separate trust for plaintiff's benefit during his lifetime (*id.*) (Joseph Article III Trust). Upon plaintiff's death, the Joseph Article III Trust would terminate and any monies in the trust would be distributed to "Exempt Organizations" as determined by the Defendant Trustees (*id.*). Pursuant to Article XVI of the 2010 Trust Agreement,

"[n]o individual Trustee shall be liable for any act or omission in administering any trust created hereunder, unless such act or omission is the result of such Trustee's willful misconduct. Notwithstanding the preceding sentence, if any individual Trustee becomes liable for any such act or omission that is not the result of such Trustee's willful misconduct, such Trustee shall be entitled to indemnity out of the property of such trust. No Trustee hereunder shall be responsible for any act or omission of any other Trustee."

(Exculpation Clause) (*id.*). The 2010 Trust Agreement also contains an "in terrorem" clause, limiting the extent that a beneficiary can challenge the Defendant Trustees' conduct or prosecute claims relating to the 2010 Trust Agreement without forfeiting his or her rights under the 2010 Trust Agreement (2010 Trust In Terrorem Clause) (*id.* at Article XVII).

On September 7, 2010, John W. Kluge passed away; plaintiff survived him (NYSCEF Doc. No. 38, amended complaint, ¶ 7). Plaintiff alleges that, the Trustee Defendants, "as Preliminary Executors of John Kluge's Estate, refused to fund the trust authorized by the Restated 1984 Trust," but eventually the parties entered into an agreement, dated May 13, 2011, whereby the Defendant Trustees agreed to give plaintiff \$1 million dollars, pursuant to another agreement not at issue here, and create the Joseph Article III Trust (Joseph Agreement) (*id.* at ¶ 9; see also NYSCEF Doc. No. 39, Joseph Agreement). Pursuant to Joseph Agreement, the Defendant Trustees would

appropriate \$3,075,000 of the assets governed by the 2010 Trust Agreement to the Joseph Article III Trust for plaintiff's benefit (NYSCEF Doc. No. 39 at p. 2, ¶ E). The Joseph Agreement also provides, in relevant part,

"None of Joseph, any wife or former wife of Joseph (each, "Joseph's "Joseph's Wife" Wife"), and Joseph's issue shall, directly or indirectly, institute or prosecute, or be in any way directly or indirectly interested in or instrumental in the institution or prosecution of, any action, proceeding, contest or objection, or give any notice, for the purpose of:

a. setting aside, invalidating or disputing this Agreement, or any provision hereof, John's Will, or any provision thereof, the 1984 Trust, or any provision thereof, any other trust created by John, or any provision thereof, or the Joseph Trust, or any provisions thereof, any written instrument by which a person waives all interest in John's estate or any trust created by him, or any gift or pledge made by John during his lifetime, whether or not any such action, proceeding, contest or objection is instituted in good faith and with probable cause;

b. asserting any right or claim against John, his estate, the 1984 Trust or any other trust created by John other than to enforce the terms of this Agreement or exercising or attempting to exercise any right to take any part or share of John's estate contrary to the provisions of this Agreement, John's Will, the 1984 Trust or any other trust created by John;

e. bringing or participating in an action against any fiduciary under John's Will, the 1984 Trust, any other trust created by John or the Joseph Trust, and failing to establish in such action by clear and convincing evidence that such fiduciary's conduct was grossly negligent or constituted willful misconduct; and

f. asserting any contract, quantum meruit or similar claim against John, his estate, any trust created by John or the Joseph Trust.

(*id.* at p.6, Article Three). If plaintiff violates this provision, pursuant to Article Three, ¶

5, he would have to pay \$1 million in liquidated damages (Joseph Agreement In

Terrorem Clause) (*id.* at p. 7). Article Three also provides for mutual releases¹ (*id.* at p.

5).

¹ On July 8, 2011, plaintiff signed a separate release, whereby he agreed to "discharge, indemnify, and hold harmless" the Defendant Trustees from any claims; this release is not at issue for the purposes of this motion (NYSCEF Doc. No. 28, Release).

Plaintiff alleges that the Defendant Trustees have grossly mismanaged the Joseph Article III Trust, resulting in a significant loss of the Trust's principal and interest (NYSCEF Doc. No. 38, amended complaint, ¶ 13). Plaintiff asks the court (1) to construe the meaning of the 2010 Trust Agreement In Terrorem Clause and the Joseph Agreement In Terrorem Clause as well as the meaning of the 2010 Trust Agreement's Exculpation Clause; and (2) to declare them inapplicable and unenforceable (*id.* at ¶¶ 1, 3). The Trustee Defendants now move to dismiss the amended complaint, asserting that the 2010 Trust Agreement's Delaware forum selection clause applies, and thus, Delaware courts have exclusive jurisdiction over this dispute.

There is no dispute that the 2010 Trust Agreement contains a Delaware choice-of-law provision and a Delaware forum selection clause; the dispute is whether the forum select is applicable to the Joseph Agreement. Although Article IV of the Joseph Agreement provides that, "[t]his instrument and the rights of the parties hereunder shall be governed by and shall be construed and enforced in accordance with the laws of the State of New York without giving effect to conflict of law principles" (NYSCEF Doc. No. 39 at p. 8), it does not contain a forum selection clause.

Discussion

Plaintiff asserts that the 2010 Trust Agreement has terminated, and thus, the forum clause is not enforceable. Article II of the 2010 Trust Agreement states that,

"[u]pon the death of the Grantor, this trust shall terminate, at which time the remaining principal of this trust, together with any accrued and undistributed income and any property passing under this Agreement . . . shall be disposed of in accordance with the succeeding provisions of this Agreement"

(NYSCEF Doc. No. 40 at p. 3). Article II distinguishes between "this trust" and "this Agreement." "This trust" specifically refers to the 1984 Trust established by John W.

Kluge in 1984, restated in 2010. It is the 1984 Trust that terminated upon John W. Kluge's death in September 2010. The 2010 Trust Agreement, itself, which governs several trusts, including the Joseph Article III Trust, did not terminate upon John W. Kluge's death. If it had terminated, then plaintiff would not have acquired the assets that he did upon John W. Kluge's death, because the provision from which plaintiff acquired those assets would have terminated immediately upon John W. Kluge's death.

It is undisputed that plaintiff is not a signatory to the 2010 Trust Agreement. Nevertheless, under New York law, a non-signatory can "invoke [or be bound by] a forum selection clause" in three instances: (1) where the non-signatory "is a third-party beneficiary of the agreement" with the forum selection clause; (2) "where the non-signatory is a party 'to a 'global transaction' [but] are not signatories to a specific agreement within that transaction" which contains a forum selection clause and "the agreements are executed at the same time, by the same parties or for the same purpose"; and (3) where the non-signatory is "'closely related' to one of the signatories" (*Freeford Ltd. v Pendleton*, 53 AD3d 32, 39 [1st Dept 2008] [citations omitted], *lv denied* 12 NY3d 702 [2009]; *see also Tatko Stone Prods. v Davis-Giovinzazzo Constr. Co.*, 65 AD3d 778, 779 [3d Dept 2009]). Here, plaintiff is an intended third-party beneficiary of the 2010 Trust Agreement, which provides that if plaintiff survives his father, the Defendant Trustees are authorized to appropriate \$5 million to be held in a separate trust for plaintiff's benefit (see NYSCEF Doc. No. 40 at pp. 8-9). Thus, plaintiff is bound by the forum selection clause contained in the 2010 Trust Agreement for any claims involving this Agreement.

Plaintiff alleges that the cases cited by the Trustee Defendants are inapposite since all involve commercial transactions rather than a trust binding a non-signatory beneficiary. However, plaintiff's cases also involve commercial transactions and neither side cites case law with facts directly on point.

Further, the cases cited by plaintiff are distinguishable. For example, *Natl. Union Fire Ins. Co. v Williams* (223 AD2d 395 [1st Dept 1996]) involves a promissory note and an indemnity agreement both with competing forum selection clauses. In *National Union Fire Ins. Co.*, the Court found that National Union's claims under the indemnity agreement were so distinct and separate from any legal claims under the note that the indemnity agreement's forum selection cause was operative, and the indemnity claims would be heard in New York. The court dismissed National Union's claim under the note on the ground that it was not brought in the appropriate forum pursuant to the note's forum selection clause. Here, plaintiff's own pleadings intertwine the 2010 Trust Agreement and the Joseph Agreement by seeking a declaration as to both which require a simultaneous review, as discussed below, as well as an interpretation of an Agreement with a Delaware forum selection clause.

In *CooperVision, Inc. v Intek Integration Tech., Inc.* (7 Misc 3d 592, 2005 Slip Op 25060 [Sup Ct, Monroe County 2005]), plaintiff brought claims under a software implementation agreement, which did not have a forum selection clause. Defendant Intek Integration Technologies argued that a software licensing agreement with a Washington state forum selection clause was integrated into the implementation agreement, and thus, Washington was the proper forum. The court disagreed and held that plaintiff only brought claims arising out of the implementation agreement which did

not provided for a mandatory forum. Again, plaintiff here seeks a determination involving both Agreements.

Further, plaintiff's reliance on *L-3 Communications Corp. v. Channel Technologies, Inc.* (291 AD2d 276 [1st Dept 2002]) for the proposition that, under New York law, a party will not be bound to a forum selection clause in an agreement he did not sign is also misplaced. The non-signatory in that case bore no relation to the signatory to be implicitly included within the agreement's forum selection clause. Here, plaintiff is an express and intended third-party beneficiary to the 2010 Trust Agreement.

Although plaintiff argues that the 2010 Trust Agreement is separate and distinct from the Joseph Agreement, he asks the court to interpret both and declare certain provisions of each of them unenforceable and inapplicable. Thus, the 2010 Trust Agreement is one of two contracts forming the basis for this action. Further, the Joseph Agreement In Terrorem Clause explicitly incorporates the 2010 Trust Agreement, precluding plaintiff from bringing an action setting aside any provision of the 2010 Trust Agreement or bringing an action against any fiduciary under the 2010 Trust Agreement without clear and convincing evidence that such fiduciary's conduct was grossly negligent or constituted willful misconduct (NYSCEF Doc. No. 39 at pp. 5-6, Article Three). The court cannot make a determination as to whether plaintiff's challenge to certain investment choices by the Defendant Trustees will set aside any provision of the 2010 Trust Agreement without analyzing that Agreement, which is subject to the Delaware forum selection clause.

Finally, plaintiff has not sufficiently demonstrated that the forum selection clause should be set aside as unreasonable, unjust, or overreaching, or because of fraud. In

New York, forum selection clauses are prima facie valid and enforceable, “and are not to be set aside unless a party demonstrates that the enforcement of such would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court” (*Sterling Natl. Bank v E. Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006] [internal quotation marks and citations omitted]). Plaintiff’s contention that it is unreasonable and unjust to enforce the forum selection clause because Delaware courts view in *terrorem* provisions more favorably than New York courts is not sufficient. The 2010 Trust Agreement provides for the forum of Delaware. Nevertheless, both Agreements contain choice of law provisions regardless of the forum.

Plaintiff also opposes enforcement of the forum selection clause because the parties’ dispute lacks a sufficient nexus to Delaware. He argues that the decedent’s will was probated in New York, a trustee resides in New York, and all other related agreements and trusts were executed in New York and provide that New York law applies. However, the 2010 Trust Agreement is governed by Delaware law, appointed a Delaware entity as its initial Administrative Trustee, and designated Delaware as the intended initial situs of all trusts formed under it. Further, plaintiff, a Florida resident, provides no compelling reason why New York is a more convenient forum than Delaware.

Accordingly, it is hereby,

ORDERED that the motion of defendants Stuart Subotnick and David Finkelstein to dismiss the amended complaint is granted and the amended complaint is dismissed

see

in its entirety with costs and disbursements to ~~said~~ defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of ~~said~~ defendants.

see

3/24/19
DATE

HON. ANDREA MASLEY

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: