

Matter of Phillips (Dorman)

2021 NY Slip Op 32002(U)

August 3, 2021

Surrogate's Court, New York County

Docket Number: 2013-2036/C

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

DATE FILED
Date: August 3rd 2021

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In the Matter of the Petition of
Grant E. Phillips and Scott B. Phillips
for Omnibus Relief against Neal
Dorman, Individually and as Executor,
Lightstone Acquisition III LLC,
LSG 365 Bond Street LLC, and
The Lightstone Group, LLC, in the
Estate of

File No. 2013-2036/C

JOSEPH PHILLIPS,

Deceased.
-----X

A N D E R S O N, S.

Grant Phillips and Scott Phillips have filed a petition seeking omnibus relief against the estate of their father, Joseph Phillips, and the estate's executor, Neal Dorman, in his individual capacity. Petitioners allege that Joseph committed certain breaches of fiduciary duty (as discussed below) and that Dorman, who also happens to be the Phillips family's lawyer, aided and abetted those breaches. Dorman, in both capacities, has moved to dismiss (CPLR 3211[a]).

Background

Joseph died on May 10, 2013, survived by his second wife, Rosemary, and petitioners, decedent's sons from a prior marriage. In his will, dated August 24, 2010, Joseph disinherited petitioners and left his entire estate to a trust he established for the sole benefit of Rosemary. Letters testamentary issued to her in July 2013. Upon her death in 2015, Dorman and Ira Schapiro, the nominated successor executors, became the estate's fiduciaries. Schapiro resigned in 2017, and Dorman has served as the sole

executor of Joseph's estate ever since.

Petitioners commenced the instant proceeding in August 2017. This was not petitioners' first effort to sue their father's estate and Dorman. More than a year earlier, they had filed an action against the estate, Dorman and Citibank N.A., in the United States District Court for the Southern District of New York (the "Federal Action") in which they alleged, among other things, that Joseph and Citibank had engaged in misconduct as co-trustees of a trust established under the will of Joseph's father, David Phillips (the "Trust"), and that Dorman had aided and abetted such conduct.

Before the Federal Action was commenced, petitioners, as remaindermen of the Trust, had filed objections in this court to a pending accounting proceeding brought by Citibank as co-trustee of the Trust (the "Trust Accounting"). Eventually, the federal court abstained in favor of the Trust Accounting, finding that the Federal Action and the Trust Accounting involved substantially the same parties, issues, and events and that this court was better equipped to resolve the estate-related matters raised in the complaint (see *Phillips v Citibank, N.A.*, 252 F Supp 3d 289 [SDNY 2017]). The federal court then stayed petitioners' claims seeking damages from Citibank and Dorman, individually and as executor, pending "resolution of the proceedings in the Surrogate's Court" (*id.* at 304). Thereafter, petitioners commenced the instant proceeding, which ostensibly seeks to bring before this court petitioners' claims arising out of facts, first alleged in the

federal action, that are unrelated to the Trust Accounting.

The Allegations in the Petition

Petitioners' six causes of action relate mostly to events involving their grandmother, Sylvia Phillips, and the disposition of her assets. They allege a close relationship with Sylvia and claim that she had always intended that they be the ultimate beneficiaries of her property when she died. According to them, her 1986 will reflected that intent by providing that her property would be held in trust for the lifetime benefit of Joseph, but with remainder to petitioners.

Petitioners further allege that Joseph was unhappy with this arrangement. They assert that after Sylvia's health had begun to deteriorate, Joseph, with the aid of Dorman, undertook a campaign to influence Sylvia to change her estate plan. By that point, her property consisted of a 35% interest in a valuable parcel of realty in Brooklyn (the "Brooklyn Property"), a Manhattan cooperative apartment (the "Coop"), a lake house in Mahopac, New York (the "Lake House"), and her personal effects, including jewelry (the "Personal Property"). Petitioners claim that Joseph orally agreed to "pass on" to them whatever property he received from his mother, and, in exchange for that promise, she agreed to give him her property outright (the "Agreement"). Thereafter, in 1991, in reliance on Joseph's promise, Sylvia executed a new will (drafted by Dorman) that provided for the Coop, Lake House, and Personal Property to go to Joseph directly, leaving only Sylvia's interest

in the Brooklyn Property in a trust for Joseph's lifetime benefit with remainder to petitioners. Two years later, in 1993, she made a gift of the Brooklyn Property to Joseph, mooting the devise to the trust in the 1991 will.

Petitioners also allege that Joseph, with Dorman's assistance, leveraged a confidential relationship with Sylvia to unduly influence her to change her 1986 will and then to transfer the Brooklyn Property to him. They contend that Sylvia changed her estate plan when she was in poor health and particularly susceptible to her son's improper influence. Sylvia died in June 1993, four months after transferring the Brooklyn Property to Joseph. Her will was admitted to probate without objection, and Joseph and Dorman were appointed executors. However, when Joseph died in 2013, he had not "pass[ed] on" to petitioners any of the property he had received from Sylvia.

Based on these allegations, petitioners allege five causes of action against Joseph's estate, *i.e.*, against Dorman as executor. The theory behind each of the claims is that petitioners are third-party beneficiaries of Joseph's promise to Sylvia to "pass on" her property to petitioners. They assert that Joseph breached not only the Agreement but also the implied covenant of good faith and fair dealing contained therein. In addition, they allege causes of action for promissory estoppel and fraud based on Joseph's promise. Finally, they seek from Joseph's estate turnover of the property that was the subject of the Agreement under SCPA § 2105. As against

Dorman individually, petitioners assert one cause of action, namely that he aided and abetted Joseph's various breaches of fiduciary duty.

The Motions to Dismiss

Dorman, as executor, contends that the five causes of action leveled against him should be dismissed on three independent grounds, first, that documentary evidence warrants dismissal (CPLR 3211[a][1]), second, that the petition fails to a state cause of action (CPLR 3211[a][7]), and third, that some of the causes of action are in any event barred by the statute of limitations (CPLR 3211[a][5]).

Dorman, in his individual capacity, seeks dismissal of the single cause of action against him on those same grounds, but also on the basis that the Federal Action is a prior action pending (CPLR 3211[a][4]).

The standards on a CPLR 3211 motion are well established. Pleadings should be construed liberally, and the facts as alleged presumed true and accorded the "benefit of every possible favorable inference" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]; see CPLR § 3026). However, as the Appellate Division, First Department, has stated, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003][citations omitted]).

For documentary evidence to be a basis for dismissal (CPLR 3211[a][1]), it must be "unambiguous," of "undisputed authenticity," and its contents "essentially undeniable" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019][internal quotations and citations omitted]). Even then, dismissal is warranted only if the documentary evidence "utterly refutes plaintiff's factual allegations" and "conclusively establish[es] a defense to the asserted claim as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002][citations omitted]).

On a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]), the test is whether the allegations in the pleading "manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977][citations omitted]). If they do, the motion must be denied. As for a motion based on a statute of limitations defense (CPLR 3211[a][5]), movant "bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011][internal quotations and citations omitted]). The burden then shifts to the claimant to raise a question of fact concerning the expiration of the limitations period (see e.g. *MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019][citations omitted]).

The Causes of Action against Dorman as Executor

a) Breach of Contract

Based on a third-party beneficiary theory, petitioners allege that Joseph breached the Agreement by failing to transfer to petitioners the property that Sylvia had given to him as a gift or left to him outright in her will. Movant first argues that the claim should be dismissed because it is based on an unenforceable oral agreement to make a testamentary disposition. Movant is correct that EPTL § 13-2.1(a)(2) requires that such an agreement be in writing. However, petitioners do not allege that Joseph promised to make the transfers in question only by his will. Their pleading alleges instead that Joseph agreed to "pass on" or "transfer" to his sons whatever property he received from Sylvia. Because Joseph could have met this obligation by giving the property to his sons during his lifetime, petitioners' argument fails. As for the "documentary evidence" that movant relies upon to establish that Joseph's oral agreement was to make a testamentary disposition, it fails to meet the standards noted above that would warrant dismissal at the pleading stage (*see e.g. VXI Lux Holdco S.A.R.L v SIC Holdings, LLC*, 171 AD3d 189 [holding documentary evidence that failed to "utterly refute" the plaintiff's factual allegations was insufficient to warrant dismissal at the pleading stage]).

Nonetheless, although petitioners escape the consequences of EPTL § 13-2.1(a)(2), they cannot avoid another statutory provision, namely General Obligations Law ("GOL") § 5-703, which requires that

agreements to convey real property be in writing. The Agreement as it relates to Sylvia's real property, namely the Lake House and the Brooklyn Property, thus runs afoul of GOL § 5-703, notwithstanding the mandate of EPTL § 13-2.1(a)(2).

Such a determination does not render the entire contract void, however. Although generally, the invalidity of a part of a contract under the Statute of Frauds renders the whole contract void, an exception exists if the oral agreement is severable, *i.e.*, has "two or more parts not necessarily dependent on each other" (*Apostolos v R.D.T. Brokerage Corp.*, 159 AD2d 62, 66 [1st Dept 1990][citations omitted]). In that circumstance, the part of the contract that is not required to be in writing may still be enforced (*id.*). Here, viewing the petition in its most favorable light, the court cannot conclude that the Agreement was a "single, indivisible contract unenforceable under the Statute of Frauds" (*Roberts v Grandview Dairy, Inc.*, 20 AD2d 574, 575 [2d Dept 1963]).

This leaves as potentially enforceable the parts of the Agreement that relate to the Coop and the Personal Property. Movant argues that, even without regard to the Statute of Frauds, the terms of the Agreement as alleged are too vague to be enforceable. They rely on the "definiteness doctrine," which provides that "a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to" (*166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991][citation omitted]). This doctrine "assures that courts will not impose contractual

obligations when the parties did not intend to conclude a binding agreement" (*Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]). However, as the Court of Appeals has observed, the doctrine should be used only as a "last resort" since it requires the conclusion that a party's promise "be ignored as meaningless" (*id.* at 483 [citation omitted]).

Here, the Agreement, as alleged, is not too indefinite to be enforceable. That the Agreement did not identify the specific property that Sylvia would transfer to Joseph is hardly fatal since the parties contemplated that whatever property Sylvia ultimately transferred to Joseph would be transferred by him to petitioners. The Court of Appeals has stated that "[i]mperfect expression does not necessarily indicate that the parties to an agreement did not intend to form a binding contract" (*166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d at 91). Nor does movant's reliance on an email sent by Grant to Joseph in 2013 establish that the Agreement was fatally vague as to how Sylvia's property would be allocated between petitioners. The Agreement, as alleged, provided that Joseph would transfer the property he received from his mother to his "sons." Grant's email to his father does not alter those terms.

Finally, movant argues that the six-year statute of limitations for breach of contract (CPLR § 213) expired long ago. Movant relies on documentary evidence, namely the March 15, 1994, Memorandum of Closing for the sale of the Coop by Joseph and Dorman

as executors of Sylvia's estate. Petitioners concede that the Coop was sold in 1994, which rendered it no longer available for distribution to Joseph under Sylvia's will. However, they argue that the sale was not a breach of the Agreement because they consented to the sale to pay taxes in Sylvia's estate. According to petitioners, they "waived or excused the performance of Joseph's promise with respect to the Coop" except to the extent that the sale proceeds were not used to pay the taxes or exceeded the taxes due.

Petitioners' argument ignores that the petition (1) does not mention that the Coop was sold, let alone with petitioners' consent, and (2) does not limit the damages sought to the sale proceeds that were not used to pay taxes. Two issues thus arise. First, of what consequence is the fact that the Coop was sold with petitioners' consent, and second, from what point did the six-year statute of limitations for breach of contract begin to run.

As to the first issue, petitioners' admission that they agreed to the Coop's sale requires dismissal of the breach of contract claim as it relates to the Coop. As petitioners themselves argue, the sale of the Coop was not a breach of Joseph's alleged agreement to "pass on" the Coop to petitioners. Although petitioners maintain in their opposition papers that they still have a claim to whatever portion of the sale proceeds that were not used to pay taxes in Sylvia's estate, the petition makes no mention of the Coop's sale, let alone of any agreement between Joseph and petitioners that

would support a claim to excess sale proceeds. Under these circumstances, petitioners' cause of action for breach of contract as it relates to the Coop is not viable and must be dismissed.

Regarding the second issue, the application of the six-year statute of limitations for breach of contract as it relates to the Personal Property (the only remaining part of petitioner's breach of contract claim), movant argues that the limitations period began to run when the Coop was sold in 1994. Alternatively, movant claims that the limitations period has run in any event under the "reasonability standard" imposed by courts where, as here, the agreement fails to include a performance date. However, petitioners make clear that they consented to the sale, *i.e.*, they did not consider the sale a breach. Thus, it cannot be determined on the present record that the claim for breach of contract accrued when the Coop was sold (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993][noting that "a breach of contract cause of action accrues at the time of the breach" [citations omitted]]).

Moreover, where a contract fails to include a performance date, courts determine what is a reasonable date based on the facts and circumstances (*see e.g. Savasta v 470 Newport Assocs.*, 82 NY2d 763, 765 [1993][citations omitted]). Here, there was nothing unreasonable about Joseph's having the use of the property his mother had given him during his lifetime. After all, under Sylvia's 1986 will, she essentially had given Joseph a life estate in the

same property. Under these circumstances, a reasonable time for Joseph to have performed under the Agreement was anytime before his death in May 2013. Because this proceeding was commenced within six years of that date, the Agreement as it relates to the Personal Property is not barred by the statute of limitations. The court has considered movant's other arguments and finds them to be without merit.

Based on the foregoing, petitioners' cause of action for breach of contract is dismissed except with respect to the Personal Property.

b) Breach of the Covenant of Good faith and Fair Dealing

Based on a third-party beneficiary theory, petitioners also assert that Joseph breached the implied covenant of good faith and fair dealing contained in every contract (see e.g. *American-European Art Assocs. v Trend Galleries*, 227 AD2d 170, 171 [1st Dept 1996]). The law is clear that any such claim must be based on an enforceable contract (see e.g. *Schorr v. Guardian Life Ins. Co. of Am.*, 44 AD3d 319 [1st Dept 2007][citation omitted]). Here, the Agreement between Joseph and his mother is not enforceable except as it applies to the Personal Property. Thus, only that part of petitioners' contract claim can support a further claim for breach of the implied covenant of good faith and fair dealing.

As so limited, petitioners' cause of action runs afoul of well-settled law that such a claim is properly dismissed as

duplicative of a breach of contract claim where both claims "arise from the same facts and seek the identical damages for each alleged breach" (*Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 434 [1st Dept 2013][internal quotations marks and citation omitted]). Notwithstanding petitioners' effort to differentiate their good faith and fair dealing claim from the contract claim, both claims arise out of Joseph's alleged failure to honor his promise to Sylvia, and both seek identical damages. That this case is in the pre-answer and pre-discovery stage is not dispositive where, as here, the claim for breach of the covenant of good faith and fair dealing, as alleged, fails to stand as an independent claim (see e.g. *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995][affirming dismissal of claim for breach of the covenant of good faith and fair dealing because it was "redundant" of breach of contract claim]). Accordingly, petitioners' claim for breach of the implied covenant of good faith and fair dealing is dismissed for failure to state a claim (CPLR 3211[a][7]). As a result, the court need not reach movant's argument that the claim is barred by the statute of limitations.

c) Promissory Estoppel

To state a claim for promissory estoppel, a party must allege: "(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance" (*MatlinPatterson ATA Holdings LLC v Federal*

Express Corp., 87 AD3d 836, 841-842 [1st Dept 2011][citations omitted]). Movant argues that petitioners fail to state a claim because Joseph's promise was made to Sylvia and not to them, *i.e.*, they were not a promisee. We need not reach this issue because, even assuming for argument's sake that petitioners have standing to make a claim for promissory estoppel in the circumstances here, their allegations are insufficient as a matter of law.

A cause of action sounding in promissory estoppel "is not viable where the conduct underlying the claim is governed by contract, and where the plaintiff fails to allege a duty independent of the contract" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 33 [1st Dept 2015] [citation omitted]). Here, petitioners predicate their cause of action on the same allegations as their breach of contract cause of action, namely that Joseph made a promise to Sylvia to transfer property to petitioners but did not do so. In addition, they do not allege that Joseph had a duty to act that was independent of the contract.

To the extent that petitioners assert their cause of action for promissory estoppel in order to avoid the consequences of the statute of frauds as to *the Brooklyn Property and the Lake House*, their allegations remain plainly insufficient. In this circumstance, a promissory estoppel claim is viable only where unconscionable injury results from the reliance placed on the alleged promise (*see Melwani v Jain*, 281 AD2d 276, 277 [1st Dept

2001][citation omitted]). Here, petitioners have failed to allege the requisite level of unconscionability. The only injury that petitioners claim to have suffered is that they did not receive the property Joseph promised to "pass on" to them. If the mere loss of an expectancy could serve to satisfy the unconscionability requirement, then every unfulfilled promise would meet the standard. The court has considered petitioners' other arguments and finds them to be without merit.

Based on the foregoing, the cause of action for promissory estoppel is dismissed for failure to state a claim (CPLR 3211[a][7]).

d) Fraud

As alleged in the petition, petitioners premise their fraud cause of action on allegations that Joseph falsely represented to Sylvia that he would eventually transfer to petitioners any property she gave to him and that, in reliance on those misrepresentations, she provided for Joseph to receive her property outright either by gift or in her 1991 will. Petitioners allege that they were damaged by the misrepresentations because they did not receive Sylvia's property from Joseph as promised. In Scott's opposition affidavit, the kind of submission that can serve to remedy any defects in the petition (see e.g. *Leon v Martinez*, 84 NY2d 83, 88 [1994]), Scott further alleges that petitioners were aware of Joseph's promise to Sylvia and, in reliance on it, he and

Grant did not challenge the validity of Sylvia's 1991 will or her 1993 gift of the Brooklyn Property to Joseph.

The elements of a cause of action for fraud are "a misrepresentation or a material omission of fact which was false and known to be false by [the respondent], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd v Wildenstein*, 16 NY3d 173, 178 [2011][internal quotation marks and citations omitted]). A party asserting a fraud claim may not establish the reliance element by showing that a third party relied on the false statements resulting in injury to the plaintiff (*see Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 829 [2016]["We ... decline to extend the reliance element of fraud to include a claim based on the reliance of a third party, rather than the plaintiff"]). However, the Court of Appeals has made clear that a fraud claim may lie where the fraudulent statement was made to a third party but "made with the intent that it be communicated to the plaintiff and that the plaintiff rely on it" (*id.* at 828, *citing Eaton Cole & Burnham Co. v Avery*, 83 NY 31 [1880]).

Here, petitioners allege that they became aware of the false statements to Sylvia and relied on them as well and that their reliance caused them damage because they did not receive the benefit of Joseph's promise to Sylvia. These allegations

distinguish this case from *Pasternack*. There, the plaintiff had no knowledge of and therefore did not rely on the misrepresentations that formed the basis for his fraud claims. However, even viewing the petition and Scott's opposition affidavit in its most favorable light, petitioners fail to allege, as they must when an indirect communication is involved, that Joseph made the statements to Sylvia with the intent that they would be communicated to petitioners and that petitioners would rely on them (*see id.* at 828; *see also New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 153 AD3d 1351, 1354 [2d Dept 2017]). The factual statements asserted only in petitioners' memorandum of law are insufficient to remedy this pleading defect.

Also without merit is petitioners' effort, also in their memorandum of law, to recast this cause of action as an equitable one for constructive fraud arising from a confidential relationship between Joseph and Sylvia. Petitioners provide no authority to support a wholesale revision of a cause of action in this manner. In any event, the pleading itself, even viewed in its most favorable light and in conjunction with Scott's opposition affidavit, is insufficient to state the claim envisioned by petitioners' in their memorandum of law. The court has considered petitioners' other arguments and finds them to be without merit.

For these reasons, the fraud cause of action is dismissed for failure to state a claim (CPLR 3211[a][7]).

The Reverse Turnover Claim against Dorman as Executor

Finally, petitioners seek reverse turnover (SCPA § 2105) of the property that Joseph allegedly promised Sylvia that he would transfer to petitioners. SCPA § 2105 requires the party seeking turnover to demonstrate his or her "unquestioned and unconditional right to the immediate possession of the specific items of property in question" (*Matter of Lederle*, NYLJ, June 12, 1998, at 31, col 1 [Sur Ct, NY County 1998][citation omitted]). As discussed above, the petition fails to state a claim against Dorman, as executor, except for breach of contract as it relates to Joseph's promise to transfer the Personal Property to petitioners. Thus, the only viable reverse turnover claim is limited to the Personal Property. As to that property, viewing the petition in its most favorable light, petitioners have sufficiently alleged facts that support such a claim.

That petitioners also have a cause of action seeking damages for breach of contract related to the Personal Property does not render the cause of action "superfluous" as movant contends. The relief requested in a reverse turnover proceeding is equitable. Therefore, the two causes of action are not duplicative, and petitioners may also seek turnover of the Personal Property or the "proceeds thereof" as contemplated in SCPA § 2105.

The Cause of Action against Dorman in his Individual Capacity

a) Aiding and Abetting Breach of Fiduciary Duty

Dorman, in his individual capacity, seeks dismissal of the sole cause of action alleged against him, namely that he aided and abetted various breaches of fiduciary duty by Joseph. Those underlying breaches fall into two categories: 1) Joseph's conduct relating to Sylvia with whom it is alleged he had a confidential relationship and 2) Joseph's acts as co-trustee of the Trust. Petitioners allege that Dorman, as the Phillips family's long-time attorney, "advised and assisted" Joseph's breaches, which resulted in petitioners' being denied Sylvia's property.

Movant first argues that this cause of action should be dismissed because the Federal Action was filed first (CPLR 3211[a][4]). In the Federal Action, petitioners also asserted a cause of action for aiding and abetting Joseph's alleged breaches of fiduciary duty based on the same basic allegations. As noted above, in abstaining, the federal court stayed petitioners' aiding and abetting claim pending the outcome of the proceedings in this court.

Under CPLR 3211(a)(4), courts have "broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*DAIJ, Inc. v Roth*, 85 AD3d 959,

959 [2d Dept 2011][citations omitted]; see *Whitney v Whitney*, 57 NY2d 731 [1982]). If the two actions are substantially similar, courts generally follow the "first-in-time" rule under which the court that has "first taken jurisdiction is the one in which the matter should be determined" (*Syncora Guar., Inc. v J.P. Morgan Sec., LLC*, 110 AD3d 87, 96 [1st Dept 2013][internal quotation marks and citation omitted]). However, courts may deviate from the rule if circumstances warrant (see e.g. *Certain Underwriters at Lloyd's, London v Hartford Accident & Indem. Co.*, 16 AD3d 167, 168 [1st Dept 2005][holding that lower court properly exercised its discretion in dismissing the first-filed action apparently commenced to obtain a "tactical advantage through forum shopping"]).

Here, there can be no dispute that the two causes of action are substantially similar; they involve the same parties and arise from the same basic set of facts. Moreover, petitioners elected to commence the Federal Action when the Trust Accounting was already pending in this court. Petitioners could have sought then, as they do now, an adjudication of all their claims in this court but elected not to. Under these circumstances, it is understandable that movant would ask this court to dismiss petitioners' aiding and abetting cause of action and thereby hold petitioners to the consequences of the litigation path that they initially elected to pursue.

Nonetheless, there are other factors that strongly militate in

favor of this court's deviating from the "first-in-time" rule and exercising its discretion to allow petitioners' aiding and abetting cause of action to proceed in this court. The Trust Accounting was commenced before the Federal Action, which was itself stayed based on the federal court's view that the Surrogate's Court was the best place to resolve the matters raised in the complaint. At issue in the Trust Accounting is the propriety of Joseph's conduct as co-trustee of the Trust. Such conduct is also a basis for petitioners' aiding and abetting cause of action against movant.

Moreover, as a specialized forum, this court is simply better equipped to deal with all of the issues petitioners raise. The federal court noted as much in abstaining in favor of the Trust Accounting. Petitioners' aiding and abetting claim implicates not only David's and Joseph's estates but also potentially Sylvia's. None of these estates is a stranger to this court, each having been involved in significant litigation over the years.

Contrary to movant's contention, the federal court did contemplate that petitioners might seek additional relief in this court. The federal court also recognized that this court's resolution of the parties' dispute would promote judicial economy and reduce the possibility of inconsistent outcomes. For these reasons, the motion to dismiss based on CPLR 3211(a)(4) is denied.

We now turn to whether petitioners fail to state a claim against movant for aiding and abetting Joseph's alleged breaches of

fiduciary duty. As noted above, petitioners' cause of action rests on Joseph's alleged breach of the fiduciary obligations he owed to his mother, Sylvia, and the Trust. As to that part of petitioners' claim that rests on Joseph's alleged breaches of fiduciary duty to his mother, we assume for argument's sake that Joseph had a fiduciary duty to his mother arising out of their alleged confidential relationship.

A precondition for a cause of action for aiding and abetting a breach of such a duty is a prima facie demonstration that a fiduciary duty is owed to the party seeking relief (see e.g. *Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008]; *Ulico Cas. Co. v Wilson Elser, Moskowitz, Edelman & Dickler*, 56 AD3d 1, 11 [1st Dept 2008]). Here, petitioners allege that Joseph breached a fiduciary duty owed to his mother. They do not allege that Joseph also owed them such a duty. Because petitioners are claiming damages for aiding and abetting a breach of fiduciary duty owed not to them but to Sylvia, their claim must fail. Accordingly, to the extent that petitioners base their aiding and abetting cause of action on alleged breaches of a fiduciary duty owed to Sylvia, it is dismissed under CPLR 3211(a)(7) for failure to state a claim.

As for the part of petitioners' aiding and abetting claim based on Joseph's conduct as trustee of the Trust, a threshold standing question requires discussion. Petitioners seek relief against movant for aiding and abetting in their capacity as

beneficiaries of the Trust. Yet, they have not sought a remedy for the Trust itself, since they are seeking damages for themselves alone. Moreover, even if that were not the case, trust beneficiaries generally do not have standing to sue in their individual capacity on a claim belonging to a trust (see e.g. *Matter of Barrett*, NYLJ, July 24, 2015, at 22, col 6 [Sur Ct, NY County 2015]; *Matter of Taschereau*, NYLJ, July 31, 2006, at 21, col 2 [Sur Ct, NY County 2006]).

In the first instance, it is the fiduciary who has the duty to bring an action to enforce the rights of those the fiduciary was appointed to represent. Only if the fiduciary fails or refuses to bring the action due to a conflict of interest or other reason can a beneficiary do so. In the Surrogate's Court, SCPA § 702 ("Limited and restricted letters") provides a mechanism for the beneficiary to obtain authority to act on behalf of the trust in these circumstances through an application for limited letters (see e.g. *Matter of Bennett*, 84 AD3d 1365, 1366 [2d Dept 2011]).¹

Here, petitioners have failed to obtain the limited letters under SCPA § 702 that would give them standing to seek relief on

¹Outside of the Surrogate's Court where SCPA § 702 does not apply, courts have permitted trust beneficiaries to sue on behalf of a trust, but only if they have shown that the trustee has refused a request to sue or that any such request would have been futile (see e.g. *Velez v Feinstein*, 87 AD2d 309 [1st Dept 1982]). Petitioners have not cited any authority for the proposition that a beneficiary has standing to commence a proceeding in Surrogate's Court to vindicate the interests of an estate or trust for which the beneficiary has not received a fiduciary appointment, and the court is aware of none.


behalf of the Trust. Under these circumstances, the cause of action as it pertains to Joseph's conduct as trustee is dismissed for lack of standing. Given this determination, the court need not address the parties' other arguments.

Finally, petitioners included in the present petition a purported cause of action for consolidation with the Trust Accounting under SCPA § 501(2)(a). That portion of the petition prompted Citibank, as trustee of the Trust, to seek dismissal for failure to state a claim (CPLR 3211[a][7]). Citibank correctly notes that petitioners' request for consolidation is a procedural one that should have been raised by motion. Nevertheless, under SCPA § 501(2)(a), the court can "on its own initiative" direct consolidation. The court will thus evaluate whether consolidation is appropriate in the circumstances here.

The only causes of action that have not been dismissed are breach of contract and reverse turnover (SCPA § 2105) as they relate to the Personal Property. Since those claims have absolutely no relationship to the Trust Accounting, consolidation is not warranted.

This decision constitutes the order of the court.

Dated: August 3, 2021



S U R R O G A T E