

Robey v Ryan

2022 NY Slip Op 33817(U)

November 9, 2022

Supreme Court, New York County

Docket Number: Index No. 154278/2022

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

ANNELISE ROBEY,

Petitioner,

- v -

PETER F. RYAN, JOHN SERVIN

Respondents.

-----X

INDEX NO. 154278/2022

MOTION DATE 11/07/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISSAL.

The motion (MS002) to dismiss is denied.¹

Background

Petitioner contends that she is the successor trustee of the Barchilon Family 2012 Trust dated December 22, 2012. She claims that she took over as the trustee after respondents, both of whom were the former co-trustees, resigned. Petitioner contends that the beneficiaries of the trust are non-parties Andrew and Josette Barchilon, the children of non-party Sara Barchilon (the grantor). Sara Barchilon appointed her husband, respondent Peter Ryan, to be a trustee of the subject trust (it appears that the beneficiaries were Ms. Barchilon's children and Mr. Ryan's stepchildren).

¹ The Court observes that motion sequence 001 was returnable on September 30, 2022 but was never marked submitted by the back offices. Given that only respondent Ryan answered, the Court will sort out the procedural mess as detailed below.

Petitioner alleges that the trust permits respondents to distribute income to Ms. Barchilon's children but could not take the money for the benefit of the grantor or her spouse. She insists that in 2020, respondent Ryan entered into an agreement about a time share in Mexico. Petitioner maintains that Mr. Ryan was required to make up-front payments and so he established an account at Banco Santander in April 2020. She alleges that respondent Ryan used funds from the trust and some of his wife's personal funds. Petitioner insists that he withdrew and misappropriated \$610,000.00 of trust assets from July through September 2020.

Petitioner contends that respondent Ryan wrote himself checks and initiated wire transfers in order to abscond with this money. Petitioner also argues that both respondents authorized borrowing on margin by collateralizing securities owned by the trust and then sold trust securities to fund this scheme, which later led to about \$250,000 in capital gain taxes for the trust. She argues that respondent Ryan resigned as trustee soon after misappropriating these funds. Petitioner alleges that respondent Servin allowed or to failed to act to prevent the depletion of the trust's assets.

Respondent Ryan alleges that he was scammed and admits that he "liquidated Trust assets to satisfy the growing expenses" related to charges incurred for the time share (NYSCEF Doc. No. 19, ¶ 13).

Respondent Servin moves to dismiss the claims against him. He claims that he lives and works in Vermont (he contends that he works for 'NFP Retirement') and has no connection to New York. Mr. Servin argues that this Court lacks personal jurisdiction over him.

With respect to the merits of the petition, he acknowledges he signed the trust agreement, and signed the form to permit the opening of an account to borrow on margin but did not authorize any instances of borrowing on margin and never sold any securities on behalf of the

trust. He claims he never received any compensation for his time as trustee (he resigned this position in 2021). Mr. Servin argues that he is the one who found suspicious transactions (from the trust to respondent Ryan's personal account), found the successor trustee and questions why he is now being sued.

In opposition, petitioner insists this Court has jurisdiction over respondent Servin because this proceeding relates to a New York trust created by a New York resident. She also argues that she has stated a cognizable cause of action against Servin for breach of fiduciary duty. Petitioner observes that Servin is respondent Ryan's stepson and he cannot evade the responsibilities of his role as trustee by claiming ignorance.

Personal Jurisdiction

As an initial matter, the Court must consider whether it has long-arm jurisdiction over respondent Servin, a Vermont resident who insists he has no relation to New York. "CPLR 302(a)(1) requires us to first determine if defendant purposefully availed itself of the privilege of conducting activities in the state by transacting business in New York. A non-domiciliary defendant transacts business in New York when on his or her own initiative, the non-domiciliary projects himself or herself into this state to engage in a sustained and substantial transaction of business. The primary consideration is the quality of the non-domiciliary's New York contacts" (*D & R Glob. Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 297-98, 56 NYS3d 488 [2017][internal quotations and citation omitted]).

Here, the Court finds that respondent Servin clearly transacted business in New York by agreeing to serve as a trustee for a New York trust for a New York grantor, where his co-trustee was also a New York resident and where the trust is governed by New York law. Moreover, he served as trustee for nearly a decade before the alleged dissipation of the trust's assets began.

“In addition, the plaintiff's cause of action must have an articulable nexus or substantial relationship with the defendant's transaction of business here” (*id.* at 298-99). Petitioner easily satisfies this factor as this proceeding concerns allegations that respondent Servin breached his fiduciary duty by failing to prevent his co-trustee from taking the trust's assets.

The fact is that respondent Servin cannot be surprised that he might be a defendant in a lawsuit commenced in New York—the situs of the trust that was depleted and where he served as trustee. He cannot evade this Court's jurisdiction by merely claiming he lives in Vermont and does business there. The relation to New York is far from attenuated; rather, it would make little sense for petitioner to bring this proceeding anywhere else.

Dismiss

The Court denies the branch of the motion that seeks dismissal on the merits. Respondent Servin's assertions that he had nothing to do with the alleged misdeeds by his co-trustee is not a basis to grant a motion to dismiss. Those assertions may be true but the Court cannot make such a factual conclusion on these papers. The Court observes that Mr. Servin admitted that he authorized the opening of an account for borrowing on margin (NYSCEF Doc. No. 22). That does not mean that Mr. Servin is liable but it does require more investigation and compels the Court to deny the instant motion. Moreover, respondent Ryan admits he liquidated trust assets while respondent Servin was serving as trustee. Therefore, there are material issues to explore, including what respondent Servin knew about these transactions and when he discovered them.

“[I]t is also a firmly established principle of trust law that a trustee owes a duty of undivided loyalty to the trust, which standard “does not permit a trustee to create or to occupy a position in which he has interests to serve other than the interest of the trust estate. Undivided

loyalty is the supreme test, unlimited and unconfirmed by the bounds of classified transactions” (*Sankel v Spector*, 33 AD3d 167, 171-72, 819 NYS2d 520 [1st Dept 2006]). The allegations present here suggest that it was respondent Ryan who primarily diverted trust assets. However, that does not absolve Mr. Servin from the duties related to his role as trustee. A trustee has a solemn obligation to ensure that distributions are carried out in accordance with the provisions of the trust. The claims here are that Mr. Servin knew or should have known that his co-trustee was depleting the assets for his own personal gain and he may have had some involvement.

And the trust explicitly provides that Trustees “shall not be liable for any act or omission in administering this Trust, except that the Trustees shall be liable for actual fraud, gross negligence or willful misconduct” (NYSCEF Doc. No. 4 at 24). The allegations in this proceeding certainly rise to that level.

Summary


The procedural posture of this proceeding must be sorted. The instant motion is motion sequence 002, respondent Servin’s motion to dismiss. Because the Court is denying that motion, respondent Servin must now file an answer by December 13, 2022. That answer should be filed under motion sequence 001. The Court observes that respondent Ryan filed an answer in response to the petition. However, the Court need not consider that filing in connection with this motion as it must first wait for motion sequence 001 to be fully briefed.

The petition (MS001) was never marked fully submitted and so the Court will adjourn it to December 15, 2022. The parties are directed to appear for an in-person oral argument on the petition on December 15, 2022 at 10 a.m.

Accordingly, it is hereby

ORDERED that the motion (MS002) by respondent Servin to dismiss is denied and he is directed to answer on or before December 13, 2022; and it is further

ORDERED that the parties shall appear for an in-person oral argument on December 15, 2022 at 10 a.m.

<u>11/9/2022</u> DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE