

Robey v Ryan
2023 NY Slip Op 33956(U)
November 6, 2023
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, Trustee of the Barchilon
Family 2012 Trust Agreement

Petitioner,

- v -

PETER F. RYAN, JOHN SERVIN, as
prior Co-Trustees of the Barchilon Family
2012 Trust Agreement

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 64, 67, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for

MISCELLANEOUS

The petition for an accounting from the respondents related to their tenure as trustees for the Barchilon Family Trust and for damages arising out of the misappropriation of funds is granted in part and denied in part.

Background

Petitioner contends that she is the successor trustee of the Barchilon Family 2012 Trust. She claims that she took over as the trustee after respondents, both of whom were the former co-trustees, resigned. Petitioner alleges 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 (the

beneficiaries were Ms. Barchilon's children from a prior marriage and Mr. Ryan's stepchildren). Respondent Servin (Ryan's son-in-law) was also appointed as a trustee.

Petitioner alleges that the trust permits distributions to Ms. Barchilon's children (the beneficiaries) but barred respondents from taking 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 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 to make these payments. Petitioner insists that Ryan 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 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 failed to act to prevent the depletion of the trust's assets.

The Court previously denied respondent Servin's motion to dismiss (NYSCEF Doc. No. 28). Servin claimed he had nothing to do with the misappropriation of funds described above. The parties engaged in discovery in this special proceeding and the Court directed the parties to file supplemental papers based on that discovery.

In its supplemental papers, petitioner contends that Ryan and Servin had different roles as trustees. Servin was the independent trustee while Ryan had limited powers. She insists that

only Servin had the right to determine when (or if) any portion of the trust would be paid out or distributed to the benefit of the beneficiaries. Petitioner emphasizes that Ryan was specifically prohibited from making any distributions.

However, petitioner asserts that discovery revealed that Ryan took an active role as trustee while Servin merely acted in a passive manner. She observes that Ryan opened a bank account for the trust and that he alone was listed on this account. The trust had also had a brokerage account and although Servin was listed as a co-trustee, only Ryan received the statements. Ryan claims that he sent Servin the monthly statements for the accounts but that Servin did very little with respect to the trust.

Petitioner observes that Ryan included the failed timeshare investment on the monthly balance sheets from January 2020 through October 2020 as an asset worth \$1.346 million based solely on this investment's potential future revenue. She insists this was mere speculation. Petitioner questions why Servin never questioned the propriety of this valuation or the inclusion of misappropriated funds as an asset of the trust.

Petitioner observes that Ryan first sent a wire transfer related to the timeshare investment in April 2020 and eventually sent \$5.5 million to the fraudster's bank account. The money came from the trust's bank and brokerage accounts as well as from his own funds (including his own trust). Petitioner maintains that Ryan took \$610,000 from the trust at issue here for this timeshare scam. At his deposition Ryan admitted that "All those checks that I drew on the Barchilon Family Trust and deposited in my account were transferred, the funds were transferred to accounts in Mexico in connection with the rental scam" (NYSCEF Doc. No. 76 at 93).

Petitioner also points out that Ryan admitted to borrowing on margin against the assets held in the brokerage account to fund his timeshare venture and eventually had to sell

appreciated securities owned by the trust to raise cash to get the margin loans. These trades resulted in tax consequence for the trust and reduced distributions to the beneficiaries.

Petitioner maintains that both Ryan and Servin should be held liable for the losses suffered by the trust. She argues that Servin is liable because he acted as a rubber stamp for everything Ryan did and actively disregarded his duties as the independent trustee.

In his supplemental papers, Servin argues that he was not grossly negligent. He insists that when Ryan sent him an email in September 2020 asking for his signature on a wire transfer, he denied that request and ultimately discovered Ryan's misdeeds. He emphasizes that a mere breach of a provision of the trust agreement does not constitute gross negligence and emphasizes the exculpatory clause in the trust agreement.

Servin argues that he did not object to the inclusion of RyBarFam LLC on the trust's assets because his understanding was that this was an investment vehicle related to the timeshare that would make distributions to the trust as a gift. He emphasizes that after the September 2020 wire transfer request, he investigated the issue and suggested that the family look into the timeshare investment. Servin insists that he demanded that Ryan resign as a trustee.

Discussion

The Court's analysis begins with the claims against Ryan. The agreement contains a clause that limits the trustees' liability. This paragraph provides that:

"The 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. If the Trustees become liable, as Trustees, to any person not beneficially interested in this Trust, in connection with matters not within the Trustees' control and not due to the Trustees' actual fraud, gross negligence or willful misconduct, the Trustees shall be entitled to indemnification therefor out of the property of this Trust" (*id.* § [11][B]).

The record shows that Ryan is clearly liable as he engaged in conduct that easily meets the threshold for both gross negligence and willful misconduct. He distributed funds in contravention of the trust's requirements in order to fund the failed timeshare venture and cost the trust at least \$610,000. In his answer, Ryan admits that he withdrew the \$610,000 in trust assets (NYSCEF Doc. No. 18, ¶ 24).

His affidavit, NYSCEF Doc. No. 19, contains numerous admissions that he took the money from the trust to invest in the time share scam. And he does not deny (Ryan did not submit any papers in response to the supplemental papers offered by petitioner) that he took money from the trust by writing checks to himself or wiring money from the trust to a Santander bank account. The trust provides that “no Trustee shall have any power or discretion, or be deemed to be a Trustee, with respect to payments, applications or allotments of income or principal to or for the use or benefit of (i) himself or herself as a beneficiary of any trust hereunder” (NYSCEF Doc. No. 73, § [15][K]). Obviously, taking money from the trust to fund the time share scheme constitutes gross negligence and willful misconduct on the part of a trustee, who has a fiduciary duty to act for the benefit of the beneficiaries. This is not a case where Ryan made investments generally accepted to be safe (such as investing in mutual funds or broad-based ETFs) that turned out to be unsuccessful. Rather, he siphoned off hundreds of thousands of dollars for a timeshare in Mexico.

The central question on this motion is the culpability of respondent Servin. As Servin points out, the record does not suggest that he engaged in actual fraud or in willful misconduct. That leaves gross negligence as the only basis upon which the Court could impose liability on Servin. “[G]ross negligence is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing” (*AEA Middle Mkt. Debt Funding LLC v Marblegate Asset*

Mgt., LLC, 214 AD3d 111, 132, 185 NYS3d 73 [1st Dept 2023]). The trust agreement provides that he was the independent trustee. It defines the independent trustee as:

“the Trustees other than Grantor, Grantor's Husband, Grantor's Issue, persons subordinate or related (as defined in Code Section 672) to Grantor or any beneficiary of the subject Trust, and other than those individuals whose possession of the powers and discretion conferred under this Trust Agreement on Independent Trustee would result in (1) any portion of the Trust Fund of any Trust in existence on the date of Grantor's death being included in her gross estate for federal estate tax purposes, or (2) any portion of the Trust Fund of any Trust in existence at such individual's death being included in his or her gross estate for federal estate tax purposes or (3) any portion of the Trust Fund of any Trust in existence at the death of any beneficiary being included in his or her gross estate for federal estate tax purposes, or (4) any portion of the Trust Fund being subject to the creditors of any beneficiary of the subject trust” (NYSCEF Doc. No. 73, § [1][E]).

This section clearly means that Servin was the independent trustee as Ryan was the grantor's husband. The next inquiry is whether or not Servin's status as independent trustee suggests he should have had a more active role in the running of the trust. For instance, the trust provided Servin with the discretion to make certain distributions in his sole discretion (*id.* § [4][A][1]). And it stated that:

“Notwithstanding the foregoing, while Grantor's Husband is acting as a Co-Trustee hereunder, any distributions of income or capital gains pursuant to this Subsection (A)(2) shall be made by the Trustee(s) other than Grantor's Husband, and Grantor's Husband shall have no right to participate in a decision to make any such distribution. However, in the event that Grantor's Husband is the sole acting Trustee hereunder, Grantor's Husband may make discretionary distributions of income or capital gains pursuant to this Subsection (A)(2) provided that he shall first obtain the consent of all of the adult beneficiaries who are currently entitled to discretionary distributions from the Trust Fund” (*id.* § [4][A][2][c]).

Petitioner attempts to insist that these provisions, when taken together, make clear that the goal of the trust was to ensure that the independent trustee supervised the distributions made by the trust. There is no dispute that Ryan clearly took on the more active role in managing the trust. But a review of the trust agreement suggests that the independent trustee was under no obligation to take an active role or to approve the transactions initiated by the other trustee.

Article Eleven of the trust sets forth the fiduciary powers for the trustees and makes almost no distinction between Ryan and Servin (as the independent trustee)¹. It states, for instance, that both trustees were given the power “(1) To sell, purchase, exchange, invest and reinvest in bonds, preferred or common stocks, mortgages, interests in any kind of investment trust, or other evidences of rights” and “(15) To open and maintain bank accounts and brokerage accounts” (*id.* § 11[A]).

In other words, this section expressly permitted Ryan to open the Chase bank account and the brokerage account as well as make transactions related to these accounts. Petitioner did not point to anything in the trust that expressly obligated Servin, as the independent trustee, to approve or sign off on Ryan’s actions as trustee.

The Court therefore finds that Servin was not grossly negligent (the only way he could be held liable here) on this record. The first possible sign that something was amiss with Ryan’s handling of the trust, at least on this record, was in a July 2020 account statement that contained a check issued by the trust for \$100,000 and electronic withdrawals for \$66,800 (NYSCEF Doc. No. 77 at 106 [Servin’s deposition transcript]). Servin also acknowledged that in an August 2020 statement, there were numerous withdrawals and transactions made by Ryan, including two checks for \$100,000 and a wire transfer to the Bank of Santander in Mexico (*id.* at 113-14).

But Servin attached an email thread dated September 17, 2020 in which he declined to approve a wire transfer from the brokerage account for \$370,000 from the trust for the time share scam (NYSCEF Doc. Nos. 111 and 112). At one point, Servin even stated that “Given the amount of the transfer request and my fiduciary responsibility to the Barchelon [sic] Trust, I think it’s appropriate to cover off on some basic diligence” (NYSCEF Doc. No. 112). Servin

¹ The lone distinction is that “only the Independent Trustee shall participate in any decision to lend property without security and/or at less than a reasonable rate of interest” (NYSCEF Doc. No. 73, § [11][A][10]).

insists he was the one who started the investigation into Ryan's transactions (NYSCEF Doc. No. 77 at 145) and that this eventually led to Ryan's resignation as a trustee and the revelation of the fraud.

Boiled down, the Court finds that, at best, Servin might have raised questions about some of Ryan's transfers with the July 2020 statement which he presumably received sometime in August 2020 (Servin did not recall exactly when he received this statement). But the fact is that Servin raised the alarm by the middle of September 2020, about a month later, and he prevented more depletion of the trust's assets. As noted above, the trust permitted Ryan to engage in these transactions without approval by Servin and did not require Servin to actively supervise Ryan. It is therefore impossible for this Court to conclude that Servin's actions demonstrated reckless disregard for the beneficiaries. When he was directly asked to approve a significant wire transfer, he declined and asked questions. That forecloses a conclusion of gross negligence.

Summary

The Court grants the petition but only with respect to Ryan. Petitioner may understandably raise questions about respondent Servin's role as trustee. Servin's deposition makes clear that he did not take much interest in his role as trustee, lacked answers to numerous basic questions about the running of the trust, and let Ryan make all the financial decisions with respect to the trust. However, the question on this petition is whether Servin's general indifference as trustee constitutes gross negligence for the misdeeds of Ryan. The Court concludes that it does not as gross negligence is a significantly higher standard than mere negligence. Nothing on this record shows that Servin ignored clear and obvious warning signs for months or that he assisted Ryan in these risky financial transactions. At worst, one might conclude that Servin should have spoken up a few weeks before he eventually did (i.e., when he

received the July 2020 statement). That failure, in this Court's view, does not yield a conclusion of gross negligence.

Petitioner is directed to upload a proposed judgment in accordance with this decision. The Court observes that the petition seeks an accounting (although the Court queries whether that is still necessary after discovery) as well as damages for taxes, penalties, interest, or fees incurred by the trust as a result of the misappropriation of funds (this seems to relate to the loans taken out based on the brokerage account). No precise amount for this is included in the papers.

The proposed judgment should be uploaded by November 20, 2023 and respondent Ryan may upload a counter proposed judgment on or before December 5, 2023.

Accordingly, it is hereby ORDERED that the petition is granted only with respect to respondent Ryan and denied with respect to respondent Servin; and it is further

ORDERED that the claims against respondent Servin are severed and dismissed and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that petitioner shall upload a proposed judgment in accordance with this decision on or before November 20, 2023.

11/6/2023					
DATE			ARLENE P. BLUTH, J.S.C.		
CHECK ONE:	☒	CASE DISPOSED	☐	NON-FINAL DISPOSITION	
	☐	GRANTED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER	☒	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT	☐ REFERENCE