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TRUSTS AND ESTATES UPDATE

Expert Analysis

Discovery Motions and the Statute Of Limitations: Timing Is Everything

By
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While motion practice in the Surrogate's Court has previously been the subject of review by the undersigned,[1] it continues to be worth examining as a result of recent decisions addressed to unheeded demands for the production of documents, and the statute of limitations. To this extent, opinions rendered by the Court of Appeals, the Fourth Department, and the Surrogate's Courts in New York and Suffolk counties are informative.

Statute of Limitations

Although the decision in *Matter of Lawrence* is perhaps best known for the Court of Appeals' approval of a $44 million contingency fee arrangement, it also provided useful instruction with respect to the statute of limitations as applied to attorney-client relations.

In *Lawrence*, the Court of Appeals was confronted with two issues; the propriety of a contingency fee arrangement—which ultimately resulted in a $44 million legal fee to the law firm—entered between the decedent, Alice Lawrence, and her attorneys at Graubard Miller, in the context of a dispute involving the real estate holdings of her late husband, and the validity of cash gifts amounting to in excess of $5 million made by Lawrence to three partners with the firm.

With respect to the contingency arrangement, the court rejected the opinion of the Appellate Division, First Department. The First Department had reduced the fee of the law firm to an hourly fee-based $3 million, on the grounds, inter alia, that the contingency fee arrangement was procedurally and substantively unconscionable, and that the fee was disproportionate compensation for the number of hours spent by the firm on the litigation after the revised retainer agreement went into effect. The parties previously had an hourly fee arrangement.

The Court concluded that the contingency fee arrangement was neither procedurally nor substantively unconscionable inasmuch as Lawrence, a sophisticated business woman, fully understood its terms, had sought the advice of trusted advisors to clarify it for her, and possessed a tremendous amount of detailed information about the upside and downside of the case and the likelihood of success of her various claims. Additionally, the court concluded that absent incompetence, deception or overreaching, contingency fee arrangements that are not void at the time of inception should be enforced as written.

The court observed that declaring a contingency fee agreement unconscionable in hindsight should be undertaken with great caution, as the contingency fee system would be undermined if a lawyer did not sometimes receive a lucrative fee in return for the risk taken in a litigation, which, in the case of a client such as Lawrence, who frequently fired her professionals, was significant.

Lawrence also sought return of gifts to the law firm. As for the validity of the subject gifts, the Court of Appeals found that the claims by the Lawrence estate for a refund of the funds were time-barred.[2] The court rejected the Appellate Division's opinion that the statute of limitations was tolled on the basis of the continuous representation doctrine, holding that there was a difference between an attorney's alleged malfeasance in the provision of professional services on the client's behalf, and a dispute between an attorney and his client over a financial transaction, such as legal fees or a gift.

In the latter circumstance, the Court explained that the attorney is not representing the client in the transaction, but is engaging in a transaction that is separate and distinct from the attorney's rendition of professional services on the client's behalf. The court held that it has never endorsed the continuous representation tolling for disputes between professionals and their clients for fees and the like, as opposed to claims of deficient performance, and declined to expand the scope of the doctrine to the circumstances presented by the case.

Moreover, although the court noted that the continuous representation toll could apply to claims of self-dealing,[3] it held that counsel's conduct in accepting the gift checks did not constitute self-dealing, inasmuch as counsel were not rendering professional services and advice to Lawrence within the context of the disputed gift transaction.

Accordingly, the court reversed the Order of the Appellate Division, with costs,

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and remitted the matter to the Surrogate's Court, New York County, for entry of a decree in accordance with the opinion.

Matter of Lawrence, 24 NY3d 320 (2014).

Constructive Trust

In *Matter of Thomas*, the Appellate Division, Fourth Department, was confronted, inter alia, with an appeal from an order of the Surrogate's Court, Monroe County, dismissing a petition seeking the imposition of a constructive trust on certain real properties and stock, which petitioners claimed were assets of the decedents' estates.

The record revealed that the decedents, husband and wife, died, testate, survived by four children, each of whom were named beneficiaries of their residuary estates. Shortly after the decedents' deaths, the petitioners, two of the decedents' children, instituted a proceeding against their sibling, who was the executor and trustee under both decedents' wills, challenging numerous real estate transactions between respondent and the decedents, as well as respondent's failure to identify, as assets of the decedents' estates, the shares of stock in a company, that had been founded by their father, and which respondent claimed had been transferred to him.

More specifically, according to the petitioners, the respondent exploited his close relationship with the decedents by inducing them to transfer the realty to him, with the promise that he would either pay for or reconvey the parcels to the decedents or his siblings. The petitioners alleged that respondent failed to do either. Moreover, petitioners alleged that respondent failed to produce any records reflecting the transfer of the stock from their father or any records reflecting respondent's payment for the stock.

Petitioners sought, inter alia, the imposition of a constructive trust related to the real properties and stock in issue, and the respondent moved to dismiss the proceeding on the grounds that the petition failed to state a cause of action and was time-barred.

In concluding that the petition stated a cause of action, the Appellate Division opined that in order to assert a claim for constructive trust, a petitioner must show a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, a breach of the promise and unjust enrichment. Further, the court noted that inasmuch as a constructive trust is an equitable remedy, the elements thereof are not rigidly applied, and have been invoked under circumstances where the promise is not express, but may be implied based on the relationship of the parties and the nature of the transaction between them.

Accordingly, the court held that the Surrogate erred in dismissing the petition on this ground. Significantly, to this extent, the court found that the petition and corresponding affidavits had alleged that the respondent's father had believed he owned the company until the day he died, and that respondent had made promises to allow all of his siblings, i.e., the decedent's children, to share in the company. Indeed, the court noted that while the petition lacked allegations of an express promise between the parties, even if a petition fails to allege facts sufficient to support one of the elements of a constructive trust, a constructive trust may nevertheless be imposed.

> Decisions in 'Seltun' and 'Krasner' addressed the ramifications of a party's failure to timely comply with demands for discovery. They provide a cautionary tale to counsel and their clients.

On the other hand, the court modified the order of the Surrogate's Court on the issue of the statute of limitations, holding that the Surrogate's Court had correctly dismissed the claims with respect to the real estate, but had erred when it determined that the claim with respect to the shares of stock was untimely. The court opined that a claim for the imposition of a constructive trust is governed by the six-year statute of limitations of CPLR 213(1), which begins to run at the time of the wrongful conduct or event giving rise to restitution.

Referring to the allegations in the petition, the court noted that petitioners claimed that the respondent had promised to share the stock in issue with his siblings upon the death of the decedents, which had occurred in 2012. In view of the fact that the proceeding seeking its recovery was instituted in 2013, the court held that the claim for a constructive trust with respect to the shares of stock was not time-barred.

However, the court held that the statute of limitations with respect to the real properties in issue began to run when the promised payments for same were due and owing. In the case of one of those properties, the promised payments were due between 1989 and 1992, and in the case of the second, payments were due in 1994 and again in 1998. Accordingly, the court found that under any such circumstance, the proceeding for a constructive trust was untimely.

Finally, the court rejected petitioners' contention that their claim for a constructive trust could nevertheless be maintained as an equitable remedy for other causes of action, holding that an equitable remedy is not available to enforce a legal right that is, itself, barred by the statute of limitations. Additionally, the court held that petitioners' claims based upon equitable estoppel lacked merit, concluding that there was no evidence that the decedents were lulled into inactivity with respect to the real property in question until after the statute of limitations had expired.

Matter of Thomas, 2015 NY Slip Op 00017 (4th Dept. 2015).

Discovery Cautionary Tale

The decisions in *In re Seltun*, NYLJ, Dec. 19, 2014, at p. 35 (Sur. Ct. New York Co.) (Mella, S.) and *In re Krasner,* NYLJ, Jan. 21, 2015, at p. 27 (Sur. Ct. Suffolk Co.), each addressed the ramifications of a party's failure to timely comply with demands for discovery. Both matters provide a cautionary tale to counsel and their clients.

Before the Surrogate's Court, New York County, in *Seltun* was a motion by the administrator of the estate to strike the answer of the decedent's father for failure to comply with court-ordered discovery. In the underlying proceeding ,the petitioner, the decedent's mother, sought court approval of a settlement reached by her in connection with litigation commenced in the Supreme Court for the decedent's personal injuries and wrongful death. In addition to this relief, the petitioner requested that the decedent's father be disqualified as a distributee of the estate on the grounds of abandonment and failure to support. The decedent's father filed an answer objecting to the relief, and a discovery order was issued.

Thereafter, petitioner's counsel served respondent with interrogatories and a document demand. No response to these requests was ever received despite follow-up letters. Ultimately, respondent's counsel assured the court and petitioner's counsel that his client's responses would be served. Nevertheless, no responses were forthcoming.

As a consequence, petitioner's counsel moved to strike respondent's answer. In response to that motion, respondent's counsel moved to be relieved, maintaining that without his client's cooperation he was unable to defend the motion. On the return date of the motion, counsel for both parties appeared and reported that respondent continued to be uncooperative. Accordingly, noting that its discovery order did not provide for any sanctions in case of a party's failure to comply, the court issued a conditional order granting the motions to dismiss and to be relieved as counsel, unless respondent provided responses to both the interrogatories and document demand within 30 days of personal service upon him of the court's decision and order.

In a contested proceeding for the turnover of assets to the decedent's estate, the Surrogate's Court, Suffolk County, in *Krasner* was confronted with a motion by the respondent, to vacate a decree striking her answer. The proceeding before the court had been commenced by the petitioner, the decedent's surviving spouse, against the respondent, the decedent's brother, seeking recovery of one-half of the funds in an annuity account, which petitioner claimed belonged to the estate.

The decedent's brother, who had been in a coma since 2010, was represented in the proceeding by his attorney-in-fact. In response to the petition, the respondent, though his attorney-in fact, filed an answer, and a discovery order was issued. Nevertheless, the respondent repeatedly failed to provide responses to petitioner's discovery demands resulting in petitioner moving to strike his answer to her petition. The court conditionally granted the motion, which was unopposed, and the petitioner was awarded monetary sanctions. When respondent still failed to comply with the demands, the court issued a decree awarding petitioner one-half of the disputed funds in issue.

The court in 'Thomas' noted that inasmuch as a constructive trust is an equitable remedy, the elements thereof are not rigidly applied, and have been invoked under circumstances where the promise is not express, but may be implied based on the relationship of the parties and the nature of the transaction between them.

Thereafter, the respondent instituted the subject proceeding to vacate the decree. In support thereof, counsel then representing the respondent alleged that both partners in the firm handling the litigation on respondent's behalf were suffering from medical disabilities at the time the motion to strike was made, which precluded them from opposing the motion. Respondent further maintained that the illness of her counsel precluded her from timely complying with the court's discovery order. More specifically, the respondent explained that one of the partners was being treated for leukemia, and the other was on administrative leave and undergoing psychological evaluation and counseling.

Petitioner opposed the application, arguing that respondent had failed to satisfy the requirements of CPLR 5015, noting, in particular, that the partner in the firm undergoing counseling had participated in court conferences, entered stipulations, and filed motions seeking affirmative relief on the respondent's behalf during the period of time he was purportedly unable to do so. Under these circumstances, petitioner maintained that counsel's recent claims of being medically incapable of representing his client should serve as no excuse for his default on the motion to strike his clients' pleading. In addition, petitioner argued that respondent had failed to establish a meritorious defense to the underlying proceeding.

In denying the respondent's application, the court, inter alia, relied upon the opinion in *Fremming v. Niedzialowski*, 93 AD3d 1336 (4th Dept 2012), in which the Fourth Department held that while an attorney's illness may, under certain circumstances, constitute a reasonable excuse for a default, it will not in all cases suffice, particularly where counsel is able to practice law despite mental health issues. To this extent, the court noted that it was not entirely clear that respondent's counsel was suffering from his mental issues at the time of the default on the motion, or that these issues prevented him from responding to the motion on his client's behalf despite having ample time to do so. Accordingly, the court found that respondent's default was not excusable.

Further, the court held that respondent had failed to establish a meritorious defense to the application, finding, as petitioner had argued, that there were a number of inconsistencies in respondent's affidavit of merit, and her prior assertions during the course of the litigation.

1. See Ilene Sherwyn Cooper, "Motion Practice in the Surrogate's Court," NYLJ, April 14, 2014, at p. 3.

2. Given the strict scrutiny that accompanies transactions between attorneys and their clients, the Surrogate found that the gifts had not been voluntarily made, and directed that the funds be restored to Lawrence's estate. The Appellate Division modified the result, holding that the claims as to the gifts involved self-dealing and were tolled under the doctrine of continuous representation. Further, the appellate court concluded that the attorneys did not satisfy their burden of showing by clear and convincing evidence that the gifts were given willingly and knowingly, without undue influence. In particular, the court held the "secrecy surrounding the gifts, and their extraordinary amounts, which the [attorneys] accepted without advising the widow to seek independent counsel" precluded a favorable finding. The Court of Appeals did not reach this analysis, finding that any claim as to the propriety of the gifts was time-barred.

3. The court explained that self-dealing occurs when an attorney (or other fiduciary) takes advantage of his position in a transaction and acts in his own interests rather than in the best interests of the client.

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