New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

VOLUME 252—NO. 28

MONDAY, AUGUST 11, 2014

TRUSTS AND ESTATES UPDATE

Expert Analysis

Discovering Discovery Proceedings: Recovering Assets on Behalf of Estate

By
Ilene Sherwyn Cooper

The duty to marshal estate assets is a fundamental responsibility of a fiduciary. When an asset belonging to an estate is, or may be, in the possession of a third party, who either refuses to relinquish the asset, or who may have information as to its whereabouts, proceedings for the recovery, or discovery, of the asset may be utilized by the fiduciary to fulfill this task. Bringing to bear such issues as the validity of a gift, conversion, and the statute of limitations, discovery proceedings provide the topic of instruction for this month's column.

Recovery From Debtor

In *In re Estate of Cain*, the Surrogate's Court, New York County (Mella, S.) was confronted with a petition, pursuant to SCPA §2103, seeking the turnover of $105,945 from the decedent's granddaughter. Although served with citation, the granddaughter failed to answer the petition. Accordingly, the court proceeded to an inquest in order to determine whether the record supported the relief requested.

The facts established that between 2006 and 2007, the decedent had cosigned four promissory notes to Sallie Mae, which provides student loans, in the total sum of $78,000, in order to enable her granddaughter to attend college. The loan documents established that the principal debtor, the decedent's granddaughter, and cosignor, the decedent, were jointly and severally liable for repayment.

Specifically, the documents indicated that the decedent was not a surety on the loan, but instead, was a guarantor, against whom the creditor could proceed directly without the need to first seek collection from the principal debtor. The documents further indicated that upon the death of either one of the parties to the notes, repayment could be accelerated.

As a consequence, following the decedent's death and the appointment of the petitioner as fiduciary of the estate, Sallie Mae made demand for repayment of the outstanding balance of the unpaid loan. Repayment was made by the fiduciary in the sum of $105,94. The fiduciary then sought indemnification from the decedent's granddaughter. When she failed to respond to the fiduciary's request, the proceeding for discovery was commenced.

In granting the relief requested by the petitioner, the court opined that a guarantor has a right to indemnification upon repaying the creditor for a loan from which the principal debtor benefitted. The right of recovery by the guarantor from the principal debtor does not need to be supported by a separate contract with the principal debtor. Rather, the liability of the principal debtor is lodged in equity, which seeks to prevent unjust enrichment. As a result, the guarantor, who has repaid the creditor, stands in the shoes of the creditor as to the principal debtor for purposes of recovering any monies paid on the principal debtor's behalf.

Within this context, and based on the undisputed record, the court held that the fiduciary had made a prima facie case for indemnification against the principal debtor, the decedent's granddaughter, who was directed to turn over to the estate the full amount requested by the petition.

In re Estate of Cain, NYLJ, June 20, 2014, at p. 22 (Sur. Ct., New York County).

Turnover of Assets

In a discovery proceeding pending before the Surrogate's Court, Queens County, the respondent moved for an order dismissing the claims against him requesting, inter alia, the turnover of estate assets and information regarding the transfer of the decedent's real property, on the grounds that they were barred by the statute of limitations. The record revealed that the decedent died on March 3, 2007, survived by her three children,

ILENE SHERWYN COOPER *is a partner with Farrell Fritz, in Uniondale. She is the past-chair of the New York State Bar Association's Trusts and Estates Law Section.*

each of whom had been appointed the administrators of her estate.

On May 10, 2013, a discovery proceeding was commenced by one of the co-administrators against his sister, who was also a co-administrator. The petition initially requested, among other things, an order directing the respondent to turn over to the estate the sum of $80,000, and directing the respondent to produce any and all documentation regarding the transfer to her of the decedent's real property in North Carolina. Subsequent to the filing of the motion, that part of the petition requesting the production of documents pertaining to the real property was withdrawn, and that branch of the motion seeking dismissal of that portion of the claim was denied as moot.

With respect to the balance of the motion, the petitioner alleged that in 2006, at a time when the decedent was in ill health and incapable of making decisions on her own, the respondent removed important papers from the decedent's residence, and caused the decedent to issue her a check in the sum of $80,000 under the false pretense that respondent would utilize the funds to purchase a condominium. The petitioner further alleged that the day before the check was issued, the respondent caused the decedent to execute a deed transferring to respondent the decedent's real property in North Carolina. The decedent died eight months later.

In support of her motion to dismiss the petition, the respondent alleged that the proceeding was time-barred since it was commenced more than one year after the decedent's date of death. More specifically, relying on the provisions of CPLR 210(a), respondent argued that while a three-year statute of limitations applies to a turnover proceeding, because the transfer of the check was made while the decedent was alive, and the statute of limitations had not yet expired by the decedent's death, the petitioner had only one year from the date of death, i.e. March 3, 2008, to commence the proceeding. Since she had not commenced the proceeding until May 2013, it was untimely.

In opposition, the petitioner maintained that the respondent should be estopped from asserting the statute of limitations as a defense, since she deliberately delayed disclosing that she had received a check from the decedent in breach of her fiduciary duty as a co-administrator of the decedent's estate until after the expiration of the statutory period.

The court opined that a discovery-turnover proceeding is akin to an action for replevin or conversion, and, as such, is generally governed by a three-year statute of limitations. The accrual date runs from the date of the conversion, and not from the date of actual or imputed discovery. However, where actual fraud is alleged, the applicable statute of limitations is six years or two years from the discovery of the fraud, or the date on which it could have reasonably been discovered, whichever is later.

> The court in 'Cain' opined that a guarantor has a right to indemnification upon repaying the creditor for a loan from which the principal debtor benefitted.

Within this context, the court held that respondent was incorrect in her analysis of CPLR 210(a) to the extent that she suggested that it reduced the statutory period of time within which to commence an action following death. Nevertheless, applying the three-year statute of limitations to the circumstances and date of the subject transfer, the court found that the period within which to commence the proceeding would have expired on July 12, 2009. Moreover, the court opined that even if the six-year statute of limitations period for fraud were applied, the proceeding was untimely, since the record revealed that the petitioner was aware of the check at least by Feb. 4, 2011, and yet, did not commence the action two years later as required.

As for petitioner's claim of estoppel, the court noted that a party may be estopped from asserting the statute of limitations as a defense where the claimant has been induced by fraud, misrepresentation or deception from bringing a timely lawsuit. Accordingly, the petitioner was required to establish that subsequent and specific actions by the respondent kept him from timely instituting suit for recovery of the proceeds represented by the check issued by the decedent.

The court found that petitioner not only failed to make this showing, but, as co-administrator of the decedent's estate, had all of her bank and financial records available disclosing the subject transaction. Petitioner's claims based on estoppel were therefore denied, and respondent's motion to dismiss the proceeding was granted.

In re Estate of Dinizulu, NYLJ, Jan. 17, 2014, at p. 40 (Sur. Ct. Queens County).

Proceeding Alleging Fraud

In *In re Estate of Friedricks*, the Surrogate's Court, Nassau County, dealt with a motion to dismiss a discovery proceeding commenced by the estate executor pursuant to SCPA 2103. The subject matter of the proceeding involved certain monetary transfers made by the decedent to the respondents, who were his son and co-fiduciary of his estate, his son's wife, and his son's two children. The petitioner claimed the transfers were the result of fraud and undue influence.

More specifically, the petitioner maintained that the transfers, which amounted to approximately $426,000, were out of character for the decedent, who had no history of making large gifts to his children or grandchildren, that they were effected by forged checks and documents, and that the respondents perpetrated actual or constructive fraud on the decedent. In addition, the petitioner alleged, based

on the decedent's medical records and conversations with the decedent's doctors and others, that the decedent was suffering from manic depression and dementia, cognitive impairment, psychosis and confusion, and lacked the mental capacity to make the transfers, some of which she also claimed were made pursuant to forged instruments. Finally, the petitioner maintained that the respondent had agreed to equalization of the transfers, which amounted to approximately $426,000, but that the attorneys for the parties were unable to resolve the issue.

The petitioner claimed that each transfer constituted a conversion of the decedent's property, and requested a return of the assets to the estate pursuant to the equitable principles of replevin and unjust enrichment.

In response to the petition, the respondents alleged that the petitioner's claims were time-barred by the statute of limitations and the doctrine of laches, having been asserted nearly six years after the final transfer of assets by the decedent, and more than three years after the issuance of preliminary letters testamentary. Further, respondents argued that petitioner could not satisfy her burden of proving undue influence, since decedent and respondents lived 3,000 miles apart, and that her claims were supported by nothing more than hearsay statements and conclusory allegations unsupported by facts.

Based on the foregoing claims, the respondents moved to dismiss the petition. The petitioner opposed the motion maintaining that any delay in the filing of the proceeding was based on her good faith reliance upon lengthy settlement negotiations between the petitioner and the respondents. To this extent, petitioner claimed that the respondents were equitably estopped from asserting the statute of limitations as a defense since they acted wrongfully in reneging on an agreement to equalize the transfers, and that, in any event, the statute of limitations was not a bar to all of the causes of action asserted. Finally, the petitioner argued that she should be allowed to pursue discovery in order to bolster the allegations in her petition, and thus, dismissal of the proceeding was premature.

The court opined that pursuant to CPLR 214(3), the statute of limitations for replevin and conversion actions is three years. A conversion takes place when a party, without authorization, exercises ownership rights over the rightful owner's property, to the exclusion of the owner's rights. A cause of action for conversion, or for replevin based on a conversion, accrues on the date the conversion took place, and not when it was or should have been discovered.

The court opined that pursuant to CPLR 214(3), the statute of limitations for replevin and conversion actions is three years.... A cause of action for conversion, or for replevin based on a conversion, accrues on the date the conversion took place, and not when it was or should have been discovered.

Within this context, the court noted that while the alleged conversions began in 2005 and ended sometime prior to the decedent's death on Oct. 4, 2009, the petitioner did not commence her action until 2013, more than three years after each of the causes of action accrued. The court rejected the petitioner's request that the statute of limitations be tolled, finding that she received preliminary letters testamentary in January 2010, well before the statute of limitations had expired, but did not commence her cause of action for conversion for another three years.

Further, the court rejected the petitioner's claim of equitable tolling of the limitations period, concluding that the petitioner had offered no meaningful support for her allegations that the respondents conducted settlement negotiations with her with the intention of delaying the matter to a time when her claims would be time-barred. Accordingly, the court held that all of petitioner's claims based on conversion and replevin were barred by the statute of limitations.

In addition, the court held that petitioner's claims of undue influence, duress, coercion, forgery, money had and received and unjust enrichment, were also time-barred, concluding that, despite these underlying allegations, the relief requested in the petition, i.e. return of the property or replevin, was dispositive of the statutory time period for commencing the action.

However, the court held that petitioner's claims based on fraud were not time-barred. The statute of limitations for a claim of fraud is the later of six years from the commission of the wrong, or two years from the date the alleged fraud was discovered or could reasonably have been discovered. The court found that there was nothing in the record to indicate that the petitioner knew of the transfers prior to the summer of 2009, when she was first informed of them, and thus, her proceeding commenced in May 2013, was timely.

Further, although the respondents maintained that petitioner's claims of fraud were not sufficiently pleaded with specific detail to sustain a cause of action, based on a liberal construction of the pleading, and according the petitioner every possible favorable inference to determine whether the facts as alleged fit within any cognizable legal theory, the court disagreed.

In re Estate of Friedricks, NYLJ, July 25, 2014, at p. 34 (Sur. Ct. Nassau County).