

TRUSTS AND ESTATES UPDATE

Expert Analysis

Notable Opinions From Supreme and Appellate Courts

While the spring and summer months have seen a multitude of decisions from the Surrogate's Courts relevant to trusts and estates, the Supreme and Appellate courts have also rendered opinions of interest to practitioners in the field. This month's article will examine those opinions addressed to such issues as the attorney-client relationship, discovery, and settlement agreements.

Privity and Malpractice Suits

In *Damone v. Levy*, the Supreme Court, New York County, granted in part and denied in part motions for summary judgment by the attorney and accountant allegedly retained by the fiduciary in connection with the administration of the decedent's estate.

In November 1991, the decedent created a generation skipping trust in which he named his son-in-law as trustee. The same day he created the trust, he executed his will in which he named his daughter the executrix of his estate. The attorney who created the trust and the will advised the decedent at the time the instruments were executed that assets placed into the trust would not be subject to probate or to estate taxes.

Subsequent to the decedent's death, his daughter, as executrix, contacted her accountant, concerning settlement and distribution of the estate. The accountant advised her that he was not familiar with trusts and estates matters, but would nevertheless meet with the family and arrange for their consultation with an attorney experienced in the field.

The meeting with the accountant and an attorney selected by him took place shortly thereafter. Discussion revolved around whether the decedent's will had to be probated and whether estate tax returns were necessary. However, inasmuch as the trust agreement was not available at the time, counsel would not opine on the estate tax issue without reviewing the trust agreement first. Counsel advised the accountant as to the requirements for filing the return in the event one was due. The trust agreement was not left with counsel, nor was he asked by any member of the decedent's family to review the instrument.

Thereafter, the decedent's family met with another estate attorney, who was not retained. Instead, the

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decedent's daughter informed her accountant that she wanted to retain the first attorney she had met, and instructed him to inform counsel to do what was necessary to settle the estate. The decedent's daughter admitted, however, that she never followed up with this conversation, did not confirm whether counsel had been retained by her accountant, and did not retain him directly.

The Third Department affirmed an order that partially granted a motion to strike certain portions of the defendant's answer for willful noncompliance with discovery.

Ultimately, the trust agreement was faxed by the decedent's daughter to counsel, who advised the accountant that the trust was revocable, and that if the estate met the threshold value, estate taxes would be due. Counsel was not advised of the financial status of the estate until after the filing deadline had passed. Thereafter, the estate tax return was filed, and all subsequent conversations with the Internal Revenue Service (IRS) were had with the accountant.

The decedent's daughter then sued counsel and her accountant for malpractice in the handling of his estate, and motions for summary judgment by the defendants were made.

In response to the motion by counsel, the court opined that in order to recover for legal malpractice, a party must establish (1) the existence of an attorney-client relationship; (2) negligence on the part of the attorney; (3) that the attorney's negligence was the proximate cause of the injury to plaintiff; and (4) that plaintiff suffered actual damages.

In particular, the court noted that an attorney-client relationship can be established through the

existence of a written retainer, or alternatively by the actions of the parties. To this extent, relevant factors are whether a written retainer or contract between the parties existed, whether a fee was paid, whether counsel actually represented the party in the matter, whether there was an informal relationship and the attorney represented the party gratuitously, and whether the party reasonably believed that the attorney was representing him or her.

Applying these criteria to the case, the court held that counsel had sufficiently established that no attorney-client relationship existed between himself and the plaintiff, and moreover, that plaintiff had failed to present any evidence that raised a question of fact on the issue. Accordingly, the court dismissed plaintiff's causes of action for legal malpractice. In addition, the court dismissed plaintiff's claims for breach of fiduciary duty and breach of contract, as the court found that they arose from the same facts and did not allege any distinct damages.

However, the accountant's motion for summary judgment was denied, despite his claims that he had never been retained to represent plaintiff in connection with the trust. The court held that in order to recover on a claim for accounting malpractice, the threshold question is whether a duty of care existed as a result of the parties' relationship; i.e., whether they stood in a relation of privity with each other. Although the accountant argued that no such duty of care existed, the court held that there was a question of fact on this issue which precluded granting summary relief.

Damone v. Levy, *New York Law Journal*, 4/30/09, p. 29 (Sup. Court, New York County)

Discovery Sanctions

In *Olmsted v. Pizza Hut of America Inc.*, the Appellate Division, Third Department, affirmed an order of the Supreme Court (Garry, J.), which partially granted plaintiff's motion to strike certain portions of the defendant's answer for willful noncompliance with discovery.

On appeal, the defendant argued that its conduct was not willful, contumacious or in bad faith, and that the drastic remedy of dismissal was unwarranted. The Appellate Division disagreed.

In pertinent part, the record revealed that the plaintiff made repeated requests over a period of four years, for the defendant to produce the name of an employee to be deposed. Instead, defendant responded that there was no one from its corporate office with knowledge of the incident in question. Accordingly, a conference was held, at which time

the court ordered the defendant to provide plaintiff with the identity of past and present employees with personal knowledge of all of its building plans and specifications of its franchises or to advise plaintiff that no such employee could be identified.

Defendant ultimately provided plaintiff with the name of an employee, however, one who had little or no knowledge of the issues involved in the litigation. This was not discovered by plaintiff until the witness was deposed. Plaintiff's counsel informed the court that he was going to make the appropriate motion on plaintiff's behalf as a result of defendant's conduct, in response to which defense counsel wrote to plaintiff's counsel that it was unable to identify any employee having knowledge of the information plaintiff sought. In the interim, plaintiff served a notice to produce documents on the defendant, to which defendant never responded. All of these events culminated in an order of the Supreme Court striking defendant's answer.

In affirming the court's order, the Appellate Division opined that the Supreme Court had discretion to impose sanctions, including striking a party's pleading, for the willful failure to disclose evidence. Absent a clear abuse of such discretion, the sanctions imposed will not be disturbed on appeal. Assessed in this context, the Appellate Court found that the record supported the Supreme Court's determination that the defendant had willfully failed to comply with the plaintiff's repeated discovery demands, most particularly as evidenced by its inability to provide an employee with knowledge of the subject matter in issue, or with a reasonable explanation as to why such information could not be ascertained. Furthermore, the court concluded that defendant's willfulness could be established from its general pattern of noncompliance.

Olmsted v. Pizza Hut of America Inc., NYLJ, 4/30/09, p. 32 (A.D. 3d Dept.)

Divorce Agreement Vacated

In a matrimonial action, the plaintiff moved, inter alia, for an order setting aside the stipulation of settlement entered between her and the defendant, her former spouse.

At the time the settlement was entered the plaintiff was represented by counsel. Subsequently, she retained new counsel and moved to set aside the agreement. In support of the requested relief, plaintiff contends that she entered the agreement under duress, and that the terms thereof are so one-sided as to be unconscionable as a matter of law. Specifically, plaintiff argued that at the time the stipulation was entered, her sole concern was to free herself from the wrath of her abusive husband. Further, she alleged that although she had a basic understanding of the English language, she did not understand the ramifications of the agreement and what proved to be its onerous terms.

She claimed that she did not know the value of her husband's business and did not realize that she was not receiving the marital residence. Moreover, plaintiff alleged that she had a number of part-time jobs during the course of the marriage, for which she was not well-compensated, and that the defendant paid all the household expenses from his employment income and his business. Additionally, she stated that while a tenant resides in the marital home, he no longer pays rent. As a consequence, plaintiff

maintained that she did not have the financial resources to support and clothe her children, or to provide for their medical expenses.

Despite arguments by the defendant that an agreement may not be set aside when the parties have been represented by counsel and have had the opportunity to conduct disclosure, the court granted plaintiff's application. Relying upon the opinion by the Court of Appeals in *McCoy v. Feinman*, 99 NY2d 295 (2002), the court found that plaintiff had stated sufficient grounds for a determination that the agreement for equitable distribution was ambiguous, overreaching and unconscionable, and ordered that the judgment reciting these provisions, as well as the provisions for maintenance and child support, be vacated.

Infante v. Infante, NYLJ, 5/13/09, p. 39 (Sup. Court, Nassau County)

When an attorney is retained for business or personal advice, or to do the work of a non-lawyer, the resulting communications from the lawyer are not necessarily protected by the attorney-client privilege, nor for that matter, do they constitute attorney-work product.

Claiming Lack of Standing

In an action for foreclosure and sale of real property, the defendant moved, inter alia, for an order staying the impending sale of the subject premises, and dismissal of the complaint on the grounds that plaintiff lacked standing to maintain the action due to its lack of ownership of the note and mortgage at the time suit was commenced.

In denying the motion, the court opined that the issue of a party's lack of standing is tantamount to a claim that the party lacks the capacity to sue. When a defendant does not challenge a plaintiff's standing, the plaintiff is not required, nevertheless, to demonstrate that it is the proper party to seek the requested relief. Instead, the plaintiff is relieved of this burden. The court held that the issue of a plaintiff's standing to sue must be raised by the defendant in its answer or in a pre-answer motion to dismiss. To the extent that the defendant fails to address the issue as such, the defense is waived pursuant to CPLR 3211(e).

Based upon the foregoing, the court found that the defendant had waived the defense of lack of standing, inasmuch as he had failed to raise it at the appropriate time.

Washington Mutual Bank NA v. Payne, NYLJ, 6/24/09, p. 29 (Sup. Ct., Suffolk County)

Attorney-Work Product

In *Siewert v. Greater Atlantic Beach Water Reclamation District*, the court denied the defendant's motion for a protective order seeking to quash a subpoena duces tecum served on a non-party witness on the grounds that the documents sought, consisting in part, of engineering reports, constituted attorney-

work product, material prepared in anticipation of litigation, and were otherwise privileged. The record revealed that the documents had been inadvertently disclosed by the defendant to the plaintiff, and consequently defendant requested that the order to be issued direct that the originals be returned and all copies be destroyed.

The defendant maintained that at no time did it intend that the documents in issue be produced, and that the inadvertent production of the records did not result in a waiver. The court opined that inadvertent disclosure will not act as a waiver if it can be shown that (1) the client intended to maintain the confidentiality of the document; (2) reasonable steps were taken to prevent disclosure; (3) the party asserting the privilege acted promptly to remedy the situation; and (4) the parties who received the document will not suffer undue prejudice if a protective order is issued.

In opposition to the motion, the plaintiff alleged that it had a substantial need for the requested material, and could not obtain it from any other source without undue hardship.

After examining the criteria for disclosure under the CPLR, and case law as it pertained to the privileges asserted, the court noted that the attorney-client privilege could not be used as a means of shielding disclosure of discoverable information such as an investigative report. Citing the opinion by the Court of Appeals in *Spectrum Systems International Corporation v. Chemical Bank*, 78 NY2d 371, the court stated that an investigative report does not become privileged merely because it was sent to an attorney; nor is the report privileged merely because it was conducted by an attorney.

Indeed, when an attorney is retained for business or personal advice, or to do the work of a non-lawyer, the resulting communications from the lawyer are not necessarily protected by the attorney-client privilege, nor for that matter, do they constitute attorney-work product. Rather, attorney-work product is limited to only those materials that are the product of the lawyer's learning and professional skills.

Finally, with respect to the claim that the materials were prepared in anticipation of litigation, the court found it significant that the subject reports were commissioned almost six months prior to the commencement of the litigation, and there was no indication of who requested that they be prepared or for what purpose. Given these deficiencies, the court held that the defendant had failed to satisfy its burden of proving that the documents constituted attorney-work product or materials prepared in anticipation of litigation.

Accordingly, the court denied the defendant's motion for a protective order, and held, as such, that a determination of the issue of waiver was no longer required.

Siewert v. Greater Atlantic Beach Water Reclamation District, NYLJ, 6/12/09, p. 28 (Sup. Ct., Nassau County)