Beverly Hills Bar Association – Trusts & Estates' Section

Case Summaries for February 2018

Sheldon Fong v. East West Bank. (Filed 01/09/2018) Case Number A146028 & A147048, First Appellate District, Division Two (Conversion Claims Survive Summary Judgment)

Sheldon Fong, an octogenarian real estate investor, sought to help some of his younger friends establish a real estate business by securing third party funding for the venture, through a combination of borrowing in his own name and guaranteeing loans. Mr. Fong defaulted on a loan made to Mr. Fong, as an individual. Eventually the lender liquidated Mr. Fong's CD, which had been pledged as collateral.

Mr. Fong filed a complaint against the lender (among others). All but two of the thirteen counts of the complaint were dismissed by the trial court without leave to amend in response to demurs. The surviving causes of action against the lender were for conversion and for financial abuse of an elder. The lender moved for summary judgment on both claims. In granting the summary judgment motion, the trial court found that Mr. Fong failed to submit competent and admissible evidence to create a triable issue of fact and awarded the lender reasonable attorney's fees and costs as the prevailing party. Mr. Fong appealed.

The appellate court reversed the trial court. On the conversion claim, the appellate court rejected the lender's arguments that (1) as a matter of law, it could not be liable for a claim of conversion brought by its own depositor; (2) Mr. Fong's failure to comply with legal procedural requirements was sufficient grounds for granting the summary judgment motion; and (3) the challenged transfer was appropriately authorized. The appellate court further noted that Mr. Fong disagreed with some, not all, of the lender's enumerated facts. Finally, the appellate court found that a triable issue of fact remained in that Mr. Fong's evidence raises a triable issue of material fact as to the geniousness of the documents on which the lender relies for authorization. In addition to reversing the trial court's order granting summary judgment and awarding attorney's fees and costs, the appellate court awarded Mr. Fong his costs on appeal.

Estate of Kirk Kerkorian, Una Davis v. Anthony Mandekic (Filed 01/19/2018) Case Number B283132, Second Appellate District, Division Five (Court authorized to allow Executor to Oppose Heirship Petition)

The Decedent executed a Will in July of 2013. On March 30, 2014, the Decedent married Una Davis. The Decedent died in June 2015, and his Will was admitted to probate. The Will provided for several bequests and for distribution of the remainder of the estate to charitable organizations, as determined by a committee named in the Will. Although Ms. Davis received a lifetime transfer of $10 million purportedly in exchange

for her waiver of marital rights, including any transfer that the Decedent might have made at death, Ms. Davis was not mentioned in the Will.

Ms. Davis petitioned the Court for determination of her right to receive a distribution of the estate as an omitted spouse pursuant to California Probate Code Section 11700 and Section 21601et seq. The Executor (Anthony Mandekic), with the consent of the Attorney General, sought Court approval to oppose Ms. Davis' omitted spouse petition under Probate Code Section 11704. Ms. Davis opposed, asserting that the California Attorney General was obligated and able to represent the charitable beneficiaries in opposing the omitted spouse petition.

The Probate Court granted the Executor's request and found that good cause existed for allowing the Executor to participate in the heirship proceedings. The Probate Court expressly found that good cause existed because: (1) the Executor's familiarity with the Decedent's financial and personal affairs gave the Executor unique insight into the Testator's intent regarding Ms. Davis' omission from the Will; (2) the Executor has no financial interest in the estate, as he has been paid a cash bequest, which Ms. Davis did not challenge; (3) the Executor was not otherwise improperly motivated to participate in the proceeding; (4) the Executor would waste resources trying to educate the Attorney General on the underlying facts; and (5) the Executor's participation would result in a speedier conclusion of the estate and speedier distributions.

The Appellate Court affirmed the Probate Court. The Appellate Court rejected Ms. Davis' argument that the Court is required to find that the Executor's participation as a party is necessary to assist the Court, holding that the Probate Court's good cause finding subsumes the determination that the Executor's participation is necessary because a Court cannot appropriately determine if good cause exists to allow an Executor to participate in an action without taking some notice of what form that participation will take. Further, the Appellate Court held that "necessary" in this context means useful and not indispensable.

Dorothy W. Gaynor v. James A. Bulen (Filed 01/23/2018) Case Number D070907, Fourth Appellate District, Division One (Anti-SLAPP motion not available remedy for petition alleging breach of fiduciary duty)

This is the second case between one group of beneficiaries of a Trust established for the benefit of Trustees and the beneficiaries ("Gaynor beneficiaries") and the Trustees. The first case involved contentious disputes over the Trust's management, control and distributions. (Affirmed in Gaynor v. Bulen (Nov. 20 2014) D064872 (non-pub. opn.)

After the resolution of the first case in their favor, the Gaynor beneficiaries filed a petition to surcharge the Trustees for a breach of Trust. Bulen was later added as a defendant based on his alleged de facto status Trustee status as reveal in discovery of email between the Trustees and Bulen. In the surcharge petition, the Gaynor beneficiaries allege that the Co-Trustees and Bulen breached their fiduciary duty, as demonstrated by the numerous actions taken to benefit themselves at the expense of

the other beneficiaries, including, but not limited to (1) the Co-Trustees and Bulen took actions to distribute Trust funds only to themselves and other elder beneficiaries; (2) the Co-Trustees and Bulen planned to modify the Trust to create new Trustee succession terms, which would have ensured their continued control of Trust distributions; (3) the Co-Trustees and Bulen wrongfully withdrew Trust assets and used them to file and defend petitions in an attempt to have the Probate Court adopt their Trustee succession and distribution plan.

Bulen filed a motion to strike the claims against him under California's anti-SLAPP statute (Code of Civil Procedure Section 425.16) asserting that the allegations that Trust assets were wasted on probate litigation constitute claims that he engaged in constitutionally protected activity entitled to anti-SLAPP protection. The Probate Court denied the motion, finding that the claims were not subject to the anti-SLAPP statute. The Probate Court found that Bulen's involvement in the litigation adverse to the Gaynor beneficiaries was mere evidence of his alleged breach of the fiduciary duties owed to the Gaynor beneficiaries. Bulen appealed.

The Appellate Court affirmed the Probate Court. To trigger anti-SLAPP protection, the moving party has the initial burden to show that the claim arises from the moving party's constitutionally protected activity. The Appellate Court stated that although the surcharge petition did include allegations that Bulen engaged in constitutionally protected activity by his actions in the prior Probate Court litigation, Bulen did not meet his burden of proof and failed to show that the claims arose from that litigation activity.

California Self-Insurers' Security Fund et. al v. Superior Court of Orange County, Acticare Living et al, real parties in interest (Filed 01/26/2018) Case Number G054981, Fourth Appellate District, Division Three (Law Firm Disqualification)

The California Self-Insurers' Security Fund ("Fund") continues to pay injured workers' compensation claims when a self-insured entity is unable to do so. When providing those payments, the Fund is legally required to seek reimbursement from the employer under Labor Code Section 3744. This action is such a collections action by the Fund against 304 member of the Healthcare Industry Self-Insurance Program ("Program"), of which 170 members had settled with the Fund at the time of the appeal. The Fund hired Nixon Peabody to represent it in this matter. Two of the remaining defendants (the real parties in interest, Activcare Health Care Group and Mountainview Retirement Ltd) were represented by Michelman & Robinson (M&R). From 2009 until February 2, 2017, Andrew Selesnick was the Chair of the Health Care Department at M&R and was actively engaged in the representation of the real parties in interest.

On or about February 1, 2017, Selesnick left M&R and joined Nixon Peabody. After Nixon Peabody was advised by M&R of the potential conflict issue and on or about March 8, 2017, Selesnick left Nixon Peabody.

On March 15, 2017, real parties in interest filed a motion to disqualify Nixon Peabody as a result of Selesnick's brief tenure at that firm because if an attorney is disqualified from

a representation, the entire law firm is vicariously disqualified as well, especially when the attorney's disqualification is due to the attorney's prior representation of the opposing side during the same lawsuit. The trial court granted the motion for disqualification, concluding that when an attorney switches sides during the pendency of a litigated matter, disqualification is mandatory. The Fund and Nixon Peabody filed a petition for writ of mandate and a stay of the trial court proceeding.

Because it appears from the trial court's order that it thought disqualification was mandatory and automatic, it did not exercise its discretion, which allowed the appellate court to review this issue on a de novo basis. The appellate court stated that Selesnick could not represent the Fund and if he remained employed by Nixon Peabody, the entire firm would be disqualified. The question left for decision was whether Nixon Peabody and all its attorneys should also disqualified given all of the relevant facts including the fact that Selesnick no longer works at Nixon Peabody and was only with that firm for a very brief period. The appellate court concluded that the trial court must perform an analysis of whether confidential information was transmitted from Selesnick to the attorneys working on the matter at Nixon Peabody and must determine if Selesnick's tenure at Nixon Peabody endangers the duty of confidentiality Selesnick owed to the real parties in interest. If it does, then disqualification is required. If it does not, the trial court must exercise its discretion to determine whether other reasons compel disqualification. Accordingly, the appellate court granted the petition and directed the trial court to vacate its order disqualifying Nixon Peabody and to consider all relevant facts and circumstances as set forth in the appellate court's opinion in determining whether the motion to disqualify should be granted.

Sun Life Assurance Company of Canada v. Richard E. Jackson, Sierra N. Jackson individually and on behalf of the Estate of Bruce D. Jackson, United States Court of Appeals for the Sixth Circuit (Filed 11/28/2017) Case Number 17-2120 (QDRO)

Bruce Jackson and Bridget Jackson divorced in 2006. As part of their separation agreement, they agreed to maintain any employer related life insurance policies for the benefit of their daughter until she attained age 18. Mr. Jackson had two such policies for which he named his uncle as beneficiary and did not change that designation even after the separation agreement was signed. Mr. Jackson died, and a dispute developed between Sun Life Assurance, the Jacksons' minor daughter and Mr. Jackson's uncle. Rejecting the separation agreement as a sufficient QDRO, Sun paid the life insurance benefits to Mr. Jackson's uncle. The guardian on behalf of the Jacksons' minor daughter sued Sun for the life insurance proceeds. The District Court found in favor of the Jacksons' minor daughter and order Sun to pay her the life insurance benefits and interest. On appeal, the Sixth Circuit upheld the District Court, agreeing with the Ninth Circuit (as well as the Seventh and Tenth) that the substantial compliance was the standard for determining compliance with the QDRO statutes. (See 29 USC Sections 1144(b)(7) and 1056(d)(3)(C).)

Hutcheson v. Eskaton Fountain Wood Lodge, 17 Cal. App. 5th 937, (11/28/2017, Third Appellate District). (Agent under Power of Attorney and arbitration)

Barbara Lovenstein signed a health care power of attorney in which she appointed her niece, Robin Lovenstein, as her attorney in fact to make health care decisions for Barbara. Barbara also signed a personal care power of attorney appointing both Robin and Barbara's sister, Jean Charles, as attorneys in fact. The personal care power of attorney expressly did not authorize anyone to make "medical and other health-care decisions" for Barbara.

Using the personal care power of attorney, Jean voluntarily admitted Barbara to the Eskaton Fountain Wood Lodge ("Lodge") and a signed an admission agreement that included an arbitration clause. After admission, the Lodge was provided with a copy of the health care power of attorney, which appointed only Robin to make health care decisions for Barbara. The Lodge began giving Barbara more than her prescribed amount of Ativan and Barbara's health declined. Jean decided, on doctor's advice, to remove Barbara from the Lodge. Unfortunately, before that move could be accomplished, Barbara developed pneumonia and subsequently died.

Robin, as successor in interest to Barbara, sued the Lodge for elder abuse and fraud. Jean sued the Lodge for negligent infliction of emotional distress. The Lodge petitioned the trial court to compel arbitration. The trial court reasoned that the admission to the Lodge, including the agreement to arbitrate, had been a health care decision for which Jean had no authority to make under the personal power of attorney. The Lodge appealed.

In its review, the appellate court focused on the statutory definition of health care under Barbara's powers and the Probate Code authorizing those powers. Neither of Barbara's powers defined "health care" or "health care decisions". Although Probate Code Section 4050(a)(1) and Section 4401 allow a an attorney under a personal health care power to pay for medical care, including custodian care, Section 4050 does not authorize an attorney-in-fact to make health care decisions for the principal that exceed the simple residential care and the basic necessities of life. In contrast, Probate Code Section 4671 provides that the health care power of attorney may authorize the attorney-in-fact to make health care decisions, which includes the election and discharge of health care providers and institutions. Accordingly, the question to be resolved is whether signing the admissions contract with the Lodge was a health care decision as contemplated by Probate Code Section 4671.

The appellate court upheld the trial court and found that the Lodge did provide health care services to Barbara because it agreed to provide dementia care as part of its custodian care, which was beyond those services needed only for personal care. Further, because the Lodge had a copy of the Barbara's health care power of attorney, it should have known that Jean was not authorized to make health care decisions for Barbara.

Statutes

Civil Procedure – Law & Motion Practice

From January 1, 2018 through 2021, California Code of Civil Procedure Section 435.5 imposes a duty to meet and confer before filing a motion to strike and Section 439 imposes a duty to meet and confer before filing a motion for judgment on the pleadings.