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WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

	SUPERIOR COURT OF NEWJERSEY CHANCERY DIV., PROBATE PART ESSEX COUNTY DOCKET NO.: ESX-CP0044-2011
In The Matter of the Estate of LEON GENET	**OPINION**

Decided: October 13, 2011

By: Walter Koprowski, Jr., J.S.C.

This matter arises out of an action filed by Plaintiff Gerald Genet ("Gerald" or "Plaintiff") against the estate of Leon Genet ("Leon" or "Decedent") and its representatives. Gerald is the decedent's brother and former business partner.[1] He filed this claim in his capacity as both a putative creditor and surviving partner, seeking various forms of equitable and legal relief. The matter is complicated by the fact that Gerald's claim is based on an unspecified debt and was filed approximately five years after the decedent's death and the partnership's dissolution. Defendants seek to dismiss the complaint. The issue before the Court is whether the Plaintiff may maintain this action against Leon's estate, and if so whether he is entitled to any of the relief he seeks in his order to show cause.

Leon Genet died testate on February 27, 2005, leaving a Last Will and Testament, dated September 25, 2003. Leon's Will was admitted to probate on March 16, 2005 by the Surrogate's Court of Essex County. Pursuant to the

[1] Because many of the individuals are related and share the same last name, the Court will use their given names when necessary to avoid confusion. No disrespect is intended by this informality.

terms of the Will, his daughters, Pamela J. Genet ("Pam"), Jill Genent Waller ("Jill"), and Wendy Genet Kaplan ("Wendy"), were equal one-third beneficiaries of his estate.[2] Pam was named co-executor, along with attorney Robert Marcus, Esq.

The estate's assets included annual commissions from a general partnership known as Genet Realty. Leon and his brother Gerald established Genet Realty as equal partners in the early 1980's. Genet Realty engaged in the commercial real estate leasing business. The partnership earned commissions on lease transactions, some of which were paid annually during the life of the lease contract. Pursuant to the partnership's compensation scheme, the salesperson who handled a transaction received the first 50% of the commissions, and the remaining 50% would go to Genet Realty to be divided between the two partners.

Some of the lease deals Leon brokered as a salesperson continued generating income in the form of yearly commissions after his death. During the administration of Leon's estate, Gerald met with Pam, Jill and Wendy to discuss disposition of the yearly commission payments that would be earned on Leon's lease deals. So the partnership could be wound up and that Leon's Estate could be closed in a timely fashion, it was allegedly agreed that Gerald would have the future commission payments made to another real estate company which Gerald owned, Gerald H. Genet, Inc. When the future commission payments came in, Gerald would deposit the payments in his account and then forward Leon's share of the payment to Pam, Jill and Wendy in equal one-third shares.

This arrangement was honored for approximately two years, during which time Pam, Jill, and Wendy each received a total of $330,000 in commissions for 2006 and 2007. In the meantime the estate's remaining assets were marshaled, taxes were paid and, in 2007, final distributions were made and the estate checking account was closed. In 2009, Leon's children allegedly did not receive the commission payments for 2008. Pam, on behalf of herself and her sisters, contacted Gerald regarding the missing commission payments. Gerald allegedly advised her that Gerald H. Genet, Inc. was having financial issues but assured her they would receive their payments. Pam, Jill and Wendy did not receive their payments and eventually Gerald stopped returning their phone calls.

In 2010, Pam, who lives in New York, retained an attorney. On July 1, 2010, Pam's New York counsel forwarded a letter to Gerald, demanding an accounting and payment of the commissions. Gerald responded through his own New York counsel, via letter dated August 16, 2010, advising he would not be

[2] Leon was married at the time of his death. However, his wife died just over one week after Leon, on March 7, 2005. As a result of his wife's death, Leon's estate passed to his three children in equal shares.

making any further payments on the grounds that Leon owed him money from the partnership. On January 2, 2011, Pam and her sisters filed a claim in Westchester County, New York, against Gerald and Gerald H. Genet, Inc., seeking unpaid commissions and claiming breach of contract, breach of fiduciary duty, conversion, unjust enrichment, fraud and an accounting. Jurisdiction was asserted in New York because Gerald is a New York resident, as are two of the three beneficiaries.

On March 1, 2011, Gerald filed an order to show cause and verified complaint with this Court against Leon's Estate and its executors. Plaintiff asserts that during the New York action he, allegedly for the first time since Genet Realty's inception, had an opportunity to review the partnership's checkbook and account ledgers. Plaintiff claims that Leon exclusively controlled these records and kept them in his possession at all times, an assertion disputed by the Defendants. Plaintiff maintains that he loaned Leon substantial sums of money, directly and through the partnership, to help Leon live beyond his means and pay for weddings, schools, vacations, etc. Over and above these loans, Plaintiff asserts that Leon withdrew substantial funds from Genet Realty's accounts that exceeded the commissions he was entitled to. In addition, plaintiff alleges a signature stamp with his name was fraudulently used to "sign" numerous checks, without his knowledge, to pay for Leon's funeral costs and other estate expenses out of Genet Realty's checking account.

Plaintiff filed this six count complaint and order to show cause in the Chancery Division/Probate Part, asserting various causes of action, including: recovery of partnership and other assets from deceased partner (count one); imposition of a constructive trust (count two); imposition of an equitable lien (count three); formal estate accounting by co-executors (count four); breach of fiduciary duty (count five); interference with prospective business relationships (against Pam) (count six); and a preliminary injunction.

On March 17, 2011 Mr. Marcus filed a notice of motion for dismissal, summary judgment, and/or stay pending the outcome of the New York proceedings. Mr. Marcus also requested to be discharged as co-executor. Pam filed opposition to the order to show cause and joined the motion to dismiss. The Defendants argued that, under the "first-filed rule," the pending New York litigation precluded the plaintiff from filing this action. Defendants also argued that plaintiff failed to establish that failure to issue injunctive relief would cause "irreparable harm." Estate assets have long been distributed and Plaintiff's claim is for monies allegedly owed by the estate. Lastly, the Defendants argued that Plaintiff's claims are untimely under N.J.S.A. 3B:22-4, and are therefore barred.

The Court denied Plaintiff's application for a preliminary injunction for reasons placed on the record, and reserved decision regarding the remaining issues. On June 24, 2011, the Supreme Court of New York, County of Westchester, entered an order denying Pam's application for a preliminary

injunction and granting Gerald's cross-motion to dismiss the complaint. The New York dismissal was granted on the basis of a lack of standing – the New York court held the estate was the proper party to bring the action. The New York decision renders the first-filed issue moot. The Court now turns to the remaining issues: (1) whether Plaintiff may compel estate representatives to provide a partnership accounting; (2) whether Plaintiff has a right to an estate accounting, and; (3) whether Plaintiff is entitled to a constructive trust or equitable lien over estate assets.

Mr. Marcus has filed and Pam has joined a motion for dismissal and/or summary judgment. In Printing Mart-Morristown v. Sharp Electronics Corp., the New Jersey Supreme Court explained the standard for reviewing a complaint dismissed under N.J. Court Rule 4:6-2(e) and stated that the "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." 116 N.J. 739, 746 (1989). A reviewing court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Id. If any material outside the pleadings are presented to and not excluded by the court on a R. 4:6-2(e) motion, the motion is treated as one for summary judgment. See, e.g., Lederman v. Prudential Life Ins. Co. of America, Inc., 385 N.J. Super. 324, 337 (App. Div. 2006); County of Warren v. State, 409 N.J. Super. 495, 504 (App. Div. 2009). Here, both parties submitted, and the court considered, various certifications and exhibits. Thus, R. 4:6-2(e) requires the court to treat this motion as a motion for summary judgment and dispose of it as provided by R. 4:46.

Under N.J. Court Rule 4:46-2(c) a court should only grant a motion for Summary Judgment where there are no genuine issues of material fact requiring trial, and where the movant is entitled to judgment as a matter of law. See Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Moreover, "an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact." N.J. Court Rule 4:46-2(c). In Brill, the court determined that there may only be a ruling in favor of Summary Judgment when there is not a "genuine issue" of material fact. 142 N.J. 520, 541 (1995). On a Motion for Summary Judgment, the Judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Id.

Additionally, the "judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. (*citing* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine"

issue of material fact for purposes of Summary Judgment. Id. Summary Judgment is appropriate when the evidence "is so one-sided that one party must prevail as a matter of law." Id.

Partnership Accounting and Breach of Fiduciary Duty.

Plaintiff alleges that Leon and his estate representatives breached their fiduciary duty to him by appropriating his share of partnership assets.

Plaintiff asserts that this matter is governed by New Jersey's now repealed Uniform Partnership Act ("UPA"). Plaintiff argues that the Revised Uniform Partnership Act ("RUPA"), which became effective on December 8, 2000, does not apply retroactively to partnerships existing before its effective date, i.e., Genet Realty, which was created in 1981.

Plaintiff does not provide any authority for this argument. The only relevant section that touches upon the topic of retroactivity is N.J.S.A. 42:1A-56, which provides, in pertinent part, "[the RUPA does] not affect an action or proceeding or right accrued before this act takes effect...." According to the plain language of the statute, the relevant date for determining the applicability of the RUPA is when the claim accrued, not when the partnership was formed. The issue of when Plaintiff's claim(s) accrued, and thus, whether the UPA applies is difficult to answer. Plaintiff's underlying claims are for monies which Leon allegedly promised he would repay at some unspecified point in time. Some of these "loans," which were allegedly used for vacations, tuition, camps, and weddings are decades old. For purposes of this motion, the Court will assume, without deciding, that Plaintiff properly brought his claim for a partnership accounting under the now repealed UPA.

With regard to partnership accountings, the UPA contains a number of provisions that define the rights and obligations of partners, surviving partners, and the representatives of deceased partners. See, e.g., N.J.S.A. 42:1-21, -22, -39, -43. A partner's right to an accounting may be triggered by a number of different acts or circumstances. Specifically, N.J.S.A. 42:1-22 provides:

> **Any partner shall have the right to a formal account as to partnership affairs:**
> **a. If he is wrongfully excluded from the partnership business or possession of its property by his copartners;**
> **b. If the right exists under the terms of any agreement;**
> **c. As provided by section 42:1-21 of this title;**
> **d. Whenever other circumstances render it just and reasonable.**

In turn, N.J.S.A. 42:1-21(1), as referenced in subsection (c) of the above quoted statute, provides:

> **Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.**

Plaintiff submits that he has a right to a formal accounting pursuant to subsections (a), (c), and (d) of N.J.S.A. 42:1-22. In light of the fact that Leon never accounted and is now dead, Plaintiff further argues that the representatives of his estate must assume the obligation of the partnership accounting. Plaintiff asserts that Leon's Estate has possession of all of Genet Realty's books and financial records, as well as Leon's own financial records. Plaintiff argues these would enable the Court to trace the flow of funds out of the partnership and through Leon's personal account as well his estate accounts. The question is whether the right to a partnership accounting can be asserted against Leon's estate or his representative(s).

The UPA provides, "[t]he right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners, or the surviving partners, or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary." N.J.S.A. 42:1-43 (emphasis added). Under the UPA, dissolution may be triggered by any of the enumerated reasons under N.J.S.A. 42:1-31, including "the death of any partner." N.J.S.A. 42:1-31(4); *see also* Wilzig v. Sisselman, 182 N.J. Super. 519, 526 (App. Div. 1982).

Although Plaintiff correctly asserts that the dissolution of the partnership occurred on the date of Leon's death, the statute does not afford Plaintiff the relief he seeks. While the UPA creates a right of action for a partnership accounting for representatives against "winding up partners, surviving partners, or the persons or partnership carrying on the business," it does not create a reciprocal right of action for surviving partners against a deceased partner's representatives. Between representatives and surviving partners, the right to demand an accounting belongs to the former, while the obligation falls squarely on the latter. The UPA does recognize a narrow exception to the above cited statute, where the representatives of a deceased partner would be required to account. This exception applies "to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner." N.J.S.A. 42:1-21(2). In this case, the exception would not apply to Gerald, as he is the last-surviving partner, and he is still alive. There is no express language in the UPA that would allow this

Court to compel the estate or its representatives to provide a formal partnership accounting. Thus, the Plaintiff's claim for a formal partnership accounting must fail as a matter of law.

As noted, Plaintiff seeks restitution for damages caused by Leon's alleged dereliction of duties as a partner in Genet Realty. His claims could also be considered a species of breach of contract or perhaps unjust enrichment. Generally, the relationship of co-partners as fiduciaries is "one of trust and confidence, calling for the utmost good faith, permitting of no secret advantages or benefits." Stark v. Reingold, 18 N.J. 251, 261 (1955). Because Leon is now dead, Plaintiff urges this Court to impose these fiduciary duties upon the executors and representatives of his estate. Under the now repealed UPA, an accounting is a prerequisite to the availability of other remedies against the partnership and other partners. "Ordinarily, one partner may not sue another at law unless there is a prior accounting or settlement of partnership affairs." Notch View Associates v. Smith, 260 N.J. Super. 190, 198 (Law Div. 1992); compare N.J.S.A. 42:1A-25(b), (c) (RUPA does not require an accounting prior to filing other claims, but also eliminates the revival of claims otherwise barred by law.) Here, plaintiff did not demand a partnership accounting while Leon was alive and seeks to compel estate to provide an accounting after his death. Leon's claims appear to be claims for damages against the estate or the beneficiaries, more appropriately brought in the Law Division.

Formal Estate Accounting and Breach of Fiduciary Duties

Pursuant to N.J.S.A. 3B:2-2, the Superior Court has "full authority over the accounts of fiduciaries." An action may be commenced by an interested person to compel a fiduciary to file an accounting and, in appropriate circumstances, to file an inventory and appraisement. Pressler, Current New Jersey Court Rules, comment to R. 4:87-1(b). "Unless for special cause shown, he shall not be required to account until after the expiration of one year after his appointment." N.J.S.A. 3B:17-2. A creditor may be an interested party and may compel an accounting. In re Sycle's Estate, 16 N.J. Misc. 23, 24-25 (Prerog. Ct. 1938). Under N.J.S.A. 3B:22-4:

> **Creditors of the decedent shall present their claims to the personal representative of the decedent's estate in writing and under oath, specifying the amount claimed and the particulars of the claim, within nine months from the date of the decedent's death. If a claim is not so presented to the personal representative within nine months from the date of the decedent's death, the personal representative shall not be liable to the creditor with respect to any assets which the personal representative may have**

> **delivered or paid in satisfaction of any lawful claims, devises or distributive shares, before the presentation of the claim.**

"[T]he word 'creditor' is not used in the restricted sense of one to whom a debt is due, but includes a party entitled to prosecute a suit upon a tort of the deceased." Hackensack Trust Co. v. Van Den Berg, 92 N.J.L. 412, 413-14 (E. & A. 1918); see Forwood v. Green's Estate, 42 N.J. Super. 423 (Cty. Ct. 1956). "The statute itself has been said to contain 'ample indicia of an intent to include all claims enforceable by suit terminating in a money judgment.'" Pitale v. Leroy Holding Co., 65 N.J. Super. 361, 365-66 (Ch. Div. 1961) (quoting Van Den Berg, 92 N.J.L. at 413).

One of the major purposes of probate is to see that the just debts of the decedent are paid from his or her estate. A creditor must present their written claim to the personal representative who may accept or deny the claim. The Probate Part does not adjudicate common creditor claims. A creditor whose claim is denied by a personal representative must initiate a Law Division action to reduce the claim to judgment. Once a creditor has reduced a claim to judgment, the creditor has standing to demand an accounting if the judgment is not satisfied. Gerald has asserted a highly contested right to make a claim as a creditor which the estate disputes. Thus, Gerald must file an action in the Law Division to reduce his claim to a judgment before he can demand an accounting.

Even if Plaintiff qualifies as a creditor by virtue of his tort claims, he is not entitled to relief under the applicable statutes in the Probate Part. The Plaintiff in this case did not present any claims whatsoever, whether in writing and under oath or otherwise, within nine months. In fact, Plaintiff filed this action almost six years after the decedent died. Moreover, Plaintiff does not dispute that he assisted the co-executors in closing the estate by arranging the distribution of future commission payments. Similarly, relief is unavailing under N.J.S.A. 3B:22-10, which states:

> **Where the assets of an estate exceed the amount needed to pay claims presented within the time limited pursuant to [N.J.S.A 3B:22-4], a claimant, who has failed to present his claim within the time so limited, may present the claim, in the form required by that section, to the personal representative at any time before the remaining assets of the estate shall have been distributed or paid over pursuant to law.**

In essence, N.J.S.A. 3B:22-10 gives tardy creditors another chance to file a claim, up to the point where the assets are distributed from the estate. Here there is no dispute that all assets were distributed by August 24, 2007 and the

estate checking account was closed on October 9, 2007. Therefore, Plaintiff is not entitled to file a claim as a creditor under this statute either. Plaintiff relies heavily on the fact that release and refunding bonds were not filed by the co-executors regarding any of the beneficiaries until very recently, after the commencement of this action, despite the estate's claim that everything was closed in 2007. The statute contemplates such a situation. N.J.S.A. 3B:22-15 states:

> **In an action by a creditor against a personal representative, for the payment of a ratable proportion of his debt, it shall be presumed that the assets of the estate due a devisee or heir have not been paid over to him, if no refunding bond from the devisee or heir is on file. However, the presumption may be rebutted by proof that the devise or distributive share was actually paid over to him.**

Here, the release and refunding bonds were not filed until after the Plaintiff filed this claim, thus raising the presumption that the estate is still active and in possession of assets. The presumption is rebuttable by proof that the devise was actually paid to the beneficiaries. In this case, the co-executors have submitted affidavits that the three daughters of Leon Genet were paid. These affidavits provide undisputed evidence that the beneficiaries were paid. Similarly, as stated above, the estate checking account showed a balance of zero in 2007, which is also not disputed by Plaintiff.

Under the Summary Judgment standard as articulated by Brill, in determining whether there exists a "genuine issue" of material fact, the court considers whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." 142 N.J. at 540. Although the Plaintiff benefits from the presumption that the estate is still active and in possession of assets, he has not provided any evidence that this is indeed the case. In contrast, the Defendants have provided affidavits that Leon Genet's daughters were paid in the fall of 2007, and have provided the final monthly statement of the estate checking account showing a balance of $0.00. While it is not the judge's function in a motion for Summary Judgment to "to weigh the evidence and determine the truth of the matter," or make credibility determinations, the judge must "determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (*citing* Anderson v. Liberty Lobby, Inc., 477 U.S. at 249). Here, it is not that the Plaintiff's evidence is less credible than that of the Defendants; it is that the Plaintiff has not provided any evidentiary material. Thus, because there is no "genuine" issue of material fact, the Defendants are entitled to judgment as a matter of law. For these reasons, the Plaintiff is not entitled to a formal estate accounting. Of course, the

Plaintiff has the right to pursue the beneficiaries in a court of competent jurisdiction. N.J.S.A. 3B:22-16.

Constructive Trust and Equitable Lien

Plaintiff asserts that Leon and Leon's children have the burden to identify the disposition of his and Genet Realty's assets which are in the possession of the estate or have been transferred to Leon's children or other third parties. Plaintiff seeks to encumber these assets with a constructive trust and/or equitable lien. The issue here is whether the asset-less estate is the proper party to these causes of action. In order to impose a constructive trust, the court must find: (1) a wrongful act and; (2) a resulting transfer of property that creates an unjust enrichment on the part of the recipient. D'Ippolito v. Castoro, 51 N.J. 584, 589 (1968). Wrongful acts include, but are not limited to, fraud, mistake undue influence, or breach of a confidential relationship. Ibid. "Constructive trust must be established by clear, definite, unequivocal and satisfactory evidence." Massa v. Laing, 160 N.J. Super. 443, 446 (App. Div. 1977) aff'd Massa v. Laing, 77 N.J. 227 (1978). In this case, the evidence of wrongdoing or unjust enrichment is far from "clear, definite, unequivocal and satisfactory."

The concept of an equitable lien is similar to that of a constructive trust. "An equitable lien is a right of special nature in a fund and constitutes a charge or encumbrance upon the fund" to prevent unjust enrichment. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 546 (1994). "For an equitable lien to arise there must be debt owing from one person to another, specific property to which the debt attaches, and an intent, expressed or implied, that the property will serve as security for the payment of the debt." Highland Lakes Country Club & Community Ass'n v. Franzino, 186 N.J. 99, 112-13 (2006) (quotations omitted). In this case, there is no concrete evidence of a debt owing from the Estate or Leon's children to Gerald – to the contrary, "who owes what to whom" is hotly contested, and the Defendants here maintain the debt actually is owed by Plaintiff to them. There is also no specific property to which the debt attaches, nor is there any intent, express or implied, that any "fund" or other property is meant to serve as security for the debt.

The Plaintiff fails to provide any authority for the assertion that the representatives of Leon's estate have the burden to identify the assets. To the contrary, the above cited case law appears to place the burden squarely on the Plaintiff's shoulders. More importantly, as stated above with regards to Plaintiff's argument for a formal estate accounting, what is missing here, other than the proof contemplated by case law, is the actual res or property that Plaintiff seeks to encumber. The assets at issue have long been distributed, and there is nothing left in the estate. Even viewing the facts in the light most favorable to the Plaintiff as required by the Summary Judgment standard, a rational fact-finder could not find that a constructive trust or equitable lien should be imposed as the plaintiff has not provided no evidence that there is anything to impose a

constructive trust or equitable lien against. There is no reason why Plaintiff's claims against individual Defendants should be made part of an estate action in probate court.

Conclusion

Plaintiff's cause of action for a partnership accounting fails because he has not provided any authority to demonstrate such an accounting may be compelled of a partner's heirs or estate in the Probate Part. Similarly, Plaintiff is not entitled to compel an accounting of the estate. The claims Plaintiff has asserted as a putative creditor are late, having been filed more than five years after Leon's death and three years after the estate's assets had been fully distributed. Because the estate is without assets, there is nothing to encumber with a constructive trust or equitable lien; even if Plaintiff could satisfy the elements of those causes of action or remedies, which he cannot. Thus, there are no genuine issues of material fact requiring trial, and the Defendants are entitled to judgment as a matter of law. Accordingly, all of Plaintiff's claims against the estate and its representatives are dismissed without prejudice. There is nothing preventing the Plaintiff from seeking to recover against the residuary devisees either for the damages he asserts they caused or to recover the devises they recovered from Leon's Estate (N.J.S.A. 3B:22-40). Plaintiff's claims sound more in law than equity, and he is free to pursue them in the proper forum. Finally, the Court expresses no opinion as to Plaintiff's remaining claims against Pam, against whom he has asserted claims for money damages based on misappropriation by conversion, fraud, or mistake and interference with prospective business relationships. It suffices to say these matters do not concern the estate and are improperly before the Probate Part.

The relief sought in the Order to Show Cause is **DENIED.** The complaint is dismissed without prejudice.