

**SUPREME COURT- STATE OF NEW YORK
COUNTY OF NASSAU: TRIAL/IAS PART16**

PRESENT:

Hon. Thomas Rademaker, J.S.C.

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CHRISTINE M. COMENGA

Plaintiff(s),

-against-

**The COMEGNA CHILDREN'S 2019
REVOCABLE TRUST, COMEGNA FAMILY
2019 REVOCABLE TRUST, and LISA A.
DUBIN and WILLIAM M. DUBIN, individually
And in their capacities as the Trustees of the
COMEGNA CHILDREN'S 2019 REVOCABLE
TRUST AND COMEGNA FAMILY 2019
REVOCABLE
TRUST,**

Defendant(s).

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Index No: 600390/2021

Motion Seq. No.: 001

Motion Submitted: 1/6/2021

DECISION AND ORDER

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including e-filed documents/exhibits numbered 34 through and including 64, this motion is decided as follows:

The Plaintiff moves the Court by Notice of Motion for an Order which, inter alia, pursuant to C.P.L.R. 3212, granting Plaintiff summary judgment on her sole cause of action for declaratory relief in the complaint pursuant to C.P.L.R. 3001 to reform the Comegna Children's 2019 Revocable

Trust, remove Defendants Lisa A. Dubin and William M. Dubin as Trustees and appoint Plaintiff of the same or, alternatively, to rescind the Comegna Children's 2019 Revocable Trust and form a new trust in accordance with the terms of a certain separation agreement. The Defendant opposes said motion.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980]). The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 [1st Dept. 1992]), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 N2d 361 [1974]).

Plaintiff and the Decedent were married on or about May 23, 1997, and later had two children (“the children”). See Comegna Aff., at ¶¶ 3,4. On or about May 10, 2014, Plaintiff and the Decedent

entered into a Separation Agreement (“Separation Agreement”), where they stipulated to their present and future rights. See Murphy Aff., Ex. C. The Separation Agreement explicitly stated in Article III, Section F:

Until such time as the children are emancipated in accordance with this Article III of the herein Agreement, each party shall continue to maintain in full force and effect a life insurance policy on their own life in the minimum face value of \$500,000 with the children named as beneficiaries of the same and the other party named as Trustee for the benefit of the children. Each party shall provide the other with proof of such coverage annually upon request. Id. at Ex. C, at pg. 8.

On July 18, 2019, the Hon. Thomas Rademaker issued a Divorce Decree (“Divorce Decree”), which incorporated by reference without merging the Separation Agreement. See Murphy Aff., Ex. D. The Divorce Decree provided, in relevant part:

The terms of the Separation Agreement entered into by the parties dated May 10, 2014, a copy of which is filed with the Court, are incorporated in the judgement by reference, shall survive and shall not be merged in this judgement, and the parties hereby are directed to comply with every legally enforceable term and provision of the Separation Agreement dated May 10, 2014, as if such terms or provisions were set forth in its entirety herein, and this Court retains jurisdiction of this matter concurrently with the Family Court for the purpose of specifically enforcement, to the extent permitted by law, and of making such further judgement with respect to custody, visitation, maintenance or support, as it finds appropriate under the circumstances existing at the time application for that purpose is made to it, or both... Id. at Ex. D, at pg. 9.

On August 17, 2007, the William Penn Life Insurance Company of New York (“William Penn”) issued an insurance policy to the Decedent with a death benefit of \$750,000.00, to which Plaintiff was the sole beneficiary (the “Policy”). See Murphy Aff., Ex. E. Unbeknownst to Plaintiff, on March 5, 2019, the Decedent submitted a Beneficiary Change Form to William Penn, which removed Plaintiff as a beneficiary and named Mrs. Dubin as the beneficiary and Mr. Dubin as

contingent beneficiary. See Murphy Aff., Ex. F; Comegna Aff., at ¶ 14. The Decedent passed away later on August 28, 2020. See Comegna Aff., at ¶ 13.

Plaintiff then discovered that, shortly before his death, the Decedent established the Children's Trust on or about March 13, 2019 and assigned two-thirds of the insurance proceeds (66.67%) from the Policy to that trust, a little over \$500,000. See Murphy Aff., Ex. G, Ex. I. Upon the Decedent's death, William Penn issued a payment to the Children's Trust in the amount of \$501,775.36. See id., Ex. H. The Children's Trust lists the Children as the beneficiaries and appoints the Dubins as the Trustees.

The Children's Trust also restricts the distribution of the income and principal of the trust to the payment of the children's undergraduate educational expenses, including, but not limited to tuition, room and board, books, supplies and meal plans until the children first obtain a Baccalaureate Degree or attain the age twenty-five, although no such limitation is provided for in the Separation Agreement. See id., Ex. G, at pgs. 3-4; Murphy Aff., Ex. C.

A separation agreement which is incorporated into but not merged with a divorce decree survives as an independent binding contract unless impeached or challenged for some cause recognized by law. (*Merl v. Merl*, 67 NY2d 359 [1986]; *Hoyt v. Hoyt*, 307 AD2d 621 [3rd Dept. 2003]). In general, a marital agreement which is regular on its face will be recognized and enforced by the courts in much the same manner as an ordinary contract. (*Petracca v. Petracca*, 101 A.D.3d 695, 697 [2d Dept. 2012]; *Levine v. Levine*, 56 N.Y.2d 42, 47 [1982]); *Einhorn v. Einhorn*, 24 Misc. 3d 1250(A) [Sup. Ct. 2009])

The principles of contract law apply to the interpretation of separation agreements. (*Fecteau v. Fecteau*, 97 AD3d 999 [3rd Dept. 2012]). Any ambiguity in the agreement's terms must be resolved

by determining the parties' intent at the time of contracting, either from within the four corners of the document, if possible, or as a last resort, from whatever extrinsic evidence is available. (*Desautels v. Desautels*, 80 AD3d 926 [3rd Dept. 2011]). The Court is not limited to the literal language of the agreement, but should also include a consideration of whatever may be reasonably implied from the literal language. (*Desautels v. Desautels*, 80 AD3d 926, 927 [3rd Dept. 2011])

A court may not write into a contract conditions the parties did not insert or, under the guide of construction, add or excise terms, and it may not construe the language in such a way as would distort the apparent meaning. (*Korosh v. Korosh*, 99 AD3d 999 [2nd Dept. 2012]). The interpretation of a separation agreement is a matter of law reserved for the Court. (*Fetner v. Fetner*, 293 AD2d 645 [2nd Dept. 2002])

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. (Restatement 2nd of Contracts § 205) "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty." (Restatement 2nd of Contracts § 205, para d)

The obligation of good faith and fair dealings applies to the enforcement of a contract. "The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses." (Restatement 2nd of Contracts § 205, para e) The obligation of good faith obligates the parties to mitigate damages, where appropriate. (*Id.*)

In her affidavit, the Defendant Lisa Dubin ("Defendant's Affidavit") offers speculation that the Decedent trusted herself, the Decedent's sister and the affiant's husband more than he did his Ex-Wife "to make sure his children got a proper college education." The Defendant's affidavit does not

contend that the Plaintiff would act in derogation of the children's best interests, or that the Plaintiff would not act appropriately/ In contrast, the affiant offers that "[she] can only surmise that [the decedent] thought my husband and I [sic] would make sure the children got a college education."

New York courts have recognized that spouses stand in fiduciary relationships with each other. (*Christian v. Christian*, 42 NY2d 63 [1977]). The Plaintiff and Decedent had entered into a binding contractual relationship with each other and the Decedent had by definition breached his fiduciary obligation to the Plaintiff by unilaterally substituting her as a trustee and replacing her with relatives from his side of the family.

Upon review of a careful review of the papers submitted in support of and in opposition to the parties' motions, along with their respective annexed exhibits, including but not limited to the underlying separation agreement and judgment of divorce, the applicable provisions of the trust, and given the insufficiency of the defendant's opposition, the Plaintiff's motion for Summary Judgment is hereby **GRANTED** in favor of the Plaintiff against the Defendants in its entirety, and it is hereby

ORDERED, that the Trusts be reformed by removing Lisa A. Dubin and Grace M. Comegna as beneficiaries of the Family Trust and by removing the restrictions to the distribution of income and principal of the Children's Trust, and that Lisa A. Durbin and William M. Durbin be removed as Trustees of the Trusts and Plaintiff be appointed as sole Trustee for the same.

This constitutes the Decision and Order of the Court.

Dated: March 7, 2022
Mineola, N.Y.



Hon. Thomas Rademaker, J. S. C.