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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re WARREN FAMILY
REVOCABLE LIVING TRUST
DATED JUNE 20, 1989,

B281177

(Los Angeles County
Super. Ct. No. BP141435)

SHERYL SIRIGNANO,

Petitioner and Appellant,

v.

ELAINE LYNNE WARREN
HAMMERMEISTER, etc., et al.,

Respondents.

APPEAL from an Order of the Superior Court of Los Angeles County. Clifford L. Klein, Judge. Affirmed in part and reversed in part.

George M. Halimi for Petitioner and Appellant.

Velasco Law Group, Dana M. Cannon and Richard J. Radcliffe for Respondents.

Petitioner Sheryl Sirignano appeals from the denial of her petition seeking redress for her mother's sale of an asset of the family's irrevocable trust of which petitioner was a beneficiary. The probate court denied her petition principally on statute of limitations grounds because her mother sold the property in 2004, but petitioner did not commence her action until 2015. On appeal, petitioner asserts that the statute was tolled under equitable principles of delayed discovery and estoppel. We find that the facts pleaded establish that petitioner had no knowledge of the transfer until after her mother's death, thereby tolling the statute of limitations, and reverse the trial court's order on her first and second causes of action for enforcement of trust and accounting, and affirm on the third and fourth causes of action for imposition of constructive trust and enforcement of abatement rights.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 20, 1989, Robert and Phyllis Warren,¹ husband and wife (collectively Settlers), executed the Warren Family Revocable Trust (Trust). The Settlers amended the Trust on May 14, 1993 (Restated Trust) to provide, at section 3.01, that upon the death of either of the Settlers, the Restated Trust would be divided into two trusts: Subtrust A (the Survivor Trust) and Subtrust B. Petitioner Sheryl Sirignano (petitioner) and respondents Elaine Lynn Warren, Brian Lane Warren,

¹ We refer to the Settlers by their first names where necessary to avoid confusion.

and Craig Alan Warren are the children of the Settlers and beneficiaries of the Restated Trust.

The corpus of Subtrust A, as set forth in section 3.02 of the Restated Trust, consisted of the Survivor's interest in the property of the Trust Estate, and other assets selected by the Trust for tax purposes.

The corpus of Subtrust B, as set forth in section 3.03 of the Restated Trust, consisted of all assets that were not allocated to Subtrust A. With respect to distributions to be made from Subtrust B, section 4.04 of the Restated Trust provided that upon the death of the surviving spouse, Trust B would terminate and certain items of personal property would be distributed to the beneficiaries (the Settlers' four children). Section 4.04 also provided for the distribution of four real property interests, as follows:

1. Real property located at 4617 Arbor Road, Long Beach (Arbor Road); beneficiary, petitioner Sheryl Sirignano. The Arbor Road property is the subject of the dispute here.
2. Real property located at 4307 Greenbrier Road, Long Beach; beneficiary, Elaine Lynne Warren Hammermeister.
3. Real Property located at 3512 Fairman Street, Lakewood; beneficiary, Brian Lane Warren.
4. Real property located at 4763 Pearce Avenue, Long Beach; beneficiary, Craig Alan Warren.

The provisions of the Amendment to the Trust provide at Article 4, paragraphs 4.01 and 4.02 for the distribution from the Trusts upon the death of the surviving Trustor. The principal and interest of Trust

A would be distributed according to powers of appointment. If such powers were not exercised, the corpus of Trust A was to be added to Trust B, and distributed as if such assets had been originally included in the corpus of Trust B.

On March 9, 1994, the Settlers conveyed a 10.53 percent interest in the Arbor Road property by Gift Deed to themselves as the trustees of the Sheryl L. Sirignano Irrevocable Trust. The deed represented a \$20,000 gift. By amendment to the Restated Trust of the same date, the Settlers confirmed petitioner as beneficiary of the Arbor Road property.

Robert died on October 3, 1998. Pursuant to the terms of the Restated Trust at section 1.09, the Restated Trust became irrevocable upon his death.

After Robert's death, Phyllis amended section 4.04 of the Restated Trust numerous times. The Fourth Amendment, dated January 1, 1999, named Phyllis as successor trustee based on Robert's death, and confirmed petitioner's bequest of the Arbor Road property and stated that, "It is Trustor's intent that [petitioner] receive the real property known as [Arbor Road] free of any liens and encumbrances." The Sixth Amendment, a handwritten note dated January 16, 2001, stated that gifts to the children would be taken into account in making distributions; and the "distribution to [petitioner was] to remain the same." By the Seventh Amendment dated March 28, 2001, Subtrust B had been changed to remove the Arbor Road property from petitioner's bequest. Instead, the amendment states that "[t]here shall be no deduction for any monies advanced to [petitioner] as she is not

participating in the distribution of the residuary trust assets.
([Petitioner] has been advanced approximately \$52,000 in the past.)”²

On January 16, 2001, Phyllis, as Trustee of the Restated Trust, granted to herself, as Trustee of Trust B of the Restated Trust, the remaining 89.47 percent interest in the Arbor Road property.

On January 22, 2004, Phyllis, as Trustee of the Restated Trust and as Trustee of the Sheryl L. Warren Sirignano Irrevocable Trust, conveyed the Arbor Road property to a third party, Steven M. Desisto. Petitioner alleges that 89.47 percent of the proceeds of sale were given as loans to respondents.

Upon Phyllis’s death on December 18, 2012, Elaine Lynne Warren Hammermeister became Trustee of the Restated Trust. Petitioner alleges she never received any copies of the Trust or its amendments, was not aware that the seventh amendment eliminated her interest in the Arbor Road property, or that the Arbor Road property had been sold and the proceeds given to respondents as loans.

In a proceeding commenced May 17, 2013, petitioner filed a petition demanding distribution from Subtrust A (Subtrust A Action).³ She sought to invalidate the Seventh Amendment to the Restated

² Petitioner asserts, without support in the record, that the Fourth through Seventh Amendments modified Subtrust A. On the contrary, all of the amendments refer to changes to section 4.04 of the Restated Trust which is entitled “Distribution of Trust B.”

³ Although all of the amendments to the Restated Trust referred to section 4.04, “Distribution of Trust B,” petitioner pursued her action against Subtrust A because she asserts in her Opening Brief she had been “made to believe that [the] Arbor property is an asset of Subtrust A.”

Trust. On November 29, 2015, after a trial, the probate court denied the petition and found that Trust A was revocable and amendable by Phyllis; the Fourth through Ninth Amendments to the Restated Trust legally amended Trust A; all assets were the community property of Robert and Phyllis; and the 84.39 percent of the proceeds of sale of the Greenbriar property vested in Trust A.⁴

On October 21, 2015, petitioner filed her instant petition for enforcement of trust, allocation of assets of subtrusts, and accounting. She alleged that she had not received the benefits to which she was entitled under Subtrust B and that after Robert's death, Phyllis had unlawfully transferred assets from Subtrust B to Subtrust A.

After two amendments to her petition,⁵ petitioner filed her operative third amended petition, stating claims for (1) enforcement of Subtrust B; (2) accounting of Subtrust B; (3) imposition of constructive trust, and (4) enforcement of abatement rights. Petitioner asserted that at no time during the prosecution of her 2013 Subtrust A action did Elaine Lynne Warren Hammermeister, trustee, inform her that the Arbor Road property remained in Trust B and was not part of Trust A. Furthermore, petitioner never received an accounting, and Phyllis had

⁴ The Greenbriar property was originally bequeathed to Brian. By gift deed, the Trustor conveyed the three properties bequeathed to the other respondents sometime before the Fourth Amendment.

⁵ On June 10, 2016, the probate court sustained with leave to amend respondents' demurrer to her first amended petition. On August 22, 2016, the probate court sustained respondents' demurrer to petitioner's second amended petition.

transferred the Arbor Road property either through mistake or a breach of her fiduciary duties.

On October 20, 2016, respondents demurred to petitioner's third amended petition. Respondents argued that the petition was barred by the applicable statute of limitations for mistake (Code Civ. Proc., § 338, subd. (d) [three years]),⁶ nonfraudulent breach of fiduciary duty (§ 343 [four years]), an action founded on a writing (§ 337 [four years]) and claims against a decedent's estate (§ 366.2 [one year]) because the action was filed in October 2015 and the sale had taken place in January 2004; and further that the third and fourth causes of action failed to state a claim because they were remedies.

The probate court ruled that the first, third, and fourth causes of action were time-barred on their face and petitioner failed to plead facts showing her entitlement pursuant to the delayed discovery rule. First, the causes of action arose from Phyllis's sale of the property on January 22, 2004; thus, the three-year statute of limitations for fraud and mistake (§ 338, subd. (d)) and the four-year statute of limitations for breach of fiduciary duty (§ 343) rendered her petition filed October 21, 2015 untimely. Second, although petitioner did not receive a copy of the Trust or an accounting and did not know the sales proceeds had been given to the other beneficiaries, petitioner failed to plead reasonable diligence, given that petitioner received 10.53 percent of the proceeds of the sale, demonstrating she at least had knowledge of the sale. Finally,

⁶ All statutory references herein are to the Code of Civil Procedure unless otherwise noted.

the third and fourth cause of action labeled the remedies sought as causes of action. Because petitioner failed to cure previous defects in pleading relating to the statute of limitations, the trial court sustained the demurrer as to the first, third and fourth causes of action, with prejudice, and denied it without prejudice as to the second cause of action for an accounting.

DISCUSSION

Petitioner argues that (1) the statute of limitations does not run unless an accounting is given, and none was given here; (2) the statute of limitations begins running only on the discovery of facts necessary to put petitioner on notice of her claim, which did not occur here; (3) respondents are estopped from asserting the statute of limitations because in the prior proceedings, respondents did not alert her to the fact that the Arbor Road property was in Trust B, not Trust A; and (4) the filing of her first petition against Subtrust A tolled the statute of limitations.

A. *Petitioner's Cause of Action Accrued Upon Phyllis's Disposition of the Property from Subtrust B*

“Revocable trusts are different from irrevocable trusts in that the contents of a revocable trust can be amended without approval from the beneficiaries.” (*Babbitt v. Superior Court* (2016) 246 Cal.App.4th 1135, 1146.) After a settlor's death, however, the rights of the beneficiaries are no longer contingent and instead mature into present and enforceable rights under trust law. (*Estate of Giralдин* (2012) 55

Cal.4th 1058, 1070.) Here, on October 3, 1998, upon Robert’s death, the Restated Trust became an irrevocable trust pursuant to its terms: the Restated Trust at section 1.09 provided, “Trusts Irrevocable on Death of First Trustor. Except as otherwise expressly provided in this Declaration, on the death of either Trustor the trusts created by this Declaration shall become irrevocable and *not subject to amendment or modification.*” (Italics added.) (See *Crook v. Contreras* (2002) 95 Cal.App.4th 1194, 1206 [nature and extent of rights retained by Trustor are measured by the four corners of the instrument].) Thus, after Robert’s death, Phyllis lacked the power to change the distribution scheme of Subtrust B by amendment or transfer of assets.⁷ (*Aguilar v. Aguilar* (2008) 168 Cal.App.4th 35, 40.) She required the consent of the beneficiaries to effect any changes. (*Ibid.*) Her conveyance of the Arbor Road property was improper. (*Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 291–292; *Aguilar v. Aguilar, supra*, 168 Cal.App.4th at p. 41 [co-trustee lacked power to change trust once it became irrevocable].)

As a result, at the latest, petitioner’s claim accrued on January 22, 2004, when Phyllis transferred the real property in Subtrust B to a third party. At that time, Subtrust B of the Restated Trust was irrevocable and any attempt to transfer assets from it was ineffective. (*Heaps v. Heaps, supra*, 124 Cal.App.4th at pp. 291–292.)

⁷ We note that petitioner’s previous challenge was to the legality of amendments to Subtrust A. However, because all of the amendments made changes to paragraph 4.04 of the Restated Trust, which governed Subtrust B, the legality of any of those amendments was not at issue nor was it decided in her prior petition.

B. *The Statutes of Limitations Have Expired*

The gravamen of petitioner's claim is that Phyllis breached her fiduciary duty by modifying Subtrust B and improperly conveying its assets. A trustee may be required to repay money lost due to his or her breach of trust, whether the repayment is characterized as damages, restitution, or a surcharge. (Prob. Code, § 16420, subd. (a)(3); see *Estate of Talbot* (1956) 141 Cal.App.2d 309, 322.) A four-year statute of limitations applies to actions for breach of fiduciary duty. (§ 343.) Thus, to the extent Phyllis breached her duties as Trustee of Subtrust B by conveying the Arbor Road property that was petitioner's bequest under Subtrust B, the statute would have run in 2008. The statute of limitations for an obligation founded on a contract, with a similar four-year statute, also would have run (§ 337), as would have the three-year statute for mistake. (§ 338, subd. (d).) Thus, petitioner's action on Subtrust B commenced in October 2015 was time-barred.

Respondents also urge us to apply section 366.2, which provides for a one-year statute of limitations for actions against a decedent. "If a person against whom an action may be brought on a liability of the person . . . whether accrued or not accrued, *dies before the expiration of the applicable limitations period*, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply." (§ 366.2, italics added.) As explained in the Law Revision Commission comments: "This section applies a one-year statute of limitations on all actions against a decedent *on which the statute of limitations otherwise*

applicable has not run at the time of death. This one-year limitations period applies regardless of whether the statute otherwise applicable would have expired before or after the one-year period.” (Cal. Law Rev. Com. com., West’s Ann. Code Civ. Proc. (2006 ed.) foll. § 366.2, p. 452, italics added.) Section 366.2 is plainly intended to extend and at the same time constrain the limitations period for claimants whose claims have not otherwise expired such that claims against the estate are timely presented. Here, however, petitioner’s claim had expired because, assuming that Phyllis breached her fiduciary duties to the beneficiaries of the now irrevocable Subtrust B in January 2004, the four-year statute of limitations for such actions (section 343) would have expired in January 2008. Thus, because Phyllis’s death did not occur until December 2012, section 366.2 by its terms does not apply.⁸

C. *Tolling of the Statute of Limitations*

1. *Pendency of Subtrust A Action Did Not Toll this Action on Subtrust B*

Petitioner argues that her pursuit of an action against Subtrust A tolled the applicable limitations period while that action was pending. We disagree.

⁸ Nor does section 366.3, which applies to “a claim that arises from a promise or agreement with a decedent to distribution from an estate or trust or under another instrument, whether the promise or agreement was made orally or in writing.” Petitioner has alleged no agreement with Phyllis regarding the Arbor Road property other than what is set forth in Subtrust B. (See *Stewart v. Seward* (2007) 148 Cal.App.4th 1513, 1522 [observing that an action to recoup wrongfully withdrawn funds by grantor from trust did not arise from “promise or agreement with a decedent to distribution from an estate or trust”].)

Generally, the statute of limitations is tolled on a claim where the plaintiff has several alternative remedies, but has made the decision to reasonably pursue one of them. In such case, the statute of limitations is equitably tolled because a plaintiff should not be required to pursue duplicative remedies in order to enforce the same rights. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 414; *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) To apply the doctrine, a party must establish three elements: timely notice, lack of prejudice, and reasonable good faith conduct on the part of the plaintiff. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 102.)

Here, petitioner has failed to allege facts which plausibly suggest that any of respondents misled her while the Subtrust A action was pending. Indeed, if petitioner had knowledge of the existence of Subtrust A sufficient to bring suit, she necessarily had knowledge of the existence of Subtrust B because both trusts were created by the same document, the First Amendment to the Trust.

2. *The Record Discloses Petitioner Had No Knowledge that Phyllis Had Changed the Terms of Subtrust B Until After Phyllis's Death*

Petitioner argues that she did not receive statutorily required notice from the trustee when Robert died of her rights under Subtrust B. (See, e.g., Prob. Code, § 16061.7.) Under the delayed discovery rule, her failure to investigate was reasonable given that she was not put on notice of the facts regarding the sale.

A defendant's fraudulent concealment of a claim against it may toll the applicable statute of limitations. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 533.) The plaintiff must establish the defendant's fraudulent conduct resulted in concealment of the operative facts, plaintiff failed to discover such facts, and the plaintiff's due diligence. (*Sagehorn v. Engle* (2006) 141 Cal.App.4th 452, 460–461.) The statute is tolled only for so long as the claim is undiscovered by the plaintiff through the exercise of reasonable diligence. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 935.) The defendant's misrepresentation tolls the statute as long as the plaintiff's reliance thereon is reasonable. (*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637–638.)

However, because the statute of limitations has expired, the burden of pleading and proving belated discovery of a cause of action falls on petitioner. (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174 (*Czajkowski*); see also *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 833 [“It is plaintiff's burden to establish “facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry.””].) “[T]he plaintiff claiming delayed discovery of the facts constituting the cause of action has the burden of setting forth pleaded facts to show ““(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.”” (*Czajkowski, supra*, 208 Cal.App.4th at p. 175; see also *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808.)

Here, as pleaded, the petition establishes petitioner was not on notice of facts that should have, with the exercise of reasonable diligence, alerted her to the fact that Phyllis, at a minimum, altered the terms of Subtrust B and later sold the Arbor Road property. Petitioner pleads that at no time prior to Phyllis's death did she receive notice of the amendments to the Trust; there is nothing to indicate that petitioner resided in the Arbor Road property such that she would necessarily have had actual notice of a sale; the March 1994 Gift Deed was made between the Settlers as trustees of petitioner's own trust, and thus petitioner could have been unaware of the Gift Deed; and the fact that petitioner received advancements and that such advancements resulted in a diminution of her bequest would not necessarily have alerted her to Phyllis's improper amendments and transfers. Finally, the lack of any accounting or notice after Robert's death is of no import because Robert died in 1998, well before Phyllis began modifying Subtrust B and conveyed the property. Thus, petitioner's action, filed in October 2015, was within the applicable three- and four-year statutes of limitation.

3. *The Facts Do Not Support Application of Equitable Estoppel*

"Equitable tolling and equitable estoppel are distinct doctrines. "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. . . . Equitable estoppel, however, . . . comes into play only after the limitations period

has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period.”” (*Lantzy v. Centex Homes*, *supra*, 31 Cal.4th at p. 383.) For a defendant to be equitably estopped from asserting a statute of limitations, the plaintiff must be “directly prevented . . . from filing [a] suit on time.” (*Id.* at p. 385.)

To assert estoppel, the party must establish that its conduct was reasonable under the circumstances. (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 655.) The elements of equitable estoppel are: (1) the party to be estopped must be apprised of the facts; (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her injury. (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 529.)

As discussed above, during the pendency of the Subtrust A action, respondents’ actions did not prevent petitioner from filing her claim under Subtrust B. At the time petitioner filed her action in 2013, if she had knowledge of Subtrust A, she necessarily had knowledge of Subtrust B.

Thus, based on our resolution and petitioner’s contentions, the superior court’s order with respect to plaintiff’s first and second causes of action for enforcement of Subtrust B and an accounting is reversed.

As plaintiff did not challenge the demurrer to her third and fourth causes of action for imposition of constructive trust and abatement, the superior court's order is affirmed as to those causes of action. We note that the trial court's order correctly observes that "sustaining the demurrer does not mean that [petitioner] could not seek [those] remedies."

DISPOSITION

The order of the Superior Court is reversed on plaintiff's first cause of action for enforcement of Subtrust B and second cause of action for accounting. In all other respects, the order is affirmed. Appellant is to recover her costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.