

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BURNS PHILP FOOD, INC. : CIVIL ACTION  
 :  
 v. :  
 :  
 MARILYN SEGAL, et al. : NO. 96-CV-4137

MEMORANDUM

Rendell, J.

August 1, 2003

Plaintiff Burns Philp Food, Inc., ("plaintiff") seeks a declaration as to the validity of an option granted by the trustees of the Deborah Jean Segal Trust ("Segal Trust" or "the Trust") as part of a lease agreement entered into with SCM Corporation in 1977. As assignee of all of SCM's rights, plaintiff sought in 1995 to execute the option pursuant to the lease, but was met with defendants' contention that the option was invalid since the language of the Segal Trust never provided the trustees with the power to grant options on trust property.<sup>1</sup> Plaintiff has now moved for summary judgment, arguing in favor of the trustees' power to option and the validity of the option, and also claiming that defendants are barred from contesting the option for various reasons. In response, defendants have moved for summary judgment as well, claiming that the option is invalid under the applicable law. Notwithstanding all the convoluted arguments by both plaintiff and defendant as to why the option is or is not enforceable, I find that plaintiff is entitled to

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<sup>1</sup> Defendants include the trustees of the Segal Trust, trustees of a trust f/b/o Judson Wolfe, Joshua Mailman, and The Mailman Foundation, Inc.

exercise the option based upon the language of the trust and the intent of the settlor as gleaned therefrom.<sup>2</sup>

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<sup>2</sup> I briefly note my disagreement with the five other arguments raised by the plaintiff. First, plaintiff argues that it is protected by Restatement (Second) of Trusts § 315 (1959), because Deb Segal ratified any breach of fiduciary duty that may have occurred when the trustees granted the option. However, § 315 requires a "transfer" of property, and plaintiffs have cited no caselaw interpreting the Restatement to show that it applies in a situation such as this, where no transfer of title occurred, and where an option was one of the terms of a lease. Second, plaintiff does not qualify as a bona fide purchaser. Id. at § 296. It is black letter law that a party to whom property is transferred is not a "purchaser" within this rule unless title is transferred. See 4 Austin W. Scott & William F. Fratcher, Scott on Trusts § 310, at 200 (4th ed. 1989). There is no evidence in the record that plaintiff obtained title to this property, and the rule is thus inapplicable.

Third, neither laches nor equitable estoppel bar the defendants from challenging the validity of the option. Laches requires inexcusable delay in prosecuting a suit and prejudice to the adverse party, Central Penn. Teamsters Pension Fund v. McCormick Dray Line, Inc., 85 F.3d 1098, 1108 (3d Cir. 1996), but plaintiffs have not demonstrated either element; there is no showing that defendants were aware of the breach of a trust or were under a duty to prosecute an action asserting its validity, and the record is devoid of evidence of prejudice. Plaintiff has not shown that it would not have rented the Bethlehem property without the option to buy, and its reliance on Wheeler v. Nationwide Mut. Ins. Co., 749 F. Supp. 660, 662 (E.D. Pa. 1990), to show prejudice from a loss of evidence is misplaced. Similarly, plaintiff has not satisfied the elements of equitable estoppel, which requires (1) a material misrepresentation, (2) upon which the party relied, (3) to his or her detriment. Monongahela Valley Hosp., Inc. v. Sullivan, 945 F.2d 576, 589 (3d Cir. 1991). The record simply does not support a finding of misrepresentation as a matter of law, and, as before, there is not enough evidence to support a finding of prejudice or harm.

Finally, I note that the parties' arguments as to whether Pennsylvania law permits a power to option are moot in light of my finding herein that the settlor of the Segal Trust intended to give the trustees such power.

I. THE LANGUAGE OF THE SEGAL TRUST

The Segal Trust instrument provides a number of express powers to the trustees to deal with trust assets. For present purposes, the most important of these powers can be found at Sections 2, 6, and 13 of the Trust's Second paragraph. Those sections provide as follows:

SECOND: The Trustees and their successors shall have the following powers and discretions, in addition to any conferred by law:

\* \* \*

(2) To sell, exchange, or otherwise dispose of any property at any time held hereunder and, without being restricted to property of a character now or hereafter authorized by the laws of the State of Florida or of any other jurisdiction for trust investment, to invest and reinvest in any property or interest in property of any kind whatsoever, real or personal, tangible or intangible, and wherever situated . . .

\* \* \*

(6) To sell, exchange, lease, mortgage, manage, operate, repair, improve and alter, structurally or otherwise, any real estate at any time held hereunder (including real estate acquired on foreclosure or by deed in lieu thereof), upon such terms as the Trustees may deem proper, and to execute and deliver deeds, leases, mortgages, or other instruments relating thereto. Any lease may be made, with or without covenants for renewal, for such period of time as the Trustees may deem proper without regard to the probable duration of any trust created hereunder or any statutory restrictions on leasing and without the approval of the court.

\* \* \*

(13) To make any sale of property at any time held hereunder, real or personal, at public or private sale, for cash or on credit, or partly for cash and partly for credit, secured or unsecured, and upon such terms and conditions as the Trustees shall deem advisable.

Segal Trust at 2, 3, 5.

The Trust also contains a choice of law provision, which states that "[a]ll questions pertaining to the construction, regulation,

validity and effect of this Indenture, shall be determined in accordance with the laws of the State of Florida." Id. at 9.

Defendants contend that because the conflict of laws provision does not indicate that Florida law governs the "administration" of the trust, the law of the situs of the land in question, Pennsylvania, governs the trustees' powers of administration regarding the grant of options.<sup>3</sup> Thus, they argue, since under Pennsylvania law trustees cannot grant options without specific permission in the trust instrument, and since the power to sell and lease clauses do not say the trustees have the right to option the property, the option granted by the trustees of the Segal Trust is invalid.

Unfortunately for defendants, I view the situation differently. The language and meaning of the trust document itself has been obscured by the parties' diversion of the Court's attention to the thorny issue of conflicts. I conclude that the issue in this case revolves around the powers expressly given to the trustees and is one of interpretation, and I need not even reach the issue of conflict of laws or grapple with the choice of law provision in the settlor's trust.<sup>4</sup>

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<sup>3</sup> Although the Segal Trust was originally settled with \$6,000 in cash, the Trust now contains the property on which plaintiff tried to exercise the lease option. The property is located in Bethlehem, Pennsylvania.

<sup>4</sup> Interpretation of the terms of the trust to determine the powers and duties of the trustee "does not involve the conflict of laws." 5A Austin W. Scott & William F. Fratcher, Scott on Trusts § 619, at 380 (4th ed. 1989).

"The extent of the powers and of the duties of a trustee depends primarily upon the terms of the trust." 5A Austin W. Scott & William F. Fratcher, Scott on Trusts § 310, at 200 (4th ed. 1989) [hereinafter "Scott on Trusts"]. Therefore, my first duty is to examine the language of the trust instrument itself to determine what powers, if any, the trustees were given to enter into a lease with an option of this property. I need not concern myself initially with whether Florida or Pennsylvania law applies, or whether the choice of law provision was properly drafted, because the issue is not, as the parties argue, whether the settlor of the Segal Trust intended Florida law to apply to the "administration" of trust assets. If the trust were silent as to the power of the trustees to deal with real estate, it could be said that this action involves a matter of administration as to which no choice of law has been expressed. However, in the instant case, the settlor has stated in the language of the trust that the trustees have the power to sell and lease upon any terms deemed advisable. Segal Trust at 3, 5. Thus, the issue is not one of administration, or of conflict of laws, but is one of interpretation of the language actually used. See Scott on Trusts § 619, at 380-81 (writing that if the trust language which addresses trustee powers and duties is unclear, or if the language does not address a certain power, "a question of interpretation arises"). Consequently, I must employ principles of interpretation to answer the principal question relevant to this dispute: did Abraham Mailman, the settlor of the Segal

Trust, intend by the language of the Trust to grant the trustees the power to option property? If so, the option is valid and enforceable. If not, the option is invalid and void.<sup>5</sup>

The basic rule governing interpretation is that "the intent of the creator of a trust controls the interpretation of the trust document." Schreiber v. Kellogg, 50 F.3d 264, 268 (3d Cir. 1995). "The inquiry here is one of fact; what did the testator [or settlor] actually intend?" 1 Jeffrey A. Schoenblum, Multistate and Multinational Estate Planning § 14.08.3, at 429 (1982). In interpreting the trust, I may review the plain language of the document, the "ordinary meaning of the words used, the context in which they appear, and the circumstances under which the instrument was drafted." Scott on Trusts, § 574, at 201. I may also consider where the settlor was domiciled at the time he drafted the instrument, where he was domiciled when the instrument became effective, and whether the settlor "was probably using the language of his domicil or of the place of

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<sup>5</sup> I note that I am employing principles of "interpretation," rather than principles of "construction," in analyzing this Trust. Interpretation is a question of fact which refers to the review of all relevant evidence in determining the settlor's intent, while construction pertains to the application of a legal rule or presumption in attempting to define the settlor's most likely intent. See Scott on Trusts § 648, at 528; 1 Jeffrey A. Schoenblum, Multistate and Multinational Estate Planning § 14.08, at 424 (1982). This distinction is especially critical here, because the Segal Trust is silent on the issue of interpretation, but provides that rules of construction are to be governed by Florida law. Segal Trust at 9. Thus, I stress that I am interpreting, not construing, the trustees' power to option property, and am using familiar principles of interpretation, and not Florida law, in doing so.

execution of the instrument." Id. In short, during the process of interpretation, I may resort to any relevant evidence that is indicative of the settlor's intent. Id., § 648, at 529-30; see also Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989).

## II. SUMMARY JUDGMENT STANDARD

Observing these principles here, I find that plaintiff has presented sufficient evidence of Abraham Mailman's intent to warrant a grant of summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law, id. at 248, and all inferences must be drawn, and all doubts will be resolved, in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997).

Although both parties have moved for summary judgment here, their burdens remain the same. The party moving for

summary judgment bears the initial burden of identifying for the Court those portions of the record that it believes demonstrate the absence of dispute as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat summary judgment, the non-moving party "may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. See Anderson, 477 U.S. at 248-49.

### III. DISCUSSION

I find that summary judgment is appropriate in this case because there are no genuine issues of material fact with respect to Abraham Mailman's intent to permit the trustees of the Segal Trust to option trust property.

#### A. Plaintiff's Evidence of Intent

The record contains at least three indicia of the settlor's intent to allow options as part of leases of real property. First, the language of the Trust itself evidences an intent that the trustees shall have wide-ranging powers to deal with real property. Section (6) of the Trust allows the trustees to "sell, exchange, lease, mortgage, manage, operate, repair, improve and alter any real estate . . . upon such terms as the

Trustees may deem proper," states that a lease can be made for as long as the trustees desire, and provides that leases may even be made without regard to "any statutory restrictions on leasing." Segal Trust at 3 (emphasis added); see supra p. 3 (citing full text of statute). In addition, Section (13) of the Trust allows the trustees to make any sale of property at any time under any terms and conditions "as the Trustees shall deem advisable." Id. at 5. The ordinary meaning of these words, and the context in which they are used, show that Abraham Mailman intended his trustees to have as much latitude as possible in leasing, selling, and maintaining the Trust's property, and that the grant of discretion as to terms would include the ability to include an option as one of the terms of a lease.<sup>6</sup> Further, while an option is not a sale per se, it falls well within the parameters of the powers granted in the Segal Trust, because it represents a common method for selling property. See Philadelphia Housing Auth. v. Barbour, 592 A.2d 47, 50 (Pa. Super. Ct. 1991), affirmed by, 615 A.2d 339 (Pa. 1992). Therefore, the broad terms of the Trust

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<sup>6</sup> This reading is consistent with the sweeping manner in which Abraham Mailman describes the other powers given to the trustees in the Segal Trust. See, e.g., Segal Trust at § (10), p. 4 (power to "borrow money for any proper purpose in connection with the administration of the trust"); id. at § (14), p. 5 (power to "receive and retain any property, real or personal, acquired in connection with any of the foregoing provisions"); id. at § (17), pp. 5-6 (power to "exercise all of the powers and authority, including discretionary powers, conferred in this Indenture, with respect to all acquisitions of income and with respect to property constituting investments of accumulated income and with respect to all property held under a power in trust account pursuant to the provisions of this Indenture").

indicate an intention to allow options on real estate and leases that include options as one of the terms.

Second, the record shows that Abraham Mailman ("Mr. Mailman") drafted the Segal Trust as a resident and domiciliary of Florida, at a time when Florida law granted trustees the power to option property. Plaintiff Burns Philp Food Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment ("Pl. Brief") at 3. In interpreting the meaning of the terms in the Trust, I may look to all the surrounding circumstances, including "the usage at the place of execution of the trust instrument or the domicile of the settlor at the time of execution, the usages of these states being the ones the settlor most probably had in mind." Schoenblum, supra, § 17.02.1, at 588. Here, the Trust was drafted in Florida, it was prepared by a Florida practitioner, and the settlor himself was a resident and domiciliary of Florida at the time of the Trust's execution in 1960. This weighs strongly in favor of finding that the settlor's frame of reference was Florida trust law, especially in view of the fact that the intended beneficiary of the Trust,

Deborah Segal, was also living in Florida when the trust was established.<sup>7</sup>

Reference to Florida law supports the finding that Abraham Mailman intended to grant the trustees a power to enter into a lease with an option, because Florida law in 1960 supplied trustees with the clear power to provide for options in leases of property. The Florida statute in effect in 1960 provided in relevant part that "[i]n the absence of contrary or limiting provisions in the Trust Instrument or a subsequent Order or Decree of a Court of competent jurisdiction,"<sup>8</sup> a trustee was authorized to "grant options and to sell real property at public auction or at private sale," Fla. Stat. ch. 691.03(2) (1951) (repealed 1975), and to

grant leases of real property of which the Trustee is the fee owner, to begin at once or within three years from the date thereof, and to grant leases of all rights and privileges above or below the surface of such real property for any term of years not exceeding ninety-nine years, with or without option of purchase. . . .  
Id. at ch. 691.03(3).

Defendants argue, and offer expert opinion to the effect, that Florida law only allowed a power to grant options, first, in

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<sup>7</sup> Although the issue of conflicts of laws is, I find, a red herring, see Scott on Trusts, § 619, at 380 (interpretation "does not involve the conflict of laws"), it is interesting to note that the settlor did include a conflicts of law provision which stated that matters of "construction" of the Trust instrument were also to be governed by the laws of Florida. This is consistent with Florida law in aid of intent in connection with the interpretation of the trust instrument.

<sup>8</sup> The Segal Trust, of course, contains no "contrary or limiting provisions" removing the trustees' power to grant leases with options.

conjunction with an auction or private sale -- neither of which occurred here -- and, second, as to surface rights. I find both of these readings to be strained and incorrect. As plaintiff correctly notes, an interpretation limited to sales makes no sense, because an option is not granted at the same time as a sale; "people do not sell and option property in the same transaction." Plaintiff's Supplemental Memorandum in Support of its Motion for Summary Judgment ("Pl. Supp. Memo") at 2. I also reject defendants' reading as limiting options to grants of privileges above or below the surface of real property, because I find the commas in § 691.03(3) to be placed in such a manner as to show that the phrase "with or without option of purchase" modifies both a trustee's power to grant leases in general and the power to grant leases of rights above and below the surface.<sup>9</sup> Therefore, I have no doubt that the Florida statute in effect when Mr. Mailman established the Segal Trust provided that a trustee could grant options in leases of real property. And, considering that both Mr. Mailman and Deborah Segal resided in Florida at that time, and that the Trust was drafted in Florida by a Florida lawyer, I find that the record contains clear

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<sup>9</sup> Defendants' expert opinion relies upon nothing other than the statutory language, without any historical or other basis for the reading offered. Thus, I am free to reject this view in favor of the plain meaning of the language as I read it. See Edelman v. Commissioner of Soc. Sec. 83 F.3d 68, 71 (3d Cir. 1996) ("[t]he first principle in determining the meaning of a statute is the plain language of that statute"); Barnes v. Cohen 749 F.2d 1009, 1013-15 (3d Cir. 1984) (reviewing expert testimony only after first determining whether the language of the statute was clear).

evidence of Abraham Mailman's intent to provide his trustees with the power to grant options.

Furthermore, I find that Abraham Mailman intended to permit options in view of the powers he bestowed on the trustees of the other two trusts that he established in the 1960's. Plaintiff offers evidence that in 1963, three years after creating the Segal Trust, Mr. Mailman executed trusts for the benefit of his nephews Joseph S. Mailman and Joshua L. Mailman. Those trusts were executed in New York and expressly invested their trustees with the power to "grant options to lease or to buy." See Plaintiff's Amended Compl., at Exs. B & C (containing copies of the Joseph and Joshua Mailman Trusts). As plaintiff argues, it is highly logical that Abraham Mailman would have intended "the trustees of trusts for his granddaughter [Deborah Segal] and nephews (some of whom acted as trustee for more than one of the trusts) to have the same powers of disposal." Pl. Brief at 14.<sup>10</sup> Indeed, Mr. Mailman probably included the power to option expressly in the Joseph and Joshua Mailman Trusts because -- unlike Florida law -- New York law required that the power to grant options longer than six months be spelled out in

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<sup>10</sup> Defendants argue that "it is equally logical to assume that the same settlor would have chosen the law of only one state for all three trusts," Defendants' Amended Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment ("Def. Brief") at 34, but I disagree. The issue is not whether Abraham Mailman would have wanted one law to govern all three trusts, but is, rather, whether he would have wanted the trustees of all three trusts to have the same powers of disposal, including the same power to option trust property.

the language of the instrument. See N.Y. Estates, Powers and Trusts Law § 11-1.1(b)(7) (McKinney 1997). I find that this bolsters the view that Abraham Mailman intended to allow the optioning of property in the Segal Trust. Consequently, my interpretation of the language and the circumstances surrounding the Segal Trust indicate that plaintiff has met its burden to show an absence of genuine issues of material fact as to the settlor's intent to allow the trustees to enter into leases containing options of property.

B. Defendants' Evidence of Intent

In contrast, defendants have presented no evidence demonstrating a contrary intent by the settlor or from which a contrary intent could reasonably be inferred. Defendants offer five arguments to support their position regarding Abraham Mailman's intent, see Def. Brief at 31-36, but none of these contentions is sufficient to meet their burden of creating a genuine issue of material fact.

Of the five arguments in defendants' brief, only two are even relevant to whether Abraham Mailman intended to provide a power to option. Defendants' first, third, and fourth arguments address the incorrect issue; they examine whether Abraham Mailman intended Florida law to apply to matters of administration, rather than showing whether Mr. Mailman intended to authorize the granting of options. Def. Brief at 32-34. In

addition, the two remaining arguments fail to satisfy defendants' burdens in moving for, and defending against, summary judgment.<sup>11</sup>

First, defendants argue that there is a factual issue regarding the settlor's intent since Abraham Mailman did not intend to grant a power to option because he wanted "to give his disabled granddaughter who -- unlike his nephews Joseph and Joshua -- would always be mentally and physically disabled and always be financially dependent on her trust -- a greater degree of protection." Def. Brief at 33. Defendants do not, however, offer any evidence to support this assertion. While ascertaining the settlor's intent necessarily involves drawing inferences, those inferences must at least be drawn from evidence in the record, including the language of the trust, the applicable law, affidavits, deposition testimony, and so forth. Here, defendants identify nothing in the record regarding Deborah Segal's alleged disability, the extent of her financial dependence, or Abraham Mailman's purported intention to provide her with "additional

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<sup>11</sup> While in order to succeed on their motion for summary judgment, defendants would have to demonstrate the absence of a genuine issue of fact, in order to defeat plaintiff's motion, they must show that genuine issues do exist. Fed. R. Civ. P. 56(e). The arguments pertaining to intent go primarily to the latter burden, since defendants' argument for a grant of summary judgment relies more heavily upon the issue of the absence of the power to option as precluding the plaintiff from exercising it.

protection."<sup>12</sup> In fact, as plaintiff correctly argues, the evidence in the record actually conflicts with defendants' position. For example, the record shows that Abraham Mailman distributed all the assets of the Segal Trust to Deborah Segal when she turned twenty-one, but only permitted Joshua and Joseph Mailman to collect the full proceeds from their trusts at the age of thirty, a fact that makes little sense if Mr. Mailman viewed Deborah Segal as less capable and in need of more protection than his nephews. Plaintiff Burns Philp Food Inc.'s Reply Memorandum in Support of its Motion for Summary Judgment ("Pl. Reply") at 12; Segal Trust at 1; Joseph Mailman Trust at 1; Joshua Mailman Trust at 1. Therefore, this argument fails to satisfy the defendants' burdens of creating a genuine issue for trial.

Likewise, defendants' final contention designed to thwart plaintiff's motion for summary judgment is unavailing. Defendants seek to block plaintiff by challenging several of the inferences which plaintiff has drawn in support of its motion. Def. Brief at 35. Nevertheless, even assuming that some of the inferences plaintiff offers are questionable, defendants have still not met their burden to show the existence of a genuine issue for trial. In opposing plaintiff's motion, defendants "may not prevail merely by discrediting the credibility of the

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<sup>12</sup> I need not reach the issue of whether it logically follows that concern of this kind on the settlor's part does then translate into a restriction on the grant of options in leases, when the trustees here are generally given broad powers to sell, lease, etc., "upon such terms as the Trustees may deem proper." Segal Trust at 3.

movant's evidence; [they] must produce some affirmative evidence." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Here, though, defendants never identify portions of the record which show that Mr. Mailman intentionally excluded the power to option from the Segal Trust. Instead, I am left with a record replete with evidence of Abraham Mailman's intent to permit the granting of options on Trust property. The language of the Trust, the surrounding circumstances under which it was drafted, and the facts in the record all show that Abraham Mailman intended his trustees to grant real property leases which contained options if they so desired.

I recognize that summary judgment is usually inappropriate on matters of interpretation since the issue is purely one of fact. However, where, as here, those facts are not in dispute, and where there exists an absence of genuine issues of material fact, it is appropriate to rule that summary judgment is warranted.

Accordingly, plaintiff's Motion for Summary Judgment is GRANTED, and defendant's Cross-Motion for Summary Judgment is DENIED. The option provision dated June 30, 1977, that is the subject of plaintiff's complaint is DECLARED valid and enforceable.