

SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Application of Radio Drama  
Network, Inc., Seeking Relief Regarding the Himan  
Brown Revocable Trust Created by

New York County Surrogate's Court

Date: JULY 15, 2019

HIMAN BROWN,

File No. 2010-2056 A

Grantor.

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ANDERSON, S.

The above-captioned proceeding was commenced by Radio Drama Network, Inc. ("Radio Drama" or "petitioner"), a charitable corporation established by Himan Brown ("Grantor") in 1984, requesting the following relief: (1) invalidation of specific provisions of instruments amending a revocable trust created by Grantor (the "Revocable Trust") and consequent reinstatement of Radio Drama as the remainder beneficiary of the Trust; (2) imposition of a constructive trust for petitioner's benefit on the assets of a subsequently-created charitable trust (the "Charitable Trust"); (3) removal of Grantor's long-time lawyer ("respondent") from his position as a director of Radio Drama; (4) declarations that respondent defrauded both Grantor and petitioner, unduly influenced Grantor, breached his fiduciary duty to petitioner, and violated Judiciary Law § 487; and (5) an award of compensatory, punitive, exemplary and treble damages consistent with such declarations.

Radio Drama's petition asserts six grounds for relief: (1) fraud; (2) fraudulent concealment; (3) undue influence; (4) breach of fiduciary duty; (5) violation of Judiciary Law §487; and (6) unjust enrichment (asserted against respondent both individually and as trustee of the Charitable Trust).

Before the court are two cross-motions. Respondent moves to dismiss the petition pursuant to CPLR 3211(a)(2), (5), and (7). Radio Drama, in turn, seeks a preliminary injunction

suspending respondent from his position as a director of Radio Drama and enjoining him, as trustee of the Charitable Trust, from making any further distributions from that trust beyond the minimum amount set forth in Internal Revenue Code § 4942 pending a final adjudication of this proceeding.<sup>1</sup>

### **Background**

Grantor was a successful producer of radio programs when he died on June 4, 2010, at the age of 99, leaving an estate valued at approximately \$850,000. During the decade before his death, Grantor had transferred property worth many millions of dollars to the Revocable Trust, of which he was the sole trustee and primary beneficiary, under an instrument dated November 20, 2002. Under the terms of the Revocable Trust instrument as originally stated, at Grantor's death the lion's share of the trust remainder (after relatively modest provisions for family and friends) was to be distributed to Radio Drama, established by Grantor to "create, produce, market and distribute radio dramas," according to its certificate of incorporation. The original instrument was silent as to commissions, which would thus be calculated pursuant to the provisions of SCPA 2309.

In a first restatement of the Revocable Trust instrument, executed on July 8, 2003, Grantor provided that his successor trustee would be entitled to commissions "in an amount equal to the commission[s] payable to an executor of [an] estate, the total principal of which equals the trust principal." According to Radio Drama, this provision (the "commissions

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<sup>1</sup> In its cross-motion, Radio Drama also sought an order directing respondent to provide Radio Drama's three other directors with access to its books and records, but since respondent subsequently provided such access, this request for relief is denied as moot.

provision”) results in respondent’s receipt of an additional \$1.7 million in trustee commissions.

The first restatement did not alter Radio Drama’s share of the trust remainder. However, a further restatement to the Revocable Trust, executed on October 20, 2004, eliminated Radio Drama’s designation as the remainder beneficiary, created a new trust (the Charitable Trust), and named the latter as remainder beneficiary in Radio Drama’s place. The primary purpose of the Charitable Trust, as identified in the second restatement, was to advance “language and the spoken word.” On the same day, Grantor executed a new will in which he left his by-then relatively modest estate to Radio Drama.

All of the above-described trust and testamentary instruments were drafted either by respondent himself or by another lawyer at respondent’s law firm. Respondent is the executor of Grantor’s estate and is the sole trustee of both the Revocable Trust and the Charitable Trust. He is also one of four directors of Radio Drama; Grantor’s two granddaughters, Melina and Barri, are two of the three other directors.

Radio Drama alleges that, through the above-described successive revisions to the Revocable Trust, respondent carried out a “fraudulent scheme” to divert virtually all of Grantor’s assets from Radio Drama to the Charitable Trust, over which respondent, as trustee, has complete control, and to respondent individually, through steeply increased commissions. Specifically, Radio Drama contends that respondent drafted the terms of the 2004 restatement relating to the Charitable Trust’s purpose to resemble that of Radio Drama’s, while affording respondent absolute and sole discretion to make contributions to any charitable organization of his choice. According to Radio Drama, respondent thereby misled and confused Grantor, who was elderly and hearing-impaired, into changing the provisions of the Revocable Trust relating

to the computation of commissions and to the disposition of the Trust remainder. In this proceeding, Radio Drama in effect seeks to nullify the provision in the second restatement ousting Radio Drama as the remainder beneficiary and to nullify the provision contained in the first and second restatements relating to the computation of commissions.

**Respondent's Motion to Dismiss**

Respondent moves to dismiss the petition for failure to state a claim (CPLR 3211[a][7]). Additionally, he seeks dismissal of the first, second, third, fourth and sixth stated grounds for relief as time-barred pursuant to CPLR 3211(a)(5). Finally, respondent moves to dismiss petitioner's request to remove respondent from its board of directors, on the ground that this court lacks subject matter jurisdiction over such a claim for relief (CPLR 3211[a][2]).

**Motion to Dismiss for Lack of Subject Matter Jurisdiction - CPLR 3211(a)(2)**

Respondent argues that this court lacks subject matter jurisdiction over Radio Drama's request that, based upon respondent's alleged breach of his fiduciary duty to Radio Drama, he be removed as one of its corporate directors. According to Radio Drama, respondent breached his duty as director by concealing from the three other directors: (i) the circumstances surrounding the Charitable Trust's creation and its replacement of Radio Drama as the remainder beneficiary of the Revocable Trust; (ii) respondent's purported appointment as a "permanent member" of Radio Drama; and (iii) the status and impact of the probate proceeding for Grantor's estate, thereby preventing Radio Drama from effectively asserting its legal rights in that proceeding.

The Surrogate's subject matter jurisdiction derives from the New York State Constitution, which in relevant part states: "The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills,

administration of estates and actions and proceedings arising thereunder or pertaining thereto . . . and such other actions and proceedings not within the exclusive jurisdiction of the supreme court, as may be provided by law” (NY Const Art VI, § 12[d]). Such constitutional mandate, as implemented by various statutes, confers on the Surrogate a jurisdiction that is limited, stopping short of “independent matters involving controversies between living persons” *Matter of Lainez* (79 AD2d 78, 80 [2d Dept 1981], *aff’d* 55 NY2d 657 [1981]), including corporations as well as individuals (*see Matter of Corning*, 108 AD2d 96 [3d Dept 1985]).

Over the past century, constitutional and statutory amendments have incrementally expanded the Surrogate’s jurisdiction (*see* Fifth Report of the Temporary Commission on the Modernization, Revision and Simplification of the Law of Estates, Appendix M-1, Report No. 4.4.1A (Mar. 31, 1966) The most recent constitutional amendment bearing upon this court’s jurisdiction is section 12 of Article VI, quoted above, effective September 1, 1962. As was observed by the Surrogate in *Matter of Rothko*, the amendment “broadened and made more explicit the jurisdiction and powers of the Surrogate’s Court” (69 Misc 2d 752, 755 [Sur Ct, NY County 1972]). The statutes expanding the court’s jurisdiction pursuant to this constitutional provision include SCPA § 209(6), giving the court power over “any and all matters relating to lifetime trusts,” and SCPA § 2103, as amended to empower the court to direct discovery over contract rights and other choses in action.

Notwithstanding this expansion, the courts have been mindful that the Surrogate’s jurisdiction has its limits. The Court of Appeals’ landmark decision in *Matter of Piccione*, 57 NY2d 278 (1982) is a case in point. *Piccione* involved several separate litigations, including an application by estate executors seeking to evict tenants from realty owned by the estate. In

determining that the Surrogate had power to grant such relief, the Court reasoned that the analytical touchstone was not merely the nature of the relief sought, but rather whether the grant of such relief would “affect” an estate or trust (57 NY2d at 288), a standard that was readily satisfied by the executors’ eviction application.

At the same time, however, the *Piccione* Court determined that the Surrogate did not have jurisdiction over a related action for malicious prosecution and abuse of process, although the same tenants and the same executors were parties to both the proceeding and the action (57 NY2d at 291). Even though the conduct of the executors, as alleged, had been designed to advance the estate’s interest, the Court nonetheless reasoned that the requested damages could be imposed upon the executors only in their individual capacities and therefore “[could not] be said to relate to either the affairs of a decedent or the administration of his estate” (*id.* at 291; *see also Matter of Corning*, 108 AD2d 96 [3d Dept 1985] [although all claims before Surrogate involved overlapping parties and facts, Surrogate had jurisdiction solely over those claims affecting decedent’s estate]; *Lincoln First Bank v Sanford*, 173 AD2d 65 [4<sup>th</sup> Dept 1991] [finding that Surrogate lacked jurisdiction over derivative claim for damages to a corporation of which estate was major shareholder, since corporation, not estate, would be entitled to such relief]; *Matter of Gitenstein*, 2016 NY Slip Op 32018[U] [Sur Ct, Nassau County 2016] [finding that Surrogate lacked jurisdiction over “operation or dissolution of the not-for-profit corporation” that was sole beneficiary under the decedent’s will]; *Matter of Tong*, NYLJ, July 24, 2017 at 23 [Sur Ct, NY County 2017] [Surrogate retained jurisdiction over dispute between decedent’s two sons as to whether decedent’s brokerage account was asset of estate, but not over dispute as to ownership of decedent’s IRA

account, because the latter constituted a dispute “between living persons” in which estate had no interest]).

Petitioner’s breach of fiduciary duty claim – to the extent that it is offered as the ground for respondent’s removal as a director on petitioner’s Board – is clearly an issue between “living persons,” specifically between petitioner (a corporation) and respondent individually. Respondent’s removal would affect only the corporation’s internal governance, a matter in which neither the estate nor the Revocable Trust has an interest. That an estate and trust both figure in the narrative giving rise to the dispute between petitioner and respondent is not a per se basis for the court’s exercise of jurisdiction (*see, e.g., Matter of Wallace*, 239 AD2d 14 [3<sup>rd</sup> Dept 1998] [holding that the Surrogate did not have subject-matter jurisdiction over action for decedent’s wrongful death, despite having been commenced by the fiduciary of the decedent’s estate, because it was based upon losses suffered by the decedent’s living distributees, rather than by the estate]). The fact that this court has jurisdiction over some of the claims asserted by petitioner against respondent cannot bootstrap the removal issue into one within the court’s purview (*see, e.g., Matter of Piccione, supra*).

This is not to overlook decisions recognizing the importance of avoiding needless fragmentation of litigation among the same parties (*see, e.g., Matter of Brandt*, 81 AD2d 268 [1<sup>st</sup> Dept 1981] [Surrogate had jurisdiction over requests for relief on behalf of trust seeking not only removal of certain trustees but also damages against general partners of partnership in which trust was invested]; *Matter of Rothko*, 69 Misc 2d 752 [Sur Ct, NY County 1972] [Surrogate had jurisdiction not only as to petitioner’s request for respondents’ removal as executors, but also over request to rescind contracts between respondent corporations and estate for the sale of estate assets at allegedly deflated prices]; *Wagenstein v Shwarts*, 82

AD3d 628 [1<sup>st</sup> Dept 2011] [Surrogate had jurisdiction over various disputes involving decedent's estate and lifetime trust, including action seeking the partition of real property owned by trust]). But such cases involved claims to relief that, without exception, would clearly affect an estate or trust if granted. Radio Drama's request for removal of one if its corporate directors does not present such a case.

Finally, there is no merit to petitioner's suggestion that SCPA § 201(3) by its terms places Radio Drama's request for removal of one of its directors under the aegis of this court. The terms in question confirm the Surrogate's power "to make full, equitable and complete disposition of the matter . . . as justice requires." Radio Drama's reading of such provision – as a source of subject matter jurisdiction – would virtually erase the limits on the subject matter that this court can adjudicate. In recognition that there are such limits, the provision must be read to apply only as to an issue that is already "properly before the court" (*see Matter of Rothko, supra*, at 755) pursuant to a grant of jurisdiction under some other law.

Accordingly, petitioner's breach of fiduciary duty claim – to the extent that it is offered as the ground for respondent's removal as one of petitioner's directors -- is dismissed for lack of subject matter jurisdiction.

Motion to Dismiss for Failure to State a Claim - CPLR 3211(a)(7)

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a claim, the court must accept the facts as alleged in the pleading as true, must accord the petitioner the benefit of every possible favorable inference, and may determine only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 84, 87-88 [1994]).



Before establishing whether the requisite elements of each of Radio Drama's claims were adequately pled so as to survive a motion under CPLR 3211(a)(7), the court will address respondent's argument that each of Radio Drama's claims should be dismissed because they essentially amount to a claim for tortious interference with prospective inheritance, which is not recognized in New York. Citing *Hutchins v Hutchins*, 7 Hill 104 [1845]), respondent argues that the loss of a mere expectation of an inheritance does not give rise to a claim for relief. In *Hutchins*, the plaintiff alleged that the defendants, through false representations and fraud, induced the plaintiff's deceased father to revoke a will in which he had devised real property to the plaintiff, and to replace it with a new will which disinherited the plaintiff. The later will was admitted to probate, and the plaintiff brought an action for damages against the defendants for interfering with his inheritance. The *Hutchins* Court (the precursor to our Court of Appeals) dismissed the action, holding that the plaintiff's inchoate interest as a prospective devisee was "too shadowy and evanescent to be dealt with by courts of law."

More than 100 years later, however, the Court of Appeals rendered its decision in *Latham v Father Divine*, 299 NY 22 [1949], in which it limited the application of *Hutchins* to cases involving requests solely for relief at law. The decedent in *Latham* had originally executed a will leaving the bulk of her estate to the defendant. The plaintiffs alleged that the decedent subsequently attempted to execute a new will which contained a significant cash bequest to them, but that the defendant, by means of fraud and undue influence, had prevented the decedent from signing it. The plaintiffs sought equitable relief, in the form of a constructive trust on the assets that they would have received pursuant to such a bequest. The trial court ruled in the plaintiffs' favor, but the Appellate Division reversed and dismissed the plaintiffs' complaint, citing the court's holding in *Hutchins* as its basis for doing so. The

Court of Appeals in turn reversed the Appellate Division's ruling on the ground that *Hutchins* was inapplicable to proceedings for equitable relief. Specifically, the Court observed that, "to use [the] same standard [as applied in *Hutchins*] in a suit for the declaration and enforcement of a constructive trust would be to deny and destroy the whole equitable theory of constructive trusts."

Like the plaintiffs in *Latham v Father Divine*, Radio Drama seeks the imposition of a constructive trust, as well as other equitable relief. Consequently, the holding in *Hutchins* is inapplicable and does not warrant dismissal of Radio Drama's claims in this proceeding.

#### **Fraud and Fraudulent Concealment**

The elements of a fraud claim are: a misrepresentation or omission of a material fact made with knowledge of its falsity and an intent to induce reliance thereon; justifiable reliance thereon; and injury resulting from such reliance (*see Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 [1996]; *P.T. Bank Central Asia v ABN AMRO*, 301 AD2d 373, 376 [1<sup>st</sup> Dept 2003]; *Swartz v Swartz*, 145 AD3d 818, 823 [2<sup>nd</sup> Dept 2016]). In order to state a claim for fraudulent concealment, in addition to pleading the afore-mentioned elements of a fraud claim, a claimant must allege that a defendant or respondent had a duty to disclose the information to him and failed to do so (*Mandarin v Wildenstein*, 16 NY3d 173, 179 [2011], *citing P.T. Bank Central Asia, supra*, 301 AD2d at 376).

Radio Drama's fraud claim is premised in part on respondent's actions in connection with the 2003 and 2004 restatements of the Revocable Trust. Radio Drama alleges that respondent inserted "misleading revisions" into the restatements in order to deceive Grantor into both significantly increasing the commissions to which respondent would be entitled and

changing the remainder beneficiary from Radio Drama to a charitable trust over which respondent is sole trustee, thereby giving him more control over Grantor's assets.

Radio Drama contends that respondent's alleged failure to disclose to Grantor the significant impact of such revisions constituted a material omission, by which respondent induced Grantor to execute the restatements, and that Radio Drama was thereby damaged when assets allegedly intended for its benefit were diverted instead to the Charitable Trust. By these allegations, Radio Drama has stated a claim for fraud, and the allegations are pled with the requisite particularity to withstand a motion to dismiss (*see* 3016[b]).<sup>2</sup> Moreover, by alleging that respondent, as Grantor's lawyer, had a duty to disclose to Grantor the impact of the revisions to the Revocable Trust but failed to do so, Radio Drama has also stated a claim for fraudulent concealment.

Radio Drama also argues that respondent's alleged failure to disclose to Radio Drama's other directors the above-described revisions prior to Grantor's death constituted fraud and/or fraudulent concealment, since the other directors would have tried to convince Grantor to undo the revisions had they been made aware of them. However, the possibility that the three directors would have been successful in persuading Grantor to undo the changes to the Revocable Trust is too speculative to constitute a stated injury.

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<sup>2</sup> Respondent's reference to this court's prior decision in the probate proceeding, in which objections to probate were dismissed on a motion for summary judgment, is misplaced. Specifically, the court dismissed a fraud objection asserted by Grantor's son because he "failed to allege the elements of fraud." The allegations underlying the fraud claim in the instant proceeding are not identical to the son's allegations in the probate proceeding, and the two proceedings involve different requests for relief by different parties.

For the same reason, Radio Drama's allegation that respondent did not provide notice of the probate proceeding to Radio Drama's three other directors, thereby depriving Radio Drama of an "opportunity to participate actively in the . . . objections, or . . . to explore its rights and potential claims," does not state a claim for fraudulent concealment. Putting aside respondent's contention that the other directors were well aware of the probate proceeding during its pendency, and further putting aside that Radio Drama's contemplated objections to probate would have been against its own interest as a beneficiary under the will, Radio Drama cannot demonstrate any injury resulting from its nonparticipation in the probate proceeding.

#### **Undue Influence**

Citing *Spinella v Costantino*, 33 Misc 3d 1232(A) (Sup Ct, Kings County 2011), respondent notes that undue influence is not a cause of action or a claim in its own right, but rather a ground for the rescission of an instrument or transaction (*see also Weinberg v Kaminsky*, 2017 NY Slip Op 31628[U][Sup Ct, NY County 2017]). Nevertheless, courts often treat undue influence as an independent claim, subject to dismissal if not adequately pleaded or supported by the evidence (*see, e.g., Matter of Nealon*, 57 AD3d 1325 [3<sup>rd</sup> Dept 2008]; *Kelly v Overbaugh*, 2008 NY Slip Op 32124 [Sup Ct, Greene County 2008]).

Regardless of how the claim is characterized, Radio Drama has stated a viable claim for rescission on the ground of undue influence. To state such a claim, Radio Drama must allege that respondent had both the motive and the opportunity to exercise undue influence over grantor and that he actually exercised such influence (*Matter of Walther*, 6 NY2d 49, 55 [1959]; *Matter of Fiumara*, 47 NY2d 845, 846 [1979]). Petitioner alleges that: (i) respondent was motivated by the prospect of increased commissions and control over trust assets; (ii) as

grantor's lawyer, respondent had ample opportunity to influence grantor; and (iii) he actually exercised such influence. These allegations clearly state a claim for undue influence.

#### **Violation of Judiciary Law § 487**

Radio Drama purports to assert a claim against respondent under Judiciary Law § 487, which provides: "An attorney or counselor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." According to Radio Drama, respondent engaged in "a pattern of delinquent, wrongful and/or deceitful behavior" while acting as attorney for Grantor's estate (*i.e.*, for himself as the named executor and proponent) in the proceeding to probate Grantor's will.

The allegations underlying Radio Drama's claim are that respondent: (i) directed that service on Radio Drama in the probate proceeding be made only upon himself and failed to forward information regarding that proceeding to Radio Drama's three other directors; (ii) made false representations to the court that Radio Drama had been advised of the probate proceeding and that the purposes of the Charitable Trust and Radio Drama were nearly identical; and (iii) concealed from Radio Drama applicable deadlines in the probate proceeding and the amount of assets in Grantor's estate.

Respondent contends that the actions arguably giving rise to this claim were not undertaken by him in his capacity as an attorney, but rather in his capacity as executor or as a party to the probate proceeding (as one of Radio Drama's directors), and that, consequently, the claim should be dismissed pursuant to CPLR 3211(a)(7). In fact, respondent wore several hats in the probate proceeding; he was the sole named executor, a director of a corporate

beneficiary, the attorney-draftsman and, for a brief period, he was the attorney of record for himself as proponent in the probate proceeding.

Respondent is correct that Judiciary Law § 487 applies exclusively to attorneys, not parties (*see Yalkowsky v Century Apartments Assoc.*, 215 AD2d 214, 215 [1<sup>st</sup> Dept 1995] [holding that the statute applies only to the conduct of attorneys “and cannot extend derivative liability to a client”]; *Haber v Kisner*, 255 AD2d 223 [1<sup>st</sup> Dept 1998]). Therefore, in order to state a claim under this statute, Radio Drama must allege that the above-described conduct was undertaken by respondent in his capacity as proponent’s counsel in the probate proceeding, a position he held for only a few months, from June 17, 2010, to September 23, 2010, when another firm was substituted in respondent’s place as proponent’s attorney of record. Radio Drama’s reference to an affirmation submitted by successor counsel in 2011, averring that Radio Drama “was duly served with a citation pursuant to SCPA § 1411,” cannot be the basis for a claim against respondent under Judiciary Law § 487. The only allegation in the petition which pertains to respondent’s conduct while he was acting as the estate’s attorney is his “directing that service on Radio Drama [in the probate proceeding] be made upon himself” and his “failing to forward notice and information” regarding the probate proceeding to Radio Drama’s other directors.

The wording and history of Judiciary Law § 487 attest to its criminal origins and its public policy objective of protecting the courts from subversions of justice by lawyers (*see Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]). Against that backdrop, decisions from the First Department have held that, in order to state a claim under the statute, a party must allege facts demonstrating “egregious conduct or a chronic and extreme pattern of behavior” on the part of the attorney (*see e.g., Chowaiki & Co. Fine Art Ltd. v Lacher*, 115

AD3d 600 [1<sup>st</sup> Dept 2014] [dismissing § 487 claim and noting that “relief under this statute is not lightly given”]; *Facebook, Inc. v DLA Piper LLP*, 134 AD3d 610 [1<sup>st</sup> Dept 2015] [dismissing § 487 claim due to pleading’s “factually insufficient” allegations]; *Savitt v Greenberg Traurig, LLP*, 126 AD3d 506 [1<sup>st</sup> Dept 2015] [dismissing § 487 claim due to complaint’s failure to show deceitful conduct which “reaches the level of egregious . . .”]).

It is a stretch to argue that respondent’s serving notice of the probate proceeding upon himself as a director of Radio Drama constituted an act of deceit sufficient to state a claim under Judiciary Law § 487; such an allegation falls short of the exacting standard set by the First Department. Moreover, even if this court were to find that respondent’s purported failure to cite Radio Drama constituted egregious conduct, the petition does not allege any injury proximately caused by such failure (*see Gumarova v Law Offices of Paul A Boronow*, 129 AD3d 911 [2<sup>nd</sup> Dept 2015] [noting that injury resulting from the deceitful conduct is “an essential element” of a § 487 claim]; *Jaroslawicz v Cohen*, 12 AD3d 160 [1<sup>st</sup> Dept 2004] [same]). Radio Drama’s only interest in the probate proceeding was derived from its status as the sole named residuary beneficiary under the propounded will. Since the objections to probate were dismissed, and the will was admitted to probate, Radio Drama retained its residuary bequest and lost nothing by virtue of its failure to appear. Any other injuries suffered by Radio Drama deriving from the changes made to the Revocable Trust were not the result of respondent’s alleged failure to serve notice upon Radio Drama in the probate proceeding. Accordingly, Radio Drama’s claim under Judiciary Law § 487 is dismissed.

#### **Unjust Enrichment and Imposition of a Constructive Trust**

Unjust enrichment has been described as a “quasi-contract” theory of recovery and “an obligation imposed by equity to prevent injustice” (*IDT Corp. v Morgan Stanley Dean Witter*

& Co., 12 NY3d 132, 142 [2009]). Commentators have noted the “inherent flexibility of the concept of unjust enrichment” (Restatement [Third] of Restitution and Unjust Enrichment § 1[a]).

To state a claim for unjust enrichment, a petitioner needs to show that the respondent was enriched at the petitioner’s expense and that “it is against equity and good conscience to permit [the respondent] to retain what is sought to be recovered” (*Mandarin v Wildenstein*, 16 NY3d 173, 182 [2011]; *Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 [2012]). Here, Radio Drama alleges that respondent and the Charitable Trust were enriched at Radio Drama’s expense when Grantor, allegedly as a result of respondent’s wrongdoing, executed the 2003 and 2004 restatements to the Revocable Trust. Specifically, respondent benefited from the 2003 restatement by the insertion of a new provision in the Revocable Trust instrument increasing respondent’s trustee commissions, and both the Charitable Trust and respondent (as its sole trustee) benefited from the 2004 restatement by the substitution of the Charitable Trust in place of Radio Drama as the remainder beneficiary of the Revocable Trust. Accordingly, Radio Drama has stated a claim for unjust enrichment for which the imposition of a constructive trust may be an appropriate remedy.

The Court of Appeals described the imposition of a constructive trust as an equitable remedy available “[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest.” *Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386 (1919). In *Beatty*, Judge Cardozo aptly characterized a constructive trust as “the formula through which the conscience of equity finds expression” (*id.* at 386), and courts have noted both the “broad scope” and the flexibility of the constructive trust doctrine (*see Simonds v Simonds*, 45 NY2d 233, 241 [1978], *citing* 5 Scott,



Trusts [3d ed], § 462.2 and Bogert, Trusts and Trustees [2d ed rev, 1978], § 471, at 29; see also *Weadick v Herlihy*, 16 AD3d 223 [1<sup>st</sup> Dept 2005]). If petitioner can prove the allegations giving rise to its unjust enrichment claim, the imposition of a constructive trust over the assets of the Charitable Trust may be warranted.

Motion to Dismiss on Basis of Statute of Limitations - CPLR 3211(a)(5)

Having determined that petitioner has stated valid claims for fraud, fraudulent concealment, undue influence, and unjust enrichment (and its accompanying request for the imposition of a constructive trust), the court must address respondent's argument that such claims are time-barred.

Under CPLR § 213(8), claims based on fraud and/or fraudulent concealment must be brought within either six years from the date on which the claims accrued or two years from the time the fraud was, or should have been, discovered, whichever is later (see *Matter of Kotick*, NYLJ, Oct. 7, 2009, at 32, col 1 [Sur Ct, NY County]). The parties do not dispute the applicability of CPLR § 213(8) to fraud claims, and they also agree that a six-year limitations period applies to petitioner's undue influence and constructive trust claims, but they disagree on the date on which the limitations period begins to run. Respondent argues that the limitations period begins to run on the respective dates on which the restatements were executed, while Radio Drama contends that the claims did not accrue until Grantor's death in 2010. The acts giving rise to all four claims took place on July 8, 2003 (when Grantor signed the first restatement to the Revocable Trust increasing the commissions to which respondent would be entitled) and on October 20, 2004 (when Grantor signed the second restatement to the Revocable Trust by which Radio Drama lost its status as the named remainder beneficiary). Radio Drama filed the instant petition on December 14, 2015, about five and a half years after

Grantor's death, and more than ten years after respondent is alleged to have committed fraud and/or exercised undue influence.

Radio Drama contends that the six-year statutory period did not begin to run until Grantor's death, because prior to that point it had no vested interest in the Revocable Trust and thus would have lacked standing to challenge the restatements. In support of its argument, it cites *Matter of Tisdale*, 171 Misc.2d 716 (Sur Ct., NY County 1997) for the proposition that a revocable trust instrument is more analogous to a will than a contract in that it is an ambulatory instrument, subject to change or revocation at any time prior to the settlor's death.

In *Matter of Heumann*, 2006 WL 6897055 (Sur Ct, Westchester County 2006), the court relied on the analysis in *Tisdale* when it held that a challenge to an amendment of a revocable trust was timely. In *Heumann*, the settlor had executed a revocable trust instrument in 1996 which provided that, at her death, the trust remainder was to be distributed among her six children. The settlor amended the trust instrument in 1997 to remove one of her children (the petitioner) as a beneficiary. The settlor died in 2004, and the petitioner commenced a proceeding in 2005 challenging the validity of the 1997 amendment on the ground of undue influence. The successor trustees moved to dismiss the proceeding as time-barred, noting that more than six years had passed between the amendment's execution and the filing of the petition, and that the petitioner knew, or should have known, of the amendment in 2002, more than two years prior to filing his petition. The court denied the motion, holding that, because the petitioner could not have commenced the proceeding until after the settlor had died, the six-year limitations period did not begin to run until the date of the settlor's death.

The *Heumann* and *Tisdale* decisions were cited approvingly by the Suffolk County Surrogate's Court when it noted that, since proceedings challenging revocable trusts can be instituted only after the settlor's death, "the running of the statute of limitations regarding the underlying trust instrument [does] not commence until the death of the grantor" (*Matter of Dalton*, NYLJ, Feb. 2, 2009, at 47, col 4 [Sur Ct, Suffolk County 2009]).

Nevertheless, respondent argues that the decision in *Matter of Heumann* is in conflict with the general proposition that the limitations period for claims sounding in fraud claim begins to run at the time the alleged fraud is committed. While respondent cites several cases in support of this oft-cited proposition, none of them involve a challenge to the alteration of a revocable trust. For example, in *Von Blomberg v Garis*, 44 AD3d 1033 (2nd Dept 2007), the plaintiff asserted a fraud claim relating to the defendant's execution of a deed in 1996 by which he conveyed property to himself and the plaintiff's mother as joint tenants with right of survivorship. Plaintiff's mother died in 2004, and plaintiff, a beneficiary under her will, commenced an action in 2005 alleging that the defendant had defrauded her mother by executing the deed in violation of an agreement whereby they agreed to hold title to the property as tenants in common with no right of survivorship. The Appellate Division affirmed the lower court's dismissal of the complaint as time-barred, since ten years had passed between the alleged fraud in 1996 and the filing of the complaint. In *Von Blomberg*, the statute of limitations had been triggered during the plaintiff's mother's lifetime because all the elements of fraud, including injury, had by then occurred. By contrast, Radio Drama could not demonstrate any injury to a cognizable interest in the Revocable Trust until Grantor's death had given it standing to claim such an injury.

The court deems the analysis in *Matter of Heumann* and *Matter of Dalton* to be persuasive and applicable to petitioner's claims. Accordingly, since Radio Drama filed its petition within six years of Grantor's death, its fraud, fraudulent concealment, undue influence and unjust enrichment claims are timely, and the motion to dismiss these claims is denied.<sup>3</sup>

**Radio Drama's Motion for a Preliminary Injunction**

Radio Drama moves for a preliminary injunction seeking to (i) suspend respondent from his position as a director of Radio Drama during the pendency of this proceeding and (ii) enjoin respondent, as the sole trustee of the Charitable Trust, from making any further distributions from such trust beyond the minimum distribution required of private foundations pursuant to Internal Revenue Code § 4942.

The first prong of Radio Drama's motion, to suspend respondent as a director of Radio Drama, is denied in light of this court's determination that it lacks subject matter jurisdiction to grant such relief, which is sought in connection with Radio Drama's breach of fiduciary duty claim (*see* discussion beginning on p. 4, *supra*). So the court will turn to Radio Drama's request to enjoin respondent from making more than the statutory annual minimum distributions from the Charitable Trust.

It is well-settled that, in order to prevail on a motion pursuant to CPLR 6301 for a preliminary injunction, a movant must demonstrate: (i) a likelihood of success of the merits; (ii) irreparable injury if the relief is not granted; and (iii) a balance of the equities in favor of

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<sup>3</sup> In light of its determination that the limitations period begins to run at Grantor's death, the court need not address respondent's argument that Radio Drama's other directors knew of respondent's alleged fraud back in June 2010, or petitioner's arguments regarding the tolling of the limitations period or equitable estoppel.

the movant (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Gliklad v Cherney*, 97 AD3d 401 [1st Dept 2012]); *Matter of Basie*, NYLJ, June 27, 2016, at 18 col 5 [Sur Ct, NY County].

Radio Drama has failed to show irreparable injury, and consequently, its motion is denied. Its argument is essentially that an injunction is necessary to preserve the status quo because, if respondent is not restrained from making further distributions from the Charitable Trust (beyond the minimum amount required by law) during the pendency of the proceeding, he will likely continue to deplete the principal of the Charitable Trust, leaving less funds for Radio Drama should it ultimately be successful in the proceeding. However, injunctive relief is not typically available where the moving party can be adequately compensated by an award of monetary damages (*see Matter of Hoppenstein*, NYLJ, July 1, 2016, p. 25, col 3 [Sur Ct, NY County 2016]; *Matter of Seegers*, NYLJ, June 2, 2016, p. 28, col 3 [Sur Ct, Suffolk County 2016]; *Matter of Sanabria*, 33 Misc3d 1207[A] [Sur Ct, Bronx County 2011]). Furthermore, Radio Drama's delay of over five years before bringing this proceeding belies its assertion that it would be irreparably injured if it does not obtain the relief it seeks.

To conclude, respondent's motion to dismiss petitioner's claims for respondent's removal as one of petitioner's corporate directors and for damages under Judiciary Law § 487 is granted. In all other respects, respondent's motion is denied. Petitioner's motion for a preliminary injunction is denied.

This decision constitutes the order of the court.

  
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SURROGATE

Dated: *July 15*, 2019