

FILED

Feb 4, 2021

DANIEL P. POTTER, Clerk

jzelaya

Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CURRENCY CORP., as Trustee,
etc.,

Plaintiff and Respondent

v.

THE PULLMAN GROUP, LLC,
et al.,

Defendants and Appellants,

B297162 (consolidated with
B298972 & B299796)

(Los Angeles County
Super. Ct. No. BC454901)

O R D E R

Currency Corp., a California corporation, filed a motion to substitute itself as plaintiff in the action underlying this appeal on the ground that it is the successor in interest to the named plaintiff, Leonard W. Borisoff, who has passed away. Defendants and appellants The Pullman Group, LLC, Wertheim, LLC, David Pullman, and Broadcast Music, Inc., filed an opposition to the motion, and Currency Corp. filed a reply. For the reasons that follow, the motion is granted.

I.

On February 10, 2011, Borisoff filed a complaint against The Pullman Group, LLC, Wertheim, LLC, David Pullman, and Broadcast Music, Inc. (the Pullman lawsuit). The causes of action asserted in the Pullman lawsuit arise from disputes between the parties concerning rights to royalties for Borisoff's musical compositions.

On March 21, 2011, Borisoff created a revocable trust (the Trust). Borisoff named himself trustee of the Trust and, during his lifetime, the sole beneficiary of the trust. The trust document provides that upon Borisoff's death or incapacitation, "Currency Corp. shall immediately and automatically become the Trustee." Upon Borisoff's death, the trustee "shall pay the net income and all of the principal to [Borisoff's] son, Spencer Borisoff, during his lifetime." (Capitalization omitted.)

The trust corpus includes: "All of [Borisoff's] right, title and interest in (including without limitation the proceeds of) [the Pullman lawsuit], and all underlying claims"; and all of Borisoff's "right, title and interest in all claims, demands, damages, costs, attorneys' fees, expenses, liens, judgments, orders, actions, and causes of action of every kind and nature whatsoever in law, equity, or otherwise against David Pullman and all related entities including without limitation The Pullman Group, LLC, Wertheim, LLC, Structured Asset Sales, LLC, and Structured Asset Sales Group, LLC."

Notwithstanding the transfer of these assets to the Trust, it appears (so far as our record shows) that Borisoff continued to prosecute the Pullman lawsuit without reference to the Trust or his capacity as its trustee.

On November 4, 2020, Borisoff died.

On January 5, 2021, Currency Corp. filed in this court a motion to substitute itself as plaintiff in the Pullman lawsuit on the ground that it is the successor trustee of the Trust. It supported the motion with the declaration of its president, Parviz Omidvar. Omidvar, tracking the requirements of Code of Civil Procedure section 377.32, states under penalty of perjury that “[n]o proceeding is now pending in California for administration of [Borisoff’s] estate,” that Currency Corp. “is Borisoff’s successor in interest (as defined in Section 377.11 of the California Code of Civil Procedure) and succeeds to Borisoff’s interest in the [Pullman lawsuit] and the pending appeal,” and that “[n]o other person has a superior right to commence the action or proceeding or to be substituted for Borisoff in the pending action or proceeding.” (See Code Civ. Proc., § 377.32, subd. (a).) He attached to his declaration a copy of the executed and notarized trust document.

II.

Generally, “[e]very action must be prosecuted in the name of the real party in interest.” (Code Civ. Proc., § 367.) Where the action concerns trust property, the trustee is the real party in interest and the person with standing to sue. (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1132, fn. 3; *Portico Management Group, LLC v. Harrison* (2011) 202 Cal.App.4th 464, 473; *Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419, 427, 4 Witkin, Cal. Procedure (5th ed. 2020) Pleading, § 137.) Although the pleadings should ordinarily reflect that the plaintiff in such an action is suing as trustee of a trust (*Thorpe v. Story* (1937) 10 Cal.2d 104, 114; *Lasar v. Johnson* (1899) 125 Cal. 549, 555), courts have not required that allegation when the trustee and beneficiary of the trust are the same (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 171; *McKoin v. Rosefelt*

(1944) 66 Cal.App.2d 757, 768–769). Because Borisoff was the trustee and sole beneficiary of the Trust while he was alive, there was thus no infirmity in his prosecution of the Pullman lawsuit in his name and without reference to the Trust during his lifetime.

Under the trust document, Currency Corp. became the trustee upon Borisoff's death and Borisoff's son became the sole beneficiary. The real party in interest is thus Currency Corp., which holds the assets of the Trust, including the causes of action in the Pullman lawsuit, in trust for Spencer Borisoff's benefit. Because an action must generally be prosecuted in the name of the real party in interest, it is proper for Currency Corp. to be substituted in as the plaintiff (and respondent in this appeal) and for the title of the action to reflect this change, including Currency Corp.'s capacity as trustee of the Trust. (See Code Civ. Proc., §§ 368.5, 377.31, 377.33; Prob. Code, § 16249.) Because the substitution is sought while the case is on appeal, the motion was properly made in this court. (Cal. Rules of Court, rule 8.36(a); Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2020) ¶ 5:228.)

A party moving to continue an action as a decedent's successor in interest must submit a declaration establishing certain facts, which Currency Corp. has provided. (See Code Civ. Proc., § 377.32.) The moving party must also attach a certified copy of the decedent's death certificate to the declaration. (*Id.*, § 377.32, subd. (c).) Although the declarant states that a "true and correct copy of [Borisoff's] death certificate is attached [to his declaration] as Exhibit 'B,'" the certificate was not included with the motion filed in this court. The omission, however, is harmless because defendants, in their opposition to the motion, expressly state that they "accept[] as undisputed" for purposes of the motion that Borisoff has passed away.

Pullman argues that a decedent’s personal representative is the only person who can be a successor in interest to a plaintiff who dies while an action is pending. Pullman relies on Code of Civil Procedure section 377.30, which provides: “A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent’s successor in interest, subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code, and an action may be commenced by the decedent’s personal representative or, if none, by the decedent’s successor in interest.”

Pullman contends that the clause, “subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code” requires Currency Corp. to petition the probate court to act as Borisoff’s personal representative and obtain letters authorizing it to act on behalf of Borisoff’s estate. As Currency Corp. points out, however, because the Pullman lawsuit is an asset of the Trust, it is not subject to probate procedures. (See Prob. Code, §§ 5000, 5003; *Estate of Parrette* (1985) 165 Cal.App.3d 157, 164 [“ [w]hen a person creates, and transfers property to, an inter vivos trust and the trust estate does not revert to the settlor’s estate on his death, the trust property is not subject to probate administration in the settlor’s estate’ ”]; Ross & Cohen, Cal. Practice Guide: Probate (The Rutter Group 2020) ¶ 2:109 [“ [p]roperty held in an inter vivos trust is not subject to probate administration even if the decedent-settlor was a life beneficiary of the trust or retained an unexercised power to revoke the trust”].) Currency Corp. was not, therefore, required to become the personal representative of Borisoff’s estate or to obtain probate court letters prior to acting as the trustee of the Trust.

Pullman also suggests that Currency Corp. should apply to the probate court for an order to determine its ownership of

the causes of action in the Pullman lawsuit under Probate Code section 850. That statute permits the trustee of a trust to petition the court for an order resolving disputes between a trustee and others over title to property. (Prob. Code, § 850, subd. (a)(3).) Pullman asserts that such a dispute exists because the Pullman lawsuit “is an asset in [Borisoff’s] name, not that of any trust.” Pullman is apparently referring to the fact that Borisoff did not identify himself as trustee of the Trust in his prosecution of the Pullman lawsuit. As noted above, however, Borisoff was not required to do so under these circumstances. The fact that Borisoff continued to prosecute the action under his name after transferring his causes of action to the Trust does not create a dispute as to ownership of the causes of action.

Defendants concede that Borisoff’s intent to transfer assets to a trust can be shown by reference to the trust document. As Currency Corp. points out, the trust document specifically transfers to the Trust Borisoff’s right, title, and interest in the Pullman lawsuit and all underlying claims. Defendants contend, however, that Borisoff transferred “this asset and other claims to the Pullman Group, LLC, and Wertheim, LLC,” two of the defendants. (Capitalization omitted.) Although the argument is not fully developed, it appears that defendants are referring to the alleged assignment of Borisoff’s royalty rights, which are a subject of the Pullman lawsuit. The asset that is relevant to the instant motion, however, is not a right to royalties, but the Pullman lawsuit itself. Nothing in the documents defendants have offered in support of their opposition evidences an assignment of that lawsuit to the defendants.

Lastly, defendants argue that the “assignment” by Borisoff to Currency Corp. is nonassignable and therefore void as a violation of public policy. This “problem,” could be avoided, defendants assert,

by the appointment of a personal representative. The argument is neither cogent nor supported by reference to authority. We therefore reject it. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [“ ‘the absence of cogent legal argument or citation to authority allows this court to treat the contention as waived’ ”].)

III.

The motion by Currency Corp. is granted.

Currency Corp., as trustee of a trust established by plaintiff Leonard W. Borisoff on March 21, 2011, is permitted to continue the underlying action as plaintiff’s successor in interest.

Pursuant to rule 8.36(a) of the California Rules of Court, the clerk of the court shall notify the superior court of this ruling.


ROTHSCHILD, P. J.