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POWERS OF ATTORNEY, FIDUCIARY CAN'T DELEGATE DISCRETIONARY AUTHORITY

– ALSO IN THIS ISSUE –

FORECLOSURE INVALID - ASSIGNMENT AFTER ACTION COMMENCED. . . P. 3
Wells Fargo N.A. v Marchione

CONTRACTS - RELIANCE DAMAGES . . . P. 4
St. Lawrence Factory Stores v Ogdensburg Bridge & Port Authority

In a decision following directly on the heels of the implementation of the new statutory power of attorney forms, the Dutchess County Surrogate was called upon to pass on an executor's attempt to delegate discretionary authority to his lawyers. [1] In a brief opinion, which also dealt with the issues of attorney's fees, Surrogate Pagones held that the blanket delegation of authority by the nonresident executor under a power of attorney was improper.

The Executor of the Estate of Frank J. Sadlo petitioned the court for a decree (1) determining the compensation to be paid to his former attorneys; (2) compelling the turn over of the estate file, and; (3) directing the attorneys to turn over and deliver assets and documents belonging to the estate. The proceeding presented what the Surrogate described as a *"potpourri of issues"*. The most immediately relevant was the blanket delegation the executor had made of his authority to the law firm.

Timothy J. Sadlo, the appointed executor resides in New Mexico. In March 2009, Timothy Sadlo, in his capacity as Executor, gave a durable general power of attorney which named the estate's former counsel to act on his behalf. The power contained the following broad grant of authority –

> *"This Power of Attorney is specifically intended to give my attorney-in-fact all the powers provided to me as Executor of the Estate of Frank J. Sadlo and to act on my behalf with respect to said Estate."*

Citing to a treatise coauthored by the respected former Nassau County Surrogate, Raymond Radigan,[2] Surrogate Pagones noted that powers of attorney are frequently used by persons who are unavailable to participate because of their absence. The Surrogate went on to conclude, however, that *"[t]he duty of a fiduciary is personal and cannot be divested by delegation."* [3] Thus, the Surrogate held that an executor could not grant plenary powers to his counsel to act on his behalf.[4]

The recodified and new provisions of the General Obligations Law (GOL), Article 5, § 5-1501, while not a paragon of clarity, suggest, however, that fiduciaries are empowered to employ powers of attorney. Section 5-1501B suggests that in the case of a corporate fiduciary, the power need not be on a *"statutory form"*.

> *§ 5-1501 Definitions*
>
> *As used in this title the following terms shall have the following meanings:*
>
> *9. "Person" means an individual, whether acting for himself or herself, or as a fiduciary or as an official of any legal, governmental or commercial entity (including, but not limited to, any such entity identified in this subdivision), corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, government agency, government entity, government instrumentality, public corporation, or any other legal or commercial entity.*
>
> § 5-1501B *Creation of a valid power of attorney; when effective*
>
> *4. Nothing in this title shall be construed to bar the use of any other or different form of power of attorney desired by a person* ***other than an individual as the term person is defined in section 5-1501 of this title.***

(Emphasis added).

[1] *Estate of Frank J. Sadlo Jr.,* 2009-97727/A, decided: September 25, 2009, Surrogate James D. Pagones.
[2] *Turano and Radigan, New York Estate Administration*, 2009 Edition, §13.08 at 465-467.
[3] Citing to 41 NY Jur 2d. Decedents' Estates § 1479, at 84-85.
[4] See *In re Will of Jones,* 1 Misc.3d 688,689 (Surrogates Court Broome County, 2003).

So, if we assume that GOL Article 5 sanctions the use of powers of attorney by persons occupying a fiduciary capacity, such as an executor, administrator or trustee, what limits have the courts placed on their use?

Research on this issue takes us back to *Gates v. Dudgeon, as Executor.*[5] At issue was the defendant executor's attempt to withdraw from a contract signed by his attorneys pursuant to a power of attorney and the plaintiff's suit against the executor for specific performance. Finding that the writings regarding the sale evidenced a valid contract, the Court turned to the executor's argument that the execution by his lawyers pursuant to a power of attorney was an act performed under an invalid delegation of the defendant's authority. Evidence was adduced that the defendant-executor was not only aware of the plaintiff's offer, he arranged for his attorneys to respond to the offer and he established the sale price. On this evidence the court found a valid contract lawfully executed on the defendant's behalf. So, a valid contract existed where the fiduciary made the decision to enter into a contract and set an essential term of that agreement, the price. The Court drew upon the holding by Chief Judge Denio in *Newton v Barton, executor*.[6] In that case the plaintiff sought specific performance of a real estate contract executed by attorneys on the executor's behalf. When faced with an action for specific performance, the executor countered with several arguments not relevant here, and that the contract was not signed by him and was therefore not effective to bind the estate.

Judge Denio in *Newton* instructs us that –

> *"The reason of the maxim 'Delegatus non potest delegare [a delegate cannot delegate],' however, is that in the case to which it applies the first constituent is a right to the personal judgment, care and skill of his agent. * * * In determining upon one or the other course he brought into exercise those personal qualifications on account of which he is presumed to have been selected by the testator. The law does not allow him to commit the power with which he is intrusted to another, for, perhaps, that other would bind the estate to a transaction which the former might not have considered advantageous and safe if he had acted directly upon it.* ***The reason fails where the person actually intrusted with the authority has with the full knowledge of the facts ratified the act of one who assumed to act as his agent."***

(Emphasis added).

Thus, the rule is well established in the jurisprudence of this state that the doctrine, "*Delegatus non potest delegare,*" does not apply where the act is merely ministerial and has been agreed to or ratified by the fiduciary.

[5] 173 NY 426 (1903).
[6] 13 NY 587 (1856).

How and under what circumstances then can a fiduciary validly use a power of attorney? The first question relates to the form. If the fiduciary is an individual he or she is required to use the new statutory form and it must be signed by the agent. See GOL §§ 5-1501, 5-1501B. The limitation in § 5-1501B allowing the use of another form applies only to *"persons"* other than natural persons. A corporate fiduciary appears to be free to use a non statutory form that otherwise satisfies the requisites for an enforceable power of attorney. From a practical point of view, however, no harm is done if a corporate fiduciary uses the statutory form and adheres to the requisite formalities.

As stated above, the grant of a power of attorney by a fiduciary must be limited to purely ministerial acts, such as the execution of a contract, deed, mortgage, assignment or bill of sale to name a few documents affecting real property or a cooperative interest. In the case of the sale of either real property or a cooperative interest, the fiduciary should memorialize his, her or its agreement to the terms of the sale. This is done by the execution of the contract. If the contract is also executed pursuant to a power of attorney, a separate written expression of the fiduciary's agreement to the terms of the sale and any modifications must be otherwise memorialized.

The second question is whether the fiduciary or any seller of property must complete and execute a *Statutory Major Gifts Rider (SMGR)* for transactions authorized in GOL § 5-1502A. This section governs the construction of the authority granted for *"real estate transactions"* in the statutory power of attorney form. That authority includes the following specific powers.

> *§ 5-1502A. Construction--real estate transactions*
>
> *In a statutory short form power of attorney, the language conferring general authority with respect to "real estate transactions," must be construed to mean that the principal authorizes the agent:*
>
> . . .
>
> *2.* ***To sell, to exchange, to convey either with or without covenants, to quit-claim, to release, to surrender, to mortgage, to incumber, to partition or to consent to the partitioning, to grant options concerning, to lease or to sublet, or otherwise to dispose of, any estate or interest in land;***

(Emphasis added)

The existence of GOL § 5-1514 which sets forth the form and requirements of the SMGR has raised a question in the minds of some commentators and practitioners whether an SMGR is required in all transactions by the attorney-in-fact, now referred to as the Agent, where property is to be transferred. In our view, that section must be read in harmony with GOL § 5-1502A as a requirement only on transfers that are gifts or

transfers which, like gifts, are not made for consideration paid to the principal. This view appears to echo the informal comments of at least one Law Revision Commission member.

A third question is whether an SMGR is required where the fiduciary appoints an Agent under a power of attorney to execute documents of transfer needed to carry out the gift dispositions made under a decedents will or which are required in the case of an intestate administration. A fiduciary's powers are governed by EPTL § 11-1.1, which does not confer upon a fiduciary the discretion to make gifts. In respect to an executor, the will governs the dispositions of the decedent's property so an SMGR would be irrelevant to the appointment of an attorney-in-fact to execute documents to effect those dispositions. The same would be true in respect to an administrator of an intestate estate and any dispositions of property to the distributees.

There are proposed, but not yet adopted, technical correction legislation *(Senate Bill No. 5910)* so we anticipate that there may be changes made to the statute that will clarify questions such as the proper use of the SMGR. We will monitor this and any other legislation pertaining to powers of attorney and report on any new developments.

FORECLOSURE INVALID - ASSIGNMENT AFTER ACTION COMMENCED
Wells Fargo N.A. v Marchione[7]

Among the recent spate of decisions that have put the foreclosure bar on the defensive is a decision by the Appellate Division, Second Department. In *Wells Fargo,* the Appellate Division rejected a lender's foreclosure where the action was commenced prior to the actual paper assignment of the loan to the foreclosing plaintiff. The Supreme Court, Westchester County *(Joan B. Lefkowitz, J., entered February 14, 2008)* had granted the motion defendants motion dismissing the complaint for lack of standing, the plaintiff appealed.

The foreclosing plaintiff, Wells Fargo Bank N.A., sued its borrower Vincent and Debbie Marchione after they defaulted on their loan payments. The mortgage was originated by Option One Mortgage Corporation, but not assigned to the plaintiff until the foreclosure. The summons and complaint in the foreclosure action was filed November 30, 2007 by Wells Fargo Bank N.A., as plaintiff. The record shows that Option One assigned the mortgage to Wells Fargo by assignment dated December 5, 2007, which recited that it was *effective October 28, 2007,* and as Shakespeare wrote – *"there's the "rub"*.[8]

[7] 2009 NY Slip Op 7624 (2d Dep't)
[8] 1594, William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*

The issue of the assignment first arose in the foreclosure when counsel for the defendant moved, pre-answer to dismiss the complaint, seeking a determination that the complaint was not verified, and for other relief. In its responsive papers, the plaintiff's counsel raised the assignment as its basis for standing to foreclose. The defendant would have been precluded from raising any argument concerning the assignment in its reply papers as the Appellate Division panel pointed out – "*[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion"*.[9] However, the Appellate Division upheld the trial court's exercise of discretion to consider the defendant's reply with respect to the assignment, since the assignment issue was newly raised in the opposition papers. Having opened the door, the trial court examined the assignment and agreed that plaintiff lacked standing to foreclose. The Appellate Division affirmed.

As noted earlier, the plaintiff commenced its action *November 30, 2007.* The plaintiff received its assignment five days later on December 4, which by its terms was effective *October 28, 2007.* The plaintiff contended that the retroactive effective date of the assignment gave the plaintiff an interest in the mortgage prior to the commencement of the action.

The issue of *"standing"* is a recurrent theme in mortgage foreclosure defense litigation. The secondary mortgage market greatly expanded opportunities for property ownership; but the trading and pooling of mortgages has made it difficult for the plaintiff's bar to identify the actual owner of the mortgage, let alone locate the underlying documents. Ownership of the indebtedness is a prerequisite to standing to foreclose. Citing a number of decisions on this issue, the Appellate Division restated the rule – *"In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage"*. [10] Given the simple requirement of legal or equitable ownership of the thing to be enforced, the court examined the plaintiff's right to foreclose.

The plaintiff argued that it did not serve the defendants until after it physically had the assignment in hand. This argument was unavailing, however, as the panel pointed to the 1992 change in procedure for commencing an action.[11] An action is no longer deemed commenced by service, but rather, by the filing of the summons and complaint and the purchase of the index number. Justice Leventhal, writing for the unanimous panel, noted an unintended byproduct of this change was that

[9] *Matter of Harleysville Ins. Co. v. Rosario*, 17 AD3d 677, 677-678 (2d Dep't 2005).
[10] Citing *Katz v East-Ville Realty Co*., 249 AD2d 243, 243. A *"foreclosure of a mortgage may not be brought by one who has no title to it."* Kluge v Fugazy, 145 AD2d 537, 538.
[11] CPLR § 304 Method of commencing action or special proceeding

it makes it easier to determine the date on which the action was commenced. Wells Fargo argued it had standing under the 1999 decision by a Third Department panel in *Bankers Trust Co. v. Hoovis,*[12] where that court held that where the plaintiff was an assignee of the mortgage at the time the service of the complaint was made it had standing to bring its foreclosure action. And that while the assignment in *Hoovis* was similarly made retroactive to a date prior to the filing of the complaint, it upheld the plaintiff's standing in that case because the *"[d]efendant has not submitted any proof to contradict plaintiff's documentation in support of its proposition that the assignment, including the delivery of the note and mortgage, occurred prior to initiation of the action."* [13]

In Marchione, the panel recognized that it is not uncommon for parties to make their obligations effective as of a date earlier than the execution of the operative document, however, as the panel notes, citing authority, a *"fiction of retroactivity"* should not be applied to adversely affect the rights of third parties.[14] The assignment in question was unquestionably not executed until after the commencement of the action, therefore the *"retroactive"* assignment could not be used to create standing. Accordingly, the order below was affirmed.

CONTRACTS - RELIANCE DAMAGES
St. Lawrence Factory Stores v Ogdensburg Bridge & Port Authority[15]

Upon the seller's default under a real estate purchase agreement, the purchaser sued for damages based on (i) lost profits, (ii) benefit of the bargain, and (iii) reliance costs. The trial court dismissed claims i) and iii) before trial and ii) after trial.

In a brief decision, the Court of Appeals affirmed the dismissal of claims i) and ii) as being speculative, finding that the value at time of contract did not exceed the contract price. The Appellate Division, 3rd Department, affirming the trial court stated that in respect to the reliance damage claim under a contract for the sale of real property, a buyer is limited to recovery of *"only those ordinarily incurred regarding . . . a contract, such as a title search, survey and attorney's closing fees".*[16]

The Court of Appeals rejected this limited formulation of the rule and reversed as to reliance damages holding that both the Restatement[17] and New York case law have historically recognized reliance damages. Quoting from the Restatement, a plaintiff may recover *"damages based on [plaintiff's] . . . reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the insured party would have suffered had the contract been performed."* We infer from this decision that absent a contractual limitation, or where the seller's breach is willful or in bad faith, a purchaser should be able to look for all reliance damages including loan commitment expense, attorney's and other professional fees, environmental and other costs incurred that are directly related to the contract.

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[12] 263 AD2d 937 (3rd Dept. 1999)
[13] 263 AD2d at 938
[14] Citing *Debreceni v. Outlet Co.,* 784 F2d 13, 20 (1st Cir 1986.
[15] 2009 NY Slip Op 07454
[16] 26 AD3d at 702.
[17] Restatement (Second) of Contracts § 349