Title

Mackey v. Santander Bank, N.A: Yes, but applicable trust law lurks not just in the Uniform Trust Code

Text

In Mackey v. Santander Bank, N.A, 98 Mass.App.Ct. 431 (2020), the court gropes for the applicable trust law in all the wrong places. Husband (H) declares himself express trustee of marital home for benefit of himself and his wife. H later purports to resign express trusteeship. Purported vacancy is ineffectively filled. Later H purports to re-assume the express trusteeship. During hiatus H takes out a commercial loan purportedly secured by a mortgage on marital home. Divorce proceedings ensue. Battle erupts between wife and commercial mortgagee, the former asserting that the mortgage is invalid. What the issues actually are: Was H a constructive trustee of the real estate during the hiatus (*see Loring and Rounds: A Trustee's Handbook* §3.3) or, perhaps, a trustee *de son tort* of it during that time (*see* L & R §8.15.35, which section is reproduced in the appendix below)? If so, could he have effectively conveyed the legal title to a bona fide purchaser for value (BFP) (*see* L & R §3.3)? If so, was the commercial mortgagee a BFP (*see* L & R §8.3.2)? The Uniform Trust Code (UTC) expressly declines to regulate all this core equity doctrine implicating the law of trusts. *See* UTC §102. That did not stop the court from essentially limiting its inquiry to the UTC.

Appendix

§8.15.35 *Trustees* de Son Tort; de Facto *Trustees; Officious Intermeddlers* [from *Loring and Rounds: A Trustee's Handbook* (2020)]

> *The direct connection between trustees de son tort and executors de son tort is...not difficult to infer. The executor de son tort can be traced back to at least the 13th century, but there seems no reason to doubt that the institution and the problems which created it went back for some time before that. On the other hand the term trustee de son tort seems not to have been used until the mid-19th century, indeed it appears first to have been devised by Sir John Romilly MR in Hope v. Liddell (No 1)....*[728]

Trustees *de son tort; de facto* trustees. A person who intermeddles[729] with, and assumes the management of, trust property becomes a trustee by construction. The person is said to be a trustee *de son tort*.[730] A *de facto* trustee differs from a trustee *de son tort* in that the former assumes the office of trustee under a color of right or title.[731] "Where one without authority undertakes to execute a trust requiring the investment of a fund, he must carry all the risks, and make good all the losses, and have none of the

[728]Nolan v. Nolan & ors, [2004] VSCA 109 (U.K.) (citing to Hope v. Liddell (No. 1), (1856) 21 Beav. 183 at 205.

[729]"If the word 'intermeddle' be used, it tends to confuse the issue to the extent that it suggests wrongful intermeddling, which frequently gives rise to cases where the question of liability is in issue, rather than circumstances in which the original intention is merely to act in the role of trustee in relation to certain property." Nolan v. Nolan & ors, [2004] VSCA 109 (U.K.).

[730]*See generally* Lewin ¶42-60 through ¶42-63 (England).

[731]Allen Trust Co. v. Cowlitz Bank, 210 Or. App. 648, 152 P.3d 974 (2006). *See also* In the Matter of the Estate of Max Sakow, 146 Misc. 2d 672, 676 (N.Y. 1990).

profits...."[732] Trustees *de son tort* are "subject to the same rules and remedies"[733] as trustees who have been duly appointed. This goes for *de facto* trustees as well.[734]

A trusteeship *de son tort* has been described by English commentators as a type of institutional constructive trust.[735] "Institutional constructive trusts are trusts which arise from some preexisting fiduciary relationship before and apart from any breach of trust or duty, whereas remedial constructive trusts are imposed where no fiduciary relationship previously existed."[736]

Officious intermeddlers. Assume a trustee in breach of trust transfers an entrusted parcel of real estate to a third party who knows of the breach. Assume, also, that the third party then voluntarily proceeds to make improvements on the property, *e.g.*, by landscaping the front yard. Is the third party entitled to be reimbursed from the trust estate for the costs of those improvements? Probably not: "As is true in the law of contracts, a person is not entitled to recover for a benefit conferred if in conferring the benefit the person acted as an officious intermeddler."[737] The third party knew the parcel belonged to others. On the other hand, payments made in satisfaction of obligations that run with the property, *e.g.*, real estate taxes, probably are reimbursable.[738] For a general discussion of the rights of the beneficiary as against BFPs and non-BFPs of the trust property, the reader is referred to §5.4.2 of this handbook.

[732]Stephan v. Equitable Sav. & Loan Ass'n, 268 Or. 544, 559, 522 P.2d 478, 486 (1974).

[733]Stephan v. Equitable Sav. & Loan Ass'n, 268 Or. 544, 559, 522 P.2d 478, 486 (1974).

[734]Allen Trust Co. v. Cowlitz Bank, 210 Or. App. 648, 152 P.3d 974 (2006).

[735]*See, e.g.*, Lewin ¶7-11 (England). *See generally* §3.3 of this handbook (involuntary trustees) (in part discussing the constructive trust).

[736]Lewin ¶7-11 (England). "The proposition that constructive trusts are imposed on the holder of property against his intention is, however, one that needs to be approached with some caution since there are some trusts, often classified as constructive trusts, where the intention of the holder of property is critical to the creation of the trust, for example the case of a 'trustee' 'de son tort' or common intention trusts." Lewin ¶7-02.

[737]5 Scott & Ascher §29.1.8.6 9 (Credit for Expenditures to Improve Trust Property). *See also* Hawley v. Tesch, 88 Wis. 213, 59 N.W. 670, 677 (1894).

[738]5 Scott & Ascher §29.1.8.6 9 (Credit for Expenditures to Improve Trust Property). *See also* Hawley v. Tesch, 88 Wis. 213, 59 N.W. 670, 677 (1894).