

2007 WL 6799770 (Mass.Super.) (Trial Pleading)
Superior Court of Massachusetts.
Essex County

Paul J. MARMER,

v.

Richard D. KAUFMAN, Administrator with the Will Annexed of the Estate of June S. Marmer.

No. 07-2139A.
2007.

Complaint

By his attorney, [Irving Marmer](#), Ten Emerson Place, 18 E, Boston, Mass. 02114, 617 227-0500.

Introduction

This is a complaint to implement a settlement agreement between family members.

The Parties

1. PAUL J. MARMER is a resident of the city of Peabody, Essex County, in the Commonwealth of Massachusetts. He is referred to herein as “Paul”.
2. RICHARD D. KAUFMAN is a resident of the town of North Andover, Essex County, in the Commonwealth of Massachusetts. He is referred to herein as “Richard”,

The Facts

3. Richard is the Administrator with the Will Annexed of the *Estate of June S. Marmer*, Essex Probate and Family Court Department No. 2006 P 2969 AA 1. She is referred to herein as “June”. June was Richard's mother and Paul's sister. She deceased on November 11, 2006, leaving a will, which was filed in the Essex Probate and Family Court Department on December 21, 2006. June's adult children, Richard, David M., and April R. Kaufman are the primary beneficiaries under that will.
4. From 1976 to approximately 2000, Paul was employed as a registered pharmacist by a family owned Massachusetts corporation that operated a retail pharmacy. The stock in that corporation was owned equally by Paul and his father, Henry I. Marmer. He is referred to herein as “Henry”. Henry was also a registered pharmacist and was employed by the same Massachusetts corporation. Paul and Henry shared the ownership and management of that family business.
5. From approximately 1993 onward, the retail pharmacy business began to be progressively computer driven and technologically oriented. Paul assumed those responsibilities and remained current as the changes occurred. Henry did not and relied more and more on Paul to perform those tasks.
6. Therefore, in addition to the salary that the corporation paid to each, Paul was given certificates of deposit issued by a local bank as supplemental compensation in recognition of the additional business duties and responsibilities Paul assumed and performed.

7. For Paul's convenience and at his request, those certificates stood in Henry's name as trustee for Paul. However, as each certificate was issued, it was delivered to Paul. As each certificate matured, Paul was advised by the bank of the prevailing interest rate and he renewed each certificate on maturity.

8. From approximately 1998 and onward, competition in the retail pharmacy business increased in the Greater Boston area as national, publicly traded corporations opened newer and capially intense larger stores.

9. Henry was then in his late seventies, finding it more difficult to work and share in the business responsibilities as he did before. The burden fell on, and was assumed by Paul. It was agreed to sell the business and the realty in which it was housed. Paul made those arrangements and concluded the sale of both assets.

10. In recognition of the progressively greater responsibilities that Paul had performed over the years, the benefits he conferred that resulted in the business' success, and his efforts in arranging and concluding the sale of the business and the realty, the proceeds of the sale of both assets were given to Paul.

11. At approximately the same time in 1998, June's marriage had deteriorated and divorce was imminent. June turned to Henry almost daily for advice and comfort causing him anguish, both at home and at work. June's troubles and Henry's concern for her well-being, resulted in Henry spending more time with June and accompanying her to the succession of lawyers that represented her.

12. Beginning in high school, and throughout her adult life, June suffered from a bi-polar disorder. Her deteriorating marriage and the divorce that eventuated aggravated her symptoms. In 2001, Richard found the environment in his parents' home to be so stressful, that he moved to Paul's home, where he remained until 2005.

13. As a result of consulting with June's lawyers, in December, 2002, Henry executed a Durable Power of Attorney and Health Care Proxy naming June. At the same time, Henry revoked the Declaration of Trust that held title to his home and transferred that title to June, reserving a life estate for himself. And, during the same time period, Henry divested himself of substantial bank accounts, turned their proceeds over to June. These acts were accomplished preparatory to making Henry Medicaid eligible.

14. Sometime after December, 2002, unbeknown to Paul, June went to the bank that issued the certificates of deposit that stood in Henry's name as Trustee for Paul's benefit, cashed them and deposited their proceeds in her own name.

15. As the time for the renewal of those certificates came and went without notice from the issuing bank, Paul went to the bank and learned what June had done. There then began a series of in-person and telephone inquiries from Paul to Henry as to the disposition of those certificates. Henry represented that he was without knowledge and would inquire of June. When there was no response, Paul renewed his request.

16. Henry's inquiries intensified, again without response from June. On a Friday afternoon near the Spring of 2003, Henry drove to June's home to bring her groceries. He found her seated in her automobile with the motor running, in her garage, with the garage door closed. Henry was furious. Instead of recognizing June's responsibility for all that occurred, he blamed Paul. The dialogue between Paul and Henry ended.

17. Paul filed a complaint in the Essex. Probate and Family Court Department to recover the sums due him on the certificates of deposit that had been taken by June: *Paul J. Marmer v. June S. Marmer, et al.*, no. 2003 E 0044-GC 1. The contents of those proceedings are incorporated.

18. For some unknown reason, Paul's counsel did not counter the affidavit of outdated facts that Henry filed, nor did Paul's counsel attempt to oppose Henry's efforts to prevent the testimony of Irving Marmer, who had represented the family to that time.

19. The attorney-client privilege was invoked in Henry's behalf to prevent that testimony. But, there is an exception to that privilege in Chapter Three of the Rules of Ethical Requirements and Rules Concerning the Practice of Law of the Supreme Judicial Court: Rule 1.6(b):

“A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 must reveal, such information . . . that the lawyer reasonably believes is likely to result . . . in substantial injury to the **financial** interests or property of another;”

That exception was not brought to the court's attention.

20. Paul's **financial** interests were substantially injured by what June had done. And, the court should have been informed that Henry had been holding those certificates irrevocably in trust for Paul since they were payment for services he had already rendered, as a part of an earned compensation agreement,

21. Predictably, the Probate Court found against Paul. The Appeals Court sustained the Trial Court in an unpublished Memorandum and Order under Rule 1:28 dated June 30, 2004: No. 2004 P 1460. Their contents are incorporated.

22. For the next two years Henry's affairs, funds and health care management were under June's exclusive control. Henry's health and mobility deteriorated. He could no longer live alone and required nursing home care by the end of 2005. Around March, 2006, he was admitted as an in-patient at the North Shore Medical Center Union Hospital in Lynn.

23. When Henry's acute medical needs had been addressed and his care after discharge became necessary, the hospital's social worker that attempted to make those arrangements found June unresponsive.

24. At the social worker's suggestion, on August 14, 2006, Paul and Irving Marmer filed a guardianship petition in Henry's behalf: *In re: Guardianship of Henry I. Marmer*, Essex Probate and Family Court Department No. 2006 P 1870 GI 1. Despite June's initial opposition, IrvingMarmer was appointed Temporary Guardian.

25. In September, 2006, after a Probate Court hearing, June agreed with Irving Marmer that she would pay all of Henry's necessary and reasonable medical and nursing home expenses. She honored that agreement.

26. Around September, 2006, Greater Lynn Senior Services initiated inquiry against June questioning Henry's transfer of his assets to her as a potential **financial exploitation** of Henry as an **elderly** person under G.L. c. 19A. § 14. That inquiry abated when June continued to pay for Henry's nursing home care and related expenses.

27. Initially, the untimely and unfortunate circumstances of June's passing on November 11, 2006, brought the family together. Richard agreed to continue paying for Henry's necessary and reasonable expenses as June had done. Richard, David and April recognized that June's use of Henry's assets, including the proceeds of the certificates of deposit that Henry held in trust for Paul, was inappropriate, unjust and caused family animosity and resentment.

28. After extended family discussions and meetings culminating in August and September, 2007, Richard as Administrator entered into an agreement with the assent of David and April, with Paul. He was to be paid the sum of \$136,000 to reimburse him for the certificates of deposit that had been taken by June. Then, the remainder of June's assets would be divided so that Paul would receive one-half, and Richard, David and April would receive the other one-half in equal shares.

29. The leading object or main purpose of that agreement was to accomplish these purposes:

a. to provide for Henry's daily care and well-being as a nursing home resident, pending his Medicaid eligibility;

- b. to recognize that June's conversion of the certificates of deposit that had been in trust for Paul was improper;
- c. to undo the unjust result of Paul's litigation against Henry and June by repaying him the value of the certificates of deposit that were taken from him;
- d. to eliminate any appearance or trace of family animosity or resentment so that family harmony might be restored between Paul as an uncle, and June's children as his nephews and niece;
- e. to recognize and reciprocate the love and affection that Paul expressed for Richard when he invited him to live in Paul's home from 2001 to 2005.

Requests for Judgment

Count One: in contract.

30. Paragraphs 1 through 29 preceding are incorporated.

31. The court's jurisdiction is invoked under [G.L. c. 212, §§ 3 and 4](#), the court's general civil jurisdiction.

32. Paul has performed all of his covenants under the family agreement and now awaits performance by Richard as Administrator of his covenants.

33. Paul requests that the court enter judgment in his behalf against Richard, Administrator in the amount of \$136,000, and such other sums as the court finds may be due under the family agreement, and issue execution in that amount with costs and interest. *Count Two:* for declaratory judgment.

34. Paragraphs 1 through 29 preceding are incorporated.

35. The court's jurisdiction is invoked under [G.L. c. 231A, § I](#), the declaratory judgment statute, so called.

36. Paul requests that the court make a binding declaration of the rights, duties and status, as well as the other legal relations that may arise on the facts in this complaint.

37. Paul requests that the court enter judgment in his favor in accordance with the facts as found by the court, together with costs and interest, and issue execution in that amount,

38. Paul requests that the court enter such other and further orders as may be appropriate and just.

In accordance with [Rule 38 MRCP](#), Paul requests a trial by jury on the facts in this complaint.