

# Third District Court of Appeal

State of Florida, July Term, A.D. 2011

Opinion filed December 14, 2011.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D11-709  
Lower Tribunal No. 10-15402

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**Marjorie Rosenkrantz,**  
Appellant,

vs.

**James E. Feit,**  
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Ronald Dresnick, Judge.

Arnaldo Velez, for appellant.

Arthur J. Morburger, for appellee.

Before RAMIREZ, LAGOA, and EMAS, JJ.

RAMIREZ, J.

Marjorie Rosenkrantz appeals from an order dismissing her complaint for failure to state a cause of action. Because Rosenkrantz's complaint states a claim for declaratory relief, we reverse.

Gertrude Feit executed a Durable Power of Attorney when she began having memory loss. Gertrude named her daughter, Rosenkrantz, and her son, James Feit, as attorneys-in-fact to oversee her financial affairs. Gertrude and James live in Miami-Dade County, Florida. Rosenkrantz, who lives in New York, alleges that her brother refuses fully to account for their mother's assets, and objects to her efforts to obtain information directly from the financial institutions. Rosenkrantz contends that James' actions impair her ability to carry out her responsibilities as a co-attorney-in-fact, and she is in doubt as to her rights under the power of attorney.

Rosenkrantz filed the instant action seeking a declaration of her rights, as well as an order for an accounting from James. After one amendment, the trial court dismissed with prejudice Rosenkrantz's complaint for failure to state a cause of action. We review the trial court's order of dismissal for abuse of discretion. See Academy Express, LLC v. Broward Cnty., 53 So. 3d 1188, 1190 (Fla. 4th DCA 2011) ("Generally, the standard of review of a dismissal for failure to state a cause of action is de novo. However, in cases where the complaint seeks declarative relief, the standard of review is an abuse of discretion." (citations omitted)).

Florida's Declaratory Judgment Act, §§ 86.11 to 86.111, Fla. Stat. (2010), gives jurisdiction to the circuit courts to grant declaratory relief. State, Dep't of Env'tl. Prot. v. Garcia, 36 Fla. L. Weekly D1664 (Fla. 3d DCA Aug. 3, 2011). A party "seeking declaratory relief must allege ultimate facts showing that there is 'a

bona fide adverse interest between the parties concerning a power, privilege, immunity or right of the plaintiff; the plaintiff's doubt about the existence or non-existence of his rights or privileges; that he is entitled to have the doubt removed.”  
Id. at \*4 (quoting Conley v. Morley Realty Corp., 575 So. 2d 253, 255 (Fla. 3d DCA 1991)).

The durable power of attorney executed by Gertrude made Rosenkrantz and James co-attorneys-in-fact. In Florida, co-attorneys-in-fact under a durable power of attorney are liable “for failure either to participate in the administration of assets subject to the power or for failure to attempt to prevent a breach of fiduciary obligations thereunder.” § 709.08(9)(d), Fla. Stat. (2006).<sup>1</sup> Under Section 709.08(9)(a), “concurrence of both is required on all acts in the exercise of power.” Further, section 709.08(8) provides that an attorney-in-fact

is a fiduciary who must observe the standards of care applicable to trustees as described in s. 737.302. The attorney in fact is not liable to third parties for any act pursuant to the durable power of attorney if the act was authorized at the time. If the exercise of the power is improper, the attorney in fact is liable to interested persons as described in s. 731.201 for damage or loss resulting from a breach of fiduciary duty by the attorney in fact to the same extent as the trustee of an express trust.

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<sup>1</sup> In 2011, the Florida Legislature substantially revised, rewrote and renumbered Chapter 709, and repealed sections 709.01, 709.015, 709.08 and 709.11. Ch. 2011-210, Laws of Fla. (2011). These changes became effective on October 1, 2011, and thus are not applicable to the case at bar.

Thus, those acting as co-attorneys-in-fact must be guided by the same fiduciary principles applicable to co-trustees. As our sister court has observed:

It goes without saying that co-trustees owe to each other, as well as to the beneficiaries of the trust, the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible. At the same time, the trustees should maintain an attitude of vigilant concern for the proper administration or protection of the trust business and affairs.

Ball v. Mills, 376 So. 2d 1174, 1182 (Fla. 1st DCA 1979); see also Anton v. Anton, 815 So. 2d 768 (Fla. 4th DCA 2002); Brent v. Smathers, 547 So. 2d 683 (Fla. 3d DCA 1989).

Rosenkrantz's complaint alleges conduct which if proven would evidence that James was not complying with his duties, or observing the standard of care imposed upon him, as an attorney-in-fact. Rosenkrantz alleges that she sought to issue subpoenas to Gertrude's bank to obtain bank account information, but could not issue the subpoenas, or obtain this information, without James' concurrence as co-attorney. When James would not concur, Rosenkrantz found herself on the horns of a dilemma. On the one hand, she had reason to believe that James, her co-attorney-in-fact, was not fulfilling his fiduciary role, to Gertrude's detriment, and Rosenkrantz therefore had a fiduciary duty to act to protect Gertrude. On the other hand, Rosenkrantz could not act in the exercise of her power without the concurrence of James.

Rosenkrantz thus sought declaratory relief to determine: 1) the extent to which she can, as a co-attorney-in-fact, act without the concurrence of a co-attorney who may be acting in derogation of his fiduciary duty; and 2) whether she, as one co-attorney, is entitled to an accounting from the other co-attorney. If the allegations are proven as pled, it is clear that Rosenkrantz acted properly and prudently in seeking to fulfill her fiduciary role.<sup>2</sup> As a co-attorney, and co-fiduciary, Rosenkrantz had both the right and the duty to seek an accounting from James based upon her allegations of improper disbursements of Gertrude's property. See Payiasis v. Robillard, 171 So. 2d 630 (Fla. 3d DCA 1965); George Gleason Bogert & Amy Morris Hess, Trusts and Trustees 967 (2011).

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<sup>2</sup> It should be noted that the Florida Legislature addressed these very issues in its 2011 revisions to Chapter 709. Among the several significant changes, the new statutory scheme provides:

- A principal may designate two or more persons to act as co-agents, and unless the power of attorney otherwise provides, each co-agent may exercise its authority independently. § 709.2111(1), Fla. Stat. (2011).
- If a power of attorney requires that two or more persons act together as co-agents, one or more of the agents may delegate to a co-agent the authority to conduct banking transactions pursuant to the power of attorney. § 709.2111(6).
- An agent may be required by a co-agent to disclose receipts, disbursements, or transactions conducted on behalf of the principal. § 709.2114(6).
- An agent (including a co-agent) may petition a court to construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant other appropriate relief. § 709.2116(1).
- An agent's exercise of power may be challenged in a proceeding brought on behalf of the principal on the grounds that the exercise of the power was affected by a conflict of interest. § 709.2116(4).
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Here, Rosenkrantz has alleged a bona fide dispute between herself and James concerning Rosenkrantz' rights under the power of attorney for Gertrude. Rosenkrantz is in doubt as to her rights, and is entitled to declaratory relief to have these doubts removed. Thus, the trial court's order dismissing Rosenkrantz' complaint with prejudice is an abuse of discretion.

Accordingly, we reverse the order dismissing the complaint, and remand for further proceedings.

Reversed and remanded.