

Matter of Batishko (Zulawski Asset Mgt. Trust)
2007 NY Slip Op 32753(U)
September 4, 2007
Supreme Court, Nassau County
Docket Number: 2528-05/
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

In the Matter of the Settlement of the Trustee
Judy Batishko of her Accounting as Trustee of
the

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 2528/05

ZULAWSKI ASSET MANAGEMENT TRUST,

Motion Sequence No. 005, 006

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Notice of Cross Motion, Affidavits, & Exhibits	<u>2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	<u>5</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The trustee moves for an order approving and settling the final account of Judy Batishko, as Trustee of the Zulawski Family Trust, as revised and amended and attached to an affirmation as Exhibit A, and for an order discharging Judy Batishko, as Trustee of the Zulawski Family Trust. The respondent opposes this motion. The *pro se* respondent Steven Zulawski cross moves for an order denying the petitioner- trustee's motion for an order approving and settling a final account, as revised and amended on the ground the petitioner- trustee has failed to demonstrate the legal basis for approval of the accounting, for an order directing the petitioner-trustee to return to the estate of Hugo Zulawski certain property belonging to the decedent's estate on the ground the petitioner-trustee has failed to demonstrate she is authorized to take possession of that property, for an order directing the petitioner-trustee to return to the

Zulawski Family Trust certain expenses paid on behalf of the estate of Hugo Zulawski on the ground on the ground the petitioner-trustee has failed to demonstrate she is authorized to pay those expenses, for an order holding the petitioner-trustee liable for unpaid legal fees and costs in connection with this action on the ground the legal fees and costs do not represent reasonable and proper expenses of the administration of the Zulawski Family Trust, but were incurred solely for the benefit of the petitioner-trustee and one other beneficiary to the detriment of the Zulawski Family Trust and the respondent, for an order holding the petitioner-trustee personally liable for legal fees and costs incurred by the respondent with regard to the Zulawski Family Trust on the ground these legal fees and costs were incurred as a consequence of the petitioner-trustee's wilful failure to administer the Zulawski Family Trust in accordance with law and the terms of the Zulawski Family Trust, for an order awarding a sum of money from the personal funds of the petitioner-trustee to the respondent on the ground the respondent was harmed by the petitioner-trustee's wilful withholding of distribution to the respondent, for an order directing the petitioner-trustee to immediately distribute to the respondent a sum of money with interest to be paid from the personal funds of the petitioner-trustee corresponding to distributions made previously to herself and one other beneficiary, but withheld from the respondent on the ground the terms of the Zulawski Family Trust provide those distributions are to be shared equally among the three beneficiaries, and for an order denying all commissions requested by the petitioner-trustee on the ground the petitioner-trustee's calculations are invalid and the petitioner-trustee has wilfully failed to administer the Zulawski Family Trust impartially based on what is fair and reasonable to all of the beneficiaries as required by EPTL § 11-A-1.3 (b). The petitioner-Trustee of the Zulawski Family Trust opposes this cross motion.

The underlying action involves the settlement by Judy Batishko of her account as Trustee of the Zulawski Family Trust. Hugo Zulawski, the settler, died on September 30, 2003, and there are three beneficiaries of the Zulawski Family Trust upon Hugo Zulawski's death, to wit Judy Batishko, the petitioner/Trustee and Judy Batishko's brothers, Michael Zulawski and Steven Zulawski.

The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust states, in a supporting affirmation dated June 6, 2007, the Trustee attempted to settle the account informally, but was unsuccessful, so the Trustee petitioned for judicial settlement of the final account on or about February 15, 2005. The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust states Steven Zulawski, as one of the residuary beneficiaries of the Trust, filed objections to the account., and the petitioner in due course demanded of the Objectant a verified bill of particulars, and sought to take Steven Zulawski's deposition. The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust maintains, after repeated efforts failed, the petitioner moved this Court on June 15, 2006, for an order striking the Objectant's objections, and for judicial settlement of the Trustee's account. The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust avers on or about July 19, 2006, Steven Zulawski's attorney moved, by order to show cause, to be relieved as counsel. The Trustee's prior motion and the motion by Steven Zulawski's attorney were granted in separate Court orders dated October 4, 2006. The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust also points out there has been no appearance in this action by a new attorney on behalf of Steven Zulawski. The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust points to the petitioner's amended and undated accounting, and the proposed distribution, and requests the Court approve this

accounting in its entirety. The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust states the petitioner also seeks this Court's permission to distribute certain shares of a mutual fund owned by the Zulawski Family Trust "in kind," to Steven Zulawski as part of the final distribution, or absent Steven Zulawski's cooperation in accepting such an "in kind" distribution, Judy Batishko, as Trustee of the Zulawski Family Trust seeks authorization to sell the shares, distributing the net proceeds to Steven Zulawski, and allocate to his share any costs of selling and any tax liability incurred.

The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust states the petitioner is entitled to, and does request statutory commissions under SCPA § 2309 (a) which applies to lifetime trusts, as here, subject to this proceeding pursuant to CPLR Article 77. The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust notes SCPA § 2309 (a) provides the Court must allow to the trustee for services a commission from principal for paying out all sums of money constituting principal at the rate of 1%, to wit here the undated accounting amount is \$582,485.71, making the disbursing commissions \$5,824.85.

The respondent Steven Zulawski states, in an opposing affidavit dated June 20, 2007, the petitioner fails to make a showing that she administered the Zulawski Family Trust in accordance with the law and terms of the Zulawski Family Trust. The respondent Steven Zulawski challenges the supporting affirmation of the attorney for Judy Batishko, as Trustee of the Zulawski Family Trust dated June 6, 2007, in detail, in the opposing affirmation. The respondent Steven Zulawski states the petitioner's actions do not reflect the actions of an individual who is interested in settling the account in a fair and reasonable manner, and those actions constitute *prima facie* evidence that the petitioner never intended to settle the account informally according

to the terms of the Zulawski Family Trust.

The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust states, cross motion of the respondent Steven Zulawski should be denied because the Court has already struck the respondent's answer and objections, and the respondent's time to appeal that order has expired. The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust asserts the respondent's allegations are addressed by statute and mathematical calculations as demonstrated in this affirmation. The attorney for Judy Batishko, as Trustee of the Zulawski Family Trust avers the current objections to the account and cross claims of the respondent should be dismissed, the account as amended be judicially settled and approved, and Judy Batishko, as Trustee of the Zulawski Family Trust be discharged from liability as Trustee and permitted to make distribution as requested in the motion for settlement of the amended account.

The respondent Steven Zulawski states, in an opposing affidavit dated August 8, 2007, to the petitioner's reply, the petitioner fails to make a showing the reply was served and filed in accordance with law. The respondent Steven Zulawski states, even if the Court were to allow the petitioner to submit an answering affidavit to the notice of cross motion, the answering affidavit was not served in accordance with CPLR 2214 (b).

The Court has carefully reviewed and considered all of the parties' papers, and the Court determines the motion should be granted, and the cross motion denied as a matter of law. CPLR § 7701 provides:

A special proceeding may be brought to determine a matter relating to any express trust except a voting trust, a mortgage, a trust for the benefit of creditors, a trust to carry out any plan of reorganization of real property acquired on foreclosure or otherwise of a mortgage or mortgages against which participation certificates have been issued and guaranteed by a corporation and for which the superintendent of

insurance or the superintendent of banks has been or may hereafter be appointed rehabilitator or liquidator or conservator, a trust to carry out any plan of reorganization pursuant to sections one hundred nineteen through one hundred twenty-three of the real property law or pursuant to section seventy-seven B of the national bankruptcy act, and trusts for cemetery purposes, as provided for by sections 8-1.5 and 8-1.6 of the estates, powers and trusts law.

CPLR 7702 provides: “[a] petition by a trustee praying that his intermediate or final account be judicially settled shall be accompanied by an account verified in the form required by section twenty-two hundred nine of the surrogate's court procedure act.” CPLR 7706 provides:

Where an instrument described in section seven thousand seven hundred five of this article has been executed by all of the persons who would be necessary parties in a proceeding under section seven thousand seven hundred one of this article, none of whom is under the disability of infancy or incompetency, one or more of the trustees may present to the court a petition showing the names and post office addresses of all persons interested in the trust, whether or not the trust has been fully executed, that the petitioner has fully accounted and made full disclosure in writing of his administration of the trust to all persons interested, and praying that his intermediate or final account be judicially settled. There shall be filed with the petition the instrument described in section seven thousand seven hundred five of this article. The court may thereupon make an order settling the petitioner's account and discharging the petitioner and sureties on his bond, if any, from any further liability to all persons interested therein.

Judy Batishko, as Trustee of the Zulawski Family Trust has met the statutory prerequisites, and the respondent has not adequately opposed the petition, as a matter of law. CPLR § 8005 provides:

A trustee of an express trust shall be entitled to commissions and the allowance of his expenses and compensation and, if he be an attorney admitted to practice in this state, to the allowance of a sum on account of his compensation for legal services theretofore rendered to the trust, in the same manner and amount as that provided by sections twenty-one hundred eleven, twenty-three hundred eight and twenty-three hundred eleven of the surrogate's court procedure act for testamentary trustees, if the trust was established on or before August thirty-first, nineteen hundred fifty-six, or as that provided by sections twenty-one hundred eleven, twenty-three hundred nine and twenty-three hundred eleven of the surrogate's court procedure act for testamentary trustees, if the trust was established after August thirty- first, nineteen hundred fifty-six or as that provided

for by sections twenty-one hundred eleven and twenty-three hundred eleven for testamentary trustees and twenty-three hundred twelve of the surrogate's court procedure act except that the statements required thereunder to be furnished annually in order to retain certain annual commissions need be furnished during the settlor's lifetime only to beneficiaries currently receiving income. The court shall make such determinations and allowances as the named sections require or authorize the surrogate to make, and the term "will" used in those sections shall be construed to mean the instrument creating the trust and the phrase "the court from which his letters were issued" shall be construed to mean the court having jurisdiction of the trust.

SCPA § 2309 (1) provides:

On the settlement of the account of any trustee under the will of a person dying after August 31, 1956, or under a lifetime inter trust established after August 31, 1956, the court must allow to him his reasonable and necessary expenses actually paid by him and if he be an attorney of this state and shall have rendered legal services in connection with his official duties, such compensation for his legal services as shall appear to the court to be just and reasonable and in addition thereto it must allow to the trustee for his services as trustee a commission from principal for paying out all sums of money constituting principal at the rate of 1 per cent.

The petitioner has met the burden required by SCPA § 2309 (1), and the respondent has not met challenged the petitioner's entitlement.

Accordingly the motion is granted, and the cross motion denied. Submit order.

So ordered.

Dated: **September 4, 2007**

ENTER:



J. S. C.
HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION XXX

NON-FINAL DISPOSITION

ENTERED

SEP 06 2007