

Matter of Srozenski
2008 NY Slip Op 33081(U)
November 18, 2008
Surrogate's Court, Monroe County
Docket Number: 2006-1840
Judge: Edmund A. Calvaruso
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SURROGATE'S COURT OF THE STATE OF NEW YORK - COUNTY OF MONROE

In the matter of the Compulsory Accounting of)	
the Lifetime Trust of)	Decision and Order
JOSEPH SROZENSKI,)	
Deceased.)	File No. 2006-1840

Eugene O'Connor, Esq., for Susan Porcelli, trustee and petitioner, and Sr. Barbara Srozenski, trust lifetime beneficiary.

Robert Srozenski, *pro se*, as respondent and former trustee.

BACKGROUND

The basis of this matter is a contested accounting proceeding. On August 14, 2006 the beneficiary of a lifetime trust brought a compulsory accounting proceeding against respondent. Respondent was ordered to supply the beneficiary and the court with a verified accounting on or by November 30, 2006. Respondent never filed a verified accounting, but provided an informal one, a document which showed approximately \$63,000 of losses on a corpus of approximately \$100,000. On February 2, 2007, respondent was directed to file a petition for judicial settlement and to make himself available for examination by petitioner. He did not do so. He was subsequently removed as trustee pursuant to this court's October 11, 2007 order.

Respondent filed a "motion to dismiss" on June 27, 2008, arguing that all proceedings regarding this trust should be dismissed due to lack of subject matter jurisdiction by this court, and that 'proper' jurisdiction lies in New Jersey. He also filed a motion for a stay, pending a decision on the motion to dismiss. The stay was denied on August 5, 2008 and the "motion to dismiss" was denied by decision dated September 15, 2008.

A hearing was held on August 7, 2008, the purpose of which was to establish an account on the record. SCPA 2206. Respondent defaulted at this hearing but petitioner offered proof. On

September 26, 2008, respondent filed yet another motion, again seeking dismissal of all proceedings regarding this trust, again on the basis of lack of subject matter jurisdiction. Both the motion and the adjudication of the accounting are currently before the court.

OPINION

A hearing is proper to establish the account even if the fiduciary defaults. SCPA 2206(3). On the date of the hearing, respondent defaulted, despite his own motion being made returnable that day and despite conversations with court staff regarding the date and time of the hearing. In respondent's absence, petitioner put into evidence showing that respondent as trustee of the trust was to receive over \$127,689.62 which was entirely unaccounted for. Petitioner also established that respondent's management of the trust caused drastic losses to the trust, ultimately totaling \$79,310.21, through respondent's practices of day trading. It was also shown that respondent cashed in a mutual fund to invest over 70% of the trust's corpus in a single stock. Petitioner also established the fact that these proceedings have cost her \$16,427.06 in legal fees and disbursements. Petitioner's evidence shall be accorded a great deal of weight in establishing the account, since respondent offered no proof and missing information that is absent due to the fiduciary's failure to preserve it will be resolved against the fiduciary. *Vinlis Construction Co. v. Roreck*, 30 AD2d 668, 669 (2nd Dep't, 1968).

Procedurally, when a fiduciary fails to meet his or her burden of providing an accurate account, and the objectant provides evidence as to the inaccuracies, the burden shifts back to the fiduciary to "prove by a fair preponderance of the evidence that the account is accurate and complete". *Matter of Magnor*, 2000 NY Misc. LEXIS 660, 4 (2000). *In re Estate of Schnare*, 191 AD2d 859 (3rd Dept., 1993). Respondent has wholly failed to meet his burden. Accordingly, the Surrogate has the power to surcharge him with the amount of the inaccuracies and to make an order or decree as justice requires. *Schnare, supra*.

New Jersey¹ adopted the Prudent Investor Act in 1997. For pre-existing trusts, it applies to any management decisions made after its effective date. NJ Stat. § 3B:20-11.12. A will's or trust's provisions may alter or specify the standard of care, in which case the document's provisions will trump the statute and the document's provisions prevail. NJ Stat. §3B:20-11.2(b), though this does not reflect a change in law but rather a codification. *See, Manufacturers Trust Co., v. Earle*, 32 NJ Super. 262 (1954). The statute requires diversification, barring "special circumstances". NJ Stat. §3B:20.11.4. It requires the fiduciary to weigh eight non-exclusive factors in determining an investment strategy, NJ Stat. §3B:20-11.3, and demands prudence, "reasonable care, skill and caution", *id.*, with investment decisions made, and that they be "solely in the interest of the beneficiaries". NJ Stat. §3B:20-11.5.

Fiduciaries can be surcharged for losses experienced by the estate, so long as the losses were due to breach of duty²: fraud, gross carelessness, indifference to duty. NJ Transaction Guide, § 8.43. *See, Wilson v. Tripp*, 124 NJ Eq 45 (1938). Fiduciaries are not held liable when they have managed the fund with good faith and prudence, and the losses in the estate can be attributed to economic conditions, as an old line of cases holds. *See, Wilson v. Tripp*, 124 NY Eq. 45 (1938), *Cox v. Camden Safe Deposit & Trust Co.*, 124 NY Eq., 490 (1938). Cases holding the fiduciary liable have surcharged for losses incurred through breach of fiduciary duty. In *NJ Title Insur. Co., v. Caputo*, 163 NJ 143 (2000), an executor had stolen money from an estate and had received a judgment against him. In the Caputo case, the New Jersey Supreme court wrestled with the definition of "bad faith" to help determine whether the depository bank's actions represented sufficient complicity such as to open itself up to liability under the Uniform

¹New Jersey law shall apply to the liability of respondent, since Article Tenth of the trust specifies New Jersey as settlor's choice of law for governance of the trust

²The Prudent Investor Act appears not to change the standard of review in general but rather the perspective employed during the review: to consider the trust corpus as a whole rather than a review of each particular investment in a vacuum. *See, Robert M. Hayden, Trustee Delegations and the Prudent Investor Act: Filling the Gaps*, 32 Rutgers L. Rec. 64 (2008), for a discussion on the historical background and legal progression of fiduciary guidelines.

Fiduciary Act. In *In re Niles Trust*, 176 NJ 282 (2003), a trustee who embezzled and ‘misused assets’ was held liable and surcharged. Trustees have also been held liable for ‘mere’ negligence in estate management; typically through lazy oversight of assets. In *Estate of Schlem*, the trustee was held liable for significant losses to the estate when the trustee did not sell off stock over the course of ten years though the value dropped from \$122,461 to \$2,304. The *Schlem* court stated that the trustee had “showed an absolute lack of good faith and reasonable discretion”. *Schlem* at 294. In *Estate of Bayles*, an executor was surcharged for breach of fiduciary duty when he failed to liquidate stock promptly when it caused significant loss to the estate. 108 NJ Super. 446 (1970).

As the latter examples show, under New Jersey law, a fiduciary can be held liable for omission or negligence causing loss to the estate, and the arbiter of the actions will be whether or not the trustee acted according to the requirements of prudence and caution. The Cox court states the standard thus:

a trustee is required to conduct himself faithfully and to exercise a sound discretion and to be enlightened by observance as to how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds. *Cox v Camden Safe Deposit and Trust Co.*, 124 NJ Eq., 490, 500 (1938).

The Bayles court described the standard more narrowly, quoting New Jersey Practice regarding the proper amount of caution that fiduciaries are charged with:

Where the opportunity for gain more than compensates for the risk of loss, an ordinary prudent man will speculate with his property; *but a fiduciary may not speculate with the property in his charge.* He must in that regard act more cautiously than a man of ordinary prudence; for unlike the ordinary man his concern is not with increasing an estate but with preserving the principal and providing for a regular income. *In Re Bayles*, 108 NJ Super. 446, 454 (1970), emphasis added.

The New Jersey Prudent Investor Act underscores this, since it codifies the fact that prudence will be adjudicated based upon *conduct* and not *outcome*. NJ Stat. §3B:20-11.9. Speculation can create gains in a trust fund, but the statute makes it clear that such actions would be equally imprudent even if the estate suffered no loss at all.

In the case herein, respondent breached his fiduciary duty to the trust beneficiary by using the trust corpus to speculate and to perform “day trading”. There was no evidence of fraud or embezzlement. Nevertheless, the lack of any such behavior does not equate to good faith. Fiduciary duty requires that a trustee act prudently, cautiously, without speculation. The choices respondent made in managing this trust reflected an opposite perspective. The funds in the corpus were not to be used as respondent’s experiment, toy or hobby; they were a trust estate meant to be managed reasonably, for the interest of the beneficiary. The facts show speculation, risk and a complete disregard for prudence by respondent, facts showing a step beyond mere negligence and crossing into gross carelessness and indifference to duty; in other words, bad faith. *See, NJ Title Insr. Co. V. Caputo*, 163 NJ 143 (2000), *Wilson v. Tripp*, 124 NJ Eq 45 (1938)

At the time of the hearing, petitioner established damages as well as respondent’s role in creating them. New Jersey law allows for the transferral of the cost of plaintiff’s legal fees to the defendant, if those legal fees were incurred due to a tortious act by the defendant. In *In Re Niles Trust*, 176 NJ 282 (2003), defendants were surcharged for plaintiff’s legal fees due to the breach of defendant’s duty as trustee, proximately causing the attorney fees. The same line of reasoning applies here; petitioner trustee and prior to that, the trust beneficiary have expended a great deal of time, effort and money to first inquire and then to confirm that respondent was not fulfilling his fiduciary obligations; a breach which has caused losses to the beneficiary as well as the trust.

In accordance with the damages established by the petitioner, respondent shall be surcharged \$127,689.62 in amounts unaccounted for, *In re Estate of Schnare*, 191 AD2d 859 (3rd Dept.,

1993), and \$16,427.06, representing attorney fees and attorney disbursements in bringing and prosecuting this action. With regard to the losses experienced by the trust due to the trustee's investment decisions, the trustee shall be surcharged \$79,310.21, representing losses incurred due to his mismanagement of the trust. Respondent has argued that the trust document waives liability, but his claim is without merit. Even presuming New Jersey public policy permitted a complete waiver of fiduciary liability, the trust language which respondent quotes in his memorandum of law ("to make such investments and reinvestments of principal and accumulated income as [he] may consider proper without limitation to *what is legal or trust investments*" [emphasis added], Article FOURTH), has been incorporated into the New Jersey statute to be construed to mean "authorizing any investment or strategy permitted under this act". NJ Stat. §3B:20-11.11. Furthermore, since respondent's investment decisions represented an affirmative choice to essentially gamble with the *res* of the trust, he acted in an egregiously risky manner, and his actions went a step beyond 'mere' negligence. Respondent cannot be absolved by claims that he acted in good faith when his actions have clearly shown otherwise.

With respect to Respondent's motion to dismiss dated September 28, 2008, it is denied on the grounds of *res judicata*. The issue of subject matter jurisdiction was already entertained and decided by this court. Respondent's current motion seeks to raise the same issue a second time, a practice bordering on frivolous under 22 NYCRR 130-1.

As adjudicated per the provisions above, respondent is hereby surcharged a total of \$223,426.89.

So ordered.

November 18, 2008

Edmund A. Calvaruso

Hon. Edmund A. Calvaruso, Surrogate