

Matter of Monfort

2009 NY Slip Op 31431(U)

June 22, 2009

Surrogate's Court, Nassau County

Docket Number: 76261

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Judicial Settlement of the Final Accounts of
Proceedings of Fleet Trust Company and Marguerite E. Titus, as
Resigning Co-Trustees of the Five Trusts created under the
Will of

Burtis H. Monfort
and
Maude E.H. Monfort,
Deceased,

File Nos. 76261
76262

for the Benefit, respectively, of Marguerite E. Titus, Alburta I.
Anschutz, Martha B. Knowles, Burtis H. Monfort, Jr., Eileen L.
Monfort Bradley, and others, for the period January 2, 1977 to
and including June 8, 1985.

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In the Matter of the Judicial Settlement of the Final Accounts of
Proceedings of Fleet Trust Company and Marguerite E. Titus, as
Resigning Co-Trustees of the Five Trusts created under the
Will of

Burtis H. Monfort
and
Maude E.H. Monfort,
Deceased,

Dec. Nos. 352
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for the Benefit, respectively, of Marguerite E. Titus, Alburta I.
Anschutz, Martha B. Knowles, Burtis H. Monfort, Jr., Eileen L.
Monfort Bradley, and others, for the period June 8, 1985 to
and including March 31, 1992.

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In this proceeding to settle the accounts of the trustees of five testamentary trusts,
petitioner moves for an order granting summary judgment and objectants cross-move for an order
granting partial summary judgment.

Before the court is a petition to settle the accounts of Bank of America (successor
corporate trustee) and Marguerite Titus (deceased successor trustee) for five testamentary trusts
created under the wills of Burtis Monfort and Maude E.H. Monfort for the period January 2,
1977 to June 8, 1985 and June 8,1985 to March 31, 1992.

Burtis H. Monfort and Maude E.H. Monfort were survived by five children: Burtis H. Monfort, Jr.; Marguerite Titus; Alberta Anschutz; Eileen L. Monfort Bradley and Martha Knowles. On August 7, 1956, letters of trusteeship issued to Eileen L. Monfort Bradley; Burtis H. Monfort, Jr.; Marguerite Titus and Franklin National Bank.

Fleet Trust Company succeeded Franklin National Bank and Bank of America now appears in the proceeding as successor to Fleet.

Eileen L. Monfort Bradley died in 1985. In 1992 the surviving individual trustees resigned and successor letters of trusteeship issued to James C. Titus, Townsend Anschutz, Nancy Famigletti and Pamela Monfort, remaindermen of the trust, to serve with the corporate trustee.

The petitions to settle the accounts were filed in 1992 and objections filed in 1995. It appears that pretrial examinations were conducted between 1995 and 2004. In 2005 petitioner filed a motion for summary judgment and objectants filed a cross-motion for summary judgment.

It thereafter became apparent that jurisdiction was not complete as a result of the death of several persons since the filing of the petition. In a decision dated May 24, 2008, the court noted that there was no representation for the estates of Marguerite Titus or Burtis H. Monfort, Jr. and it was not clear whether all of the beneficiaries of the estate of Alberta Anschutz had received citation.

Jurisdiction over the estate of Marguerite Titus was accomplished by substitution of the representatives of her estate.

The beneficiaries of the estate of Burtis H. Monfort, Jr. alleged that he was not a proper party to this proceeding as he had been given permission to resign by a prior decree of this court. By decision dated December 22, 2008, the court determined that the estate of Burtis H. Monfort,

Jr. was a respondent in the proceeding. Thereafter, the distributees of his estate were served, as directed by the court, with a supplemental citation and supplemental notice that the estate might be liable for indemnification and contribution to Bank of America in the event the objections to the accounting were sustained.

With respect to the estate of Alberta Anschutz (objectant), the distributees of her estate do not intend to pursue objections to the accounting and thus it is not necessary that a representative of the estate be appointed to receive supplemental citation in this proceeding.

The court concludes that jurisdiction is complete in this proceeding.

The real property, which is the subject of the objections to the account, is located in Port Washington, New York. In 1948 Burtis Monfort executed a contract with North Shore Shopping Center, Inc. for the lease of the property for forty-two years commencing July 1, 1948 and ending July 1, 1990.

Article “TWELFTH” of the lease, provided in part that:

“The lessee will deliver up the buildings required by the lease to be erected by the lessee ... in good repair and condition, reasonable wear and tear excepted.”

The last will and testament of Burtis Monfort and the last will and testament of Maude Monfort created testamentary trusts and directed the trustees to retain the real property as an asset of the trusts.

Objectants allege that the bank breached its fiduciary duty by failing to enforce the terms of the lease and recover from the tenant damages for failure to make repairs and for other violations of the lease. Objectants allege that the bank entered into an inadequate settlement with the tenant releasing the tenant from further liability for damages. Objectants seek partial summary judgment on the objections alleging mismanagement by the bank.

Objectants allege that the sale of the real property, for which the trustees received court approval, was “ill-advised.” Further, it is alleged that the trustees paid excessive premiums for insurance and excessive fees for management of the property and for legal services. There are additional allegations concerning management of the property including the collection of rents, filling of vacancies and expenses for repairs made subsequent to the termination of the lease.

EPTL 11-2.3 provides that “a trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard” as defined by the statute. The standard under EPTL 11-2.3 is not strictly whether a trustee is liable for common law negligence. It is a broader standard of breach of fiduciary duty (*Matter of Blumenkrantz*, NYLJ, Mar. 20, 2009, 35, col 6 [Sur Ct, Bronx County]). A determination as to whether a trustee’s conduct measures up to the appropriate standards of prudence, vigilance and care is a fact to be determined by the trial court (*Matter of Donner*, 82 NY2d 574 [1993]; *Matter of Hubbell*, 302 NY 246 [1951]; *Matter of Winston*, 39 AD3d 765 [2d Dept 2007]).

The trustees had authority to enter into a settlement with the tenant releasing the tenant, for consideration, from further liability for damage to the property (EPTL 11-1.1[b][13]). The court has authority to review that exercise of discretion (*Matter of Leopold*, 259 NY 274 [1932]), which necessarily involves questions of fact.

Objectants contend that the tenant breached the provision of the lease which required that the premises be returned in good condition excepting ordinary wear and tear and that the settlement was therefore inadequate. The question as to whether this express covenant to repair (*McGregor v Board of Educ.*, 107 NY 511 [1887]; Friedman on Leases §18.1 [2007]) was breached requires analysis of the age and nature of the property (*Black & Yates, Inc.*, 21 Misc 2d 672 [Supreme Court, Special Term, Kings County 1960]). These are questions of fact that

cannot be resolved on a motion for summary judgment.

Objectants seek to surcharge the bank, alone, for alleged mismanagement of the estate. If there is finding of breach of fiduciary duty, it is for the court to apportion liability among the trustees (*Matter of Rothko*, 56 AD2d 499 [1st Dept 1977], *affd* 43 NY2d 305 [1977]) which also involves questions of fact.

Whether the trustees breached their fiduciary duty by failing to petition the court to remove the restriction on a sale prior to termination of the lease is another question of fact.

Payment of attorneys' fees is subject to review by the court to determine whether they are reasonable. This requires a review of several facts (*Matter of Bobeck*, 196 AD2d 496 [2d Dept 1993]; *Matter of McCann*, 236 AD2d 405 [2d Dept 1997]) not presently before the court, and the attorneys have not waived a hearing. Whether the trustees will receive full commissions depends upon the determination of the issues previously discussed.

The existence of triable issues of fact precludes summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Bruno v Sant'elia*, 52 AD2d 3d 556 [2d Dept 2008]; *Sharoh v Hourihan*, 50 AD3d 665 [2d Dept 2008]).

Accordingly, the motion for summary judgment and cross-motion for partial summary judgment are denied. This matter will appear on the court's calendar for conference on July 8, 2009 at 9:30 a.m. to schedule a trial date.

Settle order.

Dated: June 22, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court