

Matter of JP Morgan Chase Bank (Wallace)

2010 NY Slip Op 34135(U)

July 15, 2010

Surrogate's Court, New York County

Docket Number: File No. 1340-2009

Judge: Kristin Booth Glen

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This opinion is uncorrected and not selected for official publication.

JUL 19 2010

SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Third and Final Account of
Proceedings of JPMORGAN CHASE BANK, N.A.
(successor to Central Union Trust Company of New
York by merger and change of name), as Trustee
under Indenture dated November 5, 1923 between

New York County Surrogate's Court
DATA ENTRY DEPT.
Date: JUL 15 2010

CHARLOTTE C. WALLACE,

File No. 1340-2009

as Grantor, and Central Union Trust Company of
New York and Howard Chichester, as Trustees.
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G L E N, S.

This is a proceeding brought by JP Morgan Chase Bank (as successor to Central Union Trust Company of New York) for the judicial settlement of its final account as surviving sole trustee of an inter-vivos trust created by Charlotte C. Wallace on November 5, 1923. Co-trustee Howard Chichester died on November 17, 1940, and no successor was appointed in his place. Petitioner's first and second intermediate accounts, covering the period from inception through December 28, 1987, were informally settled by agreement. Petitioner's third and final accounting, covering the period from December 28, 1987 through December 31, 2008, is under review in this case.

Under the terms of the trust instrument, the trustees were directed to pay the net income of the trust to the grantor annually, for her lifetime. Ms. Wallace died on February 28, 1976. Upon her death, the trust continued for the benefit of her son, Howard C. Wallace, with the net income of the trust payable to him, annually, for his lifetime. The trust was to terminate upon Mr. Wallace's death, with the remaining trust assets payable to such person or persons as Mr. Wallace might direct under a power of appointment. Mr. Wallace died on July 14, 2006 and his

will was admitted to probate by this court. By Article Fifth of his will, Mr. Wallace appointed the trust remainder to Heinrich J. Ziegler.

As ultimate trust beneficiary and as executor of Mr. Wallace's will, Mr. Ziegler has filed thirteen separately stated objections to the final accounting. Petitioner has now filed a motion to dismiss all but two of them¹. Additionally, petitioner has requested the alternative relief of summary judgment with regard to dismissing objection number 9.

Objections 1, 11 and 12

Objections 1 and 11, respectively, object to the "decrease in value, realized and unrealized, in the sum of \$379,710.11, of which \$186,224.86 has been realized and \$193,485.25 has been unrealized as of the date of the trustee's account" and "trustee's failure to earn a reasonable income in the trust property." Objection 12 alleges in part that "the trustee failed to exercise reasonable care, skill and [certain] caution to make and implement investment and management decisions as required of a prudent investor for the entire portfolio taking into account the purposes and terms and provisions of the governing instrument." Petitioner moves to dismiss objections 1 and 11 on the ground that they fail to state a claim (CPLR 3211[a][7]) and objection 12 on the ground that it is not sufficiently particular. However, when read singly or in combination with objection 12, objections 1 and 11 state a cognizable ground for surcharge, *i.e.*, that the trustee's actions as an investor resulted in improper losses and inadequate income on the trust fund during the accounting period. Moreover, under the statutory requirements for notice

¹ Objections numbered 5 and 6 are the subject of a separate motion to dismiss by Kenneth McCallion, Esq., who was objectant's attorney in the contested probate of the will of Howard C. Wallace.

pleadings (SCPA 302, CPLR 3026), a petition (or complaint) should not be dismissed if it “states in some recognizable form any cause of action known to our law” (*Foley v D’Agostino*, 21 AD2d 60, 64 [1st Dept][1964]; see also *Matter of Schneider*, 64 Misc2d 299, 301 [Sur Ct, Westchester County][1970]). In other words, these objections, when read in combination, give adequate notice to the fiduciary of the basis for the surcharge that objectant seeks. Accordingly, petitioner’s motion to dismiss objections numbered 1, 11 and 12 is denied.

Objection 2

Objectant alleges that petitioner’s investment of trust property in proprietary funds constituted a conflict of interest which was undisclosed to the income beneficiary. Petitioner challenges this objection on the basis of its authority under EPTL 11-2.3(d) to invest in its proprietary funds, arguing that the objection therefore fails to state a ground for surcharge. EPTL 11-2.3(d) (as well as its predecessor statute EPTL 11-2.2[b][1]) allows a fiduciary to invest in certain securities, “notwithstanding that the trustee or an affiliate of the trustee acts as investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager or provides other services to the investment company or trust.” The statute applies to “any management type investment company or trust which is registered pursuant to the Federal Investment Company Act of 1940.” Petitioner has submitted an affidavit confirming that all of the proprietary (as well as third party) mutual funds held in the trust were registered pursuant to the Federal Investment Company Act of 1940. Petitioner, therefore, was permitted under statutory law to invest in its proprietary funds (see *Matter of Chase Manhattan Bank*, 11 Misc3d 725, 728 [Sur Ct, New York County][2005]). Furthermore, there is nothing in the statute requiring disclosure of such holdings to the trust beneficiary prior to accounting. Accordingly, petitioner’s motion to dismiss

objection number 2 is granted.

Objection 3

Objection 3 challenges the \$12,500 in fees that petitioner paid to an outside accounting firm in connection with the preparation of this account. Objectant alleges that the accounting services entailed in preparing the final account were among the fiduciary's standard responsibilities. Whether the services in question were indeed to be borne by the trustee, or whether they were instead to be borne by the trust fund as tasks beyond what could be expected, even a professional fiduciary, is a question of fact (*see Matter of Acker*, 128 AD2d 867,868 [2nd Dept. 1987]). In no event, however, does the objection fail to state a ground for surcharge, based as it is on the proposition that the fee in question was an unwarranted expenditure of trust funds. Such a determination is in the discretion of the court, and therefore, the motion to dismiss objection number 3 is denied.

Objection 4

Objectant objects to the legal fees of petitioner's counsel as excessive and arising from unnecessary services. Petitioner moves to dismiss this objection in that it lacks specificity as required by SCPA 302(2). Where an objection questions the reasonableness of legal fees on an accounting, it raises a legitimate issue (in effect "stating a claim") that is not subject to outright dismissal under CPLR 3211(a)(7). Accordingly, the motion to dismiss objection number 4 is denied.

Objection 7

Objection number 7 has been withdrawn, and the motion to dismiss this objection is therefore moot.

Objection 8

Objectant alleges that the trustee's purchase and retention of iShares² was an "unsuitable investment." Objectant, however, fails to state how or why iShares were an unsuitable investment or what loss has been suffered by the trust on account of that investment. Since objectant fails to state any ground for surcharge in this connection, petitioner's motion to dismiss this objection is granted.

Objection 9

Objectant alleges that federal and New York State income taxes paid by the trustee were either entirely unnecessary or excessive. Petitioner moves to dismiss this objection as being baseless and in any event contrary to law regarding taxation of trusts.

Petitioner's motion to dismiss objection number 9 is denied because the objection clearly states a cognizable ground for surcharge. Although petitioner has moved in the alternative for summary judgment denying this objection, it has failed to provide sufficient proof on the merits. Accordingly, the motion to dismiss is denied, and the motion for partial summary judgment is denied as premature.

Objection 10

Objectant alleges the trustee retained its annual commissions without furnishing the beneficiaries with an annual statement regarding the trust assets (SCPA 2308[4], 2312[6]). The trustee responds that Howard C. Wallace, the income beneficiary, was provided with statements quarterly, and on that basis moves to dismiss. Whether Mr. Wallace was furnished with such

² An iShare is an exchange-traded fund (ETF) which performs like a mutual fund tracking specific indexes, but trades like an individual security on a stock exchange (see ishares, http://us.ishares.com/understand_etf/fundamental/what_is_etf.htm [accessed Jul. 12, 2010]).

annual statements is a question of fact. Accordingly, objection number 10 cannot be dismissed as a matter of law, and the motion for such dismissal is therefore denied.

Objection 13

Objection number 13 is withdrawn, and the motion to dismiss this objection is therefore rendered moot.

As indicated by the foregoing, petitioner's motion to dismiss is granted as to objections numbered 2 and 8, and denied as to objections numbered 1, 3, 4, and 9 through 12.

This decision constitutes the order of the court.



SURROGATE

Dated: July 15, 2010