SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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LAUREN PRESSMAN GREENFIELD,

Petitioner,

- v -

MARK JAFFE, BETH RACHEL PRESSMAN, GERARD PROEFRIEDT, JUNE JAFFE, KIMBERLY LYN PRESSMAN, and EMILY WOLF,

Respondents.

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INDEX NO. 158802/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to remove trustees.

Petitioner, pursuant to CPLR 7701 seeks a judgment removing respondents Mark M. Jaffe, Beth Rachel Pressman, and Gerard Proefriedt as trustees, and an order awarding compensatory and punitive damages for a breach of fiduciary of fiduciary duty against Mark. Respondents Mark, Beth, Proefriedt, and June Jaffe oppose.

I. BACKGROUND

On March 14, 1998, nonparty-settlors, and their son, Mark, as trustee, entered into a trust agreement creating the Jaffe Family Trust, which was created to provide for the settlors until their passing, with Mark and Beth as equal remainder beneficiaries. The trust provides that upon the death of a settlor, it is to be divided into four separate trusts, and upon the death of the other settlor, the four trusts are to be restructured into two trusts, one for the benefit of Mark and one for the benefit of Beth. In addition, the trust agreement allows Mark to convey to his spouse a 50 percent life interest in his share of the trust income upon his death if she survives him, and

provides for the appointment of a special trustee who is not "a beneficiary, or related, subordinate or subservient to the beneficiary" as defined by Internal Revenue Code (IRC) § 672(c). Upon the death of both settlors and the formation of the trusts for the benefit of Mark and Beth, the trustee, as the special trustee in its sole and absolute discretion sees fit, may pay for their benefit from the net income or, if necessary, principal of the trusts. (NYSCEF 2).

One of the settlors died on May 29, 1998, and on June 26, 1998, Mark executed a Trust Funding Agreement which transferred the assets of the Jaffe Family Trust into four separate sub-trusts. (NYSCEF 13).

On July 27, 1998, nonparty B. Jaffe Real Estate Co., LP (Jaffe LP) was formed with nonparty B. Jaffe Real Estate Co., Inc. (Jaffe GP) serving as general partner. Jaffe GP was allocated one percent of the shares in Jaffe LP, and the four sub-trusts owned the remaining 99 percent. Jaffe LP owns property in Manhattan. (NYSCEF 14, 15).

II. VERIFIED PETITION (NYSCEF 1)

By notice of petition dated September 21, 2018, petitioner initiated this special proceeding and alleges the following:

Mark appointed Proefriedt as special trustee, and appointed Beth, petitioner's mother, as a co-trustee. Mark conveyed to his wife, June, a 50 percent life interest in his share of the trust income upon his death if she survives him.

The other settlor passed away in 2002. Upon her death, the requirement that the sub-trusts be restructured into two trusts, one for Mark's and one for Beth's benefit, was put off for tax purposes. Presently, Mark and Beth serve as trustees for one another's trusts. Petitioner and her sister, respondent Kimberly Lyn Pressman, are remainder beneficiaries of those trusts.

The Manhattan property is worth $45 to $60 million and encumbered by a $19 million

loan. It consists of residential lofts, some of which are rent stabilized, retail and commercial space, a parking lot, and air rights. Jaffe GP, which manages the property, is wholly owned by Mark and Beth; Mark is the majority owner.

Since 2014, Mark has sought help with the property, and has solicited parties interested in buying it or partnering with the trusts to develop and manage it. According to Mark, by 2016, it became imperative to select a deal and "move forward" on it by the first quarter of 2017.

On December 23, 2016, petitioner emailed Mark about an offer she had obtained for the purchase of 40 percent of the property. The deal, described by petitioner as "significantly better" than others, would guarantee a ten-year stream of income, management of the property by a third-party, and, if needed, access to additional funds for Mark and his generation of beneficiaries. On January 20, 2017, Mark responded by email with detailed objections to the offer and expressed a lack of concern for the interests of the remainder beneficiaries. Rather, his focus was on the needs of Beth, June, and himself. (NYSCEF 3).

On May 1, 2017, Mark emailed petitioner, stating that neither she nor her sister has "any legal or equitable power with regard to the disposition of the property or its management" until Mark's generation of beneficiaries passes, and reported that one of the settlors had told him that neither petitioner nor her sister "should be rewarded in any extraordinary way from this property to the detriment of Beth, myself, and June." Mark also commented on other familial issues. (NYSCEF 4).

Petitioner asserts that Mark, as trustee, owes a duty of loyalty to all beneficiaries, including remainder beneficiaries, and seeks to sell or lease the property on terms that would only benefit his generation of beneficiaries. The deal she proposed, for example, increases rental income over time while decreasing the amount of units subject to rent stabilization, whereas

Mark, without objection from Beth or Proefriedt, rejected the deal given his intent to increase the income stream for June, Beth, and himself.

According to petitioner, Mark has rejected numerous viable deals, demonstrating his lack of understanding of real estate matters and failure to manage the property prudently. He did not select a qualified advisor or partner to aid him nor did he adequately negotiate the sale of the property. Instead, Mark engaged the services of a broker, an inherently interested party, which procured offers for a "hybrid ground lease" whereby a substantial amount would be paid upfront in exchange for a reduction in the amount of rent owed over the remaining years of the lease. Such a proposal, petitioner maintains, offers short-term benefits to the life beneficiaries and reduces the future value of the property.

Petitioner also takes issue with the valuation analysis prepared by Mark and the broker, contending that it reflects an inability to manage the sale of the property. Moreover, petitioner notes that the broker's 10 percent commission on the upfront payments is two to three times that of other firms recommended by her and serves to motivate it to support Mark's plans.

Despite petitioner's expertise in real estate matters, Mark has ceased all communications with her concerning the trusts and property. As neither Beth nor Proefreidt have intervened on behalf of her or her sister, she claims that they too have breached their fiduciary duties, warranting their removal.

Petitioner also asserts that Mark must be removed due to his conflicts of interest and that he is incapable of maintaining his fiduciary duties because, as the majority shareholder of Jaffe GP and a current trust beneficiary, he has a vested interest in maximizing the short-term value of the property without regard for its long-term value. Proefriedt too is conflicted, she claims, as he not only serves as special trustee, but is retained by Mark as counsel on loft law issues for the

property and trusts. She maintains that Mark's appointment of Proefriedt constitutes a breach of fiduciary duty, warranting his removal. On information and belief, respondent Emily Wolf, the alternate trustee, believes that Proefreidt cannot simultaneously be retained by Mark and serve as trustee.

Petitioner also contends that the property's rental income is not maximized under Mark's oversight and that there are rental vacancies because he neither renovated vacant units nor obtained necessary certificates of occupancy, and he permitted commercial tenants to remain in the building and renew their leases even though they paid no rent. Despite the trust requirements, petitioner received no accounting from Mark, nor has he provided her or any other beneficiary with adequate financials, in breach of his fiduciary duty.

Accordingly, petitioner brings this special proceeding seeking the removal of Mark, Beth, and Proefreidt as trustees pursuant to Estates, Powers and Trusts Law (EPTL) § 7-2.6, and asserts causes of action for breach of fiduciary duty against Mark, and for an accounting, compensatory and punitive damages, costs, and attorney fees.

On November 2, 2016, Mark, Beth, Proefriedt, and June filed their verified answer in which they admit that Wolf was appointed as "Successor Special Trustee." (NYSCEF 9). That same day, Wolf filed her verified answer in which she denies knowledge or information sufficient to form a belief as to the truth of petitioner's allegations, but admits that she is "Successor Special Trustee." (NYSCEF 10).

III. CONTENTIONS

A. Respondents (NYSCEF 9-26)

1. Mark (NYSCEF 11)

In opposition, respondents submit the affidavit of Mark in which he asserts that the

primary intent of the settlors was to provide for Beth and him in their old age, and maintains that in 2017, he sought the help of petitioner in disposing of the trust property. After receiving more than a dozen offers from developers and investors seeking to acquire and develop the property, and rejecting many which would have benefited the contingent remainder beneficiaries of the trusts, petitioner produced an offer crafted by her. After reviewing it, Mark concluded that it was not in the best interests of the life beneficiaries as it would impose on the trusts significant interest and capital charges, potentially leaving the life beneficiaries in debt. Believing that petitioner was concerned with only herself and the offeror, Mark did not involve petitioner in future discussions with developers.

Mark asserts that the offeror is still bidding on the property and that its latest offer, for example, would result in a $4,774,710.00 deficit to Jaffe LP during the first year of the ground lease, leaving Beth and him without income for several years, while disproportionately benefitting petitioner in the future.

The broker he hired, Mark claims, was successful in selling another property, and thus he hired it as marketing agent for the property. Their agreement provides that parties who had previously bid on the property would be given a 50 percent reduction on the commission. After targeting some 100 prospects, the broker procured 15 credible offers, all of which are better than that procured by petitioner, and to date, Mark has three bids, each of which is structured as a ground lease or an installment purchase sale and will annually yield approximately $1.1 million.

Mark contends that petitioner is financially stable and provides no aid to Beth, who is retired and relies on the trust for support. Moreover, he and Beth maintained and managed the property for several decades, without petitioner's help. To the extent petitioner complains that he improperly delayed restructuring the trusts, Mark claims that in doing so, the trusts realized

approximately $3,000,000 in tax benefits.

Mark asserts that he owns 51 percent of the shares of Jaffe GP, and Beth owns the remaining 49 percent. Petitioner has no office, voting rights or other rights in Jaffe GP or Jaffe LP, and Proefriedt was originally hired as an attorney by one of the two original settlors due to his expertise on loft law matters. Mark explains that after the trust was created, there was a rent strike, and as the settlors were unable to pay the fees to the originally designated institutional trustee, Proefriedt was made special trustee. According to Mark, he never employed Proefriedt as his attorney, and Proefriedt never worked on personal matters for Beth. However, Mark states that, with his and Beth's consent, Proefriedt has been "consulted" to answer questions concerning landlord/tenant and loft law issues affecting the property, and that he is being paid by the trusts for such consultation.

Mark explains his intemperate emails to petitioner as responses to her conduct, and he denies having acted contrary to his fiduciary obligations. He also claims that petitioner refused his offer of financial information about the property and denies that the trustees have refused to provide her with an accounting, which is being prepared. In support, he submits an email to him dated November 13, 2017, from the property manager in which it is stated that petitioner never asked him for financial information about the property. (NYSCEF 17). He explains that he did not provide petitioner or her sister financial reports directly because, in addition to their failure to request any information, Beth has been in a dispute with her ex-husband and Mark did not want him to get access to information regarding Beth's involvement with the trusts or Jaffe LP.

Mark explains that after the attacks on the World Trade Center in 2001, the property experienced financial difficulty, which required loans from friends, and that petitioner did not assist in preserving the property. He outlines other instances in which petitioner demonstrated

her lack of concern for her mother and him.

By letter dated January 18, 2017, he sent petitioner the trust documents, and that same day emailed her the cover letter (NYSCEF 19). By email dated February 17, 2017, petitioner acknowledged receipt. (NYSCEF 20).

Mark denies that the property has retail vacancies, and alleges that on October 16, 2018, he obtained a temporary certificate of occupancy for 72 Warren Street/88 West Broadway, and that he is "very close" to obtaining a certificate of occupancy for 74 Warren Street. Having been advised that a refusal to extend the lease of a commercial tenant who had not paid rent would result in litigation, and having litigated with the tenant, Mark alleges that after the tenant stopped paying rent February 1, 2018, he secured a new tenant by March 1, 2018. He also states that all of the commercial vacancies are rented, and that he negotiated a new lease for a store that opened on October 3, 2018. In support he submits pictures of commercial tenants currently occupying the property. (NYSCEF 21-23).

Mark notes that he has sought an institutional trustee for the property, but his preferred bank advised that it is unable to serve as trustee given the current litigation and family disputes.

2. Proefriedt (NYSCEF 24)

Proefriedt denies that he is the attorney for Mark, Beth, or the trusts, and states that he has acted as counsel to Jaffe LP for the property and has served as its representative on the New York City Loft Board. He claims to have been hired by Jaffe LP for his knowledge of loft law and other real estate matters.

3. Respondents (NYSCEF 25)

Respondents contend that the removal of trustees is governed by EPTL § 7-2.6 and SCPA § 711 and observe that petitioner submits no evidence of mismanagement of trust assets or bad

faith. They claim to have demonstrated their prudence in managing the property by engaging the services of a professional real estate broker and Proefriedt, an expert in loft law matters. Their rejection of petitioner's deal, they contend, was in the best interest of all beneficiaries, including petitioner.

Despite their diligent efforts, respondents maintain, the trustees have not yet sold or leased the property, and thus, there is no controversy concerning it. In effect, petitioner seeks an impermissible advisory opinion concerning the eventual disposition of the property.

Absent actual misconduct in managing the property, respondents deny that they are subject to removal, even if a conflict of interest exists, as simultaneous service as a beneficiary and trustee is not a ground for removal. Likewise, Proefreidt is not a trust beneficiary and he does not represent Mark, Beth, or the trusts; rather, he represents Jaffe LP, and is not an interested party. Even if he has conflicting interests, moreover, petitioner fails to allege that he engaged in actual misconduct.

Respondents maintain that they successfully managed the property and that it has gained significant value over time, especially since the attacks of September 11. They have diligently sought to obtain certificates of occupancy, and all commercial tenancies are filled.
They have provided all necessary financials to the extent requested, and are prepared to provide an accounting to petitioner.

According to respondents, petitioner's claims are barred by laches, as they concern conduct commencing immediately after September 11, 2001, and they would be prejudiced if forced to defend themselves against claims without access to relevant evidence.

B. Reply (NYSCEF 28)

Petitioner observes that respondents do not deny the alleged conflicts of interest, and to the extent they deny having committed any wrongdoing, petitioner points to Mark's preference for proposals that favor current beneficiaries at the expense of the remainder beneficiaries, the hiring of a broker incentivized by a large commission, rather than an objective advisor, and the appointment of an interested party as special trustee.

Petitioner asserts that pursuant to CPLR 7701, she is entitled to discovery and the deposition of Mark, and contends that respondents fail to establish that her claims lack merit. She also argues that the hostility between Mark and her, as reflected in the emails, renders Mark incapable of administering the trusts, and observes that Mark rejected the deal she presented because of petitioner's "disloyalty." Pursuant to that deal, the interest and capital charges would be paid by petitioner and her generation, not Beth and Mark.

Petitioner denies having received an accounting, and claims that Mark never offered one, observing that she need not ask for one. She contends that Mark's statement that he did not provide an accounting because of issues between Beth and her ex-husband demonstrate that familial issues are interfering with his ability to administer the trust, and observes that it took him almost 15 years to provide her with a copy of the trust agreement. She adds that Mark's actions amount to waste and challenges his denials of mismanagement as self-serving. Moreover, she observes, he admits having failed to obtain permanent certificates of occupancy, and that the commercial tenant was permitted to remain despite not paying rent timely.

To the extent respondents deny that Proefreidt is conflicted, petitioner argues that he is counsel to Jaffe LP, which is owned mostly by the trusts and is managed by Jaffe GP, which is owned by Mark and Beth. These connections demonstrate that Proefreidt is subservient to the trust beneficiaries and thus, should be removed.

Petitioner submits her affidavit in which she recounts her real estate expertise, and states that she contacted her proposed broker when the trustees had sought to dispose of the property because she had worked with the company previously and trusted them. She notes that the company had brought in another company with which she had no prior relationship or experience. She admits that she was involved in crafting the offer, but was unaware that bids were submitted following Mark's rejection of the initial offer. She also contends that she brought Mark another offer from a different company with which she had no prior relationship, and that she introduced Mark to other neutral advisory firms, but he did not retain them. Mark refused to do so claiming that she was not a "true" beneficiary. (NYSCEF 27).

IV. ANALYSIS

Pursuant to CPLR 7701, a special proceeding may be brought to determine any matter relating to an express trust. Proceedings under CPLR 7701 are governed by CPLR article 4 (*Matter of Wells Fargo Bank*, 2018 NY Slip Op 31883[U] [Sup Ct, NY County 2018], citing Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 7701), and are treated in the same manner as a motion for summary judgment (*Karr v Black*, 55 AD3d 82, 86 [1st Dept 2008], *lv denied* 11 NY3d 712 [2008], citing *Matter of Port of N.Y. Auth. (62 Cortlandt St. Realty Co.)*, 18 NY2d 250, 255 [1966]).

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are

insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant fails to demonstrate, *prima facie*, entitlement to relief, the motion must be denied regardless of the sufficiency of the opposition. (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

A. Advisory opinion

Allegations that the trustees wrongfully rejected favorable proposals for the disposition of the property, mismanaged the property, and have inherent conflicts of interest warranting their removal demonstrate the existence of a ripe controversy. Such a resolution would not constitute an advisory opinion even though the property has not yet been sold or leased. Accordingly, as a judicial opinion here would resolve these issues with immediate effect, the requested relief is not prohibited. (*See Hirschfeld v Hogan*, 60 AD3d 728, 729 [2d Dept 2009], *lv denied* 14 NY3d 706 [2010] [courts are prohibited from issuing advisory opinions that "have no immediate effect and may never resolve anything"] [citations omitted]).

B. Laches

"Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." (*Saratoga County Chamber of Commerce, Inc. v Pataki,* 100 NY2d 801, 816 [2003]). To establish laches, a party must show:

> (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant.

(*Meding v Receptopharm, Inc.*, 84 AD3d 896, 897 [2d Dept 2011], quoting *Cohen v Krantz*, 227 AD2d 581, 582 [2d Dept 1996]).

Respondents' sole assertion in support of their defense of laches that they lack evidence

concerning events after September 11, 2001, is too vague to warrant dismissal. (*See Matter of Silverstein (Goodman)*, 271 AD2d 340, 340 [1st Dept 2000] ["bare, conclusory allegations of prejudice, are not entitled to dismissal on the ground of laches"]).

C. Removal of trustees

Pursuant to EPTL § 7-2.6, the court may "suspend or remove a trustee who has violated or threatens to violate his trust [...] or who for any reason is a person unsuitable to execute the trust." A trustee may be removed "only upon a clear showing of serious misconduct that endangers the safety of the estate." (*Matter of Duke*, 87 NY2d 465, 473 [1996] [citations omitted]; *Matter of Joan Moran Trust*, 166 AD3d 1176, 1179 [3d Dept 2018] ["Removal of a trustee, however, is a drastic action, and courts are generally hesitant to exercise the power to remove a fiduciary absent a clear necessity"]). Petitioner bears the burden of demonstrating that the trustee should be removed. (*Matter of Giles*, 74 AD3d 1499, 1503 [3d Dept 2010]).

Although the Surrogate's Court Procedure Act applies only to proceedings brought in the surrogate's court, SCPA § 711 may provide guidance here. (*See* Margaret Valentine Turano, Practice Commentaries, McKinney's Cons Laws of NY, SCPA 711 ["Under EPTL 7-2.6, a Supreme Court judge can remove a trustee for insolvency and violating the trust (by actions described in this section and SCPA 719, for example)"]).

1. Conflicts of interest

A trustee acts as a fiduciary to the beneficiaries thereof and owes them a duty of loyalty, notwithstanding the trustee's latitude under the settlor's direction. (*Boles v Lanham*, 55 AD3d 647, 648 [2d Dept 2008]). The duty of loyalty is "inflexible" and "prohibits a trustee from even placing himself in a position of potential conflict with his or her duty to the trust." (*Sankel v Spector*, 33 AD3d 167, 172 [1st Dept 2006]). When a trustee's personal interests conflict with his

or her interests as trustee, the trustee may be removed. (*Matter of Hall*, 275 AD2d 979, 979 [4th Dept 2000]).

Even in the absence of improper conduct, the court may remove a trustee due to an actual conflict of interest. (*Id.* [removing trustee where trust corpus comprised of stock in insurance agency, and trustee "in direct competition" with agency]). However, where only a potential conflict of interest exists, removal of the trustee is only appropriate where there is misconduct. (*See Matter of Palma*, 40 AD3d 1157, 1158 [3d Dept 2007] ["potential conflict of interest on the part of a fiduciary, without actual misconduct, is not sufficient to render the fiduciary unfit to serve"]).

i. Mark and Beth

That a trustee, such as Mark and Beth, is both a trustee and trust beneficiary does not present a conflict of interest necessitating removal. (*See Matter of Heller*, 23 AD3d 61, 65 [2d Dept 2005], *affd* 6 NY3d 649 [2006] ["a party holding a beneficial interest in a trust is not disqualified merely by that status from serving as trustee"]). Mark's and Beth's motive to increase the profits for Jaffe LP does not conflict with the interests of the trust, because the trusts own 99 percent of Jaffe LP. Thus, any profits realized by Jaffe LP are equally realized by the trusts. Consequently, Mark's and Beth's dual capacities of Mark as trustees and owners of Jaffe GP, absent actual misconduct, constitute an insufficient basis for removal.

ii. Proefriedt

The trust agreement provides that the special trustee may not be one "who is related, subordinate or subservient to a beneficiary within the meaning of IRC section 672(c)," and it does not impose a requirement that the special trustee also have engaged in actual misconduct to be removed. A "related or subordinate party," as relevant here, is defined in IRC section

672(c)(2) as "a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control" or "a subordinate employee of a corporation in which the grantor is an executive." The term "subservient" is not defined.

Here, it is undisputed that Mark and Beth are the sole owners of Jaffe GP, the entity solely responsible for managing Jaffe LP, and that Proefriedt is retained as counsel for Jaffe LP. Neither party offers authority as to whether an attorney retained by a corporation in these circumstances is considered an "employee" within the meaning of the statute. Moreover, given Mark's admissions as to his and the trust's relationship with Proefriedt, petitioner should be given an opportunity to explore the relationship further.

2. Self-dealing

Neither party asserts that disposing of the property is improper. They disagree as to whether the structure of any deal should maximize the short-term or long-term value of the property, or, in other words, whether the current beneficiaries are entitled to higher income payments, to the potential future detriment of remainder beneficiaries. When determining payments to beneficiaries, the trustee is to exercise his discretion "in accordance with the standard which the trust imposes." (*Matter of Harmon*, 73 AD3d 1059, 1061 [2d Dept 2010]). When examining a trustee's use of discretion, the court only looks to ensure that the trustee "has not acted in bad faith such that his conduct constituted an abuse of discretion," regardless of whether the court agrees with the trustee's judgment. (*Matter of Bank of N.Y. Mellon*, 127 AD3d 120, 125 [1st Dept 2015]).

Under the trust agreement, the trustee is required to provide financial support from the income and, as necessary, from trust principal for the benefit of the settlors' children. Mark, as

trustee, must equally consider the remainder beneficiaries' interests. (*See Heller*, 23 AD3d at 65, citing Restatement [Second] of Trusts § 232 ["Where the income beneficiary and the holder of the remainder interest are different individuals, however, the trustee owes an equal duty of fidelity to each"]). Moreover, the trust agreement evinces no intent by the settlors to favor their children, Beth and Mark, over the grandchildren.

Mark's emails reflect that, although he is motivated primarily to seek proposals that provide sufficient funds for Beth, June, and him to live comfortably, he believed that the remainder beneficiaries' interests are to be disregarded, and the correspondence between him and petitioner reflects a hostility that may impact his ability to balance their competing interests. (*Matter of Rudin*, 15 AD3d 199, 200 [1st Dept 2005], *lv denied* 4 NY3d 710 [2005] [trustee's personal hostility towards beneficiary justifies removal if it interferes with proper administration of trust]).

Although Mark disavows his prior hostile correspondence, that correspondence raises issues of fact as to his motivation for rejecting or entertaining certain proposals. Moreover, although the correspondence reflects each parties' analysis of some of the proposals, no evidence is presented reflecting the offers allegedly improperly rejected or considered by the trustees, or any expert opinion as to their merits. Accordingly, disclosure, to be followed by a hearing, if necessary, is warranted. (*See Matter of Deneny v Van Rossem*, 115 AD3d 623 [1st Dept 2014] [factual dispute as to whether trustee's hostility toward co-trustee interfered with proper administration of trust necessitated hearing]; *Matter of Rose BB*, 243 AD2d 999, 1000 [3d Dept 1997] [questions of fact concerning trustee's conduct required hearing]). As full disclosure pursuant to CPLR article 31 is permitted (CPLR 408, 7701), the parties are to appear for a preliminary conference.

3. Mismanagement and waste

A trustee may be removed where the fiduciary is unqualified or improvidently manages the trust. (*Moran*, 166 AD3d at 1179). In opposition to petitioner's claims that under the trustees' management the property suffers from commercial vacancies, defaulting tenants, and a lack of necessary certificates of occupancy, Mark offers only his self-serving affidavit. Photographs of current tenants and the recent rental of a commercial space does not constitute dispositive evidence that the building has been properly managed.

Apart from the conflicting and self-serving statements of each party, neither offers sufficient evidence concerning the management of the building. Accordingly, disclosure on the issue of Mark's management of the property is necessary.

4. Removal based on alleged failure to provide accounting

While the trust agreement requires the trustee to provide an accounting to trust beneficiaries, only the repeated failure to do so, in contravention of court orders, warrants removal. (*See e.g.*, *Kelly v Sassower*, 52 AD2d 539, 539 [1st Dept 1976], *lv dismissed* 39 NY 2d 942 [1976] [in light of failure to account, despite repeated directions to do so, "removal proceedings should be considered if there is a continued refusal to account"]; SCPA § 711[12] [permitting removal "[i]n the case of any fiduciary who fails to file an account within such time and in such manner as directed by the court"]).

Here, absent a court order directing an accounting, there is no basis for removal due to a failure to respond to petitioner's request for an accounting.

5. Appointment of Proefriedt

Petitioner offers no support for the contention that a trustee's appointment of a conflicted special trustee warrants his or her removal. Even if such an appointment constitutes a breach of

fiduciary duty, not every such breach requires removal of the fiduciary. (*Matter of Burkich*, 12 AD3d 766, 768 [3d Dept 2004]). Removal is only appropriate where there is "a clear necessity" (*Moran*, 166 AD3d at 1179), and, here, absent any evidence that Proefriedt's appointment was a willful attempt to violate the trust agreement, Mark's removal is not warranted on that basis.

D. Accounting

Respondents agree to provide petitioner with an accounting. (*See Deneny*, 115 AD3d 623 ["Since petitioner acknowledged that [respondent] was entitled to an accounting, so much of her cross motion as sought such relief should have been granted"]).

E. Breach of fiduciary duty

The remedies for a beneficiary seeking to hold a trustee of a testamentary trust liable for breach of fiduciary duty are exclusively equitable. (*Magill v Dutchess Bank & Trust Co.*, 150 AD2d 531, 532 [2d Dept 1989]). Where, as here, the trustee is under no duty to pay money to a beneficiary immediately and unconditionally, monetary relief is inappropriate. (*Id.*). Absent authority in support of petitioner's cause of action for breach of fiduciary duty or for her contention that she is legally entitled to seek damages, her claim fails. Moreover, having sought equitable relief in the form of removal of the trustees, she may not simultaneously seek damages for the breach of fiduciary duty.

V. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied with prejudice to the extent it seeks compensatory and punitive damages for breach of fiduciary duty against respondent Mark M. Jaffe; it is further

ORDERED, that the petition is held in abeyance in all other respects pending the

completion of disclosure; and it is further

ORDERED, that the parties appear for a preliminary conference on June 26, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

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5/24/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE