SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12

Justice

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LAUREN PRESSMAN GREENFIELD,

Petitioner,

- v -

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

Respondents.

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INDEX NO. 158802/2018

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51-75 were read on this motion for injunctive relief.

Pursuant to CPLR 6301 and 6313, petitioner seeks an order (1) enjoining respondents/ trustees Mark Jaffe and Beth Rachel Pressman, their assigns, agents, successors in interest, and all persons acting in concert with and/or on behalf of respondents, from transferring, encumbering, assigning, or wasting any proceeds from the sale of the property known as 80-86 and 88 West Broadway and 68-70, 72 and 74 Warren Street, New York, New York 10007; and (2) ordering the immediate removal and replacement of Mark and Beth as trustees of the Jaffe Family Trust, dated March 14, 1998, and its sub-trusts. Respondents oppose.

The issues raised here are whether Mark and/or Beth are incompetent and cannot serve as trustees and whether Mark is or has been conflicted in his service, is or has been self-dealing, and/or makes or made poor decisions in serving as trustee. Petitioner specifically claims that Mark's decisions relating to the disposition of the property reflect his incompetence and/or that they benefit him and Beth to the exclusion of her and her sister, respondent Kimberly Pressman,

each of whom is a contingent beneficiary of the trust. Additionally, petitioner asserts that Mark violated his fiduciary duty by failing to remove Beth from her position as trustee given her incapacity and by entering into a ground lease of the property with a purchase option that was exercised and closed in December 2021. She does not seek to void the sale but argues that absent a sufficient demonstration of the wisdom of Mark's proposed 1031 exchange, he must be removed before he can enter into it. A hearing was held on January 14 and 20, 2022 to resolve these issues.

I. BETH'S CAPACITY

A. Governing law and trust instrument

"[A] person is presumed to be competent at the time of the performance of the challenged action and the burden of proving incompetence rests with the party asserting incapacity." (*Matter of Obermeier,* 150 AD2d 863, 864 [3d Dept 1989], citing *Matter of Gebauer,* 79 Misc 2d 715, 719 [Sur Ct, Cattaraugus County 1974], *affd* 51 AD2d 643 [4th Dept 1976]). The party asserting incapacity must "establish incompetency at the time the action took place" (*id.* [citation omitted]).

The standard against which Beth's capacity must be measured is that required for entering into a contract, namely, that the individual is able "to understand the nature and consequences of the transaction and come to a rational judgment about it." (*In re Est. of Donaldson*, 38 Misc 3d 841, 844 [Sur Ct, Richmond County 2012], citing *Matter of Goldberg,* 153 Misc 2d 560, 566 [Sur Ct, New York County 1992]).

Article twelfth, paragraph one, of the trust agreement creating the Jaffe Family Trust, provides as follows in pertinent part:

> 1. In determining the disability of the Trustee, the successor trustee may rely on a certificate or other written statement from one (1) state-licensed physician who has

examined the individual Trustee.

(Resps. Exh. A).

B. Analysis

Petitioner argues that Beth's affidavit (Resps. Exh. L) should be disregarded given Beth's inability to recall having signed it and certain errors she allegedly made therein. Beth's assumption that she had signed the affidavit and her difficulty remembering the circumstances surrounding its execution do not require that the affidavit be disregarded absent any basis offered for finding that the signature on it is not hers. And even if the attorney representing her had drafted the affidavit, petitioner does not argue that affidavits may not be drafted initially by attorneys or that Beth alone should have drafted it.

The maps offered by respondents that are attached to the affidavit and referenced therein are no less probative than the photograph offered by petitioner in support of her position that Beth confabulates the ability to see cruise ships from her backyard (Pet. Exh. 1), absent evidence that a fanciful imagining and episodic memory lapses constitute sufficient proof of incapacitation or incompetence. While Beth testified that the sale was to close in February 2022 when it in fact closed in December 2021 does not render petitioner's case any more persuasive given Beth's ability to recall other aspects of the transactions in issue, such as the approximate sale price, the existence of the mortgage and the lender's identity, and that Mark was considering the purchase of two Walgreens for the 1031 exchange. Moreover, respondents Wolf and Proefriedt, respectively, the successor to the special trustee and the special trustee, each testified that they saw no issue with Beth.

While a certificate or other written statement from a physician who has examined Beth is not required by the terms of the trust instrument (NYSCEF 2), an inference that such

documentation would not support petitioner's position reasonably arises from her failure to even allege that she attempted to obtain such documentation. So too for the evaluation prepared at Kimberly's instance by the home care agency as to Beth's safety and wellbeing which was not offered in evidence by petitioner.

Moreover, pursuant to article twelfth, paragraph eight, of the trust agreement:

> In the event that any Trustee is unable to participate in trust activities because of illness, disability, or any other reason, the disabled Trustee shall cease to serve as a Trustee, and the successor Trustee(s) or other Co-Trustee may act as Trustee and make any and all decisions regarding the trust Estate as if he or she were the sole Trustee under this instrument during any such incapacity.

(Resps. Exh. A).

Here, petitioner does not demonstrate or allege that Beth did not cease to participate as a trustee at the time of the sale of the property, and Wolf testified that during Beth's recovery from the stroke, Beth was not involved in the sale. Thus, once Beth suffered her stroke, Mark was authorized by article twelfth, paragraph eight, of the trust agreement to make any and all decisions regarding the property during Beth's incapacity.

For all of these reasons, petitioner fails to sustain her burden of clearly proving that Beth should be removed as a trustee or that Mark abused his discretion in not causing Beth's removal as a trustee immediately following her stroke.

II. MARK'S COMPETENCY

A. Governing law

The removal of a trustee is governed by Estates, Powers and Trusts Law § 7-2.6, which provides, in pertinent part, that a trustee may be removed for having wasted or improperly applied estate assets or otherwise improvidently managed or injured trust property. And pursuant to the Surrogate's Court Procedure Act § 711(2), a trustee may be removed, in relevant part,

> [w]here by reason of his having wasted or improperly applied the assets of the estate, or made investments unauthorized by law or otherwise improvidently managed or injured the property committed to his charge, . . . or by reason of other misconduct in the execution of his office or . . . improvidence or want of understanding, he is unfit for the execution of his office.

A determination that a trustee should be removed depends on a finding that the trustee's discretion was not exercised reasonably and in good faith. (*In re Bank of New York Mellon*, 127 AD3d 120, 125 [1st Dept 2015]). As the removal of a trustee, like the removal of a fiduciary, annuls the trust settlor's choice, it may be granted only when the grounds are "clearly established" or on "a clear showing of serious misconduct that endangers the safety of the estate." (*Matter of Petrocelli*, 307 AD2d 358, 359-360 [2d Dept 2003], citing respectively, *Matter of Leland,* 219 NY 387, 392 [1916] and *Matter of Duke,* 87 NY2d 465, 473 [1996]; *Matter of Est. of Collins*, 36 AD3d 1193. 1196 [3d Dept 2007 [not every breach of fiduciary duty warrants removal; courts generally hesitant to exercise the power to remove a fiduciary, as such action "constitutes a judicial nullification of the testator's choice"]).

B. Petitioner's testimony

Petitioner, a real estate investment professional, testified that she had suggested to Mark that he consider certain potential buyers and that Mark had rejected one of them given her involvement with the proposed buyer, which she conclusorily characterized as a nonsensical response and accused him of refusing to share information with her.

Petitioner reviewed the ground lease with purchase option and, in her experience, it was the "poorest" from a landlord's perspective given the absence of a fair market value re-set and the fixing of the option price for 99 years. The lease was twice amended and the purchase price was lowered from $50 million to $36 million, with the annual rent reduced to $800,000, which petitioner characterized as "insane," although she acknowledged that the amendments reference

the COVID-19 pandemic and a potential legislative elimination of the tax benefits of a 1031 exchange. She also testified to the payment by the buyers of the $18.4 mortgage balance, $500,500 to Beth for her health concerns, $170,000 to Proefriedt, and $57,000 to Wolf, and other attorney fees, and states that the trust was left with $10 million.

While petitioner allowed that she harbored no concerns about the Cushman/Wakefield 1031 group that Mark had enlisted to assist with the 1031 exchange, she observed that it had offered Mark no advice and she complains that she is not privy to its contract with Mark beyond knowing that it had been paid $354,000 plus $100,000 at the closing of the sale, which according to her, is excessive. She nonetheless acknowledged the tax savings to be reaped from the 1031 exchange and the possibility that Mark was concerned with the possible retroactivity of prospective legislation eliminating such tax benefits, although she posited, without specification, that "most think" it is no longer a concern. She also admitted that she has not proposed other options for it, essentially asserting that Mark has not selected good properties for the exchange.

Upon her review of materials provided her by respondents relating to the 1031 exchange, petitioner found that they constitute an insufficient basis for forming an opinion as to the advantages and disadvantages of purchasing a property absent information concerning debt bids, a cash-flow/credit analysis, a comparative analysis, and demographics, characterizing the materials provided as "just basic broker information," and expressing concern with whether Walgreens would provide a corporate guarantee for the transactions.

As evidence of the insufficiency of Cushman/Wakefield's services to Mark, petitioner offered spreadsheets by which Cushman/Wakefield informed Mark of various options for the 1031 exchange. (Pet. Exhs. 2-7).

C. Mark's testimony

Mark testified without dispute that the value of the property was impacted by the COVID-19 pandemic, by the difficult tenants residing in the building who pay less than market prices, and by a tenant who staged a fire in his loft in 2013 and commences serial and vexatious Loft Law litigation in order to avoid rent increases. These factors, in combination, he maintained, lowered the value of the property. When asked for the most recent appraisal of the property, Mark indicated that the highest bid received constituted the most accurate appraisal, finding the market to be the best way of determining value. He thus hired Cushman/ Wakefield to solicit offers and conduct an auction and utilized the services of two prominent real estate attorneys, one of whom was recommended to him by petitioner. Mark explained his refusal to work with the advisors recommended by petitioner as based on the purchase price they had quoted, other terms they had proposed, and h his belief that she had intended to steer the deal to her friends for her own purposes.

Mark accepted the offer of two individuals introduced to him by a friend of Beth's. They had formed a partnership for the transaction, intending to develop the property. A ground lease with an option to purchase the property was executed in December 2019 and most recently amended in November 2021. (Resps. Exhs. D, F). Mark alleges that in the ground lease, he had set the rent high enough to induce the prompt exercise of the purchase option, which he desired so as not to lose the opportunity of a 1031 exchange, which he reasonably feared would be eliminated by legislative action, and thus he agreed to reduce the sale price in exchange for a prompt closing by the end of 2021. The option to purchase the property was exercised by the buyers in December 2021 and the sale closed soon thereafter.

According to Mark, the estimated net proceeds from the sale were slightly under $11

million, and he acknowledged that in 2017, the value of the property with air rights was estimated as $50 to $70 million, and that in 2018, he had stated that the value of the property was more than $50 million. He had arrived at his estimate of the net proceeds by considering that the buyers had paid off the trust's outstanding $18.4 million mortgage, along with an extra $5 million at closing, much of which was used to pay the trust's expenses relating to the transactions in issue (Resp. Exh. B). He also testified that the buyers permitted the trust to retain a five percent interest in the property. Mark awaits advice on the taxes owed on the transaction, although most of the expenses are deductible to the partnership, and he is aware that Proefriedt is owed attorney fees for the litigation he conducted on behalf of the building over several years.

The 1031 group at Cushman/Wakefield has been assisting Mark by providing him with analyses, market studies, and background information, and Mark acknowledged that the group does not advise him as to which properties to select for the exchange. Mark stated that a loan will be needed to fund the 1031 exchange and that the trust can only afford a $30 million deal. Mark intends to nominate entities for the exchange by January 29, as required by law, and to close on them by the end of June 2022, all in consultation with Beth, Cushman/Wakefield, and attorneys Proefriedt and Wolf, although he has independently expressed an intent to purchase two Walgreens, one in St. Paul, Minnesota for $19 million and one in Maine, for $7 to 8 million. His goal is to achieve the highest income without excessive debt, which he believes is offered by the Walgreens properties.

In the past, Mark had engaged Kimberly as a broker, paying her more than $300,000 in commissions from the trust. He leveled accusations against petitioner only, claiming that his mother, her grandmother, had wanted to disinherit her. He nonetheless acknowledged his duty to ensure that the 1031 is accomplished and that the contingent interests not be removed by taxes.

D. Analysis

Both petitioner and Mark are interested in the outcome of the case and both are credible. However, as experienced as petitioner is in the purchase and finance of real estate, there was nothing in her testimony to indicate that she has experience with ground leases and real estate sales in New York City and she did not sufficiently account for the need to sell the property given the taxes likely to be assessed absent a 1031 exchange and the serious problems facing the property occasioned by the pandemic and the troublesome tenancies and rent-stabilized units as testified to by Mark, Proefriedt, and Wolf. Thus, petitioner's testimony as to the poor deal on the ground lease struck by Mark lacks sufficient probative value in these circumstances, as does the balance of her conclusory testimony concerning other aspects of the transactions.

While disinterested expert testimony as to the sufficiency of the Cushman/Wakefield spreadsheets may not be essential to support petitioner's claim in the first instance that they form an insufficient basis for Mark to assess the advantages and disadvantages of purchasing a 1031 exchange property, Wolf, who has served as counsel to real estate firms in New York and has experience with 1031 exchanges, testified that the spreadsheets are sufficient to inform Mark's initial decision as to the nomination of entities, and that a more detailed due diligence investigation of the nominees can be performed pending the closing. Thus, petitioner's opinion on this issue has little probative value. And, even though Cushman/Wakefield provides Mark solely with information and not advice, petitioner does not clearly demonstrate that Mark is not sufficiently competent to nominate properties based on that information.

That the relationship between petitioner and Mark is marred by mistrust and hostility is also of little probative value. (*Cf In re Trusts for McDonald*, 100 AD3d 1349, 1352 [4th Dept 2012], citing *Burke v Baudouine*, 190 AD 186, 187 [1st Dept 1919, *affd* 232 NY 532 [1921]

[mere friction or disharmony between trustee and one or more beneficiaries not sufficient ground to justify removal of trustee]). In any event, Mark made it clear in his testimony that he is aware of the fiduciary duty he owes to petitioner and Kimberly.

Moreover, Mark's testimony reflects candor, knowledge, and an understanding of the risks involved with entering into the transactions. His explanations of his various decisions, given the surrounding circumstances, signal prudence, not mismanagement.

Consequently, petitioner fails to sustain her burden of clearly demonstrating that Mark should be removed as a trustee.

III. CONCLUSION

Based on the foregoing, petitioner fails to sustain her burden of proving by clear and convincing evidence that she is likely to succeed on the merits of her claims, that the equities weigh in her favor, and that she will be irreparably harmed by the prospective 1031 exchange as it is undisputed that monetary damages are available to her.

Accordingly, it is hereby

ORDERED, that petitioner's motion is denied in its entirety.

1/25/2022
DATE

BARBARA JAFFE, J.S.C.

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