

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: The Memorial Holy	:	
Monastery of St. Andrew	:	
Apodimon Trust,	:	
A Nonprofit Corporation	:	
	:	
Appeal of: John J. Tsucalas	:	
and The Memorial Holy	:	
Monastery of St. Andrew	:	No. 168 C.D. 2010
Apodimon Trust	:	Argued: May 10, 2011

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOHNNY J. BUTLER, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE BUTLER

FILED: June 16, 2011

John J. Tsucalas (Tsucalas) appeals from the December 30, 2009 order of the Court of Common Pleas of Philadelphia County (trial court) denying the Petition for Declaratory Relief filed by Tsucalas and the Memorial Holy Monastery of St. Andrew Apodimon Trust (the Trust), and granting the Counterclaim for Declaratory Relief filed by the Holy Xenophontos Monastery (Xenophontos). There are four issues before the Court: (1) whether the trial court erred by not holding an evidentiary hearing, (2) whether the doctrines of res judicata or collateral estoppel bar Tsucalas' and the Trust's claims, (3) whether the 1987 amendments to the Trust's bylaws are valid and enforceable, and (4) whether this appeal is proper. For the

reasons that follow, we vacate the trial court's order and remand the matter for an evidentiary hearing and findings of fact.

As of the filing of Tsucalas' and the Trust's Petition for Declaratory Relief, Tsucalas was the President and Chairman of the Trust. He was voted in as President and Chairman of the Trust after the original President and Chairman died on July 22, 1987. According to the original bylaws of the Trust, upon the death of the President and Chairman, the then current Abbot of St. Andrew Apodimon Monastery in Greece (Monastery) would be the new President and Chairman of the Trust. Believing that the Monastery, and thus the Abbot, did not exist, the Board of Directors (Board) amended the bylaws, and Tsucalas, a member of the Board, was voted in as the new President and Chairman of the Trust in August of 1987.

The estate of the deceased President and Chairman included a parcel of land that allegedly belonged to the Trust. This allegation of ownership sparked litigation in the Greek courts. Within that litigation, the Greek courts determined that the 1987 amendment to the bylaws was invalid. Tsucalas appealed to the Greek courts, but failed to appear for a scheduled remand hearing.

On March 15, 2006, Tsucalas and the Trust filed a complaint with the trial court requesting a declaratory judgment. Specifically, the complaint was seeking an order declaring that: the original bylaws of the Trust were invalid to the extent that they provided that no resolution of the officers or the Board would be valid without written approval of the President and Chairman; the amendments to the Trust's bylaws, dated August 13, 1987, approved by a majority vote of the Board on August 28, 1987, were valid; the election of Tsucalas as President and Chairman of the Trust, effective August 28, 1987 was valid; and that the Trust was legally represented by its Board and President and Chairman.

Xenophontos filed preliminary objections to the complaint which were granted by the trial court. The trial court dismissed the action for lack of personal jurisdiction. Tsucalas and the Trust appealed, and on December 31, 2007, this Court reversed and remanded the matter for further proceedings. Xenophontos filed an answer, new matter and a Counterclaim for Declaratory Relief seeking an order declaring that: the original bylaws are valid; the amendments to the Trust's bylaws dated August 13, 1987 are invalid; the Supreme Court of Greece has determined that the August 13, 1987 amendments are invalid and illegal, and Tsucalas and the Trust are estopped from claiming otherwise; the election of Tsucalas as President and Chairman of the Trust, effective August 28, 1987 was invalid and illegal; the Supreme Court of Greece has determined that the election of Tsucalas was invalid and illegal, and Tsucalas and the Trust are estopped from claiming otherwise; Tsucalas is ousted as Director of the Trust; the President and Chairman of the Trust is the current Abbot of the Monastery; the Supreme Court of Greece has determined that the current Abbot is President and Chairman, and Tsucalas and the Trust are estopped from claiming otherwise; the current Abbot is Father Ephraim Sfikas; and Tsucalas' and the Trust's claims are barred by the doctrine of res judicata. Xenophontos' counterclaim also requested a citation directed to Tsucalas to show cause why he should not file an account of his administration of the Trust.

On December 5, 2008, the matter was transferred to the trial court's Orphans' Division. On April 3, 2009, after a conference with all parties present, the trial court ordered the Trust to furnish all parties and the court with: an informal accounting of all assets of the trust since its inception; a copy of all board meetings and minutes thereof, and any tax returns filed; and a detailed accounting of all counsel fees spent since the Trust's inception. Xenophontos was ordered to furnish to all parties and the court: a copy of the last will of the decedent (the former President

and Chairman); a copy of the trust instrument; a translation of each document; and an inventory of assets owned by the decedent at his death. All parties made their respective filings.

On December 30, 2009, after a second conference, the trial court: denied the Petition for Declaratory Judgment filed by Tsucalas and the Trust; granted the Counterclaim for Declaratory Relief filed by Xenophontos; and (a) declared that the original bylaws of the trust are valid, (b) declared that the attempted amendments to the bylaws dated August 13, 1987 are invalid and illegal, and that Tsucalas and the Trust are estopped from claiming otherwise, (c) declared that the attempted election of Tsucalas, effective August 28, 1987 was invalid and illegal, and that Tsucalas and the Trust are estopped from claiming otherwise, (d) declared that Tsucalas is removed as Director of the Trust, (e) declared that the President and Chairman of the Trust is the current Abbot of the Monastery, and that Tsucalas and the Trust are estopped from claiming otherwise, (f) declared that the current Abbot is Father Ephraim Sfikas, and that he is thus the current President and Chairman of the Trust, and (g) concluding that the claims of Tsucalas and the Trust are barred by the doctrines of estoppel and res judicata.

Tsucalas and the Trust appealed to this Court.<sup>1</sup> The trial court filed an opinion stating that the judge who signed the December 30, 2009 order, Judge Lazarus, was not available to state the reasons for the Decree.<sup>2</sup>

We will address Xenophontos' cross-appeal first. In its cross-appeal, Xenophontos argues that Tsucalas' appeal is improper. Specifically, Xenophontos

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<sup>1</sup> “Our standard of review in a declaratory judgment action is limited to determining whether the trial court’s findings are supported by substantial evidence, whether an error of law was committed or whether the trial court abused its discretion.” *Yost v. McKnight*, 865 A.2d 979, 982 n.6 (Pa. Cmwlth. 2005).

<sup>2</sup> Judge Lazarus is currently a Pennsylvania Superior Court Judge.

contends that the instant appeal was originally filed by the Trust and Tsucalas, and because the Trust has subsequently withdrawn its appeal and was redesignated as Appellee, all issues regarding the Trust are now moot. Xenophontos further contends that the only remaining issue is whether Tsucalas was properly removed as Director. It contends that the issue was not developed in Tsucalas' brief, and it is, therefore, waived. In addition, Xenophontos contends that because Tsucalas did not object to the Trust withdrawing its appeal or being redesignated as an Appellee, he has waived all issues raised on behalf of the Trust. Finally, Xenophontos contends that since Tsucalas is no longer a representative of the Trust, he has no standing to bring the appeal. We disagree with all of Xenophontos' contentions.

“Generally, a case will be dismissed as moot if there exists no actual case or controversy.” *Mistich v. Pennsylvania Bd. of Prob. and Parole*, 863 A.2d 116, 119 (Pa. Cmwlth. 2004). Removing Tsucalas as Director of the Trust does not make Tsucalas' claims moot; rather it makes them ripe for appeal. The original Petition for Declaratory Relief was filed by both Tsucalas and the Trust, and the claims on behalf of the Trust are directly related to Tsucalas' claims. Given that the order being appealed changed the Trust's Director, an actual case or controversy clearly exists.

Regarding Tsucalas' waiver of his issue regarding his removal as Director of the Trust, his entire brief was centered on whether he was the current President and Chairman of the Trust. Hence, he has not waived this issue for lack of development in his brief. Regarding Tsucalas' waiver of the Trust's issues, we recognize that “[i]n both civil and criminal cases, [the Pennsylvania Supreme] Court has specifically said that issues not raised or presented at the trial stage will not be considered on appellate review.” *DeMarco v. Jones & Laughlin Steel Corp.*, 513 Pa. 526, 530, 522 A.2d 26, 28 (1987). However, Tsucalas has raised these issues at the

first available time as he had no legitimate reason to object to the Trust withdrawing its appeal or the Trust being redesignated as an Appellee. Thus, he has not waived the Trust's issues.

Lastly, concerning the standing issue, we note that the term "standing," as used in this context refers to the issue of whether Tsucalas has a sufficient interest in the outcome of the litigation to be allowed to participate. *Miravich v. Twp. of Exeter*, 6 A.3d 1076 (Pa. Cmwlth. 2010). Specifically, it refers to whether Tsucalas has an interest that is direct, immediate and substantial in the outcome of this matter. *Id.* If the trial court's order is affirmed, Tsucalas is no longer the President and Chairman of the Trust, and he is no longer the Director of the Trust. Clearly, Tsucalas' removal from positions he has held since 1987 gives him a direct, immediate, and substantial interest in the outcome of this matter. Accordingly, Tsucalas' appeal is proper with respect to the issue of standing.

Tsucalas first argues in his appeal that the trial court erred by not holding an evidentiary hearing. Specifically, Tsucalas contends that the trial court's order lacked fundamental fairness and due process. Tsucalas further contends that the parties averred different versions of the facts and that the trial court chose Xenophontos' version with no basis whatsoever, as evidenced by the fact that there were only two conferences and a submitted accounting, the fact that no testimony or other evidence was taken by the trial court, and the fact that the trial court failed to issue an opinion in support of the trial court's order. We agree.

Section 7539(b) of the Declaratory Judgments Act, 42 Pa.C.S. § 7539(b), provides: "When a proceeding under this subchapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." In addition, if Xenophontos believed there were no issues of

fact, it could have filed a motion for summary judgment, which it did not. *See Certain Underwriters at Lloyds v. Hogan*, 852 A.2d 352 (Pa. Super. 2004). The fact that the proceeding was held in the trial court's Orphans' Division does not preclude an evidentiary hearing on the factual issues. In addition, the fact that no opinion was issued with the trial court's order leaves this Court at a loss with respect to the trial court's reasoning as to why an evidentiary hearing was not held.

Specifically, the issue of whether there was an existing Abbot of the Monastery at the time of death of the original President and Chairman is clearly an issue of fact that should not have been decided without an evidentiary hearing. Additionally, Tsucalas was removed as Director of the Trust without being given a full opportunity to support and defend his position. Moreover, the Greek court's opinions, and the translation thereof, apparently relied upon by the trial court were never authenticated in the trial court. An evidentiary hearing was clearly required to make such factual findings. *See generally Brannam v. Reedy*, 906 A.2d 635 (Pa. Cmwlth. 2006) (wherein this Court required an evidentiary hearing prior to determining whether the parties had reached a settlement); *Hill v. City of Bethlehem*, 909 A.2d 439 (Pa. Cmwlth. 2006) (wherein this Court required an evidentiary hearing prior to determining preliminary objections that raised an issue of fact); and *City of Phila. v. AFSCME, Dist. Council 47*, 708 A.2d 886 (Pa. Cmwlth. 1998) (wherein this Court required an evidentiary hearing prior to determining the factual issue of timeliness of an arbitration appeal). Accordingly, the trial court erred in granting the Counterclaim for Declaratory Relief filed by Xenophontos without holding an evidentiary hearing.<sup>3</sup>

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<sup>3</sup> Based on the determination of this issue, there is no need for this Court to address the remaining issues.

For all of the above reasons, we vacate the trial court's order, and remand the matter for an evidentiary hearing, express findings of fact, and an appropriate written opinion detailing the basis for the trial court's ultimate decision in this matter.

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JOHNNY J. BUTLER, Judge

Judge Cohn Jubelirer did not participate in the decision in this matter.



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ORDER

AND NOW, this 16<sup>th</sup> day of June, 2011, the December 30, 2009 order of the Court of Common Pleas of Philadelphia County is vacated, and the matter is remanded to the trial court for an evidentiary hearing, express findings of fact, and an appropriate written opinion detailing the basis for the trial court's ultimate decision in this matter.

Jurisdiction relinquished.

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JOHNNY J. BUTLER, Judge