IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ELLA MOFFETT	)	
	)	
Plaintiff,	)	C.A. No. 6879-MA
	)	
v.	)	
	)	
ELIZABETH M. SUTOR-BANKS, and DEAN A BANKS, D.D.,	)	
	)	
Defendants.	)	

MASTER'S REPORT

Date Submitted: February 19, 2013
Draft Report: March 28, 2013
Final Report: April 11, 2013

Pending before me is Plaintiff Ella Moffett's exceptions to the accounting filed on November 13, 2012, by Defendants Elizabeth M. Sutor-Banks and Dean A. Banks to account for their use of $7170.02 from Moffett's financial account at WSFS Bank.[1] At the conclusion of the hearing on Plaintiff's exceptions, which was held on February 19, 2013, I reserved decision in order to review the transcript from the September 26, 2012 trial on Plaintiff's verified complaint for breach of fiduciary duty, demand for accounting, constructive trust, unjust enrichment, and invalidation of transfer of real property. I have now reviewed the entire record, and am issuing a draft report sustaining Moffett's exceptions to the Defendants' accounting and recommending that Defendants be ordered to pay

[1] $7170.02 is the amount of funds apparently withdrawn from Moffett's WSFS account and deposited in Defendant Sutor-Banks' personal checking account on July 29, 2011. DI 49.

$7,170.02 to Moffett, and that a judgment be entered against the Defendants, jointly and severally, for $7170.02, and that this judgment may be transferred to and recorded in the Prothonotary of the Superior Court.

The record shows that Moffett was 95 years old and recuperating in a nursing home after injuring her arm in the spring of 2011 when she signed several legal documents prepared by her niece Sutor and Sutor's then boyfriend Banks. One of the documents Moffett executed on May 4, 2011, was a durable general power of attorney naming Sutor as Moffett's agent.[2] Another was a "Termination of Employment" document purporting to terminate David J. Durham as Moffett's financial advisor.[3] On July 28, 2011, after Moffett had returned to her own home, she executed a new Durable Personal Power of Attorney drafted by Raymond E. Tomassetti, Esquire, in which she named Durham as her agent.[4]

According to Moffett's trial testimony, she had named her niece as agent to handle her financial affairs while Moffett was in the nursing home simply because Sutor lived nearby and was available, along with her boyfriend Banks, to help Moffett. Moffett, however, had no recollection that she had signed other documents, including a purported will naming Banks as executor, and testified that she was on some unknown prescription medication at the time.[5] Moffett also denied having authorized Defendants to remove approximately $7000 from her

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[2] Plaintiff's Trial Exhibit 3.
[3] Plaintiff's Trial Exhibit 2.
[4] Plaintiff's Trial Exhibit 7.
[5] Trial Transcript on September 26, 2012, at 120-123, 146-149.

WSFS account.[6] She only knew that Sutor-Banks had closed her WSFS account the day after Moffett had visited Tomassetti to change her power of attorney to Durham, and she had no idea what Defendants had done with that money.[7]

The record, including Defendants' accounting and its supporting documentation, reflects that on July 29, 2011, $7170.02 was deposited into Sutor's Wells Fargo checking account.[8] According to the receipts, invoices, bank statements, and handwritten notations on the bank statements, Defendants used these monies to pay their personal expenses, including rent, groceries, electric, cable, car insurance, tires, parking, and gasoline for their vehicle, in addition to mail supplies, postage, legal fees, court fees and Recorder of Deeds fees in their attempt to protect Moffett from her financial planner, David Durham, whom they viewed as a predator. At trial, Defendants testified that they were only following Moffett's directions after they had informed Moffett in the nursing home that Durham was not to be trusted. Banks testified that Moffett told them to hire an attorney and also told them to use her money for their own personal expenses because Banks had to miss work in order to help Moffett while she was in a nursing home for six weeks.[9] At trial, Moffett denied that she had hired Samuel Guy, an attorney whom the Defendants had hired purportedly to protect Moffett from Durham. Guy visited Moffett in her home one time with Sutor-Banks, and

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[6] *Id.* at 142, 144.
[7] *Id.* at 123, 132.
[8] DI 49.
[9] Trial Transcript on September 26, 2012, at 21-26.

suggested having an appraisal done. Defendants paid him $1400, and Sutor-Banks admitted on cross-examination that Moffett never hired Guy.[10]

Defendants alleged that the monies used for their personal expenses were a gift from Moffett. However, as a fiduciary, Defendant Sutor-Banks was prohibited from engaging in self-dealing. I previously issued a bench report after trial finding Defendants failed to demonstrate that Moffett had knowingly and voluntarily waived the duty of loyalty owed to her and had allowed Sutor to engage in self-dealing. No exceptions were taken to my draft bench report, and now it is a final order of the Court. Defendants have failed to demonstrate that any of the other expenditures, i.e., mail supplies, postage, legal fees, court fees, and Recorder of Deeds fees, were for Moffett's benefit. It is clear from the trial record that Moffett does not share Defendants' belief that Durham is untrustworthy and is exploiting her. Notwithstanding Defendants' belief that Durham is laying the groundwork for depleting Moffett's estate after her death, Moffett is entitled to the return of her monies that were used by Defendants for their personal expenses and their personal crusade against Durham.

For the foregoing reasons, Plaintiff's exceptions to Defendants' accountings are sustained, and Defendants should pay $7,170.02 to Plaintiff. A judgment should be entered against Defendants, jointly and severally, for $7170.02, and this judgment should be transferred to and recorded in the Prothonotary of the Superior Court.

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[10] *Id.* at 193.