

RENDERED: SEPTEMBER 6, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-000251-MR

NO. 2012-CA-000414-MR

WILLIAM G. DUNCAN, JR.,  
ANNE DUNCAN MATHEWS, and  
MARY DUNCAN BAER

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE FREDERIC J. COWAN, JUDGE  
ACTION NO. 07-CI-010832

NATIONAL CITY BANK OF KENTUCKY  
N/K/A PNC BANK

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING

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BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: William G. Duncan, Jr., Anne Duncan Mathews and Mary

Duncan Baer appeal from an Opinion and Order of the Jefferson Circuit Court

dismissing most of their claims against National City Bank of Kentucky alleging

breach of fiduciary duty involving trust administration. The Appellants, who are the remainder beneficiaries of the trusts, contend that the Jefferson Circuit Court improperly determined that National City Bank of Kentucky was entitled to Summary Judgment. In its cross-appeal, National City Bank of Kentucky requests that this Court reverse the trial court's holding that the Appellants' claims arising prior to the year 2000 were not barred by the doctrine of laches. For the reasons stated below, we affirm the Opinion and Order on appeal.

The matter before us encompasses an extensive factual and procedural history dating back to 1963, when Stewart E. Duncan, I ("Mr. Duncan") died leaving an estate of \$1,919,647.53. Mr. Duncan was predeceased by his first wife, Mary Grinstead Duncan and his second wife, Anne Leathers Duncan. The will of Mr. Duncan created a testamentary trust in his name that came into existence upon his death. Mr. Duncan, as settlor of the Duncan Trust, designated his daughter, Anne Stuart Duncan, to be the beneficiary of all of the income generated by the trust. This trust was fully funded in 1966 with \$648,083.16. Mr. Duncan's second wife, Anne Leathers Duncan, was settlor of the Anne Leathers Duncan Trust (the "Leathers Trust"), under which her daughter Anne Stuart Duncan was also an income beneficiary. The Leathers Trust was funded in 1963 with \$163,418.68. At the time of Anne Stuart Duncan's death in 2006, the Duncan Trust was valued at \$2,182,466.05. Because Anne Stuart Duncan died without issue, the corpus of the Duncan Trust was distributed to the remaindermen and Appellants herein. These remaindermen each are descendants of Mr. Duncan by his first wife, with

one-half of the Duncan Trust corpus going to Mr. Duncan's grandson William G. Duncan, Jr., and the other half equally to the issue of issue of Mr. Duncan's other grandson, Stuart E. Duncan, II, namely Mary Duncan Baer and Anne Duncan Mathews.

The record reveals that at most relevant times, both trusts were administered by National City Bank.<sup>1</sup> In 1985, the Trustee altered the mix of the Duncan Trust from 65% in common stock and 35% in fixed-income producing assets to 38% in common stock and 62% in fixed-income producing assets. The Trustee never altered the mix of the Leathers Trust, and it remained at about the same 65/35 split of common stock and fixed-income producing assets.

In 2000, the Trustee filed an action in Jefferson Circuit Court seeking to authorize encroachments to the corpus of the trusts for the benefit of Anne Stuart Duncan, to apportion these encroachments between the Duncan Trust and Leathers Trust, and to sell appreciated assets for the purpose of increasing the percentage of fixed-income assets. William G. Duncan and Stuart E. Duncan, II (grandsons of Mr. Duncan) responded with a counterclaim alleging that the Trustee breached the fiduciary duty it owed them.

The matter proceeded in Jefferson Circuit Court, resulting in an Opinion and Order rendered on October 30, 2000, ordering that the asset mix of the Duncan Trust be reconfigured to increase the fixed-income assets to 60%, and apportioning all encroachments 60/40 between the Duncan Trust and Leathers Trust,

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<sup>1</sup> National City Bank is the successor by merger to Kentucky Trust Company. Kentucky Trust Company was the appointed Trustee of the trusts when they were first established.

respectively. On December 27, 2000, the parties entered into an Agreed Order allowing the Trustee to maintain the asset mix of the Duncan Trust more heavily slanted toward growth stock and allow the Trustee to invade the Trust Corpus to pay Ms. Duncan as though the Trustee had complied with the court-ordered adjustment of the asset mix. Lastly, the court rendered an Order on May 25, 2004, dismissing the counterclaim of William G. Duncan and Stuart E. Duncan, II without prejudice. The Order was rendered on the motion of William G. Duncan and Stuart E. Duncan, II, apparently because they recognized that any damages for alleged breach of fiduciary duty could not be established because their interests had not yet vested.

Stuart E. Duncan, II died on September 2, 2006, and his aunt, Anne S. Duncan, died about two months later. At that time, the remaining corpus of the Duncan Trust vested one half to William G. Duncan, Jr. (grandson of Mr. Duncan) and one half to the children of William's brother Stuart E. Duncan, II, namely Mary Duncan Baer and Anne Duncan Mathews. In 2007, National City Bank of Kentucky distributed \$2,182,466.05 to the beneficiaries and Plaintiff/Appellants herein.

On October 30, 2007, William G. Duncan, Jr., Mary Duncan Baer and Anne Duncan Mathews (hereinafter "Appellants") filed the instant action in Jefferson Circuit Court against National City Bank (also referred to as "the Bank" or "the Trustee"). Alleging that National City Bank breached its fiduciary duty by mismanaging the trust assets, the Appellants noted that while it was under the

control of National City Bank, the initial trust corpus of \$648,083.16 grew to only \$2,182,466.02. The Appellants argued that if adjusted for inflation, the initial corpus of \$648,083.16 would have been \$4,032,517.44 in 2006; therefore, the Appellants noted that the Duncan Trust lost nearly half of its purchasing power during National City Bank's administration.

Specifically, the Appellants alleged that National City Bank breached the duty of loyalty and impartiality by maintaining a markedly different asset mix in the Leathers Trust and Duncan Trust, and by improperly encroaching on only the Duncan Trust in 1984 and again in 1990. The Appellants also argued that National City Bank failed to follow the testator's intent to maintain an asset mix in the Duncan Trust that was reasonably calculated to preserve the purchasing power of the trust. Additionally, the Appellants alleged in the complaint that National City Bank failed to act as a prudent investor by radically altering the trust's asset mix in 1985 without any documentation or analysis, and that such a rebalancing was made over the expressed objections of the Duncan Trust beneficiaries.

The matter proceeded in Jefferson Circuit Court, whereupon National City Bank filed a Motion for Summary Judgment on September 30, 2011. It sought summary judgment "on each claim asserted against it in this action by Plaintiffs[.]" The remainder beneficiaries and Appellants herein contemporaneously moved for partial summary judgment. After taking proof on the motions, the circuit court rendered an Opinion and Order on January 18, 2012, sustaining National City Bank's Motion for Summary Judgment. Specifically, the court granted Summary

Judgment on all claims except those that related to the 1983 and 1990 encroachments. The court denied National City Bank's motion solely as to its assertion of entitlement to a judgment based on the doctrine of laches. The court granted the Appellant's motion for partial summary judgment on their claim that the Trustee improperly encroached on the Duncan Trust an amount which should have been proportionately charged to the Leathers Trust. This appeal followed.

The Appellants now argue that the Jefferson Circuit Court erred in sustaining the Bank's motion for summary judgment. They first argue that the court improperly granted summary judgment as to all claims when National City Bank had only sought a narrow list of judicial determinations. The Appellants contend that National City Bank did not expressly assert or otherwise argue that it had met the burden of demonstrating that there was no genuine issue of material fact and that the Bank was entitled to a judgment as a matter of law. Rather, the Appellants maintain that the Bank - via its motion for summary judgment - merely sought six narrow legal "judgments," and that the court's *sua sponte* dismissal of all claims was neither sought nor warranted. They direct our attention to *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), and its progeny, and contend that the standard of appellate review is even more rigorous where the trial court has granted summary judgment *sua sponte*. In sum, the Appellants argue that full summary judgment was neither sought nor supported by the facts and the law, and that the Jefferson Circuit Court erred in failing to so rule.

The Appellants' argument on this issue centers on their claim that National City Bank never sought full summary judgment as to all claims. This contention is refuted by the record. The Bank's motion for summary judgment, styled DEFENDANT, NATIONAL CITY BANK'S, MOTION FOR SUMMARY JUDGMENT expressly "requests that the Court enter summary judgment on each claim asserted against it in this action by Plaintiffs." In a 20-page supportive memorandum found in the record at page 924, the Bank again asserts that "Each of Plaintiffs' claims fails for want of an underlying duty or because Plaintiffs suffered no damages as a result of NCB's actions as Trustee." The Memorandum then addresses each of the Plaintiffs' claims in turn, and concludes by maintaining that the Bank 1) did not have a duty to grow the Duncan Trust, 2) did not have a duty to manage the expenditures of the income beneficiary and the Duncan Trust, 3) did not breach its fiduciary duty under *Wiggins v. PNC Bank, Kentucky, Inc.*, 988 S.W.2d 498 (Ky. App. 1998), as to the encroachments on the principal of the Duncan Trust, 4) did not have a duty to mirror the asset mix of the Leathers Trust , and 5) fulfilled its obligation to provide the Plaintiffs with an accounting of the Duncan Trust.

We conclude from the record that National City Bank sought summary judgment as to all issues asserted by the Plaintiffs/Appellants and that the circuit court's entry of same was not *sua sponte*. The question then becomes whether summary judgment as to all issues was supported by the law. As the parties are well aware, summary judgment "shall be rendered forthwith if the pleadings,

depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc.* at 480. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to the Appellants and resolving all doubts in their favor, we must conclude that the trial court correctly determined that there were no genuine issues as to any material fact and that National City Bank was entitled to a judgment as a matter of law. As to the Appellants’ contention that the Bank breached its duty of loyalty and impartiality by changing the asset mix of the Duncan Trust to emphasize income generation while making no comparable adjustment to the Leathers Trust, the circuit court



determined that a bank or trust company owes fundamental duties of loyalty and impartiality, as well as utmost fidelity. Kentucky Revised Statutes (KRS) 286.3-277(4)(a); *Bryan v. Security Trust Co.*, 296 Ky. 95, 176 S.W.2d 104 (Ky. 1943). The court recognized that *Wiggins, supra*, stands for the proposition that a trustee breaches the duty of loyalty and impartiality it owes to one set of remaindermen when it provides for the income beneficiary by encroaching upon their trust corpus and favoring the other set of remaindermen by leaving their trust corpus undisturbed. In the matter at bar, the court found the instant facts to be distinguishable from *Wiggins* because the Appellants did not claim that the Duncan Trust bore the brunt of supporting Anne Stuart Duncan's income needs during her life, and did not dispute that the income to Ms. Duncan was proportionately borne by both trusts. It concluded that by providing for Ms. Duncan during her life from the income of both trusts, shared by each in proportion to the size of their trust corpus, the Bank "complied with *Wiggins* in every respect." We find no error in this conclusion. The record supports the circuit court's determination that Ms. Duncan's income needs were borne proportionately by both trusts, and it properly applied *Wiggins* in concluding that the Bank strictly complied with its duty of loyalty and impartiality.

Closely woven into the Appellants' argument on this issue is the implicit assertion that the Leathers Trust's outperformance of the Duncan Trust stands as proof that the Bank breached its duties of loyalty and impartiality. In the circuit court's view, this was the Plaintiffs' entire complaint "stripped to its essence."

However, the plaintiffs did not cite, nor did our research reveal, a single decision or treatise from any jurisdiction requiring a Trustee to equally grow the corpus of two trusts that share the same life income beneficiary but designate different remaindermen. As the circuit court noted, the practical effect of such a rule would require a Trustee to protect itself against lawsuits by mirroring the asset mix of two different trusts which were formed at entirely different times and by different assets. The Jefferson Circuit Court concluded that the “rule the plaintiffs propose is unsupported by any legal authority and is practically unsound.” Our duty is to determine if the circuit court properly applied *Steelvest* and its progeny to the record and the law in finding that there were no genuine issues of material fact and that the Bank was entitled to a judgment as a matter of law. We so conclude, and find no error on this issue.

The Appellants also argue that the circuit court erred as a matter of law in overlooking issues of fact concerning whether the Trustee breached its duty of prudence. They direct our attention to Kentucky’s Prudent Investor Act, KRS 286.3-277(1), which provides in relevant part that when a bank or trust company is investing and otherwise managing assets in a fiduciary capacity, it “shall act as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the fiduciary account.” The Appellants note also that comments “a” of Restatement 3d of Trusts Section 77, Duty of Prudence, states that the “test of prudence is one of conduct not of performance.”

In asserting a claim of error on this issue, the Appellants do not point to an individual or series of investments which they claim breached the Bank's duty of prudence. Rather, they assert that a "genuine issue of material fact exists regarding whether such duty was breached when the trustee dramatically altered the historical asset mix employed by the trustee."

A trustee's duty of prudence may be characterized as follows:

The liability of a trustee does not arise from the mere fact of a loss to the estate, in the absence of the violation of some statutory inhibition. It arises, if at all, from a failure to exercise the judgment of a prudent businessman investing funds of his own or of others. To this degree of care he is accountable. . . . We cannot apply "hindsight" as a criterion.

*People's State Bank & Trust Co. v. Wade*, 269 Ky. 89, 106 S.W.2d 74, 76 (Ky. 1937). The two usual purposes of creating a trust are to preserve the corpus and to create an income for the beneficiary. *Id.* at 75.

In examining this issue, the Jefferson Circuit Court determined that the Trustee preserved the corpus of the Duncan Trust while providing a steady stream of income to Anne Stuart Duncan for forty-four years. Additionally, the court found that the Appellants cited no authority for the proposition that the asset mix established in 1985 violated the prudent investor standard, nor that any individual investment or collection of investments within the trust was violative of that standard. Even when viewing the record in a light most favorable to the Appellants on this issue, we find no error in the circuit court's determination that no genuine issue of fact remained for consideration on this issue and that the Bank

was entitled to a judgment as a matter of law. Subsumed in the question of whether the Bank violated its duty of prudence is the related issue of whether the Bank failed to employ an asset allocation that would reasonably keep pace with inflation. Again, even when viewing the record in a light most favorable to the Appellants, there is no basis for concluding that the Bank failed to invest the corpus in assets “whose values will float with the inflationary tide[.]” *Carlick v. Keiler*, 375 S.W.2d 397, 398 (Ky. 1964).

In its cross-appeal, National City Bank argues that the Jefferson Circuit Court erred when it concluded that the Bank failed to show sufficient prejudice warranting application of the bar of laches. Specifically, the Bank contends that the remainder beneficiaries knew of their instant claims as early as the year 2000, when they asserted them as counterclaims in an action instituted by the Bank. In that action, the remainder beneficiaries’ counterclaims were voluntarily dismissed, and the resultant disposition of the Bank’s claim was without prejudice. The Bank now maintains that because the Appellants could have asserted the instant claims at any time subsequent to 2000, but did not do so, it is unfair and prejudicial to the Bank for them to assert them now. The Bank argues that with the passage of time, memories have faded and Bank employees have moved on or retired, thus damaging the Bank’s ability to prosecute a defense. Directing our attention to the Restatement 2d of Trusts Section 219 and *Brown v. Bishop Trust Co.*, 355 P.2d 179 (Ha. 1960), the Bank maintains that the instant facts are a textbook case for the application of laches. It argues that the circuit court erred in failing to bar the

Appellants from now asserting the very claims which they voluntarily dismissed in 2000.

Based on our disposition of the Appellants' claims of error, we hold the Bank's laches argument as moot. *Arguendo*, even were it not moot, we would find no error. It is uncontroverted that the 2000 action was resolved without prejudice, thus availing the Appellants to re-assert the same claims in the future.

Additionally, the Jefferson Circuit Court determined in the instant matter that the applicable statute of limitations did not begin to run until such time as the remaindermen's interests vested, which was at the death of Ms. Duncan. The Bank does not contest this finding. Thus, even if the Bank's laches defense were not moot, we would find no error in the circuit court's determination that it did not operate to bar the Appellants from asserting the instant claims. We find no error.

For the foregoing reasons, we affirm the Opinion and Order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT  
FOR APPELLANTS/CROSS-  
APPELLEES:

Matthew F. Coogle  
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-  
APPELLANT:

Robert Y. Gwin  
Rebecca A. Wood  
Louisville, Kentucky

ORAL ARGUMENT FOR  
APPELLEE/CROSS-APPELLANT:

Robert Y. Gwin  
Louisville, Kentucky