Matter of Wellington Trusts

2013 NY Slip Op 32570(U)

September 30, 2013

Surr Ct, Nassau County

Docket Number: 167490

Judge: Edward W. McCarty III

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Judicial Settlement of the Final Account of Proceedings of the

WELLINGTON TRUSTS.

File No. 167490
File No. 117708
File No. 329415
File No. 329418
File No. 329419

Dec. No. 29023
Dec. No. 29024
Dec. No. 29025
Dec. No. 29026
Dec. No. 29027

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Before the court is JPMorganChase's (hereinafter "JPMorgan") motion to reargue this court's decisions and orders dated March 27, 2013 (Dec. Nos. 28472, 28473, 28474, 28475 and 28476). For the reasons that follow, the motion for reargument is granted. Upon granting leave to reargue, the court's decision is vacated as set forth below.

BACKGROUND

Sarah P. Wellington (hereinafter, "Sarah"), is the daughter of Thomas D. Wellington, who is deceased (hereinafter, "Tom"), and the granddaughter of Herbert G. Wellington, Sr., (hereinafter, "Herbert, Sr.") and Elizabeth Wellington (hereinafter, "Elizabeth"), both also deceased. The trusts herein referred to as the Wellington Trusts, or the trusts, were created pursuant to four instruments: (1) an inter vivos trust agreement executed by Herbert, Sr. on August 15, 1961 (hereinafter, the "1961 Trust Agreement"); (2) Herbert Sr.'s Last Will and Testament (hereinafter, "Herbert Sr.'s will"); (3) the Last Will and Testament of Herbert's wife, Elizabeth (hereinafter, "Elizabeth's will"); and (4) the Last Will and Testament of Herbert Sr.'s younger son, Tom (hereinafter, "Tom's will"). Prior to Tom's death, JPMorgan served as co-

trustee of the trusts for almost forty years. Herbert, Sr. had appointed his older son, Herbert Wellington, Jr. ("Herb"), as co-trustee while Elizabeth had appointed Herbert Sr.'s and Herb's business partner, Robert Merrill (hereinafter, "Robert"), as co-trustee. While Tom was alive, there were three trusts for his benefit, under the 1961 Trust Agreement (hereinafter, "Tom Trust #1"), one under Herbert Sr.'s will (hereinafter, "Tom Trust #2") and one under Elizabeth's will (hereinafter, "Tom Trust #3"). Under the 1961 Trust Agreement, upon Tom's death, one-fourth of Tom Trust #1 flowed into a trust for the benefit of Sarah (hereinafter, "Sarah Trust #1") (and the other three-fourths to trusts for her half-siblings). Upon Tom's death, Tom exercised powers of appointment granted to him under Herbert Sr.'s will and under Elizabeth's will and created four new trusts, one for each of his four children, funded with the assets from Tom Trust #2 and Tom Trust #3. Sarah's trust is known as "Sarah Trust #2." Following Tom's death, JPMorgan continued, along with Herb, to serve as co-trustee under the 1961 Trust Agreement until Herb's resignation in 2004. JPMorgan has served as sole trustee of Sarah Trust #2, following the renunciation of her half-siblings as co-trustees.

THE ACCOUNTS

In August 2003, JPMorgan and its co-trustees filed petitions seeking approval of their accounts for Tom Trust #1, Tom Trust #2, Tom Trust #3, Sarah Trust #1 and Sarah Trust #2. The petitions were served on all interested parties, including but not limited to Sarah and her half-siblings. Only Sarah filed objections.

OBJECTIONS TO THE ACCOUNT

Sarah alleges that JPMorgan breached its fiduciary duties to her by: (1) causing substantial losses in the trusts by failing to diversify the trusts' assets; and (2) failing to make appropriate distributions to her from the income and/or principal of the trusts. More specifically,

the expert report filed in support of Sarah's objections alleges that JPMorgan failed to sell certain assets, failed to diversify among different classes of assets, and failed to diversify within classes of assets. Sarah seeks equitable and monetary damages in the form of restitution, retroactive distributions, return of commissions, surcharges, attorneys' fees, diversification, removal of the fiduciary and appointment of a successor trustee or co-trustee.

JPMorgan argues, however, that Sarah's expert's report provides a simplified analysis of the alleged damages suffered and does not address how the trusts should have been invested in the alternative, thus rendering it impossible for JPMorgan to respond with a calculation of purported damages by its own expert. The trustee maintains that even if Sarah proves liability, it would be impossible at this stage to determine what stocks should have been sold and when, and which classes and types of assets should have been reallocated, if any.

PRIOR MOTION TO
BIFURCATE LIABILITY AND DAMAGES

In anticipation of the upcoming trial on the contested accountings, JPMorgan made a motion to bifurcate the liability portion of the trial and the damages portion of the trial. The requested bifurcation would have limited the first phase of the proceedings solely to liability issues. It was argued that this was necessary due to the complexity of the issue of damages. If the trial was bifurcated, and JPMorgan was found to have breached its fiduciary duties to Sarah, the court would then address the issue of damages.

An affirmation in support of JPMorgan's underlying motion to bifurcate was filed by counsel for Peter L. Wellington (hereinafter, "Peter"), and Margaret Wellington Constantine (hereinafter, "Margaret"). Peter and Margaret are two of the three presumptive remainder beneficiaries of the trusts for the benefit of Sarah, and they are also the primary beneficiaries of the parallel trusts whose accounting proceedings are uncontested. Counsel also represents the

adult children of Peter and Margaret; the children are contingent remainder beneficiaries of Sarah's trusts as well as beneficiaries of the trusts for the respective benefits of their parents. Counsel's affirmation indicates that he concurs with the motion for bifurcation, in the hope that bifurcation will enable the avoidance of unnecessary trust expenses and lead to a speedier resolution of the conflict.

Sarah opposed JPMorgan's motion to bifurcate and disputed the claims of JPMorgan's expert, who argued that this is an unusually complex case. Sarah argued that the proceeding is essentially a simple and direct one, turning on whether JPMorgan failed to appropriately manage the Wellington Trusts. She argues that "liability and damages in this matter are so interwoven as to be indistinguishable. This is a case about damages, and damages are perhaps the best evidence of liability." Sarah asserted that bifurcation would be inefficient and would further delay these accounting proceedings, which were originally filed in 2004.

In Decision Nos. 28472, 28473, 28474, 28475 and 28476, this court declined to order bifurcation of the trial on liability and damages finding that JPMorgan failed to establish that bifurcating the trial on liability and damages would lead to a more expeditious resolution of these proceeding. In addition, the court found that the nature and extent of damages is essential to the issue of liability because the damages are being presented as evidence of liability. Accordingly, the court denied the motion for bifurcation.

MOTION TO REARGUE

Motions for leave to reargue are governed by CPLR 2211. A motion for leave to reargue is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2211 [d] [2]). It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some

reason mistakenly arrived at its earlier decision (*Andrea v E.I. duPont de Nemours & Co.*, 289 AD2d 1039 [4th Dept 2001]; *Bolos v Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]; *Schneider v Soloway*, 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equipment Corp v Kassis*, 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.,* 99 AD2d 971 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*Giovanniello v Carolina Wholesale Off. Mach. Co., Inc.,* 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Cmty. Mgt.*, 20 AD3d 388 [2d Dept 2005]; *Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.,* 10 AD3d 374 [2d Dept 2004]; *Frisenda v X Large Enters.*, 280 AD2d 514 [2d Dept 2001]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). Nevertheless, it is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision (*Peak v Northway Travel Trailers, Inc*., 260 AD2d 840 [3d Dept 1999]). Additionally, even in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate (*Loris v S & W Realty Corp.*, 16 AD3d 729, 730 [3d Dept 2005]).

JPMorgan now argues that reargument should be granted and the court's decision should be vacated because: (i) evidence of damages cannot be introduced to prove liability; (ii) the decision overlooked the several reasons why bifurcation would achieve a more expeditious resolution of the issues; and (iii) the decision overlooked the case law cited by JPMorgan in which bifurcation was ordered in breach of fiduciary duty cases.

Specifically, JPMorgan argues that the court incorrectly stated that damages may be presented as evidence of liability, and, as a result, concluded that bifurcation would not be beneficial. JPMorgan asserts that under the standard of conduct governing fiduciary investment that liability is not predicated upon performance, or lack thereof, of a trust portfolio but rather upon adherence to standards of conduct. "The test is prudence, not performance, and, therefore, evidence of losses following the investment decision does not, by itself, establish imprudence" (*Matter of Janes*, 223 AD23d 20, 26 [4th Dept 1996, *affd*, 90 NY2d 41 [1997]). JPMorgan contends that the court's decision relied "on personal injury cases in concluding that bifurcation is not appropriate when the extent of damages or evidence of damages, has a bearing on the issue of liability." JPMorgan argues that the cases the court relied upon did not address the issue of bifurcation where standards governing fiduciary investments are at issue.

In addition, JPMorgan argues that the court failed to address or overlooked the issues raised by their expert, G. William Schwert, in his affidavit. Mr. Schwert would have to "run near endless permutations and combinations of factors in his damages calculations" if bifurcation is not ordered. "Without this court's guidance on liability, JPMorgan can only speculate as to what purportedly would have the proper percentages of specific equities . . . liability will need to be presumed with respect to various trust investments and distributions at varying times, with an endless number of speculations." Essentially, JPMorgan argues that the court misapprehended the law with respect to how liability is determined in a breach of fiduciary duty case, which caused the court to mistakenly find that there would not be any benefit from bifurcation of liability and damages.

Lastly, JPMorgan argues that the court's decision "incorrectly recites that neither party had cited case law supporting bifurcation involving allegations of breach of fiduciary duty to

invest and distribute assets." JPMorgan claims that it cited several cases where the issues of liability and damages were bifurcated in breach of fiduciary duty matters, including *HSBC (Knox)*, 30 Misc 3d 1203[A] [Sur Ct, Eric County 2010], *mod*, 98 AD 3d 300 [4th Dept 2012], *Matter of Sakow,* 97 NY2d 436 [2002], *McGuire v Huntress*, 83 AD3d 1418 [4th Dept 2011], *leave to appeal denied*, 17 NY3d 712 [2011] and *Don Buchwald & Assoc. v Marber-Rich*, 305 AD2d 338 [1st Dept 2008].

Sarah opposes the motion to reargue on the following grounds: (i) that the motion to reargue is untimely (CPLR 2221); (ii) that the court was correct in stating that damages are evidence of liability; (iii) that the court in fact considered but rejected the opinion of JPMorgan's expert; (v) that the court correctly recognized that none of the breach of fiduciary duty cases cited by JPMorgan involved a trial court ordering bifurcation. Sarah's counsel disputes that she intends to prove her case entirely through damages but rather argues that JPMorgan failed to meet the standard of performance incumbent upon a trustee.

In reply, JPMorgan asserts that the motion to reargue is timely because under CPLR 2221, the 30 day time period does not begin to run until service of both the order and notice of entry.

To date, no notice of entry of the court's decision has been served, and therefore, the time to file a motion for reargument has not begun to run. Accordingly, the motion is timely (*see Zhi Fan Shi v Sanchez*, 36 AD3d 486 [1st Dept 2007]).

As stated above, the court has discretion to grant reargument, even where the requirements are technically not met and does so in this case. The court did not conclude, as JPMorgan claims, that JPMorgan failed to cite cases where bifurcation occurred in fiduciary duty cases, but rather stated that "neither party has cited a decision in which a court directed

bifurcation of liability and damages where the sole issue before the court was whether there was a breach of fiduciary duty to properly invest and distribute assets." Moreover, while the court agrees that the standard of conduct is prudence, the court does not agree, as JPMorgan suggests, that damages may not be presented as evidence of liability where the issues are intertwined. Nevertheless, in the prior decision, the court did not specifically consider how the standards governing fiduciary investments impact the issue of bifurcation, and as a result, gave insufficient credence to JPMorgan's contention that bifurcation might result in a more expeditious resolution of the issues in these proceedings. Accordingly, reargument is granted.

ANALYSIS

These proceedings involve accountings for five separate trusts covering periods ranging as far back as 1962 and up to 2009. Sarah's objections, admittedly, are limited to the period after July 2000, but it is possible that fiduciary conduct prior to that time might also be relevant. Sarah alleges that JPMorgan breached its fiduciary duties by: (i) causing substantial losses in the trusts by failing to diversify the trusts' assets; and (2) failing to make appropriate distributions to her from the income and/or principal of the trusts. She further alleges that JPMorgan should have diversified specific stock holdings, the allocation of holdings between major asset classes and the allocation of types of holdings within asset classes.

In support of her claims, Sarah relies on a written report from her expert, Loren Ross. Other than claiming the trusts were too heavily weighted in equities and, among the equities, too heavily weighted in large capitalization and domestic common stocks, Mr. Ross provided no further details regarding how he contends the trusts should have been invested.

The court's power to bifurcate trials arises from its broad discretion, codified in CPLR 4011 and 603, to regulate all aspects of trial scheduling (Carmody-Wait NY Prac § 37:15). The

purpose of bifurcation is to simplify the issues and make the litigation and the trial more efficient (Carmody-Wait, NY Prac § 37:15). In determining whether to bifurcate proceedings, the court must weigh several factors including whether hardship to the parties will be reduced, whether a just determination will be more speedily reached and whether the various issues will be clarified (Carmody-Wait, NY Prac § 52:4).

In determining whether bifurcation would result in clarification and an expeditious resolution in these proceedings, the court must analyze the issue of bifurcation specifically with respect to the standards of fiduciary conduct.

Here, the accountings span two different legal standards for trust investment. As Surrogate Scarpino stated in *Matter of Hunter* (27 Misc. 3d 1205[A] [Sur Ct, Westchester County 2010]):

> "The accounting here spans two different legal standards for trust administration. Prior to January 1, 1995, New York followed the prudent person rule of investment (*see* EPTL 11-2.2) which mandated that a trustee employ diligence and prudence in the care and management of a trust equivalent to that of a prudent person of discretion and intelligence in managing his or her own affairs. This standard dictates against any absolute rule that a fiduciary's failure to diversify, in and of itself, constitutes imprudence, as well as against a rule invariably immunizing a fiduciary from its failure to diversify in the absence of some selective list of elements of hazard. Instead, the inquiry is simply whether, under all facts and circumstances of the particular case, the fiduciary violated the prudent person standard in maintaining a concentration of a particular stock in the [trust's] portfolio of investment.
>
> For a trustee's investments made or held on or after January 1, 1995, the prudent investor rule (*see* EPTL 11-2.3 [a]) requires a trustee to diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes and terms and provisions of the governing instrument. The diversification mandate of the prudent investor rule is generally consistent with the diversification standards developed by the courts under the prudent person rule.
>
> Assuming imprudence is found, the court may then determine, within the applicable accounting period, the reasonable time within which the fiduciary should have divested itself of the investment. There is no fixed standard for what constitutes a reasonable time for divestment, and such a finding will be measured by the diligence and prudence of prudent and intelligent [persons] in the management of their own affairs."

Calculation of damages in breach of fiduciary duty cases is predicated upon the type of misconduct or breach of fiduciary duty found. As this court stated in *Matter of Pollack,* NYLJ, Sept. 17, 1998, at 30, col. 3 (Sur Ct, Nassau County]):

> "[L]iability for a trustee's negligent retention of stock requires not only a showing of imprudence but proper proof of damages. It is clear that in order to establish what these damages are an objectant must prove at trial the time when the trustee should have sold the shares (*Matter of Janes*, 90 NY2d 41; *Matter of Newhoff,* 107 AD2d 417). This burden can usually be met only with expert testimony. The proper measure of damages for a fiduciary's negligent retention of assets is the value of lost capital as calculated by determining the value of the stock at the time the shares should have been sold, less their value when they were eventually sold or at the time of the accounting or at the time of the trial (*Matter of Janes,* 90 NY2d 41). Subtracted from this difference would be any amounts received as dividends or other benefits attributable to the retained assets (in this instance, the losses were used to offset capital gains from other stocks owned by trusts on the fiduciary's tax return).

If, on the other hand, the fiduciary's misconduct is found to consist of "deliberate self-dealing and faithless transfers of trust property," damages are calculated on a 'lost profit' measure (*Matter of HSBC Bank* , *USA, N.A., Knox,* 30 Misc 3d 1203 [Sur Ct, Erie County [2010], *mod*, 98 AD3d 300 [4th Dept 2012]). As the court in *Matter of Garrasi* (33 Misc. 3d 1224(A) [Sur Ct, New York County 2011]), damages may differ depending on the type of misconduct (see *Matter of Rothko*, 43 NY2d 305 [1977] [allowance of appreciation damages where the fiduciary's misconduct consisted of deliberate self-dealing and faithless transfers of trust property]; *Scalp & Blade, Inc. v. Advest, Inc.*, 309 AD2d 219 [4th Dept] [compensatory damages are recoverable where breach of fiduciary duty extends beyond mere negligent retention of the portfolio's holdings and involves deliberate and flagrant self-dealing and dishonesty on the part of the fiduciaries]; *Matter of Hunter,* 27 Misc. 3d 1205[A] [Sur Ct, Westchester County 2010] ["lost profit" measure of damages appropriate where fiduciary's misconduct consisted of deliberate self-dealing with trust property]; *Matter of Tydings* , 32 Misc 3d 1204[A] [Sur Ct,

Bronx County 2011] [where the breach of trust consists of a serious conflict of interest, the trust can recover the lost profit from the trustee].

Thus, the calculation of damages is dependent upon a finding as to the type of breach of fiduciary duty, an issue not yet determined. In addition, the calculation of damages requires the court to determine the value of the stock on the date it should have been sold and subtract from that figure the proceeds from the sale of the stock or, if the stock is still retained by the estate, the value of the stock at the time of the accounting. Dividends and other income generated by the retention may offset losses occasioned by the retention and capital gains must also be subtracted.

JPMorgan is correct that bifurcation of liability and damages has been permitted in breach of fiduciary duty cases (*see HSBC Bank, USA, N.A., Knox* (30 Misc 3d 1203 [Sur Ct, Erie County 2010]; *Matter of Reichenbaum,* NYLJ, June 9, 1992 at 25 [Sur Ct, Nassau County]; *Matter of Sakow,* 36 Misc 3d 1233 (A) [Sur Ct, Bronx County 2012]) and the court considered them in its prior decision, but concluded they were all distinguishable from the case at bar. Also, in *Matter of Ayer*, (2005 NY Misc Lexis 4352 [Sur Ct, Westchester County 2005]), the court considered and rejected a request by the corporate trustee to bifurcate the trial and held as follows:

> "The case before the court is not one in which a simple, factual, threshold issue will determine whether or not a trial of damages is necessary. Distinct and severable issues which may be tried separately are not easily separated in this matter (*see Barrera v Skaggs-Walsh, Inc.*, 279 AD2d 442 [2001]). While it is a matter beyond dispute that the Prudent Investor Rule is a test of conduct and not performance, the issue of whether FTCI breached its duty as trustee is inextricably intertwined with the same issues which concern the assessment of damages. In short, the petitioner has failed to demonstrate that bifurcation would assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action
> *Matter of Ayer* (2005 NY Lexis 4352 [Sur Ct, Westchester County 2005]).

Thus, there are breach of fiduciary cases which reach different conclusions on the

appropriateness of bifurcating the liability and damages portions of a trial on breach of fiduciary duty. Unlike the facts in *Matter of Ayer,* where administration of a singe trust was at issue, here, there are five trusts at issue. The accountings covers different periods. It appears that the assets and holdings of the trusts are not identical. The issue of liability may, therefore, vary with respect to each trust. As stated above, a computation of damages depends not only on the type of fiduciary breach of duty, but also upon the assets held in the trust.

Upon reconsideration, the court concludes that bifurcation will likely result in a more expeditious resolution of the issue. Absent bifurcation, petitioner's expert would have to prepare for many scenarios and permutations which would result in further expenses to the trusts, and, therefore, the beneficiaries. Given the nature of Sarah's claims and the allegations and conclusions contained in Mr. Ross' report regarding liability and damages, it would be virtually impossible for JPMorgan to respond with a calculation of purported damages by its own expert. Assuming that Sarah were ultimately able to prove liability, it would be nearly impossible prior to a finding of liability to determine what individual stocks, if any, should have been sold and, if so, to what extent they should have been sold, as of what date or dates, and how the proceeds should have been invested. Likewise, it would be nearly impossible to determine what asset classes (*i.e.*, equities, cash, fixed income), if any, should have been reallocated and, if so, to what extent they should have been reallocated, as of what date or dates, and into what other asset class or classes. Finally, it would be also difficult to determine what types of holdings within an asset class (*e.g.*, large capitalization, small capitalization, domestic and international equities), if any, should have been reallocated and, if so, to what extent they should have been reallocated, as of what date or dates, and into what other types of holdings within the asset class. Morever, this

analysis would have to be performed for each of the five trusts in these accounting proceedings.

It is more convenient and economical and serves the interests of judicial economy by narrowing the range of potential damages (if any) with more precise and less speculative calculations, and adjudicating in the first phase issues that may altogether dispose of the need to litigate the issue of damages. Additionally, bifurcation will not prejudice Sarah, but would actually minimize the costs to the trusts since the expert's fee seemingly would be substantially greater if he had to engage in the type of analysis required absent bifurcation.

Accordingly, the court vacates its prior decisions and the motion for bifurcation is granted.

Dated: September 30, 2013

EDWARD W. McCARTY III
Judge of the
Surrogate's Court