Matter of Littleton
2014 NY Slip Op 31497(U)
June 10, 2014
Surrogate Court, New York County
Docket Number: 2008-1714
Judge: Nora S. Anderson

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

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In the Matter of the Judicial Settlement of the First Intermediate account of HSBC Bank USA, N.A.(successor in interest to Marine Midland Bank F/K/A The Marine Midland Trust company of Western New York) As Trustee under Agreement dated 3/21/60 of Jesse T. Littleton, deceased, for the benefit of

HARVEY LITTLETON, et al.

2008-1714

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A N D E R S O N, S.

HSBC Bank (the Bank or petitioner), as trustee of a trust created by decedent Jesse Littleton for the benefit of Harvey Littleton, moves for partial summary judgment[1] dismissing the objections filed by the trust's beneficiaries to its first intermediate account.

The Objectants are income beneficiaries Jesse's son, Harvey Littleton and Harvey's wife, remainderpersons Carol Shay, Thomas, Maurine and John Littleton, and a GAL appointed for Harvey. They assert, in sum, that the Bank breached its fiduciary duty by its failure to timely dispose of a concentrated position in Corning Glass stock and to diversify the holdings of the trust. In response, the Bank contends that

[1] The Bank objects to the submission of Objectant's expert's affidavit on the grounds that facts and opinions offered are beyond the disclosure provided; provides documents not authenticated or produced in discovery; and is conclusory and speculative. The court makes reference to this matter solely to advise that it has not considered the affidavit in its determination here.

the retention clause of the trust agreement specifically exonerates the Trustee from liability for its actions.

Decedent, the inventor of Pyrex and a former high-ranking executive at Corning Glass, created an inter vivos trust dated March 21, 1960. Pursuant to his April 2, 1960 will, the residue of his estate was to pass to two trusts for the benefit of his wife and upon her death, the remainder was to pass in equal shares in trust for each child of the settlor then living. The exculpatory clause to which petitioner refers states: "to the extent that the trustee retain any stock, it shall not be held responsible for any loss or appreciation that may occur."

The Bank filed an interim accounting in July 2008, covering the period 1966 through 1994 to which objections were filed in May 2009. Objectants allege that the trustee failed to invest the assets of the trusts in a manner required of a corporate fiduciary of discretion and intelligence, seeking reasonable income and preservation and increase of capital.

The Court of Appeals has set forth a list of factors to be considered in determining whether the standards for a prudent person or prudent investor have been violated. Among those factors are:

> "the amount of the trust estate, the situation of the beneficiaries, the trend of prices and of the cost of living, the prospect of inflation and of deflation. [A] trustee must weigh all of these investment factors as they affect the principal object of the testator's or

> settlor's bounty as between income beneficiaries and remainderpersons, including decisions regarding whether to apportion the investments between high-yield or high growth securities[;] various factors affecting the prudence of any particular investment must be considered in light of the circumstances of the trust itself rather than merely the integrity of the particular investment."

(*Estate of Janes*, 90 NY 2d 41, 51, [1997] *citations and internal quotations omitted)*.

However, during the forty-two years covered by the instant accounting, the standard of care by which a prudent person was to be judged changed from the common law rule to two separate statutory rules:

> "From 1957 until 1970, the standard [by which a fiduciary was to be judged] was the common law rule, which provided that the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent persons of discretion and intelligence in such matters employ in their like affairs.
>
> From 1970 to 1995, the standard of care was the prudent person rule established in EPTL 11 - 2.2 (a) (1), which provided that a fiduciary holding funds for investment may invest the same in such securities as would be acquired by prudent persons of discretion and intelligence in such matters who are seeking a reasonable income and preservation of their capital."

Matter of HSBC Bank USA, N. A. (Knox), 98 AD3d 300, 308 [4th Dept 2012], citations and internal quotations omitted).

Therefore, objectants argue, the Bank must prove that it was diligent, prudent and intelligent in the management of the trust from 1966 through 1994, when the majority of transactions involving the Corning Glass shares occurred. (*See, e.g., In re*

Dumont, 4 Misc 3d 1003 [Surr Monroe 2004] reversed in part on other grounds, 26 AD 3rd 824 [4th Dept 2006]).

> "Effective January 1, 1995,. . .(EPTL 11 - 2.3) created a new standard of care by providing that a trustee shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument." *Id.*

While "[t]he prior iterations of the prudent investor standard were not as explicit [as the Prudent Investor Act], they still required a fiduciary to make a careful examination of whether maintaining a concentration was advisable." *(See, Matter of JPMorgan Chase (Strong), 41 Misc 3d 1231 (A), citing Janes at 49.* Thus, from 1970 through the end of the accounting period, the Bank was required to prove it exercised reasonable care, skill and caution in its management decisions.

However, even if later events suggest a trustee could have displayed better judgment, or could have produced a more favorable result by selling earlier, that in and of itself does not equate with liability. *(See, e.g., In re Kopec, 25 Misc 3 901, 905, 909, [Surr Monroe, 2009], affd 79 AD 3d 1732 [4th Dept 2010], citing Matter of Kent 146 Misc 155, 161 [Surr NY 1932]).* Moreover, the fact "that a trust might have been able to earn more money through other investments [. . .does not] establish a breach of duty[.]" *(In re Knox, 98 AD 3d 300, 317 (4th Dept 2012) citing Bankers Trust, 219 AD 2d 266, 272 [1st Dept 1995]).* The

determination of whether a trustee has complied with the relevant standards depends on the facts and circumstances of each case. *Janes, supra at 50.*

Specifically, Objectants contend that for eight years after the initial funding, the Bank did virtually nothing to develop an investment plan, meet with and determine Harvey's income needs, or meet with the remainder persons, or diversify the portfolio, all of which would be required of a person of discretion and intelligence. (*See, e.g., Dumont, supra*). Indeed, the Bank was unable to produce any policy or procedural manuals for its trust practices for the period 1968 - 1972. Unquestionably, "[t]he complete lack of documentation alone is itself a breach of trust." (*Dumont, supra, citations omitted*). A corporate fiduciary's failure to follow its own procedural requirements and to undertake a formal analysis of the holdings is itself relevant to the question of liability. *Janes, supra, at 54.*

In support of its motion, the Bank counters that Harvey, as one of the co-executors, knew both the settlor's history with Corning and its stock, and knew or should have been aware of the settlor's direction to the trustees that they exercise options for Corning stock. In fact, the Bank offers that Objectant himself, as a co-executor, transferred the Corning stock to the trust, and was thus aware of the trust's holdings. The court

finds unavailing the Bank's attempt to mitigate its liability by asserting that the estate's fiduciaries had the opportunity to reduce the Corning holdings but failed to do so.

The Bank is not entitled to escape its fiduciary duties by relying on the acts of others. "The trustee's duty is to exercise that degree of care which 'prudent men of discretion and intelligence in such matters, employ in their own like affairs.'" (*Matter of Hahn, 93 A.D. 3d 583, 586 [4th Dept 1983] citing King v Talbot 40 NY 76 [1869] quoted in Matter of Bank of NY, 35 NY2d 512, 518-519 [1974] and Matter of Clark, 257 NY 132, 136[1931])*. Here, the Bank as a fiduciary with specific investment skills, is charged with the responsibility of, among other things, determining whether to retain or dispose of initial assets; develop and follow an investment strategy in accordance with the need to make distributions, and balance risk against rate of return. A trustee is required to consider factors including size of the portfolio, need for liquidity of the estate, distribution, and tax consequences and to view diversification as the default provision. *(See, e.g. In Re Kopec, 25 Misc. 3d 901, 905 [Surr Monroe 2009], affd, 79 A.D.3d 1732[4th Dept 2010])*.

The Court now turns to the Objectant's claim that the Bank failed to keep the income beneficiaries and remainderpersons informed of its activities and thus concealed its breach of

duty. While the record contains documents indicating some communication with beneficiaries, it is void of any evidence that petitioner personally met with either the income beneficiary or the remainderpersons to evaluate their needs within the context of the trust's current status. Similarly, while some documents reflect interaction with an income beneficiary, there are none showing interaction with the remainderpersons. Clearly, "[a] trustee has a duty of impartiality among classes of beneficiaries[,]" *(Dumont, supra, citing Restatement of Trusts 2nd §232; In re Woodin's Estate 118 NYS 2d 465, 469 (1952); In re Kilmer's Will, 18 Misc 2d 60, 69 [1959])*. The question of whether the trustee ever met or consulted with the remainderpersons raises a factual issue yet to be determined.

The Bank offers copies of correspondence between itself and Harvey and its internal records, such as semiannual notices regarding the trust's holdings. In a November 1968 letter, Harvey requested an invasion of principal to provide sufficient funds for his children's education. He suggested that since the children were the ultimate remainderpersons of the trust, that invasion of principal would be the most logical and least expensive. An internal Bank memo dated August 8, 1974 notes that "since the inception of the trust in 1968, Mr. Harvey Littleton has annually invaded the trust for the educational expenses of

his children and to date such invasions total $35,000." The trust officer who prepared the memo recommended to the Officers Trust Investment Committee that the 1974 request be granted, as had such earlier requests. Thus, the Bank contends, Harvey was well aware of its handling of the trust's assets, and was himself the party to its activities in seeking invasion of the principal. Whether or not this is factually correct is of no moment since Harvey's actions or requests cannot provide the basis to evaluate a trustee's actions, and certainly cannot be the basis for summary judgment.

Yet another claim asserted by Objectants is that the Bank should have divested the trust of 90% of the Corning stock by October 1968, i.e., some five months after the trust was first funded. "What constitutes a reasonable time [for diversifying concentrated holdings] will vary from case to case and is not fixed or arbitrary." (*Matter of Janes, 90 NY 2d 41, 54 [1997], citing Matter of Weston, 91 NY 502, 510-511 [1883]*). While there is no definitive time by which concentrated stock holdings must be disposed of, the Court of Appeals affirmed the trial court's holding that such disposition within a month was appropriate. *(Janes, supra at 54-55)*. The Third Department affirmed a trial court's ruling that such sale within four months of the funding of the trust was required. (*In re Estate of Rowe, 274 A.D. 2d 87, 90 [3rd Dept 2001]*). "In older cases, 12 to 18 months was

seen as a reasonable time period to liquidate stock." *(In re Kopec, 25 Misc 3d 901 (2009); affd 79 AD 3d 1732 [4th Dept 2010], citations omitted)*. Here, however, the first sale of Corning stock by the Bank was made in April of 1969, nearly a year after the assets of the estate were turned over to the Bank. Objectants claim that the trust lost more than $380,000 over the 42 year period of the accounting. The timing of sales of Corning Glass and its impact on the trust constitute a question of material fact which cannot be summarily determined.

Finally, the court considers Objectants' argument that the exculpatory provision of the indenture does not absolve the Bank of being inattentive, which, they argue, cannot be denied, pointing to Bank's failure to support its claim of actively managing the trust. The Bank, on the other hand, asserts that the restrictions of EPTL 11-1.7 (which exonerate a fiduciary from liability for failure to exercise reasonable care, diligence and prudence as contrary to and violative of public policy) do not apply to lifetime trusts. Be that as it may, some accountability is required. *(In re Knox, 98 A.D. 3d 300, 312 [4th Dept 2012] citations omitted.)* "[T]rustees with special investment skills [are] held to a higher standard of care. . . requiring them to 'exercise such diligence in investing and managing assets as would customarily be exercised by prudent investors of discretion and intelligence having special

investment skills.'" *(Matter of JPMorgan Chase (Strong), 41 Misc 3d 1231 (A), citing EPTL 11-2.3(b) [6])*.

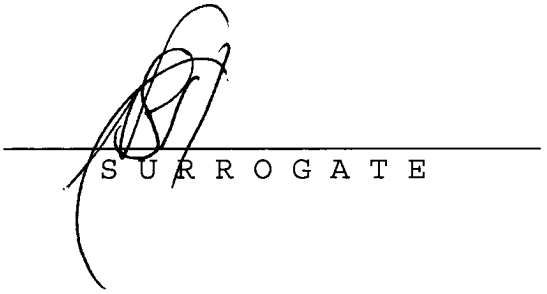
"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *(Winegrad v N.Y. Univ. Med. Center, 64 N.Y. 2d 851, 853 [1985], citations omitted)*. Objectants must raise facts sufficiently material as to require the motion be denied. *(See, e.g., Friends of Animals v Associated Fur Mfrs, 46 NY 2d 1065, 1067 [1979])*. Here, Objectants have raised sufficient material facts regarding the fiduciary's compliance with its obligations. This requires the Court to deny petitioner's motion seeking dismissal of the objections to the accounting. "The determination of whether the conduct of a trustee measures up to the appropriate standards of prudence, vigilance and care is a fact to be found by the trial court." *(In re Harry Winston, 39 AD 3d 765, 766 [2d Dept 2007] citations omitted)*.[2]

[2] Movant also sought leave to file a petition pursuant to SCPA 2211, seeking attorneys' fees and expenses incurred in defense of the objections. Such provision, however, does not govern attorney fee applications. To the extent movant intended to refer to SCPA 2210, leave is not required before making such application. That matter can be tried following the trial of the accounting.

Discovery has been completed. Trial will commence on July 21, 2014at 11:00 AM.

This is the decision and order of the court. Settle order.

Dated: June 10, 2014



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