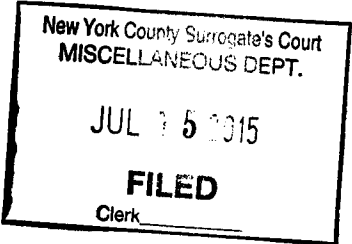


Matter of Goodman
2015 NY Slip Op 31234(U)
July 15, 2015
Sur Ct, New York County
Docket Number: 2011-2991
Judge: Rita M. Mella
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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK



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In the Matter of the Judicial Settlement of the First
Intermediate Account of Proceedings of Van Kirk Reeves
as Sole Surviving Trustee of the Trust created by

MARK L. GOODMAN,
Grantor,

DECISION
File No.: 2011-2991

Under Agreement dated September 15, 1981.
-----X

M E L L A, S.

<u>Papers Considered</u>	<u>Numbered</u>
Amended Notice of Motion.....	1
Affidavit of Thomas R. LeViness, Esq. dated Aug. 11, 2014.....	2
Affidavit of Van Kirk Reeves, Esq. dated Aug. 7, 2014, with Exhibits A-F.....	3
Memorandum of Law in Support of Petitioner’s Motion for Summary Judgment.....	4
Affirmation of John K. Walsh, Jr., Esq. in Opposition to Summary Judgment Motion, with Exhibits A through J.....	5
Memorandum of Law in Opposition to Motion for Summary Judgment	6
Reply Memorandum of Law in Support of Motion.....	7
Affidavit of Van Kirk Reeves, Esq., regarding French Law.....	8

This is a contested proceeding to settle the first intermediate account of Van Kirk Reeves, as trustee of an inter-vivos irrevocable trust created by Mark L. Goodman under agreement dated September 15, 1981. Mr. Reeves moves for summary judgment dismissing all of the objections to his account filed by Valerie Goodman and Corinne Fay Goodman-Burstein,¹ the grantor’s daughters and two of four remainder beneficiaries of the trust.

¹ The Objections are verified only by Valerie Goodman, which according to Petitioner, makes her the only objectant. If Valerie and her sister Corinne are united in interest, the verification by only one of them suffices (CPLR 3020[d]). In any event, any concern regarding the lack of verification by Corinne may be cured post-filing in the absence of prejudice to a substantial right of a party (see *Matter of Taschereau*, NYLJ, July 24, 2009, at 44, col 3 [Sur Ct, New York County]).

Procedural History

Mark Goodman established a lifetime irrevocable trust² under agreement dated September 15, 1981 (“the Trust”), between himself as grantor, and his mother, Libby Goodman, and Russell M. Porter, as co-Trustees. In brief, the terms of the Trust were that Mr. Goodman would receive income for life. The Trust also directed that the Trustees “shall distribute to the Grantor or in the Trustees’ discretion shall apply for his benefit from the principal of the trust property so much of said principal as in [sic] Trustees’ discretion shall be deemed advisable for the maintenance of the Grantor in comfort and good health and for any of his emergency needs.”

The Trust agreement further provided that, upon the grantor’s death, his wife, Perla (Sophie) Bouhadana Goodman (“Ms. Bouhadana”), was to receive income for life, and “so much of the principal as in the Trustees’ discretion shall be advisable for the maintenance of the Grantor’s wife in comfort and good health and for any of her emergency needs.” Upon Ms. Bouhadana’s death, the Trust was to terminate and all undistributed income and principal was to be paid to Mr. Goodman’s four children, namely, Valerie Anne Goodman, Corinne Fay Goodman-Burstein, Judith Caroline Goodman, and David Oliver Goodman.

Pursuant to Article F of the 1981 Trust, Mr. Goodman reserved a limited power to amend

² The trust instrument does not expressly state that the trust is irrevocable. The instrument is also silent as to the grantor’s right to amend, change, or revoke the trust, except for one provision, found in Article F, which, as will be discussed in further detail below, authorizes him to “amend the deed” to the extent of removing trustees and appointing successor trustees. In 1981, when this trust was created, the common law rule that a lifetime trust was irrevocable unless the trust instrument expressly made it revocable was applicable in New York (*see Hammerstein v Equitable Trust Co.*, 156 App Div 644, 652 [1st Dept 1913]). Thus, this trust is irrevocable except to the very limited extent provided in Article F, *infra*.

the Trust “by changing one or both trustees and substituting one or two trustees in his or their stead.” In a writing dated October 10, 1991 (the “1991 writing”), the grantor purported to amend the trust by replacing Article F with a provision limiting the Trustees’ right to appoint successor trustees to the designation of a United States citizen or a United States domestic bank or trust company.

After the death of the grantor’s mother, by instrument dated November 8, 1993, the grantor designated Guy Herbert Dunham to serve as co-trustee with Mr. Porter.

By instrument dated January 8, 1999, Mr. Porter appointed Mr. Reeves as co-trustee, citing the terms of Article F of the 1981 instrument by which the “Trustees shall have the right at any time, subject to the approval of the Grantor, to designate such individual, wherever domiciled, as he or she shall elect to act” By the term of this instrument, Mr. Reeves’s appointment was to become effective upon Mr. Reeves’s acknowledged acceptance after a trustee vacancy arose. Mr. Reeves executed his acceptance the same day which by its terms became effective immediately.³

During the administration of the Trust, the grantor and Ms. Bouhadana Goodman began divorce proceedings. A writing dated May 11, 1999 entitled “FIRST AMENDMENT TO THE TRUST DEED DATED SEPTEMBER 15TH, 1981,” (the “1999 writing”),⁴ signed by the

³ In a May 11, 1999 writing signed by Mr. Reeves, among others, and which purports to amend the Trust, the preface erroneously indicates that Mr. Reeves was designated as successor trustee to the grantor’s mother. That writing further states, also erroneously, that Mr. Reeves is the “new co-Trustee and has accepted his role in accordance with a designation dated Jan. 8, 1999.”

⁴ It is unclear why this instrument was entitled “First Amendment” in light of the grantor’s purported amendment of the Trust in 1991, and the grantor’s styling his 1993

grantor, Mr. Porter, Mr. Reeves and each of the grantor's four adult children purports to amend the Trust to authorize the Trustees to apply income only to satisfy the grantor's prospective alimony payments to Ms. Bouhadana in the sum of 53,000 French francs per month. On September 29, 1999, the Court of Appeals in Paris confirmed the judgment of divorce including the monthly alimony payment of 53,000 francs to Ms. Bouhadana with cost-of-living adjustments. The Order also contained the following additional language with respect to alimony payments, "Find that the payment of the monthly alimony is guaranteed by the establishment of an amendment to the 'Trust for the benefit of Mark Goodman' signed 05/11/1999 by the latter, the trustees and his four children, two of whom are from a previous marriage." The couple's divorce was finalized on December 1, 1999.

On March 11, 2009, the grantor removed Mr. Porter and Mr. Dunham as co-Trustees and appointed Mr. Reeves as sole trustee.

On July 3, 2010, the grantor died in France where he had been residing for a long time.

On August 8, 2011, Mr. Reeves filed an account of his proceedings as Trustee covering the period from January 1, 1999 to December 31, 2010, together with a petition for its judicial settlement pursuant to SCPA 2208. No accounting was ever filed by Mr. Porter and Mr. Dunham for the period of their service as trustees and neither adopted or ratified the account filed by Mr. Reeves. On December 4, 2012, Valerie Goodman filed a petition to compel their account for the period from 1981 to 1998. However, at the call of the April 2, 2013 calendar, that petition was held in abeyance pending substitution for Mr. Porter, who died on February 24, 2013 (CPLR

instrument appointing Mr. Dunham as a successor trustee an "Instrument of Amendment."

1015[a]), and the appointment of a guardian ad litem for Mr. Dunham, who was alleged to be under disability (SCPA 403). A guardian ad litem was appointed for Mr. Dunham but, Mr. Dunham passed away on August 1, 2014. Consequently, that proceeding is still pending.

After discovery was complete, Mr. Reeves moved for summary judgment seeking dismissal of all of the objections (SCPA 102 and CPLR 3212). Mr. Reeves states that he exercised “care, skill[,] and experience” in discharging his duties and that during the time he served as trustee the accounting shows a 47% increase in the market value of the trust assets.

The Objections

The Objections generally fall into three categories: Category I relates to the alleged failure of Mr. Reeves to maintain adequate records for the trust administration (Objections 1- 8 and 13), and his alleged failure to obtain records or an accounting from his predecessors, all of which caused him to possess little or no information regarding the assets of the trust (Objection 14-16). Category II relates to distributions of principal to or on behalf of the grantor. Included in this category are the objections related to payments made by the Trustee to Ms. Bouhadana in order to satisfy the grantor’s alimony payments (Objections 10, 11, 12). Category III relates to the payment of trustee’s commissions to Mr. Porter, which payments were made without a court order and at a time when alleged improper distributions were being made (Objection 9). Finally, objectants claim that Mr. Reeves failed to exercise prudence in the management of the Trust which resulted in a substantial loss to them for which a surcharge should be imposed (Objection 17).

Legal Standard for Summary Judgment

Summary judgment may be granted only where it is clear that no triable issue of material fact exists (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]). Because summary judgment is in derogation of the parties' right to a trial, the rubric applied to the court's analysis has always been "issue finding" rather than "issue determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Therefore, it is incumbent on the movant to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR § 3212[b]; *see, e.g., Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). The papers submitted in support of and in opposition to the motion are scrutinized in a light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hspital.*, 98 AD2d 976 [4th Dept 1983]). If there is any doubt as to the existence of a triable issue of fact, then the motion must be denied.

Discussion

Category I

Category I consists of 12 objections relating to the Trustee's failure to: use a cost basis other than the actual cost of acquisition of certain assets (Objs. 1, 2, 6, 13), identify the assets sold and to report the sales proceeds (Objs. 3, 4, 7), identify the specific transactions relating to the adjustments (Objs. 5, 8), maintain proper and adequate records of the trust administration (Obj. 14), obtain all books and records of the Trust from former co-trustees Mr. Porter and Mr. Dunham (Obj. 15), as well as obtain an accounting from them (Obj. 16).

In support of his motion for summary relief concerning Objections 1 through 8 and 13,

Mr. Reeves contends that the failure of the trustees to maintain records detailing the cost basis of the trust's securities resulted in no loss or damage to the Trust because grantor trusts, such as this one, are not considered to be separate taxable entities, since trust income is reported on the grantor's income tax return and taxed to the grantor (*see* 26 USC §§ 671, 677). As proof that the Trust suffered no financial harm, Mr. Reeves refers to Schedule C of his account which shows that no taxes were paid by the Trust on any capital gains.

The purpose of a trustee's account is to afford beneficiaries a basis upon which to evaluate the trustee's performance (*see Matter of Alpert*, NYLJ, Mar. 8, 2010, at 29, col 6 [Sur Ct, New York County]). Critical to the analysis of a trustee's investments is information relevant to the nature and value of assets received by the accounting trustee (*see, e.g.*, EPTL 11-2.3[b][3][D]), applicable to any investment made or held by a trustee on or after January 1, 1995 (EPTL 11-2.3[a]). To satisfy this requirement, a trustee must provide accurate values in his account. Additionally, whether or not trust assets have generated reasonable returns is an appropriate inquiry since "[a] trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen" (*see, e.g.*, EPTL 11-2.1[a][1]). The return generated on an asset can be assessed only if its cost basis is known.

By failing to provide material and relevant financial information pertaining to the administration of the trust during the period covered by his account, including the nature and value of assets acquired and identification of assets sold or the net proceeds of sales, Mr. Reeves failed to establish his entitlement to summary judgment as a matter of law.⁵ Accordingly,

⁵ Mr. Reeves claims he was unable to provide the specific financial information objectants allege is missing from his account because the prior trustees did not supply that

summary judgment with respect to Objections 1-8 and 13 is denied.

Ms. Goodman and Ms. Goodman-Burstein also object to the alleged failure by Mr. Reeves to: (1) maintain proper and adequate records of the trust administration (Obj. 14), (2) obtain all books and records of the Trust from former co-Trustees Mr. Porter and Mr. Dunham (Obj. 15), and (3) obtain an accounting from them (Obj. 16).

Mr. Reeves submits that no proof has been presented that administration of the Trust was jeopardized by any failure of the Trustees to maintain independent records of the Trust's administration. He contends that complete financial records were maintained by the investment advisor at Burnham & Co., and that he used those records to prepare his account.

In response, objectants point out that the brokerage statements from the investment advisor were incomplete. As proof, they note that at his deposition, Mr. Reeves could not explain several entries on Schedules A-1 and B of his account, including the meaning of any of the asterisks.⁶ Therefore, objectants submit that, despite having filed an Affidavit attesting to the

information to him, and the prior trustees' records are incomplete. Even if Mr. Reeves had shown entitlement to judgment as a matter of law, questions of fact exist at least with respect to the proper method of establishing inventory values when, as here, information is missing, and whether using any value other than cost of acquisition is consistent with fiduciary accounting principles (*see Matter of Gilas*, NYLJ, Apr. 7, 1998, at 26, col 6 [Sur Ct, Nassau County]).

⁶ Also during this examination, Mr. Reeves was asked whether he was aware if the former co-trustees ever filed federal or state tax returns for the 1981 Trust. Mr. Reeves testified that he was not aware that such filings had occurred. Further, when objectants' counsel inquired of Mr. Reeves about the status of the returns for the Trust during his time at the helm of the Trust, Mr. Reeves testified that he had not prepared such returns himself nor did he give instructions to anyone to prepare such returns until 2013, three years after the grantor's death. When asked why returns had not been prepared before 2013, Mr. Reeves was unable to offer any justification for the delay in filing. However, the court notes that Ms. Goodman-Burstein and Ms. Goodman did not amend their objections to add Mr. Reeves's delay in filing tax returns for the 1981 Trust as an objection.

accuracy of his account (SCPA 2209), Mr. Reeves filed an account that is incomplete and inaccurate.

A fiduciary's failure to maintain and produce accurate records will result in all obscurities, presumptions and doubts being held against him (*Matter of McFarland*, 2010 NY Slip Op 33060[U] [Sur Ct, Nassau County], citing *Matter of Shulsky*, 34 AD2d 545 [2d Dept 1970]). In addition, "whether [a] trustee maintained adequate records is a question of fact," prohibiting summary judgment (*Matter of Lehman*, 40 Misc 3d 1208[A], at *5 [Sur Ct, Nassau County 2013]; *Matter of Gleason*, NYLJ, Nov. 25, 2013, at 32 [Sur Ct, New York County]).

A review of the submissions related to the accounting reveals that several Affirmations amending the account were filed with the court in response to errors and omissions identified by the staff in the Accounting Department of this court. One such response, by Affirmation dated February 17, 2012, with regard Schedule A-1 and B in particular, Mr. Reeves's counsel stated: "In these cases the inventory values and purchase prices of the securities of those sales are missing due to the fact that the records of these transaction [sic] were not among the records given to the trustee by the former trustee when the current trustee assumed his office as trustee."

Upon this admission, coupled with the deficiencies identified in the account by objectants, the court finds that they have raised a material question of fact as to whether the account, as filed, is complete and accurate (*Matter of Schnare*, 191 AD2d 859 [3d Dept 1993]; *lv denied* 82 NY2d 653 [1993]; *see also Matter of Curtis*, 16 AD3d 725 [3d Dept 2005]).

Notwithstanding the foregoing, Mr. Reeves is entitled to summary judgment with respect to Objection 16 insofar as it concerns the demand of a formal account from the prior trustees. A

successor trustee is responsible only for the assets which come into his or her hands, and has no particular legal duty to seek a formal accounting from his or her predecessors (*Matter of Green*, 128 AD3d 1366 [4th Dept 2015]; *Matter of Ketcham*, 124 NYS2d 895 [Sur Ct, New York County 1953]).⁷ Consequently, summary judgment is denied with respect to Objections 14, 15, and in part as to Objection 16, and is granted in part, as to Objection 16.

Category II

Objection 10 relates to objectants' assertion that the Trustee abused his discretion by invading principal and paying \$1,285,159.42 during the accounting period for the benefit of the grantor. According to objectants, the Trustee "failed to properly, if at all, consider the 'comfort and good health and for any of [Grantor's] emergency needs' standard for invasion of principal as required by the terms of the Trust."⁸ Objectants further argue that the Trustee failed to consider other resources available to the grantor.

⁷ SCPA 1506 addresses a trustee's liability for the actions of an Executor from whom he receives trust property. Commentators have noted that while there is no parallel provision in the SCPA for addressing the liability of a successor trustee for the actions of a prior trustee, there is a long-standing body of case law on this topic adopting the Restatement Second's approach, which holds a successor trustee liable for a predecessor's actions if he or she: (1) knows or should have known of a predecessor's breach of trust and permits it to continue, (2) fails to take proper steps to compel his predecessor to deliver trust property, or (3) fails to properly redress a predecessor's breach of trust (Peter C. Valente and Herbert Bockstein, *The Plight of the Successor Trustee*, NYLJ, Mar. 31, 2010, at 3, col 1; see Restatement [Second] of Trusts § 233).

⁸ Mr. Reeves notes that the Trust states the standard as "the maintenance of the Grantor in comfort and good health," and that by omitting the words "the maintenance of the Grantor in," objectants mistated the standard in their pleading. In their opposition papers, objectants state the standard correctly and argue that it is Mr. Reeves who misreads the word "maintenance" under the Trust.

Objectants also point out that even though Mr. Reeves asserts that he familiarized himself with the grantor's financial status in order to determine whether any requests for invasion of principal were warranted, Mr. Reeves could not explain the distribution of 4 million francs to the grantor from the 11 million francs held in the Goodman Family Trust and distributed to the grantor around the time of his divorce in 1999, which is the same year, according to the account, that the grantor received a principal distribution of \$194,300.47 from the 1981 Trust. Consequently, she contends that there is a question of fact as to whether Mr. Reeves considered the grantor's other available resources as he contends.

Mr. Reeves asserts that he is entitled to summary judgment as to this objection because documentary evidence, namely his account, his affidavit in support of the motion, and the deposition testimony of Paul Elliot, the investment advisor, support his claim that he did not abuse his discretion when deciding to invade principal for the grantor's benefit, that he took care to determine independently whether it was appropriate to do so, and that contrary to objectants' contention, he did consider the grantor's other resources and his standard of living before invading principal, even though the Trust instrument did not require him to consider such other resources.

As proof, Mr. Reeves further relies on his deposition testimony in the context of an SCPA 2211 examination wherein he testified that he had numerous conversations with Mr. Porter, Chandrasiri Rajakaruna, the grantor's accountant, Mr. Elliot, and with the grantor himself, to ascertain the grantor's financial needs, and to prudently discharge his duty to determine whether the requested distributions could be made and in what amounts in view of the need to protect the Trust corpus.

Mr. Reeves, an attorney licensed to practice law in the State of New York and the Republic of France, also relies on his unopposed “French Law opinion,” to establish that Article 227-3 of the Penal Code of France provides that a former spouse to whom court-ordered alimony payments are owed may commence a criminal action against the defaulting party (CODE PÉNAL [C. PÉN.] art. 227-3 [Fr.] [modified by law dated May 17, 2011 and Article 373, Section 3, of the Civil Code of the Republic of France]). If alimony remains unpaid for two months after the filing of a complaint, the defendant can be sentenced to imprisonment of up to two years and a fine of 15,000 Euros.⁹ Mr. Reeves testified that he based his decision to invade principal to continue to make the court-ordered alimony payments on behalf of the grantor because he determined that it would be “uncomfortable” for the grantor to be prosecuted for failure to make those payments.

As the Appellate Division, Second Department held in *Matter of Harmon* (73 AD3d 1059, 1061 [2d Dept 2010]), summarizing applicable law,

“In determining payments to beneficiaries, a trustee must exercise his or her discretion in accordance with the standard which the trust imposes. In addition, ‘the trustee must reach a judgment soundly formed and in good faith upon the basis of the circumstances presented to him’ (*Matter of Eckert*, 23 AD2d 32, 35 [2d Dept 1965]). ‘Once the test of discretion imposed by the settlor has been met, and the trustee has acted reasonably and in good faith, the court will not interfere with the exercise of his judgment’ (*id.* at 35; *see Community Serv. Socy. of N.Y. v New York Community Trust*, 275 AD2d 171, 181 [1st Dept 2000]; *Matter of McManus*, 62 AD2d 758, 764 [2d Dept 1978], *affd* 47 NY2d 717 [1979]).”

⁹ This opinion by Mr. Reeves is contained in his “Affidavit in Support of Motion for Summary Judgment.” In addition, Mr. Reeves has submitted an affidavit “Regarding French Law,” in which he repeats his opinion that failure of a party to comply with an obligation to pay alimony is punishable by a fine or imprisonment.

The court finds that Mr. Reeves made a prima facie showing that he acted in good faith when responding to the grantor's requests while trying to preserve the corpus of the Trust, and that his decision to invade principal to discharge a legal obligation of the grantor was reasonable under the circumstances, and not an abuse of discretion. The burden now shifts to objectants to raise a triable issue of fact.

Objectants contend that Mr. Reeves erroneously focused on the grantor's "comfort" as the basis for his decision to invade principal. They note that the term "comfort" has been interpreted in case law to refer to a beneficiary's physical comfort, and that, in any event, the term should not be separated from the complete Trust standard "for the maintenance of the Grantor in comfort and good health and for any of his emergency needs."

The court's task in construing a trust is to determine the intent of the trust's creator as expressed in the trust instrument and ascertained from a reading of the entire document. As stated in *Matter of Day* (10 AD2d 220, 222-223 [1st Dept 1960]):

"A cardinal principle of construction is that the intention of the settlor is to be sought in all his words, and when ascertained is to prevail unless contrary to public policy or an established rule of law [citations omitted]. The meaning of the words employed by the donor is not to be decided *in vacuo*[,] but is to be found by considering the entire instrument and the background of facts and circumstances existing when the indenture was executed [citation omitted]."

The Trust under consideration here requires the Trustee to distribute, in his discretion "so much of said principal as in [sic] Trustees' discretion shall be deemed advisable for the *maintenance of the Grantor in comfort and good health* and for any of his emergency needs" (emphasis added). In light of this standard, the court cannot find that Mr. Reeves's and the prior

trustees' decision to invade principal to make alimony payments on behalf of the grantor was an improper use of their discretion. Even though Mr. Reeves testified that he opined that it would be "uncomfortable" for the grantor to be jailed for failure to satisfy his alimony obligations, it is objectants who are placing undue emphasis on Mr. Reeves's use of the word in the context of explaining his invasion power. Having failed to rebut Mr. Reeves's prima facie showing of entitlement to summary judgment as a matter of law, summary judgment with respect to Objection 10 is granted.

In Objection 11, objectants attack Mr. Reeves's alleged breach of his fiduciary duty by making payments from principal in the sum of \$75,412.04 to Ms. Bouhadana after the grantor's death because: (1) Ms. Bouhadana had relinquished her interest in the Trust as part of her divorce from the grantor; and (2) Mr. Reeves had no authority to invade principal for her benefit except in accordance with the Trust standard.

The record reflects that Mark Goodman and Perla Sophie Bouhadana were married on January 21, 1969, after signing a prenuptial agreement for separation of property the day before. The record also reflects that a court decision on the couple's divorce was issued on January 8, 1998, and that Ms. Bouhadana filed an appeal of it. On June 30, 1999, after hearing from both parties and their counsel, the Court of Appeal of Paris issued an Order dated September 29, 1999, acknowledging the agreement of the parties with respect to, among other things, the payment by the grantor of "capital" in the sum of 722,500 francs as well as monthly alimony payments to Ms. Bouhadana in the amount of 53,000 francs. As aforementioned, that court also found that payment of the monthly alimony was "guaranteed" by an "amendment" to the Trust signed on May 11, 1999.

In light of this, objectants' contention that their stepmother relinquished her interest in the Trust as part of her divorce from the grantor is without merit.

To show that issues of fact exist as to Mr. Reeves's exercise of discretion to invade principal for Ms. Bouhadana's benefit, objectants call the court's attention to the following testimony Mr. Reeves gave during his deposition:

Q. Mr. Reeves, after you took over as trustee, did you make any determination as to whether it was appropriate for the trust to make any payments to Perla?

A. I made the decision once he continued the program that had been instituted by the former trustee, with the agreement of Mr. Goodman, of course.

Q. Did you take any other steps to determine independently whether it was appropriate for the trust to make any payments to Perla?

A. I have a memory. The memory- Mr. Porter told me about the divorce settlement and so forth, which we needed to make monthly, which I negotiated with Mr. Kevorkian.

Q. Did you take any other steps to determine independently whether it was appropriate for the trust to make payments to Perla from the trust?

A. I thought I had sufficient background, so I did not need to.

(Reeves Dep. 101:18-102:15, May 2, 2013.)

Objectants also point out that Mr. Reeves testified that he did not review the 1981 Trust agreement until after the grantor passed away.

Often, cases that test the limits of a trustee's discretion are those that involve trust provisions for the discretionary distribution of trust principal. Whether a trustee has acted in bad

faith, beyond the bounds of reasonable judgment, failed to use his judgment, or was improperly motivated are normally questions of fact, requiring a hearing (*see Matter of Gleason, supra*, citing *Matter of Bruches*, 67 AD2d 456 [2d Dept 1979]).

Here, given the testimony provided by Mr. Reeves, the court finds that he failed to establish his prima facie entitlement to summary judgment as a matter of law, and that objectants raised questions of fact as to: (1) whether Mr. Reeves informed himself of his duties and responsibilities under the Trust as they related specifically to Ms. Bouhadana; and (2) whether Mr. Reeves failed to use his judgment, or simply blindly followed a course of dealing that had been instituted by his predecessors concerning principal distributions to Ms. Bouhadana. Therefore, summary judgment with respect to Objection 11 is denied.

Objection 12 relates to objectants' claim that the trustees' action of signing the 1999 writing which purported to amend the Trust so as to guarantee payments of income to the grantor's former spouse constituted a breach of their duty to the Trust. In their Memorandum of Law in opposition to the motion, however, objectants advance no legal argument with respect to this claim.¹⁰

¹⁰ Discussion of the 1999 writing in that memorandum is limited to its description as "purport[ing] to authorize the Trustees to use **income only** to satisfy payments to be made to Perla" (emphasis in original), and an argument that "the 1999 Amendment did not, as argued by Petitioner, give the Trustees carte blanche to invade principal to satisfy the Grantor's alimony obligation. Even if the Grantor retained the right to amend the dispositive provisions of the trust, **which he did not**, the 1999 Amendment merely authorized the Trustee to pay the income from the trust to satisfy the alimony obligation. Nowhere is the petitioner authorized to invade principal for such purposes" (emphasis in original). These statements do not support objectants' contention that the trustees breached their duty to the Trust by purporting to amend the Trust.

In his motion, Mr. Reeves asserts that objectants are estopped from claiming that the 1999 "Amendment" is not effective. He points out that the document was signed by objectants and their siblings, signifying their agreement to "hold the Trustees harmless for their compliance with the terms of this amendment to the Trust." Thus, Mr. Reeves contends that by signing the 1999 instrument, which contains the foregoing language, objectants have waived any right to object to its validity.

An estoppel "rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury. Indeed, a party may not, even innocently, mislead an opponent and then claim the benefit of her deception" (*Triple Cities Const. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448 [1958] [citations omitted]). Here, the grantor satisfied his support obligations to his former spouse because his children consented to his doing so, and the Trustees relied on such consent when authorizing payments at the grantor's request. To allow objectants to now challenge the validity of the 1999 writing on technical grounds would be placing form over substance, thereby resulting in an injustice of the highest degree. Accordingly, summary judgment is granted with respect to Objection 12.

Category III

Objectants allege in Objection 9 that former co-trustee Mr. Porter received the aggregate sum of \$42,668.69 as trustees commissions without first obtaining a court order and at times when the Trustee was making improper distributions.

Mr. Reeves contends that Mr. Porter was not required to obtain a court order before paying himself fiduciary commissions. In his Reply papers and in response to objectants'

assertions, he argues that objectants submitted no proof that Mr. Porter failed to furnish annual statements to the grantor between September 2005 and April 2008, as required by the version of SCPA 2309 in effect at the time fiduciary commissions were retained.

As the moving party, Mr. Reeves has the burden to make a prima facie case for the propriety of payment of commissions by showing that such statements were sent to the grantor. Mr. Reeves's need to establish his entitlement to summary judgment is not dependent on the adequacy or inadequacy of the objectants' opposition to his motion, as Mr. Reeves must first make a prima facie showing of his entitlement to such relief (*see Matter of Gleason, supra*). Having failed to do so, the request for summary judgment as to Objection 9 is denied.

Objection 17 states that the allegations in Objections 1 through 16 show that Mr. Reeves engaged in improper, wrongful and negligent conduct which demonstrates a failure to exercise prudence in the management of the Trust resulting in a "substantial loss" to objectants for which a surcharge should be imposed.

Mr. Reeves posits that in the absence of a presentation of evidence by objectants of negligence in the management of the Trust's investments raising triable issues of fact, he is entitled to summary relief. However, "[t]he 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" (*Matter of Littleton*, NYLJ, June 16, 2014, at 21, col 1 [Sur Ct, NY County 2014], citing *Matter of Winston*, 39 AD3d 765, 767 [2d Dept 2007] [citations omitted]).

Even if the law were unsettled on this point, which it is not, summary relief would be inappropriate here given the absence of financial records pertaining to the administration of the trust during the period covered by this account.

Conclusion

Based on the foregoing, the court finds that questions of fact exist as to whether: (1) Mr. Reeves's account, as filed, is complete and accurate (Objs. 1-8 and 13); (2) Mr. Reeves maintained adequate records (Objs. 14, 15, and in part as to Obj. 16); (3) Mr. Reeves informed himself of his duties and responsibilities under the Trust as they relate specifically to Ms. Bouhadana, and whether Mr. Reeves failed to use his judgment, or simply blindly followed a course of dealing that had been instituted by his predecessors concerning principal distributions to Ms. Bouhadana (Obj. 11); (4) Mr. Porter furnished annual statements to the grantor between September 2005 and April 2008, as required by the version of SCPA 2309 in effect at the time fiduciary commissions were retained (Obj. 9); and (5) Mr. Reeves exercised prudence in the management of the Trust (Obj. 17).¹¹

Consequently, summary judgment as to Objections 1 through 9, 11, 13 through 15, and 17, and in part as to Objection 16 is denied. Summary judgment with respect to Objections 10, 12, and in part as to Objection 16 is granted and these objections are dismissed to the extent herein explained.

¹¹ Objectants argue that an issue of fact exists as to whether Mr. Reeves was a trustee over the 11-year period covered by his account. The court disagrees. The 1999 instrument appointing Mr. Reeves makes his appointment effective upon his "execution of a duly acknowledged instrument of acceptance after the vacancy in question shall actually have arisen." Such vacancy, did not occur until 2009 when Mr. Goodman, pursuant to the power he reserved for himself under the Trust, removed all trustees then serving.

The parties will be notified of a pre-trial conference date in due course.

This decision constitutes the order of the court.

Dated: July 15, 2015



SURROGATE