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2014 IL App (3d) 130572-U

Order filed July 21, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

RICHARD A. RENCHEN,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
)	Kankakee County, Illinois,
Plaintiff/Appellee/Cross-Appellant,)	
)	Appeal No. 3-13-0572
v.)	Circuit No. 11-CH-527
)	
THOMAS RENCHEN,)	Honorable
)	Adrienne W. Albrecht,
Defendant/Appellant/Cross-Appellee.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶1 *Held:* Even when a trust agreement gives a trustee certain powers, those powers must still be exercised with the utmost honesty and consideration for the trust's beneficiaries. Issues abandoned in the circuit court cannot be reasserted on appeal.

¶2 Plaintiff, Richard Renchen, filed a complaint against defendant, Thomas Renchen, as trustee of the Vera B. Renchen Trust. The matter proceeded to trial where the circuit court made numerous rulings. Thomas filed a timely notice of appeal and Richard timely cross appealed. Upon review, we affirm the circuit court's judgment.

¶ 9 Thomas paid himself a trustee's fee of \$500 per month, arriving at this amount in consultation with SAE's attorney, Robert LaBeau. He never maintained time records for the services he performed, nor did he ever inform Richard of these payments. In all, he compensated himself \$85,000 in fees over the course of his tenure.

¶ 10 Thomas "loaned" himself \$125,000 from the trust on August 21, 2008. This loan was never memorialized, nor was it collateralized. Thomas never informed Richard of this loan, but he repaid it, with interest, on January 11, 2012.

¶ 11 Thomas also made five loans from the trust to SAE in the amounts of \$57,703 (March 27, 2002), \$1,000 (April 5, 2002), \$4,000 (June 17, 2002), \$13,000 (July 31, 2005) and \$2,000 (August 2008).¹ These loans also were neither memorialized nor collateralized, and Thomas never informed Richard they had been made. SAE's final loan repayment to the trust was on October 26, 2011, in the amount of \$35,050. SAE allegedly still owes the trust \$1,700 plus interest.

¶ 12 On June 5, 2009, Thomas exercised an option to purchase Vera's shares in SAE for \$70,808 -- the current book value of the shares. The determination of the book value was made by Lawrence Ohm, SAE's accountant. Thomas used trust funds (\$10,000) to compensate Ohm for his services.

¶ 13 The trust was still in existence at the time of trial in 2012. Thomas acknowledged that the trust agreement required him to distribute the assets and close the trust in a timely fashion

¹ The principals of SAE executed a voting trust on October 4, 2000, which named Robert LaBeau as trustee, and granted him the power to borrow money. LaBeau prepared an employment contract dated November 15, 2000, authorizing Thomas to accept loans on behalf of SAE.

upon Vera's death. However, he had not distributed the trust's assets because the funds were allegedly needed to contest a claim by a nephew, Todd Renchen, that he was Robert's son and therefore an heir of Robert's estate. Thomas reasoned that because Vera's will poured all of her assets into the trust, disqualification of Todd's claim would increase the trust. Thomas retained counsel to represent the trust's alleged interest, using a total of \$45,700 in trust funds to compensate counsel. Thomas also never informed Richard of these payments.

¶ 14 Thomas made a \$5,000 payment to William on January 8, 2010, without informing Richard. That amount, along with interest, was repaid to the trust on January 11, 2012.

¶ 15 Thomas made charitable donations from the trust to the United Church of Christ in the amount of \$100 per week. The amount of these donations was the same as those made by Vera prior to stepping down as trustee. The donations ceased upon Vera's death. Thomas never informed Richard of these donations.

¶ 16 Richard never received a distribution from the trust. Richard never received an accounting from Thomas, nor was he ever contacted concerning the administration of the trust. He had never been informed of any loans from the trust to Thomas, SAE or other persons or of any charitable contributions or satisfaction of attorney /appraisal fees made by the trust. He only learned of these expenditures after filing the instant action.

¶ 17 The circuit court held that the loans Thomas made to himself were not "bona fide loans" because "[t]here was no promissory note or repayment schedule." Therefore, the court found that despite the permission described in paragraph (j) of Section 5 of the trust agreement, Thomas "breached his fiduciary duty."² The court concluded, however, that "since the funds

² The court also noted that the amount "was not fully repaid to the trust until after this litigation had commenced."

were repaid with interest and there was no evidence that the amount of interest was unreasonable, plaintiff has shown no damages resulting from the breach."

¶ 18 The court also held that the trust agreement expressly allows the trustee to be reimbursed for his "expenses," but not "for his services as Trustee." Moreover, "because the trustee committed misconduct, he should not receive any compensation." The court ordered that Thomas reimburse the trust \$85,500 he had paid himself as a fee plus prejudgment interest.

¶ 19 The charitable donations were approved by the circuit court because the amounts matched those given when Vera served as trustee and they fell within the scope of "any other purpose the trustee considers to be for my [Vera] best interests" (language of trust agreement).

¶ 20 The court found that the "fees paid to attorneys in order to contest the brother[']s estate were authorized by the last paragraph on the first page of the trust as 'costs of safeguarding and delivering legacies,' and since the issue of parentage has not yet been finally determined, the defendant is justified in continuing to fund the Estate litigation with the trust funds."

¶ 21 ANALYSIS

¶ 22 Direct Appeal

¶ 23 Initially, Thomas challenges the circuit court's finding that he breached his fiduciary duty with regard to the \$125,000 he loaned himself on August 21, 2008. He argues that Section 5 of the trust agreement authorized this transaction. That section allows the trustee to "deal with, purchase assets from, or make loans to the fiduciary of my estate." Upon review, we find the \$125,000 transaction is not a "loan" contemplated by section 5 of the trust agreement and therefore, Thomas breached his fiduciary duty in undertaking that transaction.

¶ 24 In analyzing this issue the circuit court stated:

"Although Thomas now claims that some funds were paid as a loan, he admits that there were none of the traditional *indicia* of a loan. There was no promissory note or repayment schedule. Not even the check by which Thomas conveyed the money to himself has any notation on it. Further, no other beneficiary was even notified of the transaction. In fact, it was not fully repaid to the trust until after this litigation had commenced. The Court concludes from this that these were not *bona fide* loans. Further evidence that the loans were not *bona fide* is that one of them was used to purchase a home from his brother's contested estate. Therefore, despite the permissions granted in Section 5 of the Declaration of Trust, the Court finds that Thomas has breached his fiduciary duty with regards to the funds which he paid himself from the trust."

¶ 25 We first note that the plain language of section 5 does not authorize Thomas's "loan" to himself. What is authorized is "loans to the fiduciary of my estate." On August 21, 2008, when the challenged loan was made, Vera was still alive, there was no "estate," and, therefore, no fiduciary of her estate.

¶ 26 Beyond that fact, we agree with the circuit court's reasoning. In doing so, we find *In re Estate of Muppavarapu*, 359 Ill. App. 3d 925 (2005) instructive. The trustee in *Muppavarapu* was found to have breached his fiduciary duty when he personally loaned himself \$400,000 from the trust. Although the trust agreement in *Muppavarapu* did not contain an express provision authorizing the trustee to "make loans," the trustee at one point did have the "authority to make

all investment and financial decisions from the testamentary trust." *Muppavarapu*, 359 Ill. App. 3d at 926. More importantly, however, we hold Thomas's conduct in the instant case does not comply with the high standard of good faith imposed upon trustees.

"A trustee must use care and diligence in the discharge of his powers and duties, is held to a high standard of conduct, and must exercise the utmost or highest good faith in the administration of the trust . [Citation.] The trustee must keep in mind the beneficiary's interest and the trustee cannot do any act inconsistent with the beneficiaries' interest irrespective of the trustee's good or bad faith. Further, good faith in administration of a trust means the trustee must act honestly and with undivided loyalty to his trust, not merely with the standard of the workaday world, but with the most sensitive degree of honor." *Muppavarapu*, 359 Ill. App. 3d at 929-30.

¶ 27 We find Thomas's actions with regard to the \$125,000 transaction do not even comply with the "standard of the workaday world," let alone the higher standard imposed on a trustee. The workaday world requires notice and documentation when closing on a "loan." It also requires that the "loan" be memorialized and recorded. Finally, "loans" in the workaday world have specific payoff dates and repayment schedules. All these factors were lacking in Thomas's self-dealing transaction. We also find it extremely significant that no other beneficiary was notified of the transaction. Arguably, this fact alone justifies a finding that Thomas breached his fiduciary duty. Even when a trust agreement gives a trustee certain powers, those powers must

still be exercised with the utmost honesty and consideration for the trust's beneficiaries. Thomas failed in this regard.

¶ 28 For all of the foregoing reasons, we agree with the trial court that Thomas's loan to himself from the trust breached his fiduciary duty.

¶ 29 Next, Thomas challenges the circuit court's order that he repay the \$85,500 plus prejudgment interest. He argues he was "entitled to reasonable compensation for his actions and duties as trustee of the trust." Thomas sets forth two specific arguments in support of his belief: (1) "[s]tatutory law (760 ILCS 5/7 (West 2010)) entitles him to reasonable compensation" and (2) "breach of fiduciary duty does not automatically mean Thomas does not receive compensation." Both arguments lack merit.

¶ 30 Section 507 of the Trusts and Trustees Act (760 ILCS 5/7 (West 2010), provides "[t]he trustee shall be reimbursed for all proper expenses incurred in the management and protection of the trust and shall be entitled to reasonable compensation for services rendered." Vera, however, intended that only a "Corporate Trustee" be entitled to "compensation for *** services."³

Section 7 of the trust agreement provides:

"The Trustee shall be reimbursed for all reasonable expenses incurred in the management and protection of the Trust, and any Corporate Trustee shall receive compensation for its services in accordance with its schedule of fees in effect from time to time."

³ Illinois public policy strongly favors the freedom to contract. *Stevens v. Rooks Pitts & Poust*, 289 Ill. App. 3d 992, 998 (1997).

¶ 31 When tasked with the construction of a trust, we apply the same principles as those applicable to the interpretation of a will. *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 19. The court must ascertain the settlor's intent by looking to the plain and ordinary meaning of the words used in the trust agreement. *Ruby*, 2012 IL App (1st) 103210, ¶ 19. The court should strive to construe the trust in a manner that gives effect to every word, phrase, and clause used in the trust agreement, and avoid constructions that would render any portion of the trust void, insignificant, or meaningless. *Ruby*, 2012 IL App (1st) 103210, ¶ 19. If the trust's language is unambiguous, the trust must be given effect without modifying or creating any new terms. *Ruby*, 2012 IL App (1st) 103210, ¶ 19

¶ 32 We find it significant that Vera differentiated between a "Trustee" and a "Corporate Trustee," when discussing "expenses" and "compensation for *** services." Therefore, affording section 7 of the trust its plain and ordinary meaning, we uphold the circuit court's finding that Thomas is only entitled to reimbursement for his "expenses," and not "for his services as Trustee." We note that the defendant in *Muppavarapu* was also required to serve without "compensation" according to the trust agreement. *Muppavarapu*, 359 Ill. App. 3d at 926.

¶ 33 Alternatively, even if we were to ignore the plain language of the trust and assume "compensation" was available to Thomas under section 507 of the Trusts and Trustees Act (760 ILCS 5/7 (West 2010)), we agree with the circuit court that he, through his misconduct and breach, forfeited the right to "compensation." Thomas asserts he should still receive be compensated because any misconduct or breach did not "cause any loss to the trust." Thomas is incorrect. The value of the trust was diminished \$85,500 by Thomas's improper monthly

"compensation." Moreover, loss to the trust is only one factor a court considers when determining whether a trustee has forfeited the right to "compensation."

¶ 34 "A trustee which neglects its duties or commits a breach of its obligations may forfeit the right to compensation for services rendered to the trust and may be surcharged for the amount of compensation which it credited to itself." *Jones v. Heritage Pullman Bank and Trust Co.*, 164 Ill. App. 3d 596, 604 (1987). The Restatement (Second) of Trusts contains the following statement concerning the effect of a breach of trust upon the trustee's right to compensation:

"It is within the discretion of the court whether the trustee who has committed a breach of trust should receive full compensation or whether his compensation shall be reduced or denied. In the exercise of the court's discretion the following factors are considered: (1) whether the trustee acted in good faith or not; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss ***; [and] (5) whether the trustee's services were of value to the trust." Restatement (Second) of Trusts § 243, comment c (1959).

¶ 35 For reasons we have already discussed, we believe factors 1 through 4 militate against compensation and overwhelm any demonstrated value of Thomas's services to the estate. We find the misconduct and the breach of fiduciary duty in the instant case to be extensive and inexcusable. To allow Thomas compensation in light of such facts would constitute an injustice.

¶ 36 Cross Appeal

¶ 37 Initially, Richard claims that the circuit court erred in finding that he suffered no damages from Thomas's breach with regard to the \$125,000 transaction. We uphold the court's finding. Upon Thomas's repayment of the \$125,000 loan to himself, with interest, the monetary value of the trust was restored as though the \$125,000 transaction never occurred. Richard contends Thomas violated his duty to distribute the trust's assets and close the trust in a timely fashion upon Vera's death. Such a violation may have injured Richard but he has failed to present any affirmative evidence establishing the breach resulted in financial diminution of the trust or caused him to lose a financial opportunity or otherwise sustain a monetary loss.

¶ 38 Next, Richard challenges the circuit court's finding that the charitable donations to the United Church of Christ were proper due to the fact that the donations matched the amount given when Vera served as trustee. We uphold the court's finding. Richard asserts that Thomas did not have written authorization from Vera to continue those donations. Nothing in the trust agreement, however, requires written authorization; instead charging the trustee to use the trust's funds "for any other purpose the Trustee considers to be for my best interests." The donations – all of which were made prior to Vera's death -- fall within the scope of this clause. While Thomas did not inform Richard of the donations, Richard fails to cite *any* authority that this fact requires repayment of donations that were authorized under the trust agreement.

¶ 39 Richard next attacks the circuit court's finding that the payments made by Thomas to various attorneys to contest Todd's claim of heirship were proper. Richard argues that Thomas was confused as to the percentage that would go to Vera if Todd fails in his effort to prove that he is Robert's son and heir, however, we note that the specific percentage is without consequence at this particular time. The fact remains that whether Vera acquires 1% or 99% that percentage will increase to some degree the value of the trust because all of Vera's assets pass to the trust via

the trust agreement. Without some showing that Thomas acted improperly in hiring, maintaining or compensating the attorneys, we conclude that the trial court's finding was correct.

¶ 40 Richard next asserts that the circuit court erred in "failing to find that Thomas committed misconduct and breached is [sic] fiduciary duty by failing to provide periodic accounting." It does not appear the court made a finding as to whether Thomas's failure to provide an accounting constituted a breach of fiduciary duty. Significantly, however, Richard never alerted the court of its apparent failure to rule on this issue. Richard now seeks to resolve a matter that the circuit court apparently did not consider. We find Richard has waived this issue. In coming to this conclusion, we note that Richard's notice of cross appeal merely prays that "the Appellate Court reverse sections 3, 5, and 6" of the circuit court's amended order. Neither of the identified sections deals with this precise issue.

¶ 41 Finally, Richard requests that we find the circuit court erred "by failing to find Thomas further breached his fiduciary duty owed to Richard in the following respects: (1) making an improper payment to William, (2) making unauthorized loans to SAE and failing to recoup the entire loan balance, (3) making an unauthorized payment from the trust to an accountant (Lawrence Ohm), (4) failing to repay all outstanding loans until after litigation was commenced and (5) and failing to terminate the trust on a timely basis." It appears the circuit court also never made findings with regard to any of these issues. We find no evidence that Richard called these oversights to the court's attention. We find Richard has also waived these issues.

¶ 42 For the foregoing reasons, we affirm the judgment of the circuit court on the issues raised in Thomas's appeal and Richard's cross appeal.

¶ 43 Affirmed.