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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0399-15T4

IN THE MATTER OF THE
ESTATE OF HARRY J. LERNER,
DECEASED,

Plaintiff-Respondent,

v.

TISA LYNN LERNER,

Defendant-Appellant.

Submitted December 22, 2016 - Decided March 30, 2017

Before Judges Lihotz and O'Connor.

On appeal from Superior Court of New Jersey,
Chancery Division, Probate Part, Morris
County, Docket No. P-2345-2012.

Javerbaum, Wurgaft, Hicks, Kahn, Wikstrom &
Sinins, P.C., attorneys for appellant
(Lawrence M. Simon, on the brief).

Connell Foley, LLP, attorneys for respondent
(Leo J. Hurley, Jr., on the brief).

PER CURIAM

Defendant Tisa Lynn Lerner, appeals from an August 11, 2015 judgment, finding she breached her fiduciary duty as trustee for plaintiff, the Estate of Harry Lerner. Defendant is one of three

daughters of the late Harry Lerner (decedent), who died in 2012. Phyllis Kornblatt, defendant's sister, initiated the underlying complaint on behalf of the Estate beneficiaries, alleging defendant breached her fiduciary duty as the named trustee of the Harry Lerner Revocable Trust (the Trust). Kornblatt sought defendant's removal, the provision of a complete trust accounting, and repayment of any improper distributions she made to herself.

Following a three-day bench trial, Hon. Stephan C. Hansbury, J.S.C., issued a written statement of reasons and order dated August 11, 2015. He found defendant committed defalcation in her role as trustee, and removed her. Further, he ordered defendant to pay damages and expert accounting and counsel fees incurred in the litigation.

On appeal, defendant argues the trial judge erred in accepting plaintiff's expert testimony regarding real estate carrying costs related to the Trust's real property appropriated by defendant and by adding four percent prejudgment interest to damages awarded. She further maintains the attorney fee award was improper. Following our review, we reject defendant's arguments as meritless and affirm.

Decedent created the Trust on October 14, 1997.¹ Initially, decedent acted as trustee. Defendant assumed the role of successor trustee in the last quarter of 2008, after decedent suffered a fall and broken hip. After his injury, decedent did not return to his co-op apartment in Brooklyn, New York (the co-op), remaining in a skilled nursing facility in Morristown until his death on January 27, 2012.

The Trust provisions generally stated funds were to be used for decedent's benefit during his lifetime and at the time of his death, specific bequests of \$25,000 would be distributed to each of decedent's three grandchildren, and the remainder of the trust corpus would be divided equally among decedent's three daughters.

After decedent passed away, defendant declined Kornblatt's repeated requests to release information regarding the Trust's assets and refused her access to the co-op. Furthermore, defendant made no effort to sell the co-op, even though it was clear decedent remained unable to return.

Kornblatt filed an order to show cause and a three-count complaint, alleging defendant abused her position as trustee, used decedent's assets for her personal benefit, sought defendant's removal and her own appointment as trustee, and requested payment

¹ As of July 31, 2007, the Trust held an estimated \$764,211.50 in assets.

of damages. Judge Hansbury's statement of reasons accurately recounts the evidence introduced by the parties. More specifically to the question of the use of the Trust's assets, Kornblatt presented testimony and an accounting prepared by a forensic accountant, Paul S. Archibold, which identified defendant's use of the Trust's funds for a variety of personal expenses during decedent's hospitalization. Defendant neither presented an accounting nor refuted Archibold's testimony.

Concluding Archibold's accounting was unrebutted, Judge Hansbury delineated the instances of defalcation committed by defendant. These included: distributions and loans to herself, without notifying other beneficiaries, some of which were not repaid; gifts to her other sister without notice to Kornblatt; payment of expenditures, including her home mortgage and utilities, which defendant admitted were not trust related, but which defendant suggested were gifts to her from decedent; payment of defendant's credit card bills; her daughter's college costs; her home newspaper subscription; New Jersey Transit fare, and others. The judge found certain monthly cash withdrawals from a Trust bank account were most likely used by decedent as spending money.

Further, the judge found defendant failed to fulfill her obligation to prepare an accounting of the income and expenses of

the Trust while she served as trustee. He determined she made unexplained loans/withdrawals of \$22,179.25, impermissibly paid a \$10,000 retainer to the attorney she hired to represent her in the underlying action and made a payment for attorney fees to defend defendant against a collection claim by a nursing home, which the judge concluded was unnecessary and unwarranted.

Next, the judge found defendant continued to pay the expenses on decedent's co-op, even though she knew he was not ambulatory and would never return to his home. He computed this expenditure as \$38,123.01. Crediting Archibold's testimony, the judge found the co-op should have been sold and defendant imprudently spent \$29,800.88.²

Archibold also computed the Trust's lost revenue from these inappropriate withdrawals and estimated lost income on the estimated proceeds had there been a timely sale five years earlier. The judge accepted the imputation of four percent interest on the actual withdrawals, but rejected the lost revenue on a hypothetical co-op sale, concluding plaintiff did not prove the amount the co-op could have sold for. The total sum awarded based upon

² Earlier in his opinion Judge Hansbury used a different amount when describing his findings; however, we have included the sum used to reach the judgment amount.

defendant's breach of her duty as trustee, along with prejudgment interest, totaled \$149,342.63.

Further, the judge awarded plaintiff accounting fees, counsel fees, and costs to be paid by defendant. Plaintiff's request for punitive damages was denied. Finally, defendant was removed as trustee and Kornblatt was appointed in her stead. Defendant appeals from the August 11, 2015 order.

The scope of appellate review of a trial court's fact-finding function is limited. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility. Because a trial court hears the case, sees and observes the witnesses, and hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses. Therefore, an appellate court should not disturb the factual findings and legal conclusions of the trial judge unless it is convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice. The appellate court should exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter.

[Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citations omitted)).]

Defendant first argues the judge erred in denying her request to bar Archibold's testimony. On the first day of trial, defendant objected to plaintiff's presentation of Archibold, arguing she suffered undue prejudice because his report was submitted one week before trial and her request for adjournment was denied. Other than this assertion, defendant presents no additional argument on this issue.

We review the admissibility of expert testimony for an abuse of discretion. Brennan v. Demello, 191 N.J. 18, 31 (2007). Here, the judge concluded although defendant submitted no discovery requests, she was aware plaintiff was presenting an expert. Defendant offered no accounting of the trust's assets, despite knowing she misused her role as fiduciary to expend trust monies on her personal obligations. Further, the judge reasoned defendant would have the opportunity to cross-examine the witness. In fact, she successfully did so, as she defeated some claims presented by Archibold. Under these circumstances, we find no abuse of discretion.

Next, defendant attacks Archibold's testimony regarding the unnecessary carrying charges spent for the co-op as well as the imputation of four percent, monthly compounded interest on the

essentially wasted assets.³ Defendant asserts plaintiff offered no evidence to show the co-op could have been sold earlier than it was, citing that portion of the judge's opinion denying interest on alleged proceeds had the co-op been sold five years earlier. We are not persuaded and reject defendant's claim, which suggests the court's findings were inconsistent.

It is undisputed defendant made no effort to sell the co-op after decedent was permanently hospitalized in 2008. The statement of reasons clearly found the co-op should have been sold before 2014. During the nearly five years that passed, defendant, as trustee, expended Trust funds to satisfy well-documented costs associated with retention of the co-op from the time of decedent's hospitalization until the actual sale. In disallowing interest on proceeds from a hypothetical sale of the co-op, the judge noted Archibold used the amount of proceeds realized in the actual 2014 sale to compute lost income from 2009-2014. The judge rejected this assumption, reasoning the record was silent on whether a sale in 2009 would match the sale price paid in 2014. However, because the judge found the co-op should have been sold in 2009, the

³ Defendant identifies three calculations made by Judge Hansbury as lacking evidential support: \$29,800.88 in unnecessary carrying costs on the co-op; \$3,287.99 in interest on these carrying costs; and \$23,389.90 in interest imputed on defalcated sums.

expended unnecessary carrying costs and interest on those readily calculable sums was awarded because the payments wasted Trust assets. Documents showed the Trust remitted \$38,123.01 to pay carrying costs on the co-op from 2008 until its sale in 2014. The judge allowed \$8,322.13, incurred in 2008, as reasonable, and concluded a sale should have been effectuated early in 2009. Interest was awarded against the net sum spent to retain the co-op.⁴

"[A] trustee's fiduciary relationship is based on the utmost trust." In re Niles, 176 N.J. 282, 297 (2003). More specifically, a trustee's most "fundamental duty" is the duty of loyalty to the trust's beneficiaries. In re Koretzky's Estate, 8 N.J. 506, 528 (1951). Accord Gilliam v. Edwards, 492 F. Supp. 1255, 1266 (D.N.J. 1980) (stating a trustee's duty is "to administer the trust solely in interest of the beneficiaries."). "The duty of a fiduciary is to 'exercise that degree of care, prudence, circumspection and foresight that an ordinary prudent person would employ in like matters of his own.'" In re Mild, 25 N.J. 467, 480 (1957) (quoting Koretzky's Estate, supra, 8 N.J. at 524).

⁴ Defendant's arguments she was charged for co-op carrying charges from 2008 and that interest was awarded on sums received as if the co-op was sold, are unfounded and incorrect.

Here, ordinary prudence required defendant as trustee to liquidate the co-op, which could not be utilized by the decedent, to maximize the funds available for beneficiaries. Instead, she did the opposite; she allowed the assets to lie fallow and expended monies for their retention. In doing so, she failed to actively supervise the administration of Trust assets and neglected her non-delegable duty to collect and preserve its assets. Thus, the judge properly imposed liability upon defendant as a "fiduciary who totally abdicates h[er] duties." Id. at 482.

Once liability for surcharging defendant was established, consideration of "the allowance of interest on surcharges, and the rate thereof," rests with the sound discretion of the judge. In re Estate of Lash, 169 N.J. 20, 34 (2001) (quoting Ditmars v. Camden Trust Co., 10 N.J. 471, 491-92 (1952)). "An appellate court will not interfere unless the interest charged is palpably unfair." Ibid. (quoting State ex rel. Matthews v. Nat'l Sur. Corp., 17 N.J. Super. 137, 142 (App. Div.), certif. denied, 9 N.J. 287 (1952)).

Here, Judge Hansbury's findings are supported by the unrefuted facts and expert evidence of record. Archibold's opinions were well supported by documents showing the costs associated with the co-op. Also, the four percent compounding interest rate was calculated by averaging the return on existing

Trust investments, namely several bond funds. Defendant offered no evidence to refute these facts. See Mild, supra, 25 N.J. at 487 ("[S]ince no evidence appears which would excuse [the trustee's] failure to collect on . . . judgments . . . it follows that the trustee should be surcharged for the losses sustained through its dereliction.") (quoting Bankers Trust Co. v. Bacot, 6 N.J. 426, 443 (1951)).

The imposition of interest added to the sums wasted by defendant was neither unreasonable nor unfounded. We find no abuse of discretion and conclude there is no basis to set aside the order. See Lash, supra, 169 N.J. at 34.

Finally, defendant challenges the assessment of counsel fees and costs. We reject her argument as lacking merit. R. 2:11-3(e)(1)(E).

Although New Jersey adopted the American Rule, the Supreme Court has held the "American Rule 'does not preclude an allowance of reasonable counsel fees where the incurring thereof is a traditional element of damages in a particular cause of action,'" which includes actions for breach of fiduciary duty. Lash, supra, 169 N.J. at 33 (quoting Pressler, Current N.J. Court Rules, comment 2.10 on R. 4:42-9 (2000)). See also Niles, supra, 176 N.J. at 294-95.

In supporting the award, Judge Hansbury stated:

Here it is clear that defendant breached a fiduciary duty. Had plaintiff not initiated litigation, including discovery frustrated consistently by defendant, defendant's conduct would not have come to light. . . . The court has reviewed the Certification of Attorney's Services and finds the hourly rate of \$300.00 per hour reasonable and appropriate. The Court further concludes that [the] detailed hourly statement of services rendered is reasonable and appropriate.

Defendant did not object to counsel's request to file a certification of services or to the facts set forth in the certification submitted. We discern no error in the trial judge's analysis of this issue, which complies with the standards outlined by the Supreme Court in Rendine v. Pantzer, 141 N.J. 292, 335 (1995). There was no error or abuse of discretion. City of Englewood v. Exxon Mobile Corp., 406 N.J. Super. 110, 123 (App. Div.) ("An award of counsel fees is only disturbed upon a clear abuse of discretion."), certif. denied, 199 N.J. 515 (2009).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION