SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4691-15T4

IN THE MATTER OF THE
ESTATE OF DOLORES M. PIERCE,
DECEASED.

Argued August 30, 2017 – Decided September 22, 2017

Before Judges Alvarez and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County, Docket No. P-0391-15.

Richard A. Ragsdale argued the cause for appellant Michael A. Pierce (Davidson, Sochor, Ragsdale & Cohen, LLC, attorneys; Mr. Ragsdale, of counsel and on the briefs).

Barbara L. Birdsall argued the cause for respondent Marilyn Cromwell (Birdsall & Laughlin, LLC, attorneys; Ms. Birdsall, of counsel and on the brief).

PER CURIAM

Dolores M. Pierce died December 9, 2014. Her son, Michael A. Pierce was named executor in his late mother's Will. Pierce's sister Marilyn Cromwell, a South Carolina resident, initially and unsuccessfully objected to the appointment. A third sibling is

not a party to the litigation. Pierce's letters testamentary issued on May 20, 2015.

On March 29, 2016, Cromwell applied for relief a second time and successfully removed Pierce. John G. Hoyle III, Esquire, was named the substitute Administrator Cum Testamento Annexo (Administrator CTA). We now reverse, finding that the statutory standard for removal was not met, and reinstate Pierce.[1]

Decedent's assets appeared to include three parcels of real estate: a 122-acre farm that Pierce had worked on for over forty years (the farm), a single-family dwelling that had an underground storage tank (the Pine Tree property), and a parcel where Pierce lived and maintained his business (the Ramshorn property). A fourth parcel of unimproved real estate had been deeded to Pierce and his wife prior to decedent's death. For reasons not disclosed on the record, the deed was not recorded until the day after decedent's death. Cromwell initially included the fourth parcel as part of decedent's assets, but the court excluded the parcel in its January 29, 2016 decision. The decedent's February 4, 2010 will instructed that the real estate "be sold as soon as practicable."

[1] We were told at oral argument the real estate was sold. Cromwell could have filed a motion to dismiss the appeal on that basis, or Pierce could have dismissed the appeal. Neither step was taken, so we must assume the issues raised in the appeal are not moot.

On November 16, 2015, Cromwell filed her first verified complaint seeking Pierce's removal. She alleged that Pierce had not fulfilled his statutory obligations because he failed to pay any New Jersey Estate Tax, exposing the estate to interest and penalties; did not sell decedent's real property; did not properly inventory, appraise or distribute decedent's personal property; and refused to allow Cromwell access to decedent's real and personal property.

Pierce submitted a thirteen-page certification with eleven exhibits in opposition to the complaint, responding that estate taxes had not been paid because the estate had no cash assets. He had obtained appraisals, but admitted that no inventory had been provided to Cromwell, because none was yet necessary. Along with the exhibits, the certification outlined Pierce's efforts to obtain appraisals of the farm and the Pine Tree properties. The certification also highlighted Pierce's efforts in managing the properties, knowing they were assets which needed to be sold.

According to the certification, during the appraisal process, an underground tank was discovered on the Pine Tree property. Nonetheless, Pierce located a buyer willing to pay a $250,000 purchase price. Pierce also stated he wished to buy the Ramshorn property, which was in foreclosure by the time Pierce was appointed executor. He loaned the estate over $20,000 to pay real estate

taxes. Pierce supplied an October 6, 2015 letter from a realtor declining to list the farm property because it included significant wetlands.

Pierce also certified that he had loaned a total of $49,430.45 to the estate in the months he had served as an executor. By August 18, 2015, he had obtained an appraisal of decedent's jewelry and offered to ship to Cromwell decedent's furniture, china, clothing, costume jewelry, and other items of personal property. On January 29, 2016, Pierce's attorney represented to the court that the contract to sell the Pine Tree property for $250,000 had been signed the previous week, and that Pierce would obtain an appraisal for the Ramshorn property within the next few weeks as he wished to purchase it.

In her decision dismissing Cromwell's first complaint, the judge stated Pierce knew the real properties had to be sold, but had "been sitting around for a year." She "[didn't] buy that argument" that Pierce had needed time to get appraisals. She ordered him to promptly sell the real property, even though she denied Cromwell's request to remove Pierce. The judge observed that, pursuant to the statute, it was "difficult" to demonstrate "clear and definite proof of fraud, gross carelessness, or indifference." She found that Pierce had acted in good faith, but was "hanging on by a thread[.]"

The judge directed Pierce to provide Cromwell with the Pine Tree property sales agreement. The order also stated: "If the sale does not close by March 1, 2016, [Pierce] shall within ten (10) days sign a multiple listing agreement" and "notify [Cromwell] of all sales activity and offers to purchase the property no less frequently than every thirty (30) days after entering the multiple listing agreement." Additionally, Pierce was required to sign a multiple listing agreement for the farm property within ten days at "a price which may be higher than but shall not be less than the appraised value reported by Gagliano Appraisal[.]"

Finally, Pierce was ordered to obtain an appraisal of the farm property within twenty days. Excepting his home, Pierce was to allow Cromwell access to the interior and exterior of all of decedent's real estate within ten days. The judge dismissed the count within the complaint seeking to void decedent's transfer of the fourth parcel to Pierce and his wife.

By letter dated February 26, 2016, Pierce's attorney on behalf of the buyer asked Cromwell's attorney for a one-week extension of the March 1, 2016 closing date for the Pine Tree property. He attached the buyer's email request to his letter. The underground storage tank had to be removed prior to closing, and the delay would ensure the removal would be complete before title was

transferred. Cromwell's attorney refused to consent. Accordingly, the closing took place on March 2, 2016.

On that same day, Cromwell filed a notice of motion for reconsideration of the February 12, 2016 order that dismissed her first complaint to remove Pierce. She again sought his removal and submitted a certification from her attorney regarding the delay of the Pine Tree property closing date. The attorney certified that "[a]s of this date, there has been no communication from [Pierce] as to the status of the sale of [the Pine Tree property]."

In opposition, Pierce filed a letter brief explaining that the Pine Tree closing had occurred on March 2, and otherwise describing his efforts to comply with the order. Cromwell had never contacted Pierce to arrange a time to inspect the real estate. Pierce's response also included an itemization of decedent's personal property, copies of which had been previously sent to Cromwell's attorney. The letter brief related a conversation in which Cromwell's attorney was informed that the decedent's personal property had been moved to a storage facility in Clifton.

A copy of an agreement listing the farm for sale at $2.8 million was provided, and Pierce attached correspondence to that document explaining that the asking price had been suggested by

the realtor, despite an earlier appraisal assessing the property at only $830,000.

Cromwell in turn disputed the jewelry appraisal provided by Pierce, stating that Pierce had years prior given her an appraisal establishing a higher value. She also claimed that several items were missing. Cromwell did not attach a copy of the earlier appraisal.

At the March 24, 2016 hearing on Cromwell's application for reconsideration, Cromwell contended that the January 2016 hearing was necessitated by Pierce's failure to act to settle the estate. She further argued that the $2.8 million listing was effectively "a decision not to sell the property" since it was significantly higher than the appraised value.

Pierce reiterated that the broker suggested the asking price, but that it would be relisted at the lower price if ordered by the court. The judge refused Pierce's request that he be allowed to testify regarding the circumstances of the listing price of the farm property. Cromwell agreed that if the personal property Pierce provided on a list were confirmed upon inspection, then they would be "done with that."

At the outset of the hearing, the judge said that she was "very, very disconcerted" by the repeated filing of Cromwell's application, but she was not sure if Pierce had violated his

statutory obligations. There was "tremendous animosity" between the parties, but animosity alone is "not really a reason to remove an executor[.]" Nevertheless, the judge ultimately found that Pierce "neglected and refused to perform or obey [the order of] judgment within the times fixed by the [c]ourt." The judge considered Pierce's listing of the farm property for three times the original appraised value to establish that he did not "really want to sell it."

The judge opined that Pierce should have been aware of the underground tank problem that delayed the Pine Tree property closing, acknowledging that it was not delayed "much." Furthermore, the judge considered Pierce's relocation of personal items to a new facility to mean he was not "cooperating." The court granted Cromwell's application and appointed a substitute Administrator CTA. She further ordered Pierce to submit a formal accounting within sixty days.

On May 2, 2016, Pierce filed a notice of motion for reconsideration along with a certification detailing his efforts to list the farm property and the reason he had disagreed with the $830,000 appraisal price. He noted that he had thirty-six years of consulting experience as a licensed professional engineer, licensed architect, and licensed professional planner. Among

Pierce's supporting documents was a certification from the appraiser explaining his valuation.

Pierce further certified that he had been making payments from his personal funds towards the loan against the property, preventing a foreclosure. The personal property had been moved into a storage facility in Clifton because his wife did not want Cromwell to come to her place of business in order to examine it.

During the reconsideration hearing on May 20, 2016, Pierce contended it was improper to remove an executor without a plenary hearing. Among other things, he argued that if the court intended to proceed summarily, it should have treated Cromwell's application as one for summary judgment. Since the Pine Tree property had been sold on March 2, Pierce argued that he was for all intents and purposes in compliance with the judge's original order. Cromwell responded that no hearing was necessary regarding the removal because Pierce had not disputed material facts and only submitted a brief in opposition to the application.

The court denied the motion for reconsideration, stating that it "had entered another order that [the] Pine Tree property was to be sold by a certain date, and it really wasn't sold by that date." She found fault with Pierce's decision to move the personal property to Clifton, knowing that Cromwell lived in South Carolina. The judge reiterated her concern that Pierce listed the farm

property for three times the appraisal price and, therefore, affirmed her earlier decision. She refused to stay the order pending appeal.

We owe no deference to the trial court's interpretation of the law, or the legal consequences that flow from established facts. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). As to mixed questions of law and fact, we give deference to factual findings of the trial court, but review de novo the court's application of legal rules to such factual findings. Patel v. Karnavati Am., LLC, 437 N.J. Super. 415, 423 (App. Div. 2014). Ordinarily, we do not disturb factual findings "unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of justice." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974) (citing Fagliarone v. Twp. of No. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1961)). Our review of factual findings is deferential because only the trial judge has the opportunity to observe the demeanor of witnesses. N.J. Div. of Youth & Family Serv's. v. G.M., 198 N.J. 382, 396 (2009). But where the judge's fact finding results from a review of allegations untested by cross-examination, review will not be deferential. Ibid.

"Moreover, it has long been the practice in reviewing chancery decrees for appellate courts 'to make an independent investigation of the facts.'" In re Estate of Mosery, 349 N.J. Super. 515, 522 (App. Div. 2002)(citations omitted) certif. denied, 174 N.J. 191 (2002). That same standard of review applies to an order removing an executor or administrator. See In re Breckwoldt, 22 N.J. 271 (1956) (independently examining the record in an appeal of an order removing an executor).

A fiduciary, acting as executor, has broad statutory powers to administer the estate "in the exercise of good faith and reasonable discretion[.]" N.J.S.A. 3B:14-23. With regard to real property, a fiduciary is empowered to take possession, pay taxes and other charges, sell, lease, mortgage, or grant easements. See N.J.S.A. 3B:14-23(e). In our view, Pierce's conduct did not fall outside of the obligations imposed by the statute.

A fiduciary may be removed for cause, pursuant to N.J.S.A. 3B:14-21, when:

> a. After due notice of an order or judgment of the court so directing, neglects or refuses, within the time fixed by the court, to file an inventory, render an account, or give security or additional security;
>
> b. After due notice of any other order or judgment of the court made under its proper authority, neglects or refuses to perform or

> obey the order or judgment within the time fixed by the court;
>
> c. Embezzles, wastes, or misapplies any part of the estate for which the fiduciary is responsible, or abuses the trust and confidence reposed in the fiduciary;
>
> d. No longer resides nor has an office in the State and neglects or refuses to proceed with the administration of the estate and perform the duties required;
>
> e. Is incapacitated for the transaction of business; or
>
> f. Neglects or refuses, as one of two or more fiduciaries, to perform the required duties or to join with the other fiduciary or fiduciaries in the administration of the estate for which they are responsible whereby the proper administration and settlement of the estate is or may be hindered or prevented.

Almost all of the evidence attached to Cromwell's motions for reconsideration and in aid of litigant's rights pertained to the Pine Tree property, which was sold by the time of Pierce's removal. The only new information and ground provided by Cromwell as a possible basis for removal in her second application was the sentence in the March 2, 2016 certification from her attorney that she had "no communication" from Pierce as to the status of the sale of the Pine Tree property. However, on February 26, 2016, Pierce's attorney asked Cromwell's counsel for a one-week extension for the closing at the buyer's request. Counsel refused the request the same day she filed her second application.

Moreover, no part of the certification from Cromwell's counsel or any other evidence, for that matter, alleged facts that demonstrated an actual violation of the court's February 12, 2016 order.

The judge's order did not require Pierce to sell the Pine Tree property by March 1. Even if it had imposed that obligation, the delay was initiated by the buyer and inconsequential.

Cromwell did not dispute the fact that she never attempted to arrange a time for viewing any property, real or personal, regardless of location. Pierce's removal was unwarranted on that basis.

It is not at all clear that Pierce's decision to list the farm property at three times the appraised value, at the realtor's suggestion, was a violation of the judge's order. He listed the property as the order required, albeit at a different price than the appraisal. If the issue for the court was the amount of the listing price, as opposed to compliance with the obligation to publicly offer the property for sale, Pierce should have been extended the opportunity to explain his decision.

The judge misapprehended Pierce's conduct, which on this record, did not appear to violate her order. A proper exercise of discretion rests upon a more complete understanding of the facts. See Wolosoff v. CSI Liquidating Trust, 205 N.J. Super.

349, 360 (App. Div. 1985). And there were significant disputes of fact that should have been resolved in some fashion before Pierce was removed as executor. The statute requires it.

Courts should be "reluctant to remove an executor as trustee without clear and definite proof of fraud, gross carelessness or indifference." In re Estate of Hazeltine, 119 N.J. Eq. 308, 314 (Prerog. Ct.) aff'd, 121 N.J. Eq. 49 (E. & A. 1936). An executor should be removed when his or her conduct shows bad faith, or jeopardizes the value of the estate's assets. Bramen v. Cent. Hanover Bank & Trust Co., 138 N.J. Eq. 165, 197 (Ch. 1946). Based on our review of the record, Pierce did not engage in misconduct that approximated the extremes in the statute. See ibid.

Pierce did not fail to comply with the judge's orders or otherwise fail to comply with the statutory duties delineated in N.J.S.A. 3B:14-21. The removal was unwarranted.

Reversed.