NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: JILL B WEINTRAUB 1997 TRUST	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: EDWARD FACKENTHAL & ANN HAMILTON	No. 2807 EDA 2013

Appeal from the Order September 19, 2013
In the Court of Common Pleas of Montgomery County
Orphans' Court at No(s): 07-3574

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY JENKINS, J.: **FILED JULY 28, 2014**

Appellants Edward Fackenthal and Ann Hamilton ("Appellants"), co-trustees of the Jill B. Weintraub 1997 Trust ("Trust"), appeal from the Montgomery County Court of Common Pleas Orphans' Court Division grant of the motion for summary judgment filed by Appellee Theodore Marasciulo ("Appellee"), a third co-trustee of the Trust, and the denial of their exceptions to the order granting summary judgment. We affirm.

I. Factual and Procedural History

On January 29, 1997, Jill B. Weintraub and Thomas E. Weintraub divorced. They executed a Marital Separation Agreement ("Agreement") providing:

> Husband shall fund a trust for Wife with (1) insurance on his life, at his expense, the proceeds of which shall be payable to the trust for Wife's benefit;

> and/or (2) securities and/or (3) cash. The total amount funded by the trust shall be $1,000,000 in any combination of the face amount of insurance, cash and securities. If for any reasons there should be less than $1 million for the trustee to administer for the benefit of Wife at the time of Husband's death, Husband's estate shall be responsible to and pay the trustees the amount of the deficit. The trust shall be substantially in the form set forth in Schedule "C."

Theodore Marasciulo's Motion for Summary Judgment to the Objections of Co-Trustees, Edward Fackenthal and Ann Hamilton [hereinafter "Summary Judgment Motion"], at Exh. I, at 2.3(b).

On January 29, 1997, Thomas Weintraub ("Weintraub"), as settlor, created the Trust, entitled "Irrevocable Agreement of Trust of Thomas E. Weintraub Creating the Jill B. Weintraub 1997 Trust." Summary Judgment Motion, at Exh. I, at Schedule C. The Trust document appointed Ann Hamilton, Edward Fackenthal, Esq., and Selwyn A. Horvitz, Esq., as the initial trustees. ***Id.***, at Schedule C, at 14.

One of the assets of the trust was a life insurance policy. Trial Court Opinion and Order, 6/28/2013, at 3. Horvitz paid the insurance premium from the Trust's assets for most years prior to 2005.[1] ***Id.***, at 5. In 2005, Appellee, an attorney who worked at the same law firm as Horvitz, forwarded the payment request from the insurance company to Weintraub.

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[1] The court found evidence the Trust paid the premiums in 1999, 2000, 2002, and 2003. Trial Court Opinion, at 5.

Objector's Motion for Summary Judgment, Exh.xxiii-xxvi. Although Weintraub initially did not pay the premium, he paid it after a second notice. ***Id.*** Horvitz passed away in 2006.[2] Opinion, at 3. In 2006, Appellee again received notice that the premium on an insurance policy with a benefit of $325,000.00 was due. He sent this notice, and the subsequent notices, to Weintraub. ***Id.*** Weintraub did not pay the premium and the insurance lapsed. ***Id.*** Weintraub was ill at the time of the lapse and the insurance policy was not replaced. ***Id.*** at 4. He died on January 16, 2007. ***Id.***

When Weintraub died, the Trust assets had a total value of $767,228.53, "falling short of the $1,000,000 required by the Agreement by $232,771.47. In accordance with the terms of the Agreement, the Trustees recovered this amount for the Trust, plus interest at the statutory rate of 6%, from the Estate of Thomas E. Weintraub." Opinion, 6/28/2013, at 4.

On April 17, 2006, after the policy lapsed, but before the date on which it could be reinstated without evidence of Weintraub's insurability, Appellee was appointed as a co-trustee. Opinion, at 4. He remained a trustee until October 2007, when he resigned.

On November 15, 2007, Appellants filed a petition for surcharge against Appellee in the Montgomery County Court of Common Pleas,

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[2] At this time, the Trust had two life insurance policies, one with a death benefit of $500,000.00 and one with a death benefit of $325,000.00, and investment assets of approximately $213,000.00. Opinion, at 3. The Trust's total assets exceeded the $1,000,000.00 required under the Agreement. ***Id.***

Orphans' Court Division, claiming Appellee was negligent in his role as co-trustee and negligent in his role as counsel to the Trust.[3] On April 19, 2010, Appellants filed a motion for summary judgment. On July 15, 2010, the parties filed a joint stipulation of facts. On September 7, 2010, the trial court denied Appellants' motion.

On December 2, 2011, Appellee filed a motion for summary judgment. The court held argument on March 22, 2012. On June 27, 2012, the court granted the motion, finding Appellants were not proper parties to maintain the action for breach of fiduciary duties against Appellee, a co-fiduciary. The court granted the summary judgment motion as to count I, negligence of delegated trustee, and count II, gross negligence of delegated trustee. As to count III, negligence as counsel for the trustee, the court found Appellants could pursue this claim in the Montgomery County Court of Common Pleas, Civil Division, and ordered them to file a civil complaint if they so chose.[4]

On July 24, 2012, Appellants filed a motion for reconsideration of the June 2012 order or, in the alternative, to amend the order to permit an

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[3] Although Appellee served the Trust as counsel from at least 2005, he was not appointed as a co-trustee until April of 2006. Appellants were the sole co-trustees from Horvitz's death in February 2006 until Appellee's appointment in April of 2006.

[4] The court also sustained one of Appellants' objections, finding the Account was not in the proper format. The court ordered the Account returned to the clerk unaudited without prejudice to the beneficiary or the estate to pursue a breach of fiduciary duty claim.

interlocutory appeal. On September 10, 2012, Jill B. Chawl ("Chawl"),[5] the Trust beneficiary, filed a petition to intervene.

On March 6, 2013, the court entered an order granting the motion to reconsider and the motion to intervene. On April 9, 2013, Chawl filed objections to the Account and a memorandum in opposition to the summary judgment motion.

On June 28, 2013, the court issued an Order and Opinion granting Appellee's motion for summary judgment and dismissing all objections to the Account.

The court found that Weintraub had an obligation to fund the Trust with not less than $1 million. Opinion, at 2-3. The court noted Appellants

> essentially argued that they had delegated certain duties and responsibilities to Horvitz with respect to the administration of the Trust. However, neither party has produced any writing delegating specific duties to Horvitz, nor any written delegation of duties to [Appellee].

Opinion, at 5. The court noted Appellants claimed the conduct of the parties established that a delegation occurred. Horvitz opened the investment account and supervised certain legal and accounting services provided to the Trust, and, in at least 1999, 2000, 2002, and 2003, the insurance premiums were paid from Trust assets. ***Id.*** In 2005, however, Weintraub paid the premium. ***Id.*** The court found the conduct was "inconsistent and [Appellee]

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[5] Jill Weintraub had changed her name to Jill B. Chawl.

cannot be held to have accepted a delegation of duty by course of conduct when a different person engaged in the course of conduct." ***Id.*** Further, the court found the one-page appointment of Appellee as co-trustee did not identify any delegated duties,[6] and Appellee's practice, in 2005 and 2006, was to send premium notices to Weintraub. ***Id.***, at 7, 10.

The court also noted Appellants did not establish a delegation occurred because Horvitz and other attorneys in his office asked for Appellants' signatures on documents related to investment accounts and tax payments. Opinion, at 8. For example, in 2002, Horvitz sent an application for the life insurance policy rider to Appellants for signature and on February 23, 2006, Fackenthal wrote an email concerning a conversation he had with Appellee stating "[Appellee] will probably be lowering the life insurance to $800,000[7] and will be seeking our, [Appellants'], signatures for that. [Appellee] would be entitled to them." ***Id.***, at 8-9. The court found this email reveals Fackenthal knew he would be asked to sign documents regarding changes of insurance policies held by the Trust and was aware the Trust was not required to keep the full amount of life insurance benefits. ***Id.***, at 9.

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[6] The court also noted Appellants did not establish the trustees were required to pay the insurance premiums from the Trust, noting Weintraub was responsible for determining how to fund the Trust and for paying the insurance premiums. Opinion, at 7.

[7] At this time, the Trust had two life insurance policies, with a total death benefit of $825,000.00. The insurance with a death benefit of $325,000.00 lapsed.

The court clarified its June 27, 2012 order, noting that pursuant to 20 Pa.C.S. § 7780.1, a co-fiduciary, and thus a co-trustee, can file a claim against a co-trustee with individual liability for the trust. Opinion, at 11. It found, however, that Appellants did not establish Appellee

> alone among the three Trustees had a duty to assure that the premiums were paid with respect to the insurance policies . . . [and] have not established that the payment of insurance premiums was the responsibility of the Trustees, rather than the responsibility of [Weintraub].

Id.

The court concluded there was no clear delegation of responsibility to Appellee to pay the insurance premiums and, therefore, Appellee did not breach a fiduciary duty. Opinion, at 11-12. Further, because the Estate paid the shortfall in the Trust, the Trust had no damages. ***Id.***, at 12. The court found the collateral source doctrine unavailing because the Trust was made whole by the obligation of the Estate, not insurance. ***Id.***

On July 18, 2013, Appellants filed exceptions to the opinion and order, which Chawl joined. The Estate of Thomas Weintraub ("Estate") also filed exceptions to the opinion and order.

On September 12, 2013, the court entered an order denying the Estate's and Chawl's exceptions and on September 19, 2013, the court issued an amended order denying the Appellants', the Estate's, and Chawl's exceptions.

Appellants timely appealed.[8] Chawl and the Estate joined Appellant's brief.

II. Claims

Appellants raise the following claims on appeal:

> 1. From the creation of the trust to the date of the lapse of its insurance policy, did a third trustee have normal trust duties to protect the trust property by paying policy premiums and keeping two co-trustees informed of material facts relative to the policy and did the third trustee fulfill those duties?
>
> 2. Did the Court below correctly interpret the parties' marital settlement agreement's indemnity clause as excusing any duty upon the third trustee to protect the policy for the trust and to keep the co-trustees and beneficiaries informed of material events?
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> 3. Did the third trustee's alleged deviation from an expected standard of care cause harm to the trust?
>
> 4. Are there material facts in dispute that would bar the summary judgment the Court below granted the third trustee?
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> 5. (a) May the co-trustees maintain an Orphans Court action for negligence against the third trustee for the benefit of the trust? (b) May they do so in Orphans Court against him in his role as counsel to the trust? (c) May they maintain a Common Pleas Civil Division action against him as counsel?

Appellants' Brief at 2.

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[8] The trial court did not issue a 1925(a) opinion. However, its summary judgment opinion addresses all issues raised in Appellants' statement of matters on appeal.

III. Standard of Review

When reviewing an order granting summary judgment we must determine whether the trial court abused its discretion or committed an error of law. ***Mee v. Safeco Ins. Co. of Am.***, 908 A.2d 344, 347 (Pa.Super.2006). A grant of summary judgment "presents a question of law, for which our scope of review is plenary." ***Sevast v. Kakouras***, 915 A.2d 1147, 1152 (Pa.2007) (citation omitted).

In analyzing a trial court's grant of summary judgment, we apply the same rule of law employed by the trial court, i.e., we review all of the evidence in the light most favorable to the non-moving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. ***Erie Ins. Exchange v. Weryha***, 931 A.2d 739, 741 (Pa.Super.2007).

IV. Analysis of Claims

A. Breach of Fiduciary Duties

Pursuant to Pennsylvania law:

> A cofiduciary may delegate investment and management functions to another cofiduciary if the delegating cofiduciary reasonably believes that the other cofiduciary has greater investment skills than the delegating cofiduciary with respect to those functions. The delegating cofiduciary shall not be responsible for the investment decisions or actions of the other cofiduciary to which the investment functions are delegated if the delegating cofiduciary exercises **reasonable care, skill and caution in establishing the *scope and specific terms of the delegation*** **and in reviewing periodically the**

> **other cofiduciary's actions in order to monitor the cofiduciary's performance and compliance with the *scope and specific terms of the delegation***.

20 Pa.C.S.A. § 7206 (emphasis added).

The trial court found there was no express written delegation of responsibility for payment of the insurance premiums to either Horvitz or Appellee and the parties' conduct did not establish a delegation. The premiums were not always paid from the Trust and Appellee's practice, which began in 2005, was to send the notice of premiums to Weintraub. Further, evidence established Horvitz and Appellee obtained Appellants' signatures on various documents related to investment accounts and tax payments. In addition, in a February 2006 email, Fackenthal acknowledged the insurance benefits would be decreased, and that he and Appellant Hamilton would be asked for signatures consenting to this change in the composition of trust assets.

The court also acted in its discretion in finding the Trust did not suffer a loss. The Agreement requiring the creation of the Trust ensured the Trust would receive $1 million. The Estate paid the deficit that existed at the time of Weintraub's death. Although the Trust would have received more if the insurance had not lapsed, pursuant to the Agreement requiring creation of the Trust, it was not entitled to more. Summary Judgment Motion, at Exh. I, at 2.3(b) ("The total amount funded by the trust *shall be $1,000,000* in any combination of the face amount of insurance, cash and securities. If for any reasons there should be less than $1 million for the trustee to

administer for the benefit of Wife at the time of Husband's death, *Husband's estate shall be responsible to and pay the trustees the amount of the deficit*.").[9]

B. Subrogation/Collateral Source

Appellants claim they represent the Estate's interest under the subrogation exception to the real parties in interest rule.[10] Subrogation is

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[9] Because we find that Appellants did not delegate any responsibility regarding the insurance premium payment to Appellee, we need not address whether the trustees or Weintraub had the responsibility to pay the insurance premium.

Appellants further argue the court erred in finding it had no jurisdiction over the claim that Appellee breached his duties as counsel. On June 27, 2012, the court granted in part Appellee's motion for summary judgment. It found it lacked jurisdiction to address the claim for Appellee's alleged breach of duties as counsel, ordered the claim transferred to the civil division of court of common pleas, and permitted Appellants to file a separate action in that court. On March 6, 2013, the court granted a motion for reconsideration of its June 27, 2012 order. On June 28, 2013, the court granted Appellee's motion for summary judgment, found the trust did not have a loss, and dismissed Appellant's "professional liability" claims. Accordingly, it appears that after reconsideration the court addressed, and dismissed, the breach of duties as counsel claim because the Trust did not suffer a loss. This was not error. ***See, e.g., Rabutino v. Freedom State Realty Co. Inc.***, 809 A.2d 933, 938 (Pa.Super.2002) (listing elements of negligence cause of action, including "actual loss or damage suffered by complainant").

It further appears, however, this claim may also be pending in the civil division of the court of common pleas. ***See Fackenthal v. Marasciulo***, No. 2012-20444 (C.P. Montgomery filed July 29, 2012). If so, it is possible that the resolution of the present appeal should result in a disposition of the pending civil suit.

[10] Pennsylvania Rule of Civil Procedure 2002 provides:

(Footnote Continued Next Page)

the "substitution of one [entity] in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities." ***Public Serv. Mut. Ins. Co. v. Kidder-Friedman***, 743 A.2d 485, 488 (Pa.Super.1999) (quoting ***Molitoris v. Woods***, 422 Pa.Super. 1, 618 A.2d 985, 989 (1992)). Although the Estate filed exceptions to the order granting summary judgment, it did not assert a claim against Appellee. There is therefore no claim to which a subrogee could succeed.

Further, the rule affording a subrogee the right to prosecute an action in its name as the real party in interest or the name of the subrogor "was enacted to shield the identity of the subrogee from the factfinder to avoid any prejudice to the subrogee and subrogor that might result from the disclosure of its identity." Goodrich Amram 2d § 2002(d):4. Even if a claim had been made, the doctrine would be inapplicable to a situation such as this, where the Estate reimbursed the Trust under the terms of a written

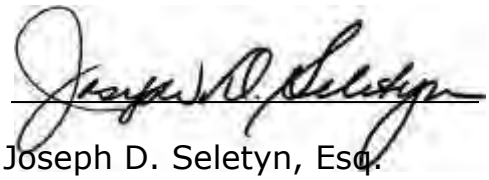
(Footnote Continued) ———————————

> (a) Except as otherwise provided in clauses (b), (c) and (d) of this rule, all actions shall be prosecuted by and in the name of the real party in interest, without distinction between contracts under seal and parol contracts.
> . . .
> (d) Clause (a) of this rule shall not be mandatory where a subrogee is a real party in interest.

agreement. The purposes of the subrogation exception to the real-party-in-interest rule would not be advanced.[11]

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/28/2014

[11] To the extent Appellant's claim that, pursuant to the collateral source doctrine, any contribution from the estate should not be considered, this claim is moot because we find Appellants not entitled to relief.