COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1462 **Cir. Ct. No. 2013PR206**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE ESTATE OF JOHN J. HOHLER:

BARBARA A. SIMONSON,

APPELLANT,

V.

JEANNE E. BAIVIER AND MARY VAIRA,

RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Barbara A. Simonson appeals from a final order of the circuit court approving a final plan of distribution for the Estate of John J. Hohler (the Estate) and the John J. and Jane Hohler Trust (the Trust) and ordering surcharges against Simonson.

¶2 This is the second appeal from circuit court proceedings involving the Estate and Trust of John and Jane Hohler. ***Simonson v. Vaira***, No. 2016AP113, unpublished slip op. (WI App Sept. 28, 2016). In the prior case, we affirmed the circuit court's order removing Simonson as personal representative of the Estate and trustee of the Trust. ***Id.*** Jeanne E. Baivier was subsequently appointed as a successor trustee, and the circuit court entered an order on June 21, 2017, approving, among other things, the successor trustee's report and the plan of distribution and ordering sanctions against Simonson. Simonson makes three arguments on appeal: (1) the circuit court erred in imposing surcharges upon her, (2) the court approved a plan of distribution in violation of the express terms of the Trust Agreement, and (3) the court improperly denied compensation relating to allegedly improper lis pendens. As we conclude that the court properly applied its equitable powers, we affirm.

Surcharges

¶3 The circuit court ordered that Simonson pay $10,000 to the successor trustee for her fees, $10,000 to Mary Vaira's[1] counsel, and $2495 for the cost of revising a tax return for the Trust from the funds distributed to Simonson. Simonson argues that the court's imposition of these surcharges was error as the

[1] Vaira is a beneficiary of the Trust and Simonson's sister.

court was required to find that Simonson acted in bad faith and breached a fiduciary duty and, according to Simonson, there was insufficient evidence in the record to support such findings. We disagree.

¶4 A court has the equitable authority to award fees and costs against a party in the administration of a trust—with limitations. A court may personally surcharge a party, but the court must find that the party engaged in misconduct or acted in bad faith.[2] *See* ***Richards v. Barry***, 39 Wis. 2d 437, 445-46, 159 N.W.2d 660 (1968) ("There may be cases within the equitable power of the court when a trustee should be charged personally with expenses he needlessly causes through his conduct," but "where the trustee's conduct is not found to be in bad faith but only substandard performance of his duty, we think that although compensation for his work may be denied he ought not in equity be personally liable for expenses he caused the remaindermen."); ***Western Sur. Co. v. P.A.H.***, 115 Wis. 2d 670, 340 N.W.2d 577 (Ct. App. 1983). The amount of a surcharge imposed against a trustee is within the circuit court's discretion. ***Hegner v. Van Rossum***, 117 Wis. 2d 314, 327, 344 N.W.2d 160 (1984).

[2] Simonson argues that an express finding of a breach of a fiduciary responsibility is necessary for a court to impose surcharges. Simonson cites to ***Mullany v. Massie***, No. 2015AP318, unpublished slip op. (WI App Jan. 18, 2017), for this proposition, but she admits that breach of fiduciary duty and bad faith were not at issue in that appeal. ***Massie*** does not aid Simonson's argument as that case merely confirmed previous decisions, concluding that "[w]hile the court's powers are not plenary, it may personally charge a party who acts in bad faith." ***Id.***, ¶9. Neither ***Richards v. Barry***, 39 Wis. 2d 437, 445-46, 159 N.W.2d 660 (1968), or ***Western Sur. Co. v. P.A.H.***, 115 Wis. 2d 670, 674-75, 340 N.W.2d 577 (Ct. App. 1983), require any express finding of breach of a fiduciary duty. In probate proceedings, a trustee acts as a fiduciary in managing another's assets and must act in good faith in exercising those duties. ***Robert Hill Found. v. Learman***, 30 Wis. 2d 116, 118, 140 N.W.2d 196 (1966). If a court finds that a trustee acted in bad faith, a separate finding of a breach of a fiduciary duty is not required.

¶5 The newly amended trust code further extends a court's authority to award fees in its discretion. Under WIS. STAT. § 701.1004(1) (2015-16),[3] a court has broad discretionary authority to surcharge a party for "costs and expenses, including reasonable attorney fees" "as justice and equity may require." The court's authority under § 701.1004(1) grants the court the power to order the surcharges against Simonson in this case.[4]

¶6 There is ample support in the record for the court's finding of bad faith. The court outlined in detail the evidence relevant to its finding of bad faith, including failure to file a full final accounting for the Trust administration in 2015, which violated a direct order of the court; failure to appear at a scheduled hearing that caused a continued delay in the administration of the Trust; and failure to promptly move the administration of the Trust along, which all led to her removal as trustee and personal representative. Even after her removal as trustee, Simonson continued to act in bad faith as the court relayed reports from various other parties that Simonson refused to cooperate. The successor trustee indicated that Simonson failed to provide itemization of receipts and disbursements for the period from May 2015 to November 2015, when Simonson was still acting trustee. This led to additional accountant fees for preparing a revised tax return. Simonson also failed to properly transfer ownership of a boat, which led to additional fees for the successor trustee. Based on these findings, the court concluded:

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[4] Simonson argues that WIS. STAT. § 701.1004(1) "only permits a court to impose surcharges for legal fees of another beneficiary." Simonson cites no authority for her assertion, and if the legislature had intended the statute to apply only to legal fees for another beneficiary it would have used that term. Instead, the statute broadly utilizes the term "party."

> I'm going to find there is bad faith for violating a court order, moving this trust along like it should but again, then appealing it and requiring additional attorney's fees, additional delays, and certainly the delays have been highlighted … that just continues to obstruct the resolution of this case.

¶7 Simonson argues that the findings of bad faith were during the period after she was no longer acting trustee, and thus she had no duty and could not be surcharged for actions during that time. We disagree. The court specifically cited Simonson's missteps prior to her removal as trustee as support for its finding of bad faith. Further, the issues the successor trustee experienced directly resulted from Simonson's actions, or more appropriately inaction, while she was the trustee, for example, failing to provide a proper accounting to the successor trustee for the period from May 2015 to November 2015, which led to extra expenses for refiling a tax return. The record supports the court's findings on this issue.

¶8 Simonson also argues that the Trust Agreement bars imposition of surcharges in this case. According to Simonson, Article X.P. of the Trust Agreement expressly provides that "[n]o individual acting as Trustee shall be liable to any beneficiary for any act or failure to act so long as he or she has acted in good faith and without gross negligence." As previously addressed, the circuit court made an express finding of bad faith by Simonson; thus, Article X.P. of the Trust Agreement is inapplicable.

¶9 The delays and additional fees resulted directly from Simonson's bad faith actions in this case and were a result of her own conduct, including a failure to follow court orders and cooperate with the successor trustee. The circuit court did not err.

Violation of Express Trust Terms

¶10 Simonson also argues that the court erred in approving a plan of distribution in violation of the express terms of the Trust Agreement. According to Simonson, the express terms of the Trust provide that all the remaining assets of the Trust are to be distributed equally to the Vaira sub-trust and the Simonson sub-trust. Simonson claims that "the Vaira Sub-trust was favored by receiving materially higher value than the Simonson Sub-trust." We conclude that the circuit court properly exercised its discretion in approving the plan of distribution.

¶11 Simonson makes several arguments challenging revaluation completed by the successor trustee of certain items of property, including a car and a boat. She claims that the court should have accepted the valuations assigned by Simonson while she was Trustee. The court, however, specifically provided in its November 24, 2015 order that the successor trustee was to "reconsider the assigned values of the assets of the estate and trust, such as real estate and tangible personal property and determine their proper valuation for purposes of distribution of the trust and estate and for making equalizing payments to either the sub-trust for … Simonson or that for … Vaira."[5] The successor trustee specifically found a "manifest injustice" as "the lack of appraisal for the boat and Chrysler car is obvious and directly unfair to [Vaira]." Both the successor trustee and the court exercised its discretion properly in this case.

[5] Simonson argues that a January 14, 2016 order superseded the November 24, 2015 order and only allowed the successor trustee to review "real property distribution" for a "manifest injustice." The January 2016 order merely reaffirmed the November 2016 order, and did not specifically remove the right of the successor trustee to review the valuation of other property in the estate.

¶12 Simonson next complains that the circuit court erred in approving payments to Vaira's counsel made by the successor trustee as she claims that it resulted in unequal distributions among the sub-trusts. The circuit court's June 5, 2015 order provided that "appropriate, reasonable and substantiated attorney fees" for the Trustee (at the time Simonson), Vaira, and Joseph Simonson were to all be paid by the Trust pursuant to WIS. STAT. § 701.1004(1). The successor trustee contacted counsel for the parties, received copies of invoices for their service during the appropriate time period, and paid the attorneys' fees from the Trust fund as provided in the June 2015 order.[6] Simonson does not explain how the payment of attorneys fees led to an unequal distribution as the successor trustee's final account indicates that substantial payments were also made to Simonson's former counsel, and these payments were made from the Trust prior to the equal distribution of the remaining assets. The court found that the successor trustee's report was "reasonable, appropriate and prepared with due diligence." Simonson has provided us no reason to disrupt the successor trustee's and the circuit court's discretionary findings concerning payment of attorneys' fees.[7]

¶13 Finally, Simonson argues that she was denied certain payments and distributions required under the Trust Agreement and the June 2015 order,

[6] Simonson argues that she, during her time as Trustee, determined that Viara's attorneys' fees "failed to comply with the requirements of [the June 2015 order] for payment." She claims that the successor trustee "second-guessed Simonson's determination over a year later." Simonson, however, does not argue what was improper about the attorneys' fees and she fails to develop an argument as to why the successor trustee erred. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[7] Simonson also argues that the circuit court approved the Trust "taking a tax return position that benefited the Vaira Sub-trust at the expense of the Simonson Sub-trust." Simonson makes no legal argument as to why that decision was improper and cites no legal authority to support her assertions. *See* ***Pettit***, 171 Wis. 2d at 646-47 (court of appeals need not address undeveloped arguments).

including costs to move items of personal property, fees for her work as the Trustee, and a water bill she paid for property that was owned by the Trust. She claims the circuit court provided no explanation for why these payments were denied under the successor trustee's plan, but she also provides no legal authority for why the court was required to order these payments be made. In ***Barry***, our supreme court explained that "the discretion of the trial court to deny compensation [to a Trustee] for unfaithful service is not restricted to bad faith or gross and inexcusable negligence or willful dereliction of duty," "but is based upon the failure to perform the trust with ordinary skill and care and with the highest degree of good faith." ***Barry***, 39 Wis. 2d at 444. As previously discussed, the circuit court did find that Simonson acted in bad faith; thus, it was well within its discretion to reduce or deny compensation to Simonson for her work as Trustee. ***Id.*** For these same reasons, it was reasonable for the successor trustee and the circuit court to deny compensation to Simonson for the costs associated with her actions as Trustee.

Lis Pendens

¶14 In November 2015, Vaira filed lis pendens on four properties held by the Simonson sub-trust. Vaira was authorized to file a lis pendens on each of the properties by a November 24, 2015 order of the circuit court, which provided that "Vaira may file and record on each property of real estate transferred to the Barbara Simonson Sub-Trust a Lis Pendens which shall only be removed by further order of this Court or the Successor Trustee." In March 2017, Simonson filed a motion for sanctions, damages, and attorneys' fees in part for "[t]he unlawful and improper imposition by Vaira of a lis pendens on the real property owned by the Simonson Sub-trust." Simonson argued that the lis pendens were

illegal and invalid, and Vaira's failure to lift the lis pendens on the property was a violation of Wisconsin law and constitutes slander of title. We disagree.

¶15 Pursuant to WIS. STAT. § 840.10(1)(a), a lis pendens "shall" be filed in an action "where relief is demanded affecting described real property which relief might confirm or change interests in the real property." A lis pendens is required as a means to put third parties on notice of pending litigation "so that they may avoid 'buying a lawsuit.'" ***Belleville State Bank v. Steele***, 117 Wis. 2d 563, 575, 345 N.W.2d 405 (1984); *see also* ***Kensington Dev. Corp. v. Israel***, 142 Wis. 2d 894, 901-02, 419 N.W.2d 241 (1988). Once a lis pendens is filed, subsequent purchasers of property are bound by proceedings affecting the property to the same extent and in the same manner as if they were parties. *See* § 840.10(1)(a). Under WIS. STAT. § 706.13(1), one who files a lis pendens is only liable for slander of title where he or she knows or should have known that the lis pendens is "false, a sham or frivolous," and this must be established by clear, satisfactory and convincing evidence. ***Kensington Dev. Corp.***, 142 Wis. 2d at 905. Thus, § 706.13 merely allows civil liability for the abusive use of the lis pendens.

¶16 Here, Vaira's filing of the lis pendens on Simonson's properties was not abusive, and it was not false, a sham, or frivolous. First, the circuit court's November 2015 order expressly authorized Vaira to file lis pendens on the properties. Second, the court was concerned about the distributions of the property in the estate, ordering in November 2015 that the successor trustee "reconsider the assigned values of the assets of the estate and trust … and determine their proper valuation for purposes of distribution of the trust and estate and for making equalizing payments" and ordering in January 2016 that the successor trustee was to review "whether there was a 'manifest injustice' in the

distribution of the rental properties." Under these circumstances, the filing of the lis pendens was necessary in case the final distribution of the estate required the court to reallocate certain assets as subsequent purchasers needed to be on notice of this possibility. The circuit court did not err in finding that Simonson failed to meet her burden to show damages and that the lis pendens were filed illegally.[8]

¶17 For the reasons stated, the circuit court is affirmed in all respects.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[8] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).