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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MAUREEN GORMAN,

Petitioner and Respondent,

v.

MICHAEL LAVERY,

Respondent and Appellant.

2d Civil No. B271527
(Super. Ct. No. 56-2012-00416597-PR-CE-
OXN)
(Ventura County)

Here, a probate court awarded \$101,787.26 attorney fees and costs to a residual trust beneficiary, Maureen Gorman (Gorman) in a trust accounting dispute. The fees and costs were incurred to protect and recover trust assets caused by appellant's, Michael Lavery, mismanagement of the family trust. After the breach of trust claim settled for \$975,000, the probate court found that the "lion's share" of Gorman's fees and costs should be borne by appellant. The court ordered the trust to pay Gorman's fees and costs, and ordered that 80 percent of the fees and costs be allocated to appellant's future trust distributions as residual beneficiary. Lavery appeals, contending that the probate court

abused its discretion and that the surcharge order is barred by the \$975,000 settlement agreement. We affirm.

The Family Trust

Appellant Michael Lavery and respondent Gorman are residual beneficiaries to a family trust (The Arthur and Mary Jane Lavery Living Trust) created by their parents, Arthur Lavery and Mary Jane Lavery. After Arthur died in 1998, the amended and restated living trust was divided into four subtrusts. Mary Jane served as trustee and, in 2005, amended the trust to add appellant as co-trustee and granted appellant a durable power of attorney for asset and property management. Appellant provided no accounting for seven years and, in 2011, appellant and his cousins (James Daze and David Daze) became successor co-trustees after Mary Jane was diagnosed with dementia.

Appellant insisted that Mary Jane move to Arizona, his place of residence, but Mary Jane wanted to stay in Thousand Oaks where she was receiving excellent care. Over Mary Jane's objection, appellant used a trust margin account to purchase a \$715,000 home in Arizona with a pool and chef's kitchen. Appellant also used trust funds to buy \$798,000 in precious metals, paid for his daughter's divorce and bought her a house in Arizona (\$480,000) with trust funds, and loaned more than \$100,000 in trust funds to his two daughters.

In May 2012, Gorman filed a conservatorship petition on behalf of Mary Jane. Appellant opposed the conservatorship and petitioned an Arizona court to approve his trust accounting. After the Arizona matter was dismissed, the Ventura County Superior Court appointed Angelique Friend (Friend), a professional fiduciary, as Mary Jane's temporary conservator.

On August 31, 2012, Friend filed a petition to recover trust property and to remove appellant as trustee for breach of trust. On March 12, 2013, the probate court ordered appellant to account for his trust administration from January 1, 2011 through March 22, 2013. Appellant filed a first trust accounting to which Gorman and Friend filed objections. Due to continued difficulties with appellant, the probate court ordered Friend's attorney to file a second accounting for appellant through June 30, 2013. Soon after the second accounting was filed, Mary Jane and Gorman filed substantive objections alleging further breach of trust by appellant. The accountings showed that appellant used trust margin accounts to buy \$1.3 million of real estate in Arizona, incurred substantial losses in the purchase of precious metals and foreign stocks, and used trust funds to pay traffic tickets, automobile expenses, and internet and travel expenses.

The Settlement Agreement

After Friend was appointed interim successor trustee, appellant resisted turning over trust property and contested standard trust accountings filed by Friend. Friend's breach of trust claim was set for trial, and then mediated and settled. The settlement agreement provided that the trust would receive \$975,000 from Chartis Insurance Company, the co-trustees' (Daze's) insurance carrier. Friend agreed to withdraw the breach of trust petition, the trustees (appellant and the Dazes) resigned, and the parties stipulated to the appointment of Friend as successor trustee of the trust and conservator of the person and estate of Mary Jane. The settlement agreement included a mutual release, stated that each party would bear his/her own fees and costs, and provided that all attorney fees

and costs incurred by Friend as conservator would be paid by the trust.

Friend petitioned the probate court to approve the settlement agreement. Appellant submitted papers in support of the petition stating: “It is important to point out that Maureen Gorman did **not** agree to settlement and is **not** a signatory to the settlement agreement. Accordingly, the settlement arguably does not, by itself, resolve all claims.” Appellant argued it was “unclear” whether Gorman’s objections to the trust accountings were moot and asked the probate court to retain jurisdiction to determine future disputes concerning administration of the trust.

The Surcharge Petition

The day after the settlement agreement was approved, Gorman filed a petition to recover trust property and for attorney fees and costs. (§ 850, subd. (a)(2).)¹ Gorman sought reimbursement for attorney fees and costs (\$101,787.26), and prayed that the fees and costs be charged against appellant’s future distributions as trust beneficiary. Appellant opposed the petition based on the theory that it was barred by the settlement agreement.

On December 1, 2015, the probate court awarded Gorman and Friend attorney fees and costs and ordered that it be paid by the trust. The court ruled that Gorman’s request to surcharge appellant’s future trust distributions would be treated as a section 17200 petition concerning the internal affairs of the trust and continued the matter to December 29, 2015.

In a December 29, 2015 tentative ruling, the probate court found that appellant violated his fiduciary responsibilities

¹ All statutory references are to the Probate Code unless otherwise stated.

as trustee, engaged in bad-faith delays and obfuscations, and “dr[ove] up attorney fees and costs for four years, . . . directed principally to bad faith avoidance of responsibility for his intentional misconduct.” Invoking its equitable power to enforce the trust, the probate court ordered that the trust pay Gorman’s fees and costs (\$101,787.26) and Friend’s attorney fees and costs (\$203,000+), and ruled that 80 percent of the fees and costs were allocable to appellant’s distributive share of the trust. During the hearing, appellant asked the court (the Honorable Judge Glen M. Reiser) to disqualify itself because it conducted a Mandatory Settlement Conference a year earlier in December, 2014. The court ordered additional briefing and continued the hearing to January 27, 2016.

On January 27, 2016, the court denied the disqualification motion and ruled that the December 29, 2015 tentative ruling to allocate fees and costs was the order. The court ordered the trust to pay Gorman’s fees and costs and ordered that 80 percent of Gorman’s fees and costs and 80 percent of Friend’s fees and costs as successor trustee be allocated to appellant’s future trust distributions.

Abuse of Discretion

Appellant does not contest the amount of fees and costs awarded but claims that the 80 percent allocation is an improper surcharge. The surcharge order is reviewed for abuse of discretion and requires a showing that the order was arbitrary, capricious or whimsical. (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1449.) Appellant must show that the surcharge order exceeds the bounds of reason and resulted in a miscarriage of justice. (*Estate of Gump* (1991) 1 Cal.App.4th 582, 597.)

Appellant claims that he was not provided adequate notice, an evidentiary hearing, or the opportunity to be heard on the surcharge request. Appellant was aware of the December 29, 2015 tentative ruling and agreed to continue the surcharge hearing to January 27, 2016. Although appellant did ask the court to disqualify itself, he did not ask for an evidentiary hearing on the proposed surcharge.² The court denied the recusal motion of January 27, 2016 and finalized its order that 80 percent of Gorman's and Friend's attorney fees and costs be allocated to appellant's distributive share of the trust.

Appellant does not challenge the order allocating 80 percent of Friend's fees and costs to appellant's distributive share of the trust. The appeal is directed to Gorman, which suggests that the surcharge is proper as to Friend's fees and costs but not Gorman's fees and costs. That cannot be. As we shall explain, the Probate Code vested the court with the discretion to surcharge appellant's beneficiary interest in the trust. (§ 17206.) The court also had inherent jurisdiction as a court of equity to

² Appellant waived the error, if any, on the order denying his motion to disqualify Judge Reiser. Code of Civil Procedure section 170.3, subdivision (d), provides, "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal." (See *People v. Freeman* (2010) 47 Cal.4th 993, 1000 ["[u]nder our statutory scheme, a petition for writ of mandate is the *exclusive* method of obtaining review of a denial of a judicial disqualification motion"].)

surcharge appellant's future trust distributions. (*Chatard v. Oveross* (2009) 179 Cal.App.4th 1098, 1108.)

Res Judicata

Appellant argues that the surcharge order is barred by the settlement agreement. Gorman, however, was not a party or signator to the settlement agreement which provides that "each party shall bear its own costs and attorney's fees." That is why Gorman was awarded \$101,787.26 attorney fees and costs. The court ordered the trust to pay Gorman's fees and costs and ruled "[t]he only thing that's still on the table after today is reallocation."

Citing *Estate of Redfield* (2011) 193 Cal.App.4th 1526, appellant argues that a court-approved settlement agreement is a res judicata bar. In *Estate of Redfield*, a will contest was settled concerning title to \$136,000 that Redfield's daughter withdrew from Redfield's account before his death. (*Id.* at p. 1529.) The probate court approved the settlement and dismissed, with prejudice, section 850 petitions to recover the \$136,000. (*Id.* at p. 1531.)

A year later, respondents objected to an estate accounting because it did not list the \$136,000 in the estate residue. The Court of Appeal held that the parties were barred from relitigating whether the \$136,000 was an intervivos gift or part of decedent's estate. (*Estate of Redfield, supra*, 193 Cal.App.4th at pp. 1534-1535.) "A dismissal with prejudice following a settlement constitutes a final judgment on the merits." (*Id.* at p. 1533.) The court explained that "[a] dismissal with prejudice is the modern name for a common law retraxit. [Citation.] . . . Dismissal with prejudice is determinative of the

issues in the action and precludes the dismissing party from litigating those issues again.’ [Citations.]” (*Ibid.*)

Unlike *Estate of Redfield*, Gorman’s trust account objections were not dismissed and no judgment was entered against Gorman. Nor was Gorman a party to the settlement agreement or bound by its waiver provisions. Appellant admitted as much when the court was asked to approve the settlement agreement. Appellant told the court that Gorman “did not agree to the settlement,” “is not a signator to the settlement agreement,” and the settlement “does not, by itself, resolve all claims.” Acting in his capacity as a remainder beneficiary, appellant asked the court to continue its trust supervision and requested that any and all fees and costs be paid from the trust with notice to the remainder beneficiaries.

Appellant is estopped from arguing that the settlement agreement barred the surcharge request. (See *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987 [discussing doctrine of judicial estoppel].) If the court had the equitable power to award Gorman attorney fees and costs, all of which were paid by the trust, it had the power to allocate the fees and costs to appellant’s distributive share of the trust. Probate courts have the general power to supervise the administration of the trust, which includes “the “*inherent power* to decide all incidental issues necessary to carry out” this function. [Citation] Section 17206 provides, in relevant part, “The court in its discretion may make *any orders and take any other action* necessary or proper to dispose of the matters presented by the petition’ (Italics

added.)” (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1413.)³

Probate courts have “the power to allocate the burden of certain trust expenses to the income or principle account and not infrequently do so in connection with accountings or suits relating to the administration of the trust. Sometimes this authority is stated in statutory form, but it exists as part of the inherent jurisdiction of equity to enforce trusts, secure impartial treatment among the beneficiaries’ [Citation.] ‘Where the expense of litigation is caused by the unsuccessful attempt of one of the beneficiaries to obtain a greater share of the trust property, the expense may properly be chargeable to that beneficiary’s share.’ [Citations.]” (*Estate of Ivey* (1994) 22 Cal.App.4th 873, 883.)

Here, the court reviewed the entire probate file (six volumes), went through each pleading, and “made a determination between two beneficiaries as to whether in equity one of those beneficiaries should bare the lion’s share of the

³ Section 17211, subdivision (b) also vested the court with the power to surcharge the fees and costs against appellant’s beneficiary interest in the trust. Section 17211, subdivision (b) provides in pertinent part: “If a beneficiary contests the trustee’s account and the court determines that the trustee’s opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney’s fees, incurred to contest the account. The amount awarded shall be a charge against the compensation or other interest of the trustee in the trust.” Subdivision (b) is a remedial statute that must be liberally construed to effectuate its object and purpose, and to suppress the mischief at which it is directed. (*Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1598.)

litigation[] expenses [I]n that review I concluded that it was appropriate in equity for [appellant] to bear 80 percent of the attorney's fees incurred by his sister [Gorman]." If the surcharge is reasonable with respect to the successor trustee's (Friend's) fees and costs, it logically follows that the same trust allocation is reasonable with respect to Gorman's fees and costs. Appellant makes no showing that the court abused its discretion in directing that future trust distributions to appellant be used to pay 80 percent of Gorman's attorney fees and costs. (See *Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 189; *Rudnick v. Rudnick* (2009) 179 Cal.App.4th 1328, 1335.)

Notice and Adversarial Hearing

Appellant claims that he was not given proper notice of the surcharge request even though Gorman filed and served the petition on October 28, 2015. Appellant filed objections a month later and was represented by two attorneys at the December 1, 2015 hearing. The court stated that it was awarding Gorman fees and costs, payable from the trust, and that the allocation of the fees and costs to appellant's distributive share of the trust would be heard on December 29, 2015. That was memorialized in a December 4, 2015 order awarding Gorman \$70,741 attorney fees and \$31,046.26 costs.

On December 29, 2015, the probate court found that 80 percent of the fees and costs incurred by Gorman and Friend would be allocated to appellant's distributive share of the trust. During the hearing, appellant's trial attorney acknowledged that "it appears the Court had [already] made a finding of bad faith against Mr. Lavery for purposes of an allocation, an 80 percent allocation, of the . . . fees [and costs]." Appellant argued that the court should disqualify itself because it participated in a

Mandatory Settlement Conference a year earlier. Overruling the objection, the court found that the allocation of fees and costs had nothing to do with the Mandatory Settlement Conference. The allocation of fees and costs “has to do with the entire course of litigation and whether it’s proper in equity for someone to bear fees and the allocation of distributive trust share. That’s all it relates to [I]t involves litigational conduct. It doesn’t have anything to do with a trial.” “I’ve managed this case exclusively for five years. So what’s the alternative? [Do y]ou just give it to some judge who doesn’t know the . . . case to make that call?”

Appellant’s trial counsel was asked, “Does [the disqualification] objection impact the Court’s ability to rule on fees today?” Counsel responded, “No. I don’t believe so, your Honor.” The court awarded fees and costs to Gorman, and continued the hearing to decide how the fees and costs would be allocated. “So the only issue is then on the post-payment . . . reallocation [of fees] within the trust, whether I can do it . . . because . . . at the somebody’s begging and insistence -- I sat through part of an unsuccessful mandatory settlement conference.”

On January 27, 2016, appellant again argued that the settlement agreement barred the allocation of fees and costs because appellant voiced “[no] objections as a non-signator” when the settlement agreement was approved. Appellant’s opposition papers and in-court statements clearly show that he had notice of the surcharge request and opposed the surcharge on res judicata grounds. We accordingly reject the argument that the surcharge was imposed without notice or that appellant was denied an adversarial hearing or the opportunity to present evidence.

*Surcharge Based On
Bad Faith Conduct*

Citing *Estate of Beach* (1975) 15 Cal.3d 623,

appellant argues that the surcharge order must be reversed because there was no finding of bad faith. Those findings appear in the December 29, 2015 tentative ruling and March 1, 2016 minute order. The probate court found that “virtually all of the delays and obfuscations were the direct result of the bad-faith conduct of Michael Lavery in violating his fiduciary responsibilities as former trustee; then driving up attorney fees and costs for four years thereafter.” The bad faith conduct was documented by six volumes of probate files spanning four years of litigation.⁴ Appellant’s trial attorney, in a memorandum filed with the court, acknowledged that appellant “is easy to vilify” and “[h]is alleged conduct as trustee is not to be emulated.”

Substantial evidence supports the finding that appellant engaged in bad faith conduct, requiring Gorman to

⁴ Appellant stored the trust-bought precious metals in safe deposit boxes maintained in appellant’s individual name in Arizona. Appellant failed to turn over the precious metals despite an order to do so on November 19, 2013. The order was amended to complete the turnover by December 9, 2013. When appellant failed to comply, the probate court set December 30, 2013 as the final date to complete the transfer and calendared an OSC re contempt for December 31, 2013. The OSC re contempt was continued to January 30, 2014, continued again to February 6, 2014, and continued to February 19, 2014 before appellant turned over all the assets. There were other acts of bad faith conduct. Appellant was ordered to rescind and return all trust payments issued after a June 24, 2013 tentative decision, but in direct violation of the order, dispersed \$30,000 in trust funds to himself and issued a \$16,000 check to co-trustee Tim Daze.

incur attorney fees and costs to protect and recover trust assets in California and Arizona. Because a trust beneficiary cannot sue the trustee for breach of contract, “[t]he remedies of a beneficiary against the trustee are exclusively in equity.” (§ 16421.) Appellant and his co-trustees agreed to pay \$975,000 to settle the breach of trust and accounting claims, but at a substantial cost to Friend and Gorman. “[B]ased on the probate court’s equitable powers alone, it has been held that beneficiaries who have incurred attorney fees, either to vindicate their position as beneficiaries [citation] or for the benefit of the trust [citation], are entitled to have those fees paid by the trust.” (*Rudnick v. Rudnick, supra*, 179 Cal.App.4th at p. 1334, fn. 2.)

Equitable Power to Surcharge Beneficiary Interest

Appellant argues that his future trust distributions are immune from surcharge. That is nonsense. The surcharge was imposed pursuant to the court’s equity power to supervise the administration of the trust. (See, e.g., *Chatard v. Oveross, supra*, 179 Cal.App.4th at pp. 1100-1101 [trust spendthrift provision did not preclude probate court from exercising its equitable powers to offset beneficiary’s trustee distribution by amount of surcharge for breach of fiduciary duty as trustee]; *Estate of Ivey, supra*, 22 Cal.App.4th at p. 883 [bad faith objections to trust accounting; equitable surcharge of attorney fees and costs on beneficiary’s future trust distribution]; *Rudnick v. Rudnick, supra*, 179 Cal.App.4th at pp. 1334-1335 [trust beneficiaries objected to petition for instructions in bad faith; \$226,000 in attorney fees and costs charged against beneficiaries’ future trust distributions based on probate court’s broad equitable powers].) The Probate Code measures liability for breach of trust (§ 16440) and provides that “[t]he provisions in

this article for liability of a trustee for breach of trust do not prevent resort to any other remedy available under the statutory or common law.” (§ 16442.) Here, “[i]t was appellant’s bad faith conduct toward the administration of this trust which caused unnecessary expenses to be incurred. Under the court’s equitable supervision of the trust, the court may order the [fees and costs] payable from appellant’s share.’ [Citation.]” (*Chatard v. Oveross*, *supra*, 179 Cal.App.4th at p. 1108.)

Appellant’s remaining arguments have been considered and merit no further discussion.

Disposition

The judgment (order surcharging appellant’s future trust distributions for 80 percent of Gorman’s fees and costs) is affirmed. Gorman is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Glen M. Reiser, Judge

Superior Court County of Ventura

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