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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

Estate of DONALD HARRY HAYDEN,
Deceased.

TIMOTHY HAYDEN,

Plaintiff and Appellant,

v.

DALE HAYDEN,

Defendant and Respondent.

B238395

(Los Angeles County
Super. Ct. No. GP001393)

APPEAL from an order of the Superior Court of Los Angeles County,
Arnold H. Gold, Referee and Coleman Swart, Judge. Reversed in part and affirmed
in part.

Law Offices of Phillip C. Lemmons, Phillip C. Lemmons, David C. Chon;
John L. Dodd & Associates, John L. Dodd for Plaintiff and Appellant.

Richard T. Kayaian for Defendant and Respondent.

Timothy Hayden, the former administrator of his father's estate, appeals an award of attorney fees pursuant to Probate Code section 11003, subdivision (b) in favor of the successor administrator, Dale Hayden.^{1 2}

OVERVIEW

This is the second appeal involving this estate. The sole issue raised in the instant appeal by Timothy is the propriety of the trial court's award of attorney fees and costs to Dale pursuant to section 11003, subdivision (b), which provides: "If the court determines that the 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. . . ."

In January 2006, Timothy filed a final account. Dale filed a contest, consisting of exceptions and objections to Timothy's final account. Timothy objected to the contest. Various aspects of the contest were resolved in Timothy's favor. However, the trial court awarded Dale attorney fees and costs against Timothy pursuant to section 11003, subdivision (b) in the amount of \$191,076.57.

Said award of attorney fees and costs was clearly erroneous, in that Timothy was substantially successful in opposing Dale's contest. Therefore, it cannot be said that Timothy opposed Dale's contest without reasonable cause and in bad faith. Accordingly, the award of attorney fees and costs to Dale, pursuant to section 11003, subdivision (b), must be reversed.

¹ For convenience and clarity, we refer to members of the Hayden family by their given names. No disrespect is intended.

² All further statutory references are to the Probate Code, unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND³

1. *Timothy's administration of the estate.*

Donald Hayden died in August of 1991, his wife having predeceased him by several months. Donald's estate consisted of a single family residence in Duarte, two vehicles and cash assets in the approximate amount of \$248,000. The cash assets consisted of what the parties have referred to as the First Nationwide checks in the amount of \$104,145.99, the Barnes checks in the approximate amount of \$64,000, a death benefit of \$40,702.34, and a joint account containing \$35,291.01.

The beneficiaries of the estate are Donald's five children, Timothy, Dale, Janice, Tom and Jerry. Letters testamentary were issued to Timothy in October of 1991.

In 1993 Timothy deposited the First Nationwide and the Barnes checks in the total amount of \$168,000 into his personal account and used the money to pay personal notes bearing interest at the rate of 9.35 percent. Shortly thereafter, Timothy made preliminary distributions to his siblings in the total amount of \$191,173.01. Timothy asserted he borrowed the funds necessary to make these distributions and did not give himself a preliminary distribution.

Timothy allowed the residence in Duarte to stand vacant. He did not sell the residence, claiming the real estate market was depressed, and did not rent the residence because it needed \$5,000 in repairs to make it habitable. Timothy claimed his siblings agreed in 1991 to hold the residence until the real estate market improved. When estate funds were exhausted, Timothy paid the expenses of maintaining the residence with his personal funds and funds he borrowed from Janice.

At a family meeting in June of 2002, Timothy suggested the residence be repaired and sold. He told his siblings the repairs would cost \$150,000 and that Janice would loan the estate the necessary funds. Dale and Jerry objected to the estate

³ The factual and procedural background is based in large part on this court's previous opinion, *Hayden v. Hayden* (Aug. 19, 2010, B207007) [nonpub. opn.] (*Hayden I*.)

borrowing money and requested estimates of the repair work. Dale went to the Duarte residence in September of 2002, found remodeling work in progress and wrote Timothy a letter objecting to the scope of the project.

Dale hired an attorney shortly after the family meeting but did not attempt to remove Timothy as executor until after Timothy had completed the project in April of 2004 at a cost of \$205,000 and had entered into an escrow to sell the property in 2005 for \$625,000. Dale's motion to remove Timothy as executor was granted in June of 2005. Timothy asserted this caused the buyer to fail to perform. Letters of administration were issued to Dale in July of 2005. Dale sold the residence in September of 2005 for \$609,000.

2. Timothy's final account.

In January of 2006, Timothy filed an Amended First and Final Account and Report of Administration and Petition for Settlement (Timothy's final account). It listed as charges the residence, the vehicles, cash assets valued at \$189,967 and \$357,000 in loans to the estate. The loans consisted of loans Janice made to the estate totaling \$194,759 and loans Timothy made to the estate in the total amount of \$162,241. Timothy sought credit for the preliminary distributions made to the heirs and for disbursements Timothy made to maintain and remodel the residence in the amount of \$388,357. Timothy indicated the remodeling required significant structural repairs.

The cash assets listed in an inventory filed with Timothy's final account did not include the \$64,000 Barnes checks.

Timothy asserted he performed 5,675.5 hours of extraordinary services for the estate overseeing the construction and marketing the residence for which he sought payment at the rate of \$25 per hour or \$141,887.

3. Dale's objections to Timothy's final account.

Dale filed exceptions and objections to Timothy's final account. Dale objected to the preliminary distributions, the loans to the estate made by Timothy and Janice, the extent of the remodeling Timothy had undertaken as well as most of the expenses claimed by Timothy.

Dale attached to his objections numerous declarations regarding the invoices submitted by Timothy to substantiate the work performed at the residence. The owner of the security firm Timothy allegedly paid \$8,300 indicated the invoices submitted by Timothy for security service from his firm were phony and that he has never provided security services for Timothy. Bernard Bessey declared he was paid approximately \$32,000 for work performed at the residence, not the \$80,302 reflected in the invoices Timothy submitted. Rubin Cesena declared an invoice in the amount of \$7,800 submitted by Timothy for air conditioning equipment is not his invoice and he was not paid the amount specified on the invoice.

Dale requested disallowance of all credits submitted by Timothy, disallowance of the loans and a surcharge for lost rental income. Dale also claimed Timothy failed to account for First Nationwide funds totaling \$101,686, which Dale asserted were different than the \$104,145 in First Nationwide funds included in the final account.

Six weeks after filing exceptions and objections to Timothy's final account, Dale filed supplemental exceptions and objections which asserted Timothy had not disclosed the Barnes checks or estate funds held at Cardinal Federal Savings Bank in the amount of \$90,414.

The following day, the trial court referred the matter for trial to Honorable Arnold Gold, referee.

4. *Trial before Referee Gold.*

Referee Gold conducted a ten-day trial over a five-month period.

a. *Testimony of the Hayden siblings.*

Timothy admitted he did not include the Barnes checks in the amount of \$64,000 in his inventory and that he deposited these checks and the First Nationwide checks into his personal credit union account, even though estate bank accounts were available. Timothy also admitted he used these funds to pay personal notes and other expenses. Timothy refinanced his home in order to place sufficient funds into his credit union account to make the preliminary distributions. Timothy claimed his siblings preferred a preliminary distribution to investing money in the residence and that Jerry and Dale requested preliminary distributions. Timothy asserted the First Nationwide funds in the amount of \$104,145 reflected in his inventory were the same funds as the First Nationwide funds in the amount of \$101,686 and the Cardinal funds in the amount of \$90,414, which Dale claimed Timothy had misappropriated.

Timothy testified he expended approximately \$150,000 maintaining the residence over the 14-year life of the estate and the remodeling project cost \$205,000. Timothy borrowed \$125,000 in 2002 to complete the remodeling and borrowed the balance of the money from Janice. Timothy first learned his siblings disagreed with his plan not to rent the house when Dale's attorney informed Timothy he would seek to recoup lost rent.

Timothy admitted that in 1993 he signed and returned to his attorney a letter regarding the duties and obligations of an executor but he did not read the letter. Timothy's probate attorney withdrew from the case later that year.

Dale testified he encouraged Timothy in 1993 to rent the house or sell it and told Timothy to make the repairs necessary to rent the residence. Dale denied he had requested a preliminary distribution. In 1998, Timothy said he had replaced the roof but a leak had caused significant damage to the interior of the residence. Dale claimed Timothy would not say how much Timothy and Janice had lent the estate.

Jerry testified Timothy said the residence could not be rented because he did not want to manage it or entrust it to anyone and the house would require \$5,000 in repairs before it could be rented.

Thomas testified Timothy told him the home could not be sold until a Florida probate had been settled. Timothy never said he could not sell the house because it was in disrepair.

Janice testified her siblings asked her to contribute to the remodeling project and she believed they promised to repay her loans when the house sold.

b. Testimony related to the expenses claimed by Timothy.

Bernard Bessey testified he was paid approximately \$32,000 for work done on the remodeling project. Timothy testified the \$80,302 reflected in the Bessey receipts was paid for work on the residence but not all the money was paid to Bessey. In ruling on the admissibility of the Bessey invoices, the referee indicated it was “absolutely clear” they had been prepared by Timothy to mislead.

Raul Cervantes testified he and his father worked on the residence for 18 months and Timothy paid them approximately \$1,500 in cash every two weeks. However, Cervantes did not prepare the invoices that Timothy submitted as his.

David Clock, a construction consultant, reviewed the invoices submitted by Timothy in connection with the repair of the home and concluded the expense of the remodel, \$208,000 or \$100 per square foot, in Clock’s opinion, was “very low” for the amount of work done.

Irving Tons, a residential real estate broker, testified other properties in the area with less square footage sold for \$555,000.

c. The arguments of the parties.

Timothy argued his siblings should be estopped from seeking lost rent after they waited 14 years to raise the issue. Counsel asked the referee to “consider our doctrine of laches request for just about everything that they have going on.”

Dale's attorney argued Timothy admitted in his testimony that he had no intention of renting the property. Further, "[t]his business of estoppel and laches is an equitable argument; but he who comes into equity has to come in with clean hands, and he has to do equity. Tell me what clean hands Timothy had when he came into these proceedings[?]" The referee responded, "Not a lot."

5. Orders of the referee culminate in the Third Engrossed Statement of Decision.

a. Order and statement of tentative decision of referee.

The referee's order and statement of tentative decision charged Timothy with the First Nationwide funds in the amount of \$104,145, which Timothy had accounted for in the final account, and First Nationwide funds in the amount of \$101,686, which the referee found were unrelated to the \$104,145 sum. The referee surcharged Timothy \$63,975 representing the Barnes checks and \$183,600 for lost rental income from July 25, 1992 to May 13, 2005. The referee ordered compound interest at the rate of 4.25 percent per annum on all these amounts.

The referee denied Timothy credit for payments to Bessey to the extent they exceeded \$32,000 and denied credit for the air conditioning expense of \$7,800, finding no such payment was made. The referee denied credit for other expenses Timothy conceded were improper. The referee did not disallow any other credits for disbursements claimed by Timothy, finding expenditures to repair the house would have been necessary to generate the rental income for which Timothy was being surcharged.

The referee approved Janice's loan to the estate in the full amount of \$194,759 and Timothy's loan to the estate in the amount of \$78,377, rather than the \$162,241 Timothy had sought. The referee approved the preliminary distributions to Timothy's siblings in the total amount of \$191,173.

The referee allowed Timothy and his attorney statutory commissions and fees but disallowed Timothy's request for \$141,887 in commissions for extraordinary services. In denying these commissions, the referee observed Timothy had "mismanaged this estate in countless ways" The referee also denied Timothy's counsel fees for extraordinary services finding "[f]ees for extricating Timothy from the predicament he himself created should be borne by Timothy personally, not by the estate."

Finally, the referee found Timothy's opposition to Dale's contest of Timothy's final account was undertaken *without reasonable cause and in bad faith* within the meaning of section 11003, subdivision (b). The referee awarded Dale attorney's fees in the amount of \$120,000 and costs of \$41,076.

b. *Timothy's motion for new trial.*

Timothy sought a new trial before the referee on six issues, namely, whether the First Nationwide funds in the amount of \$101,686 were included in the \$104,145; whether the rent surcharge was barred by laches; whether Timothy should have been awarded credit for the work reflected in the phony invoices; the propriety of the award of attorney fees; the propriety of compound interest; and, the allocation of attorney fees and costs.

On the day Timothy filed the motion for new trial, Timothy's counsel wrote a letter to Dale and the referee which stated: "Please be advised that we are not objecting to the Engrossed Proposed Statement of Decision" which previously was served on Timothy. The referee found this letter dated March 16, 2007, prevented Timothy from objecting to "any provision contained in any subsequent proposed Statement of Decision" if the provision was contained in the Engrossed Proposed Statement of Decision.

The referee thereafter granted Timothy's motion to reopen the trial to address whether the First Nationwide funds in the amounts of \$101,686 and \$104,145 were separate amounts. After conducting a hearing at which an expert testified for each side, the referee found the \$101,686 was included in the \$104,145. *The referee eliminated*

the surcharge in the amount of \$101,686 and replaced it with a surcharge in the amount of \$797.

c. The Third Engrossed Statement of Decision of Referee.

In addition to the previous findings, the proposed Third Engrossed Statement of Decision of Referee indicated that in 1993 the estate had \$247,913 in cash and that Timothy made unauthorized preliminary distributions that stripped the estate of \$191,173. These improper preliminary distributions and Timothy's misappropriation of at least \$64,773 in estate funds left the estate with virtually no cash and a house Timothy stated was uninhabitable.

Regarding the surcharge for lost rental income, the referee noted Timothy testified he "never intended to rent the Duarte property" and he did not intend to sell the property until the real estate market improved. The referee found Timothy negligently managed the estate assets and breached his duty to the estate and the beneficiaries.

The referee found the remodeled property, which Timothy kept in probate for over 14 years at an expense of at least \$334,451, was sold by Dale for \$609,500, netting the estate \$562,171. However, similar properties sold for \$550,000 and the difference between the sales price of the Duarte residence and the sales price of comparable homes left the estate with "virtually no benefit . . . when one considers that the heirs have had to wait 14 years for the sale" and they were now faced with unauthorized loans of \$357,000 and the costs of litigation.

The referee noted Timothy had conceded many of the disbursements challenged by Dale were inappropriate, including the security charges of \$8,300. The referee found the disallowed amount of the Bessey invoices was not paid to others, as Timothy claimed at trial. *The referee approved the preliminary distributions to the heirs.* The referee found Timothy did not receive a preliminary distribution and that he was entitled to offset the interest he would have earned on a preliminary distribution against the interest he was being surcharged.

Timothy filed a request for a statement of decision which sought findings as to whether the beneficiaries knew the residence was vacant between October 1991 and May 2005, whether the beneficiaries should have taken legal action to force rental of the residence and whether the beneficiaries should be barred by the doctrine of laches from faulting Timothy for not renting the residence.

Dale filed objections to portions of the proposed Third Engrossed Statement of Decision of Referee. Dale asserted Timothy should be surcharged in the amount of \$104,145, the interest rate on all surcharges should be 10 percent, the estate should not have to repay the unauthorized loans and Timothy should not be allowed a statutory commission.

The referee overruled these objections and filed the Third Engrossed Statement of Decision of Referee as its statement of decision.

6. Proceedings before the trial court.

Before the trial court, Dale sought to reinstate the First Nationwide surcharge and to disallow Timothy's loans. Although Dale's moving papers sought disallowance of Janice's loans, at the hearing Dale conceded Janice's loans should be repaid because Timothy may have misled her. Dale also sought interest at the rate of 10 percent per annum on each of the surcharges.

Timothy argued the referee "completely overlooked the issue of laches." Timothy asserted: "The entire family knew this property was not being rented [yet they] . . . waited 13 years before they came in to court to have Timothy removed." Dale's counsel responded a party seeking equity must have clean hands. Here, "every issue . . . in this case is tied to a violation of Timothy's duties a[s] personal representative of the estate."

The trial court adopted the Third Engrossed Statement of Decision as modified to increase the award of attorney fees under section 11003, subdivision (b) by \$30,000, making a total award of \$191,076 in attorney fees and costs.

The trial court also struck Timothy's statutory commission and statutory attorney fees (each in the amount of \$14,260), eliminated credit for Timothy's preliminary distribution and the interest Timothy would have earned on the preliminary distribution.

Timothy filed a motion for new trial in the trial court. With respect to the award of attorney fees under section 11003, subdivision (b), Timothy argued he prevailed on the vast majority of the disputed disbursements and the loans, he was not surcharged for the preliminary distributions and most of the funds Dale claimed Timothy had misappropriated were not misappropriated. Timothy further asserted the surcharge for lost rent constituted excessive damages because the heirs were aware the residence was not being rented but did nothing. Timothy noted the referee failed to address the issue of laches.

At the hearing on the motion for new trial, the trial court addressed Timothy's assertion he was forced to trial before the referee without an opportunity to conduct discovery. The trial court found the estate was in probate for 15 years and, if Timothy believed discovery was outstanding, he should have filed a motion for a continuance. Further, Timothy had ample time to prepare for trial and Timothy, as the former administrator of the estate, had all necessary documentation at his disposal and the need for discovery would have been with the objecting party.

The trial court denied the motion for new trial and adopted the Third Engrossed Statement of Decision.

7. The previous appeal, Hayden I (No. B207007).

Both Timothy and Dale appealed.

a. Timothy's appeal.

On Timothy's appeal, we reversed the elimination of credit for Timothy's preliminary distribution, finding "no statutory authority permitting an executor to be surcharged the executor's share of the estate as a penalty for mismanagement of the estate."

We also reversed the \$183,600 surcharge imposed for lost rental income and remanded the matter to the trial court with directions to issue a statement of decision addressing the issues of laches and unclean hands as they relate to the surcharge for lost rental income and to grant such other relief as may be appropriate under the circumstances.

As for the \$191,076 award of attorney fees and costs to Dale (§ 11003, subd. (b)), because the matter had to be remanded for further proceedings with respect to the surcharge for lost rental income, we declined to address the propriety of said award. We concluded the remand “for further statement of decision renders premature any resolution of the propriety of the award of attorney fees under Probate Code section 11003, subdivision (b).”

b. *Dale’s cross-appeal.*

We affirmed those aspects of the order attacked in Dale’s cross-appeal.

We found no error in the referee’s reversal of the \$101,686 First Nationwide surcharge. We concluded the referee properly reversed said surcharge after he concluded the \$101,686 already was included in the \$104,145 reported in Timothy’s final account.

With respect to Dale’s contention the interest rate on surcharged items should be 10 percent per annum, we upheld the determination of the referee and the trial court that compound interest at the rate of 4.25 percent was sufficient to make the estate whole.

Finally, we upheld the orders approving Janice’s loan to the estate in the full amount of \$194,759, and approving \$78,377 of Timothy’s loans in the asserted amount of \$162,241, rejecting Dale’s contention that the estate should not have to repay those loans.

8. *Proceedings on remand.*

At the commencement of proceedings before the referee on August 22, 2011, the referee indicated he did not believe the taking of any additional evidence was appropriate. Rather, the referee would review the transcript and exhibits from the earlier trial, and would entertain supplemental briefing and oral argument by counsel “on the issues remanded by the Court of Appeal, namely, on the doctrine of laches and the doctrine of unclean hands as applicable to the surcharge for lost rental income.”

On October 10, 2011, the referee issued a supplemental statement of decision and report and recommendations. After reviewing the earlier evidence and considering the arguments of counsel, the referee found “that neither the \$183,600 surcharge against [Timothy] for lost rental income nor the surcharge for interest thereon is barred in whole or in part by the doctrine of laches.” The referee reasoned “that even if there had been an unreasonable delay on the part of the heirs of the Estate of Donald Hayden in complaining about the loss of rental income (and the Referee finds that there was no such unreasonable delay) and even if Tim had relied to his detriment on such an unreasonable delay (and the Referee finds that he did not), the doctrine of unclean hands would bar Tim from taking advantage of the doctrine of laches in attempting to avoid any or all of said surcharge for lost rental income or said surcharge for interest thereon.”

With respect to the issue of attorney fees, the referee stated he “makes no recommendation as to whether additional interest or attorney fees – or any other relief – ought to be awarded to Dale at this time, because those issues were not re-referred to the Referee.”

On October 26, 2011, the trial court entered an order approving and adopting the referee’s supplemental statement of decision concerning laches and unclean hands. The trial court reaffirmed the 2008 decree surcharging Timothy \$186,300 in lost rental income and \$54,800 in interest thereon.

Timothy filed a timely notice of appeal from the order.

CONTENTIONS

Timothy contends the trial court erred in assessing attorney fees and costs pursuant to section 11003, subdivision (b), because Dale failed to meet his burden of proving Timothy's opposition to Dale's contest was "without reasonable cause and in bad faith."

DISCUSSION

1. *General principles; statutory scheme authorizes attorney fees where administrator unreasonably and in bad faith opposes a contest.*

Section 11001 provides that all matters relating to an account may be contested for cause shown.⁴

However, "[e]ven where successful, the beneficiaries must bear their own attorney fees in contesting an accounting of an estate. An exception exists only where the administrator opposes the contest 'without reasonable cause and in bad faith.' (Prob. Code, § 11003, subd. (b).)" (*Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 473 (*Bonaccorsi*)).

The pertinent statute, section 11003 provides at subdivision (b): "If the court determines that the 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 is a charge against the compensation or other interest of the personal representative in the estate and the personal representative is liable personally and on

⁴ Section 11001 states: "All matters relating to an account may be contested for cause shown, including, but not limited to: [¶] (a) The validity of an allowed or approved claim not reported in a previous account and not established by judgment. [¶] (b) The value of property for purposes of distribution. [¶] (c) Actions taken by the personal representative not previously authorized or approved by the court, subject to Section 10590 (Independent Administration of Estates Act)."

the bond, if any, for any amount that remains unsatisfied.” (§ 11003, subd. (b), italics added.)⁵

Thus, the issue before this court is not whether Timothy mismanaged the estate. The issue is not whether Timothy or Dale is the prevailing party in this litigation. The issue is not whether Dale’s contest achieved a benefit for the heirs. The sole issue is whether Timothy’s opposition to Dale’s contest was *without reasonable cause and in bad faith*.

2. *Standard of appellate review.*

Although an award of attorney fees is normally reviewed for an abuse of discretion, “ ‘de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.’ ” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

3. *Timothy cannot be faulted for opposing Dale’s contest.*

a. *Bonaccorsi decision is on point.*

In *Bonaccorsi*, the discharged administrator of an estate appealed from orders surcharging him \$134,000 for breach of fiduciary duty, denying statutory and extraordinary fees, and imposing an additional \$50,000 in attorney fees for bad faith opposition to a contest. (§ 11003, subd. (b); *Bonaccorsi, supra*, 69 Cal.App.4th at p. 465.)

The \$134,000 surcharge included a \$50,000 surcharge for loss on the sale of a house. However, the uncontradicted evidence showed the decline in value was due

⁵ A practice guide explains “Prob. Code § 11003 may be invoked by the Probate Court in extreme cases similar to those involving situations justifying the sanctions under Code Civ. Proc. §§ 128.5 et seq. (payment of expenses resulting from frivolous or delaying actions or tactics that are in bad faith).” (Cal. Civ. Prac. Probate and Trust Proceedings § 21:47.)

purely to a depressed real estate market. (*Bonaccorsi, supra*, 69 Cal.App.4th at p. 472.) Therefore, *Bonaccorsi* reversed that \$50,000 surcharge. (*Ibid.*)

Bonaccorsi affirmed the remaining surcharges. It found “[s]ubstantial evidence supports the court’s determination that the administrator unreasonably voted the beneficiaries’ stock to run a ‘corporation’ (whose principal asset consisted of the decedents’ private residence) outside probate. There is ample support in the record that the administrator ‘proceeded thereafter to bleed the corporation of its liquid assets’ by paying himself excessive fees and reimbursements. He was properly found to have operated at his own peril in so acting without court supervision or approval.” (*Bonaccorsi, supra*, 69 Cal.App.4th at p. 465.)

Bonaccorsi then went on to reverse the order imposing an additional \$50,000 in attorney fees against the administrator for bad faith opposition to the contest. *Bonaccorsi* recognized, “[e]ven where successful, the beneficiaries must bear their own attorney fees in contesting an accounting of an estate. An exception exists only where the administrator opposes the contest ‘without reasonable cause and in bad faith.’ (Prob. Code, § 11003, subd. (b).)” (*Bonaccorsi, supra*, 69 Cal.App.4th at p. 473.)

Bonaccorsi explained: “Since we reverse a substantial part of the surcharge (\$50,000 out of \$134,000), we cannot fault Ricca [the administrator] for opposing the contest. The beneficiaries have not asked that any fee award be apportioned between meritorious and unmeritorious claims. The \$50,000 fee award for attorney fees for bad faith cannot be sustained under these circumstances.” (*Bonaccorsi, supra*, 69 Cal.App.4th at p. 473.)

b. *Timothy achieved substantial success in opposing Dale’s contest; therefore, Timothy cannot be faulted for opposing Dale’s contest.*

A review of the proceedings in this matter establishes that Timothy had substantial success in opposing Dale’s contest. The record reflects, inter alia:

Dale requested “the Court disallow in its entirety the account, schedules, report, receipts and credits submitted by removed executor, Timothy Hayden” However, Timothy successfully defended much of his actions. To wit:

Timothy obtained full approval of his preliminary distributions to the Hayden siblings in the total amount of \$191,173.

Timothy also prevailed on his claim that he could not be denied his share of the preliminary distribution.

Timothy also prevailed on his contention that the \$101,686 surcharge was included in the \$104,145 First Nationwide funds, resulting in the elimination of the \$101,686 surcharge.

Timothy also obtained approval of Janice’s loan to the estate in the full amount of \$194,759 and Timothy’s loan to the estate in the amount of \$78,377.

Because Timothy defeated a substantial portion of Dale’s contest, Timothy cannot be faulted for opposing Dale’s contest. (*Bonaccorsi, supra*, 69 Cal.App.4th at p. 473.)⁶

⁶ With respect to the \$183,600 surcharge for lost rental income, a major issue that ultimately was resolved in Dale’s favor, the issue was at least arguable by Timothy, and therefore not subject to an attorney fee award pursuant to section 11003, subdivision (b). As indicated, in the prior appeal, this court remanded the matter for further proceedings to address the issues of laches and unclean hands in connection with the \$183,600 surcharge for Timothy’s failure to rent the property. Thus, Timothy’s opposition to the rental surcharge could not be decided against Timothy as a matter of law and was legally tenable. On remand, the referee found “that waiting more than 13 years without objecting to the fact that [decedent’s] house was neither rented out or sold” did not give rise to laches on the part of the other beneficiaries. However, the referee also found, “*each of the parties had a colorable position in connection with the matters re-referred to the Referee.*” (Italics added.) Therefore, even though unsuccessful, Timothy’s opposition to the rental surcharge cannot be said to have been without reasonable cause and in bad faith. (§ 11003, subd. (b).)

Finally, because Dale did not request that the award of attorney fees and costs “be apportioned between meritorious and unmeritorious claims,” the award of \$191,076 in attorney fees and costs cannot be sustained under these circumstances. (*Bonaccorsi, supra*, 69 Cal.App.4th at p. 473 [reversal of \$50,000 of \$134,000 surcharge also required reversal of unapportioned \$50,000 fee award for administrator’s bad faith opposition to contest].)⁷

DISPOSITION

The order is reversed insofar as it awards \$191,076.57 in attorney fees and costs to Dale pursuant to section 11003, subdivision (b); in all other respects, the order is affirmed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.

⁷ Dale does not dispute that his attorney fee request was unapportioned. Dale simply argues it was difficult, if not impossible, for his counsel to apportion attorney time as to “win” or “lose” issues. The argument is unavailing. (*Bonaccorsi, supra*, 69 Cal.App.4th at p. 473.)