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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ROBERT V. KVASSAY, as Trustee, etc.,

Plaintiff and Respondent,

v.

RICHARD S. KVASSAY et al.,

Defendants and Appellants.

B250855

(Los Angeles County
Super. Ct. No. BP122477)

APPEAL from orders of the Superior Court of Los Angeles County. Reva Goetz,
Judge. Affirmed and remanded with instructions.

Troy A. Stewart for Defendants and Appellants.

Law Office of Matthew C. Brown and Matthew C. Brown for Plaintiff and
Respondent.

This is the third appeal from an underlying probate court dispute between Robert Kvassay and his brothers Peter and Richard Kvassay¹ concerning a family trust.² In this appeal, Peter and Richard challenge the trial court's orders authorizing Robert as trustee to direct the transfer of funds to the trust, approving certain monetary claims by Robert against Peter and Richard, and approving the payment of expense reimbursements and trustee fees to Robert. We remand the matter to the trial court to modify certain of the challenged orders as indicated herein, and otherwise affirm the orders.

BACKGROUND

Robert, Peter, and Richard are beneficiaries of the Kvassay Family Trust (the trust) established by their parents, Emanuel and Maria Kvassay. The trust corpus consists of a 3.5 acre residential estate located at 1554 Hill Drive in Los Angeles, California (the property).

Richard and Peter had lived on the property continuously since the 1960's and 1980's, respectively, until they were evicted from the property pursuant to a court order issued in March 2011. During their occupancy, the property fell into a state of disrepair and deterioration, and debris and waste accumulated on the property. In 2005, Robert began renovating, repairing, and cleaning the property, using his own funds to finance the work.

Equity lines of credit

Shortly before Emanuel died in October 2006, he told Robert that the property was unencumbered by any debt. In November 2006, Richard informed Robert that a \$245,000 equity line of credit encumbered the property. In December 2006, Richard, without Robert's knowledge, applied for and obtained an increase in the existing equity

¹ Because the parties share the same surname, we refer to them hereafter by their first names to avoid confusion. Peter and Richard are sometimes referred to collectively herein as appellants.

² In the previous appeals, we affirmed orders granting Robert's petition to evict Peter and Richard from residential real property held in the trust and awarding Robert \$196,660 in damages for the lost value of the use and occupancy of the property during the pendency of Peter's and Richard's appeal of the eviction order.

line of credit to more than \$359,000. Richard signed the loan documents for the new equity line as trustee of the trust, although he was never a trustee.

Peter's resignation as trustee, Robert's succession as trustee, and the parties' working plan

Peter became trustee of the trust after Emanuel's death in October 2006, but he resigned in January 2007 and Robert became the successor trustee. At the time Peter resigned as trustee, Peter, Richard, and Robert signed a "Working Plan for Execution of Kvassay Family Trust" (the working plan) pursuant to which they agreed to renovate and sell the property and to distribute the proceeds from the sale in accordance with the terms of the trust. The working plan required all three brothers to agree upon the sale of the property and the sales price and prohibited any brother from selling any trust assets without the written consent of the other two siblings.

In the working plan, the parties agreed that Robert would be in charge of cosmetic repairs to the property and that he would be compensated as follows: "Robert shall be compensated in the amount of \$250.00 USD per day starting November 13, 2006 for his physical days spent working on Hill Drive project." The parties acknowledged in the working plan that "Richard is currently responsible for \$245,000 open credit line less money spent [on] Hill Drive project.

Loan Oak loan

When funds from the equity line of credit were exhausted, Richard, again without Robert's knowledge, obtained a \$1.5 million loan from Loan Oak Fund LLC, a firm money lender, in July 2007. The Loan Oak loan was evidenced by a note and secured by a deed of trust on the property. At Richard's direction, Peter signed the loan documents as trustee of the trust, although Robert, and not Peter, was trustee at that time.³ The original maturity date of the Loan Oak loan was June 24, 2008, but the loan was twice modified to extend the maturity date to December 31, 2008, and to March 31, 2009. Neither Richard nor Peter informed Robert about the existence of the Loan Oak loan.

³ On the court's own motion, we augment the record to include the Loan Oak loan documents. (Cal. Rules of Court, rule 8.155.)

Funds from the Loan Oak loan were disbursed as follows: \$361,157 to pay off the existing equity line of credit; \$51,045 to pay broker fees, and \$1,087,497 deposited into Richard's personal bank account. A portion of the funds, \$750,000, deposited into Richard's personal account were invested in two certificates of deposit, one in the amount of \$500,000, and the second in the amount of \$250,000. The remaining \$87,497 was transferred to Sierra Packaging, an entity owned or controlled by Richard.

Robert did not know about the existence of the Loan Oak loan until more than a year after the loan was made. He subsequently refinanced the Loan Oak loan through another lender and has been servicing the refinanced loan.

Robert's petition and amended accounting

Robert filed a petition on May 7, 2010, seeking a determination that the working plan had no legal bearing on the trust or the trustee's powers; a determination that the trust owns the \$1.5 million Loan Oak loan proceeds; an order directing return of the loan proceeds to the trust, an order requiring Peter to pay statutory double damages; and an order offsetting against Peter's and Richard's distributive shares from the trust monies fraudulently obtained by them.

On August 8, 2011, Robert served on Peter's and Richard's attorney a document captioned "Amended First Accounting and Petition for Settlement of Account and Approval of Trustee Fees; Request for Attorney's Fees" documenting expenses Robert incurred to renovate the property and the number of days he spent overseeing the renovation.

Trial, statements of decision, and judgment

An 11-day bench trial on Robert's petition commenced on January 22, 2013, and concluded on May 23, 2013. Robert, Peter, and Richard all testified at the trial, as did other witnesses, including a forensic accountant and a representative from Loan Oak. At the conclusion of the trial, the trial court issued two separate tentative statements of decision, both of which were subsequently adopted as final statements of decision.

As relevant to this appeal, the June 20, 2013 tentative statement of decision approved \$221,000 in trustee fees and \$572,772 in expense reimbursements to Robert.

The expense reimbursements consisted of \$351,772 in net expenditures incurred by Robert, \$8,500 in daily food expenditures for persons who performed work on the property, and \$212,500 as “Per Diem for Work” (calculated at \$250 per day, in accordance with the working plan, for 850 work days). The June 20, 2013 tentative statement of decision was adopted as the court’s final statement of decision in a July 24, 2013 minute order.

In its August 2, 2013 tentative statement of decision, the trial court determined that the working plan “has no legal bearing on the Trust or the Trustee’s powers due to its irreparable breach” and that “[a]ny alleged breach by Robert related to the Working Plan is excused by Richard’s material misrepresentations, and Richard and Peter’s interference with Robert’s efforts to sell the property.” The trial court found that the trust owns the \$1.5 million in Loan Oak loan proceeds and authorized Robert as trustee to direct the transfer of \$973,520 -- the amount of loan proceeds that were not used for the benefit of the trust property -- back to the trust. Finally, The court ordered that each of Peter’s and Richard’s distributive shares of the trust be offset in the amount of \$973,520. The August 2, 2013 tentative statement of decision was adopted as the final statement of decision in a September 17, 2013 minute order.

Appellants filed separate appeals of the July 24, 2013 and September 17, 2013 orders. The two appeals were subsequently consolidated.

CONTENTIONS

Appellants raise the following arguments on appeal:

1. The trial court erred by authorizing Robert to direct the transfer of \$973,520 in Loan Oak loan proceeds to the trust because Robert, as trustee, was not a party to the Loan Oak transaction, and because there was no evidence that the trust owned or was obligated to repay any of the Loan Oak loan.

2. The trial court erred by offsetting each of Richard’s and Peter’s distributive shares from the trust in the amount of \$973,520.

3. The trial court erred by charging Richard’s share in the trust for monies he was found to owe the trust, absent a specific claim for such relief in Robert’s petition.

4. The trial court erred by awarding Robert expense reimbursements and trustee fees pursuant to an amended accounting that was allegedly never served on appellants.

5. Robert is judicially estopped from receiving trustee fees pursuant to the working plan because the trial court granted his request for a determination that the working plan had no legal bearing or effect, and the trial court erred by calculating the trustee fees pursuant to a working plan provision that accorded Robert per diem compensation.

6. The trial court erred by awarding Robert \$572,772 in expense reimbursements because Robert did not seek such expenses in his amended accounting.

DISCUSSION

I. Entitlement to loan proceeds

Probate Code sections 850 and 856⁴ govern conveyances or transfers of property claimed to belong to a trust, decedent, or other person. (*Estate of Kraus* (2010) 184 Cal.App.4th 103, 110.) Section 850 allows a trustee to file a petition for an order when “the trustee has a claim to real or personal property, title to or possession of which is held by another.” (§ 850, subd. (a)(3)(B).) Section 856 authorizes the probate court to issue an order directing the person having title to or possession of such property to execute a conveyance or transfer to the trust “if the court is satisfied that a conveyance, transfer, or other order should be made.” (§ 856.)

Appellants contend the trial court erred by ordering the transfer of \$973,520 to the trust because Robert as trustee was not a party to Loan Oak loan transaction and accordingly had no valid claim to the loan proceeds. Appellants further contend there is no evidence that the trust was ever obligated as a borrower on the Loan Oak loan or required to repay any portion of that loan.

Appellants’ contentions border on the frivolous. The fact that Robert, the only trustee authorized to bind the trust at the time the Loan Oak loan was made, was not a

⁴ All further statutory references are to the Probate Code unless stated otherwise.

party to the Loan Oak loan, does not preclude him from recovering funds fraudulently obtained by appellants' encumbering of trust property.

There was evidence that Richard directed Peter to sign, as the purported trustee of the trust, a \$1.5 million promissory note in favor of Loan Oak and a deed of trust encumbering the trust property in the amount of the indebtedness under the loan. There was also evidence that the Loan Oak loan funds were disbursed to Richard, and that \$973,520 of those funds were unaccounted for. Substantial evidence supports the trial court's order requiring the transfer of \$973,520 in unaccounted for loan proceeds back to the trust.

II. Offset against Peter's and Richard's distributive shares

The trial court ordered that each of Peter's and Richard's distributive shares of the trust be offset in the amount of \$973,520 -- the amount of the unaccounted for proceeds of the Loan Oak loan. By doing so, the trial court effectively doubled the amount of the total offset to \$1,947,040.

Robert agrees that the trial court did not intend to double the amount of the offset, but that the court intended to hold Peter and Richard jointly and severally liable for the \$973,520 deficiency. The order should be modified accordingly.

III. Offset against Richard

Richard contends the trial court erred by ordering a \$973,520 offset against his distributive share of the trust because Robert's petition included no specific claim for such relief under section 850. Richard further contends he was denied his due process right to notice of such a claim under sections 17200.1, 17201, and 17203, subdivision (a).

Robert's petition filed on May 7, 2010, states as a ground for relief the fraudulent representations upon which the \$1.5 million Loan Oak loan was made. The petition also includes a request for relief "[t]hat this Court offset Richard Kvassay's distributive share of the estate to be determined by this Court."

Although the petition alleges no specific fraudulent conduct by Richard in connection with the Loan Oak transaction, the evidence adduced at the trial showed that Richard perpetrated the fraud by contacting Loan Oak and by directing Peter to sign loan

documents binding the trust when neither he nor Peter was authorized to do so. During the trial, Richard had the opportunity to present his own evidence regarding the Loan Oak transaction, and he did so. Given these circumstances, Richard had sufficient notice of the offset claim.

None of the statutory provisions cited by Richard require the specific notice to which he claims to be entitled. Neither section 17200.1 nor section 17201 governs notice. Section 17200.1 states: “All proceedings concerning the transfer of property of the trust shall be conducted pursuant to the provisions of Part 19 (commencing with section 850) of Division 2.” Section 17201 provides: “A proceeding under this chapter is commenced by filing a petition stating facts showing that the petition is authorized under this chapter. The petition shall also state the grounds of the petition and the names and addresses of each person entitled to notice of the petition.” Section 17203, subdivision (a) governs notice of hearings on a petition. It requires a petitioner to mail to the beneficiaries, at least 30 days before the date of the hearing on the petition, a notice of hearing on the petition. (§ 17203, subd. (a).) Richard does not claim to have been denied notice of the hearings on Robert’s petition. The record discloses no due process violation.

IV. Amended account petition

Appellants claim that Robert is not entitled to expense reimbursements or trustee fees requested in an “Amended First Accounting and Petition for Settlement of Account and Approval of Trustee Fees” because that document was not served on them pursuant to section 17203. Section 17203 does not govern service of accountings or other pleadings. Rather, as discussed above, it governs service of notice of hearings. Appellants do not contend they did not have notice of the various hearings on Robert’s petition.

The amended accounting was served on appellants’ counsel on August 8, 2011. It was also admitted into evidence without objection in the trial court proceedings below, in which appellants fully participated. Appellants were given sufficient notice of the matters raised in the amended accounting.

V. Trustee fees

Appellants claim that Robert is judicially estopped from receiving \$221,000 in trustee fees pursuant to the parties' working plan because he requested a determination that the working plan have no legal bearing or effect on the trust or the trustee, and the trial court granted that request. Robert's request for a determination regarding the effect of the working plan, and the trial court's ruling on that request, did not result in a forfeiture of his entitlement to trustee fees.

The allegations of the May 7, 2010 petition make clear that the determination sought was to invalidate provisions of the working plan that required appellants' written consent to a reasonable sale of the property so that appellants could not circumvent Robert's efforts to fulfill his duties as trustee.

The trial court's determination regarding the working plan did not judicially estop Robert from receiving trustee fees in any event. Robert was statutorily entitled to reasonable compensation as trustee even absent an express provision in the working plan or the trust document. Section 15681 provides that "[i]f the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances."

Appellants argue that the trial court erred by using the \$250 per diem rate specified in the working plan to calculate the trustee fees. They fail to establish, however, why the amount of fees calculated pursuant to the per diem rate is unreasonable under the circumstances.

Robert agrees that the trustee fee award incorrectly includes \$8,500 in expense reimbursements separately approved by the trial court. In his petition, Robert requested per diem compensation of \$212,500, calculated by multiplying the per diem rate of \$250 specified in the working plan by 850 working days. In addition, he requested expense reimbursement for \$8,500 in food expenses for workers at the property. The trial court included both sums in its award of trustee fees, and Robert concedes this was in error. The correct amount of trustee fees should be \$212,500.

VI. Expense reimbursement

Appellants challenge the \$572,772 in expense reimbursements to Robert on the ground that it exceeds the amount requested by Robert in the amended accounting. Robert concedes that the expense reimbursement award incorrectly includes \$212,500 in trustee fees separately approved by the trial court. The correct amount of expense reimbursements should be \$360,272.

DISPOSITION

The matter is remanded to the trial court to modify its orders as follows: (1) the order approving trustee fees (JTD # 2 on page 45 of the June 20, 2013 tentative statement of decision that became the final statement of decision) should be modified to reduce the amount of fees from \$221,000 to \$212,500; (2) the order approving the reimbursement of expenses to the trustee (JTD #3 on page 45 of the June 20, 2013 tentative statement of decision that became the final statement of decision) should be modified to reduce the amount of approved expenses from \$572,772 to \$360,272; (3) the orders approving an offset in the amount of \$973,520 against each of Peter's and Richard's distributive shares of the trust (JTD #5 and JTD #6 on page 23 of the August 16, 2013 tentative statement of decision that became the final statement of decision) should be modified to reflect that Peter and Richard are jointly and severally liable to the trust in the total amount of \$973,520, and that their respective distributive shares from the trust may be offset to discharge that joint and several liability in a total amount not to exceed \$973,520.

The trial court's orders, as modified, are affirmed. Robert is awarded his costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST