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

Estate of GUY ABRAHAM, Deceased.

MICHAEL R. AUGUSTINE, as
Administrator, etc.,

Petitioner and Respondent,

v.

CARLO BOULOS et al.,

Objectors and Appellants.

B279537

Los Angeles County
Super. Ct. No.
YP012195

APPEALS from orders of the Superior Court of Los Angeles County, Mary Thornton House, Judge. Affirmed.

Burkley, Brandlin, Swatik & Keesey, Walter R. Burkley, Jr., and Deborah C. Keesey for Objectors and Appellants.

Gutman Law, Alan S. Gutman and John Juenger for
Petitioner and Respondent.

INTRODUCTION

Fourteen heirs¹ challenge portions of probate court orders instructing the estate's current administrator to pursue claims against the former administrator and the former board of directors of the decedent's corporation, the estate's main asset. Because the petition for instructions contains sufficient facts to support bringing claims against the former administrator and the former board of directors, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Guy Abraham was a physician specializing in endocrinology. A few years before he died, Abraham established Optimox, Inc., a California corporation which sold iodine-based supplements. Optimox's best-selling product was Iodoral, an iodine supplement in tablet form. Iodoral was manufactured using a combination of a liquid iodine concentrate, Lugol, and a powder that facilitated the absorption of iodine, Micosolle. Formulation Technology, Inc. (FormTech) was Optimox's main contract manufacturer. FormTech combined Lugol with Micosolle to produce Iodoral. A chemical distributor, Spectrum Chemicals & Laboratory Products (Spectrum), sold FormTech the iodine concentrate solution used in the production of the Iodoral tablets. Throughout his life, Abraham was Optimox's sole shareholder,

¹ Those individuals are Carlo Boulos, Frantz Boulos, Aida Hider, Huguette Shoucair, Patricia A. Butler, Rudolph Boulos, Marie Therese Boulos, Jocelyne Chamandy, Kathleen Boulos Weckering, Reginald Boulos, Luis Humberto Abraham, Nakarid Abraham, Cynthia Abraham, and Sergio Deeb (collectively, appellants).

director, and officer. During the last years of Abraham's life, Optimox was highly profitable, generating between \$5 million and \$6 million in annual sales.

Abraham died intestate in February 2013. In March 2013, Abraham's sister, Jocelyne Chamandy, was appointed by the other siblings to administer Abraham's estate. Chamandy then named herself as Optimox's sole director and president. Several months after appointing herself to Optimox's board, Chamandy appointed two other board members, Frantz Boulos and Bianca Hardan. Frantz Boulos, a pharmacist, is one of the heirs of Abraham's estate. Hardan is an attorney. At the time of Chamandy's appointment as the estate's administrator, Optimox was the estate's main asset.

Several of the estate's heirs objected to Chamandy's actions as administrator and litigation ensued regarding the operation and proposed sale of Optimox. Among other things, those heirs noted that during Chamandy's administration of the estate and management of Optimox, Optimox's revenues plummeted from \$6,327,612 in 2013 to \$4,325,327 in 2014. Optimox's decline in revenue was attributed to an interruption in the production of Iodoral due to the unavailability of Lugol. Apparently, Spectrum could no longer supply FormTech with Lugol because iodine is a regulated substance and FormTech needed but did not have a license from the California Department of Justice. By June 2014, Optimox stopped shipping Iodoral to its customers and its remaining supplies of the product ran out. Notwithstanding the decline in Optimox's revenue, in 2014 Chamandy charged her own expenses, and \$567,942 for legal and professional expenses, to the estate.

After months of contentious litigation, a trial was held on the issue of removal of Chamandy as administrator of the estate. After a full day of trial, the parties stipulated Chamandy would resign effective April 22, 2015. Michael R. Augustine (respondent) was appointed as the new administrator effective April 28, 2015. Optimox's assets were sold on July 31, 2015 and the corporation was dissolved as of December 31, 2015. The estate received \$13.8 million for the assets and retained \$4 million in cash in Optimox's bank accounts. On April 4, 2016, the court granted respondent's petition for authority to retain litigation counsel, Alan Gutman, to investigate potential claims by the estate regarding the management and operation of Optimox while Chamandy was the estate's administrator. The April 4, 2016 order is not challenged in this appeal.

On August 4, 2016, respondent filed a petition for instructions under Probate Code section 9611.² Specifically, respondent sought instructions to prosecute claims against Chamandy: (i) for breach of her duties to the estate by failing to hire professional management for Optimox and to anticipate supply issues concerning the iodine needed to produce Iodoral and (ii) to determine the propriety of charging her own expenses, as well as certain legal and professional fees, to the estate. Respondent also sought instructions to prosecute claims against Optimox's former board members, Chamandy, Frantz Boulos, and Hardan, for failing to perform their duties in good faith.³

² All undesignated statutory references are to the Probate Code.

³ In addition, respondent sought instructions to prosecute claims against two law firms and two accountants, and to abandon claims against several businesses and individuals. Those instructions are not challenged in this appeal.

On September 2, 2016, appellants filed an opposition and objections to the petition for instructions. Although they acknowledged that “normally some deference should be given to an Administrator’s suggested relief in a Petition for Instructions,” appellants opposed the recommendations “on the basis that they lack support in fact or law, and should be rejected.” Seven other heirs, however, supported respondent’s petition for instructions. In fact, those heirs believed that additional claims should be pursued against Chamandy.

The court heard argument on the petition for instructions on September 9, 2016. On October 19, 2016, the court issued a written order granting respondent authority to: (i) pay litigation counsel up to \$100,000; (ii) pursue claims against Chamandy as the estate’s former administrator and as a former Optimox board member; (iii) pursue claims against Frantz Boulos and Hardan as former Optimox board members; and (iv) pursue claims against the law firm of Greenberg, Whitcombe, Takeuchi, Gibson & Grayver. The court issued no instructions concerning the pursuit of claims against two accountants and instructed respondent to abandon claims against 13 individuals and business entities. On December 19, 2016, the court amended the October 19, 2016 order to instruct respondent to also pursue claims against the law firm of Pettler and Miller.

Appellants appeal from the October 19 and December 19, 2016 orders granting respondent’s petition for instructions to the extent they authorize respondent to pursue claims against Chamandy, Frantz Boulos, and Hardan.

CONTENTIONS

Appellants contend respondent's petition for instructions did not include any facts to support his request to pursue claims against Chamandy, Frantz Boulos, and Hardan, and the trial court failed to make a specific finding that pursuing those claims would be in the best interest of the estate.

DISCUSSION

1. Applicable Law and Standard of Review

"The probate court or judge is the guardian of estates of deceased persons and all proceedings are under the direction of the judge. An executor or administrator derives his power to act from the order of the court." (*County of Los Angeles v. Morrison* (1940) 15 Cal.2d 368, 371.) An estate's representative is "an officer of the court and occupies a fiduciary relation toward all parties having an interest in the estate." (*Estate of Conkey* (1939) 35 Cal.App.2d 581, 585.) As a fiduciary for the benefit of those having an interest in the estate, the representative is obligated to use "ordinary care and diligence" in managing and controlling the estate and its assets. (§ 9600, subdivision (a).) No personal representative is "totally immune from judicial scrutiny" with respect to a corporation wholly owned by a decedent. (*Estate of Massaglia* (1974) 38 Cal. App. 3d 767, 779.) " 'A representative who accepts more responsibility than he or she can reasonably expect to fulfill faces substantial risk of *surcharge* for business losses and liabilities.' [Citation]." (*Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 470.)

Section 9611, subdivision (a) provides that "[i]n all cases where no other procedure is provided by statute, upon petition of the personal representative, the court may authorize and instruct

the personal representative ... , in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection therewith.” A probate court’s decision to issue special instructions is discretionary under section 9611. (*Estate of Denton* (1971) 17 Cal.App.3d 1070, 1074 (*Denton*) [analyzing former section 588 which is the predecessor to section 9611].) Unless the probate court’s order was obtained by fraud or conspiracy or by misrepresentation contained in the petition, a final court order authorizing or instructing the personal representative releases the personal representative from all claims of the heirs, devisees, and the persons affected by the order. (See § 7250, subds. (a), (c).)

We review an order giving instructions to the estate’s administrator for abuse of discretion. (See *Denton, supra*, 17 Cal.App.3d at p. 1075.) We review the court’s factual findings for substantial evidence. (*Manson v. Shepherd* (2010) 188 Cal.App.4th 1244, 1259; *Estate of Beard* (1999) 71 Cal.App.4th 753, 778–779.)

2. The petition for instructions contains sufficient facts to support bringing claims against Chamandy, Frantz Boulos, and Hardan.

Appellants contend that respondent’s verified⁴ petition for instructions does not contain sufficient facts to support

⁴ Although section 1021 requires verification of all petitions brought under the Probate Code, the record does not contain a verification for the petition for instructions at issue in this appeal. In their briefs, however, appellants and respondent state that the petition was verified. Accordingly, appellants have forfeited any argument that the lack of verification is a basis for vacating the court’s orders. (See *Estate*

authorizing him to bring claims against Chamandy, Frantz Boulos, and Hardan. Relying on *Estate of Nicholas* (1986) 177 Cal.App.3d 1071 (*Nicholas*), appellants argue that respondent failed to “meet his burden of showing substantial evidence supporting his Petition,” and appellants’ facts and evidence in opposition “soundly demonstrate” that the petition should have been denied. We disagree.

While section 9611 states that a petition for instructions may only be filed by a personal representative where no other procedure is provided by statute, that law does not mandate any other requirement or specify the petitioner’s evidentiary burden. (§ 9611.) In *Nicholas*, however, the court held that “a trustee petitioning for instructions as to the exercise of a discretionary power has the burden of proving the exercise will be reasonable.” (*Nicholas, supra*, 177 Cal.App.3d at p. 1087.) In that case, the lower court granted the trustee’s petition for instructions to sell all of the cattle owned by the trust. (*Id.* at p. 1088.) The reviewing court reversed, holding that the trustee’s “mere belief [that it was in the best interest of the estate], unsupported by *any* facts or circumstances underlying the decision, does not constitute substantial evidence of reasonableness. A contrary conclusion would make a mockery of the process by which a court ‘instructs’ a trustee, because the court would simply ratify the unexamined decision of the trustee. [¶] Nor [was] substantial evidence of reasonableness found in the assertion that two of the three

of Conner (1964) 227 Cal.App.2d 157, 159 [“Later cases make clear the trend to regard absence of verification as ‘no more than a defect in pleading,’ hold it not to be jurisdictional, and regard the objection as waived if not raised at the noticed probate hearing.”].)

beneficiaries requested the trustee to sell the livestock as soon as possible.” (*Id.* at p. 1089.)

Nicholas does not support appellants’ position. Here, unlike the bare assertion in the trustee’s petition for instructions in *Nicholas*, respondent’s petition contains detailed facts supporting the representative’s request for authorization to bring claims against the former administrator and Optimox’s former directors. For example, respondent alleges the following in the petition:

“Chamandy served as administrator from March 22, 2013 until April 22, 2015. Chamandy failed to hire professional management and to anticipate supply issues re Iodoral. Optimox revenues plummeted from \$6,327,612 in 2013 to \$4,325,327 in 2014, a reduction in the amount of \$2,002,285. After all costs and deductions were factored in, net income went from \$2,912,773 in 2013 to \$1,160,506 in 2014, a reduction in the amount of \$1,752,167. By all accounts, the precipitous decline (approx. 60% of net income) was attributable solely to the interruption in the supply of 5% Lugol’s Solution. That loss can be attributed to a breach of Chamandy’s duties.

“[¶] ... [¶]

“Ordinary care and diligence determined by *all* the circumstances of the particular estate mandated that Chamandy immediately engage experienced and professional management. This opinion is supported by many of Chamandy’s own statements in a declaration that she submitted—that the business had been run ‘in a highly unusual fashion,’ that Abraham was ‘quite eccentric,’ that the business was not run with ‘normal profit motives,’ that none of the staff ‘had any significant

education or training,’ that there were ‘few internal controls,’ that ‘record-keeping was minimal,’ that the ‘staff was highly resistant to my efforts initially and was also highly suspicious of me,’ and other family members ‘attempted to usurp my authority.’ Chamandy was initially determined to run Optimox just as Abraham had, but whether that was her mission or not is irrelevant; that does not satisfy her statutory obligations.

“The next step in the analysis is whether the losses could have been averted. There is sufficient evidence to establish that a professional manager would have anticipated and prevented the supply chain difficulties. To begin with, it would appear that would be a core competency to assuming control of this type of business, especially since it was the sole supplier and was already at maximum capacity. ... The claim against the directors spring from the same claim against Chamandy—i.e., the directors breached their duties by failing to engage professional managers.”

Based on these detailed assertions, the probate court had substantial evidence upon which to base its implied finding that the requested instructions were in the best interest of the estate. For instance, and contrary to appellants’ contention that respondent failed to demonstrate *how* the Optimox board members failed to fulfill their obligations to the corporation, the petition alleges that the board members, and Chamandy in her additional role as the estate’s administrator, did not engage experienced and professional management that would have “anticipated and prevented the supply chain difficulties.” As a result of their inaction, Optimox—the estate’s largest asset—was

unable to obtain iodine for the production of Iodoral, “which resulted in a \$2 million decline in sales from 2013 to 2014.” While appellants submitted detailed evidence in opposition to the petition for instructions, “it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.” (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874, italics omitted.)

Appellants’ additional contention that the court was *required* to make an express finding that the requested instructions were in the best interest of the estate is meritless. Although findings of fact were once required in contested proceedings unless waived, the Probate Code no longer requires findings of fact unless requested. (*Estate of Duncan* (1969) 1 Cal.App.3d 212, 215.) And here appellants made no such request.

Finally, appellants cite no authority to support their argument that respondent’s failure to address the business judgment rule in the petition for instructions is a basis for reversing the court’s orders. In any event, Chamandy had an obligation under section 9600 to use ordinary care and diligence in managing the estate, and what constitutes ordinary care and diligence “is determined by all the circumstances of the particular estate.” (§ 9600, subd. (a).) As for the instructions sought against Optimox’s former board members, the business judgment rule only establishes a “*presumption* that directors’ decisions are made in good faith and are based upon sound and informed business judgment.” (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 715.) That is, notwithstanding the deference to a director’s business judgment, the rule does not immunize a director from liability in the case of his or her abdication of

corporate responsibilities. (*Gaillard v. Natomas Co.* (1989) 208 Cal.App.3d 1250, 1263.) And here respondent alleges that Chamandy's and the board's failure to anticipate and prevent disruptions in the supply of iodine used to produce Iodoral implicated "a core competency to assuming control" of the estate and Optimox.

In sum, appellants have not shown that the court erred when it instructed respondent to pursue claims against the former administrator and the former members of the board of directors of the estate's main asset. "Whether the court wished to decide in advance the suit proposed by the [administrator] was proper, or whether it preferred to have the [administrator] act upon [his] own convictions, and review the matter afterward, was well within its sound discretion." (*Denton, supra*, 17 Cal.App.3d at p. 1076.)

DISPOSITION

The orders granting respondent's petition for instructions are affirmed. Respondent shall recover his costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.