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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000458-MR

JOHN M. LONGMEYER,
EXECUTOR AND TRUSTEE OF THE
ESTATE OF OLLIE W. SKONBERG

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CI-007052

BANK ONE, KENTUCKY, N.A.

APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: BARBER AND KNOFF, JUDGES; AND MILLER, SENIOR JUDGE.¹

BARBER, JUDGE: Appellant, John M. Longmeyer, Executor and
Trustee of the Estate of Ollie W. Skonberg (Longmeyer), brings
this appeal from a summary judgment order entered by the

¹ Senior Judge John D. Miller, sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

Jefferson Circuit Court dismissing his claims against Appellee, Bank One, Kentucky, N.A. (Bank One), alleging breaches of fiduciary duties and fraud in its administration and involvement in the trust belonging to Ollie W. Skonberg (Ollie). We reverse and remand.

Ollie was the settlor of a revocable intervivos trust that identified her as the sole income beneficiary for her life. The trust was originally created in 1984 with Bank One's predecessor as trustee. In 1987 Ollie changed the terms of the trust to provide for the distribution of the bulk of the trust's assets to a trust to be administered for her sister's benefit for her sister's life and then to a trust established for several charities. The charities were identified in her will along with other distributees of her estate. The trust remained a revocable intervivos trust with Ollie as sole beneficiary for her life and Bank One's predecessor² as trustee.

In 1997 Ollie revoked the 1987 trust and executed a new trust document and will which named John M. Longmeyer, an attorney, as trustee, and, instead of leaving the bulk of her estate to her sister for life and then to various charities, she left it to other members of her family in a family trust. Ollie remained the sole income beneficiary for her life. Other individuals also received bequests in her will.

² Bank One eventually became the trustee by virtue of taking over Liberty National Bank.

After revocation of the 1987 trust, but before Ollie's death, Bank One agreed to, and did, enter into an "Investment Agency Agreement" with Longmeyer, the new trustee, in which it agreed to act as Longmeyer's agent for investment of the trust property. Bank One also signed off on the new trust documents. The Investment Agency Agreement was signed October 2, 1997, soon after the 1987 trust was revoked.

Shortly after the Investment Agency Agreement was entered into Ollie passed away. Longmeyer and Bank One continued their relationship until November 19, 1997, when Longmeyer terminated the Investment Agency Agreement and moved the trust's funds to Paine Webber.

Within a few weeks of this action by Longmeyer, Bank One contacted an attorney to receive advice about its duty, if any, to the charities who were the beneficiaries under the 1987 trust. Discovery documents show that a Bank One employee essentially wrote the letter later printed and signed off on by the attorney as representative of the attorney's opinion that the charities under the 1987 trust should be notified. It is unclear whether the expression of opinion in the letter was that of the attorney who simply authorized Bank One's employee to redraft it or whether Bank One's employee was telling the attorney what the bank wished to receive as advice.

At any rate, the letter was sent to the charities identified in the 1987 trust in 1998 and later that year the charities instituted a will contest against Ollie's estate. Our understanding of the basis of that suit is that the charities alleged Ollie was unduly influenced in the drafting of the 1997 trust and will. The suit was not tried but settled for a substantial sum of money just prior to its trial date.

Thereafter, Longmeyer filed this suit against Bank One alleging that it had breached its fiduciary duties to Ollie and had committed fraud by representing that it would act as Longmeyer's agent when it, in fact, did not intend to do so. The trial court granted Bank One's motion for summary judgment finding that during the time Bank One owed a duty to Ollie it did not breach that duty as trustee because it continued to pay her income and invest her monies properly. The court also stated that Bank One owed a duty to the charities and had it not notified them of the change in the disposition of Ollie's assets, it could have been subject to liability. Finally, the court found that Bank One had not committed fraud because at the time it entered into the Investment Agency Agreement with Longmeyer as trustee the bank did not intend to misrepresent any material facts, and when it did disclose information to the charities, it was no longer subject to that contract.

On appeal Longmeyer makes several arguments for reversal of the court's decision. He maintains that the court's finding that Bank One did not owe a fiduciary duty to Ollie is incorrect; that any duty the bank owed to the charities ended when the 1987 trust was revoked; that even if such a duty to the charities was owed, the bank should be estopped from relying on that to avoid liability because it accepted the 1997 trust cutting the charities out. Further, Longmeyer argues that if a duty was owed to the charities, then accepting its new role under the Investment Agency Agreement was a conflict. Finally, Longmeyer contends that material issues of fact exist as to whether Bank One misrepresented its acceptance of the 1997 trust to Longmeyer's detriment.

Bank One responds that the court's judgment that it owed any duties it had under the 1987 trust solely to the beneficiaries of the trust is in accord with settled law - that there is no law to support the contention that a trustee owes a settlor of a trust any duty. Bank One further contends that any information it gave to the charities was not confidential in nature and/or Longmeyer waived this claim by divulging information to one of the representatives for the charities himself. Moreover, the Bank argues that the charities had a right to the information that the 1987 trust had been revoked. Finally, the bank states that it is not estopped from making

these arguments based on the Investment Agency Agreement because there is no conflict and Longmeyer has not produced any evidence that the bank breached that agreement. Finally, Bank One argues that Longmeyer has not produced any evidence of fraud.

After reviewing the record and applicable statutes, case law, and treatises on the subjects involved in this appeal, we have reached the conclusion that the issues in this case do involve questions of duty. However, the trial court's analysis of these duties is incorrect.

The 1987 trust was a revocable intervivos trust of which Ollie was the sole income beneficiary for her life. The charities, and anyone else, were not entitled to receive any disbursements until Ollie's death at which point the trust was to become irrevocable. That being said, a trustee does owe a duty to both the life income beneficiary and the remainder beneficiaries to deal impartially with both while the trust is in effect. Trustees owe a duty of utmost fidelity to the beneficiaries of a trust. Bryan v. Security Trust Co., 296 Ky. 95, 99, 176 S.W.2d 104, 107 (1943); Wiggins v. PNC Bank, Kentucky, Inc., 988 S.W.2d 498, 501 (Ky.App. 1998).

However, the position that Bank One owed a duty to no one under that trust except the beneficiaries is clearly incorrect. The first duty of any trustee is to faithfully execute the trust according to the intent of the settlor. Clay

v. Crawford, 298 Ky. 654, 667, 183 S.W.2d 797, 804 (1944); Bogert, Trusts & Trustees § 541 (2d ed.rev. 1993); 76 Am.Jur.2d Trusts § 380. Ollie's express intent under the 1987 trust was that she was to be the sole beneficiary for her life, and, on her death, her sister was to be the beneficiary for her sister's life and, on her sister's death, the charities would become the beneficiaries. Bank One's duty under the 1987 trust was to ensure that Ollie's intentions be carried out, but Ollie expressly retained the power to revoke or modify the 1987 trust.

A settlor may retain this power and exercise it during his or her lifetime. Siter v. Hall, 220 Ky. 43, 294 S.W. 767, 770 (1927); Bogert, Trust & Trustees, § 1000 (2d ed.rev. 1993); Restatement (Second) of Trusts § 330(1) (1959). This includes the power to change the identity of the beneficiaries. Siter, supra; Restatement (Second) of Trusts § 330 comment i (1959)(if revocation is effective the interests of the beneficiaries are extinguished).

A trustee has a choice when faced with the exercise of the power of revocation by a settlor. If the revocation has been validly exercised, then the trustee is under a duty to wind up the trust and surrender its possession to the settlor. Bogert, Trusts & Trustees, § 1010 (2d ed.rev. 1993); Restatement (Second) of Trusts § 344 comment a (1959).

If, however, the trustee has reasonable grounds to believe that the revocation has been exercised improperly, such as under undue influence, it has the right and duty to maintain and defend the trust in its own name. KRS 386.810(3)(y) (trustee may prosecute or defend actions to protect the trust assets); Bogert, Trusts & Trustees, § 1001; 76 Am.Jur.2d Trusts § 443 (trustee's duty to protect and defend trust estate); CJS Trusts § 361.

Thus, Bank One, when confronted by Ollie's exercise of her power of revocation under the 1987 trust, had a choice – it could either acquiesce, or, it could choose to defend the trust. It chose to acquiesce in Ollie's exercise of her power of revocation. This is clear from the fact that it entered into the Investment Agency Agreement with Longmeyer as the new trustee and continued to operate under that agreement even after Ollie passed away. It was not until Longmeyer decided to remove Bank One from the picture entirely that the bank changed its tune.

Bank One has pointed to many factors that suggest Ollie was unduly influenced in changing her 1987 trust in an effort to excuse its actions. There are factors pointing to undue influence, such as Ollie changed the 1987 trust shortly before she died; she changed the disposition of her assets; and she did it through an attorney that she found in the yellow

pages. However, there are also factors that weigh on the side that Ollie was more than competent to make the choices she made such as her estate was distributed to the natural objects of her bounty (her family), many of the individuals who received specific bequests in her will remained the same, and Bank One remained named as first successor trustee to Longmeyer.

In our view, these facts concern whether Ollie validly exercised her power of revocation. This is not a disputable issue in this case because Bank One chose to accept the exercise of the power as valid. Whether Ollie was unduly influenced is now irrelevant. Bank One, if it intended to question Ollie's capacity to exercise the power of revocation in the 1987 trust, had an obligation to do so when confronted with the settlor's expression of intent that the trust be terminated. This is similar, though not identical, to the situation found in Phillips v. Lowe, 639 S.W.2d 782, 783 (Ky. 1982) where the Supreme Court agreed with the view that once a trustee acquiesces in a settlor's demand to terminate the trust, then there is no one with standing to object.

Bank One clearly chose to accept Ollie's exercise of her power of revocation as is evidenced by its entering into the Investment Agency Agreement with Longmeyer as trustee. Under that agreement Bank One became the agent of Longmeyer. An agent is a fiduciary and owes his principal the duty of loyalty and

good faith. Deaton v. Hale, 592 S.W.2d 127, 130 (1979); Bogert, Trusts & Trustees, § 543 (2d ed.rev. 1993). Those duties do not end at the termination of the agent's employment and an agent may not use information gained during the relationship to the expense of his former employer. Aero Drapery of Kentucky, Inc. v. Engdahl, 507 S.W.2d 166, 169-170 (1974).

Here, Bank One supplied information to the charities named under the 1987 trust when that trust, and the charities' interests, had been terminated.³ The validity of the termination is not at issue since Bank One chose to accept Ollie's exercise of her power and enter into an agreement whereby it took on fiduciary duties to her new trustee. Bank One subsequently disclosed information that was clearly confidential (the disposition of Ollie's estate) to parties who had no legal interest in it. We think, at the very least, there are issues of material fact on Longmeyer's claims against Bank One. Therefore, the decision of the Jefferson Circuit Court is reversed and the case remanded for further proceedings.

MILLER, SENIOR JUDGE, CONCURS.

KNOPE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

³ Bank One's argument that Longmeyer waived this complaint by his own conversation with a representative of one of the charities is without merit. Bank One's duties are independent of any duties owed by Longmeyer. Further, Longmeyer did not send a letter to each one of the charities advising them of the circumstances under which Ollie exercised her right of revocation.

KNOFF, JUDGE, CONCURRING: Although I agree with the reasoning and the result of the majority opinion, I write separately to clarify the issues before the trial court upon remand of this case. The majority correctly holds that Bank One had a fiduciary duty to faithfully execute the 1987 trust according to the intention of Ollie Skonberg, the settlor. When Ollie revoked the trust in 1997, Bank One could have either defended the 1987 trust or it could acquiesce to Ollie's exercise of her power of revocation. Having chosen the latter, Bank One could not subsequently seek shelter in its duties to the charities, which had only an expectancy in being beneficiaries of Ollie's trust.

The existence of a fiduciary duty is a question of law for the courts to decide as it essentially involves a policy determination. Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 248 (Ky. 1992). However, whether Bank One breached its fiduciary duties by notifying the charities regarding the revocation of the trust is an issue of fact. See Priestley v. Priestley, 949 S.W.2d 594 (Ky. 1997). Furthermore, it is not clear that Bank One disclosed any confidential information to the charities. The charities were informed only that they had been beneficiaries under the 1987 trust but had been removed under circumstances that Bank One regarded as questionable. Longmeyer himself provided most of this information to one of

the charities and he referred the charity to Bank One for more information. Therefore, I would disagree with any interpretation of the majority opinion suggesting that, as a matter of law, Bank One breached its fiduciary duties to the estate. Ultimately, this is the central question which the finder of fact must determine.

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