[Cite as *Puhl v. U.S. Bank, N.A.*, 2015-Ohio-2083.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

REBECCA SCHAUERTE PUHL, et al.,	:	
		CASE NO. CA2014-08-171
Plaintiffs-Appellants,	:	
		O P I N I O N
	:	6/1/2015
- vs -		
	:	
U.S. BANK, N.A.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2013-05-1599

Lierman & Cornwell Co., LLC, Jeff J. Cornwell, 7182 Liberty Centre Drive, Suite N, West Chester, Ohio 45069, for plaintiffs-appellants

Taft Stettinius & Hollister LLP, Timothy C. Sullivan, 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202, for defendant-appellee

M. POWELL, J.

{¶ 1} Plaintiffs-appellants, Rebecca Schauerte Puhl and Melissa Schauerte Boyle, appeal the decision of the Butler County Court of Common Pleas granting summary judgment to defendant-appellee, U.S. Bank, N.A., in a lawsuit alleging a mishandling of trust assets.

{¶ 2} In 1982, Rose E. Schauerte entered into a trust agreement (the Trust) with U.S.

Bank (the Trustee).[1] Under the terms of the Trust, Rose was entitled to the net income of the Trust, or could direct the Trustee to otherwise distribute the income. Additionally, she retained the authority to change or terminate the Trust, as well as the authority to withdraw property and "to exercise all rights of ownership of any property in [the] Trust, without the consent or approval of [the] Trustee."

{¶ 3} The Trust granted the Trustee "all power and authority * * * conferred by law upon trustees in the State of Ohio," as well as several more specific powers. Particularly relevant to the present case, the Trust granted the Trustee "full power and authority * * * [t]o retain any property or undivided interests in property received from any source regardless of lack of diversification, risk or nonproductivity * * *." Yet the Trust also limited the Trustee's powers in several ways, including by requiring that

> Trustee shall consult with [Rose's husband] if [the latter is] reasonably available on all investment and sale decisions. If [Rose's husband] is not reasonably available, Trustee shall consult with [Rose's daughter-in-law,] Anita Hoelle Schauerte, especially on income and principal distributions for [Rose's] three grandchildren.

{¶ 4} Between 1982 and 1989, the Trust was funded with only $10. However, after the death of Rose's husband in 1989, Rose transferred her holdings in six stocks (the 1989 stocks) into the Trust. At the time of the transfer, Rose's holdings in the 1989 stocks had a market value of between $300,000 and $400,000. At some point, her home in Hamilton, Ohio was also transferred into the Trust.

{¶ 5} In exercising her authority under the Trust, Rose was particular about retaining the 1989 stocks as part of the Trust's investment portfolio. For instance, in September 1991, Rose issued a written instruction to the Trustee "to hold and not sell" the 1989 stocks. In

1. At the time the trust agreement was entered into, the entity that is now U.S. Bank was named The Second National Bank of Hamilton.

1994, Rose acknowledged in writing that three of the original six 1989 stocks constituted almost 90 percent of the Trust's investment portfolio, but nevertheless instructed the Trustee not to sell the stocks "[d]ue to the very low tax basis and my own personal reasons * * *."

{¶ 6} Ten years later, in December 2004, the Trustee notified Rose that the 1989 stocks constituted a high percentage of the Trust's investment portfolio, which presented "an investment risk which could be reduced through liquidation of the Stock and reinvestment in other assets which would provide greater portfolio diversification." In response, Rose acknowledged that her holdings in the 1989 stocks constituted a high proportion of her investment portfolio, but again directed the Trustee to retain the stocks "until my death or incapacity, or until I otherwise direct [the Trustee] in writing." In December 2005, Rose slightly modified her position: she recognized that her holdings in one of the 1989 stocks had reached 27 percent of the Trust's portfolio, and authorized the Trustee to liquidate her shares of that stock to meet her expenses and requests for gifts and distributions.

{¶ 7} Even with such a high proportion of the portfolio invested in the 1989 stocks, the Trust generated enough income to cover Rose's living expenses between 1989 and her death in 2011, including approximately four years during which she resided in a nursing home but continued to maintain her own home. During that time, the Trust also generated an additional $3 million to $4 million of income that Rose chose to distribute to her grandchildren, great-grandchildren, and various charities. The value of the Trust's portfolio decreased drastically after 2007, the year Rose entered the nursing home; however, the Trust still had portfolio assets at the time of Rose's death in 2011.

{¶ 8} The appellants in the present case, Puhl and Boyle (the Beneficiaries), are Rose's grandchildren and two of the named beneficiaries of the Trust. In May 2013, the Beneficiaries filed a complaint against the Trustee, alleging (1) breach of fiduciary duty, (2) failure to comply with the Ohio Uniform Prudent Investor Act (R.C. Chapter 5809), (3)

negligence, and (4) unjust enrichment. In March 2014, the Trustee moved for summary judgment. On July 10, 2014, the trial court granted summary judgment to the Trustee. In so doing, the court found that the Trustee owed duties only to Rose during her lifetime, and that the Trustee had followed her directions explicitly. Therefore, the court concluded the Trustee had a full and complete defense to all of the Beneficiaries' claims.

{¶ 9} The Beneficiaries now appeal, raising one assignment of error:

{¶ 10} THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT/APPELLANT.

{¶ 11} The Beneficiaries argue the trial court erred in granting summary judgment to the Trustee because the evidence shows the Trustee breached both its duty to diversify the Trust's investment portfolio and the terms of the Trust.

{¶ 12} Appellate review of a trial court's decision granting summary judgment is de novo. *Roberts v. RMB Ents., Inc.*, 197 Ohio App.3d 435, 2011-Ohio-6223, ¶ 6 (12th Dist.). In reviewing a decision de novo, the appellate court is required to use the same standard the trial court should have used, and examine the evidence to determine whether, as a matter of law, no genuine issues exist for trial. *Deutsch v. Birk*, 189 Ohio App.3d 129, 2010-Ohio-3564, ¶ 7 (12th Dist.). Under Civ.R. 56(C), summary judgment is appropriate when (1) there are no genuine issues of material fact to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when all evidence is construed most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998).

{¶ 13} The party moving for summary judgment has the initial burden of producing evidence that affirmatively demonstrates the absence of a genuine issue of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d

280, 292-293 (1996); *D&H Autobath v. PJCS Properties I, Inc*., 12th Dist. Fayette No. CA2012-05-018, 2012-Ohio-5845, ¶ 10. Once the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but must supply evidentiary materials setting forth specific facts that demonstrate there is a genuine issue for trial. Civ.R. 56(E). Summary judgment is proper if the nonmoving party fails to set forth such facts. *D&H Autobath* at ¶ 10.

{¶ 14} Along with its motion for summary judgment, the Trustee filed affidavits from Margaret Kollstedt, the trust officer responsible for the administration of the Trust, and Joseph Belew, the portfolio manager responsible for managing the investment portfolio for the Trust. Both affidavits incorporated by reference a number of other relevant documents, including a copy of the original trust agreement, various written instructions from Rose to the Trustee regarding the management of the Trust's investment portfolio, and copies of several annual presentations summarizing the performance of the Trust's investment portfolio. *See Koop v. Speedway SuperAmerica, LLC*, 12th Dist. Warren No. CA2008-09-110, 2009-Ohio-1734, ¶ 6 (noting the correct method for introducing evidence not enumerated in Civ.R. 56(C) is to incorporate it by reference into a properly-framed affidavit). In addition, the Trustee also filed transcripts of Kollstedt's and Belew's respective depositions.

{¶ 15} By contrast, and despite an extension granted by the trial court to allow further discovery, the Beneficiaries did not respond to the Trustee's motion and evidence with any evidentiary-quality materials. Instead, the Beneficiaries relied entirely upon their Memorandum in Opposition – which was accompanied by an unsigned, non-notarized affidavit that raised questions regarding Rose's competency – and a Supplemental Memorandum in Opposition. In other words, the Beneficiaries rested upon the mere allegations or denials of their pleadings. *See* Civ.R. 56(E).

{¶ 16} Therefore, summary judgment was proper if the Trustee's evidence affirmatively

demonstrated the absence of a genuine issue of material fact as to the essential elements of the Beneficiaries' claims. *See D&H Autobath*, 2012-Ohio-5845 at ¶ 10.

{¶ 17} The Beneficiaries first argue that, given Rose's advanced age and healthcare needs, the Trustee's failure to liquidate the 1989 stocks and acquire safer investments that would produce income to pay for Rose's increased expenses was a breach of its duty to diversify.

{¶ 18} Among the many statutory duties imposed upon a trustee is the duty to "diversify the investments of a trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." R.C. 5809.03(B). Thus, a trustee is required "to distribute the risk of loss within the trust by prudent diversification, limiting the proportion of total trust assets which are invested in any one stock or class of securities." *Stevens v. Natl. City Bank*, 45 Ohio St.3d 276, 281 (1989). This duty includes the sale of investments "which, although otherwise proper investments for the trustee to retain, are improper because not properly diversified." *Id.* However, the duty to diversify "may be expanded, restricted, eliminated, or otherwise altered," even if the trust agreement does not make express reference to the statutory duty. R.C. 5809.01(C).

{¶ 19} In the present case, the evidence presented by the Trustee demonstrated that its duty to diversify was eliminated by the terms of the Trust. When construing the provisions of a trust, the court's primary duty is to ascertain, within the bounds of the law, the intent of the settlor.[2] *In re Trust U/W of Brooke*, 82 Ohio St.3d 553, 557 (1998). If the language of the trust agreement is unambiguous, the settlor's intent can be determined from the trust's express language. *Pack v. Osborn*, 117 Ohio St.3d 14, 2008-Ohio-90, ¶ 8. "The words in the trust are presumed to be used according to their common, ordinary meaning." *Id.*

2. R.C. 5801.01(S) defines a "settlor" as "a person, including a testator, who creates, or contributes property to, a trust." Accordingly, Rose is the settlor of the Trust in the case sub judice.

{¶ 20} Here, Rose retained the authority under the Trust to exercise all rights of ownership of any property in the Trust. Moreover, the Trust granted the Trustee "the full power and authority * * * [t]o retain any property or undivided interests in property received from any source regardless of lack of diversification, risk or nonproductivity * * *." As Belew testified, the Trustee interpreted this provision to allow the retention of the 1989 stocks regardless of the consequent lack of diversity in the Trust's investment portfolio. The plain language of the provision supports the Trustee's interpretation.

{¶ 21} Nevertheless, in support of their position, the Beneficiaries cite a case from the First Appellate District, *Wood v. U.S. Bank, N.A.*, 160 Ohio App.3d 831, 2005-Ohio-2341 (1st Dist.). The Beneficiaries assert that *Wood* stands for the proposition that trustees have a duty to diversify even if the trust language authorizes retention of certain assets. In *Wood*, the trust agreement authorized the trustee to "[r]etain any securities in the same form as when received, including shares of a corporate Trustee," but it did not say anything about diversification. *Id.* at ¶ 6, 24. The *Wood* beneficiaries claimed a breach of the duty to diversify where stock in the trustee's corporation constituted nearly 80 percent of the trust's portfolio, and where, in the two years following the death of the settlor, the trust suffered a significant loss of value due to the trustee's liquidation of other assets of the trust prior to the liquidation of its own stock. The First Appellate District agreed, finding that the retention language "merely served to circumvent the rule of undivided loyalty," and did not modify or eliminate the trustee's duty to diversify. *Id.* at ¶ 24.

{¶ 22} We find the present case to be clearly distinguishable. First, there is no indication in the record that the Trust at any time held stock in the Trustee's corporation. Hence, there is no reason to believe the above-quoted provision was aimed exclusively at the rule of undivided loyalty. Additionally, the "retention language" in the Trust specifically authorizes the Trustee to retain assets "regardless of lack of diversification." That is,

whereas the *Wood* trust failed to mention diversification at all, the Trust presently at issue expressly relieves the Trustee of that duty.

{¶ 23} Perhaps the most important distinction between *Wood* and the present case, however, is that the *Wood* beneficiaries challenged the trustee's management of the trust portfolio following the settlor's death, while the Beneficiaries allege the Trustee breached its duty to diversify during Rose's lifetime.

{¶ 24} As the trial court correctly observed, Rose's reservation of the right to terminate or alter the Trust rendered the instrument a "revocable trust." *See In re Estate of Davis*, 109 Ohio App.3d 181, 183-184 (12th Dist.1996), citing R.C. 1335.01.[3] "During the lifetime of the settlor of a revocable trust * * * the duties of the trustee * * * are owed exclusively to the settlor." R.C. 5806.03(A). Indeed, the trustee of a revocable trust may follow an instruction of the settlor even if that instruction is contrary to the terms of the trust. R.C. 5808.08(A). Therefore, during her lifetime, Rose had the authority to instruct the Trustee to retain the 1989 stocks (as she did on several occasions), and the Trustee had the duty under R.C. 5806.03(A) to follow Rose's instructions, regardless of the risk presented by the high percentage of the Trust's portfolio invested in the 1989 stocks.

{¶ 25} For these reasons, we find the Trustee demonstrated the absence of a genuine issue of material fact with respect to the Beneficiaries' claim that the Trustee breached its duty to diversify the Trust's investment portfolio.

{¶ 26} Next, we turn to the Beneficiaries' argument that the Trustee breached the terms of the Trust. The Trust in the present case requires the Trustee to consult with Rose's husband on all investment and sale decisions, and if Rose's husband is not reasonably

3. R.C. 1335.01 was repealed by Sub.H.B. No. 416, 2006 Ohio Laws 128, which set forth the current trust code in R.C. Title 58. R.C. 5801.01(R) provides that a trust is "revocable" if it is revocable at the time of determination by the settlor alone, or by the settlor with the consent of any person other than a person holding an adverse interest. R.C. Chapter 5806 governs revocable trusts.

available, to consult with Rose's daughter-in-law, Anita Hoelle Schauerte. Notwithstanding this provision, Belew testified "[t]here was no reason to meet with Anita. Rose was our client * * * we took direction from Rose." Thus, in addition to claiming a breach of the duty to diversify, the Beneficiaries also contend the Trustee breached its fiduciary duty to adhere to the terms of the Trust by failing to consult with Anita Hoelle Schauerte.

{¶ 27} However, the Beneficiaries failed to show they suffered any injury from the Trustee's alleged breach of its duty to adhere to the terms of the Trust. "A claim of a breach of fiduciary duty is basically a claim of negligence, albeit involving a higher standard of care." *Strock v. Pressnell*, 38 Ohio St.3d 207, 216 (1988). The essential elements of a claim of breach of fiduciary duty are (1) the existence of a duty arising from a fiduciary relationship, (2) the failure to observe the duty, and (3) an injury resulting proximately therefrom. *D&H Autobath*, 2012-Ohio-5845 at ¶ 28. Because their failure to show injury is dispositive of the Beneficiaries' argument, we need not consider whether the Trustee's failure to consult with Anita rose to the level of a breach of fiduciary duty.

{¶ 28} As noted above, the duties of the trustee are owed exclusively to the settlor during the settlor's lifetime. R.C. 5806.03(A). Both Kollstedt's and Belew's affidavits and depositions make clear that they looked to Rose for direction regarding investment and sale decisions. Kollstedt stated unequivocally that Rose "was in control," and that "Rose had the ultimate say" about whether investments were made or assets sold. Similarly, when asked to explain his role in the administration of the Trust, Belew replied that he managed the investments but "[y]ou still have a duty to follow [Rose's] wishes in terms of the [Trust]." Thus, the Beneficiaries cannot claim an injury by virtue of the Trustee's failure to meet with Anita, because there is nothing in the record to suggest either that Anita had authority under the terms of the Trust to make any meaningful decisions, or that the Trustee would have heeded Anita's advice.

{¶ 29} Moreover, the Trustee's evidence suggests that the Trust's investment portfolio performed extremely well over the life of the Trust, and there is no indication in the record that a consultation with Anita would have improved the portfolio's performance. Belew's deposition testimony indicated that in addition to covering Rose's living expenses for over two decades, the income from the Trust's investment portfolio was enough to fund between $3 million and $4 million in gifts that Rose made to the Beneficiaries, other named beneficiaries in the Trust, and various charities.

{¶ 30} Lastly, Belew testified to several variables that led him to conclude that a continued position in the 1989 stocks was a prudent investment decision. Although the Beneficiaries assert that the Trustee should have altered the investment strategy to focus on income-producing assets, Belew opined that considering the 1989 stocks' low tax basis, capital gains tax rates, historical divided yields and value growth, as well as Rose's advanced age, it was appropriate for the Trustee to hold the 1989 stocks in the Trust's portfolio. Belew also stated that even if the Trustee had sold the 1989 stocks, "[n]o [other] asset would have generated the income required, strictly the income to pay for Rose's care." This evidence was not controverted by the Beneficiaries.

{¶ 31} Accordingly, we find the Trustee demonstrated the absence of a genuine issue of material fact with respect to the Beneficiaries' claim that the Trustee breached its fiduciary duty to adhere to the terms of the Trust.

{¶ 32} Consequently, employing the applicable standard of review and construing the evidence most favorably for the nonmoving party, we find the Trustee satisfied its initial burden for summary judgment. We further find the Beneficiaries failed to meet their reciprocal burden under Civ.R. 56(E) to supply evidentiary materials setting forth specific facts that demonstrate there is a genuine issue for trial with respect either to the Trustee's duty to diversify, or its duty to adhere to the terms of the Trust. Given the evidence in the

record, reasonable minds could only conclude that the Trustee is entitled to summary judgment. Therefore, the Beneficiaries' single assignment of error is overruled.

{¶ 33} Judgment affirmed.

PIPER, P.J., and HENDRICKSON, J., concur.