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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PATRICIA DAVIS DANEMAN
AMSTER,

Plaintiff and Appellant,

v.

FRANK I. MULBERG, as Trustee, etc.,

Defendant and Respondent.

A147574

(Marin County
Super. Ct. No. PRO-1400334)

Frank I. Mulberg served as trustee for a trust with a single beneficiary, Patricia Davis Daneman Amster. Mulberg and Amster's relationship was positive at first, but later soured. Amster and Mulberg filed competing petitions with the probate court concerning Mulberg's compensation, among other things. Following a trial, the probate court issued a statement of decision finding Mulberg breached his fiduciary duties, approving a trustee's fee of \$227,897.59, and surcharging Mulberg for excess fees totaling \$267,222.16. The court subsequently denied Amster's motion for attorney fees and costs pursuant to Probate Code¹ section 17211, and also granted Mulberg's motion to tax costs. Amster now appeals from that order. We affirm the denial of attorney fees but vacate the denial of costs.

¹ All statutory references are to the Probate Code unless otherwise specified.

I. BACKGROUND

In November 2009, Arlene T. Davis executed the Patricia Davis Daneman Amster 2009 Irrevocable Trust (the Trust). Amster, Davis's daughter, was named as the sole beneficiary of the Trust.

After Davis passed away in September 2011, Amster removed the appointed trustee, Mechanics Bank, and appointed Mulberg. Before he was appointed trustee, Mulberg had acted as Amster's personal counsel. The court later found Amster was a difficult and demanding beneficiary. "She was often unreasonable and even volatile, sending [Mulberg] between 8,000 [and] 10,000 emails during the period he served the Trust as trustee. Ms. Amster expected him to return telephone calls on weekends and after regular business hours."

In January 2014, Amster filed a petition for "accountings, suspension of powers and removal of trustee; for appointment of successor trustee, and for sanctions or surcharge, punitive damages and attorney's fees." Amster asserted Mulberg had refused to make requested accountings or to otherwise respond to her requests for information, and had also refused to resign as trustee. Around the same time, Mulberg filed a cross-petition for approval of the trust accounting, requesting approval of the settlement of the trust accounts and for instructions with respect to issues raised by Amster. Amster asserted a number of objections to Mulberg's 2012 and 2013 accounts.

A trial was held on the matters in June 2015. A statement of decision was issued on September 10, 2015. The probate court held Mulberg was entitled to at least some of the fees he requested, stating: "Mr. Mulberg is certainly entitled to compensation for his work as trustee, and the Court recognizes that Ms. Amster was often difficult and demanding. She frequently made outrageous demands on Mr. Mulberg and expected him to be available virtually around the clock. Yet if Mr. Mulberg felt Ms. Amster's conduct was inappropriate, he should have informed her of this, and advised her of his duties and obligations as trustee. Furthermore, he should have then petitioned the court under Probate Code § 17200 for instructions on how to proceed if he was having difficulty with a demanding beneficiary. Instead, he responded to Ms. Amster like an attorney would

respond to a demanding deep-pocket client, by billing the Trust hourly for the work she created.”

The court ultimately held Mulberg’s compensation was limited by the Marin County Superior Court Local Rules. The court also held Mulberg breached his fiduciary duty by charging for his services as both a trustee and as an attorney in violation of section 15687, billing for attorney work performed by his son, and failing to provide an annual accounting of the Trust assets. The court found a qualified corporate trustee would have charged the Trust 1 percent of the Trust corpus per annum for the same services. However, the court also found Amster should not benefit from her conduct as a demanding and often unreasonable beneficiary, and therefore exercised its equitable discretion to award Mulberg a 1.75 multiplier of the fee. Amster’s contention that Mulberg entirely waived his right to fees by failing to submit a supporting declaration was rejected. The court surcharged Mulberg \$267,222.16, the difference between the \$495,119.75 the Trust paid him for his services and the \$227,897.59 in approved fees. With the exception of the approval of Mulberg’s requested fees, the court granted Mulberg’s petition for settlement of accounts. The court also granted Mulberg’s request for an instruction to transfer certain “529 College Plan Accounts”² to a successor trustee. Mulberg appealed several aspects of the probate court’s ruling, and we affirmed in an earlier ruling. (*Amster v. Mulberg* (Nov. 18, 2016, A146374) [nonpub. opn.] (*Amster I.*))

On October 13, 2015, Amster moved for attorney fees and costs under section 17211. Around the same time, Amster filed a memorandum of costs. In response, Mulberg filed a motion to tax costs. A hearing was held on the matter, on December 14, 2015. On January 13, 2016, the court issued a written order denying Amster’s motion for attorney fees and costs, and granting Mulberg’s motion to tax costs. This appeal followed.

II. DISCUSSION

² According to the statement of decision, Davis assumed ownership of the accounts for the benefit of Amster’s grandchildren, and directed that any successor trustee of the Trust “ ‘succeed to ownership’ ” of the accounts.

A. Attorney Fees

Amster asserts the probate court erred in denying her request for attorney fees pursuant to section 17211. Under section 17211, subdivision (b), a beneficiary who contests a trustee's account *may* recover the costs of the litigation, including attorney fees, if the trustee's opposition to the contest "was without reasonable cause and in bad faith." Amster has not come close to showing either lack of reasonable cause or bad faith, let alone showing both. Moreover, because of the permissive language of section 17211, attorney fees need not be awarded, even if there was a lack of reasonable cause and bad faith. Thus, the decision to award fees is reviewed for abuse of discretion. In light of this deferential standard of review, and the fact that Mulberg clearly had a colorable basis to oppose Amster's petition, we must affirm the trial court's decision.

1. Reasonable Cause

As an initial matter, we find Mulberg clearly had reasonable cause to oppose Amster's petition.

" 'Reasonable cause,' when used with reference to the prosecution of a claim, ordinarily is synonymous with 'probable cause' as used in the malicious prosecution context." (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 926 (*Uzyel*)). " 'Probable cause' to prosecute an action means an objectively reasonable belief that the action is legally tenable. [Citation.] There is no probable cause to prosecute an action only if no reasonable attorney would believe that the action had any merit and any reasonable attorney would agree that the action was totally and completely without merit. [Citations.] The probable cause determination is objective and is based on the facts known to the malicious prosecution defendant at the time the action was initiated or prosecuted." (*Id.* at pp. 926–927.)

"[R]easonable cause in this context does not require an objectively reasonable belief, based on the facts then known to the trustee, that the trustee would be completely exonerated. Instead, . . . reasonable cause to oppose a contest of an account requires an objectively reasonable belief, based on the facts then known to the trustee, either that the claims are legally or factually unfounded or that the petitioner is not entitled to the

requested remedies.” (*Uzyel, supra*, 188 Cal.App.4th at p. 927.) This is “a *low threshold* designed to protect a litigant’s right to assert arguable legal claims even if the claims are extremely unlikely to succeed.” (*Ibid.*, italics added.) “As with probable cause, we independently review the trial court’s finding on the existence of reasonable cause absent any factual dispute as to [the trustee’s] knowledge at the time.” (*Ibid.*)

Amster argues the trial court erred in failing to make an express ruling on reasonable cause in its January 13, 2016 order on her motion. But under the doctrine of implied findings, we must infer the trial court made all factual findings necessary to support the judgment. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) “The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.” (*Ibid.*) Thus, the trial court’s failure to make express findings on the issue of reasonable cause is of no moment. Furthermore, the trial court did make a finding in its September 10, 2015 judgment, stating: “[Mulberg’s] hard fought defense of his performance as trustee was justified in light of the demands imposed on him by Ms. Amster.”

In any event, it would have been error to find Mulberg lacked reasonable cause to oppose Amster’s contest. The primary issue raised in Amster’s petition and litigated at trial was whether Mulberg paid himself excessive compensation. The probate court ultimately determined Mulberg was entitled to recover a fee of 1 percent of the total trust corpus per annum, which is what a qualified corporate trustee would have charged the Trust for the same services. Based on its consideration of the evidence, the probate court exercised its equitable discretion and awarded Mulberg a 1.75 multiplier of that fee. Mulberg was surcharged the difference between this fee and the amount he paid himself out of the Trust. While the probate court rejected Mulberg’s arguments in favor of a higher fee, we cannot conclude those arguments were frivolous or that a reasonable attorney would not have made them. As is evident from our opinion in *Amster I*, Mulberg had at least a colorable basis to assert he was entitled to the fees charged.

Mulberg's arguments concerning the fees permitted by the trust instrument and those that could be charged by a qualified corporate trustee were not unreasonable.

Amster argues Mulberg's opposition must have been without reasonable cause because it was "entirely unsuccessful," pointing out that the probate court found Mulberg breached his fiduciary duties by charging for his services as both Trustee and as an attorney, billing the Trust for work performed by his son without first obtaining Amster's permission, and by failing to provide an annual accounting. Amster also takes issue with Mulberg's refusal to resign from his position as trustee. We remain unconvinced. Amster appears to be arguing an unsuccessful opposition is the same thing as one brought without reasonable cause. But there is a distinction. Amster's authority does not hold otherwise. In *Uzyel*, the court held a party had reasonable cause to bring a defense where he successfully opposed several substantial claims in the trial court. (*Uzyel, supra*, 188 Cal.App.4th at pp. 927–928.) The court did not hold that failure to prevail on any claim was sufficient to show a lack of reasonable cause. Moreover, Mulberg's opposition was not entirely unsuccessful, as the probate court rejected Amster's contention that Mulberg waived his right to fees by failing to submit a supporting declaration, and it also awarded Mulberg a 1.75 multiplier of his fees.

Amster also overstates the importance of the trial court's findings concerning Mulberg's breach of fiduciary duties, as that was not the primary focus of the case. Indeed, Amster stipulated that she did not intend to pursue any claims of theft, self-dealing, fraud, "or anything like that." As we held in *Amster I*, it was appropriate for the probate court to consider breaches of fiduciary duty in considering whether Mulberg's fees were excessive. However, Amster did not have an independent claim for breach of fiduciary duty. Nor is it clear to what extent the trial court's findings concerning breach factored into its decision to surcharge Mulberg. The more pertinent question here is whether Mulberg had reasonable cause to defend the fees he charged the Trust. He clearly did, and the alleged breaches of fiduciary duty were only one piece of this analysis.

In any event, we cannot say Mulberg lacked reasonable cause to contest the allegations of breach. For example, Amster makes much of the fact Mulberg violated section 15687, subdivision (b)³ by hiring Brett Mulberg, his son, to perform legal work for the Trust. But Mulberg presented evidence Amster was aware of the Mulbergs' relationship, and she wanted Brett to be involved with the Trust. It is true that Mulberg did not follow the procedures for notice set forth in section 15687, subdivision (d)⁴ before retaining Brett, but based on Amster's knowledge and actions, Mulberg had a colorable argument his conduct did not rise to the level of a breach. At the very least, he had a colorable argument that any breach did not warrant a reduction of his fee. We have similar concerns regarding Amster's other contentions regarding Mulberg's opposition to allegations of breach. But given that we have already determined a significant and material part of Mulberg's opposition had arguable merit, we need not discuss these points. (Cf. *Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1010 [sanctions for an appeal which is partially frivolous are appropriate only if the frivolous claims are a significant and material part of the appeal].)

³ Section 15687, subdivision (b) provides: "No parent, child, sibling, or spouse of a person who is a trustee, and no law partnership or corporation whose partner, shareholder, or employee is serving as a trustee shall receive any compensation for legal services performed for the trustee unless the trustee waives trustee compensation or unless the trustee obtains approval for the right to dual compensation as provided in subdivision (d)."

⁴ Section 15687, subdivision (d) states: "After full disclosure of the nature of the compensation and relationship of the trustee to all persons receiving compensation under this section, the trustee may obtain approval for dual compensation by either of the following:

"(1) An order pursuant to paragraph (21) of subdivision (b) of Section 17200.

"(2) Giving 30 days' advance written notice to the persons entitled to notice under Section 17203. Within that 30-day period, any person entitled to notice may object to the proposed action by written notice to the trustee or by filing a petition pursuant to paragraph (21) of subdivision (b) of Section 17200. If the trustee receives this objection during that 30-day period and if the trustee wishes dual compensation, the trustee shall file a petition for approval pursuant to paragraph (21) of subdivision (b) of Section 17200."

Because Mulberg had a reasonable basis to oppose Amster's petition, the trial court acted well within its discretion in denying Amster's request for fees.

2. Bad Faith

As section 17211 requires a finding of both lack of reasonable cause and bad faith, and since we have already found Mulberg had reasonable cause to oppose Amster's petition, the issue of bad faith is moot. Moreover, we are hard pressed to find Mulberg's opposition was brought in bad faith given he had reasonable cause to bring it. (See *Uzyel, supra*, 188 Cal.App.4th at p. 926, fn. 47.) We nevertheless consider Amster's arguments concerning bad faith as they overlap with issues of reasonable cause.

In contrast to the objective reasonable cause standard, “ ‘bad faith’ in this context concerns the trustee's subjective state of mind and cannot be inferred from the absence of [reasonable] cause alone.” (*Uzyel, supra*, 188 Cal.App.4th at p. 926, fn. 47.) While bad faith is not easily defined (*Moradi-Shalal v. Fireman's Fund. Ins. Companies.* (1988) 46 Cal.3d 287, 302), it generally “ ‘implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.’ ” (*Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 34.) As the presence of bad faith is a factual question, we review the probate court's determination for substantial evidence. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

Amster's arguments on bad faith echo many of the arguments addressed above. Once again, she asserts Mulberg lacked a colorable defense to the allegations concerning breach of fiduciary duties. But as discussed, this case was primarily about the fees Mulberg charged as trustee, and the breaches were only one of many elements used to determine the appropriateness of those fees. Moreover, Mulberg had a colorable basis to oppose these claims, even if he was not entirely successful. Amster further argues Mulberg hid the amount actually paid to him from the Trust assets in his accountings. Amster specifically takes aim at two payments, one for \$80,968.25, the other for \$35,000. While the trial court implicitly held these payments were for trustee services, and not for

legal fees incurred prior to Mulberg's appointment as a trustee, it never found Mulberg tried to hide them. Moreover, Mulberg presented evidence Amster was aware of these payments. Amster also argues we can infer Mulberg engaged in bad faith conduct because the only settlement offer he ever conveyed was \$0. This is hardly a smoking gun. Indeed, it is reasonable to infer Mulberg made this offer because he truly believed his case had merit.⁵

Finally, Amster argues we should reverse based on a remark made by the trial court at the hearing on the motion. Specifically, the court stated: "I believe [Mulberg] was so wedded to the idea that what he did was correct, that that drove the litigation, and that does not support a finding of bad faith." Amster asserts the evidence does not support a finding this is what drove Mulberg throughout the litigation, since there was no testimony on this subject and no evidence submitted regarding Mulberg's state of mind. According to Amster, it is pure speculation that Mulberg's defense was motivated in a good faith belief in his cause, as opposed to personal animosity towards Amster or "to his knowledge that any litigation was likely to cost more than it would recover."

The contention is unavailing. Mulberg testified at length at trial concerning his conduct as trustee. Based on this testimony, the probate court could have drawn reasonable inferences about his subjective state of mind and concluded he had a good faith belief in his opposition to Amster's contest. Even if the trial court's rationale for finding an absence of bad faith was questionable, for the reasons stated above, there was overwhelming evidence Mulberg's opposition to Amster's contest was brought in good faith and with reasonable cause. In light of this, the trial court would have abused its discretion if it found section 17211 warranted the award of attorney fees.

⁵ Amster also argues Mulberg engaged in bad faith by refusing to recognize Amster's right to remove him as trustee. But the pertinent question is whether Mulberg's opposition to Amster's contest was made in bad faith, not whether he engaged in bad faith while trustee. And at the very least, Mulberg had a colorable basis for asserting the trust instrument did not grant Amster an unlimited right to remove and appoint trustees after her mother's death. Nothing about Mulberg's conduct suggests bad faith.

For these reasons, and the reasons stated above, we affirm the trial court's denial of Amster's request for attorney fees pursuant to section 17211.

B. Costs

Amster next asserts the probate court erred in denying her motion for costs and granting Mulberg's motion to tax costs. We agree the trial court abused its discretion.

As Mulberg concedes, the probate court's decision to deny costs to Amster is "unexplainable." At the December 14, 2015 hearing, the probate court stated it was denying Amster's request because, in the September 10, 2015 judgment, the court provided Mulberg with the opportunity to recover his own costs pursuant to section 17211, subdivision (a). This is true, but on October 28, 2015, the probate court reversed course and found Mulberg was not entitled to fees or costs under section 17211. Section 17211, subdivision (a) provides a court may award costs and attorney fees against a beneficiary who contests a trustee's accounting without reasonable cause and in bad faith. In the October 28, 2015 order, the probate court found the statute was inapplicable here because "Amster's challenge to the trustee's accounting . . . was not frivolous or in bad faith." Thus, the probate court's conclusion that Amster's request for costs was precluded by the judgment was clearly erroneous and amounted to an abuse of discretion.

As Mulberg argues, a trial court's oral comments generally may not be used to impeach the order on appeal. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268.) The rationale for this rule is that "a trial court retains inherent authority to change its decision, its findings of fact, or its conclusions of law at any time before entry of judgment and then the judgment supersedes any memorandum or tentative decision or any oral comments from the bench." (*Ibid.*) But here the probate court's written order states the ruling was made "[f]or the reasons stated on the record at the time of the hearing." As the trial court adopted its oral statements at the hearing in its written order, we cannot ignore those statements in considering whether the trial court abused its discretion.

While we find the trial court erred in failing to exercise its discretion, we disagree with Amster's contention she was entitled to costs as a matter of right. Amster relies on

Code of Civil Procedure section 1032. That statute does not apply in this context. It provides a prevailing party is entitled to recover costs “[e]xcept as otherwise expressly provided by statute.” (Code Civ. Proc., § 1032, subd. (b).) Here, the Probate Code sets forth an alternative criteria for awarding costs. Specifically, section 1002 provides a probate court “may, in its discretion, order costs to be paid by *any party* to the proceedings, or out of the assets of the estate, as justice may require.” (Italics added.) Thus “although Code of Civil Procedure section 1032, subdivision (b) entitles a prevailing party in ordinary civil litigation to costs as a matter of right, the probate court retains discretion to decide not only *whether* costs should be paid, but also, if they are awarded, who will pay and who recover them.” (*Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 99.) Courts “are loath to circumscribe the probate court’s discretion” in these matters. (*Ibid.*)

For these reasons we vacate that portion of the trial court’s ruling denying Amster’s request for costs and granting Mulberg’s petition to tax costs, and we remand so that the trial court may appropriately exercise its discretion.

III. DISPOSITION

The January 13, 2016 order is affirmed to the extent it denied Amster’s motion for attorney fees. We vacate the order to the extent it denied Amster’s motion for costs and granted Mulberg’s motion to tax costs, and remand for a decision consistent with this opinion. Mulberg shall recover his costs on appeal.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.

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