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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)

DANA BIDOUC et al.,
Plaintiffs and Appellants,
v.
MARK H. CIBULA, As Executor, etc.,
Defendant and Respondent.

C066192
(Super. Ct. No. 25140)

Following a bench trial, the trial court determined that Franklin Cibula,¹ former trustee of the John B. Bidou Trust, breached his fiduciary duties as trustee. The court found in

¹ Cibula died prior to trial, and plaintiff Enid Bidou, the current trustee, filed a creditor's claim with his estate. Respondent Mark Cibula, Cibula's son and executor of his estate, took over the defense of the underlying petition.

pertinent part that but for Cibula's breach, the trust estate would have accrued an additional \$316,828 in profits.

Plaintiffs Dana Bidou, a trust beneficiary, and Enid Bidou,² the current trustee, appeal, contending the trial court erred in failing to award attorney fees (Prob. Code,³ § 17211, subd. (b)); prejudgment interest (§ 16440, subd. (a)); or costs (§ 16420, subd. (a)(3)). They also assert that the court erred in concluding that Cibula "should be held accountable . . . through to his removal in 2007," as opposed to the entry of judgment in July 2010.⁴

We shall conclude that plaintiffs are entitled to whatever additional profits would have accrued from the date of Cibula's removal as trustee to the entry of judgment and remand the matter to the trial court for a calculation of such damages. We shall otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the trial court's Statement of Decision or from the record and are undisputed except where otherwise indicated.

Testator John R. Bidou died in 1977. His will created a

² For clarity, we shall refer to Dana and Enid Bidou by their first names; no disrespect is intended.

³ Further unspecified statutory references are to the Probate Code.

⁴ On July 20, 2011, this court dismissed respondent's cross-appeal.

trust for his four grandchildren and directed that the trustee hold the trust assets until each child reached age 35. Bidou's grandchildren are: Dana, who reached age 35 in 1997; Cory Bidou, who reached age 35 in 1999; John B. Bidou, who reached age 35 in 2003; and Marci Bidou, who reached age 35 in 2004.

After specific bequests, the will provided that the residue was to be placed in trust for the four grandchildren. The residue of Bidou's estate, which was placed in trust in 1978, consisted of cash in the amount of \$102,701.66 and certain mineral rights that had an appraised value of \$1,250.⁵

The will named Bidou's son, John B. Bidou, Jr., as trustee. As of September 1980, the trust assets consisted of \$86,945.30 in cash and the mineral rights. In June 1982, the court removed Bidou, Jr. as trustee and named Cibula successor trustee.⁶

In September 2006, Dana filed a petition seeking an accounting and final distribution of the trust estate. Cibula had not filed any trust accounts since his appointment in 1982.

⁵ Plaintiffs claim that the "initial property on hand [was] \$77,965.05, which presumably includes the mineral rights." Even assuming plaintiffs are correct, that fact has no bearing on the issues raised in this appeal.

⁶ Plaintiffs claim that Bidou, Jr. "never was given the opportunity by Franklin Cibula to serve as trustee. [Cibula] never relinquished control of the estate assets to [Bidou, Jr.]" Even assuming plaintiffs are correct, plaintiffs fail to explain what, if any impact, that fact has on the issues raised in this appeal.

In November 2006, Cibula filed a petition for approval of first accounting of trustee. Dana opposed the petition, requested Cibula be removed as trustee, and sought attorney fees pursuant to section 17211, subdivision (b).⁷

The court denied Cibula's petition for approval of first accounting; removed him as trustee; appointed Enid as successor trustee; and ordered him to "turn over all assets of the trust presently in his possession or under his control in the minimum amount of \$233,432.00 to Enid Bidou as successor trustee; by 3/12/07." The court further ordered Cibula to pay Dana's attorney fees and costs in the amount of \$13,616.35. Cibula turned over \$233,432 to Enid and paid the \$13,616.35 in attorney fees.⁸

Nine months later, in February 2008, plaintiffs filed a petition for order redressing breach of fiduciary duty pursuant to section 16420, subdivision (a)(3), which authorizes a beneficiary "[t]o compel the trustee to redress a breach of trust by payment of money or otherwise."

⁷ Section 17211, subdivision (b) provides in pertinent part: "If a beneficiary contests the trustee's account and the court determines that the trustee's opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account."

⁸ By that time the mineral rights had already been distributed to the four grandchildren.

At trial, respondent admitted Cibula breached his fiduciary duties as trustee. The primary issues at trial were (1) whether Cibula met the standards set forth in the Uniform Prudent Investor Act codified in section 16047, and (2) the proper measure of damages.

The trial court concluded that Cibula had met the prudent investor standards from 1982 through 1984, but that he "should be held accountable for the period of his administration commencing in 1985 through to his removal in 2007." In particular, the court found that but for Cibula's breach of his fiduciary duties as trustee, the trust estate could have accrued an additional \$316,828 in profits. The court rejected plaintiffs' assertion that Cibula also was chargeable with a loss or depreciation in value of the trust estate, noting that when Cibula assumed control as successor trustee the value of the trust was \$86,945.30, during his tenure as trustee he distributed \$386,340 to the four grandchildren, and when he was removed as trustee he turned over \$233,432 in cash to Enid.⁹

⁹ The court ordered Cibula's estate to pay plaintiffs \$393,993 to redress Cibula's breach of his fiduciary duties, plus \$13,140.77 in lost interest on unpaid mineral rights, plus \$12,171.53 in penalties and interest on unpaid income taxes, plus 10 percent interest from the date of entry of judgment until paid.

DISCUSSION

I

Plaintiffs Are Not Entitled To Attorney Fees Under Section 17211, subdivision (b)

Plaintiffs first contend the trial court erred in refusing to award them their attorney fees under section 17211, subdivision (b). They are mistaken.

Section 17211, subdivision (b) gives the trial court discretion to award attorney fees to a trust beneficiary who "contests the trustee's account" if the court determines the trustee's opposition to the contest was "without reasonable cause and in bad faith"

As the trial court explained in its Statement of Decision, this action began as a contest of Cibula's account; however, that matter was resolved in Dana's favor, and Dana was awarded her attorney fees pursuant to section 17211, subdivision (b) in the sum of \$13,616.35. The present petition was filed nine months after the contest was concluded and after plaintiffs engaged in extensive discovery through which they "learn[e]d of the many failures on the part of [Cibula] to properly carry out his duties as a trustee" On this record, we cannot find that the instant petition constitutes a contest to the trustee's account within the meaning of section 17211, subdivision (b).

This case is distinguishable from *Leader v. Cords* (2010) 182 Cal.App.4th 1588 (*Leader*), relied on by plaintiffs.¹⁰ There, the trustee's account "revealed that the trust had remaining assets and no liabilities. The trustee, however, refused to make a final distribution based on a collateral dispute that did not pertain to the trust. The beneficiaries successfully petitioned the probate court for an order compelling the trustee to distribute the remaining assets." (*Id.* at p. 1591.) The probate court refused to award the beneficiaries their attorney fees, finding "'this is not an action on an accounting.'" (*Id.* at p. 1594.) The court of appeal reversed, finding that "'the mere furnishing of an account showing the receipt of trust funds and the use made thereof does not fulfill the duties of a trustee. He is under the further constraint to deliver the

¹⁰ Contrary to respondent's assertion, plaintiffs' failure to cite *Leader* in the trial court does not preclude them from relying on it on appeal because the issue addressed therein was raised in the trial court. We likewise reject respondent's contention that plaintiffs waived this or any of their other claims on appeal by failing to object to the Statement of Decision. The doctrine of implied findings, relied on by respondent, requires that an appellant "bring ambiguities and omissions in the factual findings of the statement of decision to the trial court's attention. If the appellant fails to do so, the reviewing court will infer the trial court made every implied factual finding necessary to uphold its decision, even on issues not addressed in the statement of decision." (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 48.) As we understand them, plaintiffs' claims do not involve ambiguities or omissions in the Statement of Decision. Moreover, plaintiffs raised each of their claims on appeal in their opposition to the trial court's Statement of Intended Decision.

property to his beneficiary, since the latter is the rightful owner.’ [Citation.] [The trustee’s] duty to account was inseparable from his duty to carry out the terms of the Trust by distributing the remaining Trust assets, and [the beneficiaries’] petition arose from and was directly related to his account.” (*Id.* at pp. 1598-1599.)

Here, unlike the trustee in *Leader*, Cibula never refused to distribute trust assets. To the contrary, before the instant petition was filed, Cibula had distributed or turned over all trust assets in his possession. Moreover, unlike in *Leader*, a trust beneficiary, Dana, was awarded attorney fees in the amount of \$13,616.35 under section 17211, subdivision (b) in an earlier proceeding contesting Cibula’s account.

The trial court properly concluded plaintiffs were not entitled to their attorney fees under section 17211, subdivision (b).

II

Plaintiffs Are Not Entitled To Prejudgment Interest

Plaintiffs next contend the trial court erred in failing to award prejudgment interest pursuant to section 16440. Again, they are mistaken.

Section 16440 sets forth the measure of liability for a breach of trust. Subdivision (a) of that section provides: “If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the

trust estate resulting from the breach of trust, *with interest*.

[¶] (2) Any profit made by the trustee through the breach of trust, *with interest*. [¶] (3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust." (Italics added.)

Here, the trial court found section 16440, subdivision (a)(1) is inapplicable because "the breach in this matter did not result in any loss or depreciation in value of the trust estate." The court likewise determined that section 16440, subdivision (a)(2) is inapplicable because "[t]here is no evidence that [Cibula] himself derived any profit from the trust assets." Rather, citing section 16440, subdivision (a)(3), the court found that "[Cibula] should be held accountable only for the profit, without interest, that could have accrued to the trust estate if he had not breached his duties."

Plaintiffs assert the trial court erred in failing "to award Petitioners the loss in value of the trust estate resulting from the breach of trust, with interest, as authorized under Probate Code § 16440(a)(1)." As the trial court explained in its Statement of Decision, that subdivision is inapplicable where, as here, the value of the trust estate *increased* during the trustee's administration. To the extent the trust estate would have increased even more but for the trustee's breach of his fiduciary duties, those "lost profits" are recoverable under section 16440, subdivision (a)(3), which as discussed below, does not provide for interest.

Plaintiffs also urge that “[t]he trial court should have awarded prejudgment interest even if the proper measure of damages was Probate Code Section 16440(a)(3).” However, the inclusion of the words “with interest” in subdivisions (a)(1) and (2), and the omission of those words from subdivision (a)(3) evidences an intent on the part of the Legislature to exclude interest from lost profits awarded under subdivision (a)(3). (See e.g., *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1040.)

Uzyel v. Kadisha (2010) 188 Cal.App.4th 866, cited by plaintiffs, is of no assistance. There, the court held “that the omission of the words ‘with interest’ in section 16440, subdivision (a)(3) was not intended to, and does not, preclude an award of prejudgment interest under Civil Code section 3287, subdivision (a).” (*Id.* at p. 922, italics added.) Plaintiffs, however, insist that they “have raised no issue under [Civil Code Section 3287, subdivision (a)] on this appeal” Thus, the trial court properly concluded that plaintiffs are not entitled to prejudgment interest.

III

Plaintiffs Are Not Entitled to Recover Their Accounting And Trustee Fees From Cibula’s Estate

Plaintiffs also contend the trial court erred in concluding they were not entitled to recover their accounting and trustee fees from Cibula’s estate. We disagree.

"The right to recover costs is purely statutory." (*Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 241; accord, *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989.) The first issue, therefore, is which statutory rule controls the allocation of costs in this action. Section 16420, subdivision (a)(3), relied upon by plaintiffs, provides that "[i]f a trustee commits a breach of trust . . . a beneficiary . . . of the trust may commence a proceeding for any of the following purposes that is appropriate: [¶] . . . [¶] (3) To compel the trustee to redress a breach of trust by payment of money or otherwise." It says nothing about costs.

Rather, costs are addressed in section 1002, which grants the trial court "discretion [to] order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." Section 1002 does not generally define allowable costs or specifically authorize an award of expert or trustee fees as costs in probate proceedings.

Code of Civil Procedure section 1033.5, on the other hand, specifically defines costs to encompass only those expert witness fees of court-appointed experts and does not include trustee fees.¹¹ Moreover, under section 17211, subdivision (b),

¹¹ A trustee, of course, is entitled to be compensated for her services and reimbursed for her expenditures properly incurred in the administration of the trust from the trust estate. (See §§ 15680, 15681, 15684.) Here, however, plaintiffs seek to hold Cibula's estate responsible for such costs.

a trial court has discretion to award a trust beneficiary her "costs of the contestant and other expenses and costs of litigation, including attorney's fees" incurred in successfully contesting a trustee's account. As previously discussed, however, the present petition does not constitute a contest to Cibula's account.

Plaintiffs nevertheless insist that they are not seeking costs, as such, but rather damages incurred as the result of Cibula's breach of his fiduciary duties. According to plaintiffs, "where the tort of the trustee results in a loss to the beneficiaries, and the beneficiaries are compelled to expend fees and costs to determine the amount of the loss separate and apart from the usual maintenance of the trust, those fees and costs may be charged to the defalcating trustee under the usual measure for tort damages."

Plaintiffs cite to *David v. Hermann* (2005) 129 Cal.App.4th 672 (*David*) in support of their argument. There, the trial court awarded attorney fees as an element of damages under *Prentice v. North American Title Guar. Corp.* (1963) 59 Cal.2d 618, 620 (*Prentice*), which held that "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a *third person* is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred.'" (*David, supra*, 129 Cal.App.3d at pp. 687-688, italics added.) The court of appeal

reversed, finding *Prentice* "has no application to the present case." (*Id.* at p. 689.) The court explained that "the petition was essentially a two-party lawsuit" and "[u]nlike *Prentice*, the judgment for attorney fees did not represent 'an application of the usual measure of tort damages' [citation], but rather was a device to award attorney fees in probate proceedings." (*Ibid.*)

The same is true here. The present petition is essentially a two-party lawsuit. Moreover, it was brought as a means of redressing Cibula's breach, not as means of mitigating the damages caused by the same. (See *David, supra*, 129 Cal.App.3d at p. 688; see also *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 910.) The mitigation of such damages was achieved in the prior proceeding that resulted in Cibula's removal as trustee and the transfer of all trust assets in his possession to Enid.

The trial court properly concluded plaintiffs are not entitled to recover their accounting and trustee fees from Cibula's estate.

IV

Plaintiffs Are Entitled To Profits That Would Have Accrued From The Date of Cibula's Removal As Trustee To The Date of Entry of Judgment

Finally, plaintiffs claim the trial court erred in calculating the amount of profit that could have accrued had Cibula not breached his fiduciary duties as trustee. More particularly, they assert that the court erred in concluding that Cibula "should be held accountable for the period of his administration commencing in 1985 *through to his removal in*

2007," as opposed to the date judgment was entered -- July 14, 2010. (Italics added.) Plaintiffs note that respondent's own expert conceded that his calculations should have run through the entry of judgment. We agree.

The trial court found that the trust estate could have accrued an additional \$316,828 in profits had Cibula not breached his duties as trustee. That figure was calculated using an imputed interest rate based on "an average of 3 month and 3 year interest rates provided by government bonds [¶] . . . [¶] . . . applicable in the years starting with a beginning balance as determined at the beginning of the year 1985" and ending in May 2007 when Cibula was removed as trustee.

While Cibula turned over all trust assets in his possession after he was removed as trustee in 2007, as plaintiffs note, the trust estate would have been significantly larger but for Cibula's breach. Thus, plaintiffs continued to suffer damages as a result of Cibula's breach after Cibula was removed as trustee insofar as they were precluded from earning any profits on those lost profits until paid.¹² Accordingly, the trial court erred in refusing to include in its lost profits calculation those profits that would have accrued from the time of Cibula's removal in 2007 to the time judgment was entered on July 14,

¹² Respondent's suggestion that the \$316,828 figure may include lost profits through June 2009 is not well taken. The record makes plain that the \$316,828 figure, calculated by respondent's expert, only ran through 2007.

2010. The matter is remanded to the trial court with directions to calculate the amount of such profits.

DISPOSITION

The judgment is reversed insofar as it limits plaintiffs' lost profits to those that would have accrued through Cibula's removal as trustee in 2007. The matter is remanded to the trial court to calculate the amount of profits that would have accrued from the date of Cibula's removal to the entry of judgment. The judgment is affirmed in all other respects. Each party shall bear their own costs on appeal. (§ 1002; Cal. Rules of Court, rule 8.278, subd. (a)(4).)

BLEASE, Acting P. J.

We concur:

HULL, J.

BUTZ, J.