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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Estate of PAUL ALLEN RULE, Deceased.

JAMES KEENAN,

Plaintiff and Appellant,

v.

BETTY M. RULE,

Objector and Respondent.

D058759

(Super. Ct. No. P161699)

APPEAL from orders of the Superior Court of San Diego County, William H. Kronberger, Judge. Affirmed.

Petitioner and appellant James Keenan (Keenan), who served until 2004 as the administrator of the Estate of Paul Rule, deceased ("Rule's Estate"), filed his amended final account and petition for settlement of the estate and allowance of fees, under

Probate Code¹ section 1060 et seq. (the amended account). Objections were filed by the current administrator, respondent and objector Betty Rule (Objector or Betty Rule, mother of Paul Rule). The probate court conducted a bench trial in 2008 on the disputed issues identified by the parties in their joint trial statement. The probate court's September 16, 2010 order surcharged Keenan over \$1.9 million for his breaches of care and fiduciary duty that took place while he was acting as independent administrator of the Rule Estate. The court approved, only in part, his amended account, while deferring final settlement of the estate until further proceedings were conducted on the requests to allow fees (not involved in this appeal). Keenan's motion for new trial was denied.

Keenan appeals the orders imposing the surcharges and partially approving the amended account. (§ 1300, subd. (g) [surcharge order appealable]; Code Civ. Proc., § 904.1, subd. (a)(2) [denial of new trial, appealable order].) Keenan contends the probate court utilized an incorrect burden of proof standard, and further, that insufficient evidence supported the imposition of the surcharges as remedies for his breaches of fiduciary duty and the applicable standard of care in his administration of Rule's Estate. A large portion of his Rule Estate administration was carried out while Keenan was

¹ All further statutory references are to the Probate Code unless noted. Keenan served from 1994-2004 under the Independent Administration of Estates Act. (IAEA; § 10400 et seq.)

participating in his personal bankruptcy reorganization proceedings, beginning in 1996, in which Rule's Estate was an alleged creditor and debtor.²

During Keenan's bankruptcy proceedings, from 1996 to 2002, the trustee for his bankruptcy estate brought several adversary proceedings to determine the respective interests of Keenan and Rule's Estate in several of their real property ventures, and the results of those proceedings were reflected in the probate court's decision upon Keenan's amended account. As relevant here, Rule's Estate, acting through Keenan, entered into a stipulated judgment in favor of Keenan's bankruptcy estate and against the Rule Estate, for \$849,392, stemming from "investment loans" that Keenan represented he had made to Paul Rule ("Mr. Rule"), when granting Mr. Rule a percentage interest in certain property ventures. Also, Keenan as the Rule Estate administrator failed to contest his own bankruptcy trustee's decision to disallow a particular 1988 promissory note that Keenan had made in favor of Mr. Rule, which had a balance due in 1993 of approximately \$84,590.36 (the "\$84,000 note").

Having reviewed the record, we conclude it strongly supports the probate court's orders surcharging Keenan and accepting, with restrictions, his amended account. Substantial evidence supports the court's determinations that as the Rule Estate administrator, Keenan breached his fiduciary duties, did not act with due care, and caused losses to that Estate for which he should be surcharged. The court did not apply an incorrect burden of proof nor incorrectly assess the evidence, and the orders are affirmed.

² *In Re James Keenan*, U.S. Bankruptcy Court, No. 96-00871 B11 (the Keenan bankruptcy).

I

BACKGROUND

This general outline of facts concerning the Rule Estate and its relationship with Keenan's bankruptcy proceedings will be supplemented in the discussion portion of this opinion, as necessary.

A. Creation of Estate in 2004; Keenan as Administrator

In the 1980's-1990's, Keenan ran a real estate management company, Data Property Services, and Mr. Rule was his longtime employee and friend. Mr. Rule had a California real estate broker's license, and Keenan had a real estate sales agent license. In the 1984-1987 time frame, Mr. Rule and Keenan entered into several oral agreements that Mr. Rule would obtain an unrecorded ownership interest in some of Keenan's real property partnership or joint venture projects, and Keenan would be compensated through credits given to Mr. Rule, who sometimes acted as the broker, from the sales proceeds or rents from the various projects. They did not arrange to have Mr. Rule's name added to the title on any of those properties they obtained or managed.

Keenan's business employed accountants, Thomas Perlowski and Kenneth Cunningham, for business and tax purposes, and they worked with both Keenan and Rule. Their accounting ledgers showed some of the property interest transactions between the two principals. In 1988, Keenan executed a \$185,000 promissory note in favor of Mr. Rule in one of their business transactions (sometimes referred to as a mirror note), and the copy of the note in the record shows that it was paid down to the \$84,000 owing to Mr. Rule.

On December 6, 1993, Mr. Rule died without leaving a will. His closest survivor and heir, his elderly mother Betty Rule, accepted Keenan's offer to serve as the independent administrator of his estate, because Keenan was knowledgeable about Mr. Rule's financial affairs, and Betty was not. (§ 10400 et seq.) Mr. Rule's other family members agreed (brother and girlfriend, Karen Barberio).

Keenan was appointed as administrator in 1994. On September 8, 1994, Keenan filed his inventory and appraisal (I&A), showing that the Rule Estate had assets amounting to \$1,651,787.65, mostly from its agreed-upon percentage interests in their partnership real property projects. This I&A described the four Oceanside real properties in which Rule had obtained a specified percentage interest, and gave their assessor's parcel numbers. They included: 2001-2003 South Hill Street (a 40 percent tenancy in common interest); 2009 Hill Street (a 40 percent tenancy in common interest); and a property on South Tremont St. (a 20 percent tenancy in common interest). For the Loma Alta Industrial Park, Keenan reported that Rule had a 7.672 percent interest as a tenant in common with Keenan and others (who are not parties to this appeal).

The same 1994 I&A was attached as an exhibit to the amended account Keenan filed in 2005, after his removal. The supplemental I&A filed in 2004 by the replacement administrator, Betty Rule, added a fifth Rule Estate property interest, the "Wisconsin-Cleveland" property (a 20 percent undivided interest, addition not disputed here; these Keenan/Rule projects are designated here the "five real properties").

Keenan did not file any creditor's claims on his own behalf against the Rule Estate, for amounts Mr. Rule might have owed to him on the five real properties. (§ 9100 et

seq.; Code Civ. Proc., § 366.2.) In the 1996 federal tax return Keenan filed on behalf of the Rule Estate, "Form 706," he showed that he personally owed a \$67,640 promissory note to the estate, and the Rule Estate owed him \$350,000 in "investment loans."³

From 1998 to 2004, Keenan, as administrator, employed attorney Kevin C. Young for some Rule Estate business, particularly in the bankruptcy proceedings. Young also represented another of Keenan's and Mr. Rule's assets, the Mikal Corporation, in the bankruptcy. Attorney Young did not review the probate files for the Rule Estate, and Keenan was still conducting the majority of the Rule Estate's business.

In 2004, Keenan was removed as the administrator for the Rule Estate.

B. Litigation About Rule Estate Interests in Keenan's Bankruptcy Proceedings

In January 1996, when Keenan filed for personal bankruptcy reorganization under Chapter 11, he listed the Rule Estate as one of many creditors and debtors of his bankruptcy estate. For several years beginning in 1996, the bankruptcy trustee (Ross Pyle, represented by attorney Jeffrey Isaacs) litigated two adversary actions he filed to determine the Rule Estate's interests in the five real properties, as Keenan was claiming he was entitled to offsets for monies the Rule Estate owed him from other partnership projects.

³ At trial, the court did not grant any relief on the Rule Estate's claim of loss from the actions of Keenan as administrator in filing its federal estate tax returns and participating in its audit proceedings. As successor administrator, Betty Rule prevailed in an IRS appeal of deficiencies assessed against the estate. No issues on appeal are raised concerning Keenan's administration on tax matters.

The bankruptcy trustee hired an accountant, Francine Meyers (since deceased) to go over Keenan's 800-900 boxes of business documents, which had been seized due to the trustee's concerns about maintaining their integrity. Negotiations to resolve the existence and amount of the Rule Estate interests were unsuccessful. In 2001, the bankruptcy trustee filed a motion for summary judgment in the adversary matter, to resolve the alleged Rule Estate indebtedness. No written note from Mr. Rule in Keenan's favor was ever found, and his name was not on the title of the five real properties.

Until 2004, Keenan continued to serve as the administrator for Rule's Estate, and he and his accountants, Cunningham and Perlowski, worked with Keenan's bankruptcy trustee and Meyers, the CPA hired by the trustee, to resolve the interrelated financial issues between the two estates (Rule and bankruptcy). In April 1999, Keenan amended his bankruptcy petition asset schedule to add references to a note receivable from Paul Rule in the amount of \$349,998.

According to testimony from Mr. Rule's girlfriend, in her presence, many times between 1998 and 2005, Keenan told Betty Rule she need not be concerned about her son's financial affairs with Keenan, and she need not pay any attention to any of those things; roughly, "Don't worry about it. I'm taking care of it. If anything comes of this, I'm going to pay you back. You're not going to lose any money, so don't worry about it. I'm taking care of everything."

At Keenan's request, Betty Rule signed documents to be filed in the bankruptcy matter concerning the summary judgment motion and opposition that eventually led to

the stipulated judgment in the adversary matters. She later filed a motion to set aside that stipulation, but the bankruptcy court and the federal district court denied her request.

During the Keenan bankruptcy proceedings, he never opposed the bankruptcy trustee's disallowance of Keenan's promissory note owed to the Rule Estate, which occurred on April 20, 1999, while Keenan was still serving as the administrator for the Rule Estate. The note was originally in the amount of \$185,000, and the copy admitted at trial shows handwritten calculations of the \$84,000 balance due.

On July 15, 2002, Keenan, as the Rule Estate administrator, stipulated to a \$849,392 judgment to resolve the adversary proceedings that had been brought by the bankruptcy trustee, to avoid the five real property interests of the Rule Estate. The noncontested order approving the stipulation was entered on August 27, 2002. This judgment in favor of Keenan's personal bankruptcy estate was based in part upon his representations in the bankruptcy schedules that there was a note receivable from Paul Rule in the amount of \$349,998. However, the record does not contain such a written note, and the amount of the stipulated judgment, including interest, was arrived at through the calculations of Keenan's accountants, Cunningham and Perlowski, in cooperation with the bankruptcy trustee's accountant, Meyers.

C. Current Probate Proceedings; Trial and Rulings

Once Keenan was removed as the administrator for the Rule Estate, in May 2005, he filed his account and petition for settlement, as amended in August 2005. (§§ 10952, 1061, subd. (a)(1).) In the amended account, he attached a copy of his original 1994 I&A

that described all Rule Estate property on hand, and that specifically identified the percentage interests owned by the Rule Estate in the five real properties.

In October 2005, Betty Rule filed objections to the amended account, and the matter was set for trial. In the joint trial statement, the parties limited the contested major issues to (a) whether Keenan breached his fiduciary duty and should be surcharged, based on the stipulated judgment against the Rule Estate entered in favor of his own bankruptcy estate; (b) breach of Keenan's duties based on his nonopposition to his bankruptcy trustee's disallowance of the Keenan note balance owed to the Rule Estate; and (c) the tax return and liability issues (not pursued on appeal; see fn. 3, *ante*).

At the six-day trial in 2008, numerous witnesses testified and numerous exhibits were received in evidence, as will be described in further detail, *post*. Work papers from Keenan's accountants, Cunningham and Perlowski, were entered into evidence at trial. Other work papers from the bankruptcy trustee's accountant, Meyers, that were found in the file of the attorney for the bankruptcy trustee were offered at trial, but only a portion of them was received into evidence.⁴

At trial, Betty Rule testified that she did not understand what her late son's financial interests in the five real properties were, or what the summary judgment proceedings in bankruptcy were supposed to achieve, or how or why the stipulated judgment was necessary for the interests of the Rule Estate.

⁴ Both the Objector and Keenan have lodged their trial exhibits with this court.

At the conclusion of trial on March 11, 2008, the probate court rendered its oral ruling on submitted matters, explaining its reasoning process in detail and summarizing the evidence. On September 16, 2010, the court issued its formal order, making findings of fact that Keenan had not established, by a preponderance of the evidence, that Mr. Rule was indebted to Keenan for the acquisition of the five real properties (the subject of the stipulated judgment against the Rule Estate). The court disapproved the amended account with respect to its treatment of the percentage ownership interests of the Rule Estate in the five real properties. In the order, these interests were recited in the order as they were "reflected in the Inventory and Appraisements" filed by Keenan.

With respect to the stipulated judgment, the court ruled that Keenan had failed to exercise ordinary prudence and care when he compromised his bankruptcy claim against the Rule Estate, through his entry into the stipulation on its behalf. With respect to the bankruptcy trustee's disallowance of the Keenan note to Rule, the court found that he had breached his fiduciary duty to the Rule Estate, by not contesting that action by the trustee.

In the formal order, the court approved the amended account, with the exception of the treatment of the percentage interests, and ordered that Keenan was surcharged for his breaches of duty, in the total amount of \$1,980,333.54 including interest. This amount was broken down, first, into a sum of \$406,642.94 to compensate for the disallowed Keenan note plus interest owed to the Rule Estate. Next, regarding the

stipulation in the bankruptcy proceedings of Keenan's claim against the Rule Estate, Keenan was surcharged for the total amount of \$1,573,690.60.⁵

Later, Keenan's motion for new trial was denied. Keenan appeals.

II

ISSUES PRESENTED AND CONTENTIONS ON APPEAL

A. Applicable Standards of Review

Keenan challenges several aspects of the order surcharging him on his amended account. He contends the probate court did not utilize the correct burden of proof at trial, there was evidentiary error, and insufficient evidence supported the factual findings underlying the imposition of the surcharges. Specifically, he contends there was no adequate showing that (1) he breached the applicable standard of care, with regard to his entry as administrator into the stipulated judgment in bankruptcy against the Rule Estate, or (2) breached his fiduciary duty as administrator by failing to contest, in his bankruptcy, the trustee's disallowance of his debt to Rule.

This order settling the amended account and surcharging Keenan was issued following a bench trial, in which the probate court heard testimony and reviewed documents to resolve the issues identified in the joint trial statement. In reviewing such an order after trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision."

⁵ Keenan's additional fees requests to allow his own attorney and accountant fees, and any administrative fees if not waived, were deferred for later probate resolution, and need not be considered on this appeal.

(*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.) The ultimate facts found in the court's order, equivalent in this case to a statement of decision, necessarily include findings on the intermediate evidentiary facts that sustain them. (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1125 (*Muzquiz*).

The appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630.) "Substantial" evidence has " 'ponderable legal significance, . . . [and is] reasonable in nature, credible, and of solid value.' " (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.) In determining its existence, we look at the entire record on appeal rather than simply considering the evidence cited by a party. (*Ibid.*) We may not reweigh the evidence and are bound by the trial court's credibility determinations. (*Howard, supra*, at p. 631; see *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1384.)

The substantial evidence rule applies on appeal of a probate court's decision to accept or disapprove an administrator's accounting, and the appellant has the burden of showing error. (*Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 471; *Estate of Massaglia* (1974) 38 Cal.App.3d 767, 774-778.) "[I]n the absence of a challenge to findings it is assumed that they are supported by the evidence and that they support the judgment [citation]." (*Id.* at p. 778.) It is "the elementary duty of an appellant to set forth all of the evidence on an issue if the sufficiency thereof is challenged." (*Ibid.*)

To the extent the trial court's evidentiary rulings are challenged on appeal, we apply an abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) The probate court's discretionary decisions are evaluated in light of the record and applicable precedents, and the court must "exercise [its] discriminating judgment within the bounds of reason. [Par.] To exercise the power of judicial discretion all the material facts in evidence must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision." [Citations.] "The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason." [Citations.] [¶] ". . . To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice" [Citation.]" (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1449.)

B. Duties of Administrator

As the standard of care for an administrator's management and control of the estate, section 9600, subdivision (a) requires the use of ordinary care and diligence, and "[w]hat constitutes ordinary care and diligence is determined by all the circumstances of the particular estate." Section 9640 provides that the independent authority of an administrator or personal representative under the IAEA (§ 10400 et seq.) is not limited by those standards. However, section 10500 in the IAEA further requires that the independent administrator "shall administer the estate in the same manner as a personal representative who has not been granted authority to administer the estate under this

part," i.e., by using ordinary care and diligence, and the probate court appropriately applied that standard in this case.

Section 10501, subdivision (a)(8) in the IAEA requires that an independent administrator shall seek probate court supervision and authority for any "[a]llowance, payment, or compromise of a claim of the personal representative, or the attorney for the personal representative, against the estate." Where an administrator has acted outside the applicable statutory framework (e.g., to compromise an estate's claim personally involving the administrator), that action in excess of authority waives statutory protections from liability, such as would have been provided by prior court approval of the particular kind of claim. The estate can recover against the former administrator if it shows "the compromise was improvident and damaged the estate." (*Treharne v. Loftin* (1984) 153 Cal.App.3d 878, 886.)

Where an administrator has improperly "in effect abdicated all of her duties to the estate" and failed to maintain control and thus to protect the estate, she may properly be surcharged for losses to the estate. (*Estate of Guiol* (1972) 28 Cal.App.3d 818, 826.) Although the administrator might have been protected from liability for a different estate-related decision, if she could have shown there was reliance on advice of legal counsel on a matter of "business advice," that was not the case before the court, where that attorney had made false representations, and that administrator failed "to assure administrative integrity." (*Id.* at p. 825.)

Under section 9601, remedies are provided for proven breaches of fiduciary duty by an administrator, who may be surchargeable in the discretion of the court, as

"appropriate under the circumstances," for losses caused to the estate, or for recovery of personal profits attributable to the administrator's breach of duty. (14 Witkin, Summary of Cal. Law (10th ed. 2005) § 525, pp. 602-603, citing Cal. Law Revision Com. com., 53A West's Ann. Prob. Code (1991 ed.) foll. § 9601, p. 513.)

In light of these basic governing principles, we turn to the specific contentions on appeal.

III

PRELIMINARY LEGAL ISSUES

A. Contentions About Burden of Proof

Under the comprehensive statutory scheme of section 1060 et seq., Keenan's amended account appropriately included summaries, supporting schedules and reports on the inventory and appraisal of estate assets. "Filing of an account is deemed to include a petition requesting its approval." (§ 1064, subd. (b); § 10952 [court may compel the account]; § 10900 [financial statement; report of administration]; see 14 Witkin, Summary of Cal. Law, *supra*, Wills, § 384, pp. 467-468; § 710, pp. 794-795.)

As the objector, Betty Rule contested some of the claims in the amended account, claiming Keenan had breached fiduciary duties or lesser, applicable duties of care.

Keenan contended at trial and on appeal that the Objector had, but failed to carry, the burden of proof. The record does not bear out Keenan's approach. At the beginning of trial, Keenan's attorney told the court the disputed issues concerned the Rule Estate's objections and surcharge requests to his amended account, and agreed with the court that he was going to rest his case on the accounts he filed. The Objector then presented

witnesses, herself and others, and as an adverse witness, Keenan. Keenan responded by calling the bankruptcy trustee's attorney, his own accountants Perlowski and Cunningham, and Attorney Young, and he testified on his own behalf. Closing argument was heard, the matter submitted, and the court rendered an oral tentative decision, first explaining the analysis it used.

The standards of section 9254, subdivision (a) normally require that in a court supervised probate matter, the burden of proof for a contest to an account falls on the contestant. However, since this was an independently administered estate (§ 10400 et seq.), these separate statutory standards apply: "The validity of an allowed or approved claim may be contested by any interested person at any time before settlement of the report or account of the personal representative [administrator] in which it is first reported as an allowed or approved claim. The burden of proof is on the contestant, *except where the personal representative has acted under the Independent Administration of Estates Act [§ 10400 et seq.], in which case the burden of proof is on the personal representative.*" (§ 9254, subd. (a); italics added.)

The probate court's oral tentative decision at the close of trial correctly framed the issues before it by stating that the parties' dispute was not about the dollar accuracy of the accounting, but rather about the nature of the actions Keenan took in entering into the stipulated judgment against the Rule Estate, as well his failure to object to the disallowance of his own debt to the Rule Estate. Although Keenan, as an independent administrator, was required to seek court approval under section 10501, subdivision (a)(8), of his personal claims or defenses against the Rule Estate, he never did so. The

probate court took that factual scenario into account and accordingly focused upon whether his actions as the administrator were otherwise appropriate and defensible within the applicable standards of care. In effect, because there had been no effort to seek court approval of his own claims against the Rule Estate, the burden of proof fell upon Keenan to show the settlement had been made in its best interests, such as if it actually owed him a large debt.

Likewise, since Keenan was able to avoid liability on his own \$84,000 debt to the Rule Estate, and he never objected to the disallowance of this debt during his bankruptcy, Keenan effectively compromised his own claim, again without seeking court authority. The probate court correctly applied the statutory scheme for the burden of proof under all these circumstances, and we will proceed to examine the substantial evidence support for its conclusions. First, however, we briefly address those arguments made by Keenan that appear to fall well outside the scope of his petition and the ruling.

B. Scope of Keenan's Petition; Side Issues

Some of Keenan's various arguments on appeal essentially attempt to reopen the bankruptcy proceedings and to relitigate this probate matter. First, Keenan incorrectly contends the probate court could not properly make orders determining the extent of the Rule Estate's percentage interests in the subject properties. Although his petition did not expressly include any request for relief under section 850 for a court order quieting title, his own allegations and admissions about the contents of the I&A of the Rule Estate's assets (as found in his amended accounting) served to establish an adequate basis for the probate court's underlying findings about the percentage interests owned by the Rule

Estate in the five real property projects, for purposes of resolving the accounting and surcharge issues.⁶ In light of Keenan's own pleadings, it is unpersuasive for him, in his reply brief, to refer to a pending quiet title action pursued by the Rule Estate concerning the Wisconsin-Cleveland and Loma Alta properties, as arguably supporting his claim that title issues were never litigated here. Nor can he realistically claim that the probate court in this matter went beyond the scope of his petition by quieting title to the percentage interests in the five real properties, since that is not what was actually ordered.

Keenan fails to recognize that the legal issues raised by his petition, and the objections framed by the joint trial statement, required the court to resolve, on the facts alleged and proven, whether the Rule Estate's valuable property interests had been inappropriately interfered with by Keenan's actions as administrator, in stipulating to the judgment against it. It was Keenan who reported the Rule Estate's percentage interests to the probate court, and he is bound by that.

Earlier, when the bankruptcy trustee sought to avoid any Rule Estate interest in the subject properties, Keenan claimed in response that ownership was not in dispute, only the amount the Rule Estate owed him, and the stipulated judgment reflects that amount.

⁶ Section 850, subdivisions (b)(2)(C) and (D) allow a personal representative or estate administrator to petition for a court order resolving property interests: "(C) Where the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another. [¶] (D) Where the decedent died having a claim to real or personal property, title to or possession of which is held by another." This court recently denied Keenan's request for judicial notice of the entire trial court record in a pending quiet title action that was separately filed by the Rule Estate, concerning the Wisconsin-Cleveland and Loma Alta properties. (Evid. Code, § 452.) Such information is not necessary to resolve the issues properly brought before us.

He now argues this must indicate all of his actions were proper, since he was then defending the Rule Estate interests. However, the questions presented to the probate court remained whether, under all the other circumstances, those Rule Estate transactions (made without any court approval) were done according to the best interests of the Rule Estate. (§ 10501, subd. (a)(8).)

We cannot accept Keenan's argument, apparently made for the first time on appeal, that the Objector should now be judicially estopped from disputing in probate that the bankruptcy stipulated judgment was seriously adverse to the Rule Estate interests. This record does not demonstrate that Keenan obtained the informed consent of Betty Rule, as a beneficiary, to stipulate to the judgment against her son's estate, based on Keenan's unsubstantiated representations that there was some kind of written agreement by Mr. Rule to pay Keenan money. Merely because Betty Rule now admits she signed what Keenan told her to sign (declaration in summary judgment opposition in bankruptcy) does not mean that this court can reopen the validity of the stipulated judgment.

Similarly, Keenan cannot be heard to rely on the 2005 district court rulings that the Rule Estate had not successfully shown grounds in the federal courts to vacate the stipulated judgment (e.g., on the grounds Keenan failed to file a timely probate claim during his administration). That is a different issue from whether substantial evidence supports the probate court's evaluation of Keenan's overall performance of his administrator duties and amended account, as we next inquire.

IV

SUBSTANTIAL EVIDENCE ANALYSIS

A. Disallowance by Bankruptcy Trustee of Keenan's Debt to Rule Estate

During the bankruptcy proceedings, Keenan failed to oppose the disallowance of his own promissory note owed to the Rule Estate. This record contains the original \$185,000 note, with handwriting on it showing that approximately \$84,000 remained owing by 1999.

Although Keenan generally attacks the sufficiency of the evidence supporting the findings and conclusions of the probate court, he does not appear to specifically challenge the portion of the surcharge that is based upon the losses to the Rule Estate from the bankruptcy disallowance of the Keenan indebtedness to it (\$406,642.94).

To the extent Keenan is actually arguing there is no substantial evidence supporting the surcharge based upon the disallowed note, he is mistaken. The probate court appropriately framed its inquiry as determining whether each disputed item in the amended account should be approved, based upon its effect on the interests of the Rule Estate. Keenan's position as administrator required him to affirmatively protect the Estate's interests. As the probate court explained: "*The failure to file the opposition or resist the trustee's actions inured directly to Mr. Keenan's benefit to his bankrupt estate and his obligations, and to the direct detriment of the Rule Estate.*" (Italics added.) Failing to oppose the disallowance of the note was clearly a breach of his administrative duties and the court's determination on that ultimate fact was legitimately based upon its express and implied findings from the evidence, about the manner of performance of

Keenan's duties in that regard. (See *Muzquiz, supra*, 79 Cal.App.4th 1106, 1125.) The surcharge based on the disallowed note is supported by the record.

B. Evidentiary Argument

Next, Keenan claims that the ruling denying admission into evidence of his exhibit 170 was an abuse of discretion under these circumstances. The record shows that counsel told the probate court that trial exhibit 170 was a 443-page compilation that included numerous documents from the files of the attorney for the bankruptcy trustee, and that the trustee's accountant, as well as Keenan's accountants and attorney, had utilized such documents in calculating the amount of the stipulated judgment. Some of the same information is found in an admitted exhibit 136, a 1987 worksheet from Perlowski.

Keenan sought admission of exhibit 170 at various points in trial, while Attorney Young and the trustee's Attorney Isaacs were testifying, claiming that it supported his version of the amount of the Rule Estate's debt to him as payment due for the percentage interests in the five real properties. Keenan argued the files overall would show that the settlement in bankruptcy was for a reasonable amount.

After hearing argument, the court deferred ruling and inquired whether laying a foundation was possible, to show that this document was part of Keenan's consideration when he made the decision to accept the stipulated judgment on behalf of the Rule Estate. This evidentiary request was not pursued further, and the court's ruling has not been shown to represent any abuse of discretion, in light of the numerous times the matter was discussed and the lack of foundation referred to by the court.

C. Surcharge Based on Stipulated Judgment Against Rule Estate

The probate court ruled that the Objector had sufficiently shown "there was little or no evidence to support [Mr. Rule's property interest] debt, which evidence was sufficient, in my view, to make a prima facie case demonstrating that the stipulation was not in the estate's best interest, and thus shift[ed] the burden of proof to Mr. Keenan." The court concluded from the evidence that Keenan had acted outside of his authority by compromising the claim against the Rule Estate without court approval, thus waiving the protection of statute. (§ 10501, subd. (a)(8) [probate court authority is required for compromise of a claim of the personal representative against the estate].) Keenan was therefore required to demonstrate that he met the applicable standards of care when agreeing to the stipulated judgment against the Rule Estate, to pay off his bankruptcy estate.

On appeal, Keenan points to several factors in the record to support his claim the probate court acted without substantial evidence support. Keenan relied on the work paper exhibits and testimony of his accountants Cunningham and Perlowski, as well as his own testimony, to claim that there was once a written note from Mr. Rule, or at least some accounting ledgers showed the same debt or offsets were due to Keenan, because of the Rule Estate's acquisition of the percentage interests in the five real properties. Keenan did not know whether he ever had any such writing, but he believed it might have been in the boxes of documents that the bankruptcy trustee had seized, although none was ever produced or found by the attorney for the trustee.

However, the probate court did not find that evidence persuasive, and questioned the reliability and credibility of Keenan's witnesses. The court noted that there was conflicting testimony about how the initial amount of the debt was computed and what type of interest rate would apply. Later, other figures were arrived at through the collaboration between Keenan's accountants and the bankruptcy trustee's accountant Meyers, during the bankruptcy summary judgment and stipulation proceedings, taking into account various claims of offsets and the "mirror note" Keenan was presenting. In analyzing all that evidence, the probate court commented that Keenan had not produced anything more than working papers, and consequently, "[t]here may well have been an indebtedness, but it doesn't appear to have ever been a meeting of the minds as to the exact amount or terms."

Subsequently, the probate court disapproved the amended account with respect to Keenan's treatment of those percentage interests, because all the evidence "doesn't demonstrate the existence of a debt as of the date of the decedent's death, nor, if the court were able to conclude there was a debt, does the evidence support the amount of such debt at the date of the decedent's death, nor does it support the terms."

From the evidence that Keenan was acting as administrator from 1994 throughout his 1996 bankruptcy filing and until removed, but he never made any written creditor's claim against the Rule Estate, the probate court could have reasonably inferred that there was no certain amount of debt. He did not add a reference to the Rule Estate debt to his bankruptcy schedules until 1999, by which time he had allowed interest to accrue against the Rule Estate, harming its interests. He also rejected a settlement offer from the

bankruptcy trustee, which would have been more favorable to the Rule Estate, before entering into the stipulated judgment. Keenan did not consistently treat Mr. Rule's acquisition of the percentage interests in the properties as requiring a certain amount of monetary compensation. It was not dispositive that the interests were unrecorded, because the pleadings showed there was some actual ownership interest that was not a matter of public record. Keenan has not set forth all of the relevant evidence on the issue to successfully challenge the sufficiency of support for the ruling. (See *Estate of Massaglia, supra*, 38 Cal.App.3d 767, 774-778.)

Keenan further argues that the stipulation represented only his effort to protect the Rule Estate from losing its interest in the properties, due to the bankruptcy trustee's request for avoidance, and Keenan contends he and Betty Rule were following the advice of counsel (Young) in doing so, and no better result was possible, since the trustee was on a winning streak. Under all these circumstances, it is unpersuasive for Keenan to claim that an advice of attorney defense should entirely protect him from any liability for surcharge. (See *Estate of Guiol, supra*, 28 Cal.App.3d 818, 824 [administrator can be liable for surcharge where she abdicated duty by turning over possession and control of estate to attorney]; 14 Witkin, Summary of Cal. Law, *supra*, § 526, pp. 604-605.)

Keenan seems to argue in his reply brief that an attorney malpractice analysis should now be used to examine the "case within a case," to determine if a different result should have been reached, but that is not what was placed before the probate court.

Rather, the testimony and declarations presented to the probate court showed that Attorney Young participated in the bankruptcy court stipulated judgment proceedings,

mainly for one of Keenan's and Mr. Rule's other businesses, Mikal Corporation, while Young nominally also represented the Rule Estate in the bankruptcy court. However, Young admitted that he never reviewed the Rule Estate probate file and that Keenan was carrying out most or all of the Rule Estate business. Keenan cannot now properly shift the focus to the conduct of Attorney Young, as opposed to his own conduct as administrator. Advice of counsel is not an available defense for an administrator whose personal actions and breaches of duty failed to protect the estate. (*Estate of Guiol, supra*, 28 Cal.App.3d 818, 826.)

When Keenan reached the stipulation without consulting the probate court for approval, that was done at his own risk. (§ 10501, subd. (a)(8).) The court evaluated the conflicting evidence about the nature and amount of any Rule Estate indebtedness, as part of the overall examination of Keenan's performance of his duties as administrator. The court then properly concluded that the stipulated judgment was not achieved in the best interests of the Rule Estate. Since Keenan had been acting outside his authority as administrator, and "the compromise was improvident and damaged the estate," the Rule Estate was entitled to be compensated by him for the loss he caused. (*Treharne v. Loftin, supra*, 153 Cal.App.3d 878, 886; § 9601.) The evidence fully supports the surcharges imposed and the ruling that approved the amended account with the exception of its treatment of the percentage interests.

DISPOSITION

The orders are affirmed. Costs are awarded to Objector and Respondent.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.