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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAY K. LEVY, as Trustee, etc.,

Plaintiff, Cross-defendant and  
Respondent,

v.

DANNA R. JONES, as Trustee, etc.,

Defendant, Cross-complainant and  
Appellant.

G051661

(Super. Ct. No. 30-2013-00623894)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas H. Schulte, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part and reversed and remanded in part.

Bunt & Shaver and David N. Shaver for Defendant, Cross-complainant and Appellant.

Jay K. Levy, in pro. per., for Plaintiff, Cross-defendant and Respondent.

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A dispute arose between defendant, cross-complainant and appellant Danna R. Jones (Danna)<sup>1</sup> and plaintiff, cross-defendant and respondent Jay K. Levy (Jay), cotrustees of a trust, as to the administration of the trust. Jay claimed Danna breached her duty as a trustee by mismanaging the trust, preventing him from performing his duties as a cotrustee and failing to timely and sufficiently account. Jay asked that Danna be surcharged for any loss to the trust and for his attorney fees in compelling an accounting.

Danna claimed Jay unilaterally and wrongfully withdrew funds from the trust's bank account and sought an order for Jay to repay them.

Danna appeals from that part of the judgment ordering her to pay \$25,000 of Jay's attorney fees on the ground she had no duty to account and the attorney fees award was improper because there was no finding she acted either unreasonably or in bad faith when she opposed Jay's objections to the accounting. She further argues Jay should have been ordered to repay the funds he unilaterally withdrew from the trust.

We conclude the court erred in ordering Danna to pay attorney fees to Jay and reverse that portion of the judgment. We otherwise affirm.

### **FACTS AND PROCEDURAL HISTORY**

Albert (Albert) and Ethel (Ethel) Levy as trustees and settlors established the Levy Family Trust (Trust). Danna, Jay, and their brother, David N. Levy (David), Albert and Ethel's children, were named equal beneficiaries and as successor cotrustees to assume office upon the death of the second settlor. Albert predeceased Ethel and upon her death the three children succeeded their parents as trustees. About six months thereafter, David resigned as a cotrustee. He did not participate in administering the Trust.

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<sup>1</sup> We use the parties' first names for clarity and not out of disrespect.

When Ethel died in September 2010, the value of the Trust estate was approximately \$2.4 million. It consisted of two pieces of real property, several bank accounts and investment accounts, two trust deeds, and some personal property.

Jay and Danna did not work together in administering the Trust. Less than a year after Ethel's death they were not on speaking terms. Danna was administering the Trust alone. Despite Jay's demand for information Danna failed to advise him.

At some point the three beneficiaries settled disputes they had about the real property and divided it pursuant to a settlement agreement. In addition, they agreed on distribution of most of the remaining assets, leaving only about \$40,000 in cash, some other miscellaneous assets, and unpaid tax liabilities.

Shortly thereafter, in November 2012, Jay unilaterally withdrew just over \$39,000 from the Trust. This was used to pay his attorney to challenge Danna's administration of the Trust. A week later he withdrew another \$283.99, without Danna's knowledge or consent which he paid to his daughter. Five weeks later in January 2013 he unilaterally took out \$5,000, again used to pay attorney fees. On that same date Jay filed a petition for Danna to account (Petition).

In May 2013 Danna filed her first account current (Account). Jay filed objections (Objections), claiming, among other things, an imbalance of approximately \$4,950 and insufficient description of certain disbursements, including "Uncategorized/Miscellaneous" disbursements of just under \$2,300 and credit card payments of approximately \$4,120. He also contended his attorney fees should be charged to Danna.

In the meantime, the Franchise Tax Board sent a notice almost \$20,000 in taxes was due, which could not be paid due to insufficient funds. When Danna demanded Jay return the sums he had taken from the Account, he failed to do so. Subsequently, Danna filed a petition for an order requiring Jay to return all the money he had withdrawn from the Trust (Petition for Return of Funds). Jay filed an opposition.

After a bench trial the court ruled as follows: Danna breached her duty to Jay by failing to provide an accounting when he first requested one prior to filing his Petition. Further, the Account did not include all of the required content, including the insufficiently detailed “uncategorized deposits” and the approximately \$6,000 in uncategorized disbursements and credit card payments. This provided Jay good cause to challenge the Account.

However, at trial Danna’s testimony sufficiently explained the imbalance and showed she had not misappropriated any sums. There was no basis to surcharge Danna because she had not caused a loss to the Trust.

As to the Petition for Return of Funds, the court found Jay had breached his duty when he unilaterally took \$39,000 from the Trust’s account despite his claim he did so because he feared Danna was mismanaging the Trust. The contention was belied by the fact the bulk of the \$2 million-plus estate had just been divided.

However, the court refused to order Jay to return the sum, finding there was no doubt he had used it to retain a lawyer to require Danna to file the Account, which he had a right to do.

The court also found both parties breached their duties as trustees. Danna did not allow Jay to administer the Trust, failed to account, requiring Jay to file the Petition, and filed an insufficient Account. Jay failed to assume his duties as a cotrustee for more than two years, doing nothing except demanding an accounting. Both breached by failing to cooperate or communicate with each other.

The court found Jay and Danna were liable for that portion of the other’s attorney fees incurred as a result of their individual breaches. The court noted it was “not surprising” Jay’s attorney fees were higher than Danna’s because of the difference in the two parties’ breaches. It ordered Danna to pay Jay \$25,000 for attorney fees. The court otherwise approved the Account.

Danna filed a motion for new trial raising several issues. As relevant to this appeal, the court ordered Jay to repay the Trust the approximate sum of \$284 he had taken for his daughter, approved the \$5,000 Jay had taken from the Trust to pay attorney fees, denied modification of the \$25,000 attorney fees award to Jay, and denied a new trial.

## **DISCUSSION**

### *1. Duty to Account*

Probate Code section 16069, subdivision (b) (all further statutory references are to this code) states a trustee is not required to provide an accounting to a beneficiary “[i]f the beneficiary and the trustee are the same person.” Relying on this section Danna claims she was not required to account to Jay because he was a cotrustee and cobeneficiary with her. Therefore, she did not breach her duty and cannot be surcharged for attorney fees because Jay had no right to demand an accounting or challenge the Account once it was filed. This argument is unconvincing.

The language of section 16069, subdivision (b) makes clear that a trustee who is a beneficiary is not required to account to himself or herself. Here, although Jay was also a cotrustee and beneficiary, he is not the person required to account because he did not have control of the Trust’s assets. Therefore, he had the same right to an accounting as any other beneficiary.

### *2. Award of Attorney Fees to Jay*

Danna argues she cannot be surcharged \$25,000 as attorney fees to Jay because she was the prevailing party as to the issue of the accounting and the court did not find she acted unreasonably or in bad faith. She also complains it was error to award Jay attorney fees because he breached his duty as a trustee and did not take any action that benefitted the Trust.

*a. Surcharge Against Danna*

“Trust beneficiaries must ordinarily pay their own attorney fees in challenging the trustee’s conduct, even when they are successful.” (*Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1595.) An exception to this is found in section 17211, subdivision (b), which states: “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. The amount awarded shall be a charge against the compensation or other interest of the trustee in the trust. The trustee shall be personally liable . . . for any amount that remains unsatisfied.” (Second italics added, original italics omitted.)

“[R]easonable 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 v. Kadisha* (2010) 188 Cal.App.4th 866, 927.) In *Uzyel*, the court denied attorney fees to the objector because the trustee defeated some of the objector’s claims, showing the trustee had reasonable cause. (*Id.* at pp. 927-928.)

Here the record reflects Danna had reasonable cause to oppose Jay’s Objections. In the Objections, Jay protested that the Account was not in balance, and complained it lacked required schedules and an explanation of certain “unusual items.” He maintains Danna prevented him from acting as cotrustee. He further claims Danna had diverted Trust assets to her personal accounts. Jay sought appointment of an independent administrator with Danna to be surcharged for the expense, and also asked she be surcharged for any loss due to her mismanagement of the Trust and for his attorney fees.

Jay did not prevail on any of these claims and the court approved the accounting. At trial, Danna sufficiently explained the reason for the imbalance. In

addition, the court did not find any mismanagement or diversion of assets. Instead, it specifically found Danna had not misappropriated any funds and there was no basis for Jay's suspicion of mismanagement given the disbursement of most of the estate totaling more than \$2 million. The court refused to surcharge Danna because Jay had not shown a loss to the Trust.

Although the court did find Danna had shut out Jay from administering the Trust as cotrustee, it also found Jay was liable to the extent he failed to assume the responsibility to act as such. Further, the finding as to Danna's failure to allow Jay to participate did not overcome Danna's successful opposition to Jay's Objections on most of the other claims. Based on the court's ruling we cannot say Danna unreasonably opposed Jay's Objections. (*Uzyel v. Kadisha, supra*, 188 Cal.App.4th at p. 928.) Thus, the court abused its discretion in ordering Danna to pay Jay's attorney fees. (*Thomas v. Gustafson* (2006) 141 Cal.App.4th 34, 44.)

On an alternative ground, the court did not find Danna acted in bad faith and neither the ruling nor the record would support such a finding. The ruling specifically found certain acts and omissions of Danna were negligent. There was no suggestion she acted in bad faith. And Jay points to nothing in the record to show otherwise. Thus, on this element of section 17211, subdivision (b) Jay was not entitled to attorney fees from Danna.

Jay's argument that he is entitled to attorney fees from Danna under section 15684 is not correct. That section provides for an award of attorney fees from the Trust estate. (§ 15684 ["A trustee is entitled to the repayment out of the trust property"].)

In addition to the order Danna pay Jay's attorney fees, the court ordered Jay to pay Danna's fees. Although there is no specific statement or explanation of how the court derived the amount, it is a reasonable inference that \$25,000 was selected based on some difference between Jay's fees and Danna's fees. The court stated Jay's fees were

substantially more than Danna's. We are not privy to those amounts. But in any event, we want to make clear Jay is not liable for Danna's attorney fees.<sup>2</sup>

Under section 17211, subdivision (a), "If a beneficiary contests the trustee's account and the court determines that the contest was without reasonable cause and in bad faith, the court may award against the contestant the compensation and costs of the trustee and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. The amount awarded shall be a charge against any interest of the beneficiary in the trust. The contestant shall be personally liable for any amount that remains unsatisfied."

Here there are no findings Jay acted without reasonable cause or in bad faith in filing the Objections to the Account. Nor does the record reflect either of those elements.

Although, as detailed above, Jay did not prevail on all of his claims, the court did order Danna to act in concert with Jay as cotrustees. Danna was also ordered to distribute Jay's remaining one-third of the Trust estate.

As a result, instead of the parties being liable for each other's attorney fees, they shall bear their own attorney fees.

*b. Jay's Withdrawal of Funds for Attorney Fees*

Danna challenges both the \$39,000 and the \$5,000 withdrawals Jay made from the Trust account to pay for his attorney fees. She claims Jay unilaterally withdrew over \$44,000 for his personal benefit and only later claimed it was for attorney fees to challenge her actions.

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<sup>2</sup> Although Jay did not appeal from the order, we may consider this issue since it is "so interwoven" with Danna's appeal of the award of attorney fees against her. (*Estate of McDill* (1975) 14 Cal.3d 831, 840 [“The appellate court, in such cases, must have power to do that which justice requires, and may extend its reversal as far as may be deemed necessary to accomplish that end”].) This will prevent any potential windfall to Danna. (*Ibid.*)

The court ruled Jay breached his duty by unilaterally withdrawing \$39,000. But it denied Danna's request the money be repaid because there was "undisputed evidence" he used the money to retain counsel to file the Account. Danna contends there is no evidence his withdrawal of those funds benefitted the Trust and it also depleted the Trust's assets to the extent the Trust is unable to pay state taxes. This argument does not persuade.

"A trustee is entitled to the repayment out of the trust property for . . . [¶] . . . [e]xpenditures that were properly incurred in the administration of the trust." (§ 15684, subd. (a).) This includes attorney fees necessary "for the preservation of the trust." (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1461.) The court found Jay had a right and a duty to file the Petition to compel Danna account.

It is unclear whether Danna questions this particular finding. She sets out some general statutory and case law about when a trustee is entitled to reimbursement. It appears her argument is solely as set out above, that Jay did not use the withdrawn money for attorney fees except for about \$8,000.

This is a challenge to the sufficiency of the evidence. In deciding whether there is substantial evidence to support a judgment we begin with the presumption the judgment is correct. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) "[T]he evidence [is viewed] in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference." (*Id.* at pp. 957- 958.) If "there is any substantial evidence, contradicted or uncontradicted," to support the findings," we "must uphold that finding." (*Ibid.*) We may not reweigh or resolve conflicts in the evidence or redetermine the credibility of witnesses. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.) The testimony of a single witness can be sufficient. (*Ibid.*)

Here Jay testified he took money from the Trust to "secure it and find out and compel for [sic] accounting." He further testified that because he "couldn't get an

accounting out of [Danna]” he took the \$39,000 “to secure it and hire an attorney to figure out if we could get an accounting.” The money was “all [for] attorney fees.” This is more than sufficient evidence to support the court’s finding.

We likewise reject Danna’s assertion the court erred in failing to surcharge Jay for his withdrawal of \$5,000 to pay attorney Richard Henry. Without much factual explanation of her argument she claims Henry represented Jay in a dispute with Danna and David about real property that had been distributed out of the Trust, allegedly before Jay withdrew the funds.

But Henry testified that when he represented Jay he made demand on Danna for an accounting. This was in addition to a dispute over real property. Again, this is sufficient evidence to support the court’s finding.

#### **DISPOSITION**

The judgment is affirmed except to the extent the court ordered the parties to pay each other’s attorney fees. The matter is remanded to the trial court to enter a new judgment stating the parties shall bear their own respective attorney fees. In all other respects the judgment is affirmed. The parties shall bear their own costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.