

FILED
April 30, 2019
ARTHUR BERGMAN, J.S.C.

By the Court

In the Matter of:

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-PROBATE PART
MIDDLESEX COUNTY**

The Estate of Todd Harris Applebaum,
deceased

DOCKET NO.: 238799

CIVIL ACTION

ORDER AND STATEMENT OF REASONS

This matter comes before the court on the application of the Estate of Todd Harris Applebaum for a final accounting for the period through July 31, 2018, and for the approval of:

- (1) commissions for corpus and income through July 31, 2018;
- (2) fees and expenses of the accountants and attorneys and other professionals;
- (3) the distribution of 60 shares of stock in Todd Harris Company, Inc. to the trustees of Todd Harris Company, Inc. Trust in accordance with Article Five of decedent's Last Will and Testament;
- (4) the Executor's proposed execution of stock redemption agreement, in exchange for forty (40) shares of stock to Benjamin Applebaum;
- (5) the proposed distribution to Edita Matos Applebaum of the balance remaining in the residuary estate; and
- (6) discharging the Executor and dismissing all claims asserted against him in all capacities by Edita Matos Applebaum.

FINDINGS OF FACT

Although many of the salient facts surrounding this matter are procedural, the Court finds as fact the following:

1. Todd Harris Applebaum died testate November 4, 2012; his Last Will and Testament was dated March 15, 2010.

2. Paragraph FIFTH of his Last Will states:

FIFTH. I give, devise and bequeath sixty (60) per cent of the Todd Harris Co., Inc. stock to the Trustees of the Todd Harris Co., Inc. Trust. My Trustees shall hold such stock upon a separate trust, and shall manage, invest and reinvest the same and collect the interest thereof, and shall pay to or apply for the benefit of my spouse and such of my descendants as shall be living so much of the net income and principal of the Trust as my Trustees shall from time to time deem advisable and in such amounts (whether equal or unequal) as my Trustees shall determine, and shall accumulate and add to the principal of the Trust any balance of income not so paid or applied.

3. Paragraph SIXTH of the Last Will states:

SIXTH. Should my beloved wife, EDITA, survive me, I give, devise and bequeath to her all the rest, residue and remainder of my estate, both real and personal, of every name, nature and kind whatsoever and wheresoever the same may be situated, including any property over which I may have any power of appointment or that I may die seized or in possession;

4. Paragraph EIGHTH of the Last Will states:

EIGHTH. I authorize and empower my Executor without authorization of the Court, to sell, convey, mortgage, lease, invest, reinvest, exchange, manage, control, retain or otherwise deal with any and all property, real or personal, comprising my estate, and no purchaser need look to the application of the purchase money; to adjust, compromise and settle any claim or demands in favor of or against my estate upon such terms as is deemed advisable; **and to make distribution under this Will wholly or partly in kind or money.** (emphasis supplied)

5. On April 4, 2014, the Plaintiff Edita Matos Applebaum filed an Order to Show Cause with Temporary Restraints, seeking a distribution of her share of the Estate, and seeking removal of the Executor in favor of her appointment.
6. On May 22, 2014, Judge Frank Ciuffani heard argument on the Order to Show Cause and denied summary disposition, but granted Ms. Applebaum the opportunity to obtain discovery. Many of the issues raised dealt with events that occurred months prior to the filing, and the lack of irreparable harm was evident to and formed the basis for the Court to not award the relief sought by the Plaintiff.
7. On January 16, 2015, Judge Ciuffani heard arguments on a number of motions, which resulted in an Order dated February 3, 2015 resolving pending discovery matters and denying the Plaintiff's motion to compel the transfer of the residuary shares to her. This motion was denied with prejudice.
8. On April 19, 2016, the Estate filed an Order to Show Cause to accept the interim accounting through December 31, 2015. In light of the motions by Plaintiff which were heard on April 28, 2016 and the discovery ordered (*infra*), the application for settling the interim accounting was withdrawn.
9. On April 28, 2016 the Court heard motions filed by Plaintiff's second set of attorneys, again seeking, inter alia, removal of the executor; removal of the Trustees of the Trust; compelling conveyance of the shares of stock; restraining the defendants from utilizing either corporate or estate funds to pay for attorney's fees, and restraining the company from paying salaries to some of the named defendants. The Court denied all of the relief sought. It also ordered the Company to provide financial books and records to Plaintiff on a monthly basis; and scheduled discovery on the outstanding issues. A discovery end date of October 7, 2016 was established for all issues regarding the authenticity of the will, employment agreements and any other documents challenged by Plaintiff.
10. On June 23, 2017 the parties appeared for the first time before this Judge. The purpose of the hearing was to hear a motion to compel Plaintiff to certify the lack of further documents, which was granted. The Plaintiff's cross motion was denied in favor of a case management conference.

11. On July 20, 2017, the case management conference was held. The issues of authenticity, as stated on the record, were abandoned by the Plaintiff's counsel. Discovery requests were admittedly served by Plaintiff. Final accounting was to be filed by August 4, 2017 and Mr. Fabian's deposition was scheduled on or before September 15, 2017 and Mr. Gold's deposition was scheduled on or before October 6, 2017.
12. October 13, 2017, another case management was held contemporaneous with the ROTSC of the Final Accounting filed by the Estate. When asked what discovery he needed to go to trial, his response was the need for (1) depositions of Lawrence Gold and Cecelia Keh.
13. On June 26, 2018 Plaintiff's third (and current) attorney once again filed a motion to remove the executor. This motion was denied by Order dated August 10, 2018.
14. On October 19, 2018, the Estate filed an Order to Show Cause with a Verified Complaint seeking approval of its formal accounting, which is the only remaining subject matter of this case.
15. On August 29, 2018, Plaintiff filed for reconsideration of this Court's August 10, 2018 Order, but did not provide any basis to do so, so this motion was also denied by Order of this Court dated November 20, 2018.
16. On November 30, 2018, Plaintiff filed an Answer to the Complaint and a verified Counterclaim. Although this was an Order to Show Cause, it was brought in this fashion as an attempt at closure of an Estate that had been opened in December 2012, and was approaching its sixth anniversary when the Order to Show Cause was filed.
17. Unfortunately, more than five years for discovery was not enough for Plaintiff. There were no specific exceptions provided in either pleading filed by Plaintiff. Given the fact that the prior motion for reconsideration was a rehash of half-baked notions that had no foundation in the record, and was not accompanied by a brief of any kind, it was not surprising to see. However, the Court treated the Answer and Counterclaims charitably as exceptions to the accounting.
18. In her Answer, the Plaintiff asserts the following:

4. Defendant admits that the Plaintiff is seeking the relief indicated at paragraph 4 of the complaint. Defendant, however, requests a plenary hearing, case management, and discovery as to all relief sought, as well as a ruling that the relief requested is in breach of the executor's fiduciary duties, and entitles defendant to damages.

19. On December 14, 2018, oral argument on the OTSC was heard. At the hearing, Plaintiff's counsel conceded that there was not a single exception to the accounting that dealt with the numbers themselves. Counsel did assert, in general terms, that the proposed stock redemption was *ultra vires*. However, the bulk of his argument and the pleadings themselves, are littered with the same vituperation without foundation that seems characteristic of the Plaintiff's strategy.

20. The verified counterclaim begins with a rambling exegesis on Mrs. Applebaum's allegations that she was removed due to whistleblowing activities. Considering that the events described occurred many years prior, and would be barred by the Statute of Limitations, she still asserts them as fact and characterizes each and every affidavit submitted in 2015 as not worthy of consideration due to their age. The same conclusion, of course, is apt for her allegations.

21. The next part of her counterclaim deals with fees and costs. Ironically, after several years of legal wrangling, and several years of permission to obtain discovery, Plaintiff offers at Paragraph 4, of Count II, the following:

4. Defendant (**sic**) is requesting for the right to have an accountant or other attorney review the billing(s) and costs, and the right to comment and/or otherwise challenge all attorney's fees in this case.

In both the Answer and the Counterclaim, Plaintiff has apparently been standing at the dock for all these years. Sadly, this ship has long sailed from port. In fact, many of the rehashed arguments about fraud were the subject of depositions of witnesses that were deposed earlier in 2018, who were touted as having "new evidence for reconsideration."

22. The transcript of the reconsideration hearing clearly places that canard to rest, but does illustrate the fact that Plaintiff had more than ample opportunity to develop any information she chose to pursue.

CONCLUSIONS OF LAW

The last item of relief sought, and the first to be discussed, is the notion that the Executor committed fraud against the Estate and its beneficiaries, and that negates the fees claimed by the Estate. Oddly enough, the case referenced by Plaintiff to support its contention that the Estate's proposal to distribute the 40% of the stock of THC, is *In re Estate of Hope*, 390 NJ Super 533 (App Div 2007). This case was similar to that case in several respects. One is that the heirs claiming bad faith on the part of the executor lost their initial case about like kind distribution, but then went on to attack the Executor once more, arguing, as here, that his actions were a breach of his fiduciary duties. In the follow up case, at 2010 NJ Super LEXIS 329 (App Div) the Appellate Division ruled that:

It has long been recognized that "[c]ourts are reluctant to remove an executor or trustee without clear and definite proof of fraud, gross carelessness or indifference." *Braman v. Cent. Hanover Bank & Trust Co.*, 138 N.J. Eq. 165, 196-97, 47 A.2d 10 (Ch. 1946) (quoting *In re Estate of Hazeltine*, 119 N.J. Eq. 308, 314, 182 A. 357 (Prerog. Ct.), *aff'd*, 121 N.J. Eq. 49, 187 A. 177 (E. & A. 1936)). Furthermore, "a trustee will not be removed for every violation of duty. For acts done in bad faith, or that have diminished or endangered the trust fund without bad faith, it is the duty of the court to remove him." *Id.* at 197 (internal quotations and citations omitted).

The "power of removal is exercised sparingly and with great caution." *Ibid.* An administrator should not be removed unless it clearly appears that he was "flagrantly derelict in his duties." *In re Estate of Hanretty*, 96 N.J. Eq. 716, 718-19, 2 N.J. Misc. 55, 125 A. 563 (E. & A. 1924). Mere "friction or hostility" between an administrator and the beneficiaries is not a sufficient ground for

removal. Braman, supra, 138 N.J. Eq. at 196. Moreover, an administrator "may exercise ordinary discretion within the scope of his powers in administering the estate," and the Chancery judge may exercise similar discretion in determining the proper distribution of estate assets. Hope, supra, 390 N.J. Super. at 541 (citation and internal quotation omitted).

There being nothing in this record to implicate the Executor in any fraud, the relief sought is granted. All claims against the Executor are dismissed as filed in this matter, and the Executor is discharged as the Estate is now closed.

The other issue for the Court to consider is whether a cash distribution of the residuary is available for the 40% minority share of the Company, or whether it must be distributed in like kind. Plaintiff relies solely on In re Estate of Hope, (supra). However, that case stands in opposition to Plaintiff's theory. The holding in In re Estate of Hope is that the Chancery Judge did not abuse his discretion in approving the Executor's decision to permit the real estate in question to be sold and the proceeds distributed to the heirs. If that were the issue in this case, I would be inclined to rule in the Executor's favor, as the record is replete with the rationale given by the Executor to provide the residuary in cash, and not deal with a minority shareholder that seems willing to litigate *ad infinitum* issues that would cripple the company. However, that is not the issue before this Court.

The ruling in In re Estate of Hope was based on NJSA 3B:23-1. The provisions of that statute are triggered "Except where a will authorizes distribution to be made in cash or in kind." That exception is exactly the language in paragraph EIGHTH of Mr. Applebaum's will, which is emphasized in paragraph 4 of the Findings of Fact (*supra*). Thus, the In re Estate of Hope case, relied upon by Plaintiff, does not even apply to this Will.

It is obvious from a reading of his Last Will that Mr. Applebaum wanted the Trust to be the majority shareholder of the company. It is also clear in his Will that he would expect the profits of the Company to redound to the benefit of his wife and children. Thus, the entire stock of the Company is impressed with the requirement that profits from the company would benefit his wife and children.

Accordingly, if the stock sale of all or part of the residuary 40% is necessary to raise enough liquid assets to pay off the expenses incurred by the Estate, the sale of the stock

to Benjamin Applebaum, to the extent he can meet the valuation established, should be limited to the actual expenses payable. Any shares remaining beyond the expenses to be paid can be purchased by the Trust, and the purchase price paid shall be provided to the residuary estate. All shares purchased by the trust shall receive the pro rata share of any distribution of profits and provide such profits to the residuary beneficiaries, as stipulated in Paragraph FIFTH of the decedent's Last Will.

IT IS, THEREFORE on this 30th day of April, based upon the foregoing,

ORDERED, that the accounting in the form filed by Plaintiff should be, and hereby is approved, and it is further

ORDERED, that the commissions are approved; and it is further

ORDERED, that the distribution of sixty shares of stock to the Todd Harris Company Trust is approved; and it is further

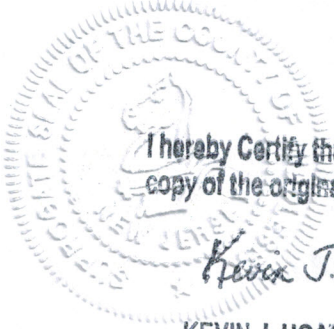
ORDERED, that the execution of the stock redemption agreement is approved as modified above; and it is further

ORDERED, that the distribution to Edita Matos Applebaum of the balance then remaining in the Estate, after payment of expenses, is approved; and it is further

ORDERED, that all claims against the Executor are dismissed as filed in this matter, and the Executor is discharged as the Estate is now closed.

Arthur Bergman

Hon. Arthur Bergman, J.S.C.,Ch.

 I hereby Certify that the foregoing is a true copy of the original on file in my office.
Kevin J. Hoagland
KEVIN J. HOAGLAND, Surrogate