COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
ORPHANS' COURT DIVISION
O.C. No. 1664 IV of 2002
Control No. 040148

Trust of Emanuel Rosenfeld, Settlor

OPINION

Introduction

The summary judgment motion by corporate trustee Wachovia raises the novel issue, inter alia, of whether a corporate trustee can be held liable for breach of fiduciary duty and negligence where it fails to seek judicial relief to break a deadlock among its co-trustees to attain a diversification of assets that it repeatedly advocated to its co-trustees. For the reasons set forth below, this court concludes that under the terms of the trust agreement and the facts of this case, Wachovia cannot be found liable; its motion for summary judgment is therefore granted and Counts II, III, IV, V and VII of the Complaint against Wachovia are dismissed with prejudice. Count VIII, seeking a partition of the Trust, remains.

Factual Background

By an irrevocable trust agreement dated December 1, 1952 ("Rosenfeld trust agreement"), Emanuel Rosenfeld created a perpetual charitable trust entitled the Mary and Emanuel Rosenfeld Foundation. He named 3 individual co-trustees: Lester Rosenfeld (his son), Rita E. Korn (his daughter, presently Rita Stein) and Murray Rosenfeld (his brother). The Rosenfeld trust agreement also named a corporate trustee, Fidelity-Philadelphia Trust Company. After the death of Murray Rosenfeld, Robert Rosenfeld, the settlor's grandson and the son of Lester Rosenfeld, was named as

substitute trustee. After a series of mergers, the current corporate trustee is now Wachovia, as the successor to the Fidelity-Philadelphia Trust Company.[1]

The trust was originally funded by two hundred shares of no par common stock of The Pep Boys, Manny, Moe and Jack of California ("Pep Boys stock"). See Wachovia's 1/23/04 Motion for Summary Judgment, Ex. A., Rosenfeld trust agreement. The value of this stock according to a "Statement of First Account" was $15,000.00.[2]

The Rosenfeld trust agreement provides that the "Trustees agree to hold the property received by them and such additional property as may be added hereto from time to time by the Settlor or others" to be invested and reinvested so that the income could be distributed to "religious, charitable, scientific, literary or education purposes" as the Trustees "in their discretion may from time to time select." See Rosenfeld Trust Agreement. The Trust Agreement also contains an indemnity provision which provides:

> (2) In addition to the powers given by law, the Trustees shall have and exercise the following powers as the decision of the majority of them may direct:
> (a) To retain any property delivered to them as long as in their discretion they deem it advisable to do so. For the exercise of this power the Trustees are completely relieved from any responsibility by reason of any loss or shrinkage in value. Rosenfeld Trust Agreement, Paragraph 2 (emphasis added).

[1] Ms. Stein notes that while First Union has merged into and changed its name to Wachovia, she will continue to refer to the corporate trustee as "First Union." Stein's 2/23/04 Memorandum at n. 1. Since the motion for summary judgment was filed under the name of Wachovia, this court will refer to it as the corporate trustee where appropriate.

[2] Wachovia attached as Exhibit A to its 3/4/04 Reply Memorandum, a "Statement of First Account of Fidelity-Philadelphia Trust Company" (stated to December 1, 1953) listing 200 shares of Pep Boys as $15,000.00 as of December 1952. This document notes that 250 additional shares of Pep Boys Stock were added October 6, 1953 at $18,750.00. Wachovia notes, however, that all ledgers, tax returns, and correspondence for the period prior to January 1, 1996 were destroyed in a warehouse fire. See Wachovia's 3/4/04 Memorandum, at 1 n.1. Ms. Stein has not objected as to the accuracy of this document presented as Exhibit A.

Although the trust agreement provides for "majority" action by the co-trustees, it contains no provision to break a deadlock that might occur among the four co-trustees.

Plaintiff Rita Stern alleges that as early as May 1997 she urged her co-trustees to diversify the foundation's assets because of her "concern that the concentration of the Foundation's assets in a single stock made it unduly vulnerable to serious losses."[3] At that time, Ms. Stein alleges, the Pep Boys stock was trading at $31, which was a loss from a high of $37 in the previous November.[4] Around this same time, First Union sent a letter dated September 30, 1997 to the three individual co-trustees recommending diversification of the Rosenfeld Foundation's portfolio. This letter acknowledged the wealth that had been previously created by the Pep Boys stock, but expressed concern about the "poor performance of the stock in recent years relative to the market."[5] The corporate trustee followed up on this advice with additional letters urging diversification dated October 22, 1998, March 17, 1999 and December 13, 1999.[6]

Ms. Stein asserts, however, that both Lester and Robert Rosenfeld refused to diversify and that First Union knew that she could not bring a legal action against them so long as her mother was alive because it would upset her.[7] She alleges that Lester refused to diversify because of his conflict of interest as a member of the Board of Directors of Pep Boys, while Robert was under the complete sway of his father and likewise refused to sell the Pep Boys stock.[8] Thereafter, Ms. Stein asserts, the Pep Boys stock suffered sharp declines so that by December 2000, it was trading at a "low of $3.44, a loss of over

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[3] Complaint, ¶ 19.
[4] Id .¶ 20.
[5] See 9/30/97 letter from Eric Wiegand, Senior Vice President , First Union National Bank to Lester Rosenfeld, copying Robert Rosenfeld and Rita Stein, attached as Ex. 1 to Stein's 2/23/04 Memorandum.
[6] See Stein's 2/23/04 Memorandum, Exs. 2-3 & 5.
[7] Complaint, ¶¶ 27 & 29.
[8] Complaint, ¶¶ 23-25.

90% of its value in four years (although the price began to recover somewhat thereafter)."[9]

On April 30, 2002, Ms. Stein filed a complaint in the civil division against her co-trustees. According to Wachovia, at the time Ms. Stein filed her suit the Foundation held 396,900 shares of Pep Boys stock valued at $7,600.635.[10] The complaint, except for Count VI, was subsequently transferred to the Orphans' Court division by order dated September 27, 2002,[11] in response to preliminary objections. Count VI, which remained within the civil division, was a claim for reputational damages and mental distress. By order dated September 3, 2003, that count was dismissed by the Honorable Thomas Watkins in response to summary judgment motions by the three co-trustees.

In the complaint currently pending before this court, Rita Stein seeks monetary damages and injunctive relief to remedy the alleged "conflicts of interest, breach of fiduciary duty and negligence of three of the trustees of a charitable foundation in failing to diversify the foundation's assets."[12] She complains that the assets of the foundation consist almost entirely of the stock of a single company – the Pep Boys stock which

[9] Complaint, ¶¶ 26.

[10] See Affidavit of Reginald J. Middleton, Relationship Manager in the Charitable Funds Services Department of Wachovia, ¶ 5, attached as Ex. J to Wachovia's 1/23/04 Memorandum. Ms. Stein does not appear to dispute Wachovia's general figures; she notes that Wachovia alleged that the Foundation was worth $8,500,000 as of January 23, 2004, and that this amount would signify a $10,000,000 loss from a value as high as $18,833,245 on June 30, 1997.Stein's 2/23/04 Memorandum at 16 & n. 9. Moreover, she argues that the Foundation "could have been worth as much as $26 million dollars, or more than *three times* what it is now worth, if it had been prudently invested." Id. at n.10.

[11] By order dated September 27, 2002, the Honorable Joseph D. O'Keefe, Administrative Judge of the Orphans' Court Division, ordered the transfer of Counts I-V and VII-VIII of the complaint by referencing an August 13, 2002 order by Judge Moss which stated:

> ORDERED, ADJUDGED and DECREED, that the said preliminary objections are sustained only to the extent that the Prothonotary is hereby ORDERED to transfer to this action and the Record herein to the Orphans' Court Division.

Judge O'Keefe's order further specified that Count VI remained wholly and entirely in the Civil Trial Division.

[12] Complaint, ¶ 1.

suffered a significant decline by as much as 85%. The remaining counts in the complaint set forth the following claims:

Count I – Breach of Trustees' Fiduciary Duty as against Lester and Robert Rosenfeld
Count II – Breach of Corporate Trustee's Fiduciary Duty as against First Union National Bank (presently Wachovia)
Count III - Negligence as against all defendants
Count IV – Restitution and Unjust Enrichment as against First Union National Bank
Count V – Surcharge as against all defendants
Count VII – Removal of First Union as corporate trustee and removal of Lester and Robert Rosenfeld as individual trustees for misfeasance and malfeasance
Count VIII – Partitioning and Severing the Trust as against all defendants

Wachovia has filed a motion for summary judgment, initially asserting that these counts should all be dismissed with prejudice on three grounds. First, the claims should be deemed invalid because of the indemnification clause in the trust agreement. Second, Ms. Stein has failed to establish the requisite loss in trust assets. Third, Wachovia emphasizes "Mrs. Stein's own concurrence for years in not seeking diversification."[13] Ms. Stein responded by citing letters from the corporate trustee that urged the individual trustees to diversify trust assets. She asserts that as the corporate trustee, the bank had the obligation to go to court to force Robert and Lester to diversify the assets of the foundation and its failure to do so was a "deliberate and intentional breach" of fiduciary duty.[14] Wachovia responds that it bore no such obligation as a matter of law to go to court to break the deadlock and force diversification. Upon consideration of the terms of the Rosenfeld trust agreement and the relative precedent, this court concurs with

[13] Wachovia's 1/23/04 Memorandum at 2.
[14] Stein's 2/23/04 Memorandum at 7.

Wachovia that it cannot be held liable either for breach of fiduciary duty or for negligence.

Analysis

Summary judgment may be granted after the pleadings are closed. Pa.R.C.P. 1035.2. Summary judgment should be granted "only in the clearest of cases where the record shows that there are no genuine issues of material fact" and that the moving party is entitled to summary judgment as a matter of law. Trowbridge v. Scranton Artificial Limb Co., 560 Pa. 640, 644, 747 A.2d 862, 864 (2000). See also Downey v. Crozier-Chester Medical Center, 817 A.2d 517, 524 (Pa. Super. 2003), app.denied, 842 A.2d 406 (Pa. 2004). The record must be viewed in the light most favorable to the non-moving party, and all doubts must be resolved in his favor. Ertel v. Patriot-News Company, 544 Pa. 93, 98-99, 674 A.2d 1038, 1041, cert. denied, 519 U.S. 1008 (1996). (1996); Hayward v. Medical Center of Beaver County, 530 Pa. 320, 324, 608 A.2d 1040, 1042 (1992). The moving party bears the burden of establishing that there is no material issue of fact. Long v. Yingling, 700 A.2d 508, 511 (Pa. Super. 1997), app. denied, 555 Pa. 731, 725 A.2d 182 (1998). A purpose of a summary judgment motion is to avoid a "useless trial." Dillon v. National Railroad Corp., 345 Pa. Super. 126, 137, 497 A.2d 1336, 1341 (1985).

The starting point for any analysis of the dispute in this case must be the terms of the Agreement of Trust by Emanuel Rosenfeld as settlor. In re McCune, 705 A.2d 861, 867, (Pa. Super. 1997), app.denied, 555 Pa. 720, 724 A.2d 953 (1998)("In Pennsylvania, the law honors a settlor's right to determine the disposition of his estate"). As the Pennsylvania Supreme Court has observed in construing a trust instrument, "it is basic

that it must be read as a whole and every portion thereof considered in determining its intent and true purpose." In re Alloy Manufacturing Company Employees Trust, 411 Pa. 492, 495-96, 192 A.2d 394, 396 (1963). The intent of the settlor is paramount:

> It is still hornbook law that the pole star in every trust (as in every will) is the settlor's (or testator's) intent and that intent must prevail. It would certainly be unreasonable to construe the proviso as intending to destroy or effectually nullify what has always been considered the inherent basic fundamental right of every owner of property to dispose of his own property as he desires, so long as it is not unlawful.
> Estate of Pew, 440 Pa. Super. 195, 220, 655 A.2d 521, 533 (1994)(citations omitted).

Pennsylvania courts have generally recognized that a corporate trustee may be held to a higher standard where it presents itself as having special expertise in administering estates. In such cases, a corporate trustee "is under a duty to exercise a skill greater than that of an ordinary man and the manner in which investments were handled must accordingly be evaluated in light of such superior skill." Estate of Knipp, 489 Pa. 509, 512, 414 A.2d 1007, 1008 (1980)(quoting Killey Trust, 457 Pa. 474, 326 A.2d 372 (1974)); In re Mendenhall, 484 Pa. 77, 80, 398 A.2d 951, 953 (1979).

On the other hand, Pennsylvania courts have recognized that the terms of a trust agreement must also be considered when analyzing the standard of care owed by a corporate trustee. Thus, after recognizing the higher standard typically applied to corporate trustees, the Pennsylvania Supreme Court emphasized the "equally important precept in our law that where a trust instrument is explicit as to the duty owed, it, as evidencing the settlor's (testator's) intent, should govern." Estate of Niessen, 489 Pa. 135, 138, 413 A.2d 1050, 1052 (1980). See also Evans Trust, 3 Fiduc. Rep. 2d 304, 310 (1982)(concluding that while the bank must be held to a higher standard of care than an

ordinary individual trustee unless the trust agreement provides otherwise, here that agreement "clearly expanded the trustee's authorized scope of investment"). This general principle is also recognized by the Probate, Estates and Fiduciaries Code which provides:

> **General rule. –** The testator or settlor in the instrument establishing a trust may prescribe the powers, duties and liabilities of the fiduciary regarding the investment or noninvestment of principal and income and the acquisition, by purchase or otherwise, retention and disposition, by sale of otherwise, of any property which, at any time or by reason of any circumstance, shall come into his control; <u>and whenever any such provision shall conflict with this chapter, such provision shall control notwithstanding this chapter, unless the court having jurisdiction over the trust shall otherwise decree pursuant to subsection (b) of this section.</u>
> 20 Pa.C.S.A. § 7319(a)(emphasis added).

The gravamen of Ms. Stein's claim that Wachovia should be liable for breach of fiduciary duty and negligence is its failure to fulfill its "special obligation" to "make sure that the Foundation and its assets were properly protected and managed even in the face of intrafamily disputes." Complaint, ¶¶ 45-46. Ms. Stein sets forth the exact nature of Wachovia's alleged breach by asserting that the bank "[k]nowing that the Foundation was grievously mismanaged through the failure to properly diversify its assets from a single stock holding, *namely* Pep Boys, Inc.," and "that court action was necessary to protect the Foundation," the bank nonetheless failed to take this action.[15]

Ms. Stein asserts that she had advocated diversification at least since May 1997.[16] Moreover, she emphasizes that Wachovia's corporate predecessor, First Union had sent

[15] Stein's 2/23/04 Memorandum at 1-2.
[16] Complaint, ¶ 19.

numerous letters to its co-trustees urging diversification.[17] Nonetheless, the two other individual co-trustees, Lester and Robert Rosenfeld "adamantly refused to diversify."[18]

The problem with Ms. Stein's argument, however, is that there is no provision within the Trust Agreement that would have provided a means for breaking this deadlock between the equally divided co-trustees.[19] Ms. Stein's father, as settlor, certainly knew that in designating an even number of trustees, a deadlock or tie vote was a distinct possibility. Not only did he provide no mechanism to break such a tie vote, but he also expressly included a proviso that certain actions could only be taken by a majority vote. The trust instrument read as a whole, therefore, clearly evidences the settlor's intent to allow no action to occur in tie vote or deadlock situations. Thus, the settlor's intent was to condition affirmative action of the trustees on a 3 to 1 or unanimous vote. In addition, the individual and corporate trustees were given an equal standing with each other.

Moreover, the Rosenfeld trust agreement does not explicitly require the diversification of the sole assets by which it was funded—the Pep Boys stock-- but instead gave a majority of the trustees discretion to retain the stock as long as they thought advisable. Thus, the Rosenfeld trust agreement provides that the "trustees agree to hold the property received by them and such additional property as may added hereto from time to time by the Settlor or others." Significantly, the Rosenfeld trust agreement

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[17] See Stein's 2/23/04 Memorandum, Exs. 1-3 & 5.
[18] Complaint, ¶ 21.
[19] The complaint in paragraph 12 asserts that Emanuel Rosenthal had provided for a corporate trustee in order to take appropriate action to safeguard the foundation from family strife. When asked in deposition as to the basis for this assertion she agreed it was based solely on a general knowledge of her father. Stein 2/23/04 Memorandum, Ex. 6, Stein depo. at 133-35. When further pressed as to why her father might have funded the foundation solely with Pep Boys stock, Ms. Stein responded: "You can't ask me why my father did things. I can't answer that." Id., Ex. 6, Stein depo. at 137. This testimony reinforces the primacy of the Rosenfeld Trust Agreement as the basis for determining the settlor's intent. Indeed, Ms. Stein herself initially indicated that the basis for her allegations in paragraph 10 of the complaint was "the instrument itself." Id., Ex. 6, Stein depo. at 133.

contains an indemnity provision that specifically addresses any decision by the trustees to retain property of the trust:

> (2) In addition to the powers given by law, the Trustees shall have and exercise the following powers as the decision of the majority of them may direct:
>
> > (a) To retain any property delivered to them as long as in their discretion they deem it advisable to do so. For the exercise of this power the Trustees are completely relieved from any responsibility by reason of any loss or shrinkage in value.
> > Rosenfeld Trust Agreement, Paragraph (2)(a)

By its clear terms, this indemnity provision gives the Trustees—as a majority--the discretion to retain any property as long as they deem it advisable to do so. The problem is that the agreement makes no provision for action as to retention of property delivered to them by less than a majority of the trustees nor does it provide a method for breaking a deadlock. It also does not give any single trustee—whether individual or corporate—greater power to make asset retention decisions than the other trustees. Ms. Stein appears to argue that this provision did not come into effect because the "decision to retain the Pep Boy Stock was not the decision of the majority…"[20] This argument, however, is sophistical: it ignores both the facts of this case and the terms of the Rosenfeld trust agreement. The mere fact that the co-trustees could not reach a majority consensus on diversification does not nullify the indemnity clause. Rather the deadlock among the co-trustees on the issue of asset diversification was simply not addressed by the trust agreement and evidences the settlor's intent to require a majority vote for any affirmative action affecting the assets within the trust.

Ms. Stein argues, however, that the corporate trustee had a special responsibility to break this deadlock by going to court. She nonetheless fails to cite any provision

[20] Stein's 2/23/04 Memorandum at 9.

within the trust agreement that imposes this special obligation. Rather, to support this claim she cites the Estate of Scharlach, 809 A.2d 376 (Pa. Super. 2002) as "illustrative if not controlling."[21] But, as Ms. Stein concedes, Scharlach is not controlling for several reasons. Most significantly, the facts are inapposite. First, Scharlach involved a guardianship of an incapacitated person, not a charitable trust. Consequently, there was no trust agreement to interpret. Secondly, Scharlach did not involve a deadlock among co-trustees. Instead, the focus was on the actions of a bank, as a court appointed corporate guardian of an incapacitated person. In Scharlach, the court issued an order prescribing how the corporate guardian was to invest the incapacitated person's assets, essentially in government insured investments. This court order explicitly stated that the corporate guardian was to petition the court "should conditions merit an appropriate adjustment of the investment scheme of the assets." Estate of Scharlach, 809 A.2d at 378. Ten years later, after a new guardian was appointed and the corporate guardian filed its account, the court concluded that the corporate guardian breached its duty in not petitioning the court to pursue an investment course suggested by an expert's investment plan that would have enhanced the incapacitated person's assets. That option of court relief had been specifically presented by the court's original order. No such option is set forth the in Rosenfeld trust agreement.[22] Moreover, there is nothing in the trust agreement that

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[21] Stein's 2/23/04 Memorandum at 11.

[22] Equally significant, the Scharlach court was careful to note that it did not base its finding on a failure to diversify assets. Estate of Scharlach, 809 A.2d at 387. The corporate guardian in Scharlach argued that under Estate of Knipps, 489 Pa. 509, 414 A.2d 1007 (1980), a surcharge could not be charged merely for failure to diversify. The Scharlach court essentially concedes this point by emphasizing the different basis for its imposition of a surcharge:

> However, in the present case, appellant is hardly complaining that Appellee breached its duty per se for failure to diversify. Appellant contends that Appellee breached its fiduciary duty by failing to invest the assets of the guardianship in accordance with the investment plan that it ordered, and that the documents of record irrefutably establish was reasonably designed to meet the

would have prevented Ms. Stein from seeking the relief she insists the corporate trustee should have taken.

Ms. Stein more fundamentally argues that the corporate trustee breached its duty or was negligent in failing to achieve diversification of the trust assets. Yet, as Wachovia counters, neither Pennsylvania law nor the trust agreement set forth an absolute requirement for diversification. The trust agreement provides that property—such as the Pep Boys Stock-- may be retained as long as a majority of the trustees "in their discretion" consider it "advisable to do so." It further immunizes the trustees from any liability in exercising this discretion: "For the exercise of this power, the Trustees are completely relieved from any responsibility by reason of loss or shrinkage." Rosenfeld Trust Agreement, para. (2)(a).

In its early cases, the Pennsylvania Supreme Court observed that "[d]iversification of trust investments has not been insisted upon in this Commonwealth." Lentz Estate, 364 Pa. 304, 310, 72 A.2d 276, 278 (1950)(citations omitted). A more nuanced position was subsequently taken by Pennsylvania Supreme Court in Estate of Knipp, 489 Pa. 509, 414 A.2d 1007 (1980). In Knipp, the Pennsylvania Supreme Court court refused to lay down a per se rule requiring diversification of trust assets. It cautioned, however, that even where a testator gives a fiduciary discretion to retain assets, the decision to retain those assets must still be prudent. Id., 489 Pa. at 513. 414 A.2d at 1009. Nonetheless, although "many financial authorities advocate diversity of investment as a desirable course for trust management, a judicial decision declaring non-diversification to be presumptively imprudent would arbitrarily foreclose executors and

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incompetent's needs. The principles at issue in Knipp have no application here. Id., 809 A.2d at 387.

trustees from opportunities to retain beneficial holdings." Id. , 489 Pa. at 514, 414 A.2d at 1009. Consequently, the preferable approach is a case by case analysis to determine whether a corporate fiduciary met the standard of care in issues of diversification. See also Trust of Munro, 373 Pa. Super. 448, 457, 541 A.2d 756, 760, app.denied, 520 Pa. 607, 553 A.2d 969 (1988)(suggesting a case by case approach because"[m]ere failure to diversify is not a sufficient basis for the imposition of a surcharge as diversification of investments is not required in Pennsylvania").[23]

Applying that case by case analysis to the instant facts, it is clear that the corporate trustee concluded that diversification was advisable and it forcefully advocated diversification by sending numerous letters to its co-trustees. Nonetheless, the terms of the trust required a majority decision as to the retention of assets; it provided no means to break the deadlock; and further, it immunized the trustees for any liability due to the loss in value of assets due to a retention decision. Under the explicit provisions of the Rosenfeld trust agreement, the corporate trustee met its fiduciary obligations by repeatedly urging the other co-trustees to diversify the trust assets. Moreover, under the trust agreement, it lacked authority to effectuate this advice unilaterally due to lack of majority support or authority to override a deadlock. There is thus no material issue of fact as to Wachovia's liability for breach of fiduciary duty or negligence.[24]

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[23] The PEF code requires a prudent diversification of funds in 20 Pa.C.S.A. § 7204, which provides that "a fiduciary shall reasonably diversify investments, unless the fiduciary reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes terms and other circumstances of the trust and requirements of this chapter." Section 7204(b) specifically states, however, that this rule does not apply to trusts that became irrevocable prior to December 25, 1999, such as the instant trust.

[24] Ms. Stein suggests repeatedly that summary judgment is not appropriate because the cases relied upon by Wachovia involved evidentiary hearings to determine issues of fact. See e.g., Ms. Stein's 2/23/04 Memorandum of Law at 19 (referencing Lentz Estate, 364 Pa. 304, 72 A.2d 276 (1950) and Estate of Knipp, 489 Pa. 509, 414 A.2d 1007 (1980)). While it is true that both the Lentz and Knipp courts analyzed accounts to determine whether the trustee had fulfilled its fiduciary duty in retaining certain

It is, of course, true that any of the co-trustees might have applied to the Orphans' Court for assistance in breaking their deadlock. Section 3328(b) of the PEF code provides:

> (b) **When no majority. –** When a dispute shall arise among personal representatives as to the exercise or nonexercise of any of their powers and there shall be no agreement of a majority of them, unless otherwise provided by the governing instrument, the court, upon petition filed by <u>any</u> of the personal representatives or by any party in interest, aided if necessary by the report of a master, in its discretion, may direct the exercise or nonexercise of the power as the court shall deem for the best interest of the estate.
> 20 Pa.C.S.A. § 3328(b)(emphasis added)

The official comment to this section cautions that the exercise of a court's authority to intervene in cases where there is no majority would be discretionary and "that the court can compel fiduciaries to attempt first to reconcile their differences without using the section as a cloak for securing advisory opinions on all questionable matters."[25] Arguably, by sending numerous letters advocating diversification, the corporate trustee in this case was seeking to "reconcile their differences" through its efforts to convince the other co-trustees, specifically Lester and Robert Rosenfeld, to diversify the foundation's portfolio.

In addition, what is significant about Section 3328 is that it empowers any of the co-trustees—including Rita Stein--and not just the corporate trustee, to seek judicial relief to break a deadlock. Although Ms. Stein suggests that she was unwilling to seek judicial relief herself due to concerns that such action would upset her mother, Ms. Stein, as a

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assets, the issue before this court differs significantly. None of those cases involved a deadlock among co-trustees; in contrast, the issue here is whether Wachovia was compelled by the Rosenfeld trust agreement to break a deadlock among trustees to force diversification of assets. There is no dispute that Wachovia urged diversification in its various letters to the co-trustees. Consequently, the sole question remaining is a question of law based on interpretation of the trust agreement.

[25] 20 Pa.C.S.A. §3328 Official Comment to subsection (b).

trustee, was also bound by a fiduciary duty to safeguard the assets of the charitable trust, albeit the standard applied would differ from the standard applicable to a trustee with more specialized expertise. For Ms. Stein, the standard of care imposed on a trustee is that which a person of "ordinary prudence would practice in the care of his own estate." Estate of Pew, 440 Pa. Super. 195, 236, 655 A.2d 521, 541 (1994). See also Trust of Mendenhall, 484 Pa. 77, 80, 398 A.2d 951, 953 (1979). Under this standard, Ms. Stein might also have petitioned the court to break the deadlock; no exceptions are mapped out for the familial concerns Ms. Stein invokes.

Since the corporate trustee did not breach its fiduciary duty nor act negligently in its administration of the foundation assets, there is no basis for a surcharge[26] against Wachovia. Trust of Munro, 373 Pa. Super. at 453, 541 A.2d at 758 ("One seeking to impose a surcharge has the burden of proving that the fiduciary failed to meet the duty of care owed to the estate"). Accord Evans Trust, 3 Fiduc. Rep. 2d 304, 309 (1982). It is thus unnecessary to address Wachovia's additional argument that it is entitled to summary judgment on the alternative theory that "the foundation has not suffered a loss."[27]

Conclusion

For these reasons, Wachovia's motion for summary judgment is granted as to

[26] A surcharge is a "penalty imposed for failure of a trustee to exercise common prudence, skill and caution in the performance of its fiduciary duty, resulting in a want of due care," but in the case of a trustee holding itself out as possessing special expertise, a higher standard applies. Estate of Scharlach, 809 A.2d at 384 (citations omitted).

[27] Wachovia's 1/23/04 Memorandum at 9. Although the parties agree that the assets of the Foundation have increased since its inception with 200 shares of Pep Boys stock, they argue over the adequacy of this increase and whether it reflects on the trustees' performance of their fiduciary duties.

defendant Wachovia alone and the following Counts of the Complaint are dismissed with prejudice:

Count II – Breach of Corporate Trustee's Fiduciary Duty

Count III – Negligence as to Defendant Wachovia, alone

Count IV - Restitution and Unjust Enrichment as to Defendant Wachovia

Count V – Surcharge as to Defendant Wachovia, alone

Count VII – Removal as to Wachovia, alone

Count VIII, seeking a partitioning and severing of the trust, shall remain.

Date: _______________ By the Court:

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John W. Herron, J.