Third District Court of Appeal

State of Florida, January Term, A.D. 2012

Opinion filed April 25, 2012.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-1528
Lower Tribunal No. 05-2680

Michelle Jacobson and Aline Sklaire, as Successor Co-Trustees of the Jacob C. Sklaire Trust,
Appellants,

vs.

Joyce Glasel Sklaire,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Herbert Stettin, Judge.

Wintter & Associates and Christopher Q. Wintter (Hollywood), for appellants.

Shutts & Bowen and William Jay Palmer, for appellee.

Before RAMIREZ, SHEPHERD, and SUAREZ, JJ.

SUAREZ, J.

Jacob Sklaire died in 2004. He created the Jacob Sklaire Trust, in which he gifted to his wife, Joyce [the Beneficiary], $475,000. At his death, the Trust contained approximately $636,000. Michelle and Aline, daughters, are Co-

Trustees and remainder beneficiaries of the Jacob Sklaire Trust. After Jacob died, the Co-Trustees refused to distribute the gift to the Beneficiary, who then filed a complaint to compel distribution of the gift from the Trust. The Co-Trustees answered, asserting defenses of lack of capacity, undue influence and fraud, and counterclaimed for funds allegedly wrongfully taken by the Beneficiary from trust assets during Jacob's life. The trial court denied the affirmative defenses and dismissed the counterclaim with prejudice. The Beneficiary prevailed at trial, and the trial court awarded her costs and fees from the Trust. The Co-Trustees appealed the final judgment and this Court affirmed.[1]

The Co-Trustees thereafter agreed to an order taxing the Beneficiary's costs against the Trust, and agreed to pay the Beneficiary's attorney's fees from the Trust. The Co-Trustees had, however, without court approval paid their own attorney's fees out of the same Trust during the course of the litigation, counterclaim and appeal, leaving less than necessary to pay the Final Judgment and orders on attorney's fees and costs. The Beneficiary filed motions to compel payment, and moved to hold the Co-Trustees personally liable for the amounts, asserting breach of fiduciary duty. The trial court awarded the Beneficiary's appellate fees and costs against the Trust and deferred ruling on the Co-Trustees' individual liability.

[1] Jacobson v. Sklaire, 985 So. 2d 1224 (Fla. 3d DCA 2008).

The bulk of the money that was improperly diverted from the Trust was ultimately repaid by the Co-Trustees' original law firm, and by the Co-Trustees themselves. There were, however, insufficient funds left in the Trust to completely satisfy a balance of about $112,000 remaining from the original amounts ordered repaid, i.e., what was improperly removed from the Trust originally, plus attorney's fees, plus post-judgment interest. Following an evidentiary hearing, the trial court rendered the order on appeal here, which found that the Co-Trustees in this breach of trust action were jointly and severally liable to the Beneficiary for attorney's fees and costs pursuant to sections 737.627,[2] and 736.1004, Florida Statutes (2011).[3] Finding no error, we affirm.

Affirmed.

RAMIREZ, J., concurs.

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[2] § 737.627, Repealed by Laws 2006, c. 2006-217, which related to costs and attorneys' fees, was derived from Laws 1993, c. 93-257, § 16 and Laws 2003, c. 2003-154, § 19. See, now, Fla. Stat. § 736.1004.

[3] § 736.1004 Fla. Stat. (2011):
(1)(a) In all actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers; and
(b) In proceedings arising under ss. 736.0410-736.0417, the court shall award taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.
(2) When awarding taxable costs under this section, including attorney fees and guardian ad litem fees, the court, in its discretion, may direct payment from a party's interest, if any, in the trust or enter a judgment that may be satisfied from other property of the party, or both.

RAMIREZ, J., (concurring).

I concur with the majority that we should affirm. I write only to address the dissent.

The trial court found that the co-trustees in this case had improperly removed funds from the trust to themselves. The court therefore entered a personal judgment against them to return the funds. The dissent would have the appellee file a separate claim against the individuals, serve them with process and commence a new civil procedure, with an answer and a new trial, on a case pending since 2005. The problem with that logic is that Michelle Jacobson and Aline Sklaire did not acquire the funds from the trust through some independent tort. They acquired the funds because they, as co-trustees, transferred the money to themselves.

Our case is totally different from Fidelity-Philadelphia Trust Co. v. Ball, 208 So. 2d 282 (Fla. 3d DCA 1968). There the trustees sued the defendants to recover upon a guarantee on a promissory note. The defendants then sought to counterclaim against the trustees, individually, even though the trustees were only before the court in their representative capacities. Here, the co-trustees were defendants charged with improperly withholding a distribution called for under the trust instrument. As a prevailing party, the beneficiary was entitled to attorney

fees, and "the court in its discretion, may direct payment from a party's interest, if any, in the trust or enter a judgment that may be satisfied from the other property of the party, or both." § 736.1004(2) Fla. Stat. (2007). The co-trustees, in their pleadings, requested the trial court award fees under this section's predecessor statute. As the trustees could expect to be awarded fees in defense of their duties under the trust instrument, they could also expect to be required to pay back the trust if they did not win and were found to have acted wrongly. Here, the very monies at issue were taken from the trust res. The reason the trustees appeal is because their efforts exhausted the trust res and could not satisfy the attorney fee award. This is not a separate cause of action for which service should be necessary.

It is not unprecedented to require participants in litigation who are not named parties to face the consequences of their conduct. In Visoly v. Security Pacific Credit Corp., 768 So. 2d 482, 489 (Fla. 3d DCA 2000), we stated:

> A "party" is defined under Florida law as any person who participates in litigation regardless of whether or not actually named in the pleadings:
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> > [The] word party includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or not. Fong Sik Leung v. Dulles, 226 F.2d 74, 81 (9th Cir. 1955). 'Parties include, not only those whose names appear upon the record, but all others who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of [the]

> proceedings....' Theller v. Hershey, 89 F. 575 (C.C.N.D.Cal.1898).
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> Lage v. Blanco, 521 So.2d 299, 300 (Fla. 3d DCA 1988) review denied, 531 So. 2d 1354 (Fla. 1988). See also, ECOS, Inc. v. Brinegar, 671 F.Supp. 381 (M.D.N.C.1987)(applicant for intervention who participates in proceedings may be treated as a party even though no formal order granting intervention has been entered); Florida Ass'n of Nurse Anesthetists v. Dep't of Prof. Reg., 500 So.2d 324 (Fla. 1st DCA 1986)(association which filed response and memorandum of law in administrative proceedings was a "party" to proceedings); Kaiser Aerospace and Electronics Corp. v. Teledyne Indus., Inc., 229 B.R. 860 (S.D.Fla.1999)(a participant in a confirmed reorganization plan who has a direct interest in the subject matter is considered a "party").
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> The above detailed facts clearly reflect the Visolys were "parties" in this litigation. By initiating numerous legal proceedings and filing countless documents in court, the Visolys personally, and through their counsel, clearly participated in the litigation and contributed to the expenses thereof. The record thus supports the trial court's finding that the Visolys were "parties." See Lage v. Blanco, 521 So.2d at 299.

Here, where Michelle Jacobson and Aline Sklaire were the beneficiaries of the remainder in the trust and participated in this litigation for over seven years, making unauthorized transfers to themselves from the trust, and consequently they were “parties” so as to make them individually liable.

Accordingly, I see no jurisdictional problem with the trial court’s order.

SHEPHERD, J., dissenting.

I respectfully dissent.

On June 25, 2005, Joyce Sklaire initiated suit against Michelle Jacobson and Aline Sklaire, as successor co-trustees of the Jacob C. Sklaire Trust, to enforce her right to payment of a $475,000 specific devise from the trust. Process was served on the co-trustees, in their representative capacity, through their attorney. Ultimately, judgment was entered in favor of Joyce Sklaire, followed by an award of attorney's fees and costs. Unable to satisfy the full award of attorney's fees and costs from the funds remaining in the trust, Joyce Sklaire filed her Motion to Determine Individual Liability of Co-Trustees for Court Ordered Fees and Motion to Impose Personal Liability for Tortious Conduct. The trial court granted the motion, finding a breach of fiduciary duty, and entered an order holding Michelle Jacobson and Aline Sklaire jointly and severally liable for the attorney's fees and costs.

Michelle Jacobson and Aline Sklaire, in their personal capacity, contest the jurisdiction of the trial court to enter the order under review because they were not personally served. I find their point well-taken. In Fidelity-Philadelphia Trust Co. v. Ball, 208 So. 2d 282, 285 (Fla. 3d DCA 1968), we stated:

> It is elemental that [a personal judgment against the trustees] may not be entered in the absence of personal service and an opportunity to be heard. The fact that the appellant[s] have submitted themselves as trustees to the jurisdiction of the Florida courts does not amount to a submission of themselves to the jurisdiction of the court for the purpose of adjudicating claims against them personally.

Unlike the concurrence, I find the facts of Fidelity-Philadelphia Trust Co. to be indistinguishable from the facts of the case before us. Both are actions for breach of trust. In Fidelity-Philadelphia Trust Co., a guardian ad litem alleged the co-trustees of a trust breached their obligations to certain minor beneficiaries of the trust by engaging in a loan transaction, which was "unauthorized, reckless and in wanton disregard of the rights of the minors," causing a loss to the children in the sum of $165,000. Id. at 283. The guardian additionally prayed for a judgment against the trustees individually for attorney's fees, costs, and punitive damages. The case before us arises out of an order imposing individual liability on the co-trustees of a trust for breach of trust by paying the fees of trust counsel without required court approval to the detriment of recovery by the beneficiary of her own legal fees and costs incurred while litigating (successfully) against the same counsel. The principle enunciated by this Court in Fidelity-Philadelphia Trust Co. is as applicable to the case before us as it was there.

The concurrence also asserts our decision in Visoly v. Security Pacific Credit Corp., 768 So. 2d 482 (Fla. 3d DCA 2000), requires a contrary result. The concurrence is incorrect. Visoly is a sanction case arising out of a mortgage

foreclosure. Despite the fact the Visolys filed a counterclaim in the foreclosure action, they urged—in a sixth appeal before this Court—they were not "named parties" in the action and the trial court therefore lacked jurisdiction over them for the purpose of awarding sanctions against them under section 57.105 of the Florida Statutes (1999). We, of course, found no merit to the claim, affirmed the sanction order, and added an award of appellate attorney's fees against the Visolys and their counsel for good measure. Id. at 489. Visoly is of no assistance to the concurrence.

The only other authority cited by the concurrence is section 736.1004(2) of the Florida Trust Code. It reads as follows:

> (2) When awarding taxable costs under this section, including attorney fees and guardian ad litem fees, the court, in its discretion, may direct payment from a party's interest, if any, in the trust or enter a judgment that may be satisfied from other property of the party, or both.

Carefully considered, this provision provides the concurrence no assistance in answering the question raised by this dissent: whether a trustee brought into a case in her individual capacity must be served with process.

Fidelity-Philadelphia Trust Co. makes it unmistakably clear a trial court is without jurisdiction to enter a personal judgment against an individual sued in her capacity as a co-trustee absent either consent or personal service upon the individual. We should follow our precedent.

I would reverse the order on appeal.