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**IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA**

CASE NO. **PRC170005718** DIVISION: **62J** JUDGE: **Gillespie, Kenneth (62J)**

In Re: Trust of: Salah, James M.

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FINAL JUDGMENT

THIS CAUSE, having come before the Court for a non-jury trial heard on March 13, 2023 and concluding March 14, 2023. The Court, having received testimony from witnesses (including deposition testimony), reviewed all exhibits and the joint pretrial stipulation, heard argument of counsel and being otherwise duly advised in the premises, makes the following findings of fact and conclusions of law:

PROCEDURAL BACKGROUND

This case involves the administration of the James M. Salah Trust – 2001 (the “Trust”) and actions taken by its former trustee, Brown Brothers Harriman Trust Company, N.A. (“Defendant”). F. Ronald Mastriana (“Plaintiff”), the current trustee of the Trust, filed a two-count Second Amended Complaint regarding Defendant’s actions on August 2, 2021. Count I of Plaintiff’s Complaint seeks a declaration and determination that Defendant breached its fiduciary duties by retaining an excessive and unreasonable reserve after being discharged as trustee. Count II of Plaintiff’s Complaint seeks a surcharge against Defendant for imprudently investing the funds held as a reserve and to disgorge any fees charged by Defendant for its services as trustee since September 7, 2016. The Plaintiff made a demand for jury trial, which was stricken pursuant to this Court’s June 24, 2022 Order on Brown Brothers Harriman Trust Company, N.A.’s Motion to Strike Demand for Jury Trial in Second Amended Complaint. On August 27, 2021, the Defendant filed an Answer to the Second Amended Complaint (and Defenses). On September 16, 2021, the Plaintiff filed his Reply to the Affirmative Defenses.

FINDINGS OF FACT

First, the Court begins its analysis with Section 736.0707(2), Fla. Stat., which provides that “[a] trustee who has resigned or been removed shall within a reasonable time deliver the trust property within the trustee’s possession to the cotrustee, successor trustee, or other person entitled to the

property, *subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.*" (emphasis added). Based upon the foregoing statute and the evidence adduced at trial, the Defendant was entitled to maintain/hold a reserve upon its removal as trustee on September 1, 2016.

Second, the Court moves to the reserve amount a trustee is permitted to retain. A trustee has broad discretion to "act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries". §736.0814(1), *Fla. Stat.* Further, a court "shall not determine that a trustee abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion". *Id. See Cohen v. Friedland*, 450 So. 2d 905, 906 (Fla. 3d DCA 1984) ("In the absence of proof that the trustee has failed to perform, or has performed arbitrarily, a court is without authority to remove trust assets from control of the trustee..."); *see also Covenant Trust Co. v. Guardianship of Ihrman*, 45 So. 3d 499, 503-506 (Fla. 4th DCA 2010).

Regarding the amount of the reserve maintained by the Defendant, the Defendant submitted evidence which supported its discretion used in determining the amount of reserve it would withhold. Both, the Defendant and the Plaintiff agreed that the Defendant held back \$8,910,829.44 as a reserve, which amount was approximately 7.98% of the total trust funds (roughly \$111,635,410.67 was distributed to the the Plaintiff's predecessor, Robert Judd, the then surviving trustee).

The Defendant established that it was the company's standard practice to hold a reserve of 10% of the total funds. On this point, Defendant provided three reasons which it found prudent to maintain a 10% percent reserve: (1) the fear that it would be sued or brought in as a party to an ongoing Massachusetts malpractice lawsuit, (commonly known as the Sally & Fitch litigation), which it determined that its potential liability exposure could be as high or greater than \$20,000,000.00); (2) the need to complete a complex final accounting of the Trust and as personal representative of James Salah's Estate; and (3) the need to potentially address any objections to its Trust and Estate accountings (in light of the then successor trustee's unwillingness to sign a consent and waiver).

True to the Defendant's concerns, Plaintiff's predecessor (Robert Judd) did in fact, file an objection to the Defendant's discharge and final estate accounting, which necessitated a response from Defendant. The Plaintiff's predecessor (Robert Judd) dismissed his objections to the final Estate accounting and discharge on June 23, 2017, and the Defendant was discharged as personal representative of the Estate on October 6, 2017. However, it was not until February 14, 2018, after service of its Trust accounting on thr Plaintiff's predecessor (Robert Judd), that thr Plaintiff's predecessor and the Trust Protector (Noreen S. Burpee) waived any objection to the trust accounting (excluding any claims related to the current litigation).

Additionally, an additional waiver and release related to the James and Beatrice Charitable Foundation Trust was executed by the Plaintiff's predecessor (Robert Judd) and the Trust Protector

(Noreen S. Burpee) on June 26, 2018. Again, true to Defendant's concerns, the Massachusetts' malpractice action (the Sally & Fitch litigation) was not settled until October 1, 2018. The stipulation of dismissal of the action and judgement thereupon was not entered until December 18, 2018. Notably, on April 17, 2019, the Defendant released approximately \$5.5 million of the reserve amount to the Plaintiff.

Currently, Defendant is holding approximately \$2.5 million of the Trust assets as a reserve, which amounts to less than 3% of the total Trust funds. In light of the Defendant's necessity to balance the purpose of the Trust (charity) with the above-noted potential and unknown litigation it might have faced, as well as its duties to wind up its administration of the Trust and the James Salah Estate, the Court finds that Defendant's reserve in an amount of 7.98% of the Trust assets was not arbitrary, was reasonable, and well within the Defendant's discretion.

Finally, as to the issue of the Defendant's investment of the reserve. Under Florida's Prudent Investor Rule, contained within section 518.11, Fla. Stat., a fiduciary has a duty to invest and manage assets as a prudent investor would "considering the purposes, terms, distribution requirements, and other circumstances of the trust." This includes taking into consideration the risks and objectives of the investment portfolio. *Id.* Section 518.11(1)(b), Fla. Stat., further provides that a fiduciary's actions and decisions are to be viewed in terms of a "reasonable business judgment" and that the Prudent Investment Rule is a "test of conduct and not of resulting performance."

Also, Florida's Trust Code provides for a prudent trust administration under section 736.0804, Fla. Stat., wherein it is noted that "[a] trustee shall administer the trust as a prudent person would [...], the trustee shall exercise reasonable care, skill, and caution." As indicated herein, the purpose of a reserve as indicated within section 736.0707(2) Fla. Stat., is to pay debts, expenses, and taxes of the trust administration. This includes payment of trustee and attorney fees. *See Smith v. Jones*, 162 So. 496 (Fla. 1935); *First Union Nat'l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4th DCA 2000); and *Sheaffer v. Trask*, 813 So. 2d 1051 (Fla. 4th DCA 2002).

As noted by the Defendant, the assets it chose to hold back to fund the reserve were fixed-income assets already within the Trust portfolio and that were sufficiently liquid, and low risk assets suitable for establishing and maintaining a reserve, with it primary purpose of accessing such funds for the immediate payment of expenses. As the Court has already noted *supra*, the Court will not interfere with the decisions of a fiduciary if they are made in good faith and non-arbitrary. *See Cohen v. Friedland*, 450 So. 2d 905, 906 (Fla. 3d DCA 1984). Accordingly, the Court finds that the Defendant exercise it discretion, purposefully, in holding back specific assets for its reserve that it believed was necessary to preserve capital by using fixed income investments and cash so that such assets would not need to be sold and would be readily available for disbursement, which the Court notes is the intent and purpose of a reserve.

CONCLUSION

Based on the evidence adduced at trial, the Court finds that the Defendant was permitted to hold a reasonable reserve upon its removal. The Defendant based its reserve amount (within its discretion) upon potential litigation, completion of accountings, and objections thereto. While the Defendant did not use a formula to determine the amount of reserve, Defendant provided evidence that holding a reserve of 10% was its standard practice, and in fact, both the Defendant and the Plaintiff agreed that the Defendant only withheld a reserve that amounted to approximately 7.98% of the total trust account funds. Accordingly, the Defendant's discretionary decision regarding the amount of reserve "held back" was reasonable, not arbitrary, and was not made in bad faith. Further, the Court finds that the Defendant prudently invested the reserve amount in light of the circumstances of this case. The reserved funds were held fixed income investments and cash, so that any debts, expenses, and taxes could be paid without delay. Lastly, the Court finds that the Defendant was entitled to pay expenses related to its duties as trustee from the reserve, as contemplated by Section 736.0707(2), Fla. Stat.

Accordingly, it is hereby

ORDERED, DECREED, AND ADJUDGED that the Plaintiff, F. RONALD MASTRIANA, as Trustee of the James and Beatrice Salah Charitable Trust U/T/A 08/09/2001, shall take nothing from this lawsuit and go hence without day.

DONE AND ORDERED in Chambers at Broward County, Florida on 13th day of March, 2024.

PRC170005718 03-13-2024 10:30 PM
Kenneth L. Gillespie

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Hon. Kenneth Gillespie

CIRCUIT COURT JUDGE

Electronically Signed by Kenneth Gillespie

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