

2013 IL App (2d) 120379-U
No. 2-12-0379
Order filed March 21, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JUDITH ECKLUND,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee and Cross-Appellant,)	
)	
v.)	No. 10-CH-4192
)	
JANIS EMERY,)	
)	Honorable
Defendant-Appellant and Cross-)	Bonnie M. Wheaton,
Appellee.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because defendant admitted in a verified pleading that she was a trustee and that plaintiff was a beneficiary, and because section 11(a) of the Trust Act requires a trustee to furnish an accounting to beneficiaries, the trial court did not deny defendant her right to due process for failing to hold a hearing and determine whether plaintiff was entitled to an accounting. In addition, the trial court's determination to not have the trust reimburse defendant for storage, attorney fees, and accounting fees was not against the manifest weight of the evidence. Finally, the trial court did not abuse its discretion in denying plaintiff attorney fees. Thus, we affirmed.
- ¶ 2 Plaintiff, Judith Ecklund, a beneficiary of the Rhoda Kliphardt trust (the trust) brought the current action against defendant, Janis Emery, also a beneficiary and the trustee of the trust.

Plaintiff's complaint sought an accounting of the trust's starting balance, and income and expenses, and further alleged that defendant breached her fiduciary duty. Following a bench trial, the trial court entered a judgment ordering that defendant's share of the trust be charged \$6,074.15 for renting storage units and to pay \$758.80 for a monthly charge at the Covenant Village in Northbrook. The trial court further awarded defendant \$3,500 in attorney fees and costs, but ordered that all fees and costs that exceeded that amount should be charged to the trustee's share of the trust. Defendant timely appealed, contending that (1) the trial court denied her due process under the fourteenth amendment to the United States constitution because the trial court did not hold a hearing to determine whether plaintiff was entitled to an accounting; and (2) the trial court abused its discretion in overruling defendant's determinations, as trustee, with respect to accounting fees, attorney fees, storage fees, and residential fees without a finding of fraud or bad faith. Plaintiff cross appealed, contending that the trial court erred in denying her request for attorney fees and cost. We affirm.

¶ 3

I. Background

¶ 4 The record reflects that Raymond and Rhoda Kliphardt executed the trust on August 27, 2004, naming defendant as trustee. The trust's beneficiaries consisted of Raymond and Rhoda's 5 daughters and 12 grandchildren. Article 3.06 of the trust provided:

¶ 5 Following Raymond's death, defendant assumed the role of trustee. During the summer of 2009, defendant approved a procedure for distributing Raymond's personal property. Each of the five sisters would pick an item during a round. If two sisters wanted the same item, they would cut cards, with the sister drawing the higher card winning the item. While the system worked well at first, a dispute over a tray from Italy ensued, and the process ultimately broke down.

¶ 6 Thereafter, plaintiff returned to her home in Naples, Florida, and retained counsel to obtain an accounting of the trust from defendant. On June 26, 2010, defendant provided plaintiff with an interim accounting. Plaintiff maintained that the accounting failed to accurately list a checking account formerly held by Raymond and that defendant paid herself \$15,000 from the trust.

¶ 7 On July 28, 2010, plaintiff filed her complaint. Count I alleged that the June 26, 2010, accounting was “substantially insufficient” because it failed to list the trust’s starting balance and did not account for the trust’s income or expenses. Count I alleged that plaintiff requested a complete accounting, defendant refused, and by doing so, “[defendant] is deliberately and intentionally refusing to fulfill her duties as [trustee].” Count I requested that the trial court order defendant to “prepare and submit a full and complete accounting of [the trust]” and disallow any fees charged by defendant as trustee, and other relief.

¶ 8 Count II alleged that defendant breached her fiduciary duty. Specifically, count II alleged that defendant failed to “fully and completely account and disclose all material facts” related to the trust. Count II further alleged that defendant “failed and refused” to distribute the trust’s net assets to the beneficiaries.

¶ 9 On October 13, 2010, defendant answered plaintiff’s complaint. Defendant admitted that she was the trust’s designated trustee and had been serving as trustee since Raymond’s death. Defendant admitted that plaintiff was a beneficiary. Defendant further admitted that she prepared the June 26, 2010, accounting and attached that accounting to her answer. Defendant denied that the accounting was insufficient, as well as the complaint’s other allegations.

¶ 10 On April 25, 2011, defendant filed a “first interim accounting.” On May 16, 2011, plaintiff filed eight objections to defendant’s first interim accounting. Plaintiff’s objection 2 related to the

charges by Covenant Village for storing Raymond's property since he died. Plaintiff argued that she and her other sisters were prepared to clean out Raymond's unit at Covenant Village by July 2009, but defendant prevented them by locking the other sisters out of the unit after a disagreement. As a result, Raymond's unit was not vacated until September 15, 2009, and the trust incurred storage charges. Plaintiff's objection 3 related to additional storage units defendant rented and charged to the trust. Plaintiff argued that the additional storage units were unnecessary and that defendant used the units to store personal property once Raymond's property was finally distributed in September 2010. Defendant filed her response to plaintiff's objections on May 18, 2011.

¶ 11 A bench trial commenced on December 19, 2011. Plaintiff first called Jill White. White testified that she was Raymond's third daughter. White testified that she lived in Michigan but that she spent "numerous weeks in Chicago" trying to help settle Raymond's estate. White testified regarding the process used to divide Raymond's assets and opined that the sisters should have been able to complete the property distribution during the summer of 2009. White testified that, at the end of summer 2009, defendant advised her sisters that she was going to rent one storage unit that would be used only on a temporary basis. White testified that she was "shocked" to later learn that defendant rented two additional storage units, with each one being half full. White testified that the final distribution of Raymond's property occurred in September 2010, about a year and a half after Raymond died.

¶ 12 Plaintiff next called Charles Emery, defendant's husband. Charles testified that, on August 11, 2009, he sent a letter to each of the sisters outlining his expectation that the trust would be closed by December 21, 2009. On cross-examination, Charles testified that the trust could not be closed by the end of 2009 because a "substantial sum of money" would not be available until the following

year, and vacating Raymond's unit at Covenant Village could not be completed because numerous items had not been removed. Emery testified that the sisters surrendered Raymond's unit back to Covenant Village around September 2009.

¶ 13 Plaintiff next called Richard Kuhn. Kuhn testified that he represented plaintiff in connection with the distribution of the trust. Kuhn testified that he received a letter from Emery regarding the trust, requested more information from Emery, and that the June 24, 2010, accounting was "willfully short" of the requirements mandated by applicable law.

¶ 14 Plaintiff next called defendant. Regarding the storage units, defendant testified that each of her sisters left in August 2009; numerous items still remained in Raymond's unit at Covenant Village; and she put those remaining items into storage. Defendant testified that she did not disclose to her sisters that she rented two additional storage units because she "had the authority to do what I had to do" and that her sisters knew that the trust would be responsible for "what I was putting into storage." Defendant testified that no further items were distributed from August 2009 through September 2010. Defendant admitted that, at the time of trial, one storage unit remained open, but she denied using the storage units for her personal property.

¶ 15 In response to questioning from her attorney, defendant testified that she prepared the June 26, 2010, accounting herself, without professional assistance. Defendant further specified the items she placed in the storage units.

¶ 16 Plaintiff testified next on her own behalf. Plaintiff testified that she returned to Illinois in the weeks before Raymond's passing and was there when he passed. Plaintiff testified regarding the system the sisters set up to distribute Raymond's property, and that by the weekend of July 4, 2009, they were "80% done." Plaintiff testified that the sisters wanted Raymond's unit at Covenant Village

closed in a timely manner, before one of the sisters, Jennifer, went on vacation. In her opinion, the sisters should have been able meet that deadline because they “were working together very, very well.”

¶ 17 Plaintiff testified that, in July 2009, during one of the rounds in which they were distributing Raymond’s property, she and defendant had a dispute over a tray her parents brought back from Italy. Plaintiff testified that a “terrible argument” ensued; she was locked out of Raymond’s unit; and she did not return until August 2009. Plaintiff testified that, when after being allowed back into the unit during the first week of August 2009, “95%” of Raymond’s property “was gone.” Plaintiff testified that she was not aware that defendant had rented two storage units until 2010, and discovered a third storage unit in 2011. Plaintiff testified that the storage units were not necessary because Raymond’s unit could have been emptied in a timely manner. Plaintiff further testified that she disputed \$3,492.80 in assessment fees from Covenant Village because defendant did not close that unit until September 2009, when it should have been closed sooner.

¶ 18 Plaintiff further testified that she objected to the trust paying for bills incurred by defendant’s prior counsel and trial attorneys because “this suit should have never been filed or those bills should not have been incurred except for the fact that [defendant] did not do what [defendant] needed to do.” Plaintiff testified that she incurred fees in connection with this lawsuit.

¶ 19 During cross-examination, plaintiff acknowledged that defendant, as trustee, was entrusted with discretion on how to manage the trust. Plaintiff testified that, if she had been trustee, the sisters “could have gotten it done” in a realistic time frame and the extra storage units would not have been necessary. Plaintiff testified that the sisters agreed that the deadline for distributing Raymond’s property would be July 2009, and that they all thought meeting that deadline was “very doable.”

Plaintiff acknowledged that defendant retained prior counsel to prepare an accounting, but according to plaintiff, “that could have been done by an accountant.” Plaintiff conceded that she did not have experience in trust administration. On redirect, plaintiff testified that she filed the lawsuit because she felt that “it was important for all of us as a family to know that this was accurate and out in the open.” Plaintiff continued, testifying that “I am begging the [trial court] to take control of this case and get it closed. It’s been 2 ½ years after [Raymond] died.”

¶ 20 Defendant recalled White, who testified regarding a Buick she bought from her parents. Thereafter, defendant testified on her own behalf. Defendant testified that, after Raymond passed, she monitored his investments, and that those investments grew by \$70,000. Defendant testified that she put forth her “best efforts” to get the property out of the Covenant Village complex; and while the sisters were optimistic that they could finish distributing Raymond’s property within a few months, there was not an agreement to do so.

¶ 21 Following closing arguments, the trial court issued its ruling. The trial court concluded that “on the basis of the testimony[,] it was unnecessary for the Trust to incur charges for storage,” finding plaintiff’s testimony credible. Regarding the Covenant Village charges, the trial court concluded that, while going beyond 30 days might have been reasonable, not vacating the unit by September 1, 2009, was not reasonable.

¶ 22 On February 6, 2012, the trial court entered a written order providing that \$5,866.99 in storage fees to be charged against defendant’s share of the trust. The order further provided that the Covenant Village’s monthly fee for September 2009, totaling \$758.80 after excluding trash removal, would be charged against defendant’s share of the trust. The order made further findings, and provided that any of Raymond’s property that remained in the storage units would belong to

defendant. The order awarded defendant \$3,500 in attorney fees and costs related to the trust, but ordered that any amount incurred in excess of \$3,500 would be charged to defendant's share of the trust. Thereafter, the trial court denied defendant's motion to reconsider, but modified the storage payments to be charged against defendant's share of the trust from \$5,866.99 to \$6,074.15. Defendant timely appealed and plaintiff timely crossed appealed.

¶ 23

II. Discussion

¶ 24

A. Accounting

¶ 25 Defendant first contends on appeal that she was denied due process when the trial court, over objection, permitted plaintiff to proceed with her breach-of-fiduciary allegation without first requiring plaintiff to prove that she had a right to an accounting. Specifically, defendant argues that the trial court never made a finding that "a trust accounting as requested by [plaintiff] was required," and further argues in her reply brief that the proper procedure required that, "[o]nce [the right to an accounting] has been established[,], then in a separate proceeding, initiated by another pleading and separate discovery, the trial court will hear any objections *** to the accounts of the trustee."

¶ 26 Defendant's contention lacks merit. Section 11(a) of the Trust and Trustees Act (the Trust Act) (760 ILCS 5/11(a) (West 2010)), provides that "[e]very trustee at least annually shall furnish to the beneficiaries then entitled to receive or receiving the income from the trust estate *** a current account showing the receipts, disbursements and inventory of the trust estate." In this case, defendant admitted in paragraph 6 of her verified answer that plaintiff was a beneficiary to the trust. Defendant further admitted in paragraph 8 that she was the trustee.

¶ 27 Illinois law is well settled that any admission contained in a verified pleading that was not the product of mistake or inadvertence is a binding judicial admission and " 'has the effect of

withdrawing a fact from issue and dispensing wholly with the need for proof of that fact.” *Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc.*, 2012 IL App (1st) 111296, ¶ 19 (quoting *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 80 (1992)). Moreover, a judicial admission in a verified pleading renders it unnecessary for the opposing party to introduce evidence in support of the admission. *Nissan Motor*, 2012 IL App (1st) 111296, ¶ 19. Here, in light of defendant’s admissions in her verified answer, which she does not claim resulted from mistake or inadvertence, plaintiff was not required to introduce evidence that she was a beneficiary of the trust or that defendant was the trustee. Thus, because the factual questions of whether plaintiff was a beneficiary and whether defendant was the trustee were not in dispute, and because section 11(a) of the Trust Act requires a trustee to furnish an accounting to beneficiaries, the trial court did not deny defendant her right to due process by failing to make an explicit finding that plaintiff was entitled to an accounting.

¶ 28 B. Accounting Fees, Attorney Fees, and Storage Fees

¶ 29 Defendant next contends that the trial court erred “in overruling the decisions of the trustee” to pay for accounting fees, attorney fees, and storage fees. Defendant argues that, as trustee, she was given broad discretion to manage the trust, and the trial court should not have interfered with that discretion absent a finding of fraud, abuse of discretion, or bad faith.

¶ 30 In Illinois, a trustee generally owes a fiduciary duty to the trust beneficiaries and is obligated to carrying out the trust according to the trust’s terms and to act with the highest degree of fidelity and utmost good faith. *In re Estate of Muppavarapu*, 359 Ill. App. 3d 925, 929 (2005) (citing *Giagnorio v. Emmet C. Torkelson Trust*, 292 Ill. App. 3d 318, 325 (1997)). Further, “ ‘[a] trustee must use care and diligence in the discharge of his powers and duties, is held to a high standard of conduct, and must exercise the utmost or highest good faith in the administration of the trust.’ ”

Muppavarapu, 359 Ill. App. 3d at 929 (quoting *Rennacker v. Rennacker*, 156 Ill. App. 3d 712, 715 (1987)). Where, as here, there is conflicting evidence, it is within the province of the trial court, as the trier of fact, to weigh the evidence. *In re Estate of Halas*, 209 Ill. App. 3d 333, 351 (1991). A trial court's judgment will be against the manifest weight of the evidence when the appealing party presents "strong and convincing" evidence sufficient to overcome the evidence favoring the appellee.

¶ 31 In *Durdle v. Durdle*, 141 Ill. App. 3d 12 (1986), the plaintiff, a trust beneficiary, filed objections to the trustee's account, which the trustee conceded failed to list certain necessary items. *Id.* at 14. The plaintiff also objected that the trustee did not pay her income despite the trust having cash, complained that she did not receive her share of the trust's property, and sought the trustee's removal. *Id.* at 14-15. Following an evidentiary hearing, the trial court approved the trustee's account and refused to remove him as trustee. *Id.* at 15.

¶ 32 On appeal, the reviewing court affirmed the trial court's decision to approve the trustee's accounting. In doing so, it noted that a trustee was to exercise the same degree of care in managing trust property as persons of prudence, discretion, and intelligence exercise in the management of their own affairs. *Id.* The court in *Durdle* further noted that a trial court's finding with respect to whether the trustee exercised the requisite level of care would not be disturbed unless it was against the manifest weight of the evidence. *Id.* The reviewing court concluded that the objections were "without foundation" because the plaintiff conceded that the trustee managed the trust property in the same manner as the settlor before his death and that there was no evidence to suggest that the trustee squandered money in an improvident purchase of farm supplies. *Id.*

¶ 33 Although *Durdle* reached the opposite conclusion, we find the reasoning instructive. Pursuant to *Durdle*, a trustee is to exercise the same degree of care in managing a trust as a prudent

and intelligent person would exercise in managing their own affairs. Further, a trial court's determination as to whether a person exercised such care will not be disturbed unless it was against the manifest weight of the evidence.

¶ 34 In this case, section article 3.06 of the trust provided that, “upon the death” of the surviving settlor, the trustee “shall *** distribute the net principle and undistributed interest” to the beneficiaries pursuant to the specified formula. Accordingly, defendant had an obligation to distribute Raymond's property upon his death. However, the testimony at trial reflected that, while most of the items in Raymond's unit had been distributed during summer 2009, the distribution ceased in July 2009 when plaintiff and defendant had a disagreement. The sisters returned during the first week of August 2009, but did not fully distribute the property. At that point, defendant advised her sisters that she would rent one storage unit on a temporary basis to store the remaining items; but defendant additionally rented two more storage units without informing her sisters. No further distributions were made until September 2010 and, as defendant conceded, one storage unit remained open at the time of trial.

¶ 35 We cannot say that the trial court's finding was against the manifest weight of the evidence. Based on the evidence adduced at trial, the trial court could have concluded that the only reason Raymond's property was not distributed during summer 2009 was because defendant stopped the distribution after having an argument with plaintiff, and as a result, defendant did not exercise the degree of care that a person of prudence, discretion, and intelligence would have exercised in managing their own affairs. *Cf. id.* at 15-16 (concluding that the trial court did not err in determining that the trustee did not engage in mismanagement or impropriety). Therefore, we conclude that the

trial court's determination was not against the manifest weight of the evidence. See *Halas*, 209 Ill. App. 3d at 351.

¶ 36

C. Plaintiff's Cross-Appeal

¶ 37 Finally, plaintiff cross-appeals the trial court's judgment, contending that the trial court abused its discretion in denying her request for attorney fees and costs. In support of this contention, plaintiff argues that she should not be punished for being willing to make certain that defendant's accountings were correct and that the trust benefitted from plaintiff's action.

¶ 38 Plaintiff's contention is unavailing. A trial court has broad discretion in deciding whether to award attorney fees, and the decision will not be reversed unless the court abused its discretion. *In re Trusts of Strange*, 324 Ill. App. 3d 37, 42 (2001). In this case, at the hearing on defendant's motion to reconsider, the trial court gave a thoughtful ruling for its determination to have the trust pay for \$3,500 of defendant's attorney fees and costs, and have the parties be responsible for their remaining fees. The trial court specifically noted that, while defendant "stretched" her fiduciary duty a "great deal," she did not breach her duty. Further, the trial court noted that this matter would have been resolved much more quickly if everyone had acted with "less contentiousness and less bitterness." As a result, we see no basis in the record to disturb the trial court's ruling.

¶ 39

III. Conclusion

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 41 Affirmed.