IN THE PROBATE COURT OF MONTGOMERY COUNTY, OHIO

IN THE MATTER OF	:	**CASE NO: 2017 EST 00158**
THE ESTATE OF	:	**(McCOLLUM, J.)**
BETTY HASKELL	:	
	:	**ENTRY DENYING EXECUTOR'S MOTION FOR PARTIAL**
	:	**SUMMARY JUDGMENT REGARDING CLAIMS ARISING**
	:	**FROM THE SALE OF GE STOCK AND GRANTING KOVERMAN**
	:	**AND ARNDTS' CROSS MOTION FOR PARTIAL SUMMARY**
	:	**JUDGMENT FOR DEITERING'S BREACH OF FIDUCIARY DUTY**
	:	

This matter is before the Court on Executor's Motion for Partial Summary Judgment Regarding Claims Arising from the Sale of GE Stock, filed by Joyce Deitering as the fiduciary/attorney for the Estate of Betty Haskell; Brief in Opposition to Executor's Motion for Partial Summary Judgment, which contains a Cross Motion for Partial Summary Judgment for Deitering's Breach of Fiduciary Duty, filed by David Koverman ("David") and Shelly Arndts ("Shelly"); Memorandum of Ohio Casualty Insurance Company in Support of Motion of Executor, Joyce Deitering, for Partial Summary Judgment and Opposing Motion of David and Shelly for Partial Summary Judgment; and Executor's Reply in Support of Motion for Partial Summary Judgment.

I. FACTS

A. Background

Betty Haskell ("Haskell") died testate on January 4, 2017. She had no surviving spouse and no children. On January 31, 2017, the Court admitted into probate the Last

Will and Testament of Betty Haskell, dated November 8, 2015 and appointed Deitering executor of Haskell's estate pursuant to the November 8, 2015 Will in Case No. 2017 EST 00158[1]. The named beneficiaries of the November 8, 2015 Will are Haskell's niece, Wendy Henderson, and her grandniece, Aimee Taylor (Wendy's daughter). Prior to purportedly executing the November 8, 2015 Will, Haskell executed an earlier Last Will and Testament, dated July 25, 2007, which named Haskell's niece and nephew, Shelly and David, as beneficiaries along with Wendy. In addition to these Wills, Haskell purportedly executed another Last Will and Testament, dated February 15, 2015, where she named Aimee and Aimee's husband, Brian Taylor, as the beneficiaries.

In all three of the Wills, Deitering is nominated and appointed as executor of Haskell's estate. Likewise, all three of the Wills have identical language in Item III that grants the following to the executor:

> [F]ull power and authority to sell and convey all or any part of my estate, real and personal, on such terms and at such prices as she may deem proper, and without obtaining any liability therefore.
>
> [F]ull power and authority to conduct and carry on, for such length of time as she may in her sole discretion deem advantageous to my estate, any and all business now conducted by me, and to do all things necessary and proper in the usual course of business until such time as the same can be sold as a going business or otherwise, for a price which, in the sole opinion of my Executor, is a reasonable value thereof, and shall in so doing be exonerated from any loss which might result thereby.

On September 18, 2017, David and Shelly filed a will contest action in this Court under Case No. 2017 MSC 00297 naming as defendants and necessary parties: Deitering (in her capacity as executor of Haskell's estate), Wendy, Aimee, Brian, and decedent's other known next of kin. In the complaint, David and Shelly asserted that Haskell

[1] During the pendency of the will contest action, Deitering acknowledged that the November 8, 2015 Will did not comply with Ohio statutory formalities. Pursuant to a Motion to Substitute Will, Deitering subsequently withdrew the November 8, 2015 Will from probate and presented the February 15, 2015 Will, which the Court admitted into probate on June 8, 2015.

lacked the testamentary capacity to execute the Wills dated February 15 and November 8, 2015 and that Haskell was subjected to undue influence. David and Shelly further asserted that the February 15, 2015 Will was not executed with the statutory formalities required for valid wills under Ohio law. In their request for relief, David and Shelly sought an order from the Court declaring the February 15 and November 8, 2015 Wills invalid and ordering Haskell's estate to pass pursuant to the July 25, 2007 Will instead.

On July 24, 2018, while the matter was still pending, the parties to the will contest action filed a Joint Motion to Approve Settlement Agreement where they informed the Court that they had negotiated a Settlement Agreement that was intended to not only resolve the will contest but also to settle all claims exclusive to the potential beneficiaries regarding the estate and its assets. The Court approved the Settlement Agreement that same day and the will contest action was subsequently closed.

Notwithstanding the settlement of the will contest action, several motions related to claims by David and Shelly against Deitering (including the motions for summary judgment presently before this Court) remain unresolved in the estate case. In an effort to settle their differences, the parties agreed to mediation with the Magistrate assigned to the estate case. Following the unsuccessful mediation that occurred on February 28, 2019, this case was referred back to Judge McCollum for further determination.

B. Motion for Partial Summary Judgment

On November 21, 2018, Deitering filed a Motion for Partial Summary Judgment Regarding Claims Arising from the Sale of GE Stock. In the motion, Deitering requests that the Court grant partial summary judgment in her favor by dismissing all claims made by David and Shelly relating to her failure to sell the GE stock. Relying on Item III of the Haskell Wills where she as the executor of Haskell's estate is expressly provided

"full power and authority to sell and convey all or any part of [Haskell's] estate" including the GE stock "on such terms and at such prices as she may deem proper," Deitering argues that the Wills dated July 25, 2007, February 15, 2015 and November 8, 2015 (collectively, "the Haskell Wills") grant her broad discretion regarding the retention or sale of assets and exonerate her from any liability. Therefore, pursuant to R.C. 2109.38, Deitering maintains that as a matter of law she had no obligation to sell the GE stock.

C. Cross Motion for Partial Summary Judgment and Brief in Opposition to Motion for Partial Summary Judgment

On December 5, 2018, David and Shelly filed a combined Cross Motion for Partial Summary Judgment for Deitering's Breach of Fiduciary Duty; Brief in Opposition to Executor's Motion for Partial Summary Judgment. In their Cross Motion/Brief in Opposition, David and Shelly argue that Deitering had a duty under R.C. 2109.371 to diversify the estate's $485,729.99 investment in the GE stock upon her appointment as the estate's fiduciary/attorney. Contrary to Deitering's assertions, David and Shelly argue that the Haskell Wills do not provide Deitering with any discretion as to the retention of the GE stock nor waive her statutory duty to diversify. For these reasons, David and Shelly assert that they are entitled to partial judgment as a matter of law on their breach of fiduciary duty claim and that Deitering's partial motion for summary judgment on all claims relating to the failure to sell the GE stock should be denied.

D. Ohio Casualty Insurance Company's Memorandum in Support of Deitering's Motion for Partial Summary Judgment and in Opposition to Motion for Partial Summary Judgment Filed by David and Shelly

On December 17, 2018, Ohio Casualty Insurance Company ("Ohio Casualty"), the surety for Deitering's fiduciary bond, filed a Memorandum in Support of Deitering's

Motion for Partial Summary Judgment and Opposing the Motion of David and Shelly for Partial Summary Judgment. Like Deitering, Ohio Casualty argues that both the Haskell Wills and R.C. 2109.38 gave Deitering discretion to retain the GE stock. Ohio Casualty further contends that the statute cited by David and Shelly, R.C. 2109.371(B), does not apply to the GE stock nor does it require Deitering to sell the GE stock in order to diversify the estate assets. Finally, Ohio Casualty asserts there is no evidence that Deitering committed fraud or acted in bad faith by retaining the GE stock and that she instead acted in her discretion by attempting to carry out Haskell's wishes.

E. Executor's Reply in Support of Motion for Partial Summary Judgment and in Opposition to Cross Motion for Summary Judgment

On December 21, 2018, Deitering filed a Reply in Support of Motion for Partial Summary Judgment and in Opposition to the Cross Motion of David and Shelly for Partial Summary Judgment. Deitering refutes David and Shelly's interpretation of R.C. 2109.371 as having established a statutory duty to diversify the GE stock held by the Haskell estate at the time the estate was opened. Furthermore, Deitering argues that requiring a fiduciary to immediately diversify an estate in order to meet the 60% percent threshold set forth in R.C. 2109.371 would be contrary to that statute and an impossible requirement for future fiduciaries to meet.

II. LAW

"The purpose of a motion for summary judgment is to test whether genuine issues of material fact exist such that a trial is necessary to resolve those issues." *In re Estate of Marsh*, 2nd Dist. Greene No. 2010 CA 78, 2011-Ohio-5554, ¶ 12, quoting *Abroms v. Synergy Bldg. Sys.*, 2nd Dist. Montgomery No. 23944, 2011-Ohio-2180, ¶ 34. Thus, "[w]hether summary judgment is appropriate hinges upon the movant's

demonstration that (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Reid v. Premier Health Care Servs.*, 2nd Dist. Montgomery No. 17437, 1999 Ohio App. LEXIS 999, *5 (Mar. 19, 1999). As the parties point out in their respective filings, the facts relative to the GE stock are not in dispute and the issue presented in this matter is a question of law to be decided by the Court.

A. Retention of GE Stock

"Except as otherwise provided by law * * * or by the instrument creating the trust," R.C. 2109.37 imposes restrictions on a fiduciary by limiting the fiduciary's investment authority to the categories of securities enumerated in that statute. R.C. 2109.37; 1 Ohio Probate Practice and Procedure §20.01. Later, with its enactment, R.C. 2109.371 added to R.C. 2109.37's list of a fiduciary's authorized investments. *Vacha v. Vacha,* 1961 Ohio Misc. LEXIS 314, *4, 179 N.E.2d 187 (P.C. 1961); R.C. 2109.371. R.C. 2109.371 further provides that a fiduciary may not invest more than sixty percent (60%) of the market value of the principal of the trust in assets authorized by this statute. In contrast, R.C. 2109.38 broadens a fiduciary's investment authority by permitting the fiduciary to retain otherwise unauthorized investments that the fiduciary receives in her fiduciary capacity in kind.

Such authority provided to a fiduciary by a provision in a will or trust is unlimited by other statutory provisions, including R.C. 2109.37 and R.C. 2109.371, as it regards the classification and/or proportion of assets held by the fiduciary. R.C. 2109.38; see also

Vacha, 1961 Ohio Misc. LEXIS 314 at *14. R.C. 2109.38 specifically provides the following:

> Sections 2109.37, 2109.371 * * * do not prohibit a fiduciary from retaining any part of a trust estate as received by the fiduciary even though that part is not of the class or percentage permitted to fiduciaries, or from retaining any investment made by the fiduciary after the investment ceases to be of a class or exceeds the percentage permitted by law, provided the circumstances are not such as to require the fiduciary to dispose of the investment in the performance of the fiduciary's duties.

Deitering argues in her Motion for Partial Summary Judgment that, pursuant to R.C. 2109.38 and Item III of the Haskell Wills, she was permitted to retain the GE stock upon her appointment as executor of Haskell's estate and that she was under no obligation to sell the stock. David and Shelly contend that the Haskell Wills do not instruct Deitering to retain any estate assets, including the GE stock, and pursuant to R.C. 2109.371 she had a duty to diversify the GE stock. The Court finds that this statute does not create a duty to diversify and is entirely inapplicable to the facts in this matter. The issue before the Court is whether Deitering was authorized to retain the GE stock that was already in Haskell's estate or whether she had a fiduciary duty to diversify the stock, and not whether she invested more than 60% of the market value of the principal of Haskell's estate in assets authorized by R.C. 2109.371. Indeed, by retaining the GE stock Deitering made no investments at all.

The analysis, however, does not end there. The Court also finds that Deitering's blanket assertion that executors have no obligation under R.C. 2109.38 to sell stock they intend to transfer to the beneficiaries of an estate in-kind is erroneous. First, the language in R.C. 2109.38 expressly states that the fiduciary is not prohibited from retaining any part of a trust estate as received by the fiduciary "*provided* the circumstances are not such as to require the fiduciary to dispose of the investment in the

performance of the fiduciary's duties." (Emphasis added). For example, if an executor needs to liquidate assets to generate sufficient cash to pay the decedent's debts or expenses of administration then the executor would be required to dispose of the investment under those circumstances. Deitering was presented with a similar situation in this case. Deitering retained the GE stock even after it significantly declined in value until she had to sell it in order to pay for anticipated estate expenses.

Moreover, nothing in the Haskell Wills or in R.C. 2109.38 absolves Deitering from the prudent person standard. Chapter 2109 of the Revised Code governs fiduciaries appointed by and accountable to the probate court, including executors, administrators, testamentary trustees and guardians. 1 Ohio Probate Practice and Procedure §20.02. These fiduciaries are also governed by the Ohio Uniform Prudent Investor Act, which is codified in R.C. 5809.01 – 5809.08, 5808.08, 5808.03, 5808.05, 5808.06, 5808.02(A) and 5808.07(B). 1 Ohio Probate Practice and Procedure §20.02. R.C. 2109.37(D) states that if a fiduciary is appointed by and accountable to the Probate Court, the fiduciary shall invest the trust's assets according to the Ohio Uniform Prudent Investor Act. R.C. 2109.37(D). In other words, a fiduciary's decision whether to retain investments must be made with the reasonable care, skill, and caution of a prudent investor. Ohio Probate Practice and Procedure §20.02; see also *Stevens v. National City Bank,* 45 Ohio St.3d 276, 279, 544 N.E.2d 612 (1989) ("As a general matter, a trustee is required to exercise the same care, skill and diligence that an ordinarily prudent [person] would exercise over his own affairs and property.").

In *Stevens*, the Ohio Supreme Court held that if a trustee is directed by the terms of a trust to retain certain investments (a situation not presented by this case), then the trustee is subject to liability if she fails to retain the investments, absent impossibility,

illegality or a judicially determined change of circumstances. *Id.* at 282. Conversely, had the terms of the Haskell Wills authorized, but not required, Deitering to retain the GE stock then Deitering could have retained the investments but only if under the circumstances it would not have been an abuse of discretion to do so. *Id.* However, such discretionary provisions in a will do not relieve a fiduciary of her duty to exercise due care and prudence with regard to the retention or disposal of estate assets. See *Union Commerce Bank v. Kusse,* 21 Ohio Misc. 217, *224, 251 N.E.2d 884 (P.C. 1969).

B. Duty to Diversify

The general rule regarding a fiduciary's duty to diversify investments is provided in the Restatement of Trusts 2d, section 228 and reads as follows:

> Except as otherwise provided by the terms of the trust, the trustee is under a duty to the beneficiary to distribute the risk of loss by a reasonable diversification of investments, unless under the circumstances it is prudent not to do so.

Cleveland Trust Co. v. Firestone, 8th Dist. Cuyahoga No. 39821, 1980 Ohio App. LEXIS 13777, *22 – 23 (Jan. 31, 1980) citing Restatement of Trusts 2d, section 228.

In her motion, Deitering argues that her retention of the GE stock was authorized by the terms of the Haskell Wills which she contends grant her broad authority and discretion in determining whether to retain or to dispose of the estate assets and expressly exonerates her from all liability arising from the sale of any part of Haskell's estate. The Court agrees that The Haskell Wills contain language which grants Deitering broad and discretionary power to sell and convey all or any part of Haskell's estate, but they do not include a retention clause authorizing her to retain any estate assets nor do they relieve her from the obligation to exercise due care and prudence in managing Haskell's estate property, including the duty to diversify the estate assets. *Id.* at *18. Thus, while R.C. 2109.371(B) did not create a statutory duty to diversify, the Court finds

that Deitering nonetheless had a duty to diversify the GE stock upon her appointment as executor of Haskell's estate and her duty to diversify was not eliminated by the terms of any of the Haskell Wills.

The Court is mindful of the evidence presented which clearly demonstrates the importance Haskell placed upon retaining the GE stock during her lifetime. Notwithstanding, a fiduciary owes a duty to the beneficiaries of an estate to exercise due care and prudence by diversifying the estate assets in order to minimize the risk of large losses. *Firestone,* 1980 Ohio App. LEXIS 13777 at *16 – 17 (Jan. 31, 1980) citing Restatement of Trusts 2d, section 228. In *Stevens*, the Ohio Supreme Court reiterated the well-established rule that "a trustee, except as otherwise provided by the terms of the trust, is under a duty to the beneficiaries to distribute the risk of loss within the trust by prudent diversification, limiting the proportion of total trust assets which are invested in any one stock or class of securities." *Stevens*, 45 Ohio St.3d at 281. The Ohio Supreme Court further explained that "[t]his duty to distribute the risk of loss includes the 'disposal,' or sale, of 'investments included within the trust at the time of its creation which, although otherwise proper investments for the trustee to retain, are improper because not properly diversified.'" *Id.* In addition, "[a] breach of such duty may render the trustee liable for any loss sustained by the failure to diversify." *Id.*

To be clear, the general rule regarding the duty to diversify investments is not absolute. *Firestone*, 1980 Ohio App. LEXIS 13777 at 23. A fiduciary is excused from diversifying investments when provided by the terms of the trust (or will) or when, in the presence of special circumstances, it would not be prudent to diversify. *Woods v. U.S. Bank, N.A.,* 160 Ohio App.3d 831, 2005-Ohio-2341, 828 N.E.2d 1072, ¶ 27 (1st Dist.). Here, there is no dispute that the terms of the Haskell Wills do not dispense with

Deitering's duty to diversify. Indeed, the Haskell Wills are silent and do not include any provision addressing the executor's authority as it regards diversification of assets (GE stock).

In order for the duty to diversify to be dispensed with, it must be expressly excluded by the terms of the trust instrument. *Id.* at ¶ 30. Contrary to Deitering's assertions, "[t]he mere fact that the trustee is authorized to make investments in his discretion does not dispense with the duty to make a reasonable diversification of investments." *Firestone,* 1980 Ohio App. LEXIS 13777, at *18 quoting Comment (g) to section 228 of the Restatement of Trusts 2d. A trustee is under a continuing duty to act reasonably and in the best interest of the beneficiaries. *Id.* at 24. This duty is not altered or abrogated simply because the fiduciary has been given broad authority and unlimited discretion in the administration of the estate. *Id.* In *Wood*, almost eighty percent (80%) of the decedent's trust assets were held in U.S. Bank stock. *Wood,* 2005-Ohio-2341, at ¶ 10; 1 Ohio Probate Practice and Procedure §20.02. Despite the fact that the trust included a retention clause that allowed the trustee (U.S. Bank) to retain its own stock, the First District Court of Appeals nonetheless held that the trustee had a duty to act prudently and to diversify the stock. *Wood,* at ¶ 29; 1 Ohio Probate Practice and Procedure §20.02. The court held that unless the terms of the trust clearly abrogate the trustee's duty to diversify the trustee continues to be bound by that duty. *Id.,* at ¶ 30; 1 Ohio Probate Practice and Procedure §20.02.

In addition, the Court finds no evidence has been offered demonstrating there were special circumstances that excused Deitering from diversifying the GE stock. First, despite the importance she placed on retaining the GE stock during her lifetime, no evidence has been presented showing that Haskell wanted her beneficiaries to retain the

GE stock. Second, Deitering's own expert testified that Deitering breached her fiduciary duty by failing to liquidate the GE stock upon her appointment as executor of Haskell's estate.

Absent unusual circumstances that might modify a fiduciary's responsibilities, if the fiduciary receives in kind a distribution of the common stock of a company that results in 90% of the common stock of the entire trust to consist of that stock then it would be prudent for the fiduciary to diversify immediately. See 1 Ohio Probate Practice and Procedure §20.02. Here, over 90% of Haskell's half-million-dollar estate was invested in GE stock upon Deitering's appointment. Moreover, no evidence was produced indicating there were any unusual circumstances that warranted Deitering's retention of the GE stock.

Furthermore, the Court finds that Deitering has misapplied the Ohio Supreme Court's holding in *In re Bentley,* 163 Ohio St. 568, 127 N.E.2d 749 (1955). Deitering is not being held accountable for either negligence or nonfeasance for failing to sell the GE stock at the peak of the market. The duty to diversify exists regardless of market conditions and therefore the "peak of the market" argument is not relevant to this matter.

Based on the foregoing, the Court finds as a matter of law that neither R.C. 2109.38 nor the Haskell Wills relieved Deitering of her duty to diversify the GE stock. Accordingly, the Court finds that David and Shelly are entitled to partial judgment as a matter of law on their breach of fiduciary duty claim and therefore Deitering is liable for any loss that resulted from her failure to diversify.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** David Koverman and Shelly Arndts' Cross Motion for Summary Judgment for Joyce Deitering's Breach of Fiduciary Duty and **DENIES** Executor Joyce Deitering's Motion for Partial Summary Judgment Regarding Claims Arising from the Sale of GE Stock.

IT IS SO ORDERED.

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ALICE O. McCOLLUM, JUDGE

NOTICE OF FINAL APPEALABLE ORDER

The Court finds that the foregoing Entry may be a final appealable order. Therefore, pursuant to Civ. R. 54(B), the Court finds that there is no just reason for delay.

IT IS SO ORDERED.

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ALICE O. McCOLLUM, JUDGE

Case Title: THE ESTATE OF BETTY HASKELL

Case Number: 2017EST00158

Type: ENTRY

So Ordered