COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-838

MICHAEL T. VELLOTTI & another[1]

vs.

ANTHONY R. VELLOTTI, individually and as trustee,[2] & another.[3]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Anthony Vellotti appeals from a judgment, after a bench trial, finding him liable for breach of trust and awarding damages and attorney's fees and costs jointly and severally with John Vellotti, his brother and cotrustee.[4] Anthony raises two primary arguments on appeal. First, he contends that the claims should have been dismissed because the statute of limitations had run. Second, he argues that the terms of the trust,

[1] Marcella P. Vellotti, whose claims were dismissed because she was not a proper party to the litigation. See Mass. R. Civ. P. 21, 365 Mass. 767 (1974).

[2] Of the Vellotti Trust.

[3] John F. Vellotti, individually and as trustee of the Vellotti Trust.

[4] John Vellotti has not appealed. Because the parties share the same last name, we will refer to them by their first names to avoid confusion.

specifically its exculpatory clause, precluded imposition of joint and several liability. We affirm.

Marcella and Michele Vellotti established a trust for the sole benefit of their developmentally disabled son, Michael Vellotti. They named their other two sons, Anthony and John, as trustees. The trust was initially funded by the transfer of the Vellotti family home (property). When that property was later sold in 2006, the net proceeds from the sale (approximately $500,000) were distributed to the trust, with small payments to Marcella, Anthony, and John. In 2014, Anthony told Michael that the trust funds were depleted.

Anthony argues that the claims were time-barred because the complaint was not filed until more than three years after Michael was informed that the trust was depleted.[5,6] See G. L. c. 203E, § 1005 (b).[7] "[A] cause of action accrues for

[5] The parties agree that for purposes of the statute of limitations issue, the operative filing date is April 18, 2017, even though the original action was dismissed and later refiled.

[6] The defendants' motion to dismiss was denied on November 24, 2017. The defendants renewed the motion shortly before trial. The renewed motion was decided as part of the findings and rulings made by the judge after trial.

[7] General Laws c. 203E, § 1005 (b), provides that "a beneficiary may not commence a proceeding against a trustee for breach of trust more than 3 years after the date the beneficiary or a representative of the beneficiary knew or reasonably should have known of the existence of a potential claim for breach of trust."

limitations purposes when a plaintiff knows (or in the case of the discovery rule, should know) facts sufficient to make a causative link between the fiduciary's conduct and the beneficiary's actual injury." Doe v. Harbor Sch., Inc., 446 Mass. 245, 256 (2006). Thus, it is knowledge of the injury, "not knowledge of the consequences of that injury (i.e., a legal claim against the fiduciary), [that] sets the three-year statute of limitations in play." Id. at 256-257.

Although framed as a denial of the defendants' motion to dismiss, the judge's determination "that the statute of limitations did not begin to run in 2014 and the instant action was timely filed" involved both findings of fact and conclusions of law. "We review a judge's findings of fact under the clearly erroneous standard and [her] conclusions of law de novo." Casavant v. Norwegian Cruise Line Ltd., 460 Mass. 500, 503 (2011).

Here, after hearing the evidence, the judge found that, although Michael was informed in 2014 that the trust was depleted, he did not know that the reason the trust was depleted was because of amounts the trustees improperly paid to themselves. The judge also found that, because the trustees never provided Michael with accountings, he had no reason to know about the improper withdrawals from the trust, or to be on notice of them. Moreover, Michael did not have access to the

statements or balances for the trust's bank accounts. In the circumstances, we see no error in the judge's conclusion that "[t]he knowledge in question is of breach of trust, not of a trust account balance," and that the notice given to Michael in April of 2014 was not the type of notice contemplated by G. L. c. 203E, § 1005 (b).

We also see no error in the judge's conclusion that the trust's exculpatory clause did not preclude imposition of joint and several liability. The judge found that, from 2006 to 2014, Anthony took a total of $58,000 from the trust, and John took a total of $83,000, for a combined total of $141,000. Anthony does not contest that the judge could properly find "by clear and convincing evidence, that the trustees acted in bad faith by utilizing over a quarter of the [t]rust corpus for their own benefit, in violation of the settlors' intent in forming the [t]rust, which was to take care of Michael." The evidence also amply supported the judge's finding "that Anthony and John largely acted in concert and by agreement"; on that basis, the judge properly concluded that they could be held jointly and severally liable. See Rutanen v. Ballard, 424 Mass. 723, 731 (1997).

Nonetheless, Anthony argues that, despite these findings, joint and several liability could not be imposed because of the trust's exculpatory clause, which provides that "[n]o Trustee

shall be liable or responsible for the acts or omissions of another Trustee." Anthony places great weight on the inclusion of the term "or responsible" as evidencing the settlor's intent to prevent joint and several liability.

Ultimately, though, the language of the exculpatory clause is not material. Massachusetts law is clear that "[a] term of a trust relieving a trustee of liability for breach of trust shall be unenforceable to the extent that it: (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries." G. L. c. 203E, § 1008 (a). See New England Trust Co. v. Paine, 317 Mass. 542, 550 (1945) ("[E]xculpatory provisions . . . are generally held effective except as to breaches of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary" [quotation and citation omitted]). The judge found that Anthony and John acted in bad faith, and that finding is supported by the record. As a result, the judge's conclusion

that the trust's exculpatory clause could not relieve the trustees of joint and several liability was correct.[8]

Judgment affirmed.

By the Court (Meade, Wolohojian & Singh, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: November 21, 2022.

[8] Michael's request for appellate attorney's fees and double costs is denied.

[9] The panelists are listed in order of seniority.