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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1133**

In the Matter of the Trusteeship under that certain Indenture of Trust dated as of April 1, 2010, by and between the Economic Development Authority of the City of Vadnais Heights and U.S. Bank National Association, as Indenture Trustee.

**Filed April 3, 2017
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Ramsey County District Court
File No. 62-TR-CV-14-15

Matthew T. Boos, Anupama D. Sreekanth, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for appellant Phillip Lucas)

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Considered and decided by Peterson, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

After a trustee sought approval of its final accounting, a beneficiary objected to the trustee's fees and the trustee's expenses for outside counsel. The district court ordered the trustee to make additional submissions concerning its fees and expenses but ruled that any relief would be limited to the beneficiary's interest in the trust. The district court later vacated its earlier order and ruled that the trustee's fees and expenses are reasonable and

that additional submissions are unnecessary. The beneficiary appeals. We affirm in part, reverse in part, and remand.

FACTS

In 2010, the City of Vadnais Heights decided to build a community and recreational center. The city financed the construction of the project by issuing \$26.8 million in municipal bonds. U.S. Bank was appointed trustee of an indenture trust, whose beneficiaries are the holders of the bonds issued by the city.

The city later defaulted on its obligations to bondholders. In early 2014, U.S. Bank commenced this action by filing a petition for instruction, which asked the district court to approve the sale of the property. After the district court approved the sale, U.S. Bank distributed approximately \$9.5 million to bondholders.

In December 2014, U.S. Bank petitioned the district court for, among other things, its release and discharge as trustee and approval of its fees and expenses. On January 15, 2015, the district court issued an order in which it directed bondholders to file any objections to U.S. Bank's petition by January 30, 2015; directed U.S. Bank to file a supplemental final accounting and responses to objections by February 10, 2015; and scheduled a hearing for February 17, 2015, to consider U.S. Bank's petition and any objections to the petition. On February 3, 2015, U.S. Bank sent notice of the February 17, 2015 hearing to bondholders.

On February 19, 2015, the district court issued an order in which it found that the trustee's fees and expenses incurred through December 31, 2014, are reasonable; authorized U.S. Bank to make additional interim distributions of funds to bondholders; and

determined that U.S. Bank would be discharged upon making the final distribution of funds to bondholders. Nonetheless, the February 19, 2015 order directed U.S. Bank to prepare a summary of receipts and disbursements from July 1, 2012, to February 28, 2015, and to file it with the court and send it to known bondholders. U.S. Bank filed its summary of receipts and disbursements on March 16, 2015.

Philip Lucas holds bonds issued by the city in the principal amount of \$5,000. Lucas did not file any objections to U.S. Bank's petition before the February 17, 2015 hearing. On June 30, 2015, Lucas requested an accounting of U.S. Bank's fees and its expenses for outside counsel, which collectively totaled approximately \$1 million.

After a hearing in November 2015, the district court issued an order on December 29, 2015, in which it ordered U.S. Bank to prepare "a properly detailed final accounting regarding Trustee and Trustee's Counsel's fees and expenses from July 1, 2012 through December 31, 2015, with enough information for Mr. Lucas to reasonably determine whether the fees and expenses were legitimate and proper expenditures." The district court also ruled that any remedy resulting from Lucas's objection to U.S. Bank's forthcoming accounting would be "available only to Mr. Lucas" and would be "limited to the percentage of recovery attributable to his personal share of the total distributions, as of March 18, 2015."

On January 14, 2016, Lucas filed a notice of review in which he challenged only the district court's ruling that limited the potential remedy to the amount of Lucas's losses. He asked the district court to strike one paragraph from its December 29, 2015 order. In response, U.S. Bank argued that the district court appropriately limited the potential

recovery and, in the alternative, that if the district court was inclined to reconsider its ruling on that issue, it should reconsider the entirety of its December 29, 2015 order.

On May 18, 2016, the district court issued an order in which it essentially adopted U.S. Bank's alternative argument. The district court vacated its December 29, 2015 order "in its entirety." The district court approved U.S. Bank's final accounting, found that U.S. Bank's trustee fees and its expenses for outside counsel are reasonable, and discharged U.S. Bank as trustee upon the final distribution of funds to bondholders. Lucas appeals.

D E C I S I O N

I. Jurisdiction

We begin by considering U.S. Bank's responsive argument that this court lacks jurisdiction over the appeal on the ground that Lucas did not timely appeal from the district court's February 19, 2015 order.

Unless otherwise authorized by law, an appeal may be taken from a final judgment within 60 days after its entry and from a final, appealable order within 60 days after service of written notice of its filing. Minn. R. Civ. App. P. 103.03, 104.01. A final order is one that "ends the proceeding as far as the court is concerned." *In re Estate of Janacek*, 610 N.W.2d 638, 642 (Minn. 2000). "The word 'final' when used to designate the effect of a trial court's judgment or order means that the matter is conclusively terminated so far as the court issuing the order is concerned." *City of Chaska v. Chaska Twp.*, 271 Minn. 139, 142, 135 N.W.2d 195, 197 (1965). If an order is issued after a hearing on a petition filed pursuant to section 501B.16, "[t]he order is final as to all matters determined by it," and any party may appeal within six months. Minn. Stat. § 501B.21 (2014); *see also In re*

Enger's Will, 225 Minn. 229, 236, 30 N.W.2d 694, 699-70 (1948). “[F]ailure to make a timely appeal is a jurisdictional defect.” *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 409 (Minn. 1982).

The district court’s February 19, 2015 order directs U.S. Bank to prepare a detailed summary of its receipts and disbursements from July 2012 to February 2015. For that reason, the action was not conclusively terminated by the order. After Lucas subsequently objected, the district court conducted further proceedings. Accordingly, the February 19, 2015 order was not final and appealable. Thus, there is no jurisdictional defect due to the fact that Lucas did not appeal from that order.

II. Notice of Right to Object

Lucas argues that the district court erred by implicitly ruling that he failed to assert a timely objection to U.S. Bank’s December 2014 petition by the January 30, 2015 deadline. Lucas interprets the district court’s May 18, 2016 final order to have the effect of precluding him from challenging trustee fees and expenses incurred before December 31, 2014. Lucas contends that any failure to object is excused by the fact that U.S. Bank did not give him proper notice of the deadline to object or the February 17, 2015 hearing. We are unsure whether Lucas has accurately interpreted the district court’s final order, but we nonetheless will consider the parties’ respective arguments on the issue.

“A trustee derives his authority from the instrument creating the trust Indeed, the powers of a trustee under a corporate trust indenture are even more circumscribed than those of trustees generally.” *National City Bank v. Coopers & Lybrand*, 409 N.W.2d 862, 866 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987). Accordingly, to determine

the applicable notice requirements, we look first to the indenture trust document. But the indenture trust document in this case does not contain any relevant provisions. We note that U.S. Bank cited the trust statutes in its petition to the district court. *See* Minn. Stat. § 501B.16 (2014) (repealed by 2015 Minn. Laws ch. 5, art. 2, § 3 at 27). We also note that the legislature recently clarified, for future purposes, that the notice requirements applicable to trusts generally also apply to indenture trusts. *See* Minn. Stat. § 501C.0102(c) (2016). Thus, to determine whether U.S. Bank gave proper notice to Lucas, we apply the statutory notice requirements in chapter 501B.

By statute, notice of a hearing related to the approval of a trustee's fees "must be given as follows: (1) by publishing, at least 20 days before the date of the hearing, a copy of the order for hearing . . . in a legal newspaper . . . and (2) by mailing, at least 15 days before the date of the hearing, a copy of the order for hearing to those beneficiaries of the trust who are known to or reasonably ascertainable by the petitioner." Minn. Stat. § 501B.18 (2014) (repealed by 2015 Minn. Laws ch. 5, art. 2, § 3 at 27); *see also* Minn. Stat. § 501C.0203, subd. 1 (2016). "The provisions with respect to giving notice are couched in mandatory language." *In re Stenzel's Estate*, 210 Minn. 509, 516, 299 N.W. 2, 6 (1941). The supreme court has required strict observance of statutory notice requirements such that a trustee's failure to give notice "affect[s] the regularity of the proceedings so as to render them 'voidable and subject to be set aside on motion or appeal.'" *Id.* (quoting *Hanson v. Nygaard*, 105 Minn. 30, 37, 117 N.W. 235, 238 (1908)).

The requirement that a trust beneficiary object to U.S. Bank's December 2014 petition by the January 30, 2015 deadline was contained in the district court's January 15,

2015 order. But U.S. Bank did not serve a copy of that order on Lucas. U.S. Bank used a different document to advise beneficiaries that a hearing would occur on February 17, 2015, and that objections should be filed by January 30, 2015. But that document provided less information than the district court's January 15, 2015 order. In any event, the statute requires that the order itself be mailed to beneficiaries, *see* Minn. Stat. § 501C.0203, subd. 1, and that statute must be strictly enforced, *see In re Stenzel's Estate*, 210 Minn. at 516, 299 N.W. at 6. Accordingly, Lucas did not receive proper notice of the January 30, 2015 deadline for objections. Thus, Lucas is not precluded from objecting to fees and expenses incurred before December 31, 2014.

III. Trustee's Fees

Lucas argues that the district court erred by finding that U.S. Bank's fees are reasonable. He contends that the information provided by U.S. Bank in its final accounting is vague and incomplete.

U.S. Bank's compensation as trustee is governed by the indenture trust document, which states that "reasonable compensation to the Trustee for its services in the premises shall be paid by the Borrower" and that "[t]he compensation of the Trustee shall not be limited to or by any provision of law in regard to the compensation of trustees of an express trust." U.S. Bank's 12-page final accounting contains a limited amount of details about the tasks performed, the persons who performed the tasks, and the time spent on each task. But U.S. Bank attached 38 pages of documentation to the final accounting with itemized details of the tasks performed. That documentation contains enough information for the district court to make a determination concerning the reasonableness of U.S. Bank's trustee

fees. Lucas does not argue that any particular item or category or type of item is unreasonable. Thus, the district court did not err by finding that U.S. Bank's trustee fees are reasonable.

IV. Trustee's Expenses for Outside Counsel

Lucas argues that the district court erred by finding that U.S. Bank's expenses for outside counsel are reasonable. He contends that the district court should have required U.S. Bank to provide additional information because the invoices of outside counsel that were submitted to the district court did not contain any information about the services performed by outside counsel.

U.S. Bank's expenses for outside counsel are governed by the indenture trust document, which states, "All advances, counsel fees, agent's fees and other expenses reasonably made or incurred by the Trustee in and about the execution of the trust hereby created . . . shall be paid by the Borrower." U.S. Bank submitted invoices of its outside counsel. The invoices do not contain any descriptions of the services provided by outside counsel. The invoices either were heavily redacted or were printed in such a way that the description of each itemized task simply is not shown. Whatever the reason, it is apparent that the invoices contain no meaningful information about the nature of the services performed by outside counsel for the trustee. Without such information, it is impossible for a district court to determine whether the services of outside counsel were "reasonably made or incurred by the Trustee," as required by the indenture trust document. The district court did not explain in its May 18, 2016 order why it vacated its earlier order or why it concluded that U.S. Bank's expenses for outside counsel are reasonable. U.S. Bank had

argued to the district court that an inquiry into Lucas's objections was not warranted by either the value of Lucas's holdings or the likelihood of unreasonable expenses or both, but U.S. Bank did not cite any legal authority in support of that argument, and we are not aware of any such authority.

Thus, the district court erred by finding that U.S. Bank's expenses for outside counsel fees are reasonable.

V. Potential Remedy

Lucas last argues that the district court erred by ruling that any relief granted on Lucas's objection to U.S. Bank's petition for approval of its final accounting would be limited to Lucas's share of the value of the trust. Lucas contends that, if the trustee's expenses are found to be unreasonable, it would be appropriate for the district court to order a remedy that makes the trust whole.

The indenture trust document is silent on this issue. By statute, an interested person may petition a district court to seek a remedy for a breach of trust. Minn. Stat. § 501B.16(19) (2014). "[I]n the event the district court concludes that [a trustee] breached his fiduciary duty to the trust beneficiaries, the district court should determine the proper remedy and damages for such a breach." *In re Revocable Trust of Margolis*, 731 N.W.2d 539, 546 (Minn. App. 2007). Minnesota caselaw does not provide illustrations of proper remedies.

The general rule appears to be that "[a] trustee who commits a breach of trust is chargeable with (a) the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach

had been properly administered; or (b) the amount of any benefit to the trustee personally as a result of the breach.” Restatement (Third) of Trusts § 100 (2012). “The primary objectives of the rule of this Section, if suit is brought against a trustee and if that suit is successful, are (i) to make the trust and its beneficiaries whole . . . and (ii) to ensure that the trustee does not personally benefit from the breach.” *Id.* § 100 cmt. a. Accordingly, the “liability of a trustee who is sued and found to have committed a breach of trust is the amount required to restore the values of the trust estate and its distributions to what they would have been if the affected portion of the trust estate had been properly administered.” *Id.* § 100 cmt. b. The legislature recently clarified Minnesota law on this issue by enacting a statute that imposes liability on a trustee who commits a breach of trust for the greater of “(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.” See 2015 Minn. Laws ch. 5, art. 10, § 2 at 56 (codified at Minn. Stat. § 501C.1002(a) (2016)). Given the general principles in the Restatement, as well as the newly enacted Minnesota statute, the district court erred by ruling that Lucas’s potential remedy is limited to his proportional share of the value of the trust.

VI. Conclusion

In sum, the district court did not err by finding that U.S. Bank’s trustee fees are reasonable. But the district court erred by finding that U.S. Bank’s expenses for outside counsel fees are reasonable and by ruling that the potential remedy is limited to Lucas’s proportional share of the value of the trust. Therefore, we remand for further proceedings.

If the district court were to find that U.S. Bank has committed a breach of trust, the district court should determine a proper remedy that is consistent with part V of this opinion.

Affirmed in part, reversed in part, and remanded.