NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

ESTATE OF RALPH SANDOR, by and through its Administrator Pendente Lite, WILLIAM I. STRASSER, ESQ., Plaintiff, vs. ROSE LUGOWE, ESTATE OF CARMEN RUSSO, SR., ESTATE OF ROSEMARIE TRENTACOST, ESTATE OF JOSEPH RUSSO, ESTATE OF JEANETTE RUSSO, ANITA LIPARI, ESTATE OF ANTHONY RUSSO, SR., ADELENE JOSSLYN, PATRICIA NAPOVEAR, DIANE FRATTA, CAROL RUSSO, WASHINGTON AVE. GROUP, LLC, ANTHONY RUSSO, JR., NICHOLAS MANDORLO, WELLS FARGO ADVISORS and WELLS FARGO CLEARING SERVICES, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET No. BER-C-54-21

DECISION ON MOTION FOR SUMMARY JUDGMENT
FILED BY WELLS FARGO CLEARING SERVICES, LLC d/b/a
WELLS FARGO ADVISORS

APPEARANCES:

Maximilian Rich, Esq.
Conrad M. Olear, Esq.
Strasser & Associates, PC
7 East Ridgewood Avenue
Paramus, NJ 07652
Counsel for Plaintiff, William I. Strasser, Esq., Administrator Pendente Lite on behalf of the Estate of Ralph Sandor, Deceased

Tracey Salmon-Smith, Esq.
Justin M. Ginter, Esq.
Faegre, Drinker, Biddle & Reath, LLP
600 Campus Drive
Florham Park, NJ 07932
Counsel for Defendant, Wells Fargo Clearing Services, LLC

Paul S. Doherty, III, Esq.
Hartmann, Doherty, Rosa, Berman & Bulbulia
433 Hackensack Avenue, Suite 1002
Hackensack, NJ 07601
Counsel for Defendant, Rose Lugowe

Michael P. DeMarco, Esq.
DeMarco & DeMarco, Esqs.
Counsel for Defendants, Anthony Russo, Jr., Washington Avenue Group, LLC, and the Estate of Anthony Russo, Sr.

Stephen P. Sinisi, Esq.
Law Offices of Stephen P. Sinisi, Esq.
2 Sears Drive, 2nd Floor
P.O. Box 1458
Paramus, NJ 07653-1458
Counsel for Defendant, Anita Lipari

Beth L. Barnhard, Esq.
Harwood Lloyd, LLC
130 Main Street
Hackensack, NJ 07601
Counsel for Defendant, Nicholas Mandorlo

Lee M. Levitt, Esq.
Lee M. Levitt, LLC
43 West Blackwell Street
Dover, NJ 07801-3848
Counsel for Defendants, Joseph Russo, Jr. and the Estate of Joseph Russo, Sr.

Daniel J. Jurkovic, Esq.
Law Offices of Daniel Jurkovic, PC
52 Chestnut Street
P.O. Box 133
Rutherford, NJ 07070
and
Richard J. Allen, Esq.
Kipp & Allen, LLP
52 Chestnut Street
Rutherford, NJ 07070
Co-Counsel for Interested Parties

Introduction

Before the court is a motion for summary judgment (the "Motion") filed by Faegre, Drinker, Biddle & Reath, LLP on behalf of Wells Fargo Clearing Services, LLC d/b/a Wells Fargo Advisors ("Wells Fargo") seeking dismissal of Counts Nine and Ten of the Complaint filed by William I. Strasser, Esq., Administrator Pendente Lite, on behalf of the Estate of Ralph Sandor (the "Administrator"), asserting claims against Wells Fargo for negligence and violation of the New Jersey Uniform

Fiduciaries Law, N.J.S.A. § 3B:14-52, *et seq.* (the "UFL"). The Motion is opposed and the court heard oral argument.

Background

Ralph Sandor (the "Decedent") died on January 20, 2018 at the age of 107. Proceedings related to the Decedent were first pursued in the action encaptioned In the Matter of the Estate of Ralph Sandor, Deceased, Docket No. BER-P-148-18 (the "2018 Action"). On June 27, 2018, the Honorable Menelaos W. Toskos, J.S.C. (Ret.) appointed William I. Strasser, Esq. ("Mr. Strasser") to serve as Administrator *Pendente Lite* of the Estate (the "Administrator"). The Administrator filed an action on October 29, 2019 encaptioned Estate of Sandor v. Lugowe, Docket No. BER-C-288-19 (the "Prior Action"), seeking to set-aside purported *inter vivos* gifts made, at least in part, by Decedent's grand-nephew, Anthony Russo, Jr. ("Russo"), by and through a power of attorney dated November 18, 2013 (the "2013 POA").[1] The Administrator in the Prior Action alleged that the transfers made by Russo and to himself and others from Decedent's account at Wells Fargo were improper. The Administrator, among other things, seeks to recover the sums transferred out of the Decedent's Wells Fargo accounts. The Administrator asserts that Wells Fargo, at which Decedent maintained the majority of his assets, is liable for the improper transfers.

[1] The 2013 POA is attached to the certification of Justin M. Ginter, Esq. dated January 25, 2021 in support of the Motion (the "Ginter Cert.") at **Exhibit F.**

Procedural Background

The court entered case management orders in connection with the Prior Action and this action. On February 21, 2020, a case management order was entered in the Prior Action, which provided for a discovery end date of August 12, 2020, production of expert reports no later than June 24, 2020, and a trial date of October 13, 2020. An Amended Case Management Order was entered in the Prior Action on July 9, 2020, which provided for the production of expert reports no later than September 24, 2020, a discovery end date of November 12, 2020, and a trial on January 19, 2021. A Second Amended Case Management Order was entered in the Prior Action on November 5, 2020 and provided that expert reports were to be furnished no later than November 30, 2020, with discovery to be completed by February 5, 2021 and a trial date of March 22, 2021. On December 21, 2020, a Third Amended Case Management Order was entered in the Prior Action requiring dispositive motions to be served and filed no later than January 22, 2021 with a return date of February 19, 2021. By letter order entered on January 21, 2020, the parties were given until January 25, 2021 to serve and file their motions for summary judgment.

By letter dated January 26, 2021 (the "January 26 Letter"), Justin M. Ginter, Esq. ("Mr. Ginter"), counsel for Wells Fargo, advised this court that on January 25, 2021, the Administrator, notwithstanding the time periods set forth in the various case management orders, had served an expert report prepared by Anthony Carrella, C.P.A. (the "Carrella Report") regarding the alleged liability of Wells Fargo. The January 26 Letter requested a case management conference to address the Carrella

Report and to seek permission to file a motion to strike such report. By letter dated January 27, 2021, the Administrator responded, asserting that Wells Fargo's request was improper and the issues raised by Mr. Ginter should first be raised with the appointed discovery master[2] since, among other things, Wells Fargo had failed to timely provide discovery and therefore the production of the Carrella Report was delayed. On January 27, 2021, Mr. Ginter responded asserting that Wells Fargo had produced all relevant discovery in its possession and that the Administrator never asked the parties nor the court for an extension of the time to file an expert report related to the alleged actions/inactions of Wells Fargo.

By letter dated January 29, 2021, the Administrator advised that he had, on January 27, 2021, conducted the deposition of Jeffrey Wilson ("Mr. Wilson"), an employee of Wells Fargo, and Wells Fargo's failure to produce certain discovery precluded the Administrator from being fully prepared for Mr. Wilson's deposition. A case management conference was conducted in the Prior Action on January 29, 2021 and Wells Fargo was granted permission to file a motion to strike the Carrella Report.

On February 19, 2021, the court conducted oral argument in connection with the motions for summary judgment filed on behalf of the Administrator and the Individual Defendants[3], as well as Wells Fargo's motion to strike the Carrella Report and the instant Motion. On February 22, 2021, the court denied the summary

---

[2] The Honorable Robert P. Contillo, P.J.Ch. (Ret.) was appointed as discovery master and resolved numerous discovery issues among the various parties.

[3] The Individual Defendants include Rose Lugowe, Anita Lipari, Anthony Russo, Jr. and Nicholas Mandorlo.

judgment motions filed on behalf of the Administrator and the Individual Defendants. The court denied Wells Fargo's motion to strike the Carrella Report but gave Wells Fargo until March 12, 2021 to retain its own expert with respect to its alleged liability and provided Wells Fargo the opportunity to depose Mr. Carrella. The Administrator was also given the opportunity to depose the expert retained by Wells Fargo. In light of the decision on the Wells Fargo motion to strike the Carrella Report, the court adjourned Wells Fargo's motion for summary judgment and gave counsel for the Administrator and Wells Fargo the opportunity to supplement their submissions once Wells Fargo submitted its expert report and counsel had the opportunity to depose the experts.

By order entered on March 2, 2021 (the "March 2 Order"), the Prior Action was dismissed on consent without prejudice with leave to file a new action. The Administrator, on March 8, 2021, refiled his complaint against all remaining parties, including Wells Fargo. Pursuant to a Case Management Order entered on April 29, 2021, a trial in the instant action is scheduled for September 27, 2021. Notwithstanding dismissal of the Prior Action, the court advised that it would consider Wells Fargo's pending motion for summary judgment in the new action. The Administrator and Wells Fargo took the additional discovery as to the experts and supplemented their prior submissions regarding the Motion.

The Motion

Wells Fargo asserts that Decedent was introduced to Wells Fargo in November of 2014 by Russo, who was also a Wells Fargo client. See Wells Fargo Statement of

Undisputed Material Facts dated January 25, 2021, submitted in support of the Motion ("Wells Fargo SUMF") at ¶¶ 1-2; see also affidavit of Jeffrey J. Wilson ("Wilson") dated January 25, 2021, submitted in support of the Motion ("Wilson Aff.") at ¶¶2-3. Wells Fargo asserts that shortly after Decedent met with Wilson, Decedent opened a custodial brokerage account and hand-signed the account-opening documents, as well as the authorization to transfer his accounts being managed by Merrill Lynch. Id. at ¶¶ 3-4; see also Wilson Aff. at ¶¶ 4-5. Wells Fargo contends that prior to opening the account and transferring the assets from Merrill Lynch, Wilson spoke with Decedent over the phone to confirm the validity of the 2013 POA and Decedent's desire to transfer his assets to Wells Fargo. Id. at ¶ 5; see also Wilson Aff. at ¶ 5, Exhibit A.

After Decedent confirmed both his desire to transfer the funds to Wells Fargo and that the 2013 POA was valid, the transfer took place. Id. at ¶ 6. Wells Fargo contends that Russo was authorized to transact business on Decedent's behalf pursuant to the 2013 POA. Id. at ¶ 8; Ginter Cert. at Exhibits F-G. On July 28, 2016, Decedent executed a form to change his brokerage account to a transfer-on-death account with Russo as the one hundred percent (100%) beneficiary and Nicholas Mandorlo ("Mandorlo") as the one hundred percent (100%) contingent beneficiary. Id. at ¶ 9; see also Wilson Aff. at ¶ 7. Wells Fargo acknowledges that Wilson conferred with Decedent's attorney, Lawrence Joel, Esq. ("Mr. Joel"), of Joel and Joel, LLP, to ensure that such change was Decedent's intent. Id. at ¶ 10; see also Wilson Aff. at ¶ 8, Exhibit B. Wells Fargo asserts that Mr. Joel confirmed that it was Decedent's

intent to do so and the brokerage account was subsequently changed to a transfer-on-death account. Id.

Wells Fargo contends that in August 2016 Decedent opened a new brokerage account with Wells Fargo and asked that the 2013 POA information in connection with his previous account be cross-referenced with his new account. Id. at ¶¶ 11-12. Wells Fargo asserts that the 2013 POA provides, in pertinent part, that Russo is authorized to "take any action in regard to [Decedent's] personal financial affairs as [Decedent's] agent deems appropriate." Id. at ¶ 17; see also Ginter Cert. at Exhibit F. Further, Wells Fargo contends that the 2013 POA expressly waived liability against any third persons acting in reliance on Decedent's agent's instructions. Id. at ¶ 18. Wells Fargo argues that it processed the 2013 POA as a "full POA" according to Wells Fargo's internal policies and associated Russo with Decedent's account. Id. at ¶ 19. Wells Fargo asserts that it does not dispute that any of the alleged transactions occurred, but that the disputed transactions were initiated by an individual authorized to transact business with Decedent's accounts at Wells Fargo. Id. at ¶ 24.

Wells Fargo argues that the UFL affords protections to institutions such as Wells Fargo against common law negligence claims for the actions of third-party fiduciaries who interact with financial institutions on behalf of their principal. See Wells Fargo brief, dated January 25, 2021, submitted in support of the Motion ("Wells Brief") at pages 6-10. To that end, Wells Fargo asserts that there is no evidence that (i) Wells Fargo breached any duty owed to Decedent and (ii) Wells Fargo had no actual

knowledge or notice that Russo was purportedly breaching his fiduciary obligations to Decedent. Id. at page 9. Wells Fargo further contends that Wilson conducted sufficient due diligence when opening Decedent's brokerage account and changing the account to a transfer-on-death designation by speaking with Decedent and Decedent's attorney about Decedent's intentions and whether such actions were authorized by the 2013 POA. Id. at page 10.

Wells Fargo argues that the Carrella Report acknowledges that there is no indication that Wells Fargo acted in "bad faith" with respect to their oversight of Decedent's account and that the Carrella Report merely alleges ordinary negligence against Wells Fargo, as to which the UFL provides Wells Fargo limited immunity. See Wells Fargo supplemental brief, dated May 11, 2021, submitted in support of the Motion ("Wells Fargo Supp. Brief") at pages 4-6. Additionally, Wells Fargo asserts that it is irrelevant whether Wells Fargo internally labeled the 2013 POA as a "full POA" because the Administrator fails to show that Wilson knew that Russo was allegedly prohibited from facilitating any of the disputed transfers. Id. at pages 7-8. Wells Fargo contends that its expert, E. Steve Scales ("Scales"), opined that "[t]here is no duty to have continued dialogue with the client once the client has granted the agent full powers." Ibid.; see also supplemental certification of Justin M. Ginter, Esq., dated May 11, 2021, submitted in support of the Motion ("Ginter Supp. Cert.") at **Exhibit D**. Wells Fargo argues that a determination of liability under New Jersey's UFL requires an examination of the facts and circumstances based on a subjective

analysis to find that "the bank recklessly disregarded or was purposefully oblivious to the facts suggesting impropriety." Id. at page 9.

Wells Fargo asserts that Wilson did not act in bad faith with respect to oversight of Decedent's brokerage account because the transaction history of Decedent's account at Merrill Lynch shows that Decedent had made similar transfers to his Valley National Bank ("VNB") account prior to Decedent opening the brokerage account with Wells Fargo and therefore Wilson would not have determined that the transfers were suspicious when made. Id. at pages 12-13. Further, Wilson was aware that Decedent had a history of gift-giving and therefore the transfers to Estate beneficiaries would not have raised "red flags" to Wilson or Wells Fargo. Ibid. Lastly, Wells Fargo asserts that the Carrella Report conceded that Wilson could not give legal or tax advice and therefore was required to elevate concerns about certain transfers and consult with Decedent's attorney, which Wilson did, and therefore, Wilson exercised adequate due diligence. Id. at pages 13-16.

The Opposition

The Administrator asserts that Wilson made significant commissions from the accounts maintained at Wells Fargo by Russo and Decedent and that Russo, not the Decedent, opened an account for Decedent with Wells Fargo. See the Administrator's response to Wells Fargo's SUMF, dated February 10, 2021, submitted in opposition to the Motion ("Administrator's Opp. SUMF") at ¶¶ 2-3. The Administrator contends that Decedent advised Wilson that he wanted his new account at Wells Fargo to be handled in the same way that it had been previously managed at Merrill Lynch and

that he [the Decedent] expected to liquidate assets occasionally for ordinary living expenses but made no mention of gift-giving. Id. at ¶ 5. The Administrator further contends that on December 17, 2020, the day the 2013 POA was uploaded onto the Wells Fargo system, Russo called Wilson and requested that $14,000.00 be transferred to Russo's account as a "gift for 2014," as well as a withdrawal of $100,000.00 to Decedent's VNB account. Id. Moreover, the Estate asserts that Russo called Wilson on December 19, 2020 to request that $14,000.00 be transferred to Mandorlo. Id. Additionally, the Administrator argues that Russo called Wilson to request similar transfers in early 2015 and that on April 9, 2015, Russo requested that Wilson liquidate $1,500,000.00 of Decedent's funds to be distributed to "beneficiaries" of Decedent's Will, although Wells Fargo did not have a copy of such Will. Id.

The Administrator asserts that Wilson put a note on Decedent's account on November 18, 2015 that Decedent was no longer able to competently make decisions for himself. Id. at ¶ 10. The Administrator contends that Wilson had only one (1) conversation with Decedent, which was when the account was first opened, and that Wilson spoke only to Russo thereafter. Id. Moreover, the Administrator asserts that Wilson switched Decedent's primary account to a payable-on-death account in favor of Russo after Wilson noted that Decedent was incompetent to transact business. See Estate's opposition brief, dated February 10, 2021, submitted in opposition to the Wells Fargo Motion ("Administrator's Opposition") at page 2.

The Administrator argues that Wells Fargo had actual notice that the 2013 POA did not permit gifting and had notice that Russo was gifting over $1,500,000.00 of Decedent's funds to himself, Mandorlo, and other third parties. Id. at ¶ 18. Further, the Administrator argues that Decedent, in the 2013 POA, only waived his rights with regard to the powers actually granted to his agent, not those which his agent was prohibited from taking. Id. Moreover, the Administrator asserts that Russo requested that none of the account documents or statements be mailed to Decedent. Id. at ¶ 24.

The Estate asserts that Wells Fargo marked the 2013 POA as a "full POA" in contravention of its own internal guidelines which require that the power of attorney expressly state that gifts are allowed and that a general grant of powers is insufficient to permit gift-giving. See the Administrator's supplemental brief dated May 11, 2021, submitted in opposition to the Motion ("Estate Supp. Brief") at page 3. The Estate argues that both Wells Fargo and Wilson were purposefully oblivious to Russo's impropriety because they had actual knowledge that the 2013 POA does not contain express gift-giving authority to Russo. Id. at pages 5-6. Further, the Administrator contends that Wells Fargo's own records reflect that Wells Fargo did not make any inquiries into why such large sums of Decedent's funds were transferred to accounts which did not bear Decedent's name. Id. at page 6.

The Administrator argues that Wells Fargo had actual knowledge of Russo's breach of his fiduciary duty to Decedent and, therefore, Wells Fargo can be held liable for such action. See Administrator's Opposition at pages 16-18. The Administrator

contends that Wilson was aware that Russo was gifting substantial amounts of Decedent's funds through the 2013 POA despite the fact that the 2013 POA did not specifically permit gifting. Id. at page 18., The Administrator asserts that within five (5) months of the Wells Fargo account being opened, Russo had gifted away approximately sixty-eight percent (68%) of the entire portfolio, totaling $1,756,000.00 and that within one year of the account being opened, the value of Decedent's portfolio had decreased from $2,724,521.00 to $1,000,883.37. Id. at page 21.

Additionally, the Administrator asserts that Wells Fargo transferred hundreds of thousands of dollars from Decedent's account into checking accounts which did not bear Decedent's name, specifically to accounts in the name of Russo and Rose Lugowe ("Ms. Lugowe"), as well as an account held jointly between Russo and Tony's Auto Body. Id. at page 23. Further, the Administrator argues that Wells Fargo failed to abide by its own internal policies and guidelines by failing to monitor Decedent's transaction history and finding same to constitute "unusual activity" to warrant further investigation. Id. at pages 24-26. Finally, the Administrator contends that because the 2013 POA did not permit gifting, the 2013 POA could not waive Wells Fargo's liability to Mr. Sandor or his Estate, since the waiver only applied to powers which are actually granted by the power of attorney. Id. at page 28.

Rule of Law

Summary judgment is intended to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Kopp, Inc. v. United Tech. Inc., 223 N.J. Super. 548, 555 (App. Div. 1988). Rule 4:46-2(c) provides that a

court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). A court must weigh whether "the competent evidential materials presented . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In determining whether a party is entitled to summary judgment, a court must determine if there is a genuine issue of material fact by viewing all facts in the light most favorable to the non-moving party. Brill, *supra*. A non-moving party "cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Id. Indeed, "if the opposing party [in a summary judgment motion] offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Id. (*citing* Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)). Further, "[s]ubstantial means '[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or "having real existence, not imaginary[;] firmly based, a substantial argument." Brill, *supra*, 142 N.J. at 530-31 (internal citations omitted); see also Manalapan Realty, L.P. v. Township Committee Twp. of Manalapan, 140 N.J. 366, 384 (1995).

Discussion

In Counts Nine and Ten of the Amended Complaint, the Administrator asserts that Wells Fargo was negligent and violated the UFL. The Administrator asserts that Wells Fargo and its employee Wilson acted negligently by failing to act in conformity with Wells Fargo's internal policies to safeguard Decedent's accounts and investigate the transfers which were purportedly made pursuant to the 2013 POA.

In the first instance, the Administrator's claim for violation of the UFL must be dismissed because the UFL does not create an affirmative cause of action against Wells Fargo. Rather, the UFL provides a defense when a bank is sued for failing to take notice of and action on a fiduciary's obligation. Lembo v. Marchese, 242 N.J. 477, 481 (2020). Thus, Count 10 of the Complaint is dismissed with prejudice.

The Administrator's remaining claim (Count 9) against Wells Fargo is for negligence. A negligence claim requires the establishment of four (4) elements: (i) a duty of care, (ii) a breach of that duty, (iii) actual and proximate causation and (iv) damages. Jersey Central Power & Light Co. v. Melcar Utilities Co., 212 N.J. 576, 594 (2013). The Administrator's claim for negligence against Wells Fargo fails for a number of reasons.

First, the relationship between Sandor and Wells Fargo was based on a contract.[4] In New Jersey, a tort remedy does not arise from a contractual relationship

[4] The Administrator did not provide the court with a complete copy of the agreements between Sandor and Wells Fargo.

unless the breaching party has an independent duty imposed by law. Saltiel v. GSI Consultants, Inc. 170 N.J. 297, 316 (2001). In this matter, there is no independent duty of Wells Fargo to Sandor.

Further, even if the Administrator were permitted to pursue a negligence claim against Wells Fargo, the Administrator must prove the applicable standard of care and a breach thereof by Wells Fargo. To show the alleged standard of care, the Carrella Report put forth by the Administrator relies solely upon Wells Fargo's internal policies. However, a defendant's internal policy, standing alone, "... cannot demonstrate the applicable standard of care." Wolens v. Morgan Stanley Smith Barney, LLC, 449 N.J. Super. 4 (App. Div. 2017). Further, the report of Wells Fargo's expert, E. Stephen Scales, which is attached as **Exhibit E** to the Ginter Supp. Cert., opines that it is industry standard for firms to rely upon representations made by the agent and there is no duty to have continued dialogue with the client. As such, the Administrator is unable to show the standard of care and that Wells Fargo breached same.

Even to the extent that the Administrator was able to show the standard of care and a breach thereof by Wells, Fargo, the UFL provides a bank with limited immunity against claims "...unless the bank acts in bad faith or had actual knowledge of a fiduciary breach." Ibid. In enacting the UFL, the New Jersey Legislature determined that a bank could not feasibly shadow the activities of fiduciaries to ensure they were acting in good faith on behalf of their principals. New Amsterdam, *supra*, 117 N.J. Eq. at 283. N.J.S.A. § 3B:14-55 provides:

> If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw the instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of the breach or with knowledge of facts that his action in taking the instrument amounts to bad faith.

Accordingly, when, from all appearances, a fiduciary draws a check from the principal's account to pay the fiduciary or a third person, the bank is not on notice of a breach of a fiduciary obligation unless the bank issues the check "with actual knowledge of the breach or with knowledge of facts that . . . amounts to bad faith." Id. The UFL immunizes the bank from a negligence-type action premised on the common law duty to exercise due care.

Further, N.J.S.A. §3B:14-58, provides:

> a. If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks drawn by him upon an account in the name of his principal, if he is empowered to draw thereon, or, except as provided in subsection b. of this section, if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving the deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary. The bank is authorized to pay the amount of the deposit of any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the deposit or in drawing the check, or with knowledge of facts that its action in receiving the deposit of paying the check amounts to bad faith.

> b. In the case of an instrument payable to the principal or the fiduciary as fiduciary, the bank has notice of the breach of fiduciary duty if the instrument is deposited to an account other than an account of the fiduciary, as fiduciary, or an account of the principal.

In New Jersey Title Ins. Co. v. Caputo, 163 N.J. 143, 155-56 (2000), the New Jersey Supreme Court found that "bad faith denotes a reckless disregard or purposeful obliviousness of the known facts suggesting impropriety by the fiduciary" and "is not established by negligent or careless conduct or by vague suspicion." See also. New Amsterdam Cas. Co. v. Nat'l Newark & Essex Banking Co., 117 N.J. Eq. 264, 270-71 (N.J.Ch.1934), *aff'd o.b.*, 119 N.J. Eq. 540 (E. & A.1936). Here, Wells Fargo was provided with a copy of the November 2013 POA, upon which Russo's authority to effectuate transfers from Decedent's Wells Fargo account was based. The 2013 POA expressly waives any liability against Wells Fargo stating, in part:

> "[p]arties may rely upon the representations of my agent [Russo] as to all matters related to any power granted to my agent, and no person who may act in reliance upon the representations of my agent or the authority granted to my agent shall incur liability to me or my estate as a result of permitting my agent to exercise any power."

Further, Mr. Carrella, during his deposition, acknowledged that there is no evidence of "bad faith" on Wells Fargo's part. See deposition of Anthony Carrella taken on April 23, 2021, at page 99, lines 15-23, which is attached as Exhibit C to the Ginter Supp. Cert. Since there is no evidence of bad faith or actual knowledge of Russo's improper activities, the Administrator cannot prevail on its claims against Wells Fargo.

Further, the checks and transfers that were intended to be delivered to Russo or Decedent were, in fact, deposited into accounts bearing their respective (or joint) names. The Administrator has not demonstrated that checks made out to Russo, for example, ended up in the hands of third parties and were deposited into unrelated accounts. To the contrary, the Administrator's papers demonstrate that Wells Fargo facilitated transfers which were intended to be made to third parties to such individuals in accordance with Russo's instructions as Decedent's attorney-in-fact. Wilson had no actual knowledge that Russo's actions were *ultra vires.* This is true and even if this court ultimately determines that the 2013 POA did not permit gift-giving, the Estate has failed to demonstrate that Wells Fargo violated N.J.S.A. §3B:14-55 and -58 by approving such transfers.

The Administrator has not demonstrated that Wells Fargo acted in bad faith by failing to perform due diligence beyond what was both internally and statutorily required. The court finds that because Wilson did not have actual knowledge that Russo was purportedly breaching his fiduciary duties to Decedent, and because none of the transfers made to third parties were initially intended for Russo or Decedent, Wells Fargo was under no legal obligation to investigate transfers that otherwise conformed with those immunized by the UFL.

The Administrator argues, for example, that Wells Fargo acted in bad faith because at Wilson's initial meeting with Decedent, Decedent expressed that he would only make occasional withdrawals to pay for his personal needs and, therefore, the substantial withdrawals made over the subsequent months purporting to be "gifts"

were contrary to the financial plans of Decedent. However, this fact alone is insufficient to impose liability upon Wells Fargo for negligence where the bank is otherwise protected by law. Wilson investigated the change in Decedent's transactional behavior by communicating with Decedent's attorney, Mr. Joel, to confirm that the transactions being requested by Russo were authorized and in keeping with Decedent's wishes.

The test for good or bad faith is a subjective one. Lustrelon, Inc. v. Prutscher, 178 N.J. Super. 128, 131 (App. Div. 1981) (*citing* Community Bank v. Ell, 278 Ore. 417 (Or. Sup. Ct. 1977)). In the instant matter, the only inference that can be drawn from the record is that Wilson and Wells Fargo performed adequate due diligence and that Wells Fargo did not act in bad faith. The Administrator has failed to overcome the liability shield created by the UFL and the court finds that summary judgment is therefore warranted.

Conclusion

The Motion is hereby granted. The Administrator's claims against Wells Fargo as set forth in Counts Nine and Ten of the Amended Complaint are dismissed with prejudice. An order consistent with this Decision is being issued simultaneously herewith.

Dated: July 12, 2021

Honorable James J. DeLuca, J.S.C.