40 N.Y.S.2d 527
Supreme Court, New York County, New York.

ST. LOUIS UNION TRUST CO.
v.
STOFFREGEN et al.
In re STOFFREGEN'S WILL.

Nov. 23, 1942.

Action by the St. Louis Union Trust Company, as trustee under the last will and testament of Charles Stoffregen, deceased, against Carl H. Stoffegen and Herman C. Stoffregen, former trustee and continuing co-trustee, for losses in securities caused by the alleged negligence of the defendants.

Complaint dismissed on the merits.

Attorneys and Law Firms

***528** Simpson, Thacher & Bartlett, of New York City (Hamilton C. Rickaby, Delmar Karlen, and Frederick K. Hackett, all of New York City, of counsel), for plaintiff.

Paul G. Gravenhorst, of New York City (Platt K. Wiggins, Paul G. Gravenhorst, and Jay F. Tiffany, all of New York City, of counsel), for defendants.

Opinion

COLLINS, Justice.

The plaintiff seeks to hold the trustees of a trust created under the will of Charles Stoffregen (who died a resident of St. Louis, Missouri, October 3, 1930), for the life benefit of his son, Otto G. Stoffregen, accountable for a breach of defendants' fiduciary duties by failing to dispose of securities during the period between February 26, 1931 (when the defendants undertook their duties as trustees), and September 30, 1936 (when the defendant Carl Stoffregen resigned and the plaintiff was appointed successor trustee). The securities were: $5,000, principal amount of Berlin, Germany, 30 year Ext. S. F. bonds 6% due 6/15/58; $20,000, principal amount of Central Bank of German State & Provincial Banks, Inc., Mtge. Sec. S. F. Ser. B 6% due 10/1/51; $3,000, principal amount of Chilean Consolidated Municipal Loan, 31 yr. Ext. S. F. Ser. A 7% Bonds due 9/1/60; $7,000, principal amount of Detroit & Candada Tunnel Co. 20 yr. conv. S. F. Deb. 6 1/2% due 5/1/48.

[1] The plaintiff maintains that the securities should have been disposed of by June of 1931. Subsequent to that date and during the balance of 1931, conditions in Chile and Germany grew progressively worse.

The trustees had no special authorization to retain the securities; they were given under the will only such powers as to the sale or retention of securities as they would ordinarily have had by operation of law. They were given full power, however, to hold the trust estate and to sell and convey any of the trust property, real or personal, and invest and reinvest the trust funds and collect the income or gain thereof.

The actual administration of the trust was conducted by defendant Carl H. Stoffegen in New York, he was the active trustee, but what he did was after consultation and with the approval of his cotrustee, defendant Herman C. Stoffregen. The life beneficiary was kept fully informed ***529** concerning estate affairs, and he was invited to make suggestions regarding investments, etc.

Defendant Carl H. Stoffegen is a man of affairs. He was associated with the decedent in the coffee business in St. Louis from 1897 until decedent's death. He was, therefore, familiar with the decedent's opinions and judgment regarding the securities in question. He came to New York in July, 1913, to become a member of the firm of Steinwender, Stoffregen & Company, of which firm the decedent had been a member since 1878. This company did an international coffee business, buying from producing countries and selling to consuming countries. The coffee concern had very close contracts with all South American countries and sold coffee in Germany as well as other European countries for a period of many years. Defendant Carl H. Stoffregen was president of the New York Coffee Exchange for two terms in 1926 and 1927, and he has been active on that exchange since coming to New York in 1913.

The City of Berlin bonds, the Central Bank of German State & Provincial Bank bonds and the Detroit & Canada Tunnel bonds were bought by the decedent on April 30, 1929, and the Chilean Consolidated Municipal Loan bonds were purchased by the decedent on March 25, 1930. Defendant Carl H. Stoffregen discussed these securities with his father prior to the decedent's death, and the decedent was in constant touch with the situation. Decedent deemed the securities desirable and safe investments. Berlin was the largest city in Germany and the third largest in the world. Decedent had faith in

Germany's recovery, in the reestablishment of Germany as a world power, politically and industrially. The record of Berlin for paying its obligations was perfect. As to the tunnel bonds, decedent felt that they would follow along the lines of the Holland Tunnel, the bonds of which he held. He reposed confidence, too, in Chile. All these securities had been held by the decedent during the 1929–1930 depression.

After the trustees assumed charge on February 26, 1931, they employed a reliable accounting firm to outline a form of accounting, and kept in close contact with conditions and the market. The life beneficiary never made any request that the securities be sold, although defendants informed him of the uncertain, shaky conditions. Reference was made to the European collapse and the Chilean moratorium, but the trustees suggested that it was no time to sell and take consequent losses in the panicky market; belief was expressed that ultimately both principal and interest would be paid.

Defendant Carl H. Stoffregen's decision to retain the securities was arrived at after investigating the nature of the securities and after consulting with, and taking the advice of, the following bankers and brokers: Alexander Pinney, formerly of Lee, Higginson & Company and now a member of the firm of Craigmyle, Pinney & Company; Harvey V. Delapena, formely with the Grace National Company and now a vice-president of the Grace National Bank; Edward H. Gilbert, formerly manager of the investment department of Clark, Dodge & Company, and now manager of the investment department of Auchincloss, Parker & Redpath; C. Russell MacGregor of Clark, Dodge & Company; Spencer ***530** Phillips of Tucker, Anthony & Company; Barrett Brown, formerly sales manager with the Bankers Trust Company and now associated with R. W. Pressprich & Company; John S. Logan of the National City Company; Robert Felheim of Lehman Brothers; Mr. Twaddell of Brown, Harriman & Company.

Full cash interest was received on the City of Berlin bonds regularly to and including the June, 1933, coupon. The December, 1933, interest was paid in April, 1934, in 50 per cent. cash and the balance in scrip. The June, 1934, interest was paid in March, 1935, in 30 per cent. cash and 70 per cent. reichsmark.

The $20,000 Central Bank of German State and Provincial Bank bonds paid their interest regularly to and including April 1, 1933. The October, 1933, interest was paid April 30, 1934, in 50 per cent. cash and 50 per cent. scrip. The April, 1934, interest was paid March 26, 1935, in 30 per cent. cash and 70 per cent. reichsmark. According to information received by Mr. Stoffregen from the Grace National Bank semi-annual payments of $600,000 were to be made to cover interest and amortization on the Chilean Consolidated Municipal Loan Bonds and from that amount sufficient funds were to be applied to pay coupons maturing March 1 and September 1, and the balance was to be applied toward calling outstanding bonds. These funds were received on schedule through September 1, 1931, and were used as outlined. Since September 1, 1931, no further remittances have been received from Chile under the terms of the indenture. As to the Detroit Tunnel securities, a default in the interest payment had occurred on February 1, 1931, and protective committees had already been formed. These were the weakest of the lot, characterized as a 'business man's investment.' Their collapse was produced by the collapse of the automobile industry around that period, as well as by competition from the Detroit International Bridge.

Consensus of opinion among those advising the trustees was that 1931 was a period of world-wide depression, that the emotional excitement in respect to securities resulting from the world situation had brought about very low prices and that it was an inopportune time to sell securities.

There was gloom, but most observers thought they envisioned the silver lining. Although Nazism had appeared and Hitler—'a stick of dynamite in the European situation'—was in the ascendancy, few were foresighted enough to presage the dire consequences.

In 1931 Chile's financial structure was in the process of rehabilititation and stabilization. Several insurance companies held some of the German bonds. Even Nazi Germany was not repudiating commercial bonds; only political obligations—reparations—were kicked overboard. As observed, Berlin has no record of default of any kind. In December, 1931, the astute and usually knowledgable Mr. Thomas Lamont, of J. P. Morgan & Co., expressed every confidence in the German people. He felt that they would not repudiate their obligations. Bankers generally were sure Germany was not going to fold up. Others having more at stake than the defendants-trustees were fearful, yet hopeful. ***531** They clung to what they held in the hope—more, expectation—that conditions would be bettered.

Yet the plaintiff asserts that the handwriting was so boldly and graphically etched on the wall that the trustees should have seen it, and seeing it, should have acted accordingly. Clinging to the securities when the signs were portent, was—plaintiff maintains—more than poor judgment, it was, plaintiff charges, downright negligence.

That there were signs of approaching disaster, and that they were portent, we now know. But were these signs as neon-like then as they became? Were they so glowing and certain and irremediable between February and June, 1931, as to have compelled the trustees of jettison the securities?

To switch the metaphor, taking a backward glance at the perilous road over which we have come since 1931, it would appear that even the unwary should have seen and guarded against the dangers ahead. But that is a judgment in retrospect. Were the perils so obvious, so sure as to cancel the optimism on which even the most prudent acted?

[2] [3] The plaintiff insists that the defendants had no right to hold these securities in the vain speculation that the prices might rise. But the nub of this doctrinaire insistence is 'vain'—should the defendants have known that holding on to them was 'vain'? True, the Detroit & Canada Tunnel Company debentures could have been sold during the months of March and April 1931, without loss to the trust estate. The Chilean bonds had too too high a yield to make the most conservative of investments. These bonds, plaintiff asserts, could have been sold without loss to the trust estate. As to the German securities, plaintiff says anyone with prudence could have foreseen their evanescence. All the securities, says the plaintiff, are classified as 'better grade speculation,' unsuitable for trust funds. Plaintiff points to and stresses the rule that 'speculation still is forbidden to fiduciaries. Prompt liquidation of speculative assets is still the standard rule'. In re Stumpp's Estate, 153 Misc. 92, 274 N.Y.S. 466, 480. The guide governing the conduct of trustees 'necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market.' King v. Talbot, 40 N.Y. 76. The plaintiff insists that it was not for the defendants to gamble as to whether or not things would turn out right or to guess that the situation might not be as bad as it appeared. It was their duty to retain only such investments as were safe and not subject to such risks. 'The true significance of bad general economic conditions,' argues the plaintiff, 'is that they require special care on the part of the trustees. When times are hard it is the time to get rid of weak securities, as these in question obviously were, and to invest the trust funds in strong securities.' Plaintiff stresses the doctrine of Rand v. McKittrick, 346 Mo. 366, 142 S.W.2d 29, 31, that '* * * the courts of the land have required trustees of trust funds to exercise a greater degree of care and caution when investing such funds than prudent men ordinarily exercise when investing their own funds. Investments which are speculative in nature have been universally tabooed, by the courts of the union, as proper investments for trust funds. ***532** Yet prudent men may and do invest in speculative enterprises. Wild v. Brown, 120 N.J.Eq. 31, 183 A. 899. Hence the rule is well stated, Restatement of the Law, on Trusts, supra, that trustees may 'make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived.''

[4] Indubitably these securities were not the best available. But that factor does not per se, make the defendants liable for not disposing of them in the first half of 1931. And to concede that the securities could have been disposed of before their greater deline without loss to the estate does not resolve the final issue. Did the defendants act prudently?—that is the question. Inasmuch as the essence of that issue is what the trustees should have done about these securities between February 26, 1931, and June, 1931, a prime difficulty encountered is in separating the situation then from what it became. Sometimes our gaze is so arrested by the length of a shadow that we do not think to give a look at the distant object which casts it. The trustees' dilemma must be viewed in the setting of 1931 rather than in the setting subsequently created by later events. To adopt hindsight as a yard stick for the trustees' conduct would be grossly unjust to them; moreover it would create a dangerous and unfair standard of conduct for fiduciaries generally. Men are not charged with omnipotence or clairvoyance; they can act only on human indices available, at the time of action or inaction. Were they foresighted enough, the world today would not be ensanguined.

While I sympathize with the beneficiary's unfortunate loss, I am unable to perceive that the trustees were guilty of negligence. To be sure, we know now that the prudent course would have been the disposal of the securities. But as was said in Costello v. Costello, 209 N.Y. 252, at page 262, 103 N.E. 148 at page 152: 'A wisdom developed after an event, and having it and its consequences as a source, is a standard no man should be judged by.'

In Fairleigh v. Fidelity Nat. Bank & Trust Co. of Kansas City, 335 Mo. 360, at page 374, 375, 73 S.W.2d 248 at page 256, the court in refusing to surcharge the trustee, appositely said: 'Certainly the trustee was not an insurer nor was it required to be infallible in its judgment or to possess and exercise powers of 'prevision or prophesy' or anticipate events not generally looked for and the mere fact that the trustee's judgment was not fully vindicated by the course of subsequent events which were not discoverable by ordinary prudence, is not a showing that the trustee failed to exercise a sound and reasonable discretion in the management of the trust.'

When the defendants became trustees on February 26, 1931, we were in the midst of the 1929–1932 world-wide depression. They were faced with a dilemma—a dilemma not easily soluble. Should they sacrifice the securities in the existing panicky feeling and put the trust to loss, or should they retain the securities with the hope that a return to normal conditions would restore the values of the securities? What was said in ***533** In re Cross' Estate, 117 N.J.Eq. 429, at pages 433, 434, 176 A. 101, at page 103, is pertinent: 'The treacherous path that lay before the investor, whether trustee or otherwise, in the spring and summer of 1931 (when it is suggested that the executors should have sold and reinvested), is apparent when, with the advantage of retrospection, we look upon the debacle that ensued. Favored forms of trust investment were sucked into the maelstrom—mortgage investments, corporate bonds, and even cash in bank. * * * However loudly it may now be said that people should have foreseen, most men of that degree of prudence and caution that we call ordinary did not foresee. Wisdom after the event is not the test of responsibility.'

The trustees' path of duty was 'somewhat blind and difficult.' Matter of Weston's Estate, 91 N.Y. 502, 508–511. Moreover, as was significantly said in the Weston case, 'It is easy to see now that it would have been wiser to have sold, and had the executors known then what they and we know now, they would undoubtedly have done so. But they did not and could not know. * * * There is, and there can be, no rigid and arbitrary standard by which to measure the reasonable time within which the discretion of an executor directed to convert an estate into money must operate. * * * The test must remain, the diligence and prudence of prudent and intelligent men in the management of their own affairs. * * * Stocks of variable value ought not to be timidly and hastily sacrificed, nor unwisely and imprudently held. Even where there is a direction to sell, reasonable time must be given, and what that is must be determined in each case by its own surroundings. Here the estate was large. A trust fund was early constituted which furnished enough of income for the immediate wants of the beneficiaries. They made no complaint at the time because the stock in question was held. If the result had been a gain to them they would have been thankful for the delay. For the loss which did result we think, under all the circumstances, the executors should not be charged.'

In In re Pettigrew's Estate, 115 N.J.Eq. 401, 171 A. 152, 155, it was said: 'For the precipitous decline in the market and the general economic depression which followed, the executors cannot be held to account. * * * In not then selling, they did as hundreds of thousands of other ordinarily prudent and cautious persons.'

In Matter of Horton's Estate, 166 Misc. 768, 770, 3 N.Y.S.2d 215, 217, a salient distinction is drawn between the purchase of a speculative stock and the retention of such a stock awaiting the arrival of a favorable opportunity to sell. The former, it was held 'would constitute negligence; the latter, regarded prospectively, might be prudent, although in retrospect it might seem to have been a grievous error. Furthermore, the distinction between negligence and mere error of judgment must be borne in mind.'

Surrogate Foley, in Matter of Kramer's Estate, 172 Misc. 598, 605, 606, 15 N.Y.S.2d 700, 707, held that a fiduciary 'may not be surcharged for a shrinkage in value or an imparied condition of the security or property due to economic conditions over which he had no control. * * * In no event can a trustee be held liable for mere error of judgment or for ***534** unfortunate results which he could not be expected to foresee and was powerless to prevent.'

It would seem that in Missouri there is no statutory law or case law which specifically defines what are legal and what are non-legal investments for trustees. Thus, in St. Louis Union Trust Co. v. Toberman, 235 Mo.App. 559, 140 S.W.2d 68, 72, 73, it was said: 'In many jurisdictions the question of the nature of the investments that a trustee may make of trust funds in his possession has come to be explicitly regulated by statute, but such is not the case in our own jurisdiction, save as respects the inhibition placed upon the right of any trust company to invest trust funds held by it in its own capital stock. * * * Neither is there any decision in our own state which purports to arbitrarily classify, define, or limit the character of investments that a trustee may or may not make for his estate. * * *'

In Rand v. McKittrick, supra, it was said: 'In making investments of trust funds the trustee is under a duty to the beneficiary (a) In the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived.'

Cornet v. Cornet, 269 Mo. 298, 190 S.W. 333, heavily leaned upon by the plaintiff, merely condemned the particular foreign investment there assailed. The trustee there had not been prudent, the court found, and had not used proper care in making the investment of trust funds in the bonds of the State of Jalisco, Mexico.

I do not read that case as authority for the proposition that investment of trust funds in foreign securities will not be sanctioned under any circumstances.

In Boland v. Mercantile-Commerce Bank & Trust Co., 349 Mo. 731, 163 S.W.2d 597, 606, it was said: 'In a consideration of the evidence presented, we must keep in mind that we are not called upon to weigh and consider the evidence with reference to selling or retaining the Frisco stock and bonds in the sense of substituting our judgment for that of the duly appointed trustees, nor may we view the exercise of their judgment and discretion in the light of what has since happened. On the other hand, in considering the action and conduct of the trustee in holding the said stock and bonds we must look to the facts and circumstances existing from time to time in order to determine whether the trustees reasonably exercised their discretion in the light of facts and issues as presented at the time, that is, without aid of the retrospective view, which view we now enjoy and which so clearly and forcefully appears from the record in this case. * * * In retrospect it appears that subsequent events have proven the views of Eastman and Moody's Investor's Service to be correct, however, that could not have been determined at the time and the mere fact that the prophecy of one happens to be right is not basis for liability against one whose erroneous judgment has resulted in loss to the estate. The evidence disclosed that the error of appellants was a most ***535** common one at the time in financial circles. * * * It may be conceded that in due time the trustees reached the conclusion that the Frisco stock and bonds were not desirable investments, but what to convert the same into, and when to do so, was still a question for the trustees considering the circumstances then existing. It appears that the trustee retained the investments, awaiting what they considered a proper time to sell, and their retention of the securities was not due to any lack of attention, but was wholly based upon the actual consideration of existing conditions.'

[5] The court in the Boland case approved what impresses me as a reasonable rule, stated in 2 Scott on Trusts (p. 1236, § 230): 'A trustee is not liable merely because he fails to sell the securities immediately or even after a considerable interval, if under the circumstances he acted prudently in postponing the sale.'

We see, therefore, that whether we apply the Missouri rule (§ 298, Restatement of Conflict of Laws) or that of New York, the standard of conduct in neither jurisdiction was transgressed.

[6] In the circumstances here I cannot find that the defendants did not act prudently in postponing the sale of these securities. The fact that their judgment did not prove right 'is not a showing that [they] failed to exercise a sound and reasonable discretion in the management of the trust.' Fairleigh v. Fidelity Nat. Bank & Trust Co., supra. Accordingly, the complaint is dismissed on the merits. No costs. Decision signed. Settle judgment accordingly.

All Citations

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