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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5898-00T1

IN THE MATTER OF THE ESTATE
OF ROBERT E. WALLACE, SR.

Argued: October 9, 2002 - Decided: JUN 06 2003

Before Judges Kestin, Eichen and Weissbard.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Union County, J-4904.

George W.C. McCarter argued the cause for appellants Wendy W. Murphy and Robert E. Wallace, III (McCarter & Higgins, attorneys; Mr. McCarter and, with William P. Higgins, Jr., on the brief).

Howard D. Cohen argued the cause for respondent United States Trust Company of New York (Parker McCay & Criscuolo, attorneys; Mr. Cohen, on the brief).

Richard Kahn argued the cause for respondent Robert E. Wallace, Jr. (Pitney, Hardin, Kipp & Szuch, attorneys; Mr. Kahn, on the brief).

Thomas J. Pyle argued the cause for respondent Harriet L. Hockey (Post, Polak, Goodsell & MacNeill, attorneys; relying on brief submitted by respondent United States Trust Company of New York).

PER CURIAM

This matter, arising from exceptions to the final accounting and distribution of testator's estate, is before us a second time. In a prior appeal, A-7430-97, we remanded the matter for a plenary

hearing on "several allegations and factual disputes that, if fully developed, might establish one or more of [the] bases to vacate [a court-approved settlement] agreement" (slip op. at 8), see R. 4:50-1, -3, between the exceptants and other parties with an interest in the estate. The underlying facts of the matter are recited in our earlier opinion; we will not rehearse them here.

We held that contentions advanced by exceptants, Wendy W. Murphy and Robert E. Wallace, III, contingent remaindermen under their grandfather's last will and testament, should be developed in an evidentiary proceeding followed by the trial court's findings and conclusions. Primarily, these contentions had to do with an asserted absence of full disclosure by the three executors/trustees, two of whom—exceptants' father and aunt—were beneficiaries under the will of the testator; and allegations of self-dealing on the part of two of the three fiduciaries, the exceptants' father, Robert E. Wallace, Jr. (Wallace, Jr.), and a corporation, United States Trust Company of New York (U.S. Trust).

The required evidentiary hearing consumed four days. Judge Boyle heard at-length testimony with supporting documentation from both exceptants, as well as excerpts proffered by exceptants from the depositions of two individuals connected with U.S. Trust, including one who testified in person on behalf of the fiduciaries. Extensive countervailing testimony and documentary evidence was also presented through exceptants' cousin, also a contingent remainderman under decedent's will; one of the attorneys who had

represented both the decedent in his estate planning and, thereafter, U.S. Trust as executor and trustee; Wallace, Jr.; and exceptants' step-mother, Wallace, Jr.'s wife.

Based on the record developed, Judge Boyle, on October 30, 2000, made findings and reached conclusions in an exhaustive oral opinion. He determined, *inter alia*, that, despite having been put on notice of the will construction proceeding and the proposed settlement of the action, exceptants had done nothing to protect their interests. He found that they had, in fact, communicated a lack of interest in the outcome of the matter and the settlement. Judge Boyle found no wrongdoing on the part of U.S. Trust which, exceptants contended, had been protecting its own interests. However, the judge did find that Wallace, Jr., also one of the executors and trustees, had defrauded exceptants. Therefore, Judge Boyle imposed a constructive trust in the amount of $232,000 upon assets Wallace Jr. had transferred to his wife. Exceptants' claim for punitive damages was denied.

A question arose after the hearing and decision whether $150,000 should be added to the amount of the constructive trust. A telephone conference was held on November 1, 2000 followed by the parties' written submissions. Judge Boyle disposed of that question in a short letter opinion dated December 22, 2000, in which, for reasons set forth therein, he "reaffirm[ed his] initial award of $232,000 for the constructive trust."

Exceptants seek reversal of the judgment on several bases. They argue, as they did in the earlier appeal, that the "proofs before the trial court were insufficient to approve acts of self-dealing by the fiduciaries," adding in this appeal that "the executors breached their duty of 'unflagging and undivided loyalty' to the exceptants[,]" and that "court approval for fiduciary self-dealing requires an extremely high standard of proof." Exceptants argue generally that "the trial court drew erroneous conclusions from the undisputed evidence," and that the court "overlooked the fiduciaries' fraud." They also contend that "all [the] fiduciaries are liable for each other's wrongful acts," that the judge erred in his calculation of damages, and that he wrongfully denied exceptants' punitive damages claim. We affirm in all respects but one, having to do with the calculation of damages.

Our detailed review of the testimonial and documentary record in the light of the written and oral arguments advanced by the parties discloses that all the findings Judge Boyle made are well supported by substantial, credible evidence, and are therefore binding on appeal. Pascale v. Pascale, 113 N.J. 20, 33 (1988); Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). The conclusions he drew, following logically as they do from those findings are, likewise, entitled to deference on review. Ibid.

We are, moreover, in substantial agreement with Judge Boyle's legal analysis. The terms of the loan guaranty given by decedent

granted U.S. Trust the right to remove funds from decedent's custodial account in the event Wallace, Jr. failed to pay the $500,000 loan we described in our opinion in the earlier appeal. We agree with Judge Boyle that U.S. Trust acted within its legal rights in removing the funds necessary to satisfy Wallace Jr.'s obligation from decedent's custodial account once Wallace, Jr. informed the bank that he was not going to repay the loan. That the loan may not have been forgivable under the terms of decedent's will is not relevant, as the guaranty was the legal document that granted U.S. Trust the right to the money. In re Estate of Lange, 75 N.J. 464 (1978), and Cohen v. First Camden Nat'l Bank, 51 N.J. 11 (1967), relied upon by exceptants to establish that U.S. Trust acted in violation of its fiduciary duties, in a self-serving manner, are distinguishable on their facts.

In Cohen, the plaintiff's first husband died in 1957. Cohen was retained as the estate's attorney. On May 28, 1958, upon Cohen's advice, the plaintiff executed an indenture of trust conveying most of her assets to the defendant bank and Cohen as co-trustees. Four days later, the plaintiff and Cohen were married. Id. at 15.

On January 27, 1960, the plaintiff executed an assignment of collateral in which she pledged all her right, title, and interest in her trust's assets as collateral for a loan made by the defendant bank to Cohen on that same day, as well as for all of Cohen's other indebtedness to the defendant bank "due or to become

due . . . whether such indebtedness shall have been heretofore or shall be hereafter contracted." Id. at 15-16. The bank required the plaintiff to execute the assignment of collateral because Cohen, who was already indebted to the bank, wanted to borrow additional funds, but the bank was unwilling to extend any additional credit to him without the plaintiff's signature or some form of collateral. Id. at 16.

In August 1964, when Cohen's indebtedness to the bank had reached almost $93,000, he disappeared, and eight of his notes went into default. The bank liquidated the plaintiff's trust, realizing $60,000. Id. at 17.

The plaintiff sued to recover her assets, and the defendant countersued for the deficiency. The trial court held that the assignment was effective and that its acceptance by the bank was not a breach of fiduciary duty. Plaintiff's claim was dismissed, as was the bank's because the plaintiff had no personal obligation for the deficiency. The Appellate Division affirmed. Id. at 14.

In reversing, the Supreme Court observed that, among the trust obligations owed by the defendant to the plaintiff, "was the duty of unflagging and undivided loyalty." Id. at 18. "This standard of utmost fidelity forbids a trustee to occupy a position in which it has interests to serve which conflict with those of the trust estate." Ibid. The defendant breached that duty when it utilized the plaintiff's trust assets "to secure itself in a profitable transaction in which it engaged to obtain the interest on Jack M.

Cohen's notes." Ibid. Thus, the bank allowed the plaintiff's trust to be exposed to a risk that the bank itself was unwilling to take so that it could make a profit. Ibid. The position of the bank as trustee, while at the same time being a creditor secured by the trust assets, placed the bank in "a conflict of interest incompatible with its duty of undivided loyalty to its trust." Id. at 18-19.

By accepting the plaintiff's assignment, the bank subjected itself to potential liability for breach of its fiduciary duty to her. Id. at 19. This liability could be avoided only if the bank could show that the plaintiff, as beneficiary, "consented to the transaction with full knowledge of all relevant facts and complete awareness of the resultant divided loyalty and its possible consequences." Ibid. After finding the bank had failed to sustain its burden in that regard, the Supreme Court directed entry of judgment in the plaintiff's favor. Id. at 24.

In the instant matter, U.S. Trust also removed funds from decedent's account pursuant to the terms of the guaranty. But, at the time the guaranty was executed, U.S. Trust was not a trustee over any of decedent's assets. Decedent was alive and fully in control of his assets. The fact that the guaranty was acted upon subsequent to decedent's death, at a time when a trust was to be created and U.S. Trust was to be a trustee, does not limit U.S. Trust's right to act upon the guaranty given earlier, while decedent lived and the bank was not a trustee. The amount removed

from decedent's account was not trust money; when Wallace, Jr. defaulted on his debt, the amount due became, pursuant to the guaranty, an obligation of the decedent and, hence, a debt of the estate. Stated yet another way, unlike the situation in Cohen, when decedent gave the guaranty, U.S. Trust was not acting both as money lender and trustee. There was no fiduciary relationship at the time to create a conflict.

U.S. Trust's collection of funds from the estate was, therefore, not improper. The remaining question is whether U.S. Trust breached its fiduciary duty to exceptants when it chose not to object to that portion of the settlement wherein the participating beneficiaries agreed to forgive the $470,000 payment from the estate to the bank, which had technically become chargeable to Wallace, Jr. under the second article of decedent's will. U.S. Trust did not breach its fiduciary duty to exceptants in failing to object to the proposed settlement.

When U.S. Trust filed the complaint, it took the position that the debt was not forgivable. However, once the beneficiaries reached a settlement pursuant to which the debt would be considered forgivable under the will, U.S. Trust, reasonably, modified its position. All interested beneficiaries who had chosen to participate in the litigation over the will's construction had agreed upon the result. Exceptants argue that U.S. Trust's insistence that everyone, including exceptants, receive notice of the proposed settlement and an opportunity to be heard suggests

that U.S. Trust, itself, perceived a conflict. That position is untenable. U.S. Trust's sense that all parties in interest receive full disclosure should not work to its detriment.

The basic, controlling fact was that exceptants had each received the notice of settlement. The trial judge was well within his discretion to reject their later expressions of belief that U.S. Trust would take a position contrary to that of Wallace, Jr. at the hearing to approve the proposed settlement. Measured against exceptants' letters in which they expressed their lack of interest in the outcome of the hearing and abdicated any role in shaping the outcome of the proceeding, we cannot conclude that Judge Boyle's credibility determinations in this regard were unreasonable. His findings that exceptants had made a choice not to take positions in conflict with their father were well-supported by the record.

Contrary to exceptants' contentions, Lange, supra, 75 N.J. 464, supports the outcome Judge Boyle reached. In Lange, the decedent died in December 1967. He was survived by his wife, Catherine, and their children, Catherine Lennox (Lennox), Elizabeth Dixon (Dixon), and George Lange (Lange). Catherine and Lennox were named co-executors of the estate and co-trustees of a residuary trust created by decedent's will. Id. at 470.

Under the terms of the will, equal cash bequests were made to each child with the residue placed in trust to produce lifetime income for Catherine. Upon her death, the trust was to terminate

with its balance distributed among the three children or their surviving issue. Ibid.

In 1969, $60,000 in federal estate tax was due, but the estate lacked the liquidity to satisfy all of that debt. Ibid. Upon Dixon's recommendation, Catherine and Lennox obtained a temporary loan secured by a pledge of stock owned by the residuary estate, and paid the balance of the estate tax due. In 1971, the estate's attorney recommended that the stock be sold to pay the loan. The same recommendation was made in 1972 by Lennox's husband, who had, by then, become the estate's attorney. Lennox agreed, but Catherine did not because Dixon and Lange objected to the sale of the stock for that purpose. Id. at 471.

> None of the beneficiaries objected to the continuation of the loan or the estate's retention of the pledged and non-pledged . . . stock. As late as May 1974, [Catherine] reiterated her continuing refusal to liquidate any of the . . . stock for the purpose of satisfying the loan even though the value of the stock had steadily declined since her husband's death. None of the residuary remaindermen, other than . . . Lennox, ever objected to the continuance of the . . . loan or the retention of the . . . stock during the decline in its market value.
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> [Id. at 472-73.]

In August 1972, the children, by agreement, had received their individual bequests in kind and had executed refunding bonds and releases. Id. at 472. However, the disagreement—stemming from the refusal of Catherine, Dixon and Lange to agree to the sale of the stock for the purpose of paying off the loan—continued. Ibid.

In 1974, Lennox filed a complaint and sought, among other things, an order directing the executors to liquidate sufficient estate assets for the purpose of retiring the $33,000 balance on the loan. Catherine filed exceptions but not as to the loan. Neither of the other contingent beneficiaries filed exceptions. Id. at 473.

Prior to filing exceptions to Lennox's complaint, Catherine filed her own complaint seeking, among other things, to restrain Lennox from liquidating the pledged stock for the purpose of retiring the loan. Instead, she wished other estate assets liquidated and applied to the loan. Temporary restraints were imposed upon the bank, and an order to show cause issued against Lennox. Ibid. At the same time, however, the judge, *sua sponte*, raised the issue of whether the co-executors had the authority to take out the loan in the first place and restrained them from paying interest on the loan until he ruled on the issue. Id. at 473-74. Catherine requested that retirement of the loan be held in abeyance until its propriety was determined. She asked the court to surcharge the executors if the loan were found to be illegal. Id. at 474.

At the hearing, Catherine advanced the position that she and Lennox had acted improperly when they negotiated the loan, and she volunteered to be surcharged. Lennox, however, vigorously contested the contention that she and her mother had exceeded their powers in borrowing the money. Ibid.

The trial judge held that the loan was *ultra vires* and in contravention of the will notwithstanding that no interested party had objected to the loan when it was negotiated, and no party, other than Lennox, had objected to the continuance of the loan over the years. Ibid. Accordingly, the co-executors were jointly surcharged almost $27,000. Id. at 475. As for Lennox's contention that the loan, even if *ultra vires*, was consented to and ratified thereafter by all interested beneficiaries, the judge held the conduct of the adult beneficiaries to have been ineffective as to their minor children and any unborn issue. Id. at 475-76. Lennox appealed, and the Appellate Division affirmed the trial judge's determination that the loan was improper. Id. at 476.

The Supreme Court, in reversing, did not address the issue of whether the executors had exceeded their authority under the will when they negotiated the loan. Instead, the Court "disagree[d] with [the] conclusion that validation by all interested beneficiaries of an otherwise *ultra vires* act by a fiduciary cannot preclude the imposition of a surcharge for that breach of duty." Ibid.

The Court first observed: "The principle that a fiduciary may be relieved from liability for the consequences of an otherwise surchargeable transaction as a result of legally sufficient validation thereof by all parties in interest is firmly rooted in the law." Id. at 477. The term "validation," according to the Court, included, but was not limited to, acquiescence. Ibid. n.8.

This principle applies equally to trustees and executors. Id. at 478. The validation "may either precede or follow the alleged infidelity of the fiduciary and may be expressly manifested or, in an appropriate case, inferred from the surrounding circumstances." Id. at 478-79.

The showing of validation "must meet exacting standards." Id. at 479. "A party in interest will not be precluded from challenging a fiduciary's acts or held to have validated his misdeeds in the absence of full knowledge of all the relevant facts and full appreciation of what was being done." Ibid.

The Supreme Court found ample evidence of consent with respect to the negotiation and the continuation of the loan. First, Dixon suggested the loan and later resisted the idea of liquidating assets to retire it. Lange acquiesced in the negotiation of the loan and opposed all recommendations that the loan be paid via the liquidation of estate assets. Dixon, Lange, and Lennox signed releases relieving the executors of liability. None of Dixon's or Lange's children had filed exceptions or otherwise objected to the loan at the time of the informal accounting. Id. at 481. The participation of Catherine and Lennox in procuring the loan constituted validation and barred them from subsequently complaining about the transaction. Finally, the failure of any party to file an exception "where the formal accounting fully and fairly apprised them of all circumstances relevant to the loan transaction from its inception" was "highly probative on the issue

of their acquiescence therein." Id. at 482. Thus, no one could seek to hold the executors responsible for their *ultra vires* act. Id. at 483.

Lange supports the conclusion that exceptants here were bound by the terms of the settlement because they had acquiesced in the arrangement it bespoke. First, despite their later claims of what they really believed, exceptants had already expressly stated, in writing, even as far back as May 1990, just before the complaint was filed, that they wanted the court to approve Wallace Jr.'s proposal. Second, despite information given them by their cousin—whose testimony Judge Boyle found to be highly credible—concerning adverse developments in their father's financial position, exceptants took no steps to protect themselves, such as by seeking legal advice.

Although exceptants maintained at trial that they had believed U.S. Trust would look out for their interests, Judge Boyle concluded reasonably, based on fair inferences from the evidence before him, that it should have become clear to exceptants in November 1990, at the latest, when each of them received the notice of the proposed settlement, that U.S. Trust's position had changed. The terms of the proposal clearly stated that there had been a settlement that included an agreement forgiving the $150,000 and $500,000 loans in the manner provided by the terms of decedent's will. Yet, in the face of this information, neither exceptant inquired why U.S. Trust's position had apparently changed. To the

contrary, they each wrote individual letters reaffirming their lack of interest in the outcome. This acquiescence in the light of all of the information available to exceptants and the surrounding circumstances was the type of validation described by the Supreme Court in Lange.

Even though exceptants did not receive the consent judgment itself, they did nothing for six years until the final accounting was provided to them. They never inquired as to the outcome of the November 1990 hearing, for example. Their conduct throughout, from the filing of the complaint through entry of the consent judgment, established clearly and convincingly their acquiescence in the settlement, validating the ultimate outcome.

Moreover, even if forgiveness of the $650,000 in loans had been contrary to the intentions of decedent, U.S. Trust, in its capacity as executor and trustee, could not be deemed to have acted improperly in not opposing the entry of the consent judgment. See In re Liss's Will, 184 N.J. Super. 184, 189-90 (Law Div. 1981) (referring to N.J.S.A. 3A:2A-81, now N.J.S.A. 3B:23-9, which requires the executor to abide by the terms of the successors' agreement to alter amounts to which they are entitled under a will); In re Will of Seabrook, 90 N.J. Super. 553, 562 (Ch. Div. 1966) (court may approve the compromise of a will contest over the objection of executors and trustees).

In conclusion in this regard, we discern no error in the trial court's determination that U.S. Trust did nothing to violate its

fiduciary duty to exceptants in removing $470,000 from decedent's account pursuant to the terms of the guaranty.

Accepting as established and unchallenged the self-dealing and fraudulent conduct of one of the executors/trustees, Wallace, Jr., we reject as meritless the premise of exceptants' argument that U.S. Trust and the remaining executor/trustee, Louise Hockey, Wallace, Jr.'s sister, should be held liable for Wallace, Jr.'s defalcations. The proposition is that fiduciaries are, in every circumstance, jointly liable for each other's wrongful acts, even when they did not participate therein. Exceptant contends that Judge Boyle erred in absolving U.S. Trust and Hockey from liability for Wallace, Jr.'s conduct on the grounds that there was no evidence that they knew of any of Wallace, Jr.'s misrepresentations and that Wallace, Jr.'s fraud was committed by him as father, not as fiduciary. These findings, too, are supported by substantial, credible evidence.

The rule of law advanced by exceptants that "acts done by one [co-executor] . . . are deemed the acts of all," In re Garey's Estate, 65 N.J. Super. 585, 589 (Co. Ct. 1961) (applying the principle in dealing with a discovery issue), is not as absolute as propounded. The Supreme Court, in In re Koretzky, 8 N.J. 506 (1951), stated a similar rule of law: "[All] executors . . . had the duty to participate in the administration of the estate and each had the duty to use reasonable care to prevent the others from committing a breach of trust." Id. at 524. The context in which

that postulate was articulated is significant, however. The focal issue in Koretzky dealt with an approval by three co-executors of a $25,000 gift to the decedent's son-in-law, which had not been provided for in the will. In making the joint decision to gift the money to the son-in-law, one of the co-executors relied upon the decedent's pre-death statement that he wanted to make a gift to the son-in-law; another considered payment of the money "salve;" and the third appears to have simply just gone along with the idea. Id. at 523.

With the knowledge of all three executors, false entries concerning the payment were then made in the estate accounts so that it would appear the gift had been provided for during the decedent's lifetime. Id. at 523-24. One of the executors directed the false entry; the other "abett[ed]" the false entry; and the third was indifferent. Id. at 524-25. "[T]hus none of the three performed their duty of considering [the legality of the payment] together as executors nor used reasonable care to prevent commission of a breach of trust." Id. at 525. For this and other reasons, the executors were removed from their positions, and the $25,000 gift was cancelled. Id. at 536-37.

The difference between the conduct of the co-executors in Koretzky and the co-executors here is that, in Koretzky, all of the co-executors knew of the wrongful conduct and participated in it. They obviously failed to "exercise that degree of care, prudence, circumspection and foresight that an ordinary prudent person would

employ in like matters of his own" in order to prevent the fraud. Ibid. Thus, they breached their "duty to use reasonable care to prevent the others from committing a breach of trust." Id. at 524. This was not the case with U.S. Trust and Hockey. There was no evidence that they knew, or should have known, that Wallace, Jr. was manipulating exceptants. The co-fiduciaries could have done nothing to protect exceptants from conduct those fiduciaries did not know was being undertaken. U.S. Trust and Hockey knew that exceptants appeared to lack interest in the outcome of the will construction proceeding other than supporting their father's view of the debt forgiveness goal. In the absence of any showing that either U.S. Trust or Hockey undertook a course of conduct with knowledge that amounted to a failure to exercise its or her duty of care, there is no basis in law for imposing liability upon either of them.

The remaining issues addressing the trial court's findings and conclusions are lacking in sufficient merit to warrant discussion. See R. 2:11-3(e)(1)(A),(E).

We come then to the only issue in the case in respect of which exceptants are entitled to some relief: the judge's calculation of "damages."

We begin with the trial court's understanding of the pertinent financial dealings in which Wallace, Jr. had engaged. In July 1988, decedent borrowed $150,000 from U.S. Trust and loaned it in cash to Wallace, Jr., who then loaned $150,000 to a company called

Gunther International (Gunther). Wallace Jr. then attempted to borrow $500,000 directly from U.S. Trust but was unable to do so without decedent's guaranty. After decedent signed a guaranty in September 1988, U.S. Trust loaned Wallace, Jr. the money, and he loaned it also, in turn, to Gunther.

In February 1990, about two months after decedent's death, counsel for Wallace, Jr. wrote to U.S. Trust and sought forgiveness of the $150,000 loan from decedent and the $500,000 loan from U.S. Trust under the second article of the will which provided for an equalizing devise for the trust in favor of Hockey and her children in the event of debt forgiveness to Wallace, Jr.

On May 8, 1990, Wallace, Jr. wrote to U.S. Trust and stated that he could not repay the $500,000 demand loan. Wallace, Jr. requested U.S. Trust to pay off the loan, pursuant to decedent's guaranty, by liquidating securities in decedent's account. The bank complied with the request after it had first recovered approximately $31,000 in assets that Wallace had been able to pledge when he obtained the loan. The total amount owed to U.S. Trust was then $470,972.49.

On May 11, 1990, exceptants each wrote identical letters to the three executors of decedent's estate stating that they had reviewed decedent's will, article second in particular, and believed that the $500,000 loan should be forgiven and the equalizing legacy paid to Hockey.

When Gunther repaid Wallace, Jr. the $650,000 he had loaned Gunther in two installments, Wallace, Jr. still owed the decedent and U.S. Trust all of the money he had borrowed from each of them to fund his loans to Gunther. According to Wallace, Jr.'s wife, the repayment from Gunther was paid over to her to repay debts and "he also owed me money that we had an agreement on." However, upon decedent's death a few months before, Wallace Jr.'s $150,000 indebtedness to him was subject to forgiveness under the will. Therefore, $150,000 of the $650,000 paid to Wallace, Jr. by Gunther was Wallace's to keep. He did not owe that money to decedent or his estate. Accordingly, Judge Boyle was correct, in calculating how much of the proceeds should be impressed with a constructive trust, to deduct $150,000 from the money Wallace, Jr. had received from Gunther.

As for the $30,000 deduction that exceptants claim was inexplicable, the fact is that Judge Boyle expressly stated that he had deducted that amount because U.S. Trust had already recovered $30,000 on the loan when it called in the collateral that Wallace, Jr. had posted in that amount to obtain the $500,000 loan in the first place. Thus, Wallace, Jr. eventually owed the bank only $470,972.

With respect to the money received by Wallace, Jr. that might be subject to exceptants' interests, exceptants argue that, if they had been made aware of the true state of Wallace, Jr.'s finances instead of deceived by him, they would not have acceded to Wallace,

Jr.'s use of any of that money to pay off his debts. The evidence fully supports this thesis, to which the trial judge accorded insufficient weight. Wallace, Jr. told his children he was broke and on the verge of bankruptcy. This was not true. There is, accordingly, no basis in the record for reducing the $470,000 "starting point" the trial court employed in calculating damages by "the legitimate debts" paid by Wallace, Jr.'s wife on his behalf. The debts may have been "legitimate" in the sense of having been genuinely and properly incurred by Wallace, Jr., but in the face of the finding that he misrepresented his finances to his children in an effort to secure their approval of the settlement, it does not follow that the children's rights as remaindermen of their grandfather's bequest should have been diminished. The forgiveness principle of decedent's will bore only upon debts owed to him or his estate and not debts owed to third parties. The total of those debts should not have been effectively deducted from the amount due exceptants. Instead, the constructive trust imposed on the funds Wallace, Jr. paid over to his wife should have extended to the entire amount due exceptants under the terms of decedent's will, $470,972.

Finally, exceptants contend the trial court erred in denying their application for punitive damages. As we have held that the trial court committed no error in determining that U.S. Trust did not breach its fiduciary duty, the issue is limited to whether

punitive damages should have been awarded against Wallace, Jr. We reject exceptants' contentions in that regard.

The decision whether to award punitive damages is within the sound discretion of the factfinder. Balsamides v. Perle, 313 N.J. Super. 7, 30 (App. Div. 1998), aff'd in part and rev'd in part on other grounds sub nom., Balsamides v. Protameen Chemicals, Inc., 160 N.J. 352 (1999). To justify such an award, the defendant's conduct must have been "wantonly reckless or malicious." Ibid. In other words, "[t]here must be an intentional wrongdoing in the sense of an 'evil-minded act' or an act accompanied by a wanton and wilful disregard of the rights of another." Id. at 30-31. Judge Boyle declined to award punitive damages on the grounds that Wallace Jr.'s conduct was not wilful, wanton, or malicious. After observing the demeanor of all involved, Judge Boyle had the opportunity to evaluate their motivations, their personal qualities, and the nature of their relationships, as well as their credibility. He determined that, while Wallace, Jr. had engaged in self-dealing, he had not done so in a malicious way. The record does not clearly establish the contrary, *i.e.*, that Wallace Jr.'s conduct was an "evil-minded act," as distinguished from the conduct of a self-absorbed individual who put himself and his immediate needs ahead of his children's long-term interests.

On the other hand, exceptants were competent adults, who were on notice that Wallace, Jr. was not being forthright with them but who chose, nevertheless, to do nothing to verify the information he

provided them. For example, they knew almost immediately that, despite Wallace, Jr.'s representations that Gunther had not repaid him, Gunther had indeed repaid him and that he had used the money to repay his debts. Despite Wallace, Jr.'s dishonesty with his children, they were given every opportunity to participate in the will construction proceeding and the settlement. Every writing of theirs conveyed the clear impression that they wanted their father's wishes to prevail. His wishes did prevail. The fact that those wishes prevailed at exceptants' expense is a result of their own disinterest at the time in advancing their own interests against their father's. The cases relied upon by exceptants where punitive damages were awarded for breach of a fiduciary duty, Security Aluminum Window Mfg. Corp. v. Lehman Associates, Inc., 108 N.J. Super. 137, 139-41 (App. Div. 1970) and Albright v. Burns, 206 N.J. Super. 625, 629 (App. Div. 1986), describe very different dynamics between the fiduciaries and the claimants. In sum, we discern no misapplication of discretion on the trial judge's part in denying these exceptants' claims for punitive damages.

Remanded for modification of the judgment to increase the amount of the constructive trust ordered to $470,972. Affirmed in all other respects.