

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

IN RE: : ORPHANS' COURT DIVISION
SUSQUEHANNA HOUSE, INC., :
A non-profit corporation :
:
COMMONWEALTH OF PA :
By JOSHUA SHAPIRO, :
Attorney General, :
Petitioner :
:
v. : CASE NO. 41-13-0355
:
SUSQUEHANNA HOUSE, INC., :
JAMES M. McCLOY, TY MOORE :
ERIC SPARKENBAUGH, RAYMOND :
McCLOY and IAN NUTT, : McCloy Motion to Dismiss &
Respondents : Motion for Summary Judgment

OPINION AND ORDER

On or about July 1, 2013, the Commonwealth filed, among other pleadings, a Petition for Citation for Rule to Show Cause as well as a Citation against, among others, Susquehanna House, Inc. and James M. McCloy. (hereinafter McCloy). The Commonwealth, in its capacity as *parens patriae* filed the Citation against McCloy, in order to seek redress and obtain damages for public injuries caused by McCloy's self-dealing and breach of his fiduciary duties of loyalty and care to Susquehanna House, Inc., a charitable organization founded to offer foster care and related services to children.

Following an initial investigation by the Attorney General, McCloy's misconduct was referred to the Lycoming County District Attorney's office. A criminal complaint was filed against McCloy alleging the misappropriation of funds (theft by unlawful taking and theft by failure to make required disposition of funds) from Susquehanna House, Inc. by Mr. McCloy from January 1, 2009 through October 31, 2011 in the amount of \$534,512.34. On

October 3, 2016, under Information No. 890-2013, McCloy pled guilty to one count of theft by unlawful taking, a felony three offense. At the time of McCloy's plea, he and the Commonwealth agreed to restitution in the amount of \$195,228.69. McCloy was subsequently sentenced to a county term of incarceration. His sentencing order also directed him to pay the agreed upon restitution.

On September 8, 2017, McCloy filed a Motion to Dismiss the Citation. On October 11, 2017, McCloy filed a Motion for Summary Judgment. In his Motion to Dismiss, McCloy seeks a dismissal of the Citation. In McCloy's Motion for Summary Judgment, McCloy seeks judgment in his favor and against the Commonwealth.

On October 13, 2017, the Commonwealth filed an Omnibus Brief in response to McCloy's Motion to Dismiss and Motion for Summary Judgment. McCloy filed a "Motion for Summary Judgment Addendum" on December 7, 2017. The motions were heard before the court on December 12, 2017. This Opinion and Order shall address McCloy's respective motions.

As confirmed during the argument in this matter, the court will treat both of McCloy's motions as Motions for Summary Judgment.

Pa. R. C. P. Rule 1035.2 provides, in relevant part:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law.

- (1) Whenever there is no genuine issue of any material fact as to a necessary element of a cause of action or defense which could be established by additional discovery or expert report...

As the Commonwealth noted in its Brief,

“[i]n considering the merits of a motion for summary judgment, a court views the record in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of a material fact must be resolved against the moving party.” *Toy v. Metro. Life Ins. Co.*, 593 Pa. 20, 34, 928 A.2d 186, 195 (2007).

In McCloy’s Motion to Dismiss, he first argues that because Susquehanna House, Inc. no longer exists, the Commonwealth lacks standing to continue the case under the doctrine of *parens patriae*. As well, McCloy argues that the Commonwealth is no longer protecting the public interest. McCloy’s argument is without merit.

McCloy was a former director of a non-profit corporation and as such is personally liable for any misappropriation of corporate property. The property is held by the corporation in trust for the corporation’s charitable purposes. The public at large is the ultimate beneficiary of all charitable trusts and the Attorney General, acting in *parens patriae*, is both entitled and in fact required, to enforce the public’s interest in restoring charitable property that has been unlawfully diverted. *Commonwealth v. Barnes Foundation*, 398 Pa. 458, 159 A.2d 500 (1960).

“It cannot be questioned that [the Attorney General], by virtue of the powers of [his] office, is authorized to inquire into the status, activities and functioning of public charities.” *Barnes*, at 467.

As the Commonwealth cogently argues, McCloy acted as the “principal director, officer and employee of Susquehanna House, Inc., a tax-exempt, charitable organization incorporated under the Nonprofit Code. Nonprofit corporations incorporated for charitable purposes, like Susquehanna House, Inc., may take, receive and hold property in trust for their charitable purposes, and the

directors of such charitable organizations are trustees of this property with the same degree of responsibility and accountability, accorded to unincorporated trustees. 15 Pa. C.S. § 5547 (a).”¹ As a director, officer and trustee of Susquehanna House, Inc., “McCloy stood in a fiduciary relation to the charity, and had a duty to prevent diversion of its property for improper purposes. 15 Pa. C.S. §§ 5547 (b) 5712.”

Once it is proven that McCloy “perpetrated acts of self-dealing and willful misconduct in his capacity as a director of Susquehanna House, Inc., the Nonprofit Code provides for his personal liability. 15 Pa. C.S. § 5713 (a).” Because McCloy’s “liability is premised upon his unlawful diversion of charitable property for which he was a trustee, the [Uniform Trust Act] authorizes this Court to compel McCloy’s redress of this unlawful diversion through payment of a surcharge. 20 Pa. C.S. § 7781 (b).”

Determinatively, “given that the charitable funds misappropriated by McCloy were originally endowed to Susquehanna House for the purpose of serving children in need, any surcharge ordered by this Court must be subsequently rededicated to the intended charitable trust through [what is known as cy pres (as near as possible to the donor’s intent)] distribution. 20 Pa. C.S. §§ 7740, 7740.7.”

Contrary to what McCloy claims, the Attorney General clearly has standing as the enforcement officer of the laws governing charitable funds. *In re: Pruner’s Estate*, 390 Pa. 529, 136 A.2d 107 (1957); *Commonwealth v. Citizen’s*

¹ The court will cite in this Opinion by quotations, several portions of the Commonwealth’s Brief. The court understands that the Commonwealth’s Brief was prepared in large part by law student and intern Jacob Wonn. The court commends Mr. Wonn on his excellent legal research and writing abilities.

Alliance for Better Neighborhoods, 983 A.2d 1274 (Cmwth. Ct. 2009).

Additionally and contrary to McCloy’s argument, the Attorney General’s standing remains intact despite the dissolution of Susquehanna House, Inc. The Nonprofit Code “states that involuntary dissolution of a corporation neither eliminates nor impairs the personal liability of its directors or officers for claims that accrued prior to the dissolution. 15 Pa. C.S. § 5979 (a).”

As well, and contrary to what McCloy argues, the present action by the Attorney General as *parens patriae* is as the Commonwealth argues “properly directed toward compensating the public at large for injuries caused by Respondent James M. McCloy’s breach of his fiduciary duties to Susquehanna House, Inc.”

Clearly through taxpayer funded operations, the award of public contracts, the services to 15 different counties and nine school districts, receiving assets in the form of tax monies and benefiting from tax exemption status, McCloy’s conduct caused harm to the public at large and arguably a “sufficiently substantial segment” of Pennsylvania’s population. Susquehanna House’s charitable funds were diverted from their charitable purpose to the detriment of its consumers and the public at large. “Any surcharge recovered would be distributed cy pres by the Court to successor organizations offering the same or similar services. 15 Pa. C.S. § 5547; *In Re: Stroudsburg Real Property*, 23 Fiduc. Rep. 2d 258 ,262 (O.C. Monroe 2003).”

In McCloy’s motion to dismiss, he further argues that “imposing additional restitution upon the agreed restitution per the plea agreement is double jeopardy.” Again, the court cannot agree.

From a factual standpoint, McCloy's criminal theft case arose from charitable funds he misappropriated between January 1, 2009 and October 31, 2012. The present action for accounting and surcharge "arises from charitable funds [misappropriated by McCloy] between January 1, 2004 and December 31, 2008, as well as between November 1, 2012 and September 30, 2013." Moreover, some funds misappropriated during the time period covered by the criminal case were not included in the charges against McCloy.

McCloy's double jeopardy argument is clearly without merit. First, the Commonwealth's "action" is specifically permitted pursuant to Pennsylvania's criminal restitution statute. 18 Pa. C.S. § 1106 (g). Secondly, the double jeopardy clauses protect against the imposition of multiple criminal punishments for the same offenses. *Commonwealth v. States*, 595 Pa. 453, 458 (2007); *Hudson v. United States*, 522 U.S. 93, 99 (1997). The Commonwealth's present action against McCloy seeks compensatory damages in the amount of charitable funds misappropriated by McCloy. It is not a criminal punishment.

With respect to McCloy's Motion for Summary Judgment, he makes several arguments. First, he seeks judgment for any monies he appropriated after the Commonwealth filed its Citation. In support of this argument, McCloy submits that the Commonwealth failed to amend its Citation.

Contrary to what McCloy claims, however, the Commonwealth was not required to amend its pleading. As the Commonwealth asserts, its initial Petition for Citation sets forth sufficient material facts relating to McCloy's conduct that form the basis for McCloy's liability for an accounting and surcharge. The Rules only require that "any pleading demanding relief...specify the relief

sought.” Pa. R. C. P. 1021 (a). The Commonwealth’s Petition for Citation requests relief in the form of an accounting and surcharge of McCloy. This Rule does not require the Commonwealth’s pleading to state the precise amount of the requested surcharge.

Second, McCloy seeks judgment for any amounts beyond those “wrongfully spent not restituted by the plea agreement.” McCloy argues that “most” of the Commonwealth’s claims were restituted during the criminal proceedings.

McCloy is not entitled to judgment as claimed. First, the Commonwealth is not pursuing recovery of any amount encompassed in his 2013 theft charges. The Commonwealth is intending to recover “charitable funds misappropriated by McCloy in transactions wholly distinct from those at issue in his prior criminal charges.”

Third, McCloy seeks judgment in his favor for personal charges on the corporate credit cards, McCloy argues that the “Commonwealth’s experts” conclude that “no specific credit card charges can be identified as misappropriated by Mr. McCloy.”

Contrary to what McCloy claims, however, the Commonwealth’s “investigator actually concluded that, although the available evidence showed that [McCloy] was definitely abusing corporate credit cards for personal use, further investigation of credit statements would be required to completely document the issue.” Accordingly, this is a matter of material fact that must be decided by the factfinder and is not appropriate for summary judgment.

Fourth, McCloy seeks judgment in his favor for “foster care

payments, while out of town in 2009.” McCloy argues that those claims are barred by the statute of limitations. He further argues that his role as a foster parent negates the doctrine of nullum tempus. Foster parents according to McCloy were independent contractors. McCloy and Susquehanna House entered into a voluntary agreement and as a result, McCloy argues the doctrine of nullum tempus does not apply.

Again and contrary to what McCloy claims, the Commonwealth is not subject to the statute of limitations due to the doctrine of nullum tempus. *Citizens Alliance*, 983 A.2d at 1278. McCloy cannot escape liability in surcharge for amounts relating to foster care and related service overpayments arising over four years before the Commonwealth’s filing of its Petition for Citation on June 28, 2013. “The Commonwealth cannot be time barred from recovering any of the amounts included in its estimate of surcharge, which arose from unlawful transactions beginning as early as 2004.”

Unfortunately for McCloy, he misinterprets and misapplies the cases upon which he relies. Indeed, if one looks carefully at the cases, they actually support the Commonwealth’s position under the circumstances.

Fifth, McCloy seeks judgement in his favor for foster care payments “while out of town in 2010, 2011 and 2012.” McCloy argues that he was “allowed to be out of town” per applicable DPW regulations.

McCloy’s argument does not entitle him to judgment as a matter of law. Even assuming McCloy’s legal representations are accurate, McCloy’s argument involves issues of material fact that have not yet been decided.

Sixth, McCloy seeks judgment in his favor and against the

Commonwealth for payments made by Susquehanna House for McCloy's criminal defense attorney legal fees. McCloy argues that it was lawful for the Board of Directors to "indemnify one of its members." According to McCloy, the Board of Directors passed a resolution at a special meeting in May of 2013 to authorize such a payment.

This again is an issue of material fact to be decided by the factfinder. Moreover, McCloy has not cited to any legal authority entitling him to judgment as a matter of law. Indeed, it is likely that any indemnification would be void following McCloy's guilty plea.

Lastly, McCloy's addendum seeks judgment in his favor and against the Commonwealth for any surcharges prior to 2009 and post 2012. McCloy claims the Commonwealth's investigators "abused fair discovery protections" and that the Commonwealth expanded its inquiry outside of the "timeframe" identified "in the subpoena." McCloy argues that he was somehow prejudiced because he could not gather and secure necessary financial documents.

As with the above arguments, this also is a matter for the factfinder to resolve. Moreover, McCloy has not cited to any case law or other legal authority to support his claims.

While the court respects McCloy's persistence in these matters, his lack of legal training and experience leads him astray. His citing of legal authorities to support his respective positions reflects his limitations on of how one should read and analyze cases and what cases, and from what jurisdictions are authoritative to this court. While Mr. McCloy is certainly an intelligent man, this talent fails him in this arena. As Oliver Wendell Holmes once said, "The life of the

law has not been logic; it has been experience.”

McCloy, however, is apparently confident enough in his presentational and analytical abilities to want to continue to represent himself. Unfortunately, and as evidenced in his most recent pleadings, he fails to understand the complexities of legal substance, procedure and proof.

Dudley N. Anderson will soon retire as a judge. He has served on the Lycoming County Court of Common Pleas since he was elected in 1997 and was retained in 2007. He is a well-respected jurist who throughout his years on the bench has demonstrated a keen intellect, a biting wit and a great ability to make the complex simple. He was previously elected and served as the President of the Pennsylvania Conference of State Trial Judges. He also served two terms on the Statewide Ethics Committee.

For decades, Judge Anderson has capably and diplomatically presided over trials in which individuals have represented themselves. He has done so objectively and within the guidelines of judicial ethics and human morality. Given his experience with pro se litigants, he has witnessed firsthand unfortunate outcomes in large part because of a litigant’s lack of experience, skills and training in the legal field. He makes it a practice to urge pro se litigants to obtain counsel if at all possible. This court urges Mr. McCloy as well. He has far too much to lose.

ORDER

AND NOW, this ____day of December 2017, following a hearing and argument, the court denies Respondent McCloy's Motion to Dismiss and Motion for Summary Judgment.

BY THE COURT

Marc F. Lovecchio, Judge

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