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OF THE COMMITTEE ON OPINIONS

ISABELLA A. CESTONE and LISA  
SOPER as guardian of NICOLE L.  
CESTONE and ANTHONY V.  
CESTONE,

Plaintiffs,

v.

VINCENT R. CESTONE and PNC  
FINANCIAL SERVICES GROUP,  
INC. d/b/a PNC WEALTH  
MANAGEMENT,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION: BERGEN COUNTY  
DOCKET No. C-81-19

**OPINION**

Argued: May 8, 2019

Decided: May 14, 2019

Appearances: Jeremy Stein, (Hartman Doherty Rosa Berman & Bulbulia, LLC, attorneys) for  
Plaintiffs

Gary Botwinick, (Einhorn, Harris, Ascher, Barbarito & Frost, P.C., attorneys) for  
Defendant Vincent Cestone

Andrew Cevasco (Archer & Greiner, P.C., attorneys) for Defendant PNC Bank

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**HON. EDWARD A. JEREJIAN, P.J.Ch.**

This matter originated before the Court as an Order to Show Cause seeking preliminary injunctive relief, filed on March 27, 2019 by Jeremy Stein, Esq., attorney for Plaintiffs Isabella Cestone and Lisa Soper as guardian of Nicole Cestone and Antony Cestone (hereinafter, "Plaintiffs"). On April 22, 2019 Steven Mignogna, Esq., attorney for Defendant PNC Bank, filed a motion to dismiss the complaint. On April 24, 2019, Gary Botwinick, Esq., attorney for Defendant Vincent Cestone, filed a separate motion to dismiss the complaint. On May 1, 2019, Plaintiff filed a

cross-motion and opposition to the two pending motions to dismiss. The Court heard oral argument on May 8, 2019.

### **BACKGROUND**

Defendant Vincent Cestone is the father of Plaintiffs Isabella Cestone, Nicole Cestone and Anthony Cestone, as well as the ex-husband of plaintiff Lisa Soper. In 2012, the Cestone children's grandfather, Ralph Cestone, formed three irrevocable trusts, one for the benefit of each of the Cestone children: The Isabella A. Cestone 2012 Irrevocable Trust, the Nicole L. Cestone 2012 Irrevocable Trust, and the Anthony V. Cestone 2012 Irrevocable Trust. Defendant Vincent Cestone was initially named the Trustee of all three trusts, but has since voluntarily stepped down from this role.

After the trusts were formed, Ralph Cestone transferred all or nearly all of the shares in a company he owned, Verona Equities, Inc., to the Trusts. Defendant is purportedly the sole director, as well as the Vice President, Secretary and Treasurer of Verona Equities, and thus he is essentially in complete control of the company.

It is alleged that Defendant did not inform the Cestone children, nor his ex-spouse, of the existence of the trusts, and has made no distributions from the Trusts to the beneficiaries. It has further been alleged that Defendant has misappropriated the Trusts' assets.

PNC Wealth Management is named as a defendant in this action because Plaintiff alleges that PNC has unlawfully withheld information from Plaintiffs based on the unlawful instruction of Defendant Vincent Cestone.

This matter originated as an Order to Show Cause seeking preliminary injunctive relief pertaining to the administration of three individual trusts.

In lieu of an Answer, Defendant Cestone filed a motion on April 24, 2019 to dismiss the complaint for failure to state a claim pursuant to R. 4:6-2(e). Defendant Cestone also urged this Court, in the alternative, to consider dismissing the Complaint due to the fact that it was filed improperly in the general equity division as opposed to the probate division, as well as in Bergen County instead of the Essex County vicinage.

In addition, Defendant PNC Bank also filed a motion to dismiss the complaint based on Plaintiffs' sole allegation against PNC Bank for violating N.J.S.A. 3B:31-67 being erroneous and inapplicable as a matter of law.

It should be noted as well that subsequent to the filing of the instant matter, Defendant Cestone initiated an accounting action regarding the three Trusts in the Essex County Chancery Division, Probate Part on April 24, 2019. Plaintiff has since filed a cross-motion in the instant action asking this court to compel Defendant Cestone to withdraw the Essex County accounting matter.

In the interests of clarity, the court will first address the pending motions to dismiss since, in the end, the Crowe analysis will be moot.

#### **DEFENDANT VINCENT CESTONE'S MOTION TO DISMISS**

Defendant Cestone's motion to dismiss in lieu of an Answer alleges that the complaint fails to plead sufficient facts to demonstrate Defendant breached any "duty to disclose and discretion to periodically report," pursuant to N.J.S.A. 3B:31-67. In addition, in the event this Court did find Plaintiff pled sufficient facts to survive a R. 4:6-2 motion, Defendant urges this Court to render the instant application moot due to the pending accounting actions in the Essex County Chancery Court, Probate Part. Lastly, Defendant asks this court to find that venue in both the General Equity division and Bergen County are improper, in comparison to the Essex County Chancery Division, Probate Part.

*LEGAL STANDARD*

A defendant may move to dismiss a plaintiff's complaint for failure to state a cause of action under R. 4:6-2(e). R. 4:6-2(e). Dismissal is warranted where no cause of action is identified or suggested by the facts of the complaint. Printing Mart, supra, 116 N.J. at 746.

When reviewing the complaint under such a motion, courts will accept well-pleaded facts as true and provide the non-moving party favorable factual inferences that are reasonable. Ibid. Moreover, a court must search the complaint in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Ibid. Accordingly, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). However, if a generous reading of the allegations "merely suggests a cause of action," the complaint will survive the motion. F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

*ARGUMENT*

Here, proper accounting actions pertaining to the three trusts at issue have already been initiated in Essex County, and Defendant has further voluntarily stepped down as Trustee, appointing Hon. R. Benjamin Cohen (Ret.), Hon. Michael R. Casale (Ret.) and Hon. Patricia K. Costello (Ret.) as Co-Trustees on April 11, 2019. Defendant proffers, and this Court agrees, that in fact the proper avenue for Plaintiffs to pursue would be to file exceptions to the Accounting in the pending Probate actions.

The Court is not inclined to address the merits of Plaintiffs' allegations regarding any breach of fiduciary duty by Defendant as Trustee of the Trusts because, as Defendant's motion illustrates, Plaintiffs seek relief in an improper division and an improper venue. This matter properly belongs in the Chancery Division, Probate Part of the appropriate vicinage.

R. 4:3-1(a)(2) specifically provides that “[a]ll actions pursuant to R. 4:83 et seq. shall be filed and heard in the Chancery Division, Probate Part.” The Probate Part has jurisdiction over actions to compel a fiduciary to settle his account and file an inventory and appraisal, which is exactly what Plaintiffs seek to compel Defendant to do in the instant matter. See R. 4:87-1. It follows that “the Surrogate as deputy clerk of the court shall audit the accounts of all fiduciaries,” and thus Plaintiff needs the Surrogate to act as the deputy clerk in order to audit the accounts it seeks. R. 4:87-6.

Because this matter was filed in the General Equity division, the Surrogate is not acting as the deputy clerk. The facts of this case could not more clearly indicate that the probate court is the proper venue to hear this matter. In essence, Plaintiff seeks a formal accounting and the removal of a Trustee of an inter vivos trusts. Plaintiffs’ counsel all but conceded this point during oral argument when questioned on this matter, going so far as to say he supposed the matter could have been filed in the Bergen County Surrogate Court before attempting, and failing, to convince this Court that it could also be properly filed as a General Equity matter.

It should also be noted that R. 4:3-2(a) provides, in pertinent part, that the matter must be brought “in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement,” subject to certain exceptions such as those provided for family actions, R. 5:2-1, and probate actions, R. 4:83-4. Moreover, R. 4:83-4(d) provides:

[I]n an action for the appointment of a trustee or substitute trustee of an inter vivos trust, venue shall be laid in the county in which there is any property of the trust estate at the commencement of the action or in the county in which a trustee is domiciled at the time the action is commenced. All subsequent proceedings affecting the trust including the appointment of an additional or substituted trustee, shall be brought in the original venue.

In the instant action, Plaintiff seeks the removal of Defendant as Trustee of the Cestone Trusts and a formal accounting of said trusts. However, Defendant is clearly a Florida resident, and

is domiciled in Florida. Similarly, the Plaintiffs, who are the sole beneficiaries of the respective trusts, reside and are domiciled in Essex County. Additionally, the Cestone Trusts themselves do not hold property in Bergen County. Rather, by Plaintiffs' own concession, the Cestone Trusts' "primary asset" consists of shares of Verona Equities, a Delaware corporation with a principal place of business in Verona, New Jersey, a town of Essex County. As a result, as Defendant argues, the physical location of PNC's wealth management office alone is insufficient to create the necessary contacts within Bergen County. Thus, even though the Court has already concluded that the matter was improperly filed in the general equity division, the Court also expresses considerable doubt as to whether this action could have properly been filed in the Bergen County Probate Part.

It is also worth reiterating that an action for the approval of each of the Trustee's accounts has *already been initiated* by the Defendant in the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County, the seemingly proper venue.

#### **DEFENDANT PNC BANK'S MOTION TO DISMISS**

Defendant PNC Bank filed its own motion to dismiss in lieu of an Answer on April 22, 2019. In the instant matter, Plaintiffs' sole allegation against Defendant PNC is that it failed to comply with the standards set forth in N.J.S.A. 3B:31-67 in that PNC refused to provide Plaintiffs with requested records regarding the Trusts and Verona Equities.

However, as a matter of law, N.J.S.A. 3B:31-67 only applies to the provision of information by *trustees*. Here, it is undisputed that PNC is not, nor has it ever been, a trustee of these Trusts.

Further, it is clear that Defendant PNC has neither the authority nor the duty to provide its client's private banking information to Plaintiffs. Moreover, Defendant's counsel stressed during oral argument, and this Court agrees, that nothing is precluding Plaintiffs from subpoenaing relevant documentation from Defendant PNC in furtherance of their relief sought. In fact, this would be the

most proper way procedurally to obtain this information, as opposed to improperly naming Defendant PNC as a party for the sole purpose of obtaining documents. It is undisputed that Defendant PNC, as a bank and wealth management team, owe a large fiduciary duty to protect *their* client's highly confidential information, who in this case, is the Trustee of the three Cestone Trusts, *not* the Plaintiffs.

Plaintiffs are also entitled to obtain this information through discovery from the new Trustees of the three Cestone Trusts since they presumably have access to the documents Plaintiffs seek. The Trustees and the Trustees alone owe a fiduciary duty to the beneficiaries of the respective trusts.

Nevertheless, joinder of PNC as a defendant in the instant matter solely for the production of financial records believed to be in PNC's possession, custody or control is improper and they should be dismissed from this case.

#### **PLAINTIFF'S CROSS-MOTION TO COMPEL THE WITHDRAWAL OF THE ESSEX COUNTY ACTIONS**

Plaintiff filed a cross-motion to have the Essex County accounting actions withdrawn on May 1, 2019. Plaintiffs' cross-motion stems from an apparent transfer of previous matrimonial matters by the Assignment Judge of Essex County to Monmouth County due to an inability for an unidentified Essex County Judge to continue to be "fair and impartial." See Plaintiff's Reply Brief, at p. 3. Specifically, Plaintiff contends that because the Assignment Judge in Essex County entered an Order transferring that case from Essex County to Hudson County "to preserve the appearance of a fair and unbiased hearing," that the instant matter is somehow precluded from review in Essex County.

As a result, Plaintiff seeks an Order from this Court compelling the withdrawal or dismissal of the accounting actions Plaintiff filed in Essex County and discussed in detail above. Plaintiff also posits that the accountings filed were filed for the "improper" purpose of concealing Defendant's

purported wrongful actions and misconduct. In addition, Plaintiff contends that the accountings filed by Defendant are deficient in that they do not provide information regarding Verona Equities, including the identity and value of all assets held by Verona Equities and payments and transfers into and out of Verona Equities since the Trusts' inception.

Nevertheless, Plaintiff ignores well-settled procedure regarding the transfer of cases and the role of the Assignment Judge in the proper venue to do so. Plaintiff is familiar with this procedure, because, as noted above, they have already experienced it in a prior matrimonial matter. Instead, Plaintiff gives the impression of forum shopping by arbitrarily filing the instant matter in Bergen County as a General Equity matter out of a fear of a potential prejudicial effect on them based on an *alleged* bias against the mother of the Plaintiffs.

As was stressed during oral argument, this matter is not about the mother of the beneficiaries, but about the administration of the trusts themselves. As has been already stated, this matter properly belongs in the Chancery Division, Probate Part. If Plaintiffs insist that the matter needs to be transferred due to an alleged bias, the proper procedure would be for an application to be made in *that* Court, at which point the Assignment Judge of Essex County would make a determination as to whether or not the case should be heard in Essex or transferred to a different vicinage. It is not proper for this Court to make that determination, nor is it proper for Plaintiffs to unilaterally and arbitrarily determine that they want to try the case in Bergen County.

#### **PLAINTIFFS' ORDER TO SHOW CAUSE**

As was noted above, this matter was initiated as an Order to Show Cause seeking preliminary restraints, filed on March 27, 2019. Although the Order to Show Cause is now moot on account of the Court's decision to grant Defendant Cestone's and Defendant PNC Bank's motions to dismiss, the Court, however, will briefly address the merits of the Order to Show Cause anyway.



An interlocutory injunction is an extraordinary equitable remedy utilized primarily to forbid and prevent an irreparable injury. See Zoning Bd. Of Adjustment of Sparta Twp. v. Service Elec. Cable Television of New Jersey, Inc., 198 N.J. Super. 370 (App. Div. 1985). It must be administered with sound discretion and always upon considerations of justice, equity and morality in a given case. Id. Injunctive relief should only be entered upon a showing, by clear and convincing evidence, of entitlement to the relief. See Dolan v. DeCapua, 16 N.J. 599, 614 (1954) (“Injunctive judgments are not granted in the absence of clear and convincing proof”).

The seminal case in determining whether preliminary injunctive relief should be granted in Crowe v. De Gioia, 90 N.J. 126 (1982).

Under Crowe, the movant bears the burden of demonstrating: (1) irreparable harm is likely if the relief is denied; (2) the applicable underlying law is well-settled; (3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and (4) the balance of the hardship to the parties favors the issuance of the requested relief. Id. at 132-134.

The first prong of Crowe requires a showing that preliminary relief is necessary to prevent irreparable harm. Id. at 132. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. Ibid.

Here, however, Plaintiffs have failed to demonstrate how any relief *other* than monetary damages might in fact qualify. For instance, Defendant has already resigned as Trustee of the trusts, and instituted an accounting action in Essex County. Thus, there is really no threat whatsoever of ongoing irreparable harm that justifies the implementation of transitory injunctive limitations on either party.

Further, there is nothing precluding Plaintiffs from filing exceptions to these accountings regarding any issues involving Verona Equities, which Plaintiff indicated is the primary disagreement in both the informal accounting exchanged amongst counsel, as well as the formal accounting actions filed in Essex County. In fact, the proper procedure would in fact be to challenge the adequacy and propriety of these accountings in the proper forum, which will be discussed in greater detail *infra*. The fact that this action was initiated prior to the Essex County accounting actions is irrelevant.

Plaintiffs have failed to plead any severe personal inconvenience or irreparable injury stemming from Defendant's alleged actions as Trustee that justify the issuance of injunctive relief.

The second prong of Crowe requires the underlying law of plaintiff's claim to be well-settled. Id. at 133. A fortiori, temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled. Ibid.

Here, Defendant has already resigned as Trustee, and therefore any purported harm that he could cause *going forward* is moot. Furthermore, as already stated, Plaintiffs have already received an informal accounting and are a party to the formal accounting action pending in Essex County, in which they can file any exceptions to the accounting they may have.

Moreover, Plaintiff fails to demonstrate a well-settled claim because this action was clearly improperly filed in the Bergen County Chancery Division, General Equity Part, and instead belongs in the Chancery Division, Probate Part of the appropriate vicinage, based on the allegations made and various requests for relief.

The third principle under Crowe is a preliminary injunction should not be issued where material facts are controverted. Ibid. This principle is important in light of the third requirement of

Crowe; that is, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. Ibid.

Here, there are clear issues of material fact that prevent Plaintiff from being able to prove there exists a reasonable probability of ultimate success on the merits. To the contrary, seemingly *all* of the material facts appear to be *substantially* in dispute. In the court's sound discretion and upon considerations of justice and equity, the Court cannot possibly find at this time that Plaintiff has shown a reasonable probability of success on the merits by clear and convincing evidence. See Dolan, 16 N.J. at 614.

The final step in considering an application for preliminary relief is balancing the relative hardships to the parties in granting or denying relief. Ibid.

Here, Plaintiff has failed to show that the balancing of relative hardships of the parties tips in plaintiffs' favor. Specifically, as already addressed, most of the material facts of this matter are substantially in dispute. What is *not* in dispute, however, is that (1) Defendant has already provided Plaintiffs' counsel with an informal accounting; (2) filed a formal accounting action of its own; and (3) voluntarily stepped down as trustee of the respective trusts.

Although the Court does not take a position on whether or not Plaintiffs may ultimately be entitled to monetary damages following discovery and a trial, it is quite clear that under the circumstances, Plaintiffs have not demonstrated justification for interlocutory relief.

#### CONCLUSION

This matter is ripe for dismissal because this matter is improperly filed as a general equity matter, when it quite clearly belongs in the Chancery Division, Probate Part of the appropriate vicinage, pursuant to R. 4:3-1(a)(2) and R. 4:87-1. Based on the statute, the audit and accounting of the inter vivos trusts at issue, as well as a potential investigation as to the propriety of actions taken

by the prior Trustee, require “the Surrogate as deputy clerk of the court” to carry out these functions. R. 4:87-6.

Moreover, it is clear based on the facts presented that Bergen County is not the proper vicinage to entertain this matter. While Plaintiff’s entire argument is that the “wrong doing occurred in Bergen County” based on one of PNC Bank’s Wealth Management Teams that happens to be located in Ridgewood, New Jersey, the Court believes that Essex County would perhaps be a more appropriate venue. This finding is based on the fact that the plaintiffs are domiciled in Essex County, and Verona Equities – the business whose shares constitute the primary assets of the trusts at issue – has its principal place of business in Essex County. It follows that because an accounting action has already been initiated in the Essex County Chancery Division Probate Part, the appropriate course of action would be for Plaintiffs to file various exceptions in that action. Although Plaintiffs’ have demonstrated a concern over the Essex vicinage’s ability to hear the matter in an unbiased manner, Plaintiffs have the ability to make the appropriate application to the Assignment Judge in Essex County to evaluate that issue.

It is also clear that Defendant PNC Bank is not, nor was it ever, under any fiduciary obligation to provide information regarding the contents of the Cestone Trusts to the Plaintiff beneficiaries. To the contrary, Defendant PNC Bank would likely be breaching a fiduciary duty *actually* owed to their own client by doing so.

Lastly, although any application for injunctive relief from this Court is now moot on account of the granting of the two pending motions to dismiss, Plaintiff has nonetheless failed to demonstrate by clear and convincing evidence that it meets the requirements set forth in Crowe on the merits. Therefore, even if this action was appropriately filed in Bergen County as a general equity matter, the relief would be denied.

For the foregoing reasons, Plaintiff's Order to Show Cause is hereby denied. Further, the motions to dismiss the complaint filed by Defendant Vincent Cestone and Defendant PNC Bank are both granted, and Plaintiff's Cross-Motion is hereby denied. An order accompanies this decision.