NOT TO BE PUBLISHED WITHOUT THE APPROVAL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

SCOTT ODABASH,

Plaintiff,

v.

ROBIN ODABASH BROWN, ARTHUR R. ODABASH CREDIT SHELTER TRUST FOR THE BENEFIT OF LOIS B. ODABASH, ODABASH FAMILY INSURANCE TRUST, LOIS B. ODABASH 1999 TRUST, LOIS B. ODABASH QUALIFIED PERSONAL RESIDENCE TRUST, LOIS B. ODABASH 2011 QUALIFIED PERSONAL RESIDENCE TRUST, LOIS B. ODABASH 2012 TRUST, ODABASH FAMILY LLC, and 27 KINDERKAMACK ROAD ASSOCIATES III, LLC,

Defendants,

and

JAMIE ODABASH MCLAIN, LOIS ODABASH and MELISSA ODABASH,

Parties in Interest.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET No. C-104-19

OPINION

Argued: June 21, 2019

Decided: June 28, 2019

Appearances: Arthur "Scott" Porter, (Fischer Porter & Thomas, P.C., attorneys) for plaintiff

Michael Profita, (DeCotiis, Fitzpatrick, Cole & Giblin, LLP., attorneys) for Defendants Robin Brown, Odabash Family LLC, and 27 Kinderkamack Road Associates III, LLC only

Allen Harris (Budd Larner P.C., attorneys) and Patrick Boyle (Venable LLP, attorneys) for Parties in Interest Jamie Odabash McLain and Lois Odabash, respectively

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

This matter comes before the Court by way of Motion to Dismiss the Complaint, filed on May 28, 2019 by DeCotiis, Fitzpatrick, Cole & Giblin, LLP, attorneys for Defendants Robin Brown, Odabash Family LLC, and 27 Kinderkamack Road Associates III, LLC. On June 12, 2019, Budd Larner, P.C., attorneys for Party in Interest Jamie Odabash McLain, filed a cross-motion to permit the use of discovery from the matter titled Jamie Odabash McLain v. Robin Odabash Brown, Docket

No. BER-C-51-19 to be used in this matter, as well as permitting the issuance of a Subpoena Duces Tecum directed to Sherman Wells Sylvester & Stamelman, LLP. Also on June 12, 2019 Venable, LLP, attorneys for Party in Interest Lois Odabash, filed a response, not definitively taking a position in the motion but requesting the Court permit Lois to answer, move or otherwise respond to Plaintiff's amended pleading within 35 days. On June 13, 2019, Fischer Porter & Thomas, P.C., attorneys for Plaintiff Scott Odabash, filed opposition to the instant motion, as well as a cross-motion for an accounting. On June 17, 2019, Budd Larner filed an opposition to Plaintiff's cross-motion for an accounting. On June 18, 2019, Plaintiff filed a reply brief in further support of its cross-motion to compel an accounting. On June 19, 2019, Defendant filed both a reply brief in further support of its motion to dismiss, as well as an opposition to Plaintiff's cross-motion for an accounting. The Court heard oral argument on June 21, 2019.

LEGAL STANDARD

A defendant may move to dismiss a complaint for failure to join parties required for a just adjudication under R. 4:6-2(f). R. 4:28 sets forth the requirements regarding joinder of persons needed for just adjudication, stating:

> "A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant."

The Supreme Court of the United States in Provident Tradesmen's Bank and Trust Co. v. Paterson, found that FRCP 19(b) suggests four interests which "must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose

absence from the litigation is compelled." 390 U.S. 102, 109, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). Those interests are: (1) whether a satisfactory alternative form is available to the plaintiff; (2) whether the defendant may face multiple litigations, inconsistent relief, or sole responsibility for a liability he shares with another; (3) whether the interest of the absent party may be impaired by the court's decision; and (4) whether judgment rendered in the absence of the party will provide a complete, consistent and efficient settlement of the controversy. 390 U.S. at 109-111.

Moreover, a defendant may also move to dismiss a plaintiff's Complaint for failure to state a cause of action under 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).

At this stage of the litigation, the Court should not be concerned with the plaintiff's ability to prove the allegations contained in the complaint, but rather should ascertain whether the facts alleged suggest a cause of action. Somers Const. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961).

While legitimate inferences are to be drawn in favor of the non-moving party, a court need not credit a complaint's bald assertions or legal conclusions. Printing Mart, supra, 116 N.J. at 768.

A motion to dismiss for failure to state a claim may be addressed to specific counts of the complaint, and the court, on a motion to dismiss the entire complaint, has the discretion to dismiss only some of the counts. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997), certif. den. 153 N.J. 405 (1998) (dismissing contract and fraud claims, but sustaining intentional interference and promissory estoppel theories).

ANALYSIS

JOINDER OF NECESSARY PARTIES

First, Defendant argues that the court should dismiss the First, Second, Third, Fifth, Sixth and Seventh Counts of Plaintiff's Complaint for failure to join the Co-Trustees of each of the Odabash Trusts as party defendants. More specifically, Defendant highlights that Plaintiff has brought these claims solely against Robin, who is only *one* of the Co-Trustees. As a result, Defendant posits that the Complaint is insufficient as a matter of law, because the failure to name Lois Odabash and Jamie McLain as Defendants in their capacity as Co-Trustees creates a risk that there may be inconsistent relief granted in this litigation. See Spitz v. Diamond, 30 Backes 186 (Err. & App. 1942) (holding that co-trustees are indispensable parties to a suit involving trusts); see also N.J.S.A. 3B:31-40 (where there are only two co-trustees, they both must act unanimously to take action on behalf of a trust; and where there are three or more co-trustees, they can act by a majority).

However, it is clear on the face of the Complaint that the other Co-Trustees to which Defendant speaks of were in fact named, but simply denominates as "parties in interest" as opposed to "defendants." Due process requires only that "all interested parties" receive notice and the opportunity to be heard. See In re Will of Seabrook, 90 N.J. Super. 553, 560 (Ch. Div. 1966). Here, it is clear that the other Co-Trustees were properly served pursuant to R. 4:4-4 and their attorneys have even requested and received extensions of time to respond already. See Porter Cert. at Exs. B

and C. Neither counsel for Jamie or Lois have raised any objections to their clients' having been denominated "parties in interest" rather than "defendants."

Although Plaintiff hypothesized during oral argument that, at the present time, it only seeks relief against Robin, the court notes that at least some of the relief sought, such as an accounting and the appointment of a special fiscal agent, would in fact impact *all* of the Co-Trustees. This point, raised in Defendants' reply brief and discussed at length during oral argument, is a much stronger point of contention. Nevertheless, it is not for this court to implement legal strategy on behalf of the parties based on what may or may not result in more "enforceable" relief. Plaintiff expressed a willingness to amend the complaint to add the Co-Trustees as defendants *if necessary*. However, from a due process standpoint, Plaintiff is not *required* to amend the complaint, since the case can continue against Robin alone, and all necessary parties were properly noticed and given opportunity to respond.

CAPABILITY OF A TRUST TO BE SUED

Second, Defendant argues that the six named trusts in this action are not capable of being sued because a trust is not considered a distinct legal entity, but rather is a "fiduciary relationship" between multiple people. Americold Realty Tr. V. Conagra Foods Inc., 136 S. Ct. 1012, 1016, 194 L. Ed. 2d 71 (2016) (internal citations omitted) ("such a relationship [is] not a thing that [can] be hauled into court; legal proceedings involving a trust [are] brought by or against the trustees in their own name"). Defendant takes the position that the action can only be maintained against the Co-Trustees specifically.

Plaintiff, on the other hand, urges this court to consider the distinction between "business trusts" and "traditional trusts." See e.g., GBForefront L.P. v. Forefront Mgmt. Grp., LLC, 888 F.3d 29 (3d Cir. 2018) ("the remaining question is how to distinguish between traditional and business

trusts. The Primary point of distinction is, again, in light of Americold Realty, that a traditional trust exists as a fiduciary relationship and not as a distinct legal entity.") (internal citations omitted).

Business trusts can be treated as "distinct legal entities for purposes of suit." Greate Bay Hotel & Casino, Inc. v. City of Atlantic City, 264 N.J. Super. 213, 218 (Law Div. 1993). "A business trust is not a trust in the ordinary sense of holding and conserving property but rather is a device for the conduct of a business." Id. (internal citations omitted).

Despite viewing the matter in a light most favorable to Plaintiff, the court cannot at this time find how any of the Trusts named as Defendants can be categorized as "business trusts." Plaintiff is absolutely correct in that these Trusts are highly sophisticated, and, in at least some cases, hold, acquire, and operate commercial real estate. However, the authority relied upon by both parties in fact indicates that the test for distinguishing "business" trusts from traditional trusts looks to the inception of the Trust, and whether the trust "facilitates a donative transfer" (traditional trusts) or "implements a bargained-for exchange" (business trusts). GBForefront, 888 F. 3d at 40-41.

The court notes that the law in this specific area is somewhat vague and underdeveloped in New Jersey. Although the court recognizes that GBForefront L.P. is a federal case, the New Jersey courts have also wrestled with the distinction between business trusts and traditional trusts in Greate Bay Hotel & Casino, Inc. v. City of Atlantic City. There, the court defined "business trust" as an "unincorporated business organization created by an instrument by which property is to be held and managed by trustees for the benefit and profit of persons holding transferable certificates evidencing beneficial interests in the trust estate. Id. at 217-18 (internal citations omitted). The Greate Bay Hotel & Casino, Inc. court concluded that the trusts in question – which were created "for the purposes of operation of a computerized link of progressive slot machines and management of the twenty-year payout of the progressive jackpots related thereto" – *did* constitute business trusts because each of

the trusts had been organized by and were administered by many of the various casinos involved. See id. at 219.

The above set of facts is clearly distinguishable from those before this court because here, the Odabash Trusts were created by either Arthur Odabash or Lois Odabash by will or inter vivos gift in order to support the various family member beneficiaries, and are therefore donative in nature. Further, the language of the Trust documents indicate that none of the beneficiaries contributed any capital to the trust res, the interests of the beneficiaries are non-transferable, and no members may be added to the trusts. Thus, even affording all inferences in Plaintiff's favor, the Trust documents themselves would seem to indicate that the Odabash Trusts are traditional trusts, as opposed to business trusts. See In re Dille Family Tr., 598 B.R. 179, 199 (Bankr. W.D. Pa. 2019) (if the primary purpose of the trust is to protect and preserve the *res* for the benefit of the family beneficiaries under the trust, and not primarily for transacting business for a profit, the trust does not qualify as a "business trust").

In other words, "not every trust where a business constitutes part, or all of the trust property is technically a business trust." Bogert, Section 247. Trusts used primarily for business purposes: The Massachusetts or Business Trust, The Law of Trusts and Trustees; see also In re Dille Family Tr. 598 B.R. 179, 198 (Bankr. W.D. Pa. 2019) (holding "business activity, without more, does not convert the trust into a business trust").

Moreover, for purposes of judicial economy, the court notes that all of the Co-Trustees of the respective trusts have received notice and an opportunity to respond to the allegations raised in the complaint. Similarly, Plaintiff would have the ability to procure the relief it seeks in the complaint by simply adding the Co-Trustees as Defendants, who would then be bound by any rulings made against the respective trusts. In order not to further delay this matter, it would be in the best

interests of judicial economy to allow the Co-Trustees to file responsive pleadings and take whatever respective positions they deem appropriate, rather than create the quagmire of necessitating legal representation for numerous trusts, which at this early stage in the proceedings, have not even been accused of any malfeasance, and do not, on their face, appear to be business entities.

Therefore, the court finds it appropriate at this time to dismiss the Trust defendants without prejudice. However, as was stressed above, an outright dismissal of Plaintiff's claims is unwarranted at this time.

REQUEST FOR MORE DEFINITIVE STATEMENTS

Third, Defendant asks this court to dismiss the First, Second, Third, and Fourth Counts of the Complaint for failure to state a claim, as a result of purported vague and indefinite allegations set forth in paragraphs 55, 60, 61, 64 and 70 of the Complaint.

However, Plaintiff's Complaint, when read in its entirety, is replete with specific allegations of improper conduct by Robin with respect to trust and LLC assets, and a purported effort to deny Scott his right to serve as Trustee and to receive distributions and information. The gravamen of the Complaint is that Robin has improperly converted assets of the Odabash family to her own personal use and benefit, to the detriment of the other Odabash family members.

Dismissal would only be warranted where no cause of action is identified or suggested by the facts of the Complaint. Printing Mart, supra, 116 N.J. at 746. Here, that is simply not the case.

When accepting well-pleaded facts as true and providing Plaintiff favorable factual inferences that are reasonable, it is clear that Plaintiff's Complaint adequately puts Robin on notice of purported activity at issue. Ibid. At this stage of the litigation, the court is not concerned with the plaintiff's ability to prove the allegations contained in the Complaint, only if the facts alleged suggest a cause of action. Somers Const. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961).

The factual allegations contained throughout the Complaint clearly and sufficiently put Robin on notice of the conduct complained of. Thus, the Court does not find it appropriate to dismiss any aspect of the Complaint pursuant to R. 4:6-2(e) at this time.

STANDING

Lastly, Defendant argues that Plaintiff lacks standing to bring any of the claims set forth in the Complaint because Plaintiff does not allege, nor has Plaintiff proven to be, a member or manager of the Odabash Family LLC.

Nevertheless, the gravamen of Plaintiff's prayer for relief, and explained at length in his Complaint, is that Robin has wrongfully converted family assets to her own personal use and benefit to the detriment of Scott and other Odabash family members. Thus, absent an initial discovery period, Scott could not possibly definitively determine whether he should be deemed a member of Odabash Family LLC or other entities at issue, or whether assets to which he may have a legitimate claim have been improperly diverted to entities in which he is not a member or beneficiary. Even a cursory review of Plaintiff's Complaint sufficiently demonstrates that Plaintiff is entitled to, at a minimum, a brief discovery period to pursue his cause of action. As stressed above, when granting all reasonable inferences in Plaintiff's favor, he would clearly have sufficient standing to pursue this claim.

Thus, for the foregoing reasons, Defendant has failed to demonstrate that Plaintiff lacks standing at this time.

PLAINTIFF'S CROSS-MOTION FOR AN ACCOUNTING AND ODABASH-MCLAIN'S CROSS-MOTION FOR DISCOVERY

For the reasons set forth on the record, the court has decided to adjourn the above referenced cross motions to July 19th, 2019.

R. 1:6-3(b) provides that "a cross-motion may be filed and served by the responding parties together with that parties' opposition to the motion and noticed for the same return date *only if it relates to the subject matter of the original motion.*" R. 1:6-3(b).

The comment number 2 to R. 1:6-3(b) provides that "if the cross-motion is not germane, it is subject to its own timeframe as is any other motion, will not be entitled to the return date of the original motion, and hence will not delay disposition of the original motion."

Here, it is clear that the cross-motion to compel an accounting was not related in subject matter to the Motion to dismiss, let alone "germane" to the substance of said motion. Therefore, that motion has been adjourned, and the parties have been allowed to make supplemental submissions prior to that date.

In regards to the discovery cross-motion, the parties indicated on the record that they would confer amongst themselves in an attempt to reach a resolution regarding the discovery of materials already produced in the C-51-19 matter, but may be subject to a protective order. The matter will be revisited on July 19th, 2019.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Complaint is hereby granted in part and denied in part. Defendant's request to dismiss the Complaint for failure to join necessary parties pursuant to R. 4:6-2(f) and for failure to state a claim pursuant to R. 4:6-2(e) is hereby denied without prejudice. However, Defendants' application to dismiss the trusts on account of them being traditional trusts, as opposed to business trusts, is hereby granted, and the Trusts shall be dismissed without prejudice. Plaintiff has the right pursuant to the court rules to amend the Complaint to insert the Co-Trustees of the respective trusts, provided there is sufficient factual basis to do so. An Order accompanies this Decision.