

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KYLE KESSLER,)
)
Plaintiff,)
)
v.) Consolidated
) C.A. No. 294-N
DEBORAH COPELAND and THE)
WILMINGTON TRUST COMPANY,)
)
Defendants.)

DEBORAH COPELAND,)
)
Plaintiff,)
)
v.)
)
MARSHA KRAMARCK, as guardian of)
Kyle F. Kessler, and KYLE F. KESSLER,)
)
Defendants,)
and)
)
Wilmington Trust Company, Trustee, and)
Sandra Williams-Poplos, as guardian for)
Matthew Luke Williams and Jacob Dean)
Williams.)

MEMORANDUM OPINION AND ORDER

Submitted: January 14, 2005
Decided: February 10, 2005

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LAMB, Vice Chancellor.

I.

In July 1993, the defendant settlor created a revocable trust naming herself as the sole beneficiary. Despite the trust's legal structure, the defendant initially used the trust only for the benefit of the plaintiff, an unrelated minor. Several years later, after the defendant paid nearly \$100,000 of the plaintiff's educational expenses from trust assets, she amended the trust to restrict similar payments in the future. Then, after being questioned about the restrictions, she revoked the trust.

The plaintiff claims that the defendant created the trust pursuant to an oral contract in return for help that his father gave to the defendant and her husband. The plaintiff alleges that the trust was effectively a gift and that the trust was structured for the legal benefit of the defendant only to avoid the tax implications of an outright gift that would have been over the exemption limits.

The plaintiff maintains that he is entitled to proceeds of the trust pursuant to the original oral contract. The settlor claims that the plaintiff had no legal or equitable interest in the trust and that she, as the sole beneficiary of a revocable trust, had authority to revoke the trust. The settlor moves to dismiss or, in the alternative, for summary judgment. The defendant trust company separately moves to dismiss. For the reasons below, the motions to dismiss are denied and the motion for summary judgment is continued.

II.¹

A. The Parties

The plaintiffs are Kyle F. Kessler (“Kyle”), a minor, and Marsha Kramarck , Kyle’s mother and custodial parent, as guardian for Kyle.²

The defendants are Deborah L. Copeland (“Copeland”), the settlor of the trust, Wilmington Trust Company (“Wilmington Trust”), the trustee of the trust, and Sandra Williams-Poplos, as guardian for Matthew Luke Williams and Jacob Dean Williams, who are Copeland’s grandchildren.

B. Background

Kyle’s father, Frederick S. Kessler, and Kramarck were married from 1972 to 1990. Beginning in 1985, Kessler was employed by Associates International, Inc. (“AI”), a company owned by Copeland’s husband. Kessler was AI’s general counsel, a position he held until his complete disability in the mid-1990s.

While employed at AI, Kessler developed a close personal relationship with both Copelands. Through this relationship, Kessler helped the Copelands

¹ Since the defendants move to dismiss, all facts herein are taken from the well-pleaded allegations of the complaint. In addition to their motion to dismiss, however, the defendants move for summary judgment, a position they support through affidavits that dispute critical facts from the complaint. Where necessary, the court notes these factual disputes.

² Kramarck was Kyle’s natural guardian until October 18, 2003, his eighteenth birthday.

overcome serious personal issues.³ Copeland was so grateful to Kessler for this help that she offered to pay for Kyle's education.

Instead of giving the money directly to Kyle or Kessler, Copeland contacted Wilmington Trust in 1992 to set up a trust. Wilmington Trust projected Kyle's educational expenses from elementary school through graduate school, and proposed a minimum initial investment figure of \$350,000.⁴ Wilmington Trust then drafted an irrevocable trust agreement and sent copies to both Copeland and Kessler for review.

In the initial version of the agreement, Copeland was the settlor, Wilmington Trust was the trustee, and Kyle was the beneficiary. The agreement provided that the trust would pay for school supplies, transportation, tutors, tuition, summer camp, and extracurricular activities until Kyle reached the age of 27, at which time the trust's corpus would be distributed evenly between Kyle and his half-brother, Jeffrey Arthur Kessler, an adult son from Kessler's previous marriage. Kessler participated in the drafting of the initial version of the trust, providing comments as well as proposing language for insertion.

³ In documents submitted to the court, neither party reveals the nature of the problems or how Kessler helped the Copelands. Both sides acknowledge the fact that Kessler did help them, but both respect the privacy of the Copelands and prefer not to discuss private matters that relate only tangentially to the issues before the court.

⁴ Wilmington Trust projected different scenarios based the initial contribution by Copeland. The possible initial contribution amounts ranged between \$350,000 and \$475,000. Am. Compl. Ex. G.

Copeland then involved her personal attorney, Joanna Reiver, in the matter. After Reiver's involvement, the trust went through several modifications before it was finalized in 1993.⁵ The final trust document differed from earlier versions in two important respects: first, the executed trust was revocable, and second, Copeland was the sole beneficiary. These two changes, which were agreed to by Kessler, Copeland, and Wilmington Trust, allegedly were made for the sole purpose of giving Copeland and her descendants favorable tax treatment.⁶

Once the trust was executed, Kessler was involved with its administration, communicating with Wilmington Trust directly and being copied on correspondence regarding the investment decisions. Then, in September 1995, Kessler was diagnosed with malignant hypertension. Kessler's condition rapidly deteriorated and he was soon unable to care for himself. The Copelands helped Kessler during this time by assuming the responsibility of his personal and business affairs and his medical care. Eventually, though, the Copelands could no longer care for him and Kessler was sent to various assisted living and nursing

⁵ At this stage of the litigation, the substance and the chronology of the interim modifications are immaterial. In summary, Copeland reviewed multiple draft trust agreements that proposed various questions to be decided, such as (i) whether the trust would be revocable or irrevocable; (ii) whether the beneficiary would be Kyle or Copeland; and (iii) who would be the trustee.

⁶ Defendants dispute this characterization of the changes to the trust. Copeland claims that the changes were for two reasons: "to take advantage of various tax laws" and to "preserve [her] flexibility in managing the trust." Copeland Aff. ¶ 10. Reiver takes a similar position, but emphasizes the insignificance of the tax advantage: "[t]he principal reason for making the trust revocable was to retain flexibility, although this also had the incidental advantages of not making unnecessary use of [] Copeland's estate tax or generation-skipping tax exemptions." Reiver Aff. ¶ 7.

facilities. Finally, by order of the Court of Chancery, a guardian was appointed for him. He now lives in a nursing home and is mentally disabled.

C. The Dispute

Before Kessler became incapacitated, he told Kramarck that the trust would pay all of Kyle's educational expenses through graduate school. Although Kessler never provided Kramarck with the details about the trust's provisions, she had no reason to doubt him since he was the one who had the relationship with the Copelands and was involved in the administration of the trust. Indeed, the trust paid for Kyle's education at Wilmington Friends School, a sum of almost \$100,000.

After Kessler's illness prevented him from being involved with the trust, Kramarck contacted Wilmington Trust for more information in an attempt to look after Kyle's interests. She alleges that Wilmington Trust refused her repeated requests for a copy of the trust instrument at the instruction of Copeland, despite the fact that the trust was for the benefit of Kyle, Kyle was a minor, and Kramarck was Kyle's guardian. As proof of Wilmington Trust's refusal, Kramarck points to an email that expressly excluded her from the list of people who could inquire about the trust. The email states, in pertinent part:

Most Important – If anyone other than Sandra Williams, the mother of the new beneficiaries, Mrs. or Mr. Copeland, one of the Copeland's [sic] children (not grandchildren), or Joanna Reiver (the Copeland's [sic] attorney) should call about this trust, they get NO information.

This includes Marsha Kramarck, Kyle's mother, or anyone purporting to speak for or be Fred Kessler, Kyle's father.⁷

Kramarck's requests for information became more critical in the spring of 2003, after Kyle accepted an offer of admission from Boston College. Since she still had not received any trust documents, Kramarck called Wilmington Trust to notify them to direct payments to Boston College. But when Kramarck called Wilmington Trust, she was told that the trust's assets had been transferred to J.P. Morgan Private Bank ("J.P. Morgan") in 2002. Consequently, Kramarck contacted J.P. Morgan and spoke to a manager of the trust who assured her that Kyle's college tuition would be paid from the trust. Despite the assurance of payment, the manager refused to provide Kramarck with any trust details because she was not listed as a contact person on the account.

In June 2003, a supervisor from J.P. Morgan called Kramarck and informed her that the trust had a restriction on college expenses. Instead of paying whatever educational expenses that Kyle might incur at the college of his choice, the trust would pay for him only to attend the University of Delaware as an in-state student, or the monetary equivalent thereof.⁸ Shortly thereafter, Kyle's counsel

⁷ Email from Mary L. Milligan, Nov. 26, 1999. Am. Compl. ¶ 23. Milligan was an employee of Wilmington Trust and an administrator of the trust.

⁸ The difference between in-state tuition at the University of Delaware and all educational expenses at Boston College is substantial. In-state tuition for the University of Delaware would have been \$6,304. Am. Compl. ¶ 35. In contrast, Kyle's expenses (tuition and room and board) at Boston College for the 2004-2005 school year are \$39,351. *Id.*

made inquiries about the trust with J.P. Morgan. Within two weeks of those inquiries, Copeland revoked the trust and, within a month of the revocation, the remaining assets of the trust were transferred from the trust account to her.

Unbeknownst to Kyle⁹ or Kramarck, Copeland had executed several modifications to the original trust after Kessler became incapacitated. Specifically, she had modified the trust as follows: (i) the trust corpus would be distributed on Kyle's 23rd, not 27th, birthday, effectively precluding the payment of graduate school expenses; (ii) the trust corpus would be distributed to the Copelands' grandchildren, not to Kyle and his half-brother; and (iii) college educational expenses would be restricted to in-state tuition at the University of Delaware. Additionally, Copeland began making contributions to various charities from the trust after Kessler's disability.

The plaintiffs pursue this action to recover the assets of the trust and to compel Copeland to fulfill her oral contract with Kessler.

D. Procedural Posture

The amended complaint states a long list of theories under which the plaintiffs might recover against the defendants. The theories include breach of oral contract, misappropriation of a gift, unjust enrichment, promissory estoppel,

⁹ There is some dispute between the parties as to whether Kyle was actually notified of certain trust modifications. The defendants maintain that they sent Kyle a letter on March 16, 2001, but the plaintiffs point out that Kyle, if he did receive the letter, was a minor at that time.

equitable estoppel, and breaches of fiduciary duty against both Copeland and Wilmington Trust. The plaintiffs request that this court impose a constructive or resulting trust and order other equitable relief as necessary.

Copeland moved to dismiss the complaint or, in the alternative, for summary judgment. In support of that motion, her counsel filed copies of various trust instruments, affidavits from both Copeland and Reiver,¹⁰ and correspondence exchanged among the parties. This extrinsic evidence was submitted to prove facts surrounding the formation and management of the trust. In response, the plaintiffs filed a Rule 56(f) motion for discovery.

Wilmington Trust moved separately to dismiss the claims against it on the theory that it cannot be liable to a trust beneficiary for the actions of a settlor who revokes a revocable trust. Wilmington Trust maintains that even if it knew of a preexisting oral contract between Copeland and Kessler, it, as trustee, would not be liable for following the provisions of the written trust instrument.

III.

A. Copeland's Motion

The court must first determine whether Copeland's motion should be treated as one to dismiss or, instead, for summary judgment. Under Delaware law, if

¹⁰ The defendants appear to have waived attorney-client privilege by submitting Reiver's affidavit. In her affidavit she discloses confidential communications that she had with Copeland regarding the formation of the trust.

matters outside the pleading are “not excluded by the court, the existence of such matter[s] means that the motion will be converted, by clear force of the pleading rules, into a motion for summary judgment under Rule 56.”¹¹

In her papers and at the hearing, Copeland relied on matters extrinsic to the complaint to support her motion. Her briefs refer extensively to the following documents submitted together therewith: the original trust agreement, four restated trust documents, the revocation of the trust, the affidavits, and various letters exchanged among the parties. For example, the affidavits are cited more than a dozen times in the five-page statement of the facts.¹² At the hearing, her counsel referred to the documents submitted in connection with the motion to substantiate fundamental points. Moreover, these factual references are inextricably entwined with Copeland’s motion to dismiss. Therefore, the court concludes that Copeland’s motion to dismiss is properly converted to a motion for summary judgment.

B. Summary Judgment

Next the court must determine whether Copeland’s motion for summary judgment is premature. “Summary judgment should be granted if the moving party demonstrates that no genuine issue of material fact exists and that the moving party

¹¹ *Malpiede v. Townson*, 780 A.2d 1075, 1092 (Del. 2001). *See also In re Santa Fe Pacific Corp. S’holder Litig.*, 669 A.2d 59, 68 (Del. 1995) (“Generally, matters outside the pleadings should not be considered in ruling on a motion to dismiss.”).

¹² Def. Copeland’s Mem. at 4-9.

is entitled to judgment as a matter of law.”¹³ However, when a motion to dismiss under Court of Chancery Rule 12(b)(6) is converted to a motion for summary judgment due to consideration of extrinsic matters, “the parties must be given an opportunity to take discovery.”¹⁴

The plaintiffs seek discovery in this matter because the key facts contained in the affidavits are in the possession or control of the defendants. Specifically, both affiants make repeated assertions regarding the mental state of Copeland in the time surrounding the formation of the trust. For example, Copeland attests to the fact that (i) she sought to establish the trust because she was concerned about who would pay Kyle’s educational expenses only in the event of her incapacity or death;¹⁵ (ii) she transferred the initial lump sum into the trust only because she considered it found money;¹⁶ and (ii) she “always wanted to retain the right to modify, or even fully revoke, the trust at any time.”¹⁷ Reiver’s affidavit attests to similar facts, such as: (i) “[Copeland] did not wish to, or intend to, commit to paying [Kyle’s educational] expenses;”¹⁸ (ii) [Copeland] told [Reiver] the

¹³ *Goodwin v. Live Entm’t, Inc.*, 1999 WL 64265, at *5 (Del. Ch. Jan. 25, 1999), *aff’d*, 741 A.2d 16 (Del. 1999).

¹⁴ *Wal-Mart Stores v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004). *See also Krasner v. Moffett*, 826 A.2d 277, 285 (Del. 2003) (“When considering a motion to dismiss under Chancery Rule 12(b)(6), the trial court may not rely on documents outside the pleadings without converting the motion to one for summary judgment, thereby implicating some discovery.”).

¹⁵ Copeland Aff. ¶ 7.

¹⁶ *Id.* at ¶ 8. Copeland had a \$330,000 bank account, on which the Internal Revenue Service had placed a lien. Since she could not utilize the funds while the account had the lien, she considered it “found money” when the lien was lifted. *Id.*

¹⁷ *Id.* ¶ 10.

¹⁸ Reiver Aff. ¶ 6.

[Wilmington Trust] officers had suggested she establish a trust, but there had been little inquiry into her goals or the specific terms and there was no discussion about the trust's revocability;"¹⁹ and (iii) "[t]he principal reason for making the trust revocable was to retain flexibility," not the "incidental advantage" gained by Copeland in avoiding gift tax implications.²⁰

Since the defendants have possession or control of the critical facts cited in their affidavits, the plaintiffs cannot determine whether there are genuine issues of material fact without taking discovery. When the defendants control relevant information material to the issue of intent, denying the plaintiffs discovery would not comport with principles of judicial discretion.²¹ Before a court decides a motion for summary judgment, "the plaintiffs [are] entitled to discovery to develop a factual record to conclude whether genuine factual issues exist."²² Yet the court "must exercise its discretion to tailor discovery so that its scope is coextensive with the issues necessary to resolve the motion."²³

¹⁹ *Id.*

²⁰ *Id.* ¶ 7.

²¹ *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986). *See also* DEL. CT. CH. R. 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.").

²² *Rhudy v. Bottlecaps, Inc.*, 830 A.2d 402, 408 (Del. 2003).

²³ *Id.*

Clearly the defendants control the crucial information presented in the affidavits. Both affidavits focus on Copeland's state of mind, as conveyed by her through confidential communications with Reiver and Wilmington Trust. Yet the plaintiffs have not had an opportunity to depose Copeland or Reiver. Without these depositions, as well as the deposition of present and former Wilmington Trust employees and possibly others, the plaintiffs cannot develop the factual record necessary to determine if there are genuine issues of material fact concerning the alleged oral contract or gift.²⁴

The plaintiffs have properly put forward a Rule 56(f) motion to discover the pertinent facts. This request is not unreasonable. Given Copeland's substantial submission of evidence in support of her motion for summary judgment, the court, in its discretion, concludes that the motion for summary judgment is premature and that the plaintiffs may complete discovery.

C. Wilmington Trust

Wilmington Trust moves separately to dismiss based on the argument that it functioned as a trustee only under the written trust agreement and, as a trustee, it breached no fiduciary duty by complying with the trust instrument. In order to

²⁴ Additionally, the plaintiffs are unable to submit competing affidavits due to Kessler's incapacity. If Kessler had not become incapacitated, he could have submitted an affidavit concerning his relationship with the Copelands, his discussions with Copeland, and the meetings with Wilmington Trust. This unfortunate situation should not penalize the plaintiffs in this lawsuit. Since the defendants are the source of all information about the formation of the trust, the plaintiffs must be allowed to proceed with limited discovery.

dismiss a complaint under Court of Chancery Rule 12(b)(6), a court “must determine whether it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiffs would not be entitled to relief.”²⁵ When making its decision, a court must accept as true all well-pleaded factual allegations in the complaint and all reasonable inferences to be drawn from those facts.²⁶ However, a court need not “blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs’ favor unless they are reasonable inferences.”²⁷

Wilmington Trust argues that its actions are protected by statute. Pursuant to 12 *Del. C.* § 3586, “[a] trustee who acted in good faith reliance on the terms of a written trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.” Wilmington Trust maintains that the plaintiffs do not allege anything more than the fact that it acted in accordance with the terms of the trust instrument. Wilmington Trust claims that, unless the plaintiffs allege acts that are in contravention to the trust instrument, it cannot be liable because of the public policy protection afforded by 12 *Del. C.* § 3586.

Wilmington Trust’s argument misses the point of the plaintiffs’ complaint. The plaintiffs complain of actions taken before the formation of the trust. They

²⁵ *VLIW Tech., L.L.C. v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (quotations omitted).

²⁶ *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988).

²⁷ *Id.*

argue that Wilmington Trust knew of the alleged oral contract, that Wilmington Trust was involved in meetings with Copeland and Kessler, and that Wilmington Trust drafted the first set of documents in a manner that supports the plaintiffs' arguments. The fact that Copeland executed a later trust instrument that is materially different from Wilmington Trust's initial draft is alleged to be irrelevant to the claim that Wilmington Trust knew that Copeland was bound by oral contract and that the terms of the executed trust agreement did not fully or accurately reflect the actual terms of the trust created.

The complaint alleges facts that call into question the ability of Wilmington Trust to shield its actions by invoking 12 *Del. C.* § 3586. By alleging preexisting knowledge of a prior agreement contradicting the terms of the written trust instrument, the plaintiffs challenge Wilmington Trust's assertion of good faith reliance that is statutorily necessary under 12 *Del. C.* § 3586. Fundamentally, the plaintiffs claim that Wilmington Trust knew that Kyle was the true beneficiary of the trust and that the different wording of the written trust was merely a device to avoid a current gift tax consequence. They do not allege that Wilmington Trust breached its fiduciary duty with respect to the written trust instrument. They allege that Wilmington Trust breached its fiduciary duty by following the provisions of a written trust instrument that it knew did not reflect the alleged oral agreement between Kessler and Copeland.

Based on the facts alleged in the complaint, there is at least an issue as to whether Wilmington Trust's conduct satisfied the good faith reliance requirement of 12 *Del. C.* § 3586. Therefore, the court denies Wilmington Trust's motion to dismiss and permits the plaintiffs limited discovery.

IV.

For the foregoing reasons, the motions to dismiss are denied and the motion for summary judgment is continued. The plaintiffs may take limited discovery pursuant to this opinion. After such discovery is completed, the defendants may again move for summary judgment. IT IS SO ORDERED.