2019 IL App (4th) 180668-U

NO. 4-18-0668

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 28, 2019
Carla Bender
4th District Appellate
Court, IL

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| THEODORE CLARK, | ) | Appeal from the |
| Plaintiff-Appellant, | ) | Circuit Court of |
| v. | ) | Champaign County |
| BANKCHAMPAIGN, N.A., | ) | No. 14L215 |
| Defendant-Appellee. | ) | |
| | ) | Honorable |
| | ) | Jeffrey B. Ford, |
| | ) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Holder White and Justice Turner concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in granting defendant's motion to dismiss.

¶ 2 Plaintiff, Theodore Clark (Ted), is a beneficiary of a trust created by his grandmother, Emily C. Diffenback, and in 2012, defendant, BankChampaign, N.A. (BankChampaign), served as successive trustee. In December 2014, Ted filed a complaint alleging BankChampaign breached its fiduciary duty as successive trustee when it, without authority, transferred approximately $150,000 of Ted's funds to his father, John M. Clark Jr. (John), to pay Ted's outstanding debts. In February 2015, BankChampaign filed a section 2-619 motion to dismiss (735 ILCS 5/2–619(a)(6), (9) (West 2014)) arguing no breach had occurred, which the trial court granted. In its written order, the court dismissed the case without prejudice

and granted plaintiff 28 days to amend his complaint. Plaintiff filed a motion to reconsider, which the court also denied.

¶ 3 On appeal, Ted argued the court improperly granted BankChampaign's motion to dismiss because the transfer of funds to John was a breach of the bank's fiduciary duty. This court dismissed the appeal for lack of jurisdiction, finding there was no final judgment. In August 2018, BankChampaign filed a motion for final judgment, which the trial court granted.

¶ 4 On appeal, Ted again argues the court improperly granted BankChampaign's motion to dismiss because the transfer of funds to John was a breach of the bank's fiduciary duty. For the following reasons, we affirm.

¶ 5 I. BACKGROUND

¶ 6 On November 19, 1971, Emily C. Diffenback, as settlor, entered into a trust agreement with Wilmington Trust Company, as trustee. The trust agreement was amended by supplemental trust agreements in February 1974, July 1979, and June 1990.

¶ 7 A. June 1990 Supplemental Trust Agreement

¶ 8 Under the most recent supplemental trust agreement, dated June 12, 1990, the income beneficiaries are Diffenback's two sons, John and Charles Clark, and their children. The terms also state John is to serve in a fiduciary capacity as distribution advisor until the youngest grandchild of Diffenback attained the age of 21. Upon Diffenback's death, John was named investment advisor of his and his children's trust funds. The parties dispute whether BankChampaign's actions were authorized under the following clause: "Trustee may take any reasonable steps to disburse funds to or for a beneficiary, including *** direct application for the benefit of the beneficiary."

¶ 9 B. October 2011 Letter of Direction

¶ 10 In October 2011, Ted signed a letter of direction directed to BankChampaign, the successive trustee, and requested Community Trust Bank of Irvington, Illinois, serve as second successive trustee. The letter stated, "I hereby approve all of the acts of BankChampaign, N.A., and of Smith Barney in their roles as Trustee and brokerage firm respectively, inclusive of all fees, and do hereby indemnify, hold them harmless, and release them from their responsibilities to the trust." The trust property was transferred to Community Trust Bank in November 2011.

¶ 11 C. December 2014 Complaint for Breach of Fiduciary Duty

¶ 12 In December 2014, Ted filed a complaint against BankChampaign, alleging it breached the fiduciary duty it owed to him as trustee. More specifically, Ted argued, BankChampaign breached its fiduciary duty when it, without authority, provided approximately $150,000 to John to pay Ted's outstanding debts.

¶ 13 On February 5, 2015, BankChampaign filed a section 2-619 motion to dismiss and argued (1) under the terms of the supplemental trust agreement, it was released from any liability or responsibility for any actions it took as trustee once it transferred all of the trust's assets to Community Trust Bank on November 7, 2011 (735 ILCS 5/2-619(a)(6) (West 2014)); (2) it was released from any liability under the letter of direction Ted signed on October 6, 2011 (735 ILCS 5/2-619(a)(6) (West 2014)); and (3) under the terms of the supplemental trust agreement, it did not breach its fiduciary duty because it took all reasonable steps to disburse funds for the benefit of Ted to pay for his medical bills, utilities, outstanding credit card balances, and attorney fees for a federal criminal matter (735 ILCS 5/2-619(a)(9) (West 2014)).

¶ 14 Attached to BankChampaign's motion to dismiss was an affidavit by L. John Clausen of BankChampaign. Clausen is the senior vice president of wealth management and stated he had personal knowledge of the administration of the trust. Clausen stated the trust

property was transferred to Community Trust Bank on November 7, 2011, and at that time, Ted had been provided with all statements and activities of the trust income and distributions. There were no periods for which BankChampaign had not reported to Ted. Clausen also stated, pursuant to the trustee's discretion via the supplemental trust agreement, BankChampaign took all reasonable steps to disburse funds in Ted's best interest to John in order to pay Ted's debts.

¶ 15 On March 23, 2015, Ted filed a memorandum of law opposing BankChampaign's motion to dismiss. In response to BankChampaign's motion, Ted argued (1) BankChampaign is not released from liability under the supplemental trust agreement because he was never provided with a full and accurate accounting; (2) BankChampaign is not released from liability under the letter of direction because Ted did not knowingly and voluntarily release it from its fiduciary duty; and (3) the trust agreement did not authorize BankChampaign to make payments to John for Ted's benefit. Attached to Ted's memorandum of law was his own affidavit. Ted stated, from October 2010 through October 2012, he did not receive a true and accurate accounting from BankChampaign. Additionally, he stated the letter of direction was prepared by BankChampaign and there were material facts withheld from him that he would have found relevant when signing a document releasing BankChampaign of liability. Ted also stated at the time BankChampaign transferred his funds to John, the youngest grandchild of Diffenback had attained the age of 21.

¶ 16 On April 6, 2015, BankChampaign filed a reply memorandum in support of its motion to dismiss. Attached to the reply memorandum was a supplemental affidavit of Clausen. The supplemental affidavit stated BankChampaign sent Ted a full, complete, and accurate accounting quarterly. Additionally, Ted contacted BankChampaign on October 22, 2009, and requested his quarterly statements be sent to John because he was living in Brazil. On September

11, 2012, Ted requested BankChampaign send him "all information relating to the Emily C. Diffenback Trust, FBO Theodore Clark." BankChampaign complied with this request on September 13, 2012.

¶ 17 On May 22, 2015, the trial court issued a written order granting BankChampaign's motion to dismiss. The court stated Ted's affidavit did not conflict with Clausen's affidavit or the terms of the supplemental trust agreement. The court held, in pertinent part, as follows:

> "In the affidavit of John Clausen attached to [BankChampaign's] [m]otion to [d]ismiss, paragraph 12 provides an explanation for disbursement of funds from the trust to [Ted's] father. Basically to pay [Ted's] doctor's bills, hospital bills, prescriptions, mental health counseling, alcohol dependency treatment clinics, utilities, outstanding credit card balances[,] and attorney fees for representing [Ted] in his federal criminal charges. [Ted] does not contest this in his affidavit. Paying off necessary expenses for the beneficiary is disbursement of funds for the beneficiary. This type of payment is within any reasonable meaning of 'direct application for the benefit of the beneficiary.'
>
> From the affidavits attached, it is clear that if the fiduciary breach, as stated in the complaint, is for allowing monies to transfer to [Ted's] father to pay necessary expenses of [Ted], it is directly allowable by the [s]upplemental [t]rust [a]greement. The evidence attached does not show any fiduciary breach as alleged in the complaint or any general breach not alleged in the complaint such as no accounting to [Ted]."

¶ 18 Since the court found BankChampaign did not breach its fiduciary duty, it did not address the release contained in the letter of direction Ted signed or the release built into the supplemental trust agreement. The court dismissed the case pursuant to section 2-619 without prejudice and granted Ted 28 days' leave to amend his complaint.

¶ 19 On June 19, 2015, Ted filed a motion to reconsider. Contained within Ted's motion was a request for the trial court to issue a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). On November 18, 2015, the trial court entered an order denying Ted's motion to reconsider and request for a Rule 304(a) finding.

¶ 20 D. Initial Appeal and Motion for Final Judgment

¶ 21 In November 2015, Ted filed a notice of appeal. In September 2016, this court entered an order dismissing the appeal for lack of jurisdiction, finding there was no final judgment from which to take an appeal because the trial court dismissed plaintiff's claim without prejudice and granted him leave to amend his complaint. *Clark v. BankChampaign, N.A.*, 2016 IL App (4th) 150959-U, ¶ 24.

¶ 22 In August 2018, BankChampaign filed a motion for final judgment, asserting Ted failed to timely file an amended complaint and requesting the court dismiss his claim with prejudice. At an October 2018 hearing, the court allowed the motion upon agreement by the parties and dismissed the case with prejudice.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, Ted argues the trial court erred in granting BankChampaign's section 2-619 motion to dismiss because its payment of funds to John, a third party to whom no money was owed, was not a payment "directly applied" for the benefit of Ted under the terms of the

supplemental trust agreement. BankChampaign argues its disbursement of funds to John was within its discretion. Alternatively, BankChampaign argues it has been released from any liability under (1) the letter of direction Ted signed and (2) the terms of the supplemental trust agreement.

¶ 26 A. Defendant's Motion to Dismiss Pursuant to 2-619(a)(9)

¶ 27 Section 2-619(a)(9) of the Code of Civil Procedure (Code) provides a defendant may file a motion for dismissal of an action on the grounds "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). "A motion for involuntary dismissal under section 2-619(a)(9) of the Code admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984. An affirmative matter is:

> " '[a] type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion[s] of material fact unsupported by allegations of specific fact contained [in] or inferred from the complaint *** [not] merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint.' " *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 121, 896 N.E.2d 232, 238 (2008) (quoting 4 R. Michael, Illinois Practice § 41.7 at 332 (1989)).

"The supreme court has further described an affirmative matter as some kind of defense other than a negation of the essential allegations of the plaintiff's cause of action [citation], and something in the nature of a defense which negates the cause of action completely [citation]."

(Internal quotation marks omitted.) *Reynolds*, 2013 IL App (4th) 120139, ¶ 33. This does not include evidence that merely refutes a well-pleaded fact in the complaint. See *id.* ¶ 34 (citing *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 723, 688 N.E.2d 732, 735 (1997)).

¶ 28 As the movant of a motion for involuntary dismissal under section 2-619(a)(9), the defendant has both the burden of proof and the burden of going forward. *Id.* ¶ 37. If the affirmative matter asserted by the defendant is not apparent on the face of the complaint, the defendant must support the motion by affidavit or other evidentiary materials. *Id.* Once the defendant satisfies this initial burden, the burden shifts to the plaintiff, who must establish, by affidavits or other proof, the defense asserted is either (1) unfounded or (2) requires the resolution of an essential fact before it is proven. *Id.* " 'If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed.' " *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383, 687 N.E.2d 1042, 1049 (1997) (quoting *Kedzie & 103rd Currency Exchange, Inc., v. Hodge*, 156 Ill. 2d 112, 116, 619 N.E.2d 732, 735 (1993)).

¶ 29 In reviewing the motion, "[t]he court must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that may reasonably be drawn in plaintiff's favor." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55, 962 N.E.2d 418. Accordingly, the court should only grant the motion "if the plaintiff can prove no set of facts that would support a cause of action." *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8, 953 N.E.2d 415. We review a section 2-619 order of dismissal *de novo. Id.*

¶ 30 B. Breach of Fiduciary Duty

¶ 31 "To state a cause of action for breach of a fiduciary duty, a plaintiff must allege and ultimately prove: (1) a fiduciary duty on the part of the defendant; (2) a breach of that duty;

(3) damages; and (4) a proximate cause between the breach and the damages." *Herlehy v. Marie V. Bistersky Trust Dated May 5, 1989*, 407 Ill. App. 3d 878, 896, 942 N.E.2d 23, 39 (2010). A trustee owes a fiduciary duty to the beneficiaries of the trust and must exercise the utmost good faith in the administration of the trust. *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457, 463-64, 898 N.E.2d 744, 751 (2008). This includes the obligation to carry out the trust according to its terms. *Herlehy*, 407 Ill. App. 3d at 896. "[A] court should not interfere with a trustee's exercise of discretion given to him or her by the trust instrument so long as the trustee does not act in a wholly unreasonable and arbitrary manner." *Laubner*, 386 Ill. App. 3d at 464. "Likewise, '[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.' " *Id.* (quoting Restatement (Second) of Trusts § 187 at 402 (1959)).

¶ 32 C. This Case

¶ 33 The trial court properly dismissed Ted's breach of fiduciary duty claim against BankChampaign as a matter of law pursuant to section 2-619(a)(9) of the Code. BankChampaign established as an affirmative matter the distributions it made to John were properly made under the terms of the supplemental trust agreement. The most recent supplemental trust agreement granted BankChampaign the discretion as trustee to take "*any reasonable steps*" to disburse funds "to or for" Ted as a beneficiary. BankChampaign does not dispute it made the alleged payments to John, and Ted does not dispute he owed money to the various individuals or entities. Instead, Ted argues BankChampaign's distributions to John were not a "direct" application for his benefit. Specifically, Ted argues the supplemental trust agreement provided only for BankChampaign to directly apply funds to individuals or entities to whom Ted owed money.

¶ 34 We believe Ted's interpretation of this provision strains the definition of "direct." BankChampaign made the distributions to John for the purpose of paying Ted's outstanding debts. The distributions satisfied Ted's obligations, bills, and living expenses as contemplated by the trust instrument. BankChampaign had a long history with John, who had previously acted as both distribution and investment advisor to the trust. This was not a situation, as Ted argues, where a trustee made "random payments" to a third party in hopes the payments would eventually be used to benefit Ted. Rather, BankChampaign made distributions to an individual intimately involved with the administration of the trust and indisputably for Ted's benefit. Moreover, even if we were to accept Ted's definition of "direct application," it appears from the language of Section 4 of the supplemental trust agreement, BankChampaign's discretion to disburse funds "to or for" Ted's benefit *included*—but was not *limited to*—the enumerated methods described in that section. In other words, BankChampaign was permitted in its discretion to take *any* reasonable steps to disburse funds to or for Ted's benefit.

¶ 35 Because BankChampaign established its distributions were proper as an affirmative matter, Ted was required to establish BankChampaign's defense was (1) unfounded or (2) required the resolution of an essential element of material fact before proven. We find Ted has failed to meet this burden. Ted failed to establish BankChampaign's distributions to John were wholly unreasonable, arbitrary, or an abuse of discretion. We find the trial court properly dismissed Ted's breach of fiduciary duty claim with prejudice pursuant to section 2-619(a)(9) of the Code. We need not address BankChampaign's alternative arguments.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the trial court's judgment.

¶ 38 Affirmed.