COURT OF CHANCERY
OF THE
STATE OF DELAWARE

ABIGAIL M. LEGROW
MASTER IN CHANCERY

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DE 19801-3734

Final Report: March 11, 2013
Draft Report: February 19, 2013

Mr. Henry A. DuHadaway
J.T.V.C.C. – SBI # 00098382
1181 Paddock Road
Smyrna, DE 19977

David J. Ferry, Jr., Esquire
Ferry Joseph & Pearce, P.A.
P.O. Box 1351
Wilmington, DE 19899

Re: *Henry A. DuHadaway v. Catherine E. O'Connor*
C.A. No. 7433-ML
Date Submitted on all Motions: January 3, 2013

Dear Mr. DuHadaway and Mr. Ferry:

Pending before me are a number of motions in the above-captioned action, including the defendant's motion to dismiss or for a more definite statement, a motion for temporary control and "seize" of the plaintiff's trust account, motions to compel and to stay discovery, the plaintiff's motion for appointment of counsel, and the plaintiff's "application for argument." The following discusses each pending motion. This is my final report on these motions, and exceptions should be taken in accordance with Court of Chancery Rule 144.

FACTUAL BACKGROUND

As required by Court of Chancery Rule 12, the following facts are drawn from the complaint and the documents it incorporates by reference, giving the plaintiff the benefit of

all reasonable inferences. Any additional facts relating to the other pending motions will be discussed as necessary in the analysis of those motions.

The plaintiff, Henry DuHadaway, is the beneficiary of a trust (the "Trust") established under the will of his mother, Marion Calleo (the "Decedent"), who passed away on September 4, 2008. The Decedent's will appointed Catherine O'Connor, Mr. DuHadaway's sister and the defendant in this action, as the trustee for the Trust. The will directs Ms. O'Connor to hold 25% of the remainder of the Decedent's estate in trust, and to expend funds for the "care and maintenance" of Mr. DuHadaway until he is released from prison. The Trust will terminate upon Mr. DuHadaway's release from prison, at which time he will be entitled to all of the funds remaining in the trust.

Although the complaint is not the model of clarity, it is evident that a number of disputes have arisen between Mr. DuHadaway and Ms. O'Connor. The first dispute appears to relate to Mr. DuHadaway's request that Ms. O'Connor make periodic distributions from the Trust for deposit into his prisoner account. Mr. DuHadaway contends that Ms. O'Connor has not made those distributions, or has not done so in a timely manner.[1] Mr. DuHadaway also appears to allege that Ms. O'Connor has been depleting the Trust by hiring an attorney and asking the attorney to perform tasks unrelated to the administration of the Trust.[2] Mr. DuHadaway further contends that his requests for accountings relating to the administration

[1] Compl. ¶¶ 19, 32.
[2] *Id*. ¶¶ 26, 29, 31.

of the Trust have gone unanswered.[3] In addition to his allegations relating to the Trust, Mr. DuHadaway alleges that Ms. O'Connor was his attorney-in-fact for approximately two years pursuant to a power of attorney he signed in September 2008, and that Ms. O'Connor failed in her duties as such, including, among other things, by failing to properly preserve and account for his personal property, despite her promises to do so.[4]

The foregoing recitation of Mr. DuHadaway's apparent claims is based primarily on my own efforts to parse the complaint, and with a very charitable view toward the allegations. The complaint does not contain any counts or specific causes of action against Ms. O'Connor. The complaint also is replete with allegations regarding the administration of the Decedent's estate, and alleged misconduct by Ms. O'Connor and others in connection with the administration of the Decedent's estate, although Mr. DuHadaway does not appear to be asserting any claims based on the administration of the estate.[5] It appears, based again on a reading of the complaint that is very favorable to Mr. DuHadaway, that he is seeking (1) an accounting relating both to the Trust and to Ms. O'Connor's actions as Mr. DuHadaway's attorney in fact; (2) removal of Ms. O'Connor as trustee of the Trust; and (3) damages relating to Ms. O'Connor's alleged breach of her fiduciary duties as trustee and attorney-in-fact.[6]

[3] *Id.* ¶¶ 13, 33, 37.
[4] *Id.* ¶¶ 6, 9, 10, 14, 15, 26, 27.
[5] *See id.* ¶ 39.
[6] *Id.*

Ms. O'Connor filed a motion to dismiss the complaint or, in the alternative, for a more definite statement. Mr. DuHadaway opposed the motion to dismiss, but conceded that the motion for a more definite statement is appropriate because "it is clear that [he] [h]as injected his emotions into his complaint."[7] The parties also have filed a number of other motions, which are discussed below.

ANALYSIS

1. Rule 12 Motion

Under Court of Chancery Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. "[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[8] That is, when considering such a motion, a court must

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[9]

This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[10]

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[7] Pl.'s Response to Def.'s Mot. for More Definite Statement at 1.
[8] *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011) (footnote omitted).
[9] *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).
[10] *Id.* at *5 & n.13.

If the well-pleaded factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.[11] The court, however, need not "accept conclusory allegations unsupported by specific facts or … draw unreasonable inferences in favor of the non-moving party."[12]

A party may move for a more definite statement under Court of Chancery Rule 12(e) when a complaint is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."[13] To withstand a Rule 12(e) motion, the complaint must be "sufficiently intelligible for the Court to discern one or more potentially viable legal theories on which the claimant might proceed."[14]

As set forth above, it is very difficult to discern from the complaint the claims Mr. DuHadaway intends to assert against Ms. O'Connor, and difficult to separate the pertinent factual allegations from the allegations that appear not to relate to any relief Mr. DuHadaway seeks, including (but not limited to) the allegations relating to the administration of the Decedent's estate. Mr. DuHadaway himself concedes the merit of the motion, and Ms. O'Connor's motion for a more definite statement therefore is granted. Mr. DuHadaway should file an amended complaint within 30 days of the date of this report. That revised complaint should specify the causes of action Mr. DuHadaway intends to assert against Ms.

[11] *Id.* at *6.
[12] *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).
[13] Ct. Ch. R. 12(e).
[14] *In re Estate of Cornelius*, 2002 WL 1732374, at *3 (Del. Ch. July 11, 2002).

O'Connor, along with factual allegations supporting those claims. The revised complaint should remove any allegations that are not related to the claims against Ms. O'Connor.

Until an amended complaint is filed, it is difficult for the Court to address the pending motion to dismiss. That motion therefore is denied without prejudice to any motion to dismiss Ms. O'Connor may file in response to the amended complaint.[15]

2. <u>Motion for "Temporary Control and Seize" of Plaintiff's Trust Account</u>

At the same time he filed his complaint, Mr. DuHadaway filed a pleading styled "Temporary Control and Seize (sic) of the Plaintiffs (sic) Trust Account" (the "Temporary Control Motion"). Although it is not entirely clear from the pleading, it appears that the Temporary Control Motion is essentially a motion for a mandatory preliminary injunction, because Mr. DuHadaway is asking this Court to remove Ms. O'Connor as trustee and appoint a neutral third-party trustee during the pendency of this action.[16]

[15] For the sake of efficiency, however, I will note that some of the arguments Ms. O'Connor asserted in her motion to dismiss appear to be based on facts outside the pleadings. *See, e.g.*, Def.'s Mot. to Dismiss ¶ 3 (periodic accountings provided). Any motion to dismiss that is filed in response to the amended complaint should conform to the standard this Court must apply on a motion under Rule 12(b)(6). If there is factual information outside the pleadings that the Defendant feels warrants judgment in her favor, those facts are best reserved for a motion for summary judgment at the close of discovery.

[16] Because Mr. DuHadaway represents himself, the Court may "look to the underlying substance of [his] filings … and hold those filings to a 'somewhat less stringent technical standard' than those drafted by lawyers." *Sloan v. Segal*, 2008 WL 81513, at *7 (Del. Ch. Jan. 3, 2008). Although the Temporary Control Motion does not use the words "preliminary injunction" (or, for that matter, "motion"), that appears to be the substance of what Mr. DuHadaway seeks.

This Court has broad discretion in granting or denying a preliminary injunction.[17] A preliminary injunction may be granted where the movant demonstrates: "(1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of the equities that tips in favor of issuance of the requested relief."[18] The movant bears a considerable burden in establishing each of these elements. "Plaintiffs may not merely show that a dispute exists and that plaintiffs might be injured; rather, plaintiffs must establish clearly each element because injunctive relief will never be granted unless earned."[19] There is, however, no precise formula for the weight accorded to each element. To the contrary, "a strong demonstration as to one element may serve to overcome a marginal demonstration of another."[20]

Preliminary injunctive relief is not warranted if an award of damages, or some other form of final equitable relief, will adequately compensate the plaintiff for the injury after a full trial on the merits.[21] The injury "must be of such a nature that no fair and reasonable

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[17] *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972) (citing *Richard Paul, Inc. v. Union Improvement Co.*, 91 A.2d 49 (Del. 1952)).
[18] *Nutzz.com, LLC v. Vertrue, Inc.*, 2005 WL 1653974, at *6 (Del. Ch. July 6, 2005) (internal citations omitted); *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008).
[19] *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007) (internal citations omitted).
[20] *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Del Ch. Nov. 5, 2004) (citing *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)).
[21] *Id.*

redress may be had in a court of law and that to refuse the injunction would be a denial of justice."[22]

The Temporary Control Motion falls well short of the mark necessary to obtain a preliminary injunction. Putting aside for a moment the question of whether Mr. DuHadaway can demonstrate a reasonable likelihood of success on the merits, Mr. DuHadaway has not shown that he faces an imminent threat of irreparable injury. Even if Mr. DuHadaway were to prevail on all of the claims he appears to be making against Ms. O'Connor, this Court could order a full accounting and enter an award of damages, which would fully redress any injury Mr. DuHadaway has suffered. Because Mr. DuHadaway has not established this critical element for preliminary injunctive relief, the Temporary Control Motion is denied.

3. <u>Motion to Compel and Motion to Stay Discovery</u>

While the Motion to Dismiss was pending and in the process of being briefed by the parties, Mr. DuHadaway served discovery requests upon Ms. O'Connor, specifically a request for the production of documents (the "Discovery Requests"). Ms. O'Connor has not responded to the Discovery Requests, but instead filed a motion to stay discovery (the "Motion to Stay"). Mr. DuHadaway did not respond to that motion, but instead filed a motion to compel Ms. O'Connor's response to the Discovery Requests (the "Motion to Compel").

[22] *State v. Del. St. Educ. Ass'n*, 326 A.2d 868, 875 (Del. Ch. 1974).

This Court has discretion to determine whether or not to stay discovery pending resolution of a potentially case dispositive motion.[23] The moving party bears the burden of proving that a stay of discovery is appropriate under the circumstances.[24] Delaware courts frequently grant a motion to stay discovery pending a motion to dismiss the complaint.[25] In exercising its discretion, a court must weigh the benefits of resolving the case efficiently against the risk of injury to a plaintiff that might result from granting the stay.[26] This Court has identified three special circumstances that would support denying a motion to stay discovery pending resolution of a motion to dismiss. Those circumstances are: (i) where the motion does not offer a "reasonable expectation" of avoiding further litigation, (ii) where the plaintiff has requested interim relief, and (iii) where the plaintiff will be prejudiced because "information may be unavailable later."[27]

[23] *Orloff v. Shulman*, 2005 Del. Ch. LEXIS 16 (Feb. 2, 2005).
[24] *Id.* at *3.
[25] *Greenspan v. Hinrichs*, 1998 Del. Ch. LEXIS 17 (Feb. 10, 1998).
[26] *In re McCrory*, 1991 Del. Ch. LEXIS 112, at *3 (July 3, 1991).
[27] *Id.* at *2-3.

Staying discovery pending the resolution of a motion to dismiss preserves resources by avoiding the time and expense associated with discovery that may be unnecessary if the motion is granted.[28] Although the motion to dismiss has been denied without prejudice, the motion for a more definite statement has been granted, and Ms. O'Connor may pursue a motion to dismiss once the amended complaint has been filed. I will not speculate about the merits of any such motion, but Ms. O'Connor may have a valid basis to seek dismissal of some or all of the amended complaint. Staying discovery at this time may save the parties from undertaking the expense of having to respond to discovery. A review of the record does not reveal that any of the three "special circumstances" identified above are present in this case.[29] Accordingly, the Motion to Stay is granted and the Motion to Compel is denied. Discovery should be stayed until Ms. O'Connor files an answer to the amended complaint.

4. <u>Motion for Appointment of Counsel</u>

In November 2012, Mr. DuHadaway filed a "Motion for Appointment of Counsel *Ad Litem*" (the "*Ad Litem* Motion"). The introductory paragraph and the "WHEREFORE" clause of the *Ad Litem* Motion indicate that Mr. DuHadaway is seeking appointment of an attorney *ad litem* under Court of Chancery Rule 176. The intervening paragraphs relate to several substantive claims that Mr. DuHadaway contends he is asserting or may assert against

[28] *Bonham v. HBW Holdings*, 2005 WL 2335464 (Del. Ch. Sept. 20, 2005).
[29] As set forth above, although Mr. DuHadaway appears to be seeking preliminary relief by requesting appointment of an interim trustee, that motion lacks merit and therefore does not form a basis to deny the motion to stay discovery.

Ms. O'Connor. It is unclear from the motion how those claims relate to Mr. DuHadaway's request for appointment of an attorney *ad litem*.

Court of Chancery Rule 176 applies to the appointment of an attorney to represent an alleged disabled person over whom guardianship is sought pursuant to 12 *Del. C.* § 3901. Rule 176 has no application to these proceedings. On two previous occasions, Mr. DuHadaway has asked this Court to order the trustee to retain counsel to represent Mr. DuHadaway. As I previously have explained in letters addressed to Mr. DuHadaway, this Court does not have the authority to order the trustee to retain counsel for one of the beneficiaries of the trust, and there are no minor or disabled beneficiaries who require representation by a guardian *ad litem*. The *Ad Litem* Motion therefore is denied.

5. <u>Application for Argument</u>

In December 2012, Mr. DuHadaway filed an "Application for Argument Need (sic) of Co-Counsel" (the "Application for Argument"). Mr. DuHadaway appears to be asking this Court to schedule argument regarding whether another attorney in the firm retained by Ms. O'Connor should be permitted to work on the matter, in addition to David Ferry, Esquire, who has been the only counsel of record to date. The precise basis for the "Application for Argument" is unclear, however, in part because the motion repeatedly refers to attorneys hired to represent the "estate," which does not appear to be the subject of this case.

In any event, the Application for Argument does not articulate any reason for this Court to schedule argument in this case at this time. The pending motions have been

resolved on the papers and without the need for argument to the Court. The Court cannot discern any need to hold argument on the trustee's decision to allow another attorney within the same firm to work on this matter. The Application for Argument therefore is denied.

CONCLUSION

For the reasons set forth above, (1) the Motion to Dismiss is denied without prejudice, (2) the Motion for a More Definite Statement is granted, (3) the Temporary Control Motion is denied, (4) the Motion to Stay is granted, (5) the Motion to Compel is denied, (6) the *Ad Litem* Motion is denied, and (7) the Application for Argument is denied. This is my final report on the foregoing motions. Exceptions should be taken in accordance with Rule 144.

Respectfully submitted,

/s/ *Abigal M. LeGrow*
Master in Chancery