

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & COUNSUMER DOCKET
DOCKET NO. BCD-CV-19-21

RICHARD P. OLSON, in his capacity as)
TRUSTEE OF THE PROMENADE)
TRUST,)

Plaintiff,)

v.)

PAMELA GLEICHMAN, et al.,)

Defendant.)

**ORDER ON PLAINTIFF/
COUNTERCLAIM DEFENDANT'S
MOTION TO DISMISS
COUNTERCLAIM**

Pending before the Court is Plaintiff/ Counterclaim Defendant Richard P. Olson's motion to dismiss the eighty-four page, seventeen-count, three-hundred-one paragraph Counterclaim filed by Defendant/ Counterclaim Plaintiff Pamela Gleichman and Counterclaim Plaintiff Karl Norberg. Ms. Gleichman and Mr. Norberg oppose the motion. The Court heard oral argument on the motion on May 29, 2019.¹ Gerald Petrucelli, Esq. represented Mr. Olson and John Campbell, Esq. represented Ms. Gleichman.

BACKGROUND

This case is one of several currently pending in the Business Court involving Ms. Gleichman and her husband, Mr. Norberg, and the companies and trusts they have set up over the years. The Complaint in this particular action—BCD-CV-19-21—was brought by Mr. Olson in his capacity as Trustee of the Promenade Trust (or the "Trust") against Ms. Gleichman and Ellen Hancock, trustee to two different trusts, as well as General Holdings, Inc. ("GH"), a Maine corporation that Ms. Gleichman apparently exercises some control over or which is otherwise

¹ After oral argument the Court took the motion under advisement. This matter, along with several associated cases involving these and other parties, was scheduled for a judicial settlement conference on July 10-11, 2019. To conserve judicial resources the Court withheld decision on the motion in light of the conference. The parties were unable to reach an agreement at the settlement conference and the Court thus now enters this Order.

implicated in fraudulent transfers allegedly orchestrated by Ms. Gleichman. (*See generally* Pl.’s Compl.) The gist of the Complaint is that Ms. Gleichman, Ms. Hancock, and GH were involved in a scheme to fraudulently transfer Ms. Gleichman and GH’s assets into two trusts for which Ms. Hancock is the Trustee—*viz.* Hillman Norberg Trust (“HNT”) and Hillman Mather Adams Norberg Trust (“HMANT”)—and out of the reach of the Promenade Trust, which includes among its assets multimillion-dollar judgments against Ms. Gleichman and GH. (Pl’s Compl. ¶¶ 8-13, 16-24.) These transfers are allegedly voidable as fraudulent pursuant to statute. *See* 14 M.R.S. §§ 3571-3582. (Pl’s Compl. ¶¶ 26-39.)

Ms. Gleichman answered and counterclaimed. *See* M.R. Civ. P. 7(a), 8(a). In her lengthy Counterclaim, she alleges essentially that the Promenade Trust—particularly under predecessor Trustee Chris Coggeshall—was once on her side but has since “flipped” to the side of her perennial adversary and daughter Rosa Scarcelli and from 2015 has engaged in tortious and illegal behavior that is inconsistent with her understanding of how the Trust would (and should) be administered. The factual allegations begin in 1999 and run through to the present day. (Def.’s Countercl. ¶¶ 18-178.)

STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6), courts “consider the facts in the [pleading] as if they were admitted.” *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed “in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). “Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim.” *Id.* “The legal sufficiency of a

[pleading] challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law” and thus subject to *de novo* appellate review. *Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2, 125 A.3d 1141.

DISCUSSION

Mr. Olson first raises an argument which is dispositive of the entire pleading and grounded not in M.R. Civ. P. 12(b)(6) but rather Rule 8(a)(1), which requires that any “pleading which sets forth a claim for relief,” including a counterclaim, consist of “a short and plain statement of the claim showing that the pleader is entitled to relief” *See also* M.R. Civ. P. 8(e). It is not unusual for a defending party to complain that a lengthy pleading falls short of the aspirational mandate of Rule 8(a)(1). Mr. Olson confirmed at the oral argument that he is not merely complaining, but suggesting that the Court could in its discretion dismiss the Counterclaim for not conforming to the Rule. Such dismissal would presumably be without prejudice and with leave to amend. *Cf.* 2 Harvey & Merritt, *Maine Civil Practice* § 9:2 at 384 (3d, 2011 ed.) (dismissal for failure to comply with requirements of Rule 9(b) “presumably with leave to amend”). Ms. Gleichman responded that notwithstanding the text of Rule 8(a)(1) some cases are more complex than others, and that the Counterclaim describes an exceedingly complex factual situation requiring eighty-four pages and over three-hundred paragraphs of allegations.

Mr. Olson cited no cases in support of such a dismissal, and the Court could not find Law Court precedent explicitly authorizing dismissal under Rule 8. *See St. Hilaire v. Edwards*, 581 A.2d 806, 807 n.1 (Me. 1990) (declining to affirm dismissal under Rule 8 where Rule 12(b)(6) grounds were sufficient). The Court thus declines to dismiss the Counterclaim on Rule 8 grounds.

Next, Mr. Olson argues that he is entitled to dismissal in his personal capacity because all the wrongful actions he is alleged to have undertaken in the Counterclaim were performed in his capacity as Trustee, and not as an individual. Ms. Gleichman responds that under *Me. Shipyard &*

Marine Ry. v. Lilley, 2000 ME 9, 743 A.2d 1264, a trustee may be liable in both his personal and representative capacity where he is proved to have participated in the wrong. However, *Maine Shipyard* is completely distinguishable. There, the defendant trust was deliberately not disclosed to the plaintiff in an attempt to avoid paying for services requested by and actually performed for the defendant individual. *Id.* ¶¶ 2, 11. Furthermore, in that case the trustees and beneficiaries were the same two people. *Id.* ¶ 2. Here, Ms. Gleichman alleges essentially that Mr. Olson has taken actions *as trustee* that are not to her liking and allegedly illegal or wrongful. The only personal benefit to Mr. Olson is the fee he is paid out of the Trust assets—a fee he would be paid regardless of whether he managed the Trust in a manner Ms. Gleichman would approve of. *Cf. In re Estate of Stowell*, 595 A.2d 1022, 1025 (Me. 1991) (trustee required to impart full knowledge and obtain the voluntary consent of *beneficiaries* before engaging in any transaction that inures to *the trustee's benefit*). In sum, there are no allegations that implicate Mr. Olson in his personal capacity, and contrary to Ms. Gleichman's characterization of the case, *Maine Shipyard* does not extend liability to the trustee personally where he is alleged to have acted only in his representative capacity. Mr. Olson as an individual is dismissed from this lawsuit with prejudice.

Relatedly, Mr. Olson points out that the Counterclaim's factual allegation far precede his appointment as Trustee in 2014, and argues that he cannot be held accountable for any actions undertaken by his predecessor. Ms. Gleichman again relies on *Maine Shipyard*, this time for the proposition that a trust is a legal entity akin to a corporation or limited liability company that can be sued as such, and that the actions of a predecessor trustee can be attributed to his successor.

At the outset, *Maine Shipyard's* holding is much narrower than Ms. Gleichman's characterization. There was no suit brought against the defendant trust as such; the caption of the case clearly identifies the relevant defendants as "DANIEL G. LILLEY and ANNETTE P.

LILLEY, TRUSTEES OF THE LILLEY TRUST.” The trial court in that case crafted an equitable remedy based on the jury’s finding that the individual defendant attempted to use an undisclosed trust as a shield from personal liability for an obligation that the individual defendant incurred personally. *Me. Shipyard & Marine Ry.*, 2000 ME 9, ¶¶ 11, 14-16, 743 A.2d 1264. There are no analogous allegations against Mr. Olson in the Counterclaim. Again, Ms. Gleichman’s problems with Mr. Olson are exclusively with regard to actions he has taken as Trustee.

Furthermore, Ms. Gleichman’s Counterclaim does not even seek to hold Mr. Olson *liable* for actions undertaken by his predecessor—rather it seeks to *bind* him to promises or arrangements between his predecessor and Ms. Gleichman. This “understanding” between Mr. Coggeshall and Ms. Gleichman may have been in Ms. Gleichman’s interest—indeed, allegations to that effect pervade the Counterclaim—but Mr. Olson, as successor Trustee, has presumably determined that whatever arrangements Ms. Gleichman had with Mr. Coggeshall were not in the best interest of the trust beneficiaries. There are no allegations that they were. (*But see* Def.’s Countercl. ¶ 97 (alleging that Mr. Coggeshall believed that his agreement with Ms. Gleichman and Mr. Norberg was the only way to protect assets from Ms. Scarcelli).)

Mr. Olson argues that the entire Counterclaim is based on enforcing an improper arrangement that gave Ms. Gleichman and Mr. Norberg control over the Trust and Ms. Gleichman protection from multimillion-dollar judgments against her personally. Indeed, the Counterclaim specifically alleges that this was the true purpose of the Trust. (*See, e.g.*, Def.’s Countercl. ¶¶ 60-66, 68, 72, 96, 129.) This brings the Court to its final, and most basic, grounds for granting the instant motion—while Ms. Gleichman and Mr. Norberg may be the settlors of the Promenade Trust, there are no allegations that they are its beneficiaries. (Def.’s Countercl. ¶ 6; *see also* Def.’s Countercl. ¶¶ 164-166 (identifying Hillman Norberg and Luigi Scarcelli as Trust beneficiaries).)

As Mr. Olson puts it succinctly in his reply memorandum, “[T]he limit of the standing of a settlor of an irrevocable trust is to seek removal of the trustee under limited circumstances not remotely consistent with the allegations of this Counterclaim. 18-B M.R.S. § 706; *see also* 18-B M.R.S. §§ 1001-1011.” (Pl.’s Reply Br. 2 (citations corrected).) As lengthy and confusing as it is, the Counterclaim’s basic premise is that Mr. Olson has not managed the Promenade Trust with a view to the best interests of Ms. Gleichman and, to a lesser extent, Mr. Norberg, and that Mr. Olson can be sued for that, notwithstanding the fact that neither Counterclaim Plaintiff is a beneficiary of the irrevocable Trust.² That basic premise fails as a matter of law: “A trustee shall administer the trust *solely* in the in the interests of the beneficiaries.” 18-B M.R.S. § 802 (emphasis added). The beneficiaries have not joined in this Counterclaim; allegations that the beneficiaries disapprove of Mr. Olson’s actions do not confer standing onto these Counterclaim Plaintiffs. (*See, e.g.*, Def’s Countercl. ¶¶ 127, 151.) If the beneficiaries have an actionable claim against Mr. Olson based on his handling of the Trust, then they are the proper plaintiffs. *See* 18-B M.R.S. §§ 1001-1011. Neither Ms. Gleichman nor Mr. Norberg state a legally cognizable claim against Mr. Olson in the Counterclaim.

CONCLUSION

Based on the foregoing it is hereby ORDERED:

That Richard Olson’s motion to dismiss the Counterclaim is GRANTED. Ms. Gleichman and Mr. Norberg’s Counterclaim is dismissed with prejudice.

² Remarkably, Ms. Gleichman and Mr. Norberg allege multiple times that the Trust itself—as an entity—owed them fiduciary duties. (*See* Def.’s Countercl. ¶¶ 18, 66, 103, 124, 159.) This allegation is a legal conclusion, not a factual allegation, but moreover, it is a faulty legal conclusion that the Court need not and does not accept as true. *See Seacoast Hangar Condo. II Ass’n v. Martel*, 2001 ME 112, ¶ 16, 775 A.2d 1166. Even if considered an entity in legal shorthand, a trust cannot owe fiduciary duties to anyone, and a trustee’s duty of loyalty is to the beneficiaries *exclusively* pursuant to statute. *See* 18-B M.R.S. § 802.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: July 17, 2019

/s/
M. Michaela Murphy
Justice, Business and Consumer Court