

2010 WL 10096145 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)

Circuit Court of Florida.

15th Judicial Circuit

Palm Beach County

Murray BIEDA, Plaintiff,

v.

Judy C. SCHULMAN, Defendant.

No. 502010CA002920.

April 21, 2010.

### **Motion to Dismiss or for More Definite Statement**

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JUDY C. SCHULMAN (hereinafter, “Schulman” or “Defendant”), through undersigned counsel, submits this motion to dismiss or for a more definite statement of the complaint in the above-referenced matter, and states as follows:

#### **OVERVIEW**

This complaint is indecipherable. It purports to contain 6 separate counts, but each count runs into the others so it is not clear whether the allegations of each count is incorporated into one another. Therefore, it is not clear to the Defendant which paragraphs apply to each count and which paragraphs are inapplicable. Moreover, to the extent that each count is meant stand alone, the complaint does not state a cause of action. There are not sufficient ultimate facts for Defendant to properly raise defenses to the complaint. For example, there are reference to an unnamed corporation where Plaintiff purportedly worked while he was on disability, but there are no ultimate facts showing the name of the corporation or how Plaintiff, though apparently totally disabled, earned one million dollars. Complaint ¶¶ 5-8.

#### **ARGUMENT**

##### **A. The Complaint Should be Dismissed in Its Entirety because it is Multifarious.**

Multifariousness occurs when distinct and disconnected subjects, matters or causes are joined in the same complaint or when parties, either as defendants or plaintiffs, who have no common interest in the subject matter of the litigation or connection with each other insofar as the issues in the litigation are concerned join in the same suit. *See Williams v. Ricou, et al., 196 So. 667 (Fla. 1940)*. Here, there are allegations that involve a corporation, a trust and individuals. The entities and individuals listed in the complaint do not have a common interest in the subject matter and therefore are not properly joined in the complaint.

##### **B. Count I Does Not Allege Sufficient Ultimate Facts.**

Under the facts set forth in the complaint, Plaintiff cannot maintain a claim for **elder abuse** under § 415.1111, Florida Statutes (2009). *Woodruff v. TRG-Harbour House, Ltd., 967 So.2d 248, 251 (Fla. 3d DCA 2007)*. Plaintiff has failed to set forth ultimate facts sufficient to state a claim that Appellant was a “vulnerable adult.” *See § 415.102, Fla. Stat.* (defining a “vulnerable adult” as “a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own

care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging”).

Other than reciting the statute in conclusory terms, there are no ultimate facts in the complaint showing Plaintiff could not “perform the normal activities of daily living or provide for his or her own care...”

Because the allegations are insufficient to establish that Plaintiff gave up funds as a result of deception, misrepresentation, or incompetency, Plaintiff failed to state a cause of action against Defendant for **elder abuse**. Thus, Defendant's motion to dismiss Count I should be granted.

#### **C. Count II Fails to State a Conversion Claim Under the Trust Agreement.**

[Florida Rule of Civil Procedure 1.130](#) provides that all documents “upon which action may be brought or defense made” or copies thereof “shall be incorporated in or attached to the pleading.” Count II of the complaint makes reference to a trust agreement and amendment, but no such documents are attached and there is no allegation that Plaintiff does not have a copy of the document. Therefore, this Count Should be Dismissed.

Further, it is not clear if Plaintiff is suing Defendant in her capacity as trustee of the Judy C. Schulman Revocable Trust or in her individual capacity. Plaintiff also makes reference to him being a co-trustee of the Trust. If that is true, than the Trust is the proper party for purposes of this Count.

#### **D. Count III Fails to State a Claim for Fraud.**

“The essential elements of a fraud claim are: (1) a false statement concerning a specific material fact; (2) the maker's knowledge that the representation is false; (3) an intention that the representation induces another's reliance; and (4) consequent injury by the other party acting in reliance on the representation.” *Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So.2d 13, 15 (Fla. 3d DCA 2002) (citation omitted). Fraud must be pled with particularity. [Rule 1.120\(b\), Fla.R.Civ.P.](#)

Plaintiff here pleads nothing but conclusions with no ultimate facts. Moreover, this appears to be nothing more than a claim under the Judy C. Schulman Revocable Trust. There is no allegation that Defendant made a false representation of current fact. Here, it is alleged that Defendant made a representation about what she would do with trust funds in the future. This is a classic example of a representation that is not actionable.

#### **E. Count IV Fails to State a Cause of Action for Breach of Fiduciary Duty.**

This Count is nothing more than a repeat of Counts I to III and, like its predecessor counts, it is based upon a written document that is not attached to the complaint. Therefore, it too must be dismissed. Further, any fiduciary duty Defendant might have vis a vis Plaintiff would be set forth in the trust agreement.

#### **F. Count V for Interference of Expectancy of Inheritance Fails to State a Claim.**

To state a cause of action for intentional interference with an expectancy of inheritance, the complaint must allege the following elements: (1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages. *Claveloux v. Bacotti*, 778 So.2d 399, 400 (Fla. 2d DCA 2001)(citing *Whalen v. Prosser*, 719 So.2d 2, 5 (Fla. 2d DCA 1998)). The court in *Whalen* clearly explained that the purpose behind this tort is to protect the testator, not the beneficiary:

Interference with an expectancy is an unusual tort because the beneficiary is authorized to sue to recover damages primarily to protect the testator's interest rather than the disappointed beneficiary's expectations. The fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is. Thus, the common law court has created this cause of action not primarily to protect the beneficiary's inchoate rights, but to protect the deceased testator's former right to dispose of property freely and without improper interference. In a sense, the beneficiary's action is derivative of the testator's rights.

*Whalen*, 719 So.2d at 6.

In the instant case, Plaintiff is not dead. Therefore, there is no cause of action under this tort. Further, this case involves a revocable trust that Plaintiff openly admits was created for Defendant.

As the *Claveloux* court noted, there are four elements for a cause of action for intentional interference with an expectancy of inheritance, and breach of a legal duty is not one of the elements. This is consistent with the *Whalen* court's explanation that the "fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is." *Id.* (emphasis added). There was no fraud directed to Defendant by Defendant. Accordingly, this Court should be dismissed.

#### **G. There is No Cause of Action for Constructive Trust Stated.**

A constructive trust is imposed by operation of law as an equitable remedy in a situation where there is a wrongful taking of the property of another. See *Finkelstein v. Southeast Bank, N.A.*, 490 So.2d 976, 984 (Fla. 4th DCA 1986). The necessary elements for imposition of a constructive trust are: (1) a promise, express or implied; (2) a transfer of the property and reliance thereon; (3) a confidential relationship; and (4) unjust enrichment. See *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022, 1024 (Fla 4<sup>th</sup> DCA 1996).

When a party does not properly plead a case for constructive trust the count may be dismissed. See, e.g., *Abele v. Sawyer*, 747 So.2d 415, 416 (Fla. 4th DCA 1999). Although constructive trusts may be an effective and appropriate solution in some cases to redress "human knavery," the remedy remains an extraordinary one. Courts are hesitant to allow such a remedy where an action at law would prohibit recovery, where the remedy would permit or reward a violation of other laws, or where the remedy would undermine other legislative policies. Because a constructive trust is a remedy, it must be imposed based upon an established cause of action. *Collinson v. Miller*, 903 So.2d 221, 228 (Fla. 4<sup>th</sup> DCA 2005). Accordingly, constructive trust is not a separate cause of action and Plaintiff has not pled any cause of action that allows him to have this remedy. Count VI therefore should be dismissed.

Respectfully Submitted:

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