

[Cite as *Grossniklaus v. Waltman*, 2010-Ohio-2937.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DONALD GROSSNIKLAUS

Plaintiff-Appellant

-vs-

JOHN R. WALTMAN, TRUSTEE, et al.

Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 09 CA 15

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 09 CV 85

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

June 24, 2010

APPEARANCES:

For Plaintiff-Appellant

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Wise, J.

{¶1} Appellant Donald G. Grossniklaus appeals the decision of the Holmes County Court of Common Pleas granting Appellee John R. Waltman's Motion to Dismiss.

STATEMENT OF THE FACTS AND CASE

{¶2} Plaintiff-Appellant Donald G. Grossniklaus is a 50% beneficiary of the Alice J. Grossniklaus Trust. Appellees Heidi DeLong, Donald Horisberger and Trudy Scheiding, are also beneficiaries of the Trust.

{¶3} Defendant-Appellee John R. Waltman served as both the Trustee of the Trust, as well as the Executor of the Estate of Alice J. Grossniklaus. Appellee Waltman also served as an attorney for himself in both capacities as the Trustee and the Executor. The Trust was the beneficiary of the Estate.

{¶4} On June 1, 2009, Appellant Grossniklaus filed a complaint against Appellee Waltman, Trustee, in the Holmes County Court of Common Pleas in Case No. 09-CV-085, alleging two causes of action against Appellee Waltman in his capacity as Trustee. The first cause of action was for negligence based on Appellee Waltman's handling of certain Trust assets, and the other cause of action was for breach of fiduciary duty based on Appellee Waltman's failure to take action to remedy a situation involving assets he failed to recover for the Trust.

{¶5} According to the Complaint, one of the assets of the Estate was ownership of the Alpine Cheese Factory, Inc. The Alpine Cheese Factory, Inc. sold substantially all of its assets to a third party in August, 2002. In this asset sale, Alpine retained the

right to disbursement of capital credits owed to Alpine from Holmes-Wayne Electric Cooperative, Inc. After such sale, Alpine was legally dissolved.

{¶6} Appellant, in his Complaint, asserts that Appellee Waltman failed to notify Holmes-Wayne of the sale, and further failed to notify it that the checks for the retired capital credits belonged to the Trust and should therefore be forwarded to a new address. Additionally, Appellant asserts that Appellee Waltman failed to inform Holmes-Wayne that the purchaser of Alpine did not have a right to receive these capital credits. Appellant asserts that in 2002, 2004, 2005 and 2006 checks for the capital credits in the amounts of \$6,855.04, \$10,107.09, \$11,291.48 and \$12,708.68, respectively, were mailed to the new buyer and that it cashed these checks and retained such funds.

{¶7} Appellant claims that he discovered the above on or about December, 2008, and made a demand on Appellee to pursue a claim against said buyers or remedy the situation but that Appellee failed to do either.

{¶8} On September 11, 2009, Appellee Waltman filed a 12(B)(6) Motion to Dismiss the complaint on the basis that it failed to state a claim for which relief can be granted. Specifically, Appellee argued that Plaintiff-Appellant Grossniklaus lacked standing to assert the claim, that Grossniklaus failed to identify any duty he breached and lastly, that the claims were barred by the statute of limitations.

{¶9} On October 7, 2009, Appellant Grossniklaus filed a response to the motion, and on October 15, 2009, Appellee Waltman filed a reply.

{¶10} On October 20, 2009, the trial court granted Appellee Waltman's motion to dismiss. In its Judgment Entry, the trial court stated:

{¶11} "Plaintiff's Complaint fails to state any claims against Defendant Waltman, as Trustee of the Alice J. Grossniklaus Trust, upon which relief could be granted." (October 20, 2009, Judgment Entry, attached at Appendix A).

{¶12} The trial court went on to dispose of the entire case finding that there were no remaining claims against the other Defendants who were also beneficiaries of the Trust, stating:

{¶13} "Furthermore, this Court finds that Plaintiff did not assert any claims against the remaining Defendants, but merely joined them as additional Trust beneficiaries. Therefore, this Court's dismissal of plaintiff's claims against Defendant Waltman, Trustee, disposed of Plaintiffs Complaint in its entirety." (October 20, 2009, Judgment Entry, Appendix A).

{¶14} It is from this judgment entry that Appellant now appeals, assigning the following error for review:

I.

{¶15} "THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION FOR FAILURE TO STATE A CLAIM."

{¶16} Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greely v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 605 N.E.2d 378, 1992-Ohio-73. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber*

(1991), 57 Ohio St.3d 56, 565 N.E.2d 584. As provided in Civ.R. 12(B), in reviewing such a motion, this Court can only consider the four corners of the complaint.

{¶17} In the instant case, Appellant alleges two causes of action in his Complaint: negligence and breach of fiduciary duty.

{¶18} “To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom.” *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, 270; See also *JP Morgan Chase Bank NA v. Lanning*, Stark App.No. 2007 CA 00223, 2008-Ohio-00293.

{¶19} The elements for a breach of fiduciary duty claim are: “(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom.” *Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc.*, 176 Ohio App.3d 54, 889 N.E.2d 1066, 2008-Ohio-1490, ¶ 19, quoting *Thomas v. Fletcher*, 3d Dist. No. 17-05-31, 2006-Ohio-6685, at ¶ 13, quoting *Werthmann v. DONet*, 2d Dist. No. 20814, 2005-Ohio-3185, at ¶ 42.

{¶20} “A claim of breach of fiduciary duty is basically a claim for negligence that involves a higher standard of care.” *Id.*, quoting *All Star Land Title Agency, Inc. v. Surewin Invest., Inc.*, 8th Dist. No. 87569, 2006-Ohio-5729, at ¶ 36.

{¶21} “A ‘fiduciary relationship’ is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.” *In re Termination of Employment* (1974), 40 Ohio St.2d 107, 115, 321 N.E.2d 603. The burden of proving the existence of a fiduciary relationship is on the party asserting it. *Craggett v. Adell Ins. Agency* (1993), 92 Ohio App.3d 443, 451, 635 N.E.2d 1326.

{¶22} Appellant in his Complaint avers that Appellee failed to secure the capital credits, which were excluded from the sale of Alpine's assets, for the Trust.

{¶23} Appellee, in his Motion to Dismiss, argues that Appellant lacks standing, that he failed to identify a duty and/or breach of that duty, and finally, that the statute of limitations has passed.

{¶24} In its Judgment Entry, the trial court states only that it finds that "Plaintiff's Complaint fails to state any claims against Defendant Waltman, as Trustee of the Alice J. Grossniklaus Trust, upon which relief could be granted."

{¶25} Upon review of the Complaint in this matter, we find that Appellant has pled the existence of a duty, i.e. Appellee's position as Trustee of the trust; a breach of said duty, i.e. failure to secure the capital credits; and injury resulting from such failure, i.e. loss of funds to the Trust.

{¶26} Under the notice pleading requirements of Civ.R. 8(A)(1), the plaintiff only needs to plead sufficient, operative facts to support recovery under his claims. *Doe v. Robinson*, 6th Dist. No. I-07-1051, 2007-Ohio-5746, ¶ 17. Nevertheless, to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions. See *DeVore v. Mut. of Omaha Ins. Co.* (1972), 32 Ohio App.2d 36, 38, 288 N.E.2d 202.

{¶27} While Appellee in his motion to dismiss raises many arguments as to these allegations, these arguments are based on facts outside of the four corners of Appellant's Complaint.

{¶28} Civ.R.12(B) permits a trial court to expand its scope of review by converting a motion to dismiss into a motion for summary judgment, but this was not done sub judice.

{¶29} Accepting all factual allegations of the complaint as true and drawing all reasonable inferences in favor of the nonmoving party, we find that the Complaint contains sufficient, operative facts to support Appellant's claims for negligence and/or breach of fiduciary duty. The Complaint is sufficient to raise the claims and survive a motion to dismiss. Therefore, the trial court erred in dismissing this claim granting appellee's motion to dismiss

{¶30} Appellant's sole assignment of error is granted.

{¶31} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Holmes County, Ohio, is hereby reversed and remanded for further proceedings consistent with the law and this opinion.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ WILLIAM B. HOFFMAN

JUDGES

