NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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September 6, 2016

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Re: *Ricardo Garcia v. Burke E. Suda, Trustee of the Donald J. Suda Revocable Trust, et al.*, Case No. CL-2015-11379

Dear Counsel:

This case is before the Court on Defendant Burke Suda's Motion to Dismiss for Lack of Standing. Plaintiff Ricardo Garcia ("Mr. Garcia") has twice sued Burke Suda ("Ms. Suda"), trustee of the Donald J. Suda Revocable Trust (the "Suda Trust"), for alleged mismanagement of the Suda Trust. Mr. Garcia is the beneficiary of a separate, unfunded subtrust, the Ricardo Garcia Trust (the "Garcia Trust"), which is to be created under the terms of the Suda Trust instrument. Mr. Garcia nonetheless claims an interest in the Suda Trust and seeks to offer input into its administration. Therefore, the Court must decide two issues:

A. Whether the beneficiary of a separate, unfunded subtrust has standing to bring a direct action against the trustee of a primary trust?

B. Whether the beneficiary of a separate, unfunded subtrust has the right to bring a derivative action against the trustee of a primary trust?

OPINION LETTER

After considering the pleadings and exhibits, authorities, and oral arguments presented by counsel, the Court answers those questions in the negative and grants the Motion to Dismiss for Lack of Standing.

I. BACKGROUND

A. Factual Background

Donald J. Suda ("Mr. Suda") died testate on May 21, 2014. Mr. Suda's pour-over will provided for the distribution of his estate in accordance with the terms of the Suda Trust instrument. Upon his death, but after an administrative period intended for the payment of estate expenses and taxes, twenty percent of the Suda Trust property was to be distributed to Ms. Suda, free of trust, with the remaining eighty percent divided equally between two separate subtrusts: the Garcia Trust and the Scott Suda Trust. Mr. Garcia is the beneficiary of the Garcia Trust, and Mr. Suda's grandson, Scott Suda, is the beneficiary of the Scott Suda Trust. Christopher Suda, Mr. Suda's nephew, is designated as the trustee of the Garcia Trust, although he is not a party to this action either personally or in his representative capacity as trustee of the Garcia Trust. To date, the Garcia Trust has remained unfunded.

B. Procedural Background

On August 27, 2015, Mr. Garcia filed this action seeking, among other relief, the removal of Ms. Suda from her role as trustee of the Suda Trust. Mr. Garcia alleges that Ms. Suda breached various fiduciary duties in administering the Suda Trust. He contends that her mismanagement dissipated the assets of the Suda Trust, which in turn diminished the value of his beneficial interest in the Garcia Trust.

In response, Ms. Suda moved to dismiss the Complaint for lack of standing. The Court took this case under advisement after hearing oral argument from counsel, and the issue of Mr. Garcia's standing is now ripe for decision. For the following reasons, the Court concludes that Mr. Garcia does not have standing to sue Ms. Suda individually and in her representative capacity as trustee of the Suda Trust.

II. STANDARD OF REVIEW

In ruling upon an evidentiary motion to dismiss for lack of standing, the trial court must determine whether the defendant demonstrated by a

preponderance of the evidence that the factual allegations cited by the plaintiff in support of standing were incorrect. *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 686–87 (2011); *see also Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 701 (E.D. Va. 2010).

III. ARGUMENTS

A. Ms. Suda's Motion to Dismiss

Ms. Suda challenges Mr. Garcia's standing to bring this action and seeks its dismissal. She asserts that Mr. Garcia lacks standing because he is not a beneficiary of the Suda Trust and, consequently, Mr. Garcia has no immediate, pecuniary, and substantial interest at stake. Instead, according to Ms. Suda, Mr. Garcia has nothing more than a remote or indirect interest arising from his status as a beneficiary of a separate, unfunded subtrust, i.e., the Garcia Trust. She argues that his remote or indirect interest is insufficient to confer standing upon Mr. Garcia to bring a direct action in relation to the Suda Trust.

In addition, Ms. Suda notes that she is not designated as the trustee of the Garcia Trust. Rather, Christopher Suda will undertake its administration and related fiduciary duties if the Garcia Trust is funded and if Christopher Suda accepts the trusteeship. She contends that Mr. Garcia not only lacks standing to bring a direct action, but also an action on behalf of the Garcia Trust. Ms. Suda posits that only a trustee may sue on behalf of a trust and, as a result, Mr. Garcia lacks standing to initiate a derivative action.

B. Mr. Garcia's Opposition

Mr. Garcia counters that any beneficiary may petition a trustee to account, regardless of whether the beneficiary is a current beneficiary. Relying on *Shriners Hospital for Crippled Children v. Smith*, 238 Va. 708, he contends that his equitable interest in the unfunded Garcia Trust is really a vested remainder interest in the Suda Trust because forty percent of its residue might ultimately fund the Garcia Trust.

Mr. Garcia also analogizes this case to *Estate of Necastro*, 1991 Del. Ch. LEXIS 30 (Del. Ch. Feb. 27, 1991), where the Delaware Court of Chancery concluded that the beneficiaries of a residuary testamentary trust had standing to file exceptions to the accounts of the executrix under the Delaware probate statute. He contends that "while normally trustees are tasked with protecting the interests of the various cestuis to take under the subject trust, where it is the misfeasant or malfeasant acts or omission of the trustee that are cause for concern, equity dictates that this conflict of interest be cured."

IV. ANALYSIS

The Court concludes that Ms. Suda demonstrated by a preponderance of the evidence that the factual allegations cited by Mr. Garcia in support of standing were incorrect. Consequently, Mr. Garcia lacks standing to bring this action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust.

A threshold standing determination "concerns itself with the characteristics of the person or entity who files suit. The point of standing is to ensure that the person who asserts a position has a substantial legal right to do so and that his rights will be affected by the disposition of the case." *Cupp v. Board of Supervisors*, 227 Va. 580, 589 (1984). A plaintiff must plead sufficient factual allegations to "show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest." *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 687 (2011).

However, a defendant may rebut those factual allegations through an evidentiary motion to dismiss for lack of standing. *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 686–87 (2011); *see also Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 701 (E.D. Va. 2010). To determine whether Ms. Suda rebutted Mr. Garcia's allegations in support of his immediate, pecuniary, and substantial interest in this litigation, the Court must examine the interests of the parties and Mr. Suda's intent as ascertained from the plain language of the Suda Trust instrument. *See Ladysmith Rescue Squad, Inc. v. Newlin*, 280 Va. 195, 201–02 (2010) ("[I]n construing, enforcing and administrating wills and trusts . . . intent is to be ascertained by the language the testator or settlor used in creating the will or trust."); *NationsBank of Virginia, N.A. v. Estate of Grandy*, 248 Va. 557, 561 (1994) ("In reaching the correct interpretation, the intent of the testator in establishing the trust as ascertained from the plain language of the instrument controls a court's inquiry.").

A. Mr. Garcia does not have standing to bring a direct action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust because Mr. Garcia is not a beneficiary of the Suda Trust.

The plain language of the Suda Trust instrument indicates that Mr. Garcia is not a beneficiary of the Suda Trust. A trust is "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create [a trust]." *Jimenez v. Corr*, 288 Va. 395, 410–11 (2014).

The parties to the trust relationship include the "'settlor,' or the person who creates a trust, the 'trustee,' or the person holding property in trust, and the 'beneficiary,' or the person for whose benefit property is held in trust."[1] *Id.* at 411 (quotations omitted). Certainly, the Virginia Uniform Trust Code (the "UTC") codifies the well-settled principle that "a beneficiary's equitable title permits the beneficiary to enforce the terms of the trust and to seek judicial remedy in the event of a breach." *Jimenez v. Corr*, 288 Va. 395, 412 (2014) (citing Va. Code Ann. § 64.2-792(B)). However, the Court is persuaded that a beneficial interest in a subtrust does not by definition confer standing upon a subtrust beneficiary to sue the trustee of a primary trust. Indeed, the Restatement (Second) of Trusts § 126 makes clear:

> The beneficiaries of a trust include only the persons upon whom the settlor manifested an intention to confer a beneficial interest under the trust, or their successors in interest. Other persons, although they may benefit from the performance of the trust, are not beneficiaries of the trust and cannot enforce it.

Restatement (Second) of Trusts, § 126 cmt. a (discussing incidental beneficiaries).

In essence, Mr. Garcia asks the Court to treat the Suda Trust and the Garcia Trust as one and the same without examining Mr. Suda's intent as ascertained from the plain language of the Suda Trust instrument. Yet, as other jurisdictions have noted:

> In considering whether the settlor intended to create a single trust or multiple trusts, a number of factors are to be considered: (1) The meaning of the trust instrument language in its use of the singular word "trust" or the plural "trusts" (2) whether the trust fund is divided or maintained as a single res; (3) whether a provision in the trust instrument authorizes a flat amount to be distributed out of the corpus to beneficiaries without regard to any separation of the corpus; (4) the practical construction of the trust instrument by the settlor[;] and (5) whether the provisions of the trust disposition plan relating to the various beneficiaries are so interwoven as to preclude the intention of multiple trusts.

19 Michie's Jurisprudence of Virginia & West Virginia, *Trusts and Trustees* § 18 (discussing *Hemphill v. Aukamp*, 164 W. Va. 368 (1980) (collecting cases)).

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[1] *See also* Va. Code Ann. § 64.2-701 (defining the term "beneficiary" as "a person that (i) has a present or future beneficial interest in a trust, vested or contingent; or (ii) in a capacity other than that of trustee, holds a power of appointment over trust property.").

Turning to those factors for guidance in the absence of Virginia authority directly on point,[2] the Court concludes that Mr. Suda intended to create multiple trusts under the Suda Trust instrument and, further, Mr. Garcia is not a beneficiary of the Suda Trust.[3]

First, the Suda Trust instrument refers to the plural "trusts." Section 13.07(b) expressly defines "this agreement" to include "*all trusts* created under the terms of this agreement." (emphasis added). Similarly, Section 13.7(o) defines "this trust" and "this trust agreement" to "refer to this agreement and *all trusts* created under the terms of this agreement." (emphasis added). Tellingly, Section 7.02 specifies, "My Trustee shall administer the share set aside for Ricardo Garcia in trust (referred to as the 'Ricardo Garcia Trust') as provided in this Section." In a parallel provision, Section 7.04 states, "My Trustee shall administer the share set aside for Scott Suda in trust (referred to as the 'Scott Suda Trust') as provided in this Section." Moreover, Section 13.7(p) indicates that the term "Trustee" will refer to the "singular or *plural as the context may require*." (emphasis added).

Second, in accordance with Sections 7.02 and 7.04, any residue of the Suda Trust will be divided into separate subtrusts with distinct trustees, and therefore the Suda Trust, the Scott Suda Trust, and the Garcia Trust are not to be maintained as a single res.

Third, the Suda Trust instrument does not authorize a flat amount to be distributed out of the corpus to beneficiaries without regard to any separation of the corpus. Indeed, the terms of the Suda Trust achieve the opposite outcome. Section 7.01 provides, "My trustee *shall divide my remaining trust property into shares* as follows . . . ." The separation of the Suda Trust corpus into shares is not merely a direction to the trustees as to the manner of keeping the accounts of the trust. After any residue of the Suda Trust corpus is divided, Mr. Garcia's share will be legally titled to a separate trustee in accordance with Section 7.02.

Fourth, the provisions of the trust disposition plan relating to the various beneficiaries of the Suda Trust, the Garcia Trust, and the Scott Suda Trust are not so interwoven as to preclude the intention of multiple trusts. For example, Section 7.02(c) grants Mr. Garcia the right to withdraw

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[2] *Cf. Fletcher v. Fletcher*, 253 Va. 30 (1997).

[3] The Court forgoes a discussion of factor four of the *Hemphill* factors for two reasons: First, the Suda Trust instrument is unambiguous. Second, the subtrusts are testamentary in nature and therefore Mr. Suda's conduct cannot be used to construe the meaning of terms that took effect after his death.

principal annually from the Garcia Trust in an amount not exceeding that referred to in Section 2514(e) of the Internal Revenue Code. In contrast, Section 7.04 sets forth different incentive provisions permitting Scott Suda to withdraw principal from the Scott Suda Trust after particular educational and employment benchmarks are attained. Accordingly, as ascertained from the plain language of the Suda Trust instrument, Mr. Suda intended the Suda Trust, the Scott Suda Trust, and the Garcia Trust to be separate and distinct.

There can be no dispute that Mr. Garcia is a beneficiary of the Garcia Trust because Section 7.02 references "the share set aside for Ricardo Garcia in trust (referred to as the 'Ricardo Garcia Trust')" and "the trust established for Ricardo Garcia." However, it is Christopher Suda, as the designated trustee of the Garcia Trust, who holds a beneficial interest in the Suda Trust, not Mr. Garcia. Section 3.03(b) provides, "I appoint Christopher Suda to serve as Trustee of the trust created under Section 7.02 hereof for Ricardo Garcia ('Ricardo Garcia Trust') upon creation of the Ricardo Garcia Trust." During the administrative period of the Suda Trust, Ms. Suda has held its corpus in trust for the benefit of Christopher Suda until he acquires legal title to forty percent of any residue and administers it for the benefit of Mr. Garcia in accordance with the provisions of the Garcia Trust. *See Jimenez*, 288 Va. at 411 (2014) ("[T]he trustee acquires legal title to the trust property, while the beneficiary is the equitable owner of trust property, in whole or in part.") (quotations and brackets omitted); *see also* Sections 3.03, 5.02, 7.02. Thus, although Mr. Garcia will benefit from the performance of the Suda Trust, he is merely an incidental beneficiary of its terms. Restatement (Second) of Trusts, § 126 cmt. a ("Other persons, although they may benefit from the performance of the trust, are not beneficiaries of the trust and cannot enforce it.").

The legal and beneficial title to the Suda Trust is split between Ms. Suda as trustee of the Suda Trust and Christopher Suda as its immediate distributee, albeit in his representative capacity as the designated trustee of the Garcia Trust. Therefore, the Court concludes that Mr. Garcia does not have an immediate, pecuniary, and substantial interest in the Suda Trust. His beneficial interest in the Garcia Trust is too indirect and remote to confer standing upon him in relation to the Suda Trust. Consequently, Mr. Garcia lacks standing to bring a direct action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust.[4] *See id.* at § 200 ("No one except a beneficiary or one suing on his

[4] For those same reasons, the Court considers *Shriners Hospitals for Crippled Children v. Smith*, 238 Va. 708 (1989), inapposite. Although relied upon by Mr. Garcia, *Shriners Hospitals* dealt with the right of a vested remainderman to seek an accounting from the trustee of a unitary trust, not standing within the context of a trust-subtrust relationship.

behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust.").

B. Mr. Garcia may have standing to bring a derivative action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust; however, any claims brought on behalf of the Garcia Trust are unripe.

The Court must consider whether Mr. Garcia has standing to assert a derivative action against Ms. Suda on behalf of the Garcia Trust. Citing *Broyhill v. Bank of America, N.A.* 2010 U.S. Dist. LEXIS 106766 (E.D. Va. Oct. 6, 2010), Ms. Suda contends that only a trustee may sue on behalf of a trust. The Court disagrees, but nonetheless holds that Mr. Garcia's claims are not yet ripe for a derivate action against Ms. Suda personally and in her representative capacity as trustee of the Suda Trust.

Generally, the right to bring a claim on behalf of a trust belongs to the trustee: A "trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust." Restatement (Second) of Trusts, § 280. Consistent with the Restatement (Second) of Trusts, the UTC directs the trustee to take "reasonable steps to enforce claims of the trust . . . ." Va. Code Ann. § 64.2-773. Similarly, the trustee must "take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee . . . ." Va. Code Ann. § 64.2-774. There is, however, "an exception to the general rule that trustees alone are competent to bring suit against third parties: If the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person." *Burton v. Dolph*, 89 Va. Cir. 101, 113 (Norfolk 2014) (quoting the Restatement (Second) of Trusts § 282 and noting that, although the Supreme Court of Virginia has not officially adopted the Restatement, it has consistently relied upon it for guidance).

Ms. Suda cites the United States District Court for the Eastern District of Virginia's decision in *Broyhill* as persuasive authority for the proposition that "only trustees—and not mere beneficiaries—can sue on behalf of trusts." To be sure, *Broyhill* involved derivative claims brought by a trust beneficiary against a third-party bank that the district court ultimately dismissed for lack of standing. *See id.* at *5. Its persuasiveness is nonetheless diminished for a reason noted by the circuit court in *Burton*: The beneficiary "neither addressed that particular issue in briefing, nor did he refute opposing counsel's contentions during oral argument." *Burton*, 89 Va. Cir. at 113.

Moreover, the *Busman* and *Poage* cases cited by the District Court in *Broyhill* do not support such a categorical bar against derivative actions by trust beneficiaries as Ms. Suda suggests.[5] For instance, as the Circuit Court in *Burton* explained, "The issue in *Busman* was not whether a trust's beneficiary could bring suit against a third party for unlawful action concerning the trust, but rather whether the *trustee* could maintain such an action." *Id.* Similarly, in *Poage v. Bell*, 35 Va. 604 (1837), although the Supreme Court of Virginia held that a trust beneficiary could not maintain an action at law against a third party alleged to have converted trust property, it went on to indicate that the beneficiary could maintain the action in a court of equity. *Id.* at 607 ("This shows the propriety of confining the cestui que trust to a court of equity . . . ."); *cf.* Restatement (Second) of Trusts § 282. For those reasons, the Court finds that "the Restatement more accurately reflects the current state of the law, especially after the enactment of the Virginia Uniform Trust Code." *Burton*, 89 Va. Cir. at 114–15 (observing that UTC § 1004 is codified verbatim at Virginia Code § 64.2-795 and quoting the official comment to UTC §1004: "On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust."). Thus, where a trustee fails to perform his duty to protect the trust, the beneficiaries may sue in equity to protect their interests. Restatement (Second) of Trusts § 282 ("If the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person."). Even so, Mr. Garcia's claims are not yet ripe for a derivative action on behalf of the Garcia Trust.

Mr. Garcia's derivative claims are unripe for several reasons. There is no indication that either Christopher Suda or Michael Cosgrove, as successor trustee, has acted to accept the trusteeship of the Garcia Trust. *See* Va. Code Ann. § 64.2-754. Accordingly, neither has undertaken a fiduciary duty to enforce claims of the trust or to compel another person to deliver trust property to the trustee. *Id.* at §§ 64.2-773, 64.2-774. Moreover, Mr. Garcia has not petitioned the Court to appoint a trustee in place of the designated trustee of the Garcia Trust. *See* Va. Code Ann. § 64.2-757(A)–(B) ("A vacancy in a trusteeship occurs if . . . [a] person designated as trustee rejects the trusteeship . . . . A vacancy in a trusteeship shall be filled if the trust has no remaining trustee."); Va. Code Ann. § 64.2-712 ("Proceedings to appoint or remove trustees may be brought by motion pursuant to [Virginia Code] §§ 64.2-1405 and 64.2-1406."). Furthermore, Mr. Garcia has never made a demand upon Christopher Suda, as the designated trustee of the Garcia Trust, to bring an action

[5] The *Broyhill* decision relied upon *Poage v. Bell*, 35 Va. 604 (1837), and this Circuit's decision in *Busman v. Beeren & Barry Invs., LLC*, 69 Va. Cir. 375 (Fairfax 2005).

against Burke Suda personally and in her representative capacity as trustee of the Suda Trust. *See, e.g., Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1245 (D.N.M. 2011) (citing G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 869, at 199 n.35 and accompanying text (rev. 2d ed., repl. vol. 1995)) ("The common law of trusts has a comparable demand requirement which predates its corporate counterpart: If a trust suffers harm at the hands of a third party, e.g., the trustee's investment agent, the trust beneficiaries first must make a demand on the trustees to correct the problem."). Mr. Garcia has not alleged that Christopher Suda, as the designated trustee of the Garcia Trust, has improperly refused or neglected to bring an action against a third person. Therefore, any derivative claims Mr. Garcia may have are unripe for adjudication by the Court.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion to Dismiss for Lack of Standing. This ruling is without prejudice to Mr. Garcia's right as a beneficiary of the Garcia Trust to make a demand against the trustee of the Garcia Trust or any action he might undertake to remove the trustee of the Garcia Trust. It is also without prejudice to any claim the Trustee of the Garcia Trust might bring against the trustee of the Suda Trust. The enclosed Order is consistent with the ruling of the Court and incorporates this Opinion Letter.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RICARDO GARCIA,	)	
Plaintiff,	)	
v.	)	**CL-2015-11379**
DONALD J. SUDA REVOCABLE TRUST, et al.,	)	
Defendants.	)	

FINAL ORDER

THIS CASE came before the Court on the Motion to Dismiss for Lack of Standing of Defendant-Counterclaim Plaintiff Donald J. Suda Revocable Trust; and

IT APPEARING to the Court, after considering the pleadings, memoranda, exhibits, relevant authorities, and arguments of counsel, that the Motion is well-taken; it is therefore

ORDERED, that the Motion to Dismiss for Lack of Standing is GRANTED without prejudice to any cause of action and right of action that Plaintiff Ricardo Garcia may have against the Ricardo Garcia Trust or the Trustee(s) of the Ricardo Garcia Trust; and

IT IS FURTHER ORDERED that this Final Order is without prejudice to

any cause of action and right of action that the Ricardo Garcia Trust may have against the Donald J. Suda Revocable Trust or the Trustee(s) of the Donald J. Suda Revocable Trust.

This Order is Final.

ENTERED on this 6 day of September, 2016.

[redacted]

Daniel E. Ortiz
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.