



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 21, 2020

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Re: *Richard Kelly v. Elaine Giuliano, et al.*; CL-2020-0007479

Dear Counsel:

This matter came before the Court on August 21, 2020, for argument on Defendants' William and Elaine Giuliano's Demurrer and Plea in Bar. At the conclusion of the hearing, the Court sustained the Demurrer with respect to Counts I, III and VII of the Complaint and took the Plea in Bar matter under advisement.

**OPINION LETTER**

## **BACKGROUND**

Plaintiff Richard Kelly is the nephew of Defendant Maura “Pat” Kelly. In 2014, Ms. Kelly executed both a Power of Attorney and a revocable trust. In the Power of Attorney, Ms. Kelly named Plaintiff as her attorney-in-fact. Ms. Kelly also named Plaintiff and Defendant Elaine Giuliano as co-trustees of the Maura P. Kelly Revocable Trust. Later, in 2018, Ms. Kelly revoked Plaintiff’s power of attorney and executed a new Durable Power of Attorney, a new Medical Power of Attorney, and a Second Amendment to her Trust naming her niece Elaine Giuliano and her friend Elsa Thompson as her attorneys-in-fact and trustees.

On June 4, 2020, Plaintiff filed a seven-count complaint in this matter against Ms. Kelly, Elaine Giuliano, William Giuliano, and Elsa Thompson. Following a hearing on August 21, 2020, the Court dismissed Counts I, III and VII of Plaintiff’s complaint. The surviving counts include: Count II Elaine Giuliano - Breach of Fiduciary Duty as Trustee; Count IV William Giuliano - Conspiracy to Breach Fiduciary Duty as Trustee; Count V William Giuliano - Conspiracy to Breach Fiduciary Duty as Agent; and Count VI Conversion against both Elaine and William Giuliano.

Presently before the Court is Defendant’s Plea in Bar, wherein Defendant asserts that Plaintiff must submit his remaining claims to arbitration.

## **ARGUMENTS**

### **I. Defendant’s Plea in Bar**

Defendants primarily rely on the assertion that the Maura P. Kelly Revocable Trust Agreement (“the Agreement”) contains a valid arbitration clause. Defendants assert that Plaintiff consented to the arbitration clause as one of the original co-trustees. Moreover, Defendants remind the Court that arbitration clauses are favored in Virginia and are binding when contained in a valid contract.

### **II. Plaintiff’s Opposition to the Plea in Bar**

Plaintiff asserts that the Virginia Arbitration Act does not apply to the Agreement because it is not a written contract in which Mr. Kelly agreed to arbitrate his future claims. In fact, Plaintiff asserts the Agreement is not a contract at all, but rather a donative instrument, like a will, and thus, not a contract. *See Martz’s Ex’r v. Martz’s Heirs*, 66 Va. 361 (1874). Consequently, Mr. Kelly’s claims are not subject to arbitration.

## ANALYSIS

The question presented is whether Plaintiff must submit his remaining claims to arbitration. This Court holds that Plaintiff does not. First, a trust agreement is not a contract that would subject the present controversy to arbitration under Virginia law. Second, even if the Agreement was a contract, the language of the Agreement narrows the scope of arbitrable claims to those requiring interpretation or enforcement of the Agreement.

**I. The Present Litigation is Not Subject to the Virginia Uniform Arbitration Act Because the Agreement is Not a Contract and the Underlying Controversy was Not in Existence at the Time of Execution.**

Pursuant to the Virginia Uniform Arbitration Act (“VUAA”):

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract.

VA. CODE ANN. § 8.01-581.01 (West 2020). There, the Virginia legislature expressly envisioned two circumstances under which an arbitration provision would be enforceable: (1) where there is a “written *agreement* to submit an *existing* controversy to arbitration,” or (2) where there exists a “written *contract* to submit to arbitration any controversy thereafter arising between the parties . . . .” *Id.* § 8.01-581.01 (emphasis added).

Because the present controversy was not in existence at the time Ms. Kelly executed the Agreement, it cannot be construed as an agreement to arbitrate the current controversy. Ms. Kelly executed the Agreement on November 26, 2014. Plaintiff, Richard Kelly, filed his complaint on June 4, 2020 alleging that Elaine Giuliano and her husband, William Giuliano wrongfully took from the trust *after* Ms. Kelly executed the Agreement. Thus, the controversy could not possibly have existed at the time of execution and is not subject to the VUAA.

The Trust Agreement is also not subject to the VUAA because it is not a contract. Contracts typically require both mutual assent and consideration between the parties. *See Spectra-4, LLP v. Uniwest Commercial Realty, Inc.*, 290 Va. 36, 45 (2015). The Virginia Supreme Court has held that a will is not a contract because the person who executes the will “can be the only party to the transaction.” *Martz’s Ex’r*, 66 Va. at 365. In fact, “the very essence of a genuine will is, that it is the voluntary, independent, individual act of the testator.” *Id.* at

366. Because a trust agreement, like a will, is the independent act of the settlor, it cannot be considered a contract, and thus, the Agreement is also not subject to the VUAA.

## **II. None of Plaintiff's Claims are Subject to Arbitration Because they Do Not Require Interpretation of the Trust Agreement.**

Under the Virginia Uniform Trust Code, trustees may “resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution[.]” VA. CODE ANN. § 64.2-778(A)(23). The grantor’s intent controls a court’s interpretation of the language of a trust agreement. *Harbour v. SunTrust Bank*, 278 Va. 514, 519 (2009). Where the language is “clear and unambiguous,” the court “will apply the plain meaning of the words that the grantor used.” *Id.* However, where the language is ambiguous, the rules of construction apply. *Id.* The arbitrability of Plaintiff’s claims in the present case, turn on this Court’s interpretation of the phrase “disputes arising hereunder,” as written in the Agreement.

Courts have construed the language in arbitration clauses to encompass either a broad array of claims or a narrow one. Language such as “related to” apply broadly to claims where the parties need only refer to a provision of an agreement to resolve the controversy. *McMullin v. Union Land & Mgmt. Co.*, 242 Va. 337, 342 (1991). For instance, in a case involving a claim against a partnership for the reasonable value of services that a partner had rendered to it, the court held that an arbitration clause applying to “any claim or controversy arising out of or relating to this Agreement or a breach hereof . . .” was sufficiently broad to encompass the claim for compensation. *Id.* at 340–42. Importantly, the court noted that the term “relating to” is broader than the language “arising out of.” *Id.* at 341. *But see Waterfront Marine Const., Inc. v. North End 49ers Sandbridge Bulkhead Groups A, B and C*, 251 Va. 417, 429–30 (1996) (stating that broad clauses are not without limit and refusing to apply an arbitration clause to an award from a previous arbitration because it did not require interpretation or application of the contract in which the arbitration clause was contained).

Similarly, in *Ahern v. Toll Bros., Inc.*, this Court held that arbitration clauses in a limited warranty and an agreement of sale were sufficiently broad to encompass claims including fraud, breach of warranty, breach of contract, false advertising, negligence per se, and a violation of the Virginia Consumer Protection Act. 55 Va. Cir. 18 (Va. Cir. Ct. 2001). There, the arbitration clause in the agreement of sale stated that it not only covered claims “arising out of this

Agreement,” but also claims “arising out of . . . the construction or condition of the Premises.” *Id.* This Court noted that it was the inclusion of the second clause which permitted the court’s broad interpretation, and, taken by itself, the phrase “‘arising out of’ would limit the scope of arbitration to any disputes involving the interpretation or performance of the contract.” *Id.*

Lastly, in *HZ Retail LLC v. Mohammed*, this Court re-iterated that “the contractual terms ‘arising out of or relating to’ are recognized as broad arbitration clauses that encompass contract-related disputes however labeled as opposed to narrow language such as ‘arising hereunder’ which is restricted to contract interpretation and performance.” 98 Va. Cir. 108 (Va. Cir. Ct. 2018) (citing *Ahern*, 55 Va. Cir. 18).

The arbitration clause in the present case includes the phrase “disputes arising hereunder” and therefore, under the aforementioned caselaw, warrants a narrow interpretation. Pursuant to section 11.02 of the Agreement:

This Trust shall be governed by and interpreted according to the laws of the Commonwealth of Virginia. Any disputes arising hereunder shall be subject to binding arbitration pursuant to the Virginia Uniform Arbitration Act, Va. Code §8.01-577, *et seq.*, in effect at the time of such dispute, with fees and expenses incurred to conduct the arbitration to be assessed as part of the reward.

Because the phrase “disputes arising hereunder” is ambiguous, this Court should first apply the rules of construction and consider the plain meaning of the terms to determine Ms. Kelly’s intent. *See Harbour*, 278 Va. at 519. According to the plain language, a dispute means “a conflict or controversy” and hereunder means “in accordance with this document.” BLACK’S LAW DICTIONARY (11th ed. 2019). Thus, applying the plain language, the Agreement clearly requires arbitration of any claim or controversy arising under the Agreement in its entirety.

Next, because this Court has previously stated that the term “arising hereunder” warrants a narrow application that limits the scope of arbitration to claims seeking either an interpretation of the agreement or to enforce performance of the agreement, this Court must consider whether any of Plaintiff’s claims require interpretation or enforcement of the Agreement. *See Ahern*, 55 Va. Cir. 18; *see also HZ Retail LLC*, 98 Va. Cir. 108. Count II alleges a breach of fiduciary duty as trustee against Elaine Giuliano. While this requires an analysis of whether Ms. Giuliano breached her duty as trustee, Plaintiff does not seek an interpretation of the Agreement, nor to enforce the Agreement. Similarly, Counts IV and V – Conspiracy to Breach Fiduciary Duty as Trustee and Conspiracy to Breach Fiduciary Duty as Agent – do not allege any ambiguity in the Agreement or ask the Court to interpret or enforce it. Count VI, likewise, requests no

interpretation or enforcement of the agreement. Because Plaintiff does not seek interpretation or enforcement of the Agreement, none of Plaintiff's claims are arbitrable under the Agreement. *See HZ Retail LLC*, 98 Va. Cir. 108.

### CONCLUSION

For the foregoing reasons, Defendant's Plea in Bar is denied. Counsel shall prepare an Order reflecting the Court's ruling and forward that Order to the Court for entry.

Sincerely,

A large black rectangular redaction box covering the signature of the sender.

Bruce D. White