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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1698**

In the Matter of the
John P. Weitzel and Mary M. Weitzel 2007 Irrevocable Trust
F/B/O Terese M. Weitzel

**Filed September 4, 2018
Affirmed
Rodenberg, Judge**

Ramsey County District Court
File No. 62-TR-CV-17-2

Robert H. Brandtjen, St. Paul, Minnesota (pro se appellant)

Christine E. Hinrichs, Casey D. Marshall, Bassford Remele, P.A., Minneapolis, Minnesota
(for respondent U.S. Bank, N.A.)

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant, on behalf of his minor son who is a beneficiary of the John P. Weitzel and Mary M. Weitzel 2007 Irrevocable Trust F/B/O Terese M. Weitzel, challenges the district court's summary dismissal of his claims against respondent-trustee U.S. Bank, N.A. He argues that the district court improperly granted summary judgment in favor of the trustee, should have permitted amendment of the complaint, and should have granted appellant injunctive relief. Because the district court did not err in summarily dismissing

appellant's claims against the trustee and did not abuse its discretion in denying appellant's motion to amend his complaint or in denying injunctive relief, we affirm.

FACTS

John P. Weitzel and Mary M. Weitzel (the settlors) and respondent trustee, U.S Bank N.A. (the trustee), established the John P. Weitzel and Mary M. Weitzel 2007 Irrevocable Trust F/B/O Terese M. Weitzel (the trust) on March 1, 2007. The trust named Terese M. Weitzel and her children, A.B. and W.B., as beneficiaries. W.B. is a minor child; his father, appellant Robert Brandtjen, represented W.B.'s interests in the proceeding below and now on appeal.¹ The trust has been funded solely by contributions from the settlors from time to time.²

Article I of the trust provides that the trust is irrevocable, and the transfer of property to the trustee is absolute. Article II provides that “[a]ny person may transfer property to the Trustee at any time.” The trust instrument provides two ways that distributions may be made from the trust estate to the beneficiaries. First, Article II provides that a beneficiary may make a withdrawal from the trust in accordance with the trust requirements “after any contribution to the trust estate.” The amount of the withdrawal by a beneficiary is “determined by dividing the balance of the contribution by the number of [b]eneficiaries.”

¹ The district court authorized appellant to represent W.B., who is his minor son, pursuant to Minn. Stat. § 501C.0303(a)(5) (2016). It further ordered that appellant may not represent A.B., who is an adult. A.B. neither filed a notice of appeal in this case nor makes any other appearance on appeal.

² The record makes it clear that this family has a number of ongoing conflicts, including apparently another court proceeding which does not involve the trustee. We see no need to recite details concerning these other conflicts. This appeal is limited to appellant's claims against the trustee.

Second, Article III of the trust provides that part or all of the net income from the trust may be distributed to the beneficiaries “in such amounts and proportions as the Trustee determines to be suitable and prudent to provide for any health, education, support or maintenance” subject to the trust terms.

From 2007 to 2016, the settlors contributed to the trust. Each contribution appears to have been completely distributed to the trust beneficiaries. Attorneys representing the settlors informed appellant of these distributions and that the trust does not obligate settlors to make contributions at all. On September 13, 2016, appellant was informed by settlors’ counsel that the settlors had ceased to make contributions to the trust and, therefore, no further distributions would be made from the trust. As of February 27, 2017, the trust assets had a negative value.

Appellant petitioned the district court for an accounting and for continuing court supervision. The petition alleged that the trustee had failed to provide an accounting of the trust assets and had failed to make distributions. Appellant’s complaint alleged that the trustee failed to gather the assets of the trust and maintain control of them, had breached its fiduciary duty in failing to “provide income from the [t]rust” to beneficiaries, had intentionally inflicted emotional distress on the beneficiaries, and failed to protect appellant and A.B. from abuse by the settlors by permitting them control over the trust.

Appellant moved for emergency injunctive relief to compel distributions from the trust. Appellant alleged that assets of the trust had been loaned to the settlors and that the trustee had refused to permit a disbursement of funds due to an outstanding note drawn on the trust. The trustee moved for summary judgment on all issues. Appellant and A.B.

moved to amend the complaint to add an additional racketeering claim against the trustee and to add additional defendants.

The district court denied appellant's motion to amend, concluding that the amendment would be futile and the proposed racketeering claim could not withstand summary judgment. The district court granted summary judgment in favor of the trustee on all claims. The district court also summarily dismissed appellant's motion for injunctive relief on behalf of A.B., concluding that none of the factors it analyzed weighed in favor of such relief.

This appeal followed.

D E C I S I O N

I. We do not consider appellant's arguments on behalf of his adult daughter, who is not an appealing party, or the extra-record materials contained in appellant's brief.

We first address the trustee's argument that we must disregard any arguments made by appellant on behalf of his adult daughter, A.B. Appellant represented his minor son, W.B., in the proceedings below under Minn. Stat. § 501C.0303(a)(5) and the district court's order; he continues to represent W.B. in this appeal. A.B. represented herself in the proceedings below. A.B. has not filed a notice of appeal, nor made any other appearance on appeal. See Minn. R. Civ. App. P. 103.01, subd. 1 ("An appeal shall be made by filing a notice of appeal."). Appellant is not a licensed attorney representing A.B., and he identifies no basis on which he may appear for A.B., even if she were making an appearance on appeal. For these reasons, we disregard all arguments in appellant's briefing purporting to be made on behalf of A.B.

The trustee further argues that we should strike two affidavits contained in appellant's addendum as extra-record material. "The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. "It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered." *Plowman v. Copeland, Buhl & Co., Ltd.*, 261 N.W.2d 581, 583 (Minn. 1977). Here, the complained-of affidavits are not only materials never presented to the district court, they were signed *after* the district court issued its order. Accordingly, we do not consider these extra-record materials submitted by appellant.³

II. The district court did not abuse its discretion in denying appellant's motion to amend his complaint.

Appellant raises arguments concerning his proposed Racketeer Influenced and Corrupt Organization Act (RICO) claim in his brief, which the district court did not permit appellant to assert by amendment to the pleadings. The district court concluded that amendment would be futile, because appellant did not propose a viable RICO claim as he did not allege the existence of a criminal enterprise, racketeering activity, or a pattern of racketeering activity.

"Generally, the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003). A district court may deny

³ The trustee filed a motion to strike appellant's reply brief because it contained extra-record material. We granted that motion by special-term order.

amendment if the “proposed amendment does not state a viable claim for relief.” *Anderson v. Minn. Ins. Guar. Ass’n*, 520 N.W.2d 155, 159 (Minn. App. 1994), *rev’d on other grounds*, 534 N.W.2d 706 (Minn. 1995).

“To establish a RICO violation, a plaintiff must allege and prove (1) the existence of an enterprise; (2) defendant’s association with the enterprise; (3) defendant’s participation in predicate acts of racketeering; and (4) defendant’s actions constitute a pattern of racketeering activity.” *Sinclair v. Hawke*, 314 F.3d 934, 943 (8th Cir. 2003) (quotation omitted). “Racketeering” does not include things like “garden-variety state law crimes, torts and contract breaches.” Instead, it encompasses “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical” along with mail fraud and interstate transportation of stolen property. *Annulli v. Panikkar*, 200 F.3d 189, 199-200 (3rd Cir. 1999) (quoting 18 U.S.C. § 1961(1)).

We see no abuse of the district court’s discretion in denying appellant’s motion to add a RICO claim because appellant made no prima facie showing of a viable RICO claim. First, appellant did not submit a proposed complaint for the district court’s consideration. More importantly, neither his motion to amend nor his arguments in support of the motion alleged the existence of a criminal enterprise, the trustee’s association with such an enterprise, or that the trustee participated in racketeering activity or a pattern of racketeering activity. Finally, appellant provides no authority on appeal to suggest that a trustee in the present context may commit a RICO violation by administering a trust according to its terms. We see no abuse of the district court’s discretion in denying the motion to amend.

III. The district court did not err in granting summary judgment in favor of the trustee, nor did it abuse its discretion in denying appellant injunctive relief.

We next address whether the district court erred in granting summary judgment in favor of the trustee on all of appellant's claims, including whether the district court abused its discretion in denying appellant injunctive relief. We address appellant's claims and requests for relief individually.

In an appeal from a grant of summary judgment, appellate courts review "whether there are any genuine issues of material fact and whether the district court erred in its application of the law. We view the evidence in the light most favorable to the party against whom summary judgment was granted. We also review de novo whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002) (citations omitted). A district court's interpretation of a trust agreement is reviewed de novo. *In re Pamela Andreas Stisser Grantor Trust*, 818 N.W.2d 495, 502 (Minn. 2012).

Appellant's Claims Concerning Trust Distributions

We first address whether the district court properly granted summary judgment in favor of the trustee on appellant's claims concerning the trust distributions and cessation thereof once the settlors discontinued making contributions to the trust. The district court concluded that the undisputed record evidence demonstrates that the trustee complied with the terms of the trust in making distributions and that the trust document does not obligate anyone to make contributions to the trust.

"A trustee derives his authority from the instrument creating the trust, and each case involving a question as to authority of the trustee must be decided in light of the provisions

of the particular trust instrument.” *Nat’l City Bank v. Coopers & Lybrand*, 409 N.W.2d 862, 866 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987). “So long as the trustees act in good faith, from proper motives, and within the bounds of reasonable judgment, the court will not interfere with their decisions.” *United States v. O’Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994).

Here, the record evidence and the terms of the trust support the district court’s grant of summary judgment. The terms of the trust permit the trustee to provide for proportional distribution to beneficiaries following a contribution to the trust, and for discretionary distributions for the benefit of a beneficiary. The language of the trust agreement does not *require* that the settlors, or anyone else, make any type of contribution to the trust. In the absence of contributions to the trust, the trustee is left with no funds from which to make distributions. As the district court concluded, the record contains no evidence that the trustee breached the terms of the trust concerning distributions. Instead, the record contains unrefuted evidence of regular financial statements documenting trust distributions up until the point when the settlors discontinued funding the trust.

Appellant further argues that the trustee improperly distributed a loan to Terese M. Weitzel, violating the trust provisions. The financial statements in the record indicate that the trust loaned Terese money. Article VII of the trust explicitly provides that the trustee may “make loans to the beneficiaries of a trust on such terms and conditions as the Trustee deems appropriate” and may “borrow money and mortgage or otherwise encumber or

pledge trust assets.” This activity, as the district court concluded, is within the trustee’s authority pursuant to the trust instrument.⁴

Accordingly, the district court did not err in granting summary judgment in favor of the trustee on this issue.

Appellant’s Claims Concerning Settlers’ Control Over the Trust and the Trustee’s Duty to Protect Trust Beneficiaries From Settlers’ Alleged Abuse

We next address appellant’s arguments concerning whether settlers exercised inappropriate control over the trust and whether the trustee thereby breached a duty to protect the trust beneficiaries. The district court concluded that the record contains no evidence that settlers exercised improper control over the trust.

To prevail on a claim for breach of fiduciary duty in Minnesota, “a plaintiff must show: (1) the existence of a fiduciary duty; (2) a breach of that duty; (3) causation; and (4) damages.” *Reisdorf v. i3, LLC*, 129 F. Supp. 3d 751, 767 (D. Minn. 2015), *see Padco, Inc., v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989) (recognizing that the same elements must be met for negligence and breach of fiduciary duty claims), *review denied*, (Minn. Nov. 15, 1989).

Appellant argues that the trust is not an irrevocable trust because Article II permits the settlers to exclude any beneficiary from withdrawal rights under the trust. Generally, a trust may not be revoked if there is no provision reserving that power. *Matter of Schroll*,

⁴ We note that the district court seems to have concluded that the current negative balance shown on the trust financial statements in the record is due to a note “held” by the trust. Our interpretation of the financial statements is that a note would have appeared on the statements as an asset. The negative balance shown in the trust financial records is not fully revealed by the record. In the final analysis, however, appellant has not identified any assets in the trust from which distribution could be made. And in the absence of such assets, distribution by the trustee is impossible.

297 N.W.2d 282, 284 (Minn. 1980). Appellant provides no Minnesota authority for the argument that an irrevocable trust is invalid if it contains a provision that a settlor may revoke a beneficiary's right to a withdrawal. More fundamentally, and as the district court concluded, the record does not indicate that this provision has ever been exercised, or that the provision has anything at all to do with W.B. no longer receiving distributions. The reason distributions have ceased is because the trust has no assets that the trustee could distribute.

The district court also concluded, in response to appellant's allegations that the trustee failed to protect the trust beneficiaries from the alleged abuse of the settlors, that the trustee had no duty to protect the trust beneficiaries. The district court relied on *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789 (Minn. 1995) to conclude that the trustee does not have a special relationship with W.B. that would render it responsible to protect W.B. from the settlors. Nothing in the record supports a conclusion that the trustee has any obligation to protect W.B. from allegedly abusive acts by settlors, or that W.B. depends on the trustee to protect him from abusive family members. See *Donaldson*, 539 N.W.2d at 792 (concluding that there is a special relationship providing a legal duty to act when "the plaintiff is in some respect particularly vulnerable and dependent on the defendant, who in turn holds considerable power over the plaintiff's welfare" and, to "reach the conclusion that a special relationship exists, it must be assumed that the harm to be prevented by the defendant is one that the defendant is in a position to

protect against and should be expected to protect against”).⁵ The district court properly granted summary judgment in favor of the trustee on this issue.

Appellant’s Claims Concerning the Trustee’s Duty to Provide Information

We next consider whether the district court erred in granting summary judgment on appellant’s claims concerning the trustee’s duty to provide information to appellant. The district court concluded that the record shows the trustee to have fulfilled its statutory obligations by providing account statements to appellant and A.B. on an ongoing basis from 2007 to 2016, and further determined that no record evidence indicates that appellant ever claimed the trustee’s information was inadequate.

The duty of a trustee to provide information concerning the trust is governed by Minn. Stat. § 501C.0813(a) (2016). That provision provides that a trustee must “keep the qualified beneficiaries of an irrevocable trust reasonably informed about the administration of the trust and of the material facts necessary to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related” to the trust.

The record supports the district court’s conclusion that this trustee properly communicated trust information to appellant. Appellant has been receiving regular financial statements from the trustee. Although the statements from the early years of the trust were addressed solely to Terese M. Weitzel, the mother of A.B. and W.B., those statements were sent to appellant’s home address (where appellant still resides). There is

⁵ By all appearances, the distributions to W.B. were used for tuition, a laudable purpose. But the absence of funding for private schooling does not amount to abuse from which W.B. must be protected by the trustee.

no evidence in the record indicating that appellant informed the trustee at any time before he commenced this action that the information it was providing was inadequate. Even after this proceeding was initiated, the record establishes that the trustee has continued to supply any and all requested relevant information. There is no genuine issue of material fact for trial on this point.

Appellant's Claims Concerning Fraud

We also consider whether the district court erred in granting summary judgment on appellant's claims that the trustee committed fraud in its administration of the trust. The district court concluded that the "record lacks any evidence that the Trustee made a false representation, with intent to deceive, inducing reliance and resulting in damage" to appellant. These are elements required for a claim of fraud. *See Royal Realty Co. v. Levin*, 69 N.W.2d 667, 670 (Minn. 1955).

A review of the record supports the district court's conclusion that there is no evidence that this trustee ever made a false representation with an intent to deceive, or that such a representation caused appellant to rely on any such representation resulting in damage. The district court properly granted summary judgment on appellant's unsupported fraud claims.

Appellant's Claims Concerning the Trustee's Failure to Control Trust Property

We next address whether the district court erred in summarily dismissing appellant's claims that the trustee failed to take control over trust property. The district court concluded that there is no genuine issue of material fact concerning whether the trustee breached any duty, because the record does not demonstrate that the trustee failed to take control of any asset of the trust or trust property.

“A trustee shall take reasonable steps to take control of and protect the trust property.” Minn. Stat. § 501C.0809(b) (2016).

The record supports the district court’s conclusion that there is no evidence that the trustee failed to take control of any trust property. This trust provides for contributions from the settlors and does not mandate contributions. The settlors have declined to fund the trust, but the trustee has no duty to interfere with the settlors’ funding decision(s).

The trustee continues to hold shares of EES Holdings in the trust. The record contains no evidence indicating that the shares have value and the district court so determined. The record also contains no evidence that the trustee improperly managed the trust’s ownership of these shares in violation of the trust or statutory trust requirements. Moreover, because the shares are, by all indications, valueless, the beneficiaries have suffered no damage as a result of the trustee’s continuing to hold these worthless shares.

The district court further concluded that an equitable accounting is not available here because the trust account here is not “exceedingly complicated.” See *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 57 n.3 (Minn. 2012) (providing that equitable accounting is available where a fiduciary owes an equitable duty to account and the accounts at issue are exceedingly complicated). We agree with the district court that this trust consists primarily of cash contributions and disbursements to a small number of beneficiaries. The account contains a limited number of investment instruments which are not subject to frequent transactions. The record supports the district court’s conclusion that an equitable accounting is not appropriate.

Appellant's Claims Concerning Intentional Infliction of Emotional Distress

We next consider whether the district court erred in granting summary judgment in favor of the trustee on appellant's claims concerning intentional infliction of emotional distress. The district court concluded that the record contains no evidence that the trustee engaged in any extreme or outrageous conduct, or any intentional or reckless conduct.

A plaintiff claiming intentional infliction of emotional distress must establish conduct that was extreme and outrageous, intentional, or reckless, that caused severe emotional distress. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). "If the claimed distress is the type people commonly encounter and endure in their lives, the claim should not be submitted to a jury." *Lee v. Metro. Airport Comm'n*, 428 N.W.2d 815, 823 (Minn. App. 1988).

The record supports the district court's summary dismissal of these claims. As discussed, appellant failed to establish any violation of the trustee's duties, and nothing in the record suggests any intentional, reckless, or extreme and outrageous actions by the trustee. Whatever distress the beneficiaries felt as a result of settlors having discontinued funding of the trust—such as W.B. no longer being able to attend the school of his choice—this type of distress does not rise above the level of what people "commonly encounter and endure in their lives." *Id.* We note that our focus in this case is on the liability of the trustee, U.S. Bank; we do not review or consider the actions of settlors, who are nonparties to this case.

The district court did not err in granting summary judgment in favor of the trustee on this issue.

Appellant's Request for Injunctive Relief

We next review whether the district court abused its discretion in denying appellant's request for temporary and permanent injunctive relief. The district court concluded that appellant is not entitled to injunctive relief because the record reveals no claim of "irreparable harm appropriate for injunctive relief." The district court concluded that appellant failed to establish a likelihood of success on the merits on any of the asserted claims.

"The grant of a temporary injunction is an extraordinary remedy," and is largely entrusted to the district court's discretion. *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). We review the grant or denial of an injunction for abuse of discretion. *Id.* A five-factor test should be applied to determine whether a temporary injunction is proper, examining the relationship between the parties, the harm to be suffered by the party seeking the injunction if relief is denied compared to that inflicted on the other party if the injunction is put in place pending trial, the likelihood that one party or the other will prevail on the merits, public-policy considerations, and the administrative burden of enforcing the injunction. *Id.*

We see no abuse of the district court's discretion in its denial of injunctive relief. Because the district court properly granted summary judgment in favor of the trustee on all of appellant's substantive claims, a grant of any injunctive relief would have been improper. The district court rightly concluded that there was no likelihood that appellant's claims would succeed on their merits. The record amply supports the district court's denial of injunctive relief.

Affirmed.