

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOHN R. STEWART,

Plaintiff and Appellant,

v.

HAROLD K. KONO et al.,

Defendants and Respondents.

2d Civil No. B234722
(Super. Ct. No. 1339150)
(Santa Barbara County)

Plaintiff John R. Stewart, the former trustee of a living trust, appeals a judgment of dismissal following the sustaining of a demurrer without leave to amend. Stewart filed a professional negligence action against defendant Harold K. Kono, his attorney while he (Stewart) was trustee. He also named defendants Dawson & Dobbs, a partnership, and Carla M. Dobbs, the accountants who performed services for the trust and estate (collectively "Dobbs" or "accountants") while he (Stewart) was trustee. We conclude, among other things, that Stewart did not state facts sufficient to state a cause of action against Kono or the Dobbs defendants. We affirm.

FACTS

In 2006, Stewart was the trustee of his brother's living trust and the executor of his estate. He hired attorney Kono to represent him in his capacity as a trustee and executor. He hired Dobbs to provide accounting services for the estate and trust.

In 2008, two objectors filed a petition to remove Stewart as trustee. They claimed the attorney fees and accounting services that Stewart incurred for the trust were "excessive and unwarranted," that his investments were improper, and that he incurred excessive debt. The court removed Stewart as trustee.

Stewart filed an action against Kono and Dobbs. He alleged they did not protect his "personal interests" when he was trustee and he sustained damages because of their negligence. He alleged causes of action for breach of a fiduciary duty, constructive fraud, professional negligence, indemnity and declaratory relief.

Kono and Dobbs filed demurrers. They claimed Stewart lacked standing as a former trustee to sue them regarding services they provided when Stewart was the trustee.

The trial court sustained the demurrers to Stewart's third amended complaint without leave to amend. It noted that all of his causes of action were based on the alleged breach of a personal duty the defendants owed to him. It ruled Stewart did not state facts that "give rise to the existence of a legal duty owed by any of the defendants to [him] in his individual capacity." It ruled, "[T]he professionals' only duty was . . . to [Stewart as] the trustee in his official capacity, . . . they 'in nowise' ever represented [him] personally or owed him any duty."

DISCUSSION

A Former Trustee's Standing To Sue His Counsel

Stewart contends the trial court erred by preventing him from suing his former attorney for alleged malpractice committed when he (Stewart) was the trustee of the trust.

Kono responds that because Stewart is no longer the trustee, Stewart lacks standing to initiate this action. He cites *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, where the court held a successor trustee may assert attorney-client privilege for communications between the former trustee and estate counsel. The court said, "The powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee." (*Id.* at p. 1131.) "It has been the law in California for over a

century that a new trustee 'succeed[s] to *all* the rights, duties, and responsibilities of his predecessors.'" (*Ibid.*) He also cites *Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 528, where the court held a "successor fiduciary of an estate in probate [may] assert a professional negligence claim against tax counsel whom a predecessor fiduciary engaged exclusively to perform tax work for the estate." But these issues are collateral to the points raised by Stewart.

As the trial court correctly observed, these cases do not resolve whether "a predecessor trustee may sue professionals retained by him."

Kono claims that as a matter of law he owed a duty to Stewart only in Stewart's official capacity as trustee. He contends a trust attorney owes no duty to a trustee as an individual; and, consequently, a malpractice claim may only be pursued by the current trustee on behalf of the trust.

But in *Moeller*, the court noted that the trustee's "fiduciary and personal capacities" may "overlap." (*Moeller v. Superior Court, supra*, 16 Cal.4th at p. 1135.) In such cases, the attorney may have to respond to two potentially conflicting duties: 1) to represent the trustee in his or her official capacity, and 2) to protect the trustee individually. (*Ibid.*) Where such conflict arises, the "trustee can mitigate or avoid the problem by retaining and paying out of his or her own funds separate counsel for legal advice that is personal in nature." (*Ibid.*) But the court also said, "[T]he distinction between these two types of confidential trustee-attorney communications--administrative, on the one hand, and defensive, on the other--may not always be clear." (*Ibid.*)

The estate's attorney may have an obligation to inform the trustee of the options available when potential conflicts arise. Conflicts in representing the trustee's official and personal interests may be subtle and difficult for the client to detect. (*Moeller v. Superior Court, supra*, 16 Cal.4th at p. 1135.) Consequently, the attorney must disclose them and "all facts and circumstances which . . . are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 147.) In cases where a

conflict arises and the attorney for the trustee fails to advise the trustee, a cause of action may be valid.

But here Stewart does not state sufficient facts to state a cause of action. He alleges Kono did not advise him that he should have obtained separate counsel to represent his "personal interests." But he does not specify what acts or events triggered the duty to provide this advice, when they occurred, or when the duty to advise arose. Stewart repeatedly refers to Kono's duty to represent his "personal interests" without specifying the nature of those interests or the specific terms of an agreement to represent him. He suggests there was a conflict of interest without stating sufficient facts to describe the conflicting interests. Instead, his causes of action are based on a series of conclusory allegations. But a pleading must contain "facts and not conclusions." (*Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537.)

Stewart alleges that Kono represented him ineffectively on a series of "personal" matters that subjected him to personal liability. But these claims arose while Stewart was acting as executor or trustee. As Kono notes, the attorney services Stewart mentions involve representing Stewart in that capacity, i.e., filing accountings, reports, defending challenges to Stewart's acts as trustee/executor, defending a petition to remove him as trustee, and seeking adequate reimbursement for Stewart's expenses incurred as the trustee. Stewart claims Kono was supposed to protect him from personal liability. But he does not allege the terms of an agreement to provide such representation.

The Liability of the Former Trust and Estate Accountants

Stewart alleges Dobbs provided accounting services to the trust/estate and also "services with respect to [his] personal interests."

Dobbs claims: 1) the "personal interests" Stewart alleges refer only to accounting services to Stewart in his capacity as trustee, and 2) Stewart's conclusory statements that they provided "services" for his "personal interests" were insufficient to state a cause of action. We agree.

"It is settled law that a pleading must allege facts and not conclusions, and that material facts must be alleged directly" (*Ankeny v. Lockheed Missiles & Space*

Co., supra, 88 Cal.App.3d at p. 537.) The trial court correctly ruled that Stewart did not plead sufficient facts to describe the alleged services for his "personal interests." He did not plead causes of action against Dobbs that were unrelated to his status as trustee. Stewart alleged Dobbs provided "accounting services and advice to [Stewart] with respect to his involvement *with* [his brother's] *estate and trust*." (Italics added.)

The trial court also took judicial notice of a 2008 probate petition for "settlement of first account" where Stewart stated Dobbs' work involved accounting services for the trust and the estate. Stewart said those services included preparing: 1) the "decendent's Federal estate tax return," 2) the "decendent's individual income tax returns," 3) the trustee's "first annual accounting," and 4) "information regarding estate accounting requirements for court review." In that petition Stewart did not claim these accountants were retained for his personal benefit. He asked court approval to pay the Dobbs billing from trust/estate funds. "The courts . . . will not close their eyes to situations where a complaint contains allegations . . . contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

The judgment is affirmed. Costs on appeal are awarded in favor of the respondents.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Denise de Bellefeuille, Judge
Superior Court County of Santa Barbara

James P. Ballantine for Plaintiff and Appellant John R. Stewart.

Gaglione, Dolan & Kaplan, Robert T. Dolan, Kaiulani S. Lie for Defendant
and Respondent Harold K. Kono.

Horton & DeBolt, LLP, DeBolt Fields, LLP, Barton E. DeBolt, Maria L.
Garcia for Defendants and Respondents Dawson & Dobbs, LLP, and Carla M. Dobbs.