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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ELIZABETH EVA BRICHETTO,

Plaintiff and Appellant,

v.

ELIZABETH M. BRICHETTO, Individually and
as Trustee, etc. et al.,

Defendants and Respondents.

F063326

(Super. Ct. No. 653879)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. William A. Mayhew, Judge.

Law Offices of Daniel L Mitchell and Daniel L Mitchell for Plaintiff and Appellant.

Damrell, Nelson, Schrimp, Pallios, Pacher & Silva, Roger M. Schrimp and James A. Oliveira for Defendants and Respondents.

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The trial court sustained, without leave to amend, defendants/respondents' demurrer to plaintiff/appellant's third cause of action. Appellant, Elizabeth Eva Brichetto challenges that order. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On October 1, 1987, George L. Brichetto and Elizabeth M. Brichetto created a revocable living trust known as "The BRICHETTO TRUST dated October 1, 1987" (the trust). George Brichetto and respondent Elizabeth M. Brichetto, were the trustors, co-trustees and initial beneficiaries of the trust. They had three children, Louis F. Brichetto, appellant Elizabeth Eva Brichetto, and respondent John P. Brichetto. According to the trust, "[s]uccessor beneficiaries are those persons designated in Article 2." All three children are mentioned in Article 2 of the trust. The trust instrument contemplated certain changes over time in accordance with the trustors' estate planning desires. While both trustors were alive, all the trust assets were held in a single, unified trust, the purpose of which was, in essence, to provide for the trustors' financial needs. After the death of one spouse, the trust corpus was to be divided into three entities, designated Trusts A, B and C. Trust A was to be composed, in essence, of the surviving spouse's share of the trustors' community property, together with the separate property of the surviving spouse. Trust C was to be composed, in essence, of the maximum amount of the decedent spouse's community property share and separate property that could be transferred without federal estate taxes under the marital property deduction established in the Internal Revenue Code. Trust B consisted of all other property of the trustors that was not contained in Trust A or C. As relevant here, the trustors' estate plan anticipated that, after the death of the first trustor, the three children would receive the income from Trust B in various designated portions.

The present dispute involves the portion of Trust B originally designated for appellant. That portion of the original trust provides:

“DISTRIBUTION OF INCOME: During the lifetime of the surviving trustor, the net income of TRUST B shall be distributed as follows:

“... The net rental income, after payment of costs and expenses, from 500 acres of dry land pasture shall be distributed to ELIZABETH EVA BRICHETTO in convenient installments no less often than quarterly. If ELIZABETH EVA BRICHETTO is not then living, or upon the death of ELIZABETH EVA BRICHETTO, this share shall be added to the balance of Trust B and shall be distributed as provided below.”

Subsequent portions of the original trust provide:

“AFTER THE DEATH OF BOTH GEORGE L. BRICHETTO AND ELIZABETH M. BRICHETTO: Upon the death of the surviving trustor, the remaining balance of Trusts A, B and C, including any assets subsequently added to the trust, shall be held, administered and distributed as follows:

“The 500 acres of dry land pasture as described in Trust B, shall remain in trust for the benefit of ELIZABETH EVA BRICHETTO for her lifetime. So long as ELIZABETH EVA BRICHETTO is living the trustee shall pay to or apply for the benefit of ELIZABETH EVA BRICHETTO, the entire net rental income, after payment of costs and expenses of said 500 acres. Upon the death of ELIZABETH EVA BRICHETTO this share of the trust estate shall be distributed to LOUIS F. BRICHETTO and JOHN P. BRICHETTO.”

The trust was amended at various times. The second amendment to the trust dated July 21, 1990, changed the foregoing provisions. The second amendment provided that “all income of Trust B shall go to the surviving spouse for the balance of her life.” The amendment further stated: “[T]he 500 acres of dry pasture land, from which ELIZABETH EVA BRICHETTO is to receive net income for her lifetime, shall be selected by the Trustees Such acreage may be changed from time to time as the Trustees deem necessary.” George Brichetto died on September 24, 1990. The original trust instrument stated: “After the death of the first trustor to die, Trust B and Trust C may not be amended by the surviving trustor.” That limitation was not altered in any subsequent amendment, nor were there any attempts by the surviving spouse to amend Trust B, although she did further amend Trust A, which, as noted, was to contain the surviving spouse’s separate property and her share of community property.

Accordingly, and in summary, at the time of George Brichetto's death in 1990, appellant had a remainder interest for life, subsequent to her mother's death, in the net income of 500 acres of dry pasture land, but the particular pasture land could be "changed from time to time" in the discretion of the trustees. Appellant's mother, respondent Elizabeth M. Brichetto, is still living. Appellant acknowledges that appellant's right to income from Trust B has not, at this time, become a present interest.

Nevertheless, on May 17, 2010, appellant filed a complaint alleging she has a continuing beneficial interest in the trust and respondents failed to protect this interest by not funding Trust B upon George Brichetto's death in 1990. The complaint alleges that around September 2009,¹ "[respondents'] representative inferred [*sic*] that [appellant's] interests were precluded for tax related reasons." Appellant states in her complaint that this was "her first inquiry" as to her "beneficial interest." Somewhat inconsistently, the complaint also alleges that Elizabeth M. Brichetto "*has at all times* represented that the failure to protect [appellant] Elizabeth Eva Brichetto's beneficial interest in the 500 acres of dry land pasture in the Trust was an 'oversight.'" (Italics added.) The complaint states that respondents "have transferred or are in the process of transferring land including the 500 acres ... to their personal ownership, for their own use, benefit and purpose such that [appellant's] beneficial interest will never be received." The complaint alleges that respondents never provided appellant with a written report or an accounting and appellant requested the latter. Appellant emphasized in her complaint that she was not aware of respondents' actions because as her mother and brother, she "reposed an exceptional degree of reliance upon their good faith" These allegations were incorporated in the following six causes of action appellant included in her complaint: mismanagement of

¹ Elsewhere in the complaint, appellant alleges she learned her interests might be precluded around June 2009. We will assume that appellant obtained this information sometime in 2009.

trust assets, self-dealing by trustees, trustees' breach of fiduciary duty, fraud and intentional deceit, fraud and negligent misrepresentation, and general negligence. Appellant attached the trust, which included the amendments, to her complaint as "Exhibit A" (full capitalization omitted).

Respondents filed a demurrer to all causes of action. After the trial court sustained the demurrer for failure to state a cause of action and granted appellant leave to amend, appellant filed her first amended complaint alleging the same causes of action. Respondents filed a demurrer to the first amended complaint. The demurrer to the first amended complaint was sustained and appellant was granted leave to amend.

Appellant filed her second amended complaint that now alleged a seventh cause of action for an accounting. Respondents again filed a demurrer. The trial court sustained the demurrer to the second amended complaint and granted leave to amend "because counsel agreed [appellant's] counsel inadvertently omitted some allegations from the second amended complaint."² Appellant filed her third amended complaint, adding allegations to her accounting cause of action, and respondents filed another demurrer. On July 18, 2011, the trial court sustained the demurrer to the third amended complaint without leave to amend because the complaint did not "state facts sufficient to state any cause of action" against respondents. The court found that the defect could not be cured by amendment and dismissed the action with prejudice in its entirety.

DISCUSSION

Appellant contends that each cause of action in her complaint currently states facts sufficient to constitute a cause of action. (She does not contend the trial court abused its discretion in denying a further opportunity to amend the complaint.)

² In the second amended complaint, appellant did not include any new allegations under her accounting cause of action.

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.’” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “Facts appearing in exhibits attached to a complaint will also be accepted as true and will be given precedence over any contrary allegations in the pleadings.” (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044-1045.) “Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.” (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) We review only the third amended complaint. “[An] amended pleading supplants all prior complaints. It alone will be considered by the reviewing court.” (*O’Melia v. Adkins* (1946) 73 Cal.App.2d 143, 147; see also *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215.)

We conclude the trial court did not err in sustaining respondents’ demurrer to the first through sixth causes of action, because each of those causes of action is barred by the statute of limitations.

“The applicable statute of limitations depends on ‘[the] nature of the cause of action, i.e., the “gravamen” of the cause of action.’” (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316 (*E-Fab, Inc.*), quoting *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22.) The three-year statute of limitations set forth in Probate Code section 16460, subdivision (a)(2) applies to claims by beneficiaries against trustees. (*Noggle v. Bank of America* (1999) 70 Cal.App.4th 853, 858.) This is the statute of limitations applicable to four of appellant’s causes of actions: mismanagement

of trust assets, self-dealing by trustees, trustees' breach of fiduciary duty, and general negligence.

It is apparent from the third amended complaint, and from our foregoing factual summary, that the central fact relevant to these four causes of action is the failure of the trustees to fund Trust B in 1990 and at all times thereafter. Appellant's civil action was not filed until 2010, a date shown by the face of the complaint to be far more than three years from the trustees' alleged breach of duty. Nevertheless, Probate Code section 16460 provides for tolling of the statute of limitations in certain circumstances if the trustees have not provided a written report to the beneficiaries. (*Noggle v. Bank of America, supra*, 70 Cal.App.4th at p. 859.) Appellant alleges in her third amended complaint that the trustees provided no such report. Probate Code section 16460, subdivision (a)(2), provides, in relevant part: "[I]f a beneficiary does not receive any written account or report, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim."

Thus, Probate Code section 16460 incorporates the discovery rule to permit tolling of the statute of limitations under certain conditions. (*Quick v. Pearson* (2010) 186 Cal.App.4th 371, 378.) "Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' [Citations.] An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.] [¶] A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citation.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806-807 (*Fox*).

The discovery rule also operates to toll, in similar circumstances, the statute of limitations for appellant's fraud causes of action. The applicable statute of limitations for those causes of action is also three years. Code of Civil Procedure section 338,

subdivision (d) provides, in relevant part: “The cause of action ... is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.” “By statute, the discovery rule applies to fraud actions.” (*E-Fab, Inc., supra*, 153 Cal.App.4th at p. 1318.)

Appellant contends her first through sixth causes of action were commenced in a timely manner because the causes of action “do not accrue until the aggrieved party discovers the facts constituting the fraud.” This is, however, a critically incomplete statement of the law, omitting the important qualifier directly applicable to the present case: “[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run *when the plaintiff has reason to suspect an injury and some wrongful cause*, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action.” (*Fox, supra*, 35 Cal.4th at p. 803, italics added.)

Appellant attempts to invoke the discovery rule in her complaint by stating that she was “unaware that [respondents], and each of them, had transferred or are in the process of transferring land or its value held by the Trust to their personal ownership” However, these allegations are inadequate to invoke the discovery rule. “In order to rely on the discovery rule for delayed accrual of a cause of action, ‘[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.’” (*Fox, supra*, 35 Cal.4th at p. 808; see also *E-Fab, Inc., supra*, 153 Cal.App.4th at pp. 1324-1326.)

Appellant does plead some minimal and vague allegations in an apparent attempt to demonstrate the time and manner of discovery of relevant facts. She alleges that in 2009, “[respondents’] representative inferred [*sic*] that [appellant’s] interests were precluded for tax related reasons.” Appellant alleges this was when “her first inquiry was

made as to her beneficial interest” However, appellant does not state what prompted her to make this inquiry almost 20 years after her father’s death, even though the complaint acknowledges that respondents failed to act in 1990: “Upon the death of George L. Bricchetto on September 24, 1990 the Trustor/Trustee Elizabeth M. Bricchetto and Trustee John P. Bricchetto did not fund Trust B....” The third amended complaint, in fact, necessarily implies appellant was aware of this key fact, that Trust B had not been funded, at all times since 1990. Thus, that complaint alleges: “... Elizabeth M. Bricchetto has *at all times* represented that the failure to protect [appellant] Elizabeth Eva Bricchetto’s beneficial interest in the 500 acres of dry land pasture in the Trust was an ‘oversight.’” (Italics added.)

Accordingly, appellant has not met her burden under *Fox, supra*, 35 Cal.4th at page 803, to plead facts demonstrating that she was unable to have made an earlier discovery despite reasonable diligence, or that she attempted to exercise reasonable diligence. Even though the third amended complaint alleges that appellant’s mother was offering excuses for failing to fund Trust B as early as 1990, appellant does not allege that appellant inquired about her beneficial interest in the trust until 2009. She has failed to demonstrate that “a reasonable investigation at [the time of her father’s death in 1990] would not have revealed a factual basis for that particular cause of action.” (*Ibid.*) Instead, appellant merely alleges she “reposed an exceptional degree of reliance upon [the trustees’] good faith, as her mother and brother, such that she was unaware of the mismanagement and self-dealing of [respondents]” However, the duty of inquiry imposed by Probate Code section 16460 is applicable even in circumstances of a beneficiary-trustee relationship. (*Noggle v. Bank of America, supra*, 70 Cal.App.4th at pp. 858-859.) Here, appellant has alleged, in effect, that as early as 1990 one of the trustees acknowledged to appellant that the trustees had breached Trust B by failing to fund that trust. This admission, regardless of the cause for the breach asserted by the trustee, was sufficient to raise a duty of inquiry. Appellant has not alleged reasonable

diligence in pursuing a timely investigation of the issues and, consequently, she has failed to establish that her causes of action did not arise until 2009.³

Appellant also contends in her opening brief that there is no statute of limitations issue because of the spendthrift provision of the trust, which provides: “No interest in the principal or income of any trust created under this trust instrument shall be anticipated, assigned, encumbered or subjected to creditors’ claims or legal process before actual receipt by a beneficiary.” “[A] spendthrift provision protects the income and principal interests of the beneficiaries from third party claims as long as the income or principal is properly held by the Trust.” (*Chatard v. Oveross* (2009) 179 Cal.App.4th 1098, 1106.) Appellant cites no authority for the far broader proposition that a beneficiary is entitled to ignore facts establishing grounds to believe, for example, a trustee has defrauded the trust, and we decline to create such a rule, which bears no relationship in logic or policy to the reasons for including a spendthrift provision in a trust.

In addition to the six causes of action that arose from the trustees’ alleged failure properly to fund Trust B, appellant also alleges a seventh cause of action for an accounting. The third amended complaint alleges respondents had a duty “to provide periodic statements of accounts of all moneys and property of the Trust.” Appellant further alleges that “Beginning on October 1, 1987, in the course of the said charge and management [respondents] have undertaken numerous sales transactions, transfers, contracts, operations, creation of business entities, which effect [*sic*] the beneficial interests of [appellant] in the Trust without notice to [appellant] herein.” Appellant alleged she requested an accounting, but was not provided with one.

³ We are not required in the present case to decide, and we do not decide, whether appellant could state a timely cause of action for failure of the trustee to pay to her the quarterly rent payments in Trust B, if appellant survives her mother. Appellant acknowledges she is not entitled to current payments from the trust at this time, and the third amended complaint does not assert a present right to income.

Contrary to appellant's allegation, respondents were not required to provide her with "periodic statements." A trustee is only required to provide an annual accounting to those beneficiaries "to whom income or principal is required or authorized in the trustee's discretion to be currently distributed." (Prob. Code, § 16062.) Appellant admits she is presently not entitled to income from Trust B. Accordingly, appellant failed to state a cause of action for an accounting. However, as a beneficiary, appellant does have a right to make a reasonable request for information about the trust and respondents had a duty to fulfill this request. "[O]n reasonable request by a beneficiary, the trustee shall report to the beneficiary by providing requested information to the beneficiary relating to the administration of the trust relevant to the beneficiary's interest." (*Id.*, § 16061.) Whether the beneficiary seeks an accounting or merely information, however, that request must be filed as a petition in the probate court. "The probate court has exclusive jurisdiction over proceedings concerning the internal affairs of the trust." (*Soria v. Soria* (2010) 185 Cal.App.4th 780, 786.) "A proceeding concerning the internal affairs of a trust is initiated by petition to the probate court pursuant to [Probate Code] sections 17200, subdivision (a)" (*Id.* at pp. 786-787; see Prob. Code, § 17200, subd. (b)(7)(B).) Because appellant's allegations concerned the "internal affairs" of the trust and she was requesting an accounting, she was required to file a petition pursuant to Probate Code section 17200, subdivision (a) to compel respondents to provide an accounting instead of including the relevant cause of action in her complaint. (*Soria v. Soria, supra*, 185 Cal.App.4th at p. 788.) Respondents' "failure to object to civil court jurisdiction did not relieve [appellant] of compliance with the required Probate Code procedures" (*Ibid.*) Because the civil court is without jurisdiction to grant a petition for information, the court did not abuse its discretion in denying appellant leave to amend the seventh cause of action to request such information in place of her request for an accounting.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondents.

DETJEN, J.

WE CONCUR:

LEVY, Acting P.J.

GOMES, J.