

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: August 18, 2015)

RHODE ISLAND RESOURCE
RECOVERY CORPORATION,
Plaintiff,

v.

RESTIVO MONACELLI, LLP,
Defendant.

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C.A. No. PB 10-4502

DECISION

SILVERSTEIN, J. This matter returns to the Court for decision on Defendant Restivo Monacelli, LLP’s (Restivo) Motion for Partial Summary Judgment questioning whether Plaintiff Rhode Island Resource Recovery Corporation (RIRRC) has appropriate standing to file suit against Restivo for its alleged injury stemming from its mandatory funding obligations to maintain certain minimum balances in two trust funds. In its operative Complaint, RIRRC claims investment losses to two trusts—the Central Landfill Remediation Trust Fund (Remediation Trust) and the Closure/Post-Closure Trust Fund (Closure Trust) (collectively, the Trusts)—due to its delayed termination of the Van Liew Trust Company (Van Liew), as fund manager and investment manager, which RIRRC attributes to Restivo’s auditing deficiencies in its compliance testing of Van Liew. In a prior Decision from this Court, issued on February 23, 2015¹, the Court found issues of material fact precluded entry of summary judgment with respect to whether Restivo had breached the standard of care owed to RIRRC with respect to these allegations. Now, arguing again for summary judgment, Restivo maintains any claims for damages emanating from the Trusts’ underperformance must be brought by the Trusts’ trustee,

¹ See R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502, 2015 WL 851463 (R.I. Super. Feb. 23, 2015) (Silverstein, J.).

Washington Trust Company (Washington Trust), and not by RIRRC, as the settlor and a beneficiary of the Trusts.

I

Facts and Travel

In light of the Court’s lengthy recitation of the facts of this case in its February 23, 2015 Decision, the Court will focus only on those narrow facts related to the formation of the Trusts, the rights of the trustee, and RIRRC’s engagement of Van Liew. By way of background, on May 16, 1996, a consent decree was filed in the United States District Court for the District of Rhode Island between the United States of America, on behalf of the Administrator of the United States Environmental Protection Agency (EPA), and the Rhode Island Solid Waste Management Corporation (subsequently renamed RIRRC) (the Consent Decree). See Robert C. Shindell Aff., Ex. B, Apr. 13, 2015. The Consent Decree was entered into by the parties in response to a complaint brought by the EPA against RIRRC based on the condition of the Central Landfill Superfund Site in Johnston, Rhode Island. Pursuant to Section XIV of the Consent Decree and as part of the agreed-upon remediation plan for the site, RIRRC agreed to establish the “Central Landfill Remediation Trust Fund.” Among other requirements, the Consent Decree outlined certain monetary obligations of RIRRC, including the condition that RIRRC deposit into the Remediation Trust “any additional sums necessary to bring the balance of the Trust Fund to one million dollars (\$1,000,000) above the level required to pay [RIRRC’s] projected expenses for the following calendar year, as modified, if at all, by EPA.” Id., Ex. B at ¶ 55. The Consent Decree further required that “[i]f the \$1 million minimum balance is also insufficient to cover the shortfall, [RIRRC] immediately shall take all steps necessary to secure sufficient funding from any and all available sources as set forth in Paragraph 54.” Id. at ¶ 55.

The Remediation Trust was officially established upon the execution of the Central Landfill Remediation Trust Fund Agreement (Remediation Trust Agreement) on August 6, 1996 between RIRRC, as settlor (and successor in interest to Rhode Island Solid Waste Management Corporation), and Van Liew, as trustee. The Remediation Trust’s express purpose, as set forth in the Remediation Trust Agreement, was to “obtain, hold, invest and disburse funds to be utilized for the payment of certain obligations of the Settlor in connection with the remediation of the Central Landfill Superfund site in Johnston, Rhode Island.” (Shindell Aff., Ex. C. at ¶ 2). The Remediation Trust Agreement conferred several powers upon Van Liew, as trustee, including the authority to “hold the Trust Estate and [to] invest and reinvest the Trust Estate solely in accordance with written instructions given from time to time by [RIRRC], which instructions shall be consistent with the then current investment policies of the Board of Commissioners of [RIRRC].” Id. at ¶ 4. Moreover, the trustee has the power to “compromise, adjust and settle claims for or against the Trust Estate[.]” Id. at ¶ 4(e). On January 15, 2008, Washington Trust succeeded Van Liew as trustee of the Remediation Trust in accordance with the provisions of the Remediation Trust Agreement. See Michael J. OConnell Aff., Ex. 1, April 27, 2015.

On March 24, 1998, RIRRC created the Closure Trust in order to comply with Solid Waste Regulation No. 2 for Solid Waste Landfills promulgated by the Rhode Island Department of Environmental Management (DEM) (effective January 1997). The DEM regulations “requir[ed] that an owner or operator of a solid waste management facility . . . provide assurance that funds will be available when needed for closure and/or post-closure care of the facility.” See Shindell Aff., Ex. E (Closure Trust Agreement). One possible mechanism delineated in the regulations for RIRRC to “demonstrate financial assurance” that it would meet the requisite costs was the establishment of a trust fund. Id., Ex. D at 87. While the Closure Trust Agreement did not expressly define which entities would be the beneficiaries of the trust, the Closure Trust

Agreement did state that the trust was established for the benefit of the State of Rhode Island. Id., Ex. E at § 3. Similar to the Remediation Trust, Van Liew was originally appointed as trustee but was succeeded by Washington Trust on March 29, 2013.² See OConnell Aff., Ex. 2. At no point in this litigation has Van Liew (as former trustee of the Trusts) or Washington Trust asserted claims against Restivo. In fact, on April 27, 2015, Washington Trust executed an Assignment of Claims Agreement with RIRRC (the Assignment) transferring to RIRRC all of Washington Trust's "right, title and interest in" the claims RIRRC has against Restivo in the instant litigation. See OConnell Aff., Ex. 3 at 1-2.

As stated by the Court in its February 2015 Decision, in August 2006, RIRRC retained Restivo to provide auditing and accounting services for a term beginning on August 1, 2006 and running through June 30, 2009. See Christopher J. Valente Aff., Ex. B (Agreement between Restivo and RIRRC). Furthermore, the Court stated the following with respect Van Liew:

"Van Liew was retained by RIRRC as its investment manager for [the Trusts] as well as to serve as the pension fund manager for the Money Purchase Pension Plan (Pension Plan). . . . Ultimately, Van Liew was terminated by RIRRC from its roles with the Pension Plan in December 2007 and the [Trusts] in January 2008. According to RIRRC, as set forth in its Second Amended Supplemental Responses to Defendant Restivo's Interrogatory No. 6, Joseph Centofanti (Centofanti), a Certified Public Accountant (CPA) and Forensic Certified Public Accountant (FCPA), is expected to testify regarding Restivo's alleged failures in testing compliance with respect to the management of [the Trusts]. Moreover, RIRRC alleges '[t]esting for compliance with the [] Consent Decree should have included a review of the [Trusts] and the related investment requirements, including those contained in RIRRC's investment policies' Accordingly, OConnell, through affidavit, opined that '[h]ad Restivo informed me of the scope and nature of Van Liew's departure from RIRRC's investment policy, I would have addressed and ultimately

² RIRRC terminated Van Liew as its investment manager in January 2008. Interestingly, while Van Liew was replaced by Washington Trust as trustee with respect to only the Remediation Trust, it continued to serve as trustee of the Closure Trust in spite of its termination. In fact, Van Liew was replaced as trustee of the Closure Trust approximately three years after suit was commenced in this matter.

ameliorated this non-compliance sooner, thereby preventing further losses.’ . . . DeNigris stated that, based on a series of contested calculations to be discussed below, Van Liew’s allegedly improper departure from RIRRC’s investment policy resulted in a loss of \$2,551,052 [to the Trusts].” See Restivo, 2015 WL 851463, at *3-4 (internal citations omitted).

Suit was eventually commenced against Restivo on July 30, 2010. Restivo’s present Motion for Partial Summary Judgment was filed on April 13, 2015. Following the hearing on the Motion, as requested by the Court, the parties submitted supplemental memoranda on the narrow issue surrounding the obligations, responsibilities, and powers of the trustee in hopes of determining whether the trustee was more than merely a custodian of the Trusts’ assets, as claimed by RIRRC.

II

Standard of Review

“Summary judgment is appropriate when no genuine issue of material fact is evident from ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any,’ and the motion justice finds that the moving party is entitled to prevail as a matter of law.” Narragansett Indian Tribe v. State, 81 A.3d 1106, 1109 (R.I. 2014) (quoting Swain v. Estate of Tyre ex rel. Reilly, 57 A.3d 283, 288 (R.I. 2012)). Our Supreme Court has instructed on numerous occasions that “[s]ummary judgment is a drastic remedy and should be cautiously applied[.]” Ardente v. Horan, 117 R.I. 254, 256-57, 366 A.2d 162, 164 (1976); accord Estate of Giuliano v. Giuliano, 949 A.2d 386, 390 (R.I. 2008). Indeed, as is clear in Rhode Island, “[t]he purpose of summary judgment is issue finding, not issue determination.” Glottone v. Ethier, 870 A.2d 1022, 1028 (R.I. 2005) (quoting Saltzman v. Atl. Realty Co., 434 A.2d 1343, 1345 (R.I. 1981)).

III

Discussion

Restivo has moved for summary judgment on the narrow ground that RIRRC does not have standing to seek relief on behalf of the Trusts because RIRRC is neither named as trustee of the Trusts nor falls within the exceptions permitting a beneficiary also to maintain an action against third parties. Before reaching this issue, RIRRC begins its opposition by arguing that Restivo's Motion comes approximately six months after the Court's initial deadline of October 15, 2014 for filing summary judgment motions. As a result, RIRRC argues that because Restivo has not raised the issue of standing prior to the present Motion, it should accordingly be precluded from doing so now at a time well after the original contemplated deadline. However, pursuant to this Court's Scheduling Order, entered and filed on April 10, 2015, Restivo was expressly permitted to file "*a motion regarding the Plaintiff's standing to seek relief for damages allegedly sustained by certain trust funds.*"³ R.I. Res. Recovery Corp. v. Restivo Monacelli, LLP, No. PB 10-4502 (R.I. Super. Apr. 10, 2015) (Silverstein, J.) (emphasis added) (Scheduling Order). As a result, the Scheduling Order, in failing to specify what type of motion would be filed, effectively disposes of RIRRC's contention that Restivo's delay in filing for summary judgment requires automatic denial of its Motion. The Court will permit this Motion as the appropriate vehicle to address Restivo's arguments on the question of standing.

A related issue to the timeliness of Restivo's Motion is whether Restivo waived its right to argue that RIRRC lacks standing to seek relief on behalf of the allegedly injured Trusts. As

³ In footnote 5 of its memorandum, RIRRC states that Restivo's counsel, at the status conference held on April 2, 2015, suggested the motion would be a motion in limine and not a motion for summary judgment. Yet, the Scheduling Order (entered without objection) makes no reference to the specific form of the motion. The Scheduling Order indicates only that the Court would permit a motion relative to standing to be filed. The Court will not preclude Restivo's filing on such technical grounds, and the Court will decide this matter before trial, rather than waiting to address the issue pursuant to a Super. R. Civ. P. 50 motion at a later date.

RIRRC argues in its opposition papers, Restivo—in its prior motions—never raised or addressed this issue.⁴ Characterizing Restivo’s Motion as a “third bite at the apple,” RIRRC argues Restivo is again seeking to contest RIRRC’s claimed damages under the Trusts but this time under a wholly-new defense. To support its argument as to waiver, RIRRC cites to a Rhode Island Superior Court decision— Foote v. Fleet Fin. Grp., No. 99-6196, 2004 WL 1541923, at *5-6 (R.I. Super. June 25, 2004) (Darigan, J.)—wherein the court concluded the plaintiffs had failed to raise the issue of standing in a “timely fashion” and thus had waived the issue. In that case, the court discussed the plaintiffs’ standing, finding that they had clearly suffered an injury in fact, but nonetheless held that the “long-standing rule of raise-or-waive shall be applied to the instant case.” Id. at *6. In reaching this conclusion, the Foote Court specifically relied on the Rhode Island Supreme Court’s holding in Direct Action for Rights & Equal. v. Gannon, 713 A.2d 218, 222 (R.I. 1998) that the issue of standing will be waived unless it is first raised at some point before the trial justice prior to appeal. See Foote, 2004 WL 1541923, at *6. The Gannon Court also determined that “standing is a separate and distinct legal concept from subject-matter jurisdiction” and, thus, while a lack of subject-matter jurisdiction can be raised at any point⁵, the issue of standing can indeed be waived. See Gannon, 713 A.2d at 222.

Restivo argues that the trial justice in Foote misinterpreted Gannon when he imposed a so-called timeliness factor on the traditional “raise or waive” rule. However, this Court does not believe the Foote Court misconstrued the law set forth by our Supreme Court when it discussed the timeliness of the plaintiffs’ challenge. Given the specific facts of that case—that the issue of

⁴ While Restivo did not plead a lack of standing as an affirmative defense in its Answer, it does claim that such a defense would naturally be included in the more generic defense that RIRRC has failed to state a claim upon which relief can be granted. Interestingly though, Restivo did not question RIRRC’s standing in either its earlier motion for summary judgment or, more tellingly, in its motion to dismiss pursuant to Super. R. Civ. P. 12(b)(6).

⁵ “Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.” Nat’l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994).

standing arose after a two-and-one-half-week trial—the trial justice most likely found it appropriate to elaborate on the test for waiver. See Foote, 2004 WL 1541923, at *1-2. Specifically, the issue was raised on the defendants’ objection to the entry of final judgment pursuant to Super. R. Civ. P. 54, rather than by a motion for summary judgment or motion in limine prior to the start of trial. See id. Indeed, in footnote 4, the trial justice even cited authority discussing when a relaxation of the standing doctrine may be appropriate when the issue is raised at a late date. See id. at *6 n.4. The cited authority in Foote also suggests that some situations may warrant a case being decided on the merits rather than blocking the action on the grounds of standing; as the court explained, “[i]f the matters progress [to trial], it may be wondered whether standing requirements might be relaxed on occasion to permit judgment on the merits.” Id. (quoting 13A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 3531.15, at 104-105 (1984)).⁶

Even if this Court were required to follow the reasoning of the Superior Court Justice in Foote, the case there, as explained, was in an entirely different procedural posture than the case presently before this Court when it ruled on the issue of waiver. Restivo’s challenge to standing here has come approximately five months before the set trial date. While Restivo had the opportunity to raise the defense on earlier occasions, this Court finds nothing in our jurisprudence requiring that it preclude Restivo from raising the issue at this time. Consequently, this Court, guided by the principles in Gannon and based on the factual dissimilarities in Foote,

⁶ In its papers, Restivo cites to Professors Wright and Miller to support its contention that summary judgment is the appropriate vehicle to contest standing and that a plaintiff will have the burden to establish standing. It is worth noting that § 3531.15, also cited by the Foote Court, applies to Article III standing (i.e., standing within the context of subject-matter jurisdiction of federal courts), which, as Gannon stated, is a distinct legal concept from the type of standing at issue here. See Gannon, 713 A.2d at 222. Nevertheless, as Foote discussed, relaxation of standing, whether tied to subject-matter jurisdiction or otherwise, may be necessary, especially when “a full trial has clearly shown a violation that warrants correction[.]” Foote, 2004 WL 1541923, at *6.

holds Restivo has not waived its right to attack RIRRC's standing to claim losses under the Trusts.

With these preliminary matters aside, the Court must focus next on what Restivo terms in its reply memorandum "a matter entirely about the law of trusts." In claiming that RIRRC is without proper standing, Restivo relies on several scholarly treatises and authorities on trust law, most notably Charles E. Rounds, Jr. & Charles E. Rounds, III, Loring and Rounds: A Trustee's Handbook (2015 ed.) (hereinafter Loring and Rounds). According to this commentary, "[t]he right to bring an action in contract or tort against a third party to remedy harm done to the trust property is primarily in the trustee." Loring and Rounds, *supra*, § 3.6, at 237. Furthermore, a beneficiary, ordinarily, would not have the right to bring suit but, instead, may have an action against the trustee for failure to bring an action against that third party. *See id.* at 238. In this case, Restivo adamantly argues it is a third party, and because RIRRC only holds a future interest as one of the beneficiaries of the Trusts, it cannot maintain a suit against it for any alleged accounting breaches that may have injured the value of the Trusts' assets.

In response, RIRRC argues that it has independent standing to seek redress from Restivo because it alleges not only breaches of a specific agreement between it and Restivo but also that Restivo breached the legal duties it owed to RIRRC with respect to the Trusts.⁷ Moreover, RIRRC claims that the structure of both trusts required it to be the party tasked with ensuring adequate funding was in place, and if the Trusts underperformed, then it was required to fund that shortfall. *See Shindell Aff., Ex. B.* at ¶ 55. Essentially, RIRRC claims that it has suffered real and concrete damages as a result of Restivo's breaches and thus should be permitted to seek relief directly from Restivo. RIRRC relies on this Court's prior decision in Am. Kennel Club

⁷ In its earlier Decision, the Court addressed at length the duty and the subsequent standard of care owed by Restivo to RIRRC. *See Restivo*, 2015 WL 851463, at *6-11.

Museum of the Dog ex rel. Camilla Lyman Unitrust v. Edward & Angell, LLP, No. PB 00-2683, 2002 WL 1803923 (R.I. Super. July 26, 2002) (Silverstein, J.) to support its argument that it, in fact, has standing as a beneficiary of the Trusts to bring the instant claims against Restivo (as a third party) because Restivo owed RIRRC a duty of care.

While the general rule is clear that trustees ordinarily are the proper party to bring suit on behalf of a trust, several commentaries are in accord that there are two specific circumstances when a beneficiary can properly maintain an action related to the trust property against a third party: “(a) the beneficiary is in possession, or entitled to immediate distribution, of the trust property involved; or (b) the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary’s interest.” 4 Restatement (Third) Trusts § 107(2), at 102 (2012); *see, e.g., Loring and Rounds, supra*, § 3.6, at 238-39; George Gleason Bogert et al., The Law of Trusts And Trustees § 869; Austin Wakeman Scott et al., 5 Scott and Ascher on Trusts § 28.2, at 1937-1943 (5th ed. 2008) (hereinafter Scott and Ascher). These authorities on trusts emphasize that the ordinary procedure for the trustee to sue on behalf of the trust is based on the general principle that the trustee is the party more suited to protect the trust’s interests. *See Scott and Ascher, supra*, at 1940-41. Indeed, a beneficiary most often will be precluded from maintaining an action at law because the interest of a beneficiary is equitable and ordinarily protected by suits in equity. *Id.* at 1937. Thus, certain exceptions to these principles are required in order for the beneficiary, rather than the trustee, to have standing to bring a suit with respect to the trust assets. Be that as it may, these principles focus only on those instances where a beneficiary would not have an action at law against the third party because those obligations actually run to the trustee. In fact, the cases cited by Scott and Ascher that suggest a beneficiary cannot maintain an action at law focus on instances when the alleged harm is not directly recoverable by the beneficiary. *Id.* For example, the situations where a beneficiary is precluded from maintaining actions at law

against third parties include actions on (i) contracts held in trust, (ii) insurance policies when the policy is payable to the trustee, and (iii) actions to enforce debts payable to the trustee. Id. While Restivo heavily relies on the fact that a beneficiary lacks appropriate standing except within limited exclusions, Restivo does not focus on instances when a beneficiary may have separate, independent standing to maintain actions at law.

In Am. Kennel Club, this Court found that an attorney for the trustee of a trust owed a duty of care to the beneficiaries of that trust. See Am. Kennel Club, No. 2002 WL 1803923, at *7-9. The Court cited a California Appeals Court decision in formulating its holding, stating that:

“[a]n attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries. It follows that when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary.” Id. at *8 (quoting Morales v. Field, 160 Cal. Rptr. 239, 244 (Cal. Ct. App. 1980)).

Based on the Court’s conclusion that the trustee’s attorney owes a similar duty of care to the trust’s beneficiaries as he does to his client, the Court rejected the defendants’ contention that the ultimate beneficiary of the trust, Dog Museum, did not have standing to bring suit against the defendants (the law firm and the attorney) for their legal malpractice and breach of fiduciary duty. Id. at *9.

Restivo attempts to distinguish Am. Kennel Club from the instant case on the ground that the beneficiary and the trustee there brought suit together. While the beneficiaries were deemed to have standing to pursue claims where a duty was owed directly to them, the question here turns on whether Washington Trust is necessary as a co-plaintiff to justify RIRRC’s standing. First, as this Court has already determined, there can be no dispute that RIRRC was owed a duty from Restivo “to use the skill and care as that of a reasonably prudent auditor under the

circumstances,” and, as alleged in the Complaint, Restivo breached that duty as well as the separate contract executed between Restivo and RIRRC outlining Restivo’s auditing duty with respect to the Trusts’ compliance with RIRRC’s investment policies. See Restivo, 2015 WL 851463, at *8. Apart from the issues related to the Trusts, RIRRC certainly has standing to maintain an action at law against Restivo regarding the real estate purchase transactions and the various charitable contributions. See id. at *4-5. When Restivo allegedly violated the standard of care in the performance of those audits, as alleged in the Complaint, it breached its duty owed to RIRRC. It did not owe an auditing duty to the Trusts or the trustee.

Therefore, putting aside for the moment any impact the April 27, 2015 Assignment would have on Washington Trust being required to also be named, the issue turns on whether Washington Trust is a necessary plaintiff in light of the Court’s holding in Am. Kennel Club. The parties disagree whether the trustee was intended to serve only as a custodian of the trust. At the hearing, the Court inquired as to whether the trustee would have the power to enforce any shortfall by RIRRC in its payment obligations, which theoretically could demonstrate that the trustee was independent enough to justify it as the proper plaintiff in this suit.

The trust agreements in the respective trusts set forth provisions that the trustee should have the power to compromise or adjust all claims for the Trusts. See Shindell Aff., Ex. C., at 2, ¶ 4(e) (Remediation Trust Agreement); id., Ex. E, at 4, § 8(e) (Closure Trust Agreement). However, from the provisions cited by both parties in the supplemental memoranda on this issue, it is unclear whether the relevant documents actually granted the trustee any authority to recoup the additional funds required to be paid by RIRRC due to the \$2.5 million loss, and if RIRRC did not pay, whether the trustee had the power to seek judicial enforcement.⁸ The Remediation Trust

⁸ If the trustee was only a custodian of the Trusts without real authority to file claims on behalf of the Trusts, then there is a strong argument that Washington Trust was “unsuitable” to maintain

Agreement provided that the trustee can only invest and reinvest the trust estate in accordance with the express, written instructions from RIRRC and RIRRC's investment policies. See id., Ex. C. at ¶ 4. On the other hand, the Consent Decree states with respect to the formation of a trust fund, "the Trust Agreement shall confer upon the Trustee(s) powers and authorities required or sufficient to provide payment of funds in the Trust Fund to meet the obligations of [RIRRC] under this Consent Decree." Id., Ex. B at ¶ 49. Furthermore, the Closure Trust Agreement specifically obviates any responsibility of the trustee to ensure RIRRC makes appropriate payments. See id., Ex. E at § 3. Section 3 states: "The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from [RIRRC], any payments necessary to discharge and liabilities of [RIRRC] established by DEM." Id. Moreover, the Consent Decree establishes that if shortfalls were noted in the Remediation Trust, it was the direct responsibility of RIRRC to deposit more funds to maintain the appropriate balances. See id., Ex. B at ¶ 52. Because of the nature of the Consent Decree and the DEM's regulations, any enforcement of RIRRC's obligations, to wit, providing sufficient funds to be deposited into the Trusts, falls within the exclusive domain of the EPA and the DEM.

While a reading of the pertinent documents fails to clarify the exact powers of the trustee, the Court need not parse through the seemingly contradictory language to reach an ultimate conclusion on this issue because it is clear to the Court that RIRRC has established its independent grounds to maintain this action. The very purpose of the Trusts, as evidenced in the Consent Decree and in Closure Trust Agreement, was to set mechanisms for ensuring payment to the various environmental enforcement agencies for the cleanup of the landfill. The responsibilities to provide the requisite funding rested solely on the shoulders of RIRRC, and as RIRRC maintains in its supplemental memoranda, Washington Trust merely served as a

this action against Restivo, as set forth in the exceptions to a beneficiary's ability to establish standing. See Restatement (Third) Trusts § 107, at 102.

custodian of the Trusts without any real power to ensure payments were sufficiently made. The creation of a trust was only one of several possible mechanisms to provide the funding to the respective government agencies; regardless of which mechanism it chose, RIRRC was the party tasked with the responsibility of ensuring proper funding and meeting its obligations under the Consent Decree and the DEM regulations. Accordingly, the alleged loss or increased risk of loss due to the failure of Restivo to properly perform its audit obligations as to the Trusts fell squarely on RIRRC.

The principles set forth in Am. Kennel Club—that the beneficiary was owed a specific, separate duty by the defendants under the circumstances there, irrespective of the trustee—demonstrate that RIRRC has standing to pursue its claims against Restivo for its alleged liability related to the auditing of Van Liew’s performance as investment manager. The question of standing is generally resolved by determining “whether the person whose standing is challenged has alleged an injury in fact resulting from the challenged statute. If he has, he satisfies the requirement of standing.” R.I. Ophthalmological Soc. v. Cannon, 113 R.I. 16, 26, 317 A.2d 124, 129 (1974). “In deciding whether a particular plaintiff possesses the requisite standing, a court should draw the line not between whether the plaintiff has suffered a substantial injury or an insubstantial injury, but between injury and no injury.” Ahlburn v. Clark, 728 A.2d 449, 451 (R.I. 1999).

Here, the Court simply cannot ignore the fact that independent duties were owed to RIRRC and the Complaint alleges monetary loss to the Trusts by way of counts for professional negligence and breach of contract (as actions at law). While the injury allegedly caused by Restivo was, in part, to the trust assets, it is also clear that RIRRC additionally suffered an injury in fact based on its increased risk of loss to fund any annual shortfall due to the Trusts’

underperformance.⁹ As explained above, RIRRC was under an express obligation to meet the minimum funding requirements established in the Trusts' documents and any shortfall would increase its financial liability. Nothing in the Court's decision in Am. Kennel Club conditioned the finding that the beneficiary had standing, by way of the duties flowing from the trustee's attorney to the beneficiaries, on the specific fact that the trustee was additionally named as a co-plaintiff. The holding in that case was simply, "[g]iven this Court's determination that a trustee's attorney owes a duty of care to the trust beneficiaries, the Dog Museum, as the ultimate beneficiary of the Lyman trust, has standing to bring suit against Defendants for legal malpractice and breach of fiduciary duty." Am. Kennel Club, 2002 WL 1803923, at *9. The facts here are enough to establish RIRRC's independent standing to bring suit against Restivo despite whether the trustee could have additionally brought suit for the losses to the Trusts' assets.

With this finding, the Court need not determine what impact the Assignment has on Restivo's argument that Washington Trust, as trustee, is the only party to claim losses under the Trusts. RIRRC had maintained that Restivo's Motion is effectively moot because even if Washington Trust was the only entity capable of bringing suit, the trustee assigned RIRRC its claims on behalf of the Trusts. See OConnell Aff., Ex. 3. The commentators on trusts acknowledge that despite the general rule regarding a beneficiary's standing, a beneficiary may

⁹ It is unclear from RIRRC's papers how much it was required to pay into the Trusts due to the alleged \$2.5 million decrease in value. While Restivo may have an argument at trial that RIRRC has in fact not suffered any damages from this underperformance (if no additional funding was actually required), the clear fact that RIRRC has alleged its financial risk increased during those years to meet the funding obligations is enough to confer standing on RIRRC. See, e.g., Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 575 (6th Cir. 2005) (recognizing plaintiff's alleged increased risk of harm as an injury in fact required to establish standing); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (discussing plaintiff's injury in fact must be "actual or imminent, not conjectural or hypothetical." (internal quotation marks omitted)). RIRRC's injury here meets the requirements for standing as RIRRC's funding obligations to compensate for shortfalls in the Trusts is a mandatory requirement.

be permitted “to sue a third party in an action at law in the name of the trustee[] when the beneficiary is entitled immediately and unconditionally to the proceeds” and the trustee has assigned the claim to the beneficiary. Scott and Ascher, supra, at 1939; see also Loring and Rounds, supra, at 239. It is clear from the record that RIRRC is not entitled “immediately and unconditionally” to the proceeds of the Trusts under the respective agreements. Rather, because RIRRC has an obligation to further fund the Trusts, RIRRC has independent grounds to maintain the present action. Consequently, RIRRC need not prove it was validly assigned the claims from Washington Trust in order to defeat Restivo’s Motion.

IV

Conclusion

Accordingly, based on the foregoing, the Court denies Restivo’s motion for summary judgment. RIRRC has established standing to maintain an action against Restivo to seek damages for its claims relative to the underperformance of the Trusts. As a result, the parties shall prepare for trial on all claims as originally scheduled.

Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Rhode Island Resource Recovery Corporation v.
Restivo Monacelli, LLP

CASE NO: PB 2010-4502

COURT: Providence County Superior Court

DATE DECISION FILED: August 18, 2015

JUSTICE/MAGISTRATE: Silverstein, J.

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