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Johnson ORDER DENYING SUCCESSOR TRUSTEE'S MOTION

Kelly Lee Ellerbee

Fulton County Superior Court Judge

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

NANCY JOHNSON, Individually, and
as Executor of the Estate of Dennis L.
Johnson, and as Beneficiary of the
Nancy Johnson Family Trust,
SHANNON JOHNSON, as Beneficiary
of the Dennis Johnson Family Trust,
THE DENNIS AND NANCY
JOHNSON CHARITABLE
REMAINDER UNITRUST, THE
DENNIS L. AND NANCY JOHNSON
FAMILY FOUNDATIONS, INC., and
DNJ INVESTMENTS, LLC,

Plaintiffs,

v.

KEVIN TAYLOR, Individually, and as
Trustee of the Nancy Johnson Family
Trust, and Trustee of the Dennis
Johnson Family Trust, and NICOLE
TAYLOR, Individually, and as Trustee
of the Nancy Johnson Family Trust,
and Trustee of the Dennis Johnson
Family Trust,

Defendants.

CIVIL ACTION NO.
2017CV296139

Business Case Div. 3

ORDER DENYING SUCCESSOR TRUSTEE'S MOTION

The above styled matter is before the Court on a Motion for Declaratory
Judgment and Final Order Discharging Successor Trustee from Office and

filed June 18, 2020 (“Motion”). The Motion was submitted by Tamara Miles Ogier as Successor Trustee of the Nancy Johnson Family Trust and of the Dennis Johnson Family Trustee (collectively, the “Trusts”).

According to the Motion, in May 2019, Ms. Ogier became the Successor Trustee of the Trusts and the Manager of the Trusts’ primary asset, Welcome to Paradise, LLC (“WTP”) which owns two pizza restaurants. The Motion describes the mismanagement, financial disarray, and physical disrepair of WTP and the restaurants. Motion, pp. 3-5. The Motion also summarizes the known assets of the Trusts and some of WTP’s outstanding liabilities. Id., pp. 5-6, Ex. A. Ms. Ogier asserts WTP is “hopelessly insolvent” and “[t]he most likely source of any funds for the Trusts and/or WTP is the pursuit of the claims [in this action] against the Defendants.” Id., p. 6. She opines “the best option, which would at least pay the outstanding tax obligations and the expenses incurred by the Successor Trustee, is the sale of the assets to Plaintiff Nancy Johnson.” Id.

Ms. Ogier asks the Court to grant her authority to enter into a Settlement Agreement assigning all assets of the Trusts (including all claims against Defendants in this action) to Plaintiff Nancy Johnson. Id., p. 6. According to Ms. Ogier, in exchange Nancy Johnson has agreed to dismiss a lawsuit pending against WTP in Dothan, Alabama and to pay \$125,000.00, funds which would be allocated between WTP and the Trusts to pay liabilities. Id., pp. 6-7. Ms. Ogier also asks the Court to

order the disgorgement of \$22,400.00 in cash and attorneys' fees Defendants' paid from WTP accounts during the pendency of this litigation, between March 21, 2019 and May 24, 2019. Id., pp. 7-8. Finally, Ms. Ogier asks the Court to order that—after execution of settlement documents, payment of settlement funds, payment of certain liabilities, and a report to the beneficiaries regarding the disposition of said funds—she be allowed to terminate the Trusts and that she “be released from office and from liability.” Id., p. 8.

Having considered the entire record, the Court find it lacks jurisdiction to grant the requested relief. The Motion seeks a “Declaratory Judgment” and is expressly brought “pursuant to O.C.G.A. §9-4-2(b).” Id., p. 1. That code section provides:

In addition to the cases specified in subsection (a) of this Code section, the respective superior courts of this state and the Georgia State-wide Business Court shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for the declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that the declaration should be made; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

Importantly, the purpose of the Declaratory Judgment Act (“Act”) “is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations” and the Act “is to be liberally construed and administered.” O.C.G.A. §9-4-1. Under the Act,

[a]ny person interested as or through a[]...trustee...in the administration of a trust...may have a declaration of rights or legal relations in respect thereto and a declaratory judgment: (1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; (2) To direct the executor, administrator, or trustee to do or abstain from doing any particular act in his fiduciary capacity; or (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

O.C.G.A. §9-4-4(a).

However, a proceeding under the Act: must be presented by “petition or other appropriate pleading” (O.C.G.A. §9-4-2(a) and (b)); must “be filed and served as are other cases in the superior courts of this state” (O.C.G.A. §9-4-5); cannot seek a declaration which would “prejudice the rights of persons not parties to the proceeding” (O.C.G.A. §9-4-7(a)); and entitles parties to a jury trial on any issue of fact (*id.*).

Here, no “petition or appropriate pleading” for declaratory relief has been presented, only a motion without any affidavit or other evidence. *See* O.C.G.A. §9-11-7(a) (“*Pleadings*. There shall be a complaint and an answer; a third-party complaint...; and a third-party answer....There may be a reply to a counterclaim... and an answer to a cross-claim...No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer”); *compare* O.C.G.A. §9-11-7(b) (“*Motions and other papers*. (1) An application to the court for an order shall be by motion...”). Also, it does not appear that the Motion has been “filed and

served as are other cases in the superior courts of this state. ” *See generally* O.C.G.A. §9-11-4.

Further, neither the Successor Trustee nor all affected beneficiaries are properly before this Court. Although Nancy Johnson and Shannon Johnson are named as Plaintiffs in their capacities as beneficiaries and Kevin Taylor and Nicole Taylor are named as Defendants in their capacities as trustees (now former trustees), Ms. Ogier in her capacity as Successor Trustee is not a party to this action. Indeed, this is the first formal appearance she has made on behalf of the Trusts and/or WTP seeking relief from this Court. Additionally, at least one remainder beneficiary—David Johnson—is not a party to this action. *See* First Amended Verified Complaint, ¶¶ 6, 31, 38, 45.

Moreover, the Court does not find the Motion is proper given the procedural posture of this case. A Pre-Trial Order was entered on June 11, 2020. A full and final bench trial on the issue of damages and all remaining claims for equitable relief was held on June 17, 2020, at which the Court heard considerable evidence regarding the assets of and funds improperly taken from the Trusts and/or WTP. None of the issues presented in the Motion were raised with the Court in the Pre-Trial Order or during the bench trial and Ms. Ogier did not appear before the Court during that proceeding. Finally, the Court issued a Final Judgment in this matter on June 18, 2020, adjudicating all pending claims.

Given all of the above, the Court finds it lacks jurisdiction to consider the Motion or to grant the relief requested therein. Accordingly, the Motion is hereby **DENIED.**

SO ORDERED this 6th day of July, 2020.


HONORABLE KELLY LEE ELLERBE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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Attorneys for Plaintiff	Attorneys for Defendants
Genevieve H. Dame DAME LAW, PC 1867 Independence Square, Suite 201 Atlanta, Georgia 30338 Tel: (678) 456-5797 gdame@DameLawPC.com H. Michael Dever FRIEDMAN, DEVER & MERLIN, LLC 5555 Glenridge Connector, NE Suite 925, Glenridge Highlands One Atlanta, Georgia 30342-4728 Tel: (404) 236-8600 mdever@fdmlaw.com <i>Counsel for Plaintiffs</i> Tamara Miles Ogier OGIER, ROTHSCHILD & ROSENFELD, P.C. P.O. Box 1547 Decatur, Georgia 30031 Tel: (404) 525-4000 tmo@orratl.com	Brian M. Deutsch Benjamin H. Pierman MCCURDY & CANDLER, LLC 160 Clairemont Avenue Suite 550 Decatur, Georgia 30030 Tel: (404) 214-5858 bdeutsch@mccurdycandler.com bpierman@mccurdycandler.com