

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

ELIOT BERNSTEIN, individually;
ELIOT BERNSTEIN as a beneficiary of the
2008 SIMON L. BERNSTEIN TRUST
AGREEMENT, as amended and restated in the
SIMON L. BERNSTEIN AMENDED AND
RESTATED TRUST AGREEMENT dated
July 25, 2012 and as Legal Guardian of
JOSHUA BERNSTEIN, JACOB BERNSTEIN,
and DANIEL BERNSTEIN,

FILE NO.: 502014CA014637XXXXMB

Plaintiffs,

v.

THEODORE STUART BERNSTEIN, individually;
THEODORE STUART BERNSTEIN, as Successor
Trustee of the 2008 SIMON L. BERNSTEIN
TRUST AGREEMENT, as amended and restated in the
SIMON L. BERNSTEIN AMENDED AND RESTATED
TRUST AGREEMENT dated July 25, 2012;
ALEXANDRA BERNSTEIN;
ERIC BERNSTEIN;
MICHAEL BERNSTEIN;
MOLLY SIMON;
JULIA IANTONI;
MAX FRIEDSTEIN;
CARLY FRIEDSTEIN;
JOHN AND JANE DOE 1-5000,

Defendants.

**MOTION TO DISMISS COMPLAINT TO REMOVE
THEODORE BERNSTEIN AS SUCCESSOR TRUSTEE, AND
TO STRIKE ALLEGATIONS CONTAINED IN COMPLAINT**

Defendants, MOLLY SIMON, ALEXANDRA BERNSTEIN, ERIC BERNSTEIN and
MICHAEL BERNSTEIN, by and through their undersigned attorney, move to dismiss the

Complaint to Remove Theodore Bernstein as Successor Trust filed by Plaintiff, ELIOT BERNSTEIN, and to strike certain allegations contained therein, and state:

Motion to Dismiss

1. Plaintiff improperly names two minors, JULIA IANTONI and CARLY FRIEDSTEIN, in both the case style and body of the Complaint. Plaintiff is required to properly name and serve these minor's parents and natural guardians. Similarly, in paragraphs 4 through 11 of the Complaint, Plaintiff fails to allege the age (whether over 18 years old) and residency of each named beneficiary. The Complaint is subject to dismissal on these grounds.
2. Plaintiff's Complaint contains five separate "counts." None of these counts incorporates by reference the jurisdictional or background paragraphs (i.e., paragraphs 1 through 17). This is grounds for dismissal of all counts.
3. There is no prayer for relief or "wherefore clause" after each of the five separate "counts" of Plaintiff's Complaint. Plaintiff is required to include a prayer for relief after each separate "count" so that Defendants are apprised of the specific relief requested with respect to each separate claim for relief.
4. Plaintiff names Defendant, THEODORE BERNSTEIN ("Defendant Ted"), both individually and as Successor Trustee in the case style. However, no relief is sought against Defendant Ted "individually" in the body of the Complaint. The Complaint should

therefore be dismissed as to Defendant Ted individually.

5. Plaintiff is not a beneficiary of the Simon Bernstein Trust, and he therefore lacks standing to seek the relief requested in his Complaint. F.S. § 736.0706(1) (“The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee”); *see also Palmer v. Horton*, 469 So.2d 903 (Fla. 3rd DCA 1985).

6. Plaintiff alleges in paragraph 3 of the Complaint that he is seeking Defendant Ted’s removal as Successor Trustee “in his capacity as Legal Guardian for his minor children who are beneficiaries of the 2012 Simon Trust.” Plaintiff is not qualified to act for his children due to a conflict of interest. Plaintiff has (in a separate action) challenged the validity of the Simon Bernstein Trust, which would essentially eliminate his children’s beneficial interests in the Trust.

7. Plaintiff essentially alleges that Defendant Ted should be removed as Successor Trustee of the Simon Bernstein Trust on the ground that hostility exists between Defendant Ted and Plaintiff (see, e.g., paragraphs 63 and 64). Plaintiff is not a beneficiary of the Simon Bernstein Trust wherein he seeks Defendant Ted’s removal as Successor Trustee, so any purported hostility between Defendant Ted and Plaintiff is irrelevant and of no consequence. Furthermore, hostility or disharmony between a trustee and beneficiaries is not cause for the trustee’s removal under Florida law. In *Parr v. Cushing*, 507 So.2d 1227 (Fla. 5th DCA 1987), the court held that friction between a trustee and contingent beneficiaries,

without more, could not justify removal of the trustee. It has also been held that an “acrimonious relationship” between a trustee and a beneficiary, coupled with “questionable and vindictive” actions taken by the trustee, did not rise to a level justifying removal of a trustee selected by the settlor. *Parker v. Shullman*, 843 So.2d 960, 961 (Fla. 4th DCA 2003). Plaintiff’s Complaint is therefore subject to dismissal.

8. Plaintiff has failed to allege a sufficient basis in law or fact to remove Defendant Ted as Successor Trustee of the Simon Bernstein Trust. The general rule is that removal of a trustee must be predicated on a “clear showing of abuse or wrongdoing in the *actual* administration of the trust.” *Parr*, 507 So.2d at 1228. It is not enough to allege or show that there is a *potential* for mismanagement or conflict of interest by the trustee; rather, a plaintiff must allege and prove *actual* conduct by the trustee amounting to a breach of trust. *Id.* Even then, minor mistakes or neglect of duty by a trustee will not justify removal unless the breach is serious enough to threaten loss or mismanagement of the trust property. *Nickels v. Philips*, 18 Fla. 732 (1882).

Motion to Strike

9. The reference to “John and Jane Doe 1 – 5000” in the case style and paragraph 12 of Plaintiff’s Complaint serves no purpose and should be stricken.

10. Plaintiff alleges in paragraph 3 of the Complaint that he is seeking Defendant Ted’s removal as Successor Trustee “in his capacity as Legal Guardian for his minor children

who are beneficiaries of the 2012 Simon Trust.” However, Plaintiff does not correspondingly allege that he is seeking Defendant Ted’s removal on his own behalf or that he is a trust beneficiary with standing to seek Defendant Ted’s removal. In fact, Plaintiff is not a beneficiary of the Simon Bernstein Trust (for the reasons set forth hereinabove). Any and all references to Plaintiff individually and/or as a trust beneficiary in the case style should be stricken, as should any such references in the body of the Complaint.

11. Paragraphs 28 through 31 of Plaintiff’s Complaint address a “failure to account in the Shirley Estate and Shirley Trust.” These allegations are irrelevant with respect to whether Defendant Ted should be removed as Successor Trustee of the Simon Bernstein Trust. Furthermore, Plaintiff has no standing to demand accountings or raise issues concerning accountings in the Shirley Bernstein Estate or Trust matters. These paragraphs should be stricken.

12. Numerous paragraphs (e.g., 34, 36, 38, 43, 44, 46, 47 and 68) of Plaintiff’s Complaint include allegations that are directed against attorneys Donald Tescher and Robert Spallina. These paragraphs are not directed against Defendant Ted or any purported misconduct by Defendant Ted. These paragraphs are irrelevant and should be stricken.

WHEREFORE, the aforementioned Defendants respectfully request that this Court dismiss Plaintiff’s Complaint with prejudice, or alternatively strike the irrelevant and impertinent material from Plaintiff’s Complaint, award attorney’s fees to the aforementioned

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Defendants to be paid by Plaintiff, and grant such other and further relief as this Court deems proper and just.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via e-mail to: ALAN ROSE, Esquire, 505 South Flagler Drive, Suite 600, West Palm Beach, Florida 33401 (arose@pm-law.com); and ELIOT BERNSTEIN, 2753 NW 34th Street, Boca Raton, Florida 33434 (iviewit@iviewit.tv), this 29TH day of December, 2014.

JOHN P. MORRISSEY, P.A.

By: _____


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