

IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

19 SEP 11 PM 4:04

NATIONAL COLLEGIATE)
STUDENT LOAN TRUST 2007-3,)
as Assignee of CITIZENS ONE,)
a Delaware Statutory Trust,)
Plaintiff,)
v.)
DANA CLAYBORN,)
Defendant.)

RICHARD ALEXANDER, CLERK

CIVIL ACTION FILE NO.

19-C-04424-S6

ORDER

This case comes before the Court on Defendant's motion to dismiss. She argues that the Plaintiff is a Delaware statutory trust which cannot bring this action in its own name. Plaintiff states in its complaint that it is indeed a Delaware statutory trust. It is organized under Delaware law pursuant to 12 Del. C. § 3801 et seq. Plaintiff's Delaware trust certificate lists Wilmington Trust Company as its trustee. A Trust Agreement between Plaintiff and Wilmington Trust Company, as Owner Trustee, is also on file with the United States Securities and Exchange Commission ("SEC").

Under Georgia law, trusts are not recognized as legal entities separate from their trustees or beneficiaries. "It is axiomatic that a trust can only act through its trustees." *PricewaterhouseCoopers, LLP v. Bassett*, 293 Ga. App. 274, 277 (2008). A trust is therefore not a "real party in interest" capable of prosecuting a legal action, as contemplated under OCGA § 9-11-17(a).

Plaintiff argues that as a statutory trust, it is an unincorporated association that "may sue and be sued" under Delaware law. 12 Del. C. § 3804(a). Georgia law states that actions may be maintained in the name of an unincorporated association. However, Plaintiff's self-characterization as an "unincorporated association" does not make it so under Georgia law. In Delaware, a statutory trust is defined as an entity which is "created by a governing instrument under which property is or will be held, managed, administered, controlled, invested, reinvested and/or operated, or business or professional activities for profit are carried on or will be carried on, by a trustee or trustees..." 12 Del. C. § 3801(g)(1). A "trustee" is defined at 3801(h) as "the person

or persons appointed as a trustee in accordance with the governing instrument of a statutory trust, and may include the beneficial owners or any of them.” The trust’s business shall be managed by or under the trustee’s direction. 12 Del. C. § 3806.

Georgia law does not have a direct equivalent to Delaware’s statutory trust. However, the fact that Delaware statutory trusts are declared in writing means that they constitute express trusts under Georgia law. An express trust is one which is “created or declared in writing and signed by the settlor or an agent for the settlor acting under a power of attorney containing express authorization.” OCGA § 53-12-20(a). An express trust must have, ascertainable with reasonable certainty, the following five elements:

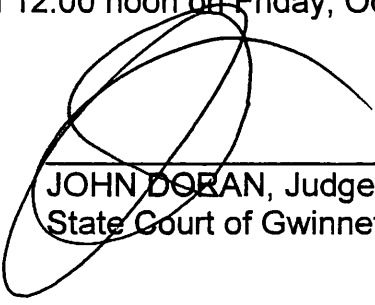
“(1) An intention by a settlor to create such trust; (2) Trust property; (3) Except for charitable trusts or a trust for care of an animal, a beneficiary who is reasonable ascertainable at the time of the creation of such trust or reasonably ascertainable within the period of the rule against perpetuities; (4) A trustee; and (5) Trustee duties specified in writing or provided by law.” OCGA § 53-12-20(b).

The above-mentioned Trust Agreement filed with the SEC details all five of these required elements.

The Court finds that Plaintiff is a trust which is required to act through its trustee, which is the real party in interest to this action. OCGA § 9-11-17(a) forbids dismissal of an action not prosecuted in the name of the real party in interest “until a reasonable time has been allowed” for ratification, joinder, or substitution of that party. It is, therefore,

ORDERED, that Plaintiff shall substitute Wilmington Trust Company as the real party in interest to this action not later than 12:00 noon on Friday, October 11, 2019.

11 September 2019



JOHN DORAN, Judge
State Court of Gwinnett County

cc:
David F. Addleton
Cherice A. Tadday



gwinnettcountry

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