[Cite as *Beard v. New York Life Ins. & Annuity Corp.*, 2013-Ohio-3700.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jason C. Beard,	:	
Plaintiff-Appellant,	:	
		No. 12AP-977
v.	:	(C.P.C. No. 12CV03-3103)
New York Life Insurance and Annuity Corporation et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 27, 2013

Morrow, Gordon & Byrd, Ltd., and *James R. Cooper*, for appellant.

Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., *John B. Schomer* and *Leigh A. Maxa*, for appellee New York Life Insurance and Annuity Corporation.

Reminger Co., L.P.A., *Michael Romanello* and *Melvin J. Davis*, for appellee Phillip B. Rosen.

APPEAL from the Franklin County Court of Common Pleas

McCORMAC, J.

{¶ 1} Plaintiff-appellant, James C. Beard, appeals from the Franklin County Court of Common Pleas' dismissal of his action against defendants-appellees, New York Life Insurance and Annuity Corporation ("NYLIAC"), and Phillip B. Rosen ("Rosen").

{¶ 2} This matter commenced with appellant's filing of a complaint on March 8, 2012. According to the allegations in the complaint, in 2004, appellant's father, David Beard ("decedent"), purchased an individual retirement annuity from NYLIAC, naming

appellant as the beneficiary. In 2007, decedent was diagnosed with Level IV melanoma. In 2010, decedent purchased an individual retirement annuity from NYLIAC, which replaced the 2004 annuity. Under the 2010 annuity, NYLIAC agreed to make payments to the decedent beginning on March 24, 2010. In his application for the 2010 annuity, decedent named appellant as his beneficiary. However, decedent later executed an amendment to the 2010 annuity which purportedly retracted the beneficiary designation. Rosen, an NYLIAC agent, advised and assisted decedent in the purchase of both annuities.

{¶ 3} Decedent died on March 25, 2011. Thereafter, appellant filed claims with NYLIAC as a purported beneficiary under both the 2004 and 2010 annuities. NYLIAC denied both claims.

{¶ 4} Appellant alleged he was a third-party beneficiary of both the 2004 and 2010 annuities and that NYLIAC breached both by failing to pay him the amount due and payable thereunder. Appellant alleged that NYLIAC and Rosen were negligent in preparing the annuities for decedent and in advising decedent with respect thereto. Appellant further asserted that NYLIAC and Rosen breached their fiduciary duties to decedent. Appellant also sought a declaratory judgment as to the rights and duties of the parties. Finally, appellant asserted that NYLIAC and Rosen were unjustly enriched as a result of their failure to pay him the proceeds of the annuities.

{¶ 5} In response to appellant's complaint, NYLIAC and Rosen filed separate motions to dismiss on May 15 and September 7, 2012, respectively. Both appellees argued that appellant was not entitled to recover under either the 2004 annuity or the 2010 annuity, that appellant lacked standing to pursue the action, and that neither owed a fiduciary duty to appellant. Appellant opposed both motions.

{¶ 6} The trial court granted NYLIAC's motion to dismiss on August 1, 2012 and granted Rosen's motion to dismiss on October 25, 2012; the October 25, 2012 filing also included a dismissal entry. In granting the motions to dismiss, the court found that: (1) appellant was not entitled to recover under the 2004 annuity because it was no longer in effect at the time of decedent's death; (2) appellant was not entitled to recover under the 2010 annuity because he was neither a party to nor an intended third-party beneficiary of that annuity; and (3) appellant lacked standing to pursue the action. Appellant timely appealed and advances the following assignment of error for our review:

> THE TRIAL COURT COMMITTED ERROR IN ITS DECISIONS AND JUDGMENTS ENTERED AUGUST 1, 2012, AND OCTOBER 25, 2012, WHEN, IN GRANTING APPELLEES' MOTIONS TO DISMISS UNDER RULE 12(B)(6) OF THE OHIO RULES OF CIVIL PROCEDURE, IT RULED THAT APPELLANT WAS NOT A THIRD-PARTY BENEFICIARY AND LACKED STANDING TO BRING HIS CLAIMS AGAINST APPELLEES.

{¶ 7} Standing is a jurisdictional requirement that a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Fed. Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 21-22. "Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged a personal stake in the outcome of the controversy." (Internal quotations omitted.) *Id.* at ¶ 21. "The doctrine of standing requires a litigant to be in the proper position to assert a claim or seek judicial enforcement of a duty or right." *Kormanik, Guardian v. HSBC Mtge.*, 10th Dist. No. 12AP-18, 2012-Ohio-5975, ¶ 41. The burden is on the plaintiff to establish that he or she "has a present interest in the subject matter of the litigation and that [he or she] has been prejudiced." *Id.* A motion to dismiss for lack of standing is properly brought pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *Brown v. Columbus City Schools Bd. of Edn.,* 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶ 4.

{¶ 8} We first address appellant's breach of contract claim. Only a party to a contract or an intended third-party beneficiary of a contract may assert a breach of contract claim. *Grant Thornton v. Windsor House, Inc.,* 57 Ohio St.3d 158, 161 (1991). Appellant asserts he has standing to pursue his breach of contract claim because he is an intended third-party beneficiary of both the 2004 and 2010 annuities. Thus, in order to determine whether appellant has standing to assert his breach of contract claim, we must determine whether he is an intended beneficiary of the 2004 and 2010 annuities.

{¶ 9} Appellate review of a trial court's decision to dismiss a case under Civ.R. 12(B)(6) is de novo. *Singleton v. Adjutant General of Ohio,* 10th Dist. No. 02AP-971, 2003-Ohio-1838, ¶ 16. For a court to dismiss a case pursuant to Civ.R. 12(B)(6), "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts

entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.,* 42 Ohio St.2d 242 (1975), syllabus. The court must presume all factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party. *Bridges v. Natl. Eng. and Contracting Co.,* 49 Ohio St.3d 108, 112 (1990).

{¶ 10} In ruling on a Civ.R. 12(B)(6) motion, a court " 'cannot resort to evidence outside the complaint to support dismissal [except] where certain written instruments are attached to the complaint.' " *Brisk v. Draf Industries,* 10th Dist. No. 11AP-233, 2012-Ohio-1311, ¶ 10, quoting *Park v. Acierno,* 160 Ohio App.3d 117, 2005-Ohio-1332, ¶ 29 (7th Dist.). In the present case, appellant attached the 2004 and 2010 annuities to his complaint as required by Civ.R. 10(D); accordingly, they may be considered for purposes of the Civ.R. 12(B)(6) motions to dismiss. *Brisk*; *Miller v. Cass,* 3d Dist. No. 3-09-15, 2010-Ohio-1930 (a copy of a written instrument attached to a pleading is a part of the pleading for all purposes and thus can be considered for purposes of a motion to dismiss).

{¶ 11} If a plaintiff attaches documents to his complaint, which he claims establish his case, such documents can be used to his detriment to dismiss the case if they along with the complaint itself establish a failure to state a claim. *Adlaka v. Giannini,* 7th Dist. No. 05 MA 105, 2006-Ohio-4611, ¶ 34. To the extent the language in attached documents clearly forecloses a plaintiff's claims, the trial court may properly dismiss those claims under Civ.R. 12(B)(6). *Denlinger v. Columbus,* 10th Dist. No. 00AP-315 (Dec. 7, 2000). "A motion to dismiss pursuant to Civ.R. 12(B)(6) should be granted in such cases 'only where the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover, or where the claim is predicated on some writing attached to the complaint pursuant to Civil Rule 10(D) and that writing presents an insuperable bar to relief.' " *Keenan v. Adecco Employment Servs., Inc.,* 3d Dist. No. 1-06-10, 2006-Ohio-3633, ¶ 9, quoting *Slife v. Kundtz Properties, Inc.,* 40 Ohio App.2d 179, 185-86 (8th Dist.1974).

{¶ 12} In general, an annuity is an investment where a person or company is obligated to pay to the annuitant a sum of money over stated intervals during the annuitant's life, in consideration for a gross sum paid for such an obligation. *Bronson v. Glander,* 149 Ohio St. 57, 59 (1948). *See also Trangenstein v. Wheaton College Bd. of Trustees,* 148 Ohio App.3d 382, 384, 2002-Ohio-2937 (2d Dist.) (an annuity is created by

an agreement to pay a certain sum to the annuitant at certain times during the annuitant's lifetime or for a given number of years in return for what is usually a single payment to the issuer of the annuity). An annuity is purely contractual in nature. *Adams v. Adams*, 12th Dist. No. CA2002-09-087, 2003-Ohio-3703, ¶ 15. Accordingly, its interpretation is subject to the standard rules of contract interpretation. *Id.*

{¶ 13} Contract interpretation is a matter of law reviewed by an appellate court de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995). The principal goal in construing contract language is to effectuate the intent of the parties. *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶ 29. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. When contract terms are clear and unambiguous, courts will not, in effect, create a new contract by finding an intent not expressed in the clear language utilized by the parties. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246 (1978).

{¶ 14} In the present case, appellant attached to his complaint both the 2004 and 2010 annuities, along with their attendant applications, and, as to the 2010 annuity, two amendments to the application. With regard to the 2004 annuity, the Policy Data Page includes the following relevant information: (1) decedent, age 56, is the annuitant and owner; (2) the policy date is November 30, 2004; (3) the plan is an "IRA"; (4) the initial premium payment is $232,977.40; and (5) the annuity commencement date is November 30, 2033. The application for the 2004 annuity indicates that it is a "deferred variable annuity" and designates appellant as the 100 percent beneficiary.

{¶ 15} As to the 2010 annuity, the first page designates the annuity as a "Lifetime Income Annuity" and an "Immediate Life Annuity," and states, under the heading "Annuity Benefit," that NYLIAC:

> will make Annuity Income Payments to you or the Payee(s) designated by you, if the Premium for this policy has been paid. Payments will be made in the amount(s) and for the period(s) of time shown on the Data Page.
>
> Annuity Income Payments will continue only as long as an Annuitant is living. If no Annuitant is living, no further

> Payments will be made and no part of the Premium will be refunded.

{¶ 16} The Policy Data Page of the 2010 annuity includes the following pertinent information: (1) decedent, age 61, is the annuitant, owner and payee; (2) the policy date is March 12, 2010; (3) the plan is a "life annuity"; (4) the initial premium payment is $217,701.47; (5) the annuity commencement date is March 24, 2010; and (6) the annuity benefit is "$1,255.31 monthly, payable only while the Annuitant is living."

{¶ 17} The application for the 2010 annuity, executed by decedent on February 23, 2010, includes several relevant provisions. Section 7, entitled "Beneficiary," designates appellant as 100 percent beneficiary; however, Section 7 instructs the applicant to "Leave [the beneficiary designation] Blank for Life Only Plans." Section 9, entitled "Replacement Information," indicates that the 2010 annuity is a replacement for the 2004 annuity. Section 12, entitled "Product Selection," designates the annuity product as a "Lifetime Income Annuity." Section 13, entitled "Non-Qualified Annuity Plans," appears to originally indicate by checkmark that the plan is a "Life Only" plan; however, that checkmark appears to have been crossed out, and the initials "DB" appear in the margin. Finally, Section 15, entitled "Qualified Annuity Plan," designates the "Plan Type" as "IRA" and indicates by checkmark that said plan is a "Life Only" plan.

{¶ 18} The 2010 annuity also includes two amendments to the February 23, 2010 application. Both amendments state that NYLIAC was to "accept the following answers in lieu of the answers to the corresponding questions in my application for * * * annuity" dated February 23, 2010. Below this language, the amendments reference Section 7 of the application and state, "IT IS UNDERSTOOD AND AGREED THAT THE INSURANCE OR ANNUITY IS WRITTEN No Beneficiary[.]" Only one of the amendments is signed by decedent; the signed amendment is dated March 31, 2010.

{¶ 19} Before the trial court, appellant maintained that NYLIAC breached the 2004 annuity by failing to pay him, the named beneficiary, the amount due and payable under that contract. The court concluded that NYLIAC was not obligated to pay appellant under the 2004 annuity because that contract was no longer in effect at the time of decedent's death. Appellant acknowledged in his complaint that the 2010 annuity replaced the 2004 annuity, and such acknowledgement is confirmed by the

documentation appellant attached to the complaint. At oral argument, counsel for appellant essentially conceded that the trial court properly determined that he is not entitled to recover as an intended third-party beneficiary under the 2004 annuity.

{¶ 20} Appellant also maintained before the trial court that NYLIAC breached the 2010 annuity by failing to pay him, the named beneficiary, the amount due and payable under that contract. The trial court disagreed, stating:

> In this instance, the terms of the contract are clear and unambiguous. David Beard changed his policy to a life annuity. The terms of the policy clearly state that the policy is only payable to the annuitant while living and that there is no beneficiary. Even though David Beard identified his son as the beneficiary, it is clear that, in fact, his designation was contrary to the executed terms of the policy. This Court does not find that this error creates any ambiguity that would require consideration of the extrinsic evidence to determine the parties' intent.

(Aug. 1, 2012 Decision, 4.)

{¶ 21} Appellant contends that the trial court erred in finding no ambiguity in the terms of the 2010 annuity. Appellant argues that the crossing out of the words "Life Only" in Section 13 of the application and the fact that two amendment pages, one signed and one unsigned, are included with the annuity renders the 2010 annuity ambiguous, allowing the court to consider extrinsic evidence to ascertain the parties' intent. Appellant points to decedent's naming of appellant as beneficiary in both the application for the 2004 annuity and the pre-amendment application for the 2010 annuity as extrinsic evidence of decedent's intent that his son receive a death benefit.

{¶ 22} A court will resort to extrinsic evidence in its effort to give effect to the parties' intentions only where the language of the contract is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning. *Kelly*, 31 Ohio St.3d 130, 132. "[W]hether a contract is ambiguous is a decision that is made as a matter of law." *Southers v. Southers*, 10th Dist. No. 11AP-113, 2011-Ohio-6233, ¶ 7. "Ambiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation." *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, ¶ 16.

{¶ 23} We agree with the trial court that the 2010 annuity clearly and unambiguously expresses decedent's intent that there be no beneficiary of the annuity. Neither of the two provisions at issue is susceptible of more than one reasonable interpretation. Appellant's argument regarding the demarcations in Section 13 of the application is misplaced; no selection in Section 13 was even warranted because the annuity, an individual retirement annuity, was a "Qualified Plan" pursuant to section 408 of the Internal Revenue Code. Rather, decedent was to complete Section 15, which he did by designating the annuity as an "IRA" and designating it as "Life Only."

{¶ 24} Appellant's attempt to create ambiguity from the two amendments to the application is also misplaced. Appellant does not dispute that one of the amendments is signed and dated by decedent and is also witnessed. Further, the written terms of the signed amendment are clear—the annuity is written with no beneficiary.

{¶ 25} Both the application and annuity itself include several provisions identifying the annuity as a "Life Only" annuity with no payable death benefit. As noted above, Sections 12 and 15 of the application identify the annuity as a "Lifetime Income Annuity" and a "Life Only" plan, respectively. The first page of the annuity describes it as a "Lifetime Annuity." The Policy Data Page confirms that decedent is the only "Annuitant," that the plan is a "Life Annuity," and that the annuity benefit is $1,255.31 per month, "payable only while the Annuitant is living." The Policy Data Page does not identify any beneficiary or any death benefit. Because the terms of the 2010 annuity clearly and unambiguously express decedent's intention that the annuity was a "Life Only" annuity with no death benefit, this court will not create a new contract by finding that which was not expressed in the clear language of the annuity. *Alexander* at 246.

{¶ 26} The evidence shows that decedent elected to accept the "Life Only" annuity payments after being informed about the "Life Only" (no beneficiary) aspect of the contract into which he desired to transfer his funds. There are no facts alleged that support any wrongdoing by his agent or insurance company. The decision was that of decedent alone as far as is evident from the record.

{¶ 27} The parol evidence rule is inferentially raised by appellant's contention that decedent's naming of appellant as beneficiary in both the application for the 2004 annuity and the pre-amendment application for the 2010 annuity constitutes extrinsic evidence of

decedent's intent that his son receive a death benefit. The parol evidence rule is a rule of substantive law developed centuries ago to protect the integrity of written contracts. *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 440 (1996). Pursuant to this rule, " 'absent fraud, mistake or other invaliding cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.' " *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 2000-Ohio-7, quoting 11 Williston on Contracts (4th Ed.1999) 569-70, Section 33:4. "By prohibiting evidence of parol agreements, the rule seeks to ensure the stability, predictability, and enforceability of finalized written instruments." *Id.* Because appellant's complaint contains no allegations of fraud, mistake or other invalidating cause, decedent's naming of appellant as beneficiary in the application for the 2004 annuity and the pre-amendment application for the 2010 annuity may not be used to contradict the parties' final written integration of their agreement.

{¶ 28} Appellant suggests that, if he were permitted to conduct discovery, he would find evidence in support of his breach of contract claim. However, the purpose of discovery is not to permit one party to conduct a "fishing expedition" for evidence to support his or her claim. *Winkle v. Southdown, Inc.* (Sept. 3, 1993), 2d Dist. No. 92-CA-107. The civil rules require the party asserting a claim for breach of contract to attach the documents at issue to the complaint. Civ.R. 10(D). As previously stated, the 2010 annuity expressly contradicts the claim asserted in the complaint, and thus the court properly dismissed the complaint under Civ.R. 12(B)(6). Permitting discovery when the allegations in the complaint are insufficient to state a claim would be improper.

{¶ 29} Because appellant is neither a party to nor an intended third-party beneficiary of the 2010 annuity, he lacks standing to pursue his breach of contract claim. Thus, the trial court properly dismissed this claim pursuant to Civ.R. 12(B)(6).

{¶ 30} We next consider appellant's breach of fiduciary duty claim. A "fiduciary relationship" is one " 'in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.' " *Ed Schory & Sons, Inc.* at 442, quoting *In re Termination of Emp.*, 40 Ohio St.2d 107, 115 (1974).

{¶ 31} The trial court properly concluded that appellant did not have standing to pursue his breach of fiduciary duty claim. Appellant's complaint does not allege that either NYLIAC or Rosen breached any fiduciary duty owed to him. Rather, the complaint alleges that NYLIAC and Rosen breached a fiduciary duty owed to decedent. However, appellant has not alleged that he is the representative or executor of the decedent's estate and, therefore, he cannot assert a claim on behalf of decedent's estate. *See Williams v. Barrick*, 10th Dist. No. 08AP-133, 2008-Ohio-4592, ¶ 10. ("[A] personal representative of a decedent's estate stands in the shoes of the decedent to assert claims on behalf of the estate."), quoting *Hosfelt v. Miller*, 7th Dist. No. 97-JE-50 (Nov. 22, 2000).

{¶ 32} Ohio law does not impose a fiduciary duty on insurance agents or companies and their insureds. "Generally, the relationship between an insurance agent and his client is not a fiduciary relationship, but rather, an ordinary business relationship." *Advent v. Allstate Ins. Co.*, 10th Dist. No. 05AP-1092, 2006-Ohio-2743, ¶ 14. "While the law has recognized a public interest in fostering certain professional relationships, such as the doctor-patient and attorney-client relations, it has not recognized the insurance agent-client relationship to be of similar importance." *Nielsen Ent., Inc. v. Ins. Unlimited Agency, Inc.*, 10th Dist. No. 85AP-781 (May 8, 1986). Even if appellant had standing to pursue a breach of fiduciary claim, his complaint fails to state a claim upon which relief can be granted. Thus, the trial court properly dismissed this claim pursuant to Civ.R. 12(B)(6).

{¶ 33} We turn next to appellant's negligent preparation/advisement claim. The trial court properly concluded that appellant lacks standing to pursue this claim. Appellant's complaint does not allege that either NYLIAC or Rosen negligently prepared or advised him on any contract or policy for his personal benefit. Rather, the complaint alleges that NYLIAC and Rosen negligently prepared and advised decedent regarding the 2010 annuity. As noted above, appellant does not allege that he is the representative or executor of the decedent's estate; accordingly, he cannot assert a claim on behalf of decedent's estate. *See Williams* at ¶ 10.

{¶ 34} The trial court also properly dismissed appellant's claim for declaratory relief. Such claim is derivative of appellant's primary claim for breach of contract. Derivative claims may be maintained only so long as the primary claim continues.

Because a derivative claim cannot afford greater relief than that permitted under the primary claim, a derivative claim fails when the primary claim fails. *Martinez v. Yoho's Fast Food Equip.*, 10th Dist. No. 02AP-79, 2002-Ohio-6756, ¶ 27. The trial court's dismissal of appellant's breach of contract claim necessarily resulted in dismissal of the claim for declaratory relief.

{¶ 35} For the foregoing reasons, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 6(C).