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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Chancery of Delaware.

Re: MERRILL LYNCH TRUST COMPANY, FSB
v.
CAMPBELL, et al.
C.A. No. 1803-VCN.

Submitted: March 28, 2007.

July 11, 2007.

[Dennis A. Meloro](#), Esquire, Greenberg Traurig, LLP,
Wilmington, DE.

[Jeffrey S. Goddess](#), Esquire, Rosenthal, Monhait &
Goddess, P.A., Wilmington, DE.

[JOHN W. NOBLE](#), Vice Chancellor.

*1 Dear Counsel:

When the settlor-beneficiary of a trust expressed her dissatisfaction of the trustee by designating a successor-trustee, yet refused to release the trustee and its affiliates, the trustee brought this action seeking judicial confirmation of its conduct. In turn, the settlor-beneficiary filed a counterclaim, subsequently amended, that alleges that the trustee employed fraud and misrepresentation to induce her to enter into the trust agreement, that the investment strategy employed by the trustee failed to meet the prevailing standard of care, and that the trustee wrongfully withdrew funds from the trust to pay the trustee's legal fees, including those incurred in an effort to enjoin an arbitration brought by the settlor-beneficiary even though the trustee was not a party in the arbitration proceeding.

I. BACKGROUND [\[FN1\]](#)

[FN1](#). The background is drawn from the well-pleaded allegations of the Amended Counterclaim.

In 1996, Defendant-Counterclaimant Mary F.C. Campbell ("Campbell"), a resident of Delaware, then 74 years of age with an even more elderly husband in failing health, was persuaded by representatives of

subsidiaries of Merrill Lynch & Co. to establish a charitable remainder unitrust (the "Trust") with a predecessor of Plaintiff Merrill Lynch Trust Company, FSB ("Merrill Lynch Trust") as the Trustee. [\[FN2\]](#) She would come to regret that decision.

[FN2](#). The Irrevocable Unitrust Agreement (the "Trust Agreement"), dated August 8, 1996, appears as Exhibit B to the Complaint. The initial Trustee was Merrill Lynch Trust Company of America. Merrill Lynch Trust is its successor by a merger that occurred on January 2, 2001. The Court refers to both corporate trustees as "Merrill Lynch Trust."

Campbell's husband had managed the family's finances until his deteriorating health deprived him of the capacity to perform that function. Campbell turned to Baerbel O'Haire, a long-time advisor and broker in the Vero Beach, Florida office of Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Pierce"), the brokerage arm of Merrill Lynch & Co. and a sister entity to Merrill Lynch Trust. Pierce and Merrill Lynch Trust cross-market each other's products and Pierce provides services to Merrill Lynch Trust under a confidential agreement.

Merrill Lynch Trust and Pierce persuaded Campbell to place the bulk of the family's holdings--primarily 10,000 highly appreciated shares of Exxon stock-- in a charitable remainder unitrust through the following representations, upon which Campbell relied:

1. O'Haire represented that the Trust corpus would grow, above the 10% annual distributions to Campbell and subsequent life beneficiaries. Such a consistent earning growth, Campbell alleges, would be unattainable over any reasonably projected time span.

2. A vice president of Merrill Lynch Trust informed Campbell that she could avoid capital gains tax liability from the sale of the Exxon stock which needed to be sold in order to provide income and to allow for diversification. It is alleged that the tax advice was wrong; the capital gains liability would only be deferred until the time of distribution--not avoided.

3. Merrill Lynch Trust also touted the charitable

benefits that could be achieved. It turns out that, given the structure of the Trust, less than one percent of the assets contributed, or slightly more than \$6,000, would qualify for a charitable deduction. That five beneficiaries were named--each projected to receive only a little more than \$1,000--is further evidence of Campbell's expectations about the scope of the charitable benefits that could be achieved.

*2 4. Campbell understood that she would have no personal control over the assets placed in the Trust portfolio, but she was promised that O'Haire, the longtime advisor in whom she had placed her trust and confidence, would continue to play an active role in the management of those assets. Indeed, O'Haire, for several years after establishment of the Trust, was identified as "your financial consultant" and as the "personal contact and relationship manager." In reality, all investment decisions were made by Merrill Lynch Trust with no apparent input from O'Haire. Moreover, Merrill Lynch Trust and Pierce would later take the position that Pierce's only involvement was "custodial" in nature.

In addition, O'Haire, as a representative of Pierce, arranged for an attorney in New York to draft the Trust instrument. The attorney never spoke with Campbell during the negotiation process; all communications, except for a limited communication after transmittal of the final draft were with O'Haire. [\[FN3\]](#) The attorney never attempted to negotiate and, far more importantly, never explained to Campbell, her client, the numerous provisions in the Trust Agreement that could reasonably be viewed as adverse to Campbell's interests, including:

[FN3.](#) The attorney's other communication with Campbell occurred when she sent the bill for her services to Campbell.

1. Merrill Lynch Trust's unilateral ability to increase its fees;
2. No requirement that Merrill Lynch Trust seek the most cost effective brokerage service fees; instead, it could pay whatever standard fees Pierce might charge;
3. Unavailability of arbitration in the event of failures by Merrill Lynch Trust, including bad portfolio performance, although arbitration was generally the only means by which disappointed consumers of Pierce's services could seek a remedy;
4. A reduced duty of care required of Merrill Lynch

Trust; and

5. Campbell's inability to replace Merrill Lynch Trust without first giving a release and discharge of all liability to not only Merrill Lynch Trust, but also all Merrill Lynch affiliates, or Merrill Lynch Trust would seek court approval of its conduct, at the Trust's expense.

Moreover, because the attorney did not reasonably communicate with Campbell, there was no effort or opportunity to assess, for Campbell's benefit, the representations of Pierce and Merrill Lynch Trust upon which Campbell relied.

Merrill Lynch Trust's investment strategy was particularly aggressive for a Trust whose principal beneficiary was an elderly woman. For example, from September 1999 to July 2000, 90% of the assets were equities; for the next two years, all of the assets were equities. By 2005, largely as a result of Merrill Lynch Trust's management of the portfolio, by 2005, the value of the assets held by the Trust had declined by approximately 50%.

Campbell decided to challenge all of this. First, in March 2005, believing that the Trust performance reflected the investment decisions of Pierce, she brought an NASD arbitration against Pierce. Merrill Lynch Trust, although not a party to that arbitration proceeding, joined with Pierce in this Court in an effort to block the arbitration. Claiming that it was necessary to protect its interests, Merrill Lynch Trust interpreted the Trust documents to allow it to fund its efforts with the Trust's money. It is unclear whether Merrill Lynch Trust has allocated (if indeed it has allocated) the cost of seeking such relief between it and Pierce. The effort to enjoin the arbitration was not wholly successful. Campbell, however, did not prevail in the arbitration forum. [\[FN4\]](#) Second, Campbell sought to replace Merrill Lynch Trust as trustee. Merrill Lynch Trust refused, as the Trust Agreement permitted, to allow the substitution--and transfer of Trust assets--unless Campbell released not only Merrill Lynch Trust, but also its affiliates, including Pierce.

[FN4.](#) The decision of the arbitrators contains the following provision: "The Panel wishes to note that the Panel's Award in this matter should have no bearing on the Delaware court [*i.e.*, this] proceeding." Pl.'s Opening Br. in Supp. of Mot. to Dismiss Countercl., Ex. B.

II. THE PROCEEDINGS

*3 Against this backdrop, Merrill Lynch Trust brought this action against Campbell, individual successor beneficiaries, and various charitable beneficiaries. It seeks approval of its accounting of its efforts since 1996 and a declaratory judgment determining that its administration of the Trust and its investment of the Trust's assets were lawful and appropriate.

Campbell counterclaimed. Raising allegations ranging from fraud to breach of fiduciary duty, she asks the Court to order a refund of all Trustee's fees and brokerage and investment and advisory fees above going market rate; a refund of all legal fees taken by Merrill Lynch Trust from the Trust; an injunction requiring Merrill Lynch Trust to deliver the Trust corpus to a successor-Trustee; rescissory damages; and an award of the costs and expenses incurred in defending this action, defending the effort by Merrill Lynch Trust to enjoin the arbitration proceeding, and in presenting the counterclaim here.

Before the Court is Merrill Lynch Trust's Motion to Dismiss Campbell's Amended Counterclaim (the "Counterclaim"). Merrill Lynch Trust focuses on time-based defenses--laches, the general three-year statute of limitations of [10 Del. C. § 8106](#), and the two-year limitations period for claims against a trustee following a trustee's report, established by [12 Del. C. § 3585\(a\)\(1\)](#). Other contentions include a failure to state a claim under [Court of Chancery Rule 12\(b\)\(6\)](#) and the failure to plead fraud with particularity, as required by [Court of Chancery Rule 9\(b\)](#).

III. ANALYSIS

Merrill Lynch Trust, by filing a motion to dismiss, has assumed the burden of demonstrating that Campbell cannot prevail even if the Court accepts all of her well-pleaded allegations as true and gives her the benefit of inferences that can be reasonably be drawn from those allegations. [\[FN5\]](#) The Court, of course, need not consider conclusory allegations. [\[FN6\]](#) Although a motion to dismiss frequently is a less than ideal means to raise an affirmative defense, such as a time-bar defense, the Court may address such defenses if the allegations of the Counterclaim allow only one reasonable inference. [\[FN7\]](#)

[FN5.](#) See, e.g., [In re Gen. Motors \(Hughes\) S'holder Litig.](#), 897 A.2d 162, 168 (Del.2006).

[FN6.](#) See, e.g., [Solomon v. Pathe Commc'ns](#)

[Corp.](#), 672 A.2d 35, 38 (Del.1996).

[FN7.](#) See, e.g., [Malpiede v. Townson](#), 780 A.2d 1075, 1083 (Del.2001); cf. [Salem Church \(Del.\) Assocs. v. New Castle County](#), 2006 WL 2873745, at * 12 (Del. Ch. Oct. 6, 2006).

Campbell's claims can be analyzed within the categories identified in the Counterclaim. First is the challenge to the inducement by representatives of Merrill Lynch Trust and Pierce of Campbell to enter into the Trust Agreement. Second is the degree of competence exhibited by Merrill Lynch Trust in developing and implementing its investment strategy. Third is the charge that Merrill Lynch Trust, without cause and in breach of its fiduciary duties, incurred and paid with Trust funds legal fees in excess of \$75,000, such legal fees having been incurred primarily with respect to the effort to enjoin an arbitration to which Merrill Lynch Trust was not a party.

A. Inducement to Establish the Trust

Campbell challenges the way in which representatives of Merrill Lynch Trust and Pierce persuaded her to enter into the Trust Agreement. Her claims sound in fraud and negligent misrepresentation, including silence when under a duty to disclose. Regardless, the applicable statute of limitations, one that equity would also borrow for laches purposes, is, as the parties acknowledge, three years under [10 Del. C. § 8106](#). All of the alleged misrepresentations, however, occurred in 1996 and that is when the causes of action arose. These events all occurred almost ten years before Campbell filed her initial counterclaim in this proceeding. Thus, unless a basis for tolling the running of the time-bar period can be found, these claims must be dismissed.

*4 The Delaware courts have narrowly carved limited circumstances in which the running of the limitations period can be tolled. Such tolling exceptions include the doctrines of (1) fraudulent concealment, (2) inherent unknowable injury, and (3) equitable tolling. [\[FN8\]](#)

[FN8.](#) [Krahmer v. Christie's, Inc.](#), 903 A.2d 773, 778 (Del. Ch.2006) (citations omitted), *aff'd*, 906 A.2d 806 (Del.2006) (TABLE).

Campbell's challenge is to demonstrate that the various alleged misrepresentations remained "unknowable" until less than three years (that is, late 2002) before she filed her counterclaim in this action.

[FN9] That the lawyer retained, at her expense, for her by Pierce did not communicate with her in an appropriate fashion is obvious--at least as an objective factual matter-- at the time. That the projection investment returns were not being achieved consistently was reflected in the regular reports which Merrill Lynch Trust provided to her; thus, she was on notice of the shortfalls well before late 2002. As to the various contractual rights claimed by Merrill Lynch Trust, the basis for her claim--whether Merrill Lynch Trust reads the Trust Agreement correctly or not--can be discovered from a careful reading of the document. Campbell argues that some of Merrill Lynch Trust's interpretations, such as the remedies available to her or that Merrill Lynch Trust could exclusively control the investment decisions, are "subtle"; perhaps that is true, but subtlety does not approach unknowable. In short, none of the alleged misrepresentations or the adverse consequences that may have resulted can fairly be characterized as unknowable as late as the fall of 2002. It follows that the tolling doctrine is of no use to Campbell and her claims generally advanced in Count I of the Counterclaim are time-barred and must be dismissed.

[FN9]. Whether the Counterclaim "relates back" to Campbell's initial counterclaim is not material.

B. *Investment Performance*

Campbell next challenges Merrill Lynch Trust's portfolio investment strategies. She does not question any particular investment; instead, she argues that investing for the elderly requires a significant component of fixed income investments instead of the 90-100% equity investment strategy implemented by Merrill Lynch Trust. This approach, alleged by Campbell in Count II of the Counterclaim, violates the Trustee's common law and statutory fiduciary duties. Merrill Lynch Trust urges dismissal because these contentions are time-barred since the investment mix concededly was revised more than two years before the filing of the Counterclaim [FN10] and because the allegations failed to state a claim upon which relief can be granted.

[FN10]. The two-year limitations period for the filing of claims against trustees following the sending of a trustee's report that "adequately discloses the facts constituting a claim" is prescribed by 12 Del. C. § 3585(a)(1).

The expressly identified purpose for Merrill Lynch Trust's filing of this action was to obtain "[c]ourt approval of the investment decisions made by [Merrill Lynch Trust] relevant to the [Trust] period."

[FN11] That question, of course, is, in substance, the same question that Campbell asked the Court to resolve. If Merrill Lynch Trust believes that there is enough of a dispute about how it managed the assets of the Trust that it brought this action, then it is difficult to conclude that there is no issue that Campbell can fairly join. Even if Campbell had not raised the challenge asserted in her counterclaim and instead had simply relied upon confronting the complaint head on, the wisdom or propriety of the investment approach would be before the Court. If the Court in assessing whether Merrill Lynch Trust satisfied its fiduciary duties concludes that it had not done so, then the very remedies which Campbell seeks could be ordered by the Court in the context of passing on the current accounting action. Thus, there is a viable issue to be resolved; dismissal of this portion of the Counterclaim would serve no purpose because the issue has already been joined. [FN12]

[FN11]. Compl. ¶ 22.

[FN12]. More specifically, the Court, after giving Campbell all of the favorable inferences to which she is entitled, cannot in this context conclude that Merrill Lynch Trust did not waive any time-bar defense that it might have had. This is because Merrill Lynch Trust seeks approval of its actions all the way back to 1996; the Complaint is not limited only to its more recent investment actions. With respect to the merits of the challenge to the investment strategy, the Counterclaim alleges that the investment strategy was without any reasonable basis given the age of the primary beneficiary. Whether that, by itself, states a claim is a close question, but with the presence of Merrill Lynch Trust's direct claim raising the same issue, the better inference is that there is an issue which needs factual development before it can be addressed fairly by the Court.

C. *Attorneys' Fees*

*5 Finally, Merrill Lynch Trust argues that Campbell's efforts to recover the legal fees that it paid from the Trust to fund the cost of the effort to enjoin the NASD arbitration and for the defense of the NASD arbitration was improper. Campbell

focuses on the fact that Merrill Lynch Trust was not even designated as a party in the arbitration proceeding. No reason emerges from the Counterclaim for why a Trustee would seek to enjoin an arbitration to which it is not a party. The Trust Agreement, of course, accords Merrill Lynch Trust significant discretion and the right to incur legal fees that are to be paid from the Trust, but the Court cannot conclude from the Amended Complaint and the documents referenced in it that that Merrill Lynch Trust conduct was consistent with its fiduciary duties. Another plausible inference to be drawn from the allegations is that Merrill Lynch Trust simply decided to use funds in the Trust to pay for the litigation strategy implemented by its sister entity, Pierce. Merrill Lynch Trust's conduct may well be justified; it is simply that that conclusion cannot be reached within the confines of a motion under [Court of Chancery Rule 12\(b\)\(6\)](#).

IV. CONCLUSION

For the foregoing reasons, Count I of Campbell's Counterclaim (that is, the allegations of fraud and misrepresentation regarding the formation of the Trust) is dismissed. Otherwise, the motion of Merrill Lynch Trust to dismiss the Counterclaim is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

Not Reported in A.2d, 2007 WL 2069867 (Del.Ch.)

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