**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF DELAWARE**

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| In re: | ) | Chapter 11 |
| | ) | |
| STONE & WEBSTER, INC., et al., | ) | Case No. 00-2142(PJW) |
| | ) | |
| Debtors. | ) | (Jointly Administered) |
| | ) | |
| | ) | |
| THE SHAW GROUP INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Adv. Proc. No. 08-51839(PJW) |
| | ) | |
| THE SWE&C LIQUIDATING TRUST, and HERBERT SEARS, solely in his capacity as Trustee for the SWE&C Liquidating Trust, | ) | |
| | ) | |
| Defendants. | ) | |

# MEMORANDUM OPINION


Adam G. Landis
Kerri K. Mumford
Landis Rath & Cobb LLP
919 Market Street, Suite 1800
Wilmington, DE 19801

Lorraine S. McGowen
Alyssa Englund
Orrick, Herrington &
Sutcliffe LLP
666 fifth Avenue
New York, NY 10103

James E. Houpt
Orrick, Herrington &
Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 95814

Counsel for The SWE&C Liquidating Trust and Herbert Sears

Steven T. Margolin
Don A. Beskrone
Gregory A. Taylor
Karen B. Skomorucha
Ashby & Geddes, P.A.
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899

Counsel for The Shaw Group Inc.


Dated: February 18, 2009

**WALSH, J**

This opinion is with respect to the motion of defendants The SWE&C Liquidating Trust ("SWE&C Trust") and Herbert Sears ("Sears") in his capacity as Trustee for SWE&C Trust (together, "Defendants"), seeking dismissal of Sears from the Complaint filed by The Shaw Group, Inc. ("Shaw") and seeking dismissal of certain counts of the Complaint. (Adv. Doc. # 20.) For the reasons stated below, the Court will deny the motion.

**BACKGROUND**

This adversary proceeding originated from the bankruptcy case of Stone & Webster, Inc. and certain of its subsidiaries (collectively, "Debtors") filed on June 2, 2000. (Case # 00-2142 (PJW).) On July 14, 2000, the Court entered an order approving the sale of substantially all of the Debtors' assets to Shaw pursuant to an Asset Purchase Agreement by and among the Debtors and Shaw. (Id. at Doc. # 340.) On January 16, 2004, the Court entered an order confirming the Third Amended Joint Plan of Reorganization which provided for the substantive consolidation of Stone & Webster, Inc. and its direct subsidiaries into the Consolidated SWINC Estate ("SWINC Estate") and, similarly, the substantive consolidation of Stone & Webster Engineers and Constructors, Inc. and its direct subsidiaries into the Consolidated SWE&C Estate. The assets of the Consolidated SWE&C Estate were transferred to SWE&C Trust on the Plan's effective date. (Id. at Doc. # 4879.)

As of November 30, 2004, non-debtor Stone & Webster Canada Limited held a tax refund of approximately $6,930,468 (Canadian Dollars) ("Tax Refund"). (Adv. Doc. # 1, ¶ 18.) On November 30, 2004, SWINC Estate, SWE&C Trust, and Shaw entered into a Settlement Stipulation to provide a mechanism for resolving outstanding issues as to Debtor's bankruptcy and the Asset Purchase Agreement and to provide an escrow for security on the payment of certain claims. (Id. at ex. A.) Simultaneously, the three parties entered into an Escrow Agreement which required the establishment of an escrow account ("Set-off Escrow Account") and the deposit of $2,000,000 of the Tax Refund by SWE&C Trust into that account ("Escrow Fund") to be held by an Escrow Agent pursuant to the provisions of the Escrow Agreement. (Id. at ex. B.)

The instant adversary proceeding involves issues arising from the Settlement Stipulation and the Escrow Agreement. In pertinent part, the Settlement Stipulation states:

REDACTED[1]

[1] The Settlement Agreement and the Escrow Agreement are exhibits to the Complaint but have been filed with the Court under seal. Consequently, Shaw has requested that the public copy of this Memorandum Opinion have the quoted portions of those two documents redacted.

(Id. at ex. A, pp. 3, 6 (emphasis added).) With respect to the Escrow Agreement, the pertinent provisions are:

REDACTED

REDACTED

(Id. at ex. B, pp. 1-2 (emphasis added).) Both agreements are governed by the law of the state of Delaware. (Id. at ex. A, p. 11; ex. B, p. 8.)

In its Complaint filed December 1, 2008, among other things, Shaw states a claim for accounting (Count VI), a claim for breach of contract (Count VII), and a claim for breach of fiduciary duty (Count VIII) against SWE&C Trust and Sears as Trustee. (Adv. Doc. #1.) Specifically, Shaw contends that Defendants failed to establish the Set-Off Escrow Account, failed to invest the Escrow Fund, and caused the Escrow Fund to be transferred without Shaw's consent, all in violation of the Escrow Agreement, thereby breaching the contract and their fiduciary duties:

> 27. Upon information and belief, neither the SWE&C Trust nor the Trustee ever established the Set-Off Escrow Account as required by the Escrow Agreement. Rather, following the execution of the Settlement Stipulation through the filing of this Complaint, the SWE&C Trust has held the Escrow Fund in one or more the SWE&C Trust's operating accounts and, moreover, transferred the Escrow Fund between certain of the SWE&C

> Trust's operating accounts on numerous occasions without Shaw's authorization or consent and in violation of the Escrow Agreement.
>
> 28. Upon information and belief, neither the Trustee nor the SWE&C Trust invested the Escrow Fund in United States government securities.
>
> 31. Upon information and belief, the SWE&C Trust currently holds the remaining approximately $875,359.00, plus accruing interest, from the Escrow Fund, and transfers such amount on a daily basis between a Business Cash Management Checking account and a Corporate Repo Sweep account. Each of the daily transfers made pursuant to this practice is without Shaw's authorization or consent and is in violation of the Escrow Agreement.
>
> 32. While such funds are in the Business Cash Management Checking account, no interest is earned on such funds. While such funds are in the Corporate Repo Sweep account, interest is earned but at rates that are lower than rates offered with respect to United States government securities for the corresponding time periods.

(Id.; see also id. at ¶ 86, 95-96.) Additionally, Shaw contends that Defendants "refused to remit the Escrow Fund to Shaw," further breaching their fiduciary duties to Shaw. (Id. at ¶ 93.) Also, Shaw requests an accounting pursuant to Defendants' alleged fiduciary duties. (Id. at ¶ 77-83.)

On January 8, 2009, Defendants filed a motion asking the Court to impose joint and several sanctions, pursuant to Fed. R. Civ. P. 11, made applicable to this Court's proceedings by Fed. R. Bankr. P. 9011, against Shaw and counsel who filed the Complaint.

(Adv. Doc. # 12.) On January 13, 2009, Defendants filed the instant motion asking the Court to dismiss Sears from the Complaint and to dismiss Counts VI-VIII of the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), which is made applicable to this proceeding by Fed. R. Bankr. P. 7012, or, alternatively, pursuant to Fed. R. Civ. P. 56, which is made applicable to this proceeding by Fed. R. Bankr. P. 7056.

**DISCUSSION**

Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must contain sufficient "factual allegations" which, if true, would establish "plausible grounds" for a claim: "the threshold requirement . . . [is] that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" Bell Atlantic v. Twombly, 550 U.S. 544, 557 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Stated differently, "a plaintiff's obligation to provide the 'grounds' of [her or] his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." Id. at 555.[2] In deciding a motion to dismiss under Rule 12(b)(6), a court tests the sufficiency of

[2] The Third Circuit has held that the pleading standard adopted in Twombly is not limited to anti-trust claims as in Twombly, but is "intended to apply to the Rule 12(b)(6) standard in general." Phillips v. County of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008).

the factual allegations: it evaluates whether a plaintiff is "entitled to offer evidence to support the claims," and "not whether a plaintiff will ultimately prevail." Oatway v. Am. Int'l Group, Inc., 325 F.3d 184, 187 (3d Cir. 2003). Indeed, the Supreme Court of the United States has stated: "[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." Twombly, 550 U.S. at 556.

In considering a motion to dismiss under Rule 12(b)(6), the allegations in the complaint are accepted as true and the complaint is construed "in the light most favorable to the plaintiff" to "determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Sands v. McCormick, 502 F.3d 263, 267-68 (3d Cir. 2007) (quoting Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)). However, "a court need not credit a plaintiff's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." Id. (quoting Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)). See also In re Rockefeller Ctr. Props., Inc. Sec. Litig., 311 F.3d 198, 216 (3d Cir. 2002) ("[L]egal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness."); Schuylkill Energy Res. v. Pennsylvania Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997)

(noting that courts are not "required to accept as true unsupported conclusions and unwarranted inferences").

Without triggering a conversion to summary judgment, a court may consider any documents attached or referred to in the complaint. See Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993) ("To decide a motion to dismiss, courts generally consider only the allegations that are contained in the complaint, exhibits attached to the complaint and matters of public record."); Sierra Invs., LLC v. SHC, Inc. (In re SHC, Inc.), 329 B.R. 438, 442 (Bankr. D. Del. 2005) ("The Court may consider documents which are incorporated into the complaint or counterclaim, even if they contradict the allegations."). Thus, the Court may consider the Settlement Stipulation and the Escrow Agreement, both of which are attached to the Complaint.

Breach of Contract Claim

In their motion to dismiss, Defendants offer evidence that the initial $2,000,000 deposit into the Set-Off Escrow Account was made pursuant to the Escrow Agreement. See Adv. Doc. # 17, ¶ 7 and ex. 8. However, Defendants do not challenge the allegations in the Complaint that during the period subsequent to the execution of the Settlement Stipulation and the Escrow Agreement and up through the filing of the Complaint, the Escrow Fund was placed in one or more of SWE&C Trust's operating accounts and was not invested in United States government securities, both in violation

of the Escrow Agreement. Of note, the Escrow Agreement is not a two-party agreement between Shaw and the Escrow Agent. Rather, SWE&C Trust, as part of the Consolidated Estates, is also party to that agreement. See Adv. Doc. # 1, ex. A, p. 1 (". . . the Consolidated Estates, Shaw, and the Escrow Agent hereby covenant and agree as follows: . . . ."). The conduct alleged in the Complaint is clearly contrary to what SWE&C Trust agreed to in the Escrow Agreement.

Defendants repeatedly assert that if Shaw has a complaint with respect to the Escrow Fund, its complaint should be directed to the Escrow Agent. It is inconceivable that when the Escrow Fund was transferred into and out of SWE&C Trust's operating accounts, as alleged by Shaw, SWE&C Trust was not a party to that conduct. It may well be that the Escrow Agent will have to answer to Shaw for allowing the Escrow Fund to be used in this fashion, but that does not negate SWE&C Trust's alleged conduct. As noted, in deciding a Rule 12(b)(6) motion, the Court "accept[s] all factual allegations as true, construe[s] the complaint in the light most favorable to the plaintiff, and determine[s] whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Sands, 502 F.3d at 267-68. Based on Shaw's allegations, it is more than appropriate to believe at this point that SWE&C Trust was a party to the activity proscribed by the Escrow Agreement, and, thus, potentially in breach of the Escrow

Agreement. Accordingly, I will not dismiss Shaw's breach of contract claim (Count VII).

Breach of Fiduciary Duty and Accounting Claims

Under Delaware law, a well-pled claim for breach of fiduciary duty alleges: "(1) that a fiduciary duty exists and (2) that the fiduciary breached that duty." York Lingings v. Roach, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999). Though "Delaware law is stingy about affording fiduciary protections to those who do not clearly qualify for them," Continental Ins. Co. v. Rutledge & Co., 1999 WL 66528, at *5 (Del. Ch. Jan. 26, 1999), Delaware "courts have consciously refused to delineate those situations where a fiduciary relationship may exist." Coleman v. Newborn, 948 A.2d 422, 429 (Del. Ch. 2007) (quoting Swain v. Moore, 71 A.2d 264, 267 (Del. Ch. 1950)) (noting that "[g]iven this doctrine, the finding of a fiduciary relationship is a factual inquiry that requires an examination of whether the relationship is of such a confidential or dependent nature as to rise to fiduciary status"). Delaware courts have held that fiduciary relationships can arise in a variety of contexts, including in the context of a standard business relationship. See, e.g., Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 872 A.2d 611, 625 (Del. Ch. 2005) ("[S]ome cases in Delaware have found certain aspects of a commercial relationship to implicate fiduciary duties . . . ."); Petenbrink v. Superior Home Builders, Inc., 1999 WL 1223786, at *2 (Del. Super. Ct. Nov. 1,

1999) ("[T]he law will recognize a fiduciary duty arising out of a commercial contract if the transaction involved facts and circumstances indicative of the imposition of trust and confidence, rather than facts and circumstances indicative of an arms length commercial contract."). Specifically, fiduciary duties have been imposed on contracting parties under the following circumstances: special or superior knowledge, confidentiality, assumption of control and responsibility, reliance, equitable interest, and alignment of interests. See Crosse v. BCBSD, Inc., 836 A.2d 492 (Del. 2003) (alignment of interests); Dolby v. Key Box "5" Operatives, Inc., 1994 WL 507881 (Del. Ch. Sept. 8, 1994) (equitable interest and control); Northeast Loan v. Furniture Mart, 1977 WL 9536 (Del. Ch. Sept. 21, 1977) (reliance); Legatski v. Bethany Forest Assoc., Inc., 2006 WL 1229689 (Del. Super. Ct. April 28, 2006) (assumption of control and responsibility); Total Care Physicians, P.A. v. O'Hara, M.D., 798 A.2d 1043 (Del. Super. Ct. 2001) (confidentiality); Petenbrink, 1999 WL 1223786 (special or superior knowledge).

Defendants argue that the Settlement Stipulation and the Escrow Agreement were arms' length business transactions between adversarial parties, thereby contending that the clash of interests among the contracting parties prevents the formation of a fiduciary duty as to SWE&C Trust. However, the Escrow Agreement is not as simple as Defendants maintain: it is not a conventional escrow

agreement whereby distribution is made upon the happening of a particular event or date; rather, the Escrow Agreement addresses a complex series of events and claims. Based upon previous decisions of Delaware courts regarding the imposition of fiduciary duties and a reasonable reading of the instant Complaint, it may be appropriate to conclude that SWE&C Trust had a fiduciary duty with respect to the application of the Escrow Fund arising from one or some of the above mentioned circumstances. Hence, I cannot conclude that Delaware law does not recognize any situations in which fiduciary duties could arise from the relevant agreements. If such a fiduciary duty existed, based on Shaw's factual allegations, which I must accept as true, that fiduciary duty may have been breached and Shaw may be entitled to relief. At this stage in litigation, it would be inappropriate to prevent Shaw from moving forward with and conducting discovery as to the breach of fiduciary duty claim. Accordingly, I will not dismiss Shaw's breach of fiduciary duty claim (Count VIII).

Further, having determined that a fiduciary duty may have existed, it likewise would be inappropriate to dismiss Shaw's accounting claim. Under Delaware law, a claim for accounting is an equitable remedy tied to fiduciary duties. See Albert v. Alex. Brown Mgmt. Servs., Inc., 2005 WL 2130607, at *11 (Del. Ch. Aug. 26, 2005) ("An accounting is an equitable remedy that consists of the adjustment of accounts between parties and a rendering of a

judgment for the amount ascertained to be due to either as a result. As it is a remedy, should the plaintiffs ultimately be successful on one or more of their claims, the court will address their arguments for granting an accounting."); Metro Ambulance, Inc. v. Eastern Medical Billing, Inc., 1995 WL 409015, at *2-3 (Del. Ch. July 5, 1995) (noting that "[e]quity will exercise jurisdiction over a fiduciary relationship"). As I have held that Shaw has sufficiently pled a plausible claim for fiduciary duty, I similarly will not dismiss Shaw's claim for accounting (Count VI).

Dismissal of Sears From Complaint

Defendants argue that the Complaint should not have been filed against the Trustee but rather only against the Trust. I do not agree.

Courts have recognized the standing of trusts to sue and be sued. See, e.g., Bridgeport Holdings Inc. Liquidating Trust v. Boyer, 388 B.R. 548 (Bankr. D. Del. 2008) (suit by a trust); City Investing Co. Liquidating Trust v. Continental Cas. Co., 624 A.2d 1191 (Del. 1993) (suit by a trust). Similarly, courts have recognized the standing of trustees of trusts to sue and to be sued in their representative capacity as trustees. See, e.g., Prusky v. ReliaStar Life Ins. Co., 532 F.3d 252 (3d Cir. 2008) (suit by a trustee in his individual capacity and as trustee); McCann v. George W. Newman Irrevocable Trust, 458 F.3d 281 (3d Cir. 2006) (suit against a trust and trustees in their capacities as

trustees); Lowsley-Williams v. North River Insurance Co., 884 F. Supp. 166, 169 (D. N.J. 1995) (noting that "the trustee . . . can sue and be sued in the capacity of trustee . . ."). Shaw's Complaint names Sears solely in his capacity as Trustee of SWE&C Trust, not in his individual capacity. It is clear that a party seeking to impose liability on a trust may name both the trust and the trustee in her or his representative capacity. As Trustee of SWE&C Trust, Sears was properly named and, as such, I will deny Defendant's request to dismiss Sears in his capacity as Trustee from the Complaint.

Conversion To Motion For Summary Judgment

Though the decision to convert a motion to dismiss into a motion for summary judgement is within the discretion of the Court, Kulwicki v. Dawson, 969 F.2d 1454, 1462 (3d Cir. 1992), generally courts are careful not to prematurely consider motions for summary judgment, especially when little or no discovery has been conducted. For example, the Third Circuit has stated that "where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course." Costlow v. United States, 552 F.2d 560, 564 (3d Cir. 1977). See also Miller v. Beneficial Mgmt. Corp., 977 F.2d 834, 845 (3d Cir. 1992) (quoting Costlow and holding that "incomplete state of discovery alone should have precluded summary judgment on the merits"); Brug

v. Enstar Group, Inc., 755 F. Supp. 1247, 1251 (D. Del. 1991) (noting that "it would be inappropriate to convert the motion to dismiss into a motion for summary judgment . . . since there has been no discovery conducted in the present case"); In re Hechinger Inv. Co. of Del., Inc., 282 B.R. 149, 156 (Bankr. D. Del. 2002) (declining to convert a motion to dismiss into a motion for summary judgment because no discovery had been conducted and the defendant had not yet answered the complaint). Shaw should be afforded the opportunity to conduct discovery on the critical facts regarding the allegations that SWE&C Trust acted in violation of the Escrow Agreement. Accordingly, I will deny Defendants' request to treat the Rule 12(b)(6) motion to dismiss as a Rule 56 motion for summary judgment.

**CONCLUSION**

For the reasons stated above, the Court will deny Defendant's motion to dismiss Sears and to dismiss Counts VI, VII, and VIII of the Complaint.[3]

[3] However, if Shaw's allegations in the Complaint -- specifically those in paragraphs 27, 28, 31, 32, and 86 -- have no basis in fact, then Defendants' motion for sanctions pursuant to Fed. R. Civ. P. 11 (Adv. Doc. # 12) may have viability. See, e.g., Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3d Cir. 1988) (noting that "[t]his Court and others have interpreted [Rule 11's] language to prescribe sanctions . . . where a claim or motion is patently unmeritorious or frivolous").

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| Defendants. | ) | |

**ORDER**

For the reasons set forth in the Court's memorandum opinion of this date, the Motion of Defendants, The SWE&C Liquidation Trust and Herbert Sears, to Dismiss Mr. Sears and to Dismiss Counts VI, VII and VIII of the Adversary Complaint or, in the Alternative, for Summary Judgment (Doc. # 20) is **denied.**

Peter J. Walsh
United States Bankruptcy Judge

Dated: February 18, 2009