

FILED _____

AT _____ O’Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

DONALD CRAIG FRIZZELL,)
)
) *Plaintiff,*)
)
 vs.)
)
) **EDWIN DEYOUNG, Trustee of Clifton and**)
) **Marjorie Frizzell Family Trust of June 30,**)
) **2009,**)
)
) *Defendant.*)
)
 _____)

Case No. **CV 2013 3998**

**MEMORANDUM DECISION AND
ORDER GRANTING PLAINTIFF’S
MOTION TO DISMISS
DEFENDANT’S COUNTERCLAIM**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on “Plaintiff’s Motion to Dismiss Counterclaim”, filed May 8, 2014.

Defendant Edwin DeYoung (DeYoung) is the trustee of the Clifton and Marjorie Frizzell Family Trust (Trust). Complaint, p. 1 ¶ 2. Plaintiff Donald Craig Frizzell (Frizzell) is one of the beneficiaries of the Trust. *Id.*, p. 1 ¶ 1. On May 29, 2013, Frizzell initiated the instant action seeking: a) removal of DeYoung as trustee; b) an order that DeYoung “provide a complete accounting of all financial activity regarding the trust and trust property from the time he became trustee until the preset”; c) damages, lost revenue and expenses incurred by the Trust; and d) attorney’s fees. *Id.*, p. 3 ¶¶ A-D.

On July 19, 2013, DeYoung filed an Answer, which contained the following counterclaim: “Defendant requests reasonable attorney’s fees and costs under Section 15-8-208 of Idaho Code.” Answer, p. 2. That was the only counterclaim at that time.

A claim for attorney fees is not appropriate for a counterclaim. Then, on January 10, 2014, DeYoung filed Defendant's *Amended Counterclaim*. On January 17, 2014, the parties filed a stipulation to allow DeYoung to amend the Counterclaim. Stipulation to Motion to Amend Defendant's Counterclaim, p. 1. DeYoung's Amended Counterclaim reads as follows:

COMES NOW, RICHARD P. WALLACE, attorney for Defendant, and alleges as a counterclaim against the Plaintiff as follows:

1. That the Plaintiff has consistently and deliberately attempted to hinder and interfere with the administration of the Trust by not responding to the Trustee and by not following the Trustee's directions in the administration of the estate as follows:
 - a. The titles to 5 vehicles belonging to the estate were lost and then put into Plaintiff's name;
 - b. Plaintiff intentionally changed the Trust's mailing address to his own house address after Defendant became Trustee of the Trust and otherwise hindered the efficient change of address for Trust administration;
 - c. That in the division of estate jewelry, consisting of gold necklace, broach, tie clasp, cuff links, and diamonds[,] Plaintiff never disclosed the amount of money received for its sale and kept the funds for himself;
 - d. Plaintiff sold the Nissan Pickup to clean up and repair the Brayton house and never gave the Trustee an accounting;
 - e. After accepting the delegation of responsibility, Plaintiff failed to complete the basic cleanup and repairs of the Brayton house, causing loss of income to the estate for one year at \$1,600 per month;
 - f. That Plaintiff kept the money from the estate sale of the items in the Holly Glen house and did not clean up the house, preventing either sale or renting of the house at \$3,500 per month;
 - g. Plaintiff changed the locks of the home owned by the estate in North Carolina and occupied it several times without permission, preventing maintenance of the property by the Trustee;
 - h. Plaintiff has deliberately delayed administration of the estate and income to the estate by not cooperating with the Trustee at every turn, resulting in damages to the Trust due to Plaintiff's actions set forth above of approximately \$100,000 (one hundred thousand dollars).
2. Defendant requests reasonable attorney's fees and court costs under 15-8-208 of Idaho Code.

Defendant's Amended Counterclaim, pp. 1-2.

On May 8, 2014, Frizzell filed Plaintiff's Motion to Dismiss Counterclaim. It was accompanied by a Memorandum in Support of Plaintiff's Motion to Dismiss Counterclaim. DeYoung filed an Objection to Plaintiff's Motion to Dismiss Counterclaim on June 2, 2014. It was accompanied by a Memorandum in Support of Defendant's Objection to Plaintiff's Motion to Dismiss Counterclaim. Hearing on the Plaintiff's Motion to Dismiss Counterclaim was held on June 5, 2014.

For the reasons set forth below, the Court grants Frizzell's "Motion to Dismiss Counterclaim" (DeYoung's Amended Counterclaim).

II. STANDARD OF REVIEW.

"A motion to dismiss under Rule 12(b)(6) for failure to state a claim must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and calls for 'a short and plain statement of the claim showing that the pleader is entitled to relief' and a demand for relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citing I.R.C.P. 8(a)(1), (2)). In considering a motion to dismiss under I.R.C.P. 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990).

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. See *Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). Complaints should not be dismissed under I.R.C.P. 12(b) unless the non-moving party can prove no set of facts which would entitle him to relief. *Dumas v. Ropp*, 98 Idaho 61, 62, 558 P.2d 632, 633 (1977). The

non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. See *Idaho Schs. for Equal Educ.*, 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). And any doubts must be resolved in favor of the survival of the complaint. *Gardner v. Hollifield*, 96 Idaho 609, 610-11, 533 P.2d 730, 731-32 (1975).

The grant of a Rule 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. See *Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopoulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct. App. 1996). When reviewing an order of the district court dismissing a case pursuant to Idaho Rule of Civil Procedure 12(b)(6), "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.'" *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v. Suzuki Motor Co. Ltd.*, 776 F.Supp. 698, 701 (E.D.N.Y. 1991)).

III. ANALYSIS.

A. The Clifton and Marjorie Frizzell Family Trust is Not a Party to This Suit; Thus, in his Capacity as Trustee, DeYoung is Not an Opposing Party that has Standing to Bring a Counterclaim on Behalf of the Trust.

"[T]he doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Idaho Branch Inc. of Associated Gen. Contractors of Am. v. Nampa Hwy. Dist. No. 1*, 123 Idaho 237, 240, 846 P.2d 239, 242 (Ct. App. 1993) (citing I.C. §§ 10-1205 –1206). "To satisfy the requirement of standing litigants must allege an injury in fact, a fairly traceable causal connection between the claimed injury and the challenged conduct, and a substantial likelihood that the judicial

relief requested will prevent or redress the claimed injury.” *Doe v. Doe*, 155 Idaho 660, 315 P.3d 848, 850 (2013) (citing *Bagley*, 149 Idaho 806, 807, 241 P.3d 979, 980 (2012)). The claimed injury must be against the party whose standing is in question. *Id.* (citing *Abolafia v. Reeves*, 152 Idaho 898, 902, 277 P.3d 345, 349 (2012)).

Frizzell seeks dismissal of the Counterclaim against him for alleged damages to the Trust because the Trust is not a named defendant to this litigation. Memorandum in Support of Plaintiff’s Motion to Dismiss Counterclaim, pp. 6-7. Having initiated this suit against DeYoung personally, Frizzell maintains that DeYoung cannot now bring a counterclaim on behalf of the Trust. *Id.*, p. 8. In the Counterclaim, DeYoung only alleges an injury to the Trust. *Id.* As such, Frizzell contends the Counterclaim must be dismissed because the Trust lacks standing to file a counterclaim. *Id.*

In response, DeYoung cites to I.C. § “68-106[(c)](25)”, “*Johnson v. Howard*, 147 Idaho 737 (2009)” [which is actually the citation for *Indian Springs, LLC, Johnson v. Howard* is found at 150 Idaho 330, 246 P.3d 983] *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 215 P.3d 457 (2009), and *State v. Cosgrove*, 36 Idaho 278, 210 P. 393 (1922) in support of his position that he has a valid counterclaim to sue Frizzell for damages to the trust. Defendant’s Memorandum in Opposition to Plaintiff’s Motion to Dismiss Counterclaim, pp. 2-3. By way of argument, DeYoung merely quotes three sentences from each of the above cited authorities, but fails to elaborate how they each support his position. *Id.*

Pursuant to I.C. § 68-106(c)(25), “a trustee has the power . . . to prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties.” I.C. § 68-106(c)(25). While I.C. § 68-106 grants a trustee certain powers, that code section alone does not allow DeYoung to

exercise his authority as a trustee by way of counterclaim in this case, where DeYoung has been sued in an individual capacity.

DeYoung also cited the following language from *State v. Cosgrove*, 36 Idaho 278, 284, 210 P. 393, 395 (1922): “A trustee is a man who is the owner of the property and deals with it as principal, as owner and as master, subject only to an equitable obligation to account to some person to whom he stands in the relation of trustee, who are his cestuis que trustent.” Defendant’s Memorandum in Opposition to Plaintiff’s Motion to Dismiss Counterclaim, p. 3 (citing *Id.*). However, the remainder of that passage provides: “A director never enters into a contract for himself, but he enters into contracts for his principal; i.e., for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued, **unless he exceeds his authority.**” *Cosgrove*, 36 Idaho 278, 284, 210 P. 393, 395 (emphasis added). In this case, Frizzell alleges DeYoung failed to perform his duties as a trustee. Complaint, p. 2. DeYoung is being sued in his personal capacity, not on behalf of the trust. However, DeYoung brings his Counterclaim on behalf of the Trust, seeking damages to the Trust alone, and is not seeking damages for DeYoung individually. See Defendant’s Amended Counterclaim, pp. 1-2.

Under I.R.C.P. 13, a counterclaim must be brought by an opposing party. Idaho Rule of Civil Procedure 13 is similar to Federal Rules of Civil Procedure 13. Several federal circuits have held that a trustee sued in his capacity as a fiduciary cannot also have a counterclaim brought against him in his individual capacity because the counterclaim is not against an “opposing party”. *Pioche Mines Consol., Inc. v. Fid.-Philadelphia Trust Co.*, 206 F.2d 336, 337 (9th Cir. 1953). “The generally prevailing, although not uniform, view is that the ‘opposing party’ requirement means that when a

plaintiff has brought suit in one capacity, the defendant may not counterclaim against him in another capacity.” *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 885-86 (2d Cir. 1981) (citing 3 Moore's Federal Practice P 13.06(1) (1980); 6 C. Wright & A. Miller, Federal Practice and Procedure s 1404, p. 16 (1971); *United States v. Timber Access Industries Co.*, 54 F.R.D. 36, 39-40 (D.Or.1971); *Chambers v. Cameron*, 29 F.Supp. 742 (N.D.Ill.1939)).

It is clear that the Trust is not a party to this action. Frizzell has sued DeYoung personally, not in DeYoung's capacity as a trustee. Frizzell seeks damages from DeYoung personally, not from the Trust itself. As the Trust is not an “opposing party”, under I.R.C.P. 13, DeYoung, in his capacity as Trustee, cannot bring a counterclaim in this suit against Frizzell on behalf of the Trust. On that basis, the Court must dismiss DeYoung's Counterclaim (Amended Counterclaim).

B. Additionally, DeYoung Fails to State a Claim Upon Which Relief Can be Granted Under I.R.C.P. 12(b)(6).

In the alternative, Frizzell argues the Counterclaim must be dismissed because it fails to allege a specific cause of action against him by not specifying the theory under which DeYoung is entitled to recovery. Memorandum in Support of Plaintiff's Motion to Dismiss Counterclaim, p. 9. Moreover, Frizzell alleges the Counterclaim does not legally state a claim under I.R.C.P. 12(b)(6) because the allegations are not made by DeYoung as an individual against Frizzell, but rather by DeYoung as a trustee against Frizzell, seeking damages owed to the Trust. *Id.*, p. 10. As such, Frizzell maintains “[n]o set of facts in support of DeYoung's claim would entitle DeYoung to relief because of this damages defect.” *Id.*, pp. 10-11 (emphasis in original). DeYoung does not specifically respond to this argument.

The Court agrees with Frizzell that DeYoung has failed to allege a specific cause of action and has failed to state a claim upon which relief can be granted in this case. DeYoung has only alleged damages to the Trust. The Trust is not a party to this action. Viewing all inference from the record in his favor, DeYoung cannot prove a set of facts which would entitle him to relief. DeYoung cannot offer evidence in support of his claims on behalf of the Trust in this litigation. As such, the Counterclaim must also be dismissed pursuant to I.R.C.P. 12(b)(6).

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Court grants plaintiff's Motion to Dismiss Counterclaim (Amended Counterclaim).

IT IS HEREBY ORDERED plaintiff Frizzell's Motion to Dismiss Counterclaim (Amended Counterclaim) is GRANTED.

IT IS FURTHER ORDERED all claims made against plaintiff Frizzell by defendant DeYoung in DeYoung's Amended Counterclaim are DISMISSED.

Entered this 11th day of June, 2014.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
James Bendell

Fax #
888-701-2147

| **Lawyer**
Marc E. Wallace

Fax #
667-2419

Jeanne Clausen, Deputy Clerk