

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CASE NO. 2020-CP-22-0882
	)	
South Carolina Board of Financial Institutions,	)	
	)	
Plaintiff,	)	ORDER
vs.	)	RECEIVED
	)	Jan 05 2023
CDM Corporation, Inc. and Guardian Fiduciary Services, LLC,	)	SC Court of Appeals
	)	
Defendants.	)	
	)	

This matter came before the Master-in-Equity on competing Motions for Summary Judgment brought by Defendants, CDM Corporation (“CDM”) and Guardian Fiduciary Services, LLC (“Guardian”) (together “Defendants”), and Plaintiff, South Carolina Board of Financial Institutions (“BOFI”).

Plaintiff’s motion sought (1) a declaration that Defendants violate the provisions of S.C. Code Ann. § 34-21-10 by serving as, and holding out to the public as offering the services of, trustee, guardian, conservator, personal representative or executor, and attorney-in-fact without first seeking and obtaining BOFI’s prior written approval to undertake such activity; and (2) a permanent injunction prohibiting Defendants from continuing such activity; and (3) dismissal of Defendants’ counterclaims.

Defendants’ motion sought summary judgment on their counterclaim for declaratory judgment of the grounds that (1) as a matter of South Carolina law, a “trust business,” as contemplated by S.C. Code Ann. § 34-21-10, must involve a trust; (2) CDM and Guardian, to the extent they serve as non-trustee fiduciaries including personal representatives of estates or executors, attorneys-in-fact, guardians, or conservators, are not

acting as a trust businesses; and (3) non-trustee fiduciary roles are controlled via the South Carolina Probate Code, not the Board of Financial Institutions.

The motions present clearly legal issues based on undisputed facts. For the following reasons, the Court grants Defendants' Motion for Summary Judgment and the Court grants in part and denies in part Plaintiff's Motion for Summary Judgment, as explained in greater detail below.

UNDISPUTED FACTS

CDM and Guardian were founded by Stephen P. Mantell in 2009 and 2011, respectively. This lawsuit was filed October 26, 2020. At that time, CDM and Guardian were serving in the roles of trustee, guardian, conservator, personal representative or executor, and power of attorney for clients across South Carolina.

The Board of Financial Institutions refers to both an agency of the State of South Carolina and the eleven-member regulatory board which it serves. The Agency has two divisions: the Consumer Finance Division and the Banking Division. The Banking Division, headed by the Commissioner of Banking, is tasked with the supervision of various financial institutions. *See* S.C. Section 34-21-20.

On and before the date this action was instituted, Defendants' shared website advertised the services of "trusteeship," "power of attorney," "personal representative," "guardianship," and "conservator." Defendants admit to this textual content of their shared website, which held the companies out to the public as providing these fiduciary services. Defendants further admit that they have never made a written application to BOFI to conduct these activities in South Carolina, nor have they received written permission from the Board.

After BOFI instituted this lawsuit and after conferring with counsel, Mr. Mantell removed all references to trusteeships from his companies' promotional material. Further, for those matters in which CDM was named as a trustee, Mr. Mantell retained counsel to end or to move those trusteeships to his name personally.¹ Defendants concede that their serving as trustee without prior approval from BOFI violates S.C. Code § 34-21-10, and represent to the Court through counsel that they have, since the institution of this matter, ceased serving as trustee of any trust.

LEGAL STANDARDS

Rule 56(c) of the South Carolina Rules of Civil Procedure requires the Court to grant summary judgment “when it is clear that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” *Smith v. T.H. Snipes & Sons, Inc.*, 306 S.C. 289, 291, 411 S.E.2d 439, 440 (1991). The trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of any one of the essential elements of the party's case. *Fender & Latham, Inc. v. First Union Nat. Bank of South Carolina*, 316 S.C. 48, 446 S.E.2d 448 (Ct. App. 1994), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In the case of statutory construction, the language of the statute must be given its plain and ordinary meaning. *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 446 S.E.2d 404 (1994).

ANALYSIS

The Parties dispute whether S.C. Code § 34-21-10, or any other law or regulation, prohibits companies from serving in non-trustee fiduciary roles such as a guardian,

¹ At no time was Defendant Guardian ever named as trustee on any trust.

conservator, personal representative or executor, or power of attorney without BOFI's prior written approval.

1. As a matter of law, the term "trust business," as contemplated by Section 34-21-10 must involve a trust.

South Carolina Code Section 34-21-10 provides as follows:

No corporation, partnership or other person shall conduct a **trust business** in this State without first making a written application to the State Board of Bank Control and receiving written approval from the Board. Before any such application shall be approved, the Board shall make an investigation to determine whether or not the applicant has complied with all the provisions of law, whether in the judgment of the Board the applicant is qualified to conduct such a business and whether the conduct of such a business would serve the public interest, taking into consideration local circumstances and conditions at the place where such applicant proposes to do business; provided, however, that any person actively engaged in conducting a trust business in this State on January 1, 1972, shall not be required to make the application and receive the approval provided for herein. Provided, further, that nothing contained in this section shall prevent a natural person or a national banking association having its principal place of business in this State from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity.

S.C. Code Ann. § 34-21-10 (emphasis added).

Based on this statute, along with S.C. Code §34-21-20, BOFI has approval and regulatory authority over non-exempt persons who conduct a trust business in this State. Such non-exempt persons violate Section 34-21-10 if they conduct a trust business in this State without the prior written approval of BOFI. The question is what constitutes conducting a trust business in this State.

The South Carolina Code does not define the term "trust business," and the term has not been defined by the South Carolina courts. Where the legislature elects not to define a term used in a statute, South Carolina courts must interpret the term in accord with its "usual and customary meaning." *Adoptive Parents v. Biological Parents*, 315 S.C. 535,

446 S.E.2d 404 (1994). “If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” *City of Camden v. Brassell*, 486 S.E.2d 492, 494–95, 326 S.C. 556, 560–61 (Ct. App. 1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996).

While there are many available legal definitions of a trust, the usual and customary meaning aligns with the definition found in Black’s Law Dictionary: “An equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in whom resides the legal title or ownership, recognized and enforced by courts of chancery.” See <https://thelawdictionary.org/trust/>.

Logically, the usual and customary definition of a “trust business” is a business involved with the administration of trusts. See, 9 C.J.S. Banks and Banking § 650 (“It has been said that the primary and ordinary conception of a trust company is a corporation or institution organized to take and administer trusts, rather than carry on the ordinary functions of banking.”); *Loudoun Nat. Bank of Leesburg v. Continental Trust Co.*, 180 S.E. 548, 551, 164 Va. 536, 543 (Va. 1935) (“The primary and ordinary conception of a trust company is a corporation to take and administer trusts.”).

Moreover, the South Carolina Probate Code, by its terms, specifically excludes other non-trustee fiduciary roles from the definition of a “Trust.” Section 62-1-201(49) of the Probate Code defines the term “trust” as follows:

“Trust” includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. ***“Trust” excludes other constructive trusts, and it excludes resulting trusts, conservatorships,***

personal representatives, trust accounts as defined in Article 6 (Sections 62-6-101, et seq.), custodial arrangements pursuant to the South Carolina Uniform Transfers to Minors Act, Article 6, Chapter 5, Title 63, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

S.C. Code Ann. § 62-1-201. (emphasis added). The Probate Code’s explicit exclusion of these non-trustee fiduciary roles from the definition of trust, confirms that these activities are not included in the definition of the term “trust business” as contemplated by Section 34-21-10.

2. **Defendants violated Section 34-21-10 by serving as, and holding themselves out to serve as a trustee without prior approval of BOFI, and are permanently enjoined from doing so absent satisfaction of the requirements set forth in the South Carolina Code.**

The Defendants have admitted, and the evidence shows, that Defendant CDM held itself out as a trustee and served in the role of trustee for four trusts without written approval from BOFI, as required by statute. The Court concludes that Defendants’ actions in serving as trustee and holding themselves out to the public as serving as trustee constitute “trust business” which necessitated the Board’s prior approval pursuant to S.C. Code 34-21-10. As Defendants did not obtain prior BOFI approval, Defendants violated S.C. Code 34-21-10. The Court therefore grants Plaintiff’s Motion for Summary Judgment declaring that Defendants served as trustee and held themselves out as trustee in violation of South Carolina Law. The Court further permanently enjoins Defendants from serving as and/or holding themselves out as trustee absent satisfaction of the requirements set forth in S.C. Code Section 34-21-10.

3. Non-trustee fiduciary roles are controlled via the South Carolina Probate Code, not the Board of Financial Institutions.

The South Carolina Probate Code specifically sets forth the requirements and regulations for, and the probate court's appointment of, non-trustee fiduciary roles including conservator, guardian, attorney-in-fact in accordance with a power of attorney, personal representative or executor. *See e.g.* S.C. Code §§ 62-5-308; 62-5-408; 62-5-405; 62-8-102(1); 62-3-203. Because these roles are codified in the Probate Code and are regulated by the probate courts, the Board of Financial Institutions does not control and regulate these functions. These areas are outside BOFI's jurisdiction. Therefore, Plaintiff's Motion to enjoin all other non-trustee fiduciary activities engaged in by Defendants is denied.

AND IT IS SO ORDERED

1. Defendants' Declaratory Judgment Counterclaim is GRANTED;
2. Plaintiff's Declaratory Judgment Claim is GRANTED as to Defendants' role as a trustee only and is DENIED as to Defendants' role as conservator, guardian, attorney-in-fact in accordance with a power of attorney, personal representative or executor;
3. Plaintiff's Motion to permanently enjoin Defendants from serving as personal representatives of estates, attorneys-in-fact, guardians, or conservators is DENIED;
4. Plaintiff's Motion to permanently enjoin Defendants from acting, or holding itself as available to act as trustee without approval from the South Carolina Board of Financial Institutions pursuant to S.C. Code Section 34-21-10 is GRANTED;

5. This order constitutes final disposition of all issues in this case except for a determination of whether attorneys' fees may be appropriate under South Carolina Code Section 15-77-300.

Joe M. Crosby
Master-In-Equity



Georgetown Common Pleas

Case Caption: Board Of Financial Institutions South Carolina VS Cdm Corporation
Inc , defendant, et al

Case Number: 2020CP2200882

Type: Order/Summary Judgment

So Ordered

s/ Joe M. Crosby 3072