

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

**SUSAN TERRY BORNÉ, ELIZABETH TERRY FOTI,
MARY CATHERINE DRENNAN, LEONARD JOHN
DRENNAN III, MARGARET YATSEVITCH AND
MICHAEL YATSEVITCH, as and on behalf of
the Heirs of ADOLPHINE FLETCHER TERRY
and MARY FLETCHER DRENNAN**

PLAINTIFFS

v.

Case No. 60CV-21-6690

**CITY OF LITTLE ROCK, ARKANSAS and the
ARKANSAS MUSEUM OF FINE ARTS F/K/A
THE ARKANSAS ARTS CENTER, and the
ARKANSAS MUSEUM OF FINE ARTS
FOUNDATION, A/K/A
ARKANSAS ARTS CENTER FOUNDATION**

DEFENDANTS

**BRIEF IN SUPPORT OF MOTION TO DISMISS
THE FIRST AMENDED COMPLAINT**

Rather than responding to the Arkansas Museum of Fine Arts Foundation’s (the “Foundation”) motion to dismiss, six heirs of Adolphine Fletcher Terry and May Fletcher Drennan (the “Heirs”) filed an amended complaint. The amendments are in two categories. Most of the amendments concern whether funds donated to the Foundation were for an endowment that restricted use to the operation and maintenance of the Terry House as a decorative arts museum. *See* Amend. Compl. ¶¶ 35-49. The other amendments concern whether certain fees were used to maintain the Terry House. *Id.* at ¶¶ 77-79. These amendments do nothing to cure the legal deficiencies in the Heirs’ original complaint and were apparently filed for press-relations purposes. The amended complaint should be dismissed as to the Foundation.

First, the fundamental basis for the Heirs’ purported claims against the Foundation still is that the Foundation has breached a deed relating to the Terry House, but the Foundation still is not a party to that deed. And the Heirs’ added allegations about fees do not somehow change that uncontroverted fact.

Second, the Heirs go to great lengths to provide details about why they believe funds donated to the Foundation were for an endowment and restricted to operation and maintenance of the Terry House.¹ *See* Amend. Compl. ¶¶ 35-49. They, however, had already alleged that in their original complaint. *See* Orig. Compl. ¶ 39 (alleging that the “Endowment funds entrusted to the Foundation for the maintenance and operation of the House and Property were ‘restricted’ funds . . .”). Making the same allegation in different ways does not change the analysis. An accounting still is not a cause of action, the Heirs still lack standing to request an accounting of Foundation donations they did not make, and they still cannot recover donations made by other people.

The Heirs have failed to state facts upon which relief can be granted against the Foundation, and their claims should be dismissed under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

BACKGROUND

The Heirs spend much of their amended complaint discussing the history of their family and the history of the Terry House. *See* Amend. Compl. ¶¶ 13-27. The focus, however, must be on the allegations that purport to establish the legal claims. The amended complaint falls woefully short.

¹ The Heirs acknowledge the fundraising was to provide funding for a “Decorative Arts Museum,” not for upkeep of the Terry House (Amend. Compl. ¶ 35), but they use a sleight of hand to try to expand the purposes of the fundraising. The Heirs are fully aware the donations were to create a decorative arts museum; maintenance of the Terry House was an obligation of the City of Little Rock. Even with their sleight of hand, the Heirs cannot state facts upon which relief can be granted.

The Heirs allege that, on August 19, 1964, Mr. Terry and Ms. Drennan executed a deed granting the Terry House to the City of Little Rock for the use and benefit of the Arkansas Arts Center, now the Arkansas Museum of Fine Arts (the “Museum”). *See* Amend. Compl. ¶ 28.

According to the deed:

- The City of Little Rock “shall, as nearly as possible, keep and maintain the said lands in their present condition, preserving, as far as possible, the trees thereon, and maintaining the home-place thereon in its present general architectural form.”

The City of Little Rock “shall use the said property exclusively for the advancement of the cultural, artistic, or educational interests of the community.” “This use may include, among other purposes, the display of the lands and the buildings to the public with or without the payment of a fee therefor. If a fee is charged, however, then the proceeds therefrom shall be used first to keep and maintain the said property and then for the further uses and purposes herein expressed.”

- If the City of Little Rock fails “to comply with these conditions or uses, and in particular with the first condition above enumerated, . . . then title to the said lands shall revert in an undivided one-half interest to the heirs of Adolphine Fletcher Terry and in an undivided one-half interest to the heirs of Mary Fletcher Drennan.”

Id. at ¶ 29, Ex. 2 ¶¶ 1-2, 4.

On September 14, 1964, the Board of Trustees of the Museum adopted a resolution recommending that the City of Little Rock accept the deed, and the city did on October 5, 1964. *See* Amend. Compl. at ¶¶ 30-31. The Foundation is not mentioned in the deed because it did not exist. *Id.* at Ex. 2. The Foundation was formed years later, on November 22, 1972. *Id.* at ¶ 33.

According to the Heirs, the Foundation commenced a fund-raising program for an endowment for the “Decorative Arts Museum.” *See* Amend. Compl. ¶ 35. Funds allegedly were for a full-time curator and support staff; rental and shipping fees for temporary exhibits; acquisitions for a permanent art collection; workshop and lecture expenses; payment of utilities; and for maintenance of the property. *Id.* at ¶ 36. Contributions to the alleged endowment included \$1,000,000 provided by a trust established under the will of former Governor Winthrop

Rockefeller and additional money from members of the public and organizations. *Id.* at ¶ 37. The total raised was \$1,672,851.88. *Id.* at ¶ 46. The Heirs say these funds were “restricted” and exclusively for the operations and maintenance of the Terry House. *Id.* at ¶ 49. They purport to show this through news releases, correspondence, and other documents from the 1980s. *Id.* at Exs. 5-16. They do not allege they donated to the alleged endowment.

The Heirs allege that the Terry House has been allowed to deteriorate and is no longer being used for cultural, artistic, or educational purposes, as required by the deed. *See* Amend. Compl. ¶¶56-62. They contend the Foundation is liable, but they have failed to state facts upon which relief can be granted and their complaint must be dismissed.

ARGUMENT

Rule 12(b)(6) of the Arkansas Rules of Civil Procedures provides that a motion to dismiss may be made for the complaint’s “failure to state facts upon which relief can be granted.” *See* Ark. R. Civ. P. 12(b)(6); *Ark. Dep’t of Env’tl. Quality v. Brighton Corp.*, 352 Ark. 396, 403, 102 S.W.3d 458, 463 (2003). Arkansas is a fact-pleading jurisdiction. The complaint must state facts, not mere conclusions, to entitle the pleader to relief. *See* Ark. R. Civ. P. 8(a)(1); *Grine v. Board of Trustees*, 338 Ark. 791, 796, 2 S.W.3d 54, 57 (1999); *Brighton Corp.*, 352 Ark. 396, at 403, 102 S.W.3d at 463 (“This court has specifically and deliberately rejected the theory of notice pleading.”). The facts alleged in the complaint must support each essential element of the plaintiff’s causes of action. *Perrodin v. Rooker*, 322 Ark. 117, 120, 908 S.W.2d 85, 87 (1995). It is not enough to allege that an element of a cause of action is present; specific facts must be alleged that support that element. *Id.* at 120-21, 908 S.W.2d at 87-88. Only the facts alleged in the complaint are treated as true, “not a plaintiff’s theories, speculation, or statutory interpretation.” *Dockery v. Morgan*, 2011 Ark. 94, 5, 380 S.W.3d 377, 382.

Under the facts alleged, the Heirs' complaint must be dismissed. They have no contract with the Foundation, and they cannot require an accounting.²

I. Plaintiffs Have No Contract With The Foundation And Have Failed State Facts Upon Which Relief Can Be Granted.

The Heirs claim the Foundation is liable for breach of contract. They contend the Foundation failed to maintain the Terry House and use certain fees for maintenance. *See* Amend. Compl. ¶¶ 55-69, 77-79.³ The “contract” that allegedly obligates the Foundation is the deed from Mr. Terry and Ms. Drennan to the City of Little Rock. *See* Amend. Compl. ¶¶ 67, 77. The conveyance was in 1964—eight years before the Foundation even existed. *Id.* at ¶¶ 28, 33.

The elements of a contract are competent parties, subject matter, legal consideration, mutual agreement, and mutual obligations. *Berry v. Cherokee Vill. Sewer, Inc.*, 85 Ark. App. 357, 361, 155 S.W.3d 35, 38 (2004). These elements clearly cannot exist as to the Foundation—a nonparty that did not even exist at the time the contract allegedly was formed. *AT&T Corp. v. Clark Cty. ex rel. Tucker*, 2018 Ark. App. 207, 12, 547 S.W.3d 697, 705 (2018) (“Both parties must manifest assent to the particular terms of the contract.”). And the “court cannot make a contract for the parties.” *City of Dardanelle v. City of Russellville*, 372 Ark. 486, 490–91, 277 S.W.3d 562, 566 (2008).

Because there is no contract, there is no claim for breach of contract—either as to maintenance or fees. *Jones v. John B. Dozier Land Tr.*, 2017 Ark. App. 23, 6, 511 S.W.3d 869, 873 (2017) (“In order to prove a breach-of-contract claim, one must prove the existence of an

² The Heirs claim a right to attorneys' fees as a count in their complaint. As the Heirs admit, however, the ability to recover fees is contingent on recovering in the lawsuit. *See* Amend. Compl. ¶ 82 (requesting fees in the event judgment is entered against the defendants). Because there are no facts upon which relief can be granted for a substantive claim, there is no claim for fees.

³ The count addressing the fees for maintenance is labeled “Rental and Other Income,” which is not a cause of action. The alleged source of the obligation is the deed, so the count is addressed here. *See* Amend. Compl. ¶ 77.

agreement, breach of the agreement, and resulting damages.”). The Heirs’ claims should be dismissed.

II. Plaintiffs Cannot Request An Accounting And, Regardless, Are Not Entitled To Foundation Funds.

The Foundation used all funds raised for the decorative arts museum and has continued to fund the decorative arts collection.⁴ The Heirs nonetheless seek an accounting from the Foundation of the \$1,800,000 allegedly contributed exclusively for maintenance and operation of the Terry House and of fees collected for the maintenance of the house. *See* Amend. Compl. ¶¶ 71-72, 79.⁵ The Heirs, however, have not asserted a claim that would trigger an accounting. “Arkansas law is clear that an equitable accounting is a remedy and not a proper cause of action.” *Panhandle Oil & Gas, Inc. v. BHP Billiton Petroleum (Fayetteville), LLC*, 2017 Ark. App. 201, 11, 520 S.W.3d 277, 285 (2017).

The Heirs do not allege that they contributed to the purported endowment for the Terry House nor that they paid any of the fees they say are at issue. “A party has no standing to raise an issue regarding property in which he or she has no interest.” *Wisener v. Burns*, 345 Ark. 84, 92, 44 S.W.3d 289, 294 (2001) (holding that trustees and trust beneficiaries lacked standing to maintain a claim relating to property belonging to the settlor of the trust); *Bank of Am., N.A. v. Brown*, 2011 Ark. 446, 2011 WL 5110201 (2011) (holding that an attorney that would be employed by a trust lacked a property interest sufficient to create standing). The Heirs lack standing to seek an accounting of funds contributed by others.

⁴ As explained to the Heirs before they filed their original complaint, all funds were spent on the decorative arts museum—including for a curator, support staff, operation of the museum, and maintenance of the Terry House. The Heirs, however, omitted this information from their complaint.

⁵ Remarkably, the alleged endowment somehow grew from \$1,621,541.55 in paragraph 41 of the amended complaint to \$1,800,000 in paragraph 71 of the amended complaint.

Even if the Heirs could compel an accounting of endowment funds, they are not entitled to the ultimate remedy they seek: the funds contributed by others. *See* Amend. Compl. ¶¶ 75-76. “An accounting is an equitable remedy designed to provide a means for compelling one, who because of a confidential or trust relationship has been entrusted with property of another, to render an account of his actions and for the recovery of any balance found to be due.” *Thomason Invs., LLC v. Huddleston*, 2020 Ark. App. 500, 18, 613 S.W.3d 729, 741 (2020) (quoting *A & P's Hole-In-One, Inc. v. Moskop*, 38 Ark. App. 234, 239, 832 S.W.2d 860, 863 (1992)). There could be no balance due to the Heirs. The money they want is not and never was theirs. They have failed to state facts on which relief can be granted.

Finally, though an accounting is improper, the Heirs have a remedy against the City of Little Rock—to enforce the reverter provision in the deed. *See* Amend. Compl. Ex. 2. They, however, do not want to assume responsibility for the structure themselves.

CONCLUSION

For these reasons, this Court should dismiss the claims against the Foundation under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

Respectfully submitted,

QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
(501) 379-1700 Telephone
(501) 379-1701 Facsimile

By: /s/ John E. Tull III
John E. Tull III (84150)
R. Ryan Younger (2008209)

*Attorneys for the Arkansas Museum of Fine Arts
Foundation f/k/a Arkansas Arts Center Foundation*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2021, I electronically filed the foregoing with the Clerk of the Court using the AOC eFlex electronic filing system, which shall send notification of such filing to all counsel of record.

/s/ John E. Tull III
John E. Tull III