THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LEON KARELITZ, Individually and
as Trustee of the Leon and Lee T. Karelitz
Trust,

Plaintiffs-Appellants, No. 31,235

vs.

THE REGENTS OF THE UNIVERSITY OF
NEW MEXICO, SUELLYN SCARNECCHIA,
THE UNIVERSITY OF NEW MEXICO
FOUNDATION, INC., et al.,

Defendants-Appellees.

Appeal from the Eighth Judicial District Court, Colfax County, New Mexico
The Honorable Sherri A. Raphaelson, Judge

ANSWER BRIEF OF THE REGENTS OF THE UNIVERSITY OF NEW MEXICO, SUELLYN SCARNECCHIA, AND THE UNIVERSITY OF NEW MEXICO FOUNDATION, INC.

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Table of Authorities ii

Introduction / Nature of the Case 1

Summary of Facts and Proceedings 1

Standard of Review 15

Preservation of Issues 15

Argument 15

SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE PLAINTIFF'S ENDOWMENT GIFT TO THE FOUNDATION DID NOT CREATE A TRUST 15

A. The Undisputed Material Documents Did Not Create a Trust. 17

B. Plaintiff's Arguments Do Not Create a Genuine Issue of Material Fact. 25

Conclusion 30

Statement Regarding Oral Argument 30

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TABLE OF AUTHORITIES

NEW MEXICO CASES

Alliance Health of Santa Teresa, Inc. v. National Presto Industries, Inc.,
2007-NMCA-157, 143 N.M. 133, 173 P.3d 55 16

Aragon v. Rio Costilla Cooperative Livestock Association,
112 N.M. 152, 812 P.2d 1300 (1991) 18

Bixby v. Reynolds Mining Corp.,
113 N.M. 372, 826 P.2d 968 (1992) 15, 25

C.R. Anthony Co. v. Loretto Mall Partners,
112 N.M. 504, 817 P.2d 238 (1991) 26

Cable v. Wells Fargo Bank N.M., N.A.
(In re Cable Family Trust Dated June 10, 1987),
2010-NMSC-017, 148 N.M.127, 231 P.3d 108 19

City of Santa Fe v. Komis,
114 N.M. 659, 845 P.2d 753 (1992) 13

Clark v. Sideris,
99 N.M. 209, 656 P.2d 872 (1982), overruled on other grounds
by Clark v. Sideris, 102 N.M. 436, 697 P.2d 119 (1985), and
overruled on other grounds by C.R. Anthony Co. v. Loretto Mall Partners,
112 N.M. 504, 817 P.2d 238 (1991) 27

Featherstone v. Walker,
43 N.M. 181, 88 P.2d 271 (1939) 26

Heimann v. Kinder-Morgan CO2 Co., L.P.,
2006-NMCA-127, 140 N.M. 552, 144 P.3d 111 26

Muse v. Muse,
2009-NMCA-003, 145 N.M. 451, 200 P.3d 105 (filed 2008) 27, 29

Selby v. Roggow,
1999-NMCA-044, 126 N.M. 766, 975 P.2d 379 19

Southern Union Exploration Co. v. Wynn Exploration Co.,
95 N.M. 594, 624 P.2d 536 (Ct. App. 1981) 29

State v.Harrison,
2010-NMSC-038, 148 N.M. 500, 238 P.3d 869 15

Tartaglia v. Hodges,
2000-NMCA-080, 129 N.M. 497, 10 P.3d 176 18

Ward v. Buchanan,
22 N.M. 267, 160 P. 356 (1916) 18

Zarr v. Washington Tru Solutions, LLC,
2009-NMCA-050, 146 N.M. 274, 208 P.3d 919 15

CASES FROM OTHER JURISDICTIONS

Bradley v. Hill,
42 P.2d 580 (Kan. 1935) 22

George W. Vallery Memorial Fund, Inc. v. St. Luke's Community Foundation (In re Estate of Vallery),
883 P.2d 24 (Colo. Ct. App. 1993) 22

Moore v. Neely,
370 S.W.2d 537 (Tenn. 1963) 22

National Foundation v. Palmer First National Bank & Trust Co. (In re Estate of Thourez),
166 So. 2d 476 (Fla. Dist. Ct. App. 1964) 22

STATUTES AND RULES

NMSA 1978, § 21-1-38 (1991) 23

NMSA 1978, § 21-1-38(A)(1) (2011) 9, 23

NMSA 1978, §§ 46-9-1 to -12 (1997) 9

NMSA 1978, §§ 46-9A-1 to -10 (2009) 9

NMSA 1978, § 46A-4-401(A) (2003) 20

NMSA 1978, § 46A-4-402(A)(2) (2003) 18

NMSA 1978, § 46A-4-405(C) (2003) 11

NMSA 1978, § 46A-4-405(E) (2003) 11

Rule 1-056(D)(2) NMRA 13

OTHER AUTHORITIES

2 E. Allan Farnsworth, Farnsworth on Contracts § 7.3 (2d ed. 1998) 27

6 Peter Linzer, Corbin on Contracts § 25.7 (Rev. ed. 2010) 27

Restatement (Second) of Contracts § 209(3) (1979) 27

1 Austin W. Scott et al., Scott and Ascher on Trusts
§ 4.1 (5th ed. 2008) 22

5 Austin W. Scott et al., Scott and Ascher on Trusts
§ 37.2.2 (5th ed. 2008) 18

Introduction / Nature of the Case

Plaintiff gave cash and securities to the University of New Mexico pursuant to an agreement made in 1994 and formally amended or supplemented on three subsequent occasions. The agreement, amendments, and supplement constitute the undisputed material facts in this case.

In 2005 Plaintiff instituted this action, seeking a declaration that the donated assets were burdened with trust obligations and also seeking remedies for alleged breaches of the claimed trust. The action continues to be pursued by Plaintiff's personal representative. It was brought against the Regents of the University of New Mexico, Suellyn Scarnecchia, who was Dean of the University of New Mexico School of Law when suit was filed, and the University of New Mexico Foundation, Inc. ("Foundation") (collectively, "UNM Defendants"). The Attorney General of New Mexico was a nominal defendant.

The district court granted summary judgment in favor of the UNM Defendants, concluding on the record presented that a trust relationship had not been created. Plaintiff brought this appeal.

Summary of Facts and Proceedings

As early as 1987, Plaintiff and his wife, Lee T. Karelitz, demonstrated a desire to benefit the University of New Mexico School of Law by endowing a

teaching chair in evidence and procedure. They executed wills that would have created an express testamentary trust for that purpose. (S.R.P. 4-18.)[1] The assets at issue in this case, however, were not transferred by either will.

In 1991, pursuant to a letter agreement with the Foundation, Plaintiff and his wife began to make a series of lifetime cash contributions, which were to be held and accumulated until the death of the survivor, at which time the accumulated funds were to be combined with the testamentary trust for endowment of the teaching chair. (S.R.P. 19-20.) But like the wills, this letter agreement is not an operative document in this case. It was replaced in 1994 by an agreement between Plaintiff and the Foundation, also signed by the then dean of the law school, to establish a Lee and Leon Karelitz Chair of Evidence and Procedure. (R.P. 200.) It is this 1994 agreement, as amended and supplemented, that governs these proceedings.

The 1994 agreement to establish the Karelitz chair began by reciting the desire of the couple (described throughout as "Donors") to use their lifetime cash contributions to establish a teaching chair in evidence and procedure as set forth in the agreement. In addition, the agreement recited the couple's desire that it

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[1]Reference is to the Supplemental Record Proper filed in this Court on October 19, 2011. (Another Supplemental Record Proper was filed on June 3, 2011, but is not necessary for the present appeal.)

supersede the 1991 letter agreement with respect to any cash contributions made or to be made by them. (R.P. 200, ¶ 1(A)-(C).) It provided that the lifetime contributions made by the couple – which were referred to also as gifts – were irrevocable and were to be accumulated until the death of the last of the couple to die and then used to establish a fund to endow the Karelitz chair. (R.P. 201-02, ¶¶ 3, 4, 5(A).)

The agreement offered comments about the caliber of individual who might be appointed to the chair and the content of the teaching, but these were expressly stated not to be requirements and to "not impose any duty upon the Foundation or the Law School." (R.P. 202, ¶ 5(B).) It expressed the "Donors' desire and intent that the [f]und" created under the agreement "be established as an endowment." (R.P. 202, ¶ 6.) The agreement provided that the Foundation was the "absolute owner" of the fund, subject to the conditions stated, and that the Foundation "shall have a duty to use reasonable care" in investing and maintaining the fund. (R.P. 203, ¶ 7.) The fund was to be augmented by any assets in a living trust that Plaintiff created at about the same time, which upon the death of Plaintiff and his wife were to pour over to the Foundation to add to the endowment of the teaching chair. (S.R.P. 21, 26-27.)

Lee Karelitz died in 1995. (See S.R.P. 51.) The record reflects a series of

subsequent communications between Plaintiff and the law school, the University, or the Foundation. Plaintiff placed copies of a number of written communications in the record (see R.P. 337-475; S.R.P. 3-141), most of which are referred to in the complaint as the basis on which Plaintiff claims to have established a trust (see R.P. 3-9). Only a few, however, actually are material as amendments or supplements to the 1994 agreement to establish the Karelitz chair. The remainder reflect Plaintiff's dissatisfaction with the Foundation's investment philosophy and his unilateral, post hoc, and not altogether consistent attempts to characterize the endowment fund he had created as a trust.

In October 1996, Plaintiff wrote a letter setting out his views on how the "gift" (a repeated term) of the teaching chair should be used, the allocation of funds between evidence and procedure, and the management of the financial assets that Plaintiff anticipated would fund the chair. (S.R.P. 53-56.) In the letter Plaintiff referred to what he described as the Foundation's "trust duty" to assure compliance with an acceptable teaching plan (S.R.P. 54-55) while also assuring that "[n]o one is going to sue for mistakes or errors in managing the teaching program" (S.R.P. 55).

In July 1997, Plaintiff wrote a letter taking exception to a description of the chair by the then dean of the law school and restating his views on the "purposes

and structure" of the chair. (S.R.P. 61.) Plaintiff was more explicit in this letter in referring to the Foundation as a trustee and the gift of assets as a trust. (S.R.P. 60.) At the same time, Plaintiff indicated that he "fully accept[ed]" the statements in a letter from the president of the University, which confirmed that Plaintiff's "gift" would be used for the purpose of teaching evidence and procedure, that the law school dean, together with the president and provost of the University, would decide on the allocation of the funds, and that the principal of the gift would be managed as the Foundation determined. (S.R.P. 58-59.)

In May 1999, Plaintiff sent a letter to the Foundation citing a statute which he believed provided assurance that the endowment for the Karelitz chair would not replace public funds otherwise available to the University. (S.R.P. 63-64.) The letter mixed references to the endowment as a gift with references to the Foundation as a trustee (S.R.P. 63) and ends with the "suggest[ion]" that, when the chair came into being, the Foundation would have a fiduciary obligation to see to it that the endowment funds were not budgeted as a substitute for public funds (S.R.P. 64).

In September 2002, Plaintiff proposed amending the 1994 agreement to establish the Karelitz chair, seeking agreement by the University "to a general goal in program and in prudent investment." (S.R.P. 68.) There followed, in

November 2002, a letter to the dean of the law school in which Plaintiff expressed concern about investment losses sustained by the Foundation account that held his lifetime contributions and about the Foundation's overhead charges. (S.R.P. 71-76.) Plaintiff complained that the Foundation's growth-oriented investment approach was "contrary to all trust concepts." (S.R.P. 73.) He included several pages of proposed guidance regarding investment policy and related matters. (S.R.P. 74-76.) He stated his determination, "if I can, to get my proposed gift over to the Law School." (S.R.P. 73.) To that end, he demanded "a segregated account for all new money; my own directions for permitted investments; no raids on what is classified as principal . . .; compliance by the Foundation with its promises to me; [and] no more excessive charges against the fund." (Id.)

In December 2002 Plaintiff, the Foundation, and the law school dean executed an amendment to the 1994 agreement to establish the Karelitz chair. (S.R.P. 77-84.) The amendment – which referred to Plaintiff as trustee of his 1994 living trust but did not refer to the Foundation as a trustee of any assets transferred (S.R.P. 77) – changed Plaintiff's plan for funding the Karelitz chair upon Plaintiff's death. Instead, Plaintiff as "Donor" agreed to make an immediate contribution to the Foundation, as of January 1, 2003, of a portfolio of state and municipal government bonds valued at approximately $2.1 million, plus additional

cash. (R.P. 209-10, ¶ 1(A), (B).) The Foundation was to create from the assets transferred, and from any additional lifetime contributions, the Lee and Leon Karelitz Fund to endow the Karelitz chair, which was to be brought into being when feasible. (R.P. 210-11, ¶¶ 2, 3.) Plaintiff's account of lifetime contributions held by the Foundation was to be held to generate annual distributions to support the Karelitz chair. (R.P. 210, ¶ 2A.) The Karelitz fund was to be segregated from the Foundation's consolidated investment fund and lodged with an outside investment firm, with the Foundation identified as the owner. It was to be managed in accordance with an investment policy attached to the amendment. A portion of the interest earned by the Karelitz fund was to be distributed annually for the endowed chair and professorship. (R.P. 211-12, ¶¶ 4-6.)

At the end of December 2002, Plaintiff wrote to the Foundation, expressing his opinion that by inviting gifts in the form of endowments, the Foundation created "a relationship of trust" which should impose "common law strictures on the considerations that must govern the purpose, nature and manner of investment of endowment funds." (S.R.P. 131.) He was concerned that enacted uniform laws could be viewed as providing leeway for investments that he considered imprudent. (Id.)

In February 2003 Plaintiff again wrote to the Foundation, raising objections

to the sale of some of the bonds he contributed pursuant to the 2002 amendment to the agreement to establish the Karelitz chair, which Plaintiff felt was in violation of the associated investment policy. (R.P. 358-59.) Plaintiff insinuated that the Foundation had taken actions designed to deter him from complaining about the Foundation's "breach of . . . common law duties as trustee of an endowment fund" and from calling upon the Attorney General to enforce a public charitable trust. (R.P. 358.) Then in April 2003, Plaintiff proposed a "working paper" relating to implementation of the investment policy under the 2002 amendment. (S.R.P. 86-94.)

A working paper providing clarification or greater detail regarding the investment policy was agreed upon and executed in October 2003. (R.P. 217-20.) The document explicitly limited the Foundation's ability to sell bonds from the portfolio in the Karelitz fund, and it strengthened the provision of the 2002 amendment that segregated the Karelitz fund from the Foundation's consolidated fund. (R.P. 217-18, ¶¶ 1-3.) It required the Foundation to make up certain principal lost as a result of transactions in which it had engaged. (R.P. 219, ¶ 5C.) It gave the law school, as "beneficiary," a voice in management of the portfolio held in the segregated fund. (R.P. 220, ¶¶ 6A, 6B.) It referred to Plaintiff as "settlor." (Id. ¶ 7.)

In April 2004, Plaintiff sent a long letter to the president of the University and the law school dean. (S.R.P. 107-27.) The nature of the letter makes concise summarization a challenge, but in essence Plaintiff criticized the Foundation's investment approach, which he likened to a growth-oriented stock market mutual fund subject to periodic decline, as contrasted with what Plaintiff referred to as an endowment approach based on the long-term holding of bond investments yielding steady interest income while preserving principal. He also complained about the assessment of the Foundation's overhead charges against assets held by the Foundation to endow the Karelitz chair.

Plaintiff asserted at the start of the letter his belief that historically a restricted gift of money in perpetuity to a charitable institution would create duties in the institution equivalent to those of a trustee. (S.R.P. 107.) He went on to discuss the history of the Uniform Management of Institutional Funds Act, adopted in New Mexico in 1997. See NMSA 1978, §§ 46-9-1 to -12 (1997), repealed and superseded by NMSA 1978, §§ 46-9A-1 to -10 (2009). Next, Plaintiff referred to a New Mexico statute adopted in 1991 which required the University and other educational institutions to adopt regulations for the management of endowment funds. See NMSA 1978, § 21-1-38 (2011). Plaintiff's focus was very much on his views regarding the prudent management of funds

given to institutions as endowments. (See S.R.P. 107-20; see also S.R.P. 132-37.)

Plaintiff referred to his "2003 gift of a bond portfolio" as "a paradigm for an endowment." (S.R.P. 109.) He wrote that he and his late wife, "were exceedingly pleased in 1991 to read the new section 21-1-38." (S.R.P. 118.) Enactment of the new statute, he said, encouraged them to begin their series of lifetime contributions to the Foundation. (Id.) He complained that the University and Foundation had not treated his "endowment gift" as an endowment fund under New Mexico law but instead invested it as "a run-of-the-mill stock market mutual fund." (S.R.P. 124.)

Plaintiff's April 2004 letter requested that the Foundation break out all the remaining lifetime contributions and accumulations held in his account. (S.R.P. 125.) He asked that the assets be transferred to the segregated investment account that had been created in connection with the December 2002 amendment to the agreement to establish the Karelitz chair. (S.R.P. 125-26, ¶¶ 1-3.) He asked that the 2002 investment policy be amended by the addition of a comma and that the December 2002 amendment itself be amended in recognition of the complete segregation of Karelitz fund assets in the outside investment account. (S.R.P. 126-27, ¶¶ 4, 5.) He asked that the investment account be governed by the 2002 investment policy and the 2003 working paper. (S.R.P. 127, ¶ 6.)

In response to the April 2004 letter, the Foundation and the dean of the law school sent a letter to Plaintiff in September 2004 stating that the Foundation, in partnership with the law school, "is committed to administering the Lee and Leon Karelitz Fund . . . as you intend." (R.P. 425.) The letter accepted the amendments that Plaintiff had requested, stated that the administrative fees charged against Plaintiff's Foundation account would be refunded, and confirmed that the Foundation account would be transferred to the outside, segregated investment account. (Id.) An exception to the Foundation's ordinary investment policies would be made in the case of the Karelitz fund. (R.P. 425-26.) Plaintiff countersigned the letter expressing agreement to the amendments. (R.P. 426.)

Plaintiff remained aggrieved, however, and in March 2005 he instituted the present action pursuant to NMSA 1978, § 46A-4-405(C) (2003) against the UNM Defendants for enforcement of an alleged public charitable trust. (R.P. 1.) The Attorney General was included as a nominal defendant. (R.P.3.) See NMSA 1978, § 46A-4-405(E) (2003). The complaint alleged that the cash and the bond portfolio conveyed to the Foundation in January 2003 were conveyed "under trust obligations" created by 27 documents spanning 15 years. (R.P. 3, 4-8.) Plaintiff sought a declaration that in dealing with the now-segregated Karelitz fund the UNM Defendants were "governed and limited by the Uniform Trust Code" and the

common law of trusts. (R.P. 9-10.) He requested that the court "instruct Defendants" regarding their duties "in accordance with settled trust law" (R.P. 15) and that the court retain jurisdiction to award cy pres relief if necessary (R.P. 18). He asked that the UNM Defendants be required to restore certain cash amounts to the fund and that he be awarded his costs and attorney fees (R.P. 18-19). The UNM Defendants answered, denying that a trust had been created or that they were subject to trust obligations. (R.P. 42-48, 49-56.)

The UNM Defendants moved for summary judgment on the ground that Plaintiff had made a completed gift to the Foundation but had not established a trust. Of the documents referenced in Plaintiff's complaint and served with it, the UNM Defendants relied on the following as dispositive:

- the December 1994 agreement to establish the Karelitz chair, supra pp. 2-3;
- the December 2002 amendment to the agreement to establish the Karelitz chair, supra pp. 6-7;
- the October 2003 working paper supplementing the investment policy for the Karelitz fund, supra p. 8; and
- the September 2004 letter amendment, supra p. 11.

They also relied on Plaintiff's October 1996 letter, supra p. 4, discussing the "gift"

of the teaching chair. (R.P. 196-222 (motion and exhibits); see also R.P. 223-31 (memorandum in support).)

Plaintiff did not challenge the facts (i.e., the documents) on which the UNM Defendants relied, thereby admitting them. See Rule 1-056(D)(2) NMRA. Plaintiff's opposing memorandum was framed in terms of three "Disputed Fact[s]" (R.P. 252, 263, 275) that actually were legal arguments. Plaintiff argued that a genuine issue as to the existence of a charitable trust was created when one considered all 27 documents referred to in the complaint. (R.P. 252-62.) Plaintiff also argued that his intent to create a trust could be found in the various communications and circumstances he discussed and that all the indicia of a charitable trust were present. (R.P. 263-75.)

In an argument less than one page in length, Plaintiff finally asserted that even in the absence of a trust the restrictive terms of the donation were controlling. That argument relied on the Foundation's articles of incorporation and three successive agreements between the Regents and the Foundation, none of which was in the record. (R.P. 275-76.) The argument is not addressed in Plaintiff's brief in chief and has been abandoned. See City of Santa Fe v. Komis, 114 N.M. 659, 665, 845 P.2d 753, 759 (1992) (issue raised in trial court but not briefed on appeal is abandoned).

With his response Plaintiff submitted a lengthy, discursive, largely irrelevant, and contentious affidavit with numerous exhibits. (R.P. 277-426.) To the extent it addressed material facts, the affidavit traced the course of events reflected by the instruments and communications previously discussed. (See also R.P. 476-80 (correction to Plaintiff's memorandum opposing summary judgment).) In reply, the UNM Defendants stressed that Plaintiff had failed to demonstrate that the material documents established a charitable trust. (R.P. 427-75 (memorandum and exhibits).)

The district court granted summary judgment following a hearing. The court criticized Plaintiff's failure to make a proper response to the summary judgment motion. (Tr. 2/15/11 at 3:24:29-3:29:25.) The court concluded that the December 1994 agreement to establish the Karelitz chair, as amended and supplemented, showed that the Karelitz donations were "not money to be held in trust." Although the record evidenced "a later attempt by the donor to try to convert what was originally a gift to a trust or otherwise gain control over the monies, . . . those efforts are legally ineffective. . . . There was . . . no trust relationship." (Tr. 2/15/11 at 3:33:36-3:36:07.) The court entered a written order granting summary judgment in favor of the UNM Defendants, from which Plaintiff appealed. (R.P. 737, 742.)

Standard of Review

"The standard of review for summary judgment is de novo." Zarr v. Washington Tru Solutions, LLC, 2009-NMCA-050, ¶ 9, 146 N.M. 274, 208 P.3d 919. "A grant of summary judgment is proper if the pleadings together with any affidavits show that there are no genuine issues as to the material facts and the movant is entitled to judgment as a matter of law." Bixby v. Reynolds Mining Corp., 113 N.M. 372, 374, 826 P.2d 968, 970 (1992).

Preservation of Issues

Generally, the issue whether a trust was created by Plaintiff was preserved by the UNM Defendants' motion for summary judgment, Plaintiff's response, and the district court's ruling. Supra pp. 12-14. Plaintiff, however, has not met his burden of "explaining how" each issue he raises on appeal "was preserved in the court below." State v. Harrison, 2010-NMSC-038, ¶ 10, 148 N.M. 500, 238 P.3d 869 (internal quotation marks & citation omitted). See infra Point B.

Argument

SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE PLAINTIFF'S ENDOWMENT GIFT TO THE FOUNDATION DID NOT CREATE A TRUST

All the relief sought in Plaintiff's complaint is predicated on the claimed violation of duties relating to financial assets (the Karelitz fund) that Plaintiff

alleges he donated to the University "under trust obligations." (R.P. 3, ¶ 6.) The district court correctly held that Plaintiff's gift of assets to the University, though designated for an educational purpose, did not create a public charitable trust as Plaintiff alleged. The court therefore properly granted summary judgment in favor of the UNM Defendants on all of Plaintiff's claims.

Whether a trust was created is determined by the only material facts properly before the court, namely the four governing contractual documents that express Plaintiff's intent: the 1994 agreement to establish the Karelitz chair, the 2002 amendment to that agreement, the 2003 working paper on investment policy, and the 2004 letter amendment. These documents were expressly referred to in the complaint and served with it (R.P. 5-8, ¶ 6(A)(6), (18), (23), (27)) and copies were attached as exhibits to the UNM Defendants' motion for summary judgment as the undisputed factual basis for the motion (R.P. 200, 209, 217, 221). There is no question regarding their authenticity.[2] Cf. Alliance Health of Santa Teresa, Inc. v. Nat'l Presto Indus., Inc., 2007-NMCA-157, ¶¶ 15-16, 143 N.M. 133, 173 P.3d 55 (documents produced by opposing party in discovery may be relied upon, without supporting affidavit or further foundation, in support of summary judgment

[2]At some point, Plaintiff placed in the record copies of all 27 documents referenced in the complaint as the source of the alleged trust relationship. (See S.R.P. 3-140.)

motion, at least where no objection is made and there is no claim that documents are incorrect). Plaintiff did not properly present any contradictory or disputed facts.

The documents do not create a trust, because their terms do not demonstrate an intent to do so. Furthermore, considering extrinsic evidence of the circumstances leading to the 1994 agreement only strengthens that conclusion. Plaintiff's resort to trust language at times in his increasingly contentious communications with the UNM Defendants over management of the Karelitz fund and the few factual assertions that can be gleaned from Plaintiff's affidavit, which amount to parol evidence, do not alter the legal effect of the documents or raise a genuine issue of material fact. The district court's grant of summary judgment therefore should be affirmed.

A. The Undisputed Material Documents Did Not Create a Trust.

Responding to the UNM Defendants' summary judgment argument that the Karelitz fund was a gift, Plaintiff argued that a gift might consist of a conveyance in trust. (R.P. 271-72.) Plaintiff also argued that enhancement of education is a charitable use. (R.P. 270.) But neither of these propositions answers the question posed by this case: whether, if a public charitable trust could have been created by Plaintiff, one actually was. No trust arose here, because in this case an

indispensable element – manifestation of an intent to create a trust – cannot be established.

"A charitable trust, like a private trust, arises only if the settlor properly manifests an intention to create it." 5 Austin W. Scott, et al., Scott and Ascher on Trusts § 37.2.2, at 2378 (5th ed. 2008). Under New Mexico law, an express trust "is one that is created by the manifest intention of the settlor." Tartaglia v. Hodges, 2000-NMCA-080, ¶ 58, 129 N.M. 497, 10 P.3d 176. Express trusts are created "by the direct and positive acts of the parties, by some writing, or deed, or will, or by words, either expressly or impliedly evincing a desire to create a trust." Ward v. Buchanan, 22 N.M. 267, 270, 160 P. 356, 357 (1916). "[E]ither written or spoken words, or conduct, will suffice," Aragon v. Rio Costilla Coop. Livestock Ass'n, 112 N.M. 152, 154, 812 P.2d 1300, 1302 (1991), but a trust cannot be established "except upon proof of circumstances clearly evidencing such intention," Ward, 22 N.M. at 271, 160 P. at 358. See also NMSA 1978, § 46A-4-402(A)(2) (2003) (trust is created only upon manifest intent).

The UNM Defendants' motion for summary judgment presented, as undisputed facts, the 1994 agreement to establish the Karelitz chair and three amendments or supplements to it. The district court could properly confine its review to these documents, because Plaintiff neither controverted any of these

undisputed facts nor made any proper factual showing of his own. See supra pp. 13-14. Selby v. Roggow, 1999-NMCA-044, ¶ 8, 126 N.M. 766, 975 P.2d 379. Thus in this case, more so even than usual, "the primary evidence of grantor intent is the plain language" of the donative documents. Cable v. Wells Fargo Bank N.M., N.A. (In re Cable Family Trust Dated June 10, 1987), 2010-NMSC-017, ¶ 13, 148 N.M.127, 231 P.3d 108.

The 1994 agreement sets out Plaintiff's design for the Karelitz chair. It is the foundational document for this litigation. The three later amendments or supplements affect the manner in which the chair was funded and the investment policy governing the associated assets, but they do not change the nature of what was created.

Unlike the non-operative wills executed by Plaintiff and his wife in 1987, which expressly provided for the creation of a testamentary trust following the death of the survivor, and the 1991 letter agreement for lifetime contributions, which contemplated pouring the accumulated contributions into that trust, see supra pp. 1-2, the 1994 agreement does not speak at all in terms of a trust. No assets were transferred to the Foundation under the wills; they are relevant only to illustrate that Plaintiff knew very well how to create a trust in clear and express language if he so intended. The 1991 letter agreement was expressly superseded

by the 1994 agreement to establish the chair. (R.P. 200-02, ¶¶ 1(B), 4.)

The 1994 agreement took a new direction. Rather than create a trust to be funded upon the death of the last to die of Plaintiff or his wife, the 1994 agreement provided for a fund to be created in the Foundation after the deaths of Plaintiff and his wife. The Karelitz fund was to be comprised of the irrevocable lifetime gifts or contributions held by the Foundation as well as assets that were to be poured out of a living trust that Plaintiff created contemporaneously. The Foundation was the "absolute owner" of the fund, which the "Donors" expressly intended to establish "as an endowment" to support a teaching chair. Plaintiff's detailed ideas about the Karelitz chair were not requirements and did not impose duties. The Foundation was not denominated as a trustee. Cf. NMSA 1978, § 46A-4-401(A) (2003) (trust may be created by transfer of property to another person "as trustee"). Rather than being subject to the fiduciary duties of a trustee, the Foundation's duty in managing the fund was specified to be one of reasonable care. The 1994 agreement manifests no expression of intent by Plaintiff to create a trust. See supra pp. 2-3.

The 2002 amendment to the 1994 agreement accelerated the funding of the Karelitz chair by providing for the present transfer of a portfolio of bonds and cash to the Foundation. It also provided for segregation of the transferred assets with

an outside investment firm. An investment policy was agreed upon. Once again, however, the Foundation was the owner of the assets held by the investment firm and the Foundation was not identified as a trustee. With respect to the securities transferred, Plaintiff was referred to as the "Donor." There is no indication in the 2002 amendment of an intent to supplant the endowment gift provided for by the 1994 agreement with a trust relationship. Supra pp. 6-7.

The 2003 working paper provided supplemental terms relating to the management and segregation of the Karelitz fund. Despite passing use of the terms "beneficiary" and "settlor," the working paper also does not purport to change the nature of the arrangement created in 1994. Supra p. 8.

Finally, the 2004 letter amendment made a series of specific changes relating to the full segregation of the Karelitz account from the Foundation's other assets and the investment policy governing the Karelitz fund, as well as providing for restoration of administrative fees charged by the Foundation. The 2004 amendment contained no trust language at all. It does not purport to address, let alone change, the nature of the Karelitz fund. Supra p. 11.

These undisputed material documents bear out the observation in a leading treatise: although it may sometimes be difficult to determine whether a property owner intends to create a trust, "[i]n most cases, . . . particularly when the settlor

manifests his or her intention in an instrument drawn by a competent lawyer, there is little difficulty in determining whether the settlor has manifested an intention to create a trust." 1 Scott § 4.1, at 178-79. Trust-forming intent cannot be found in these documents that create, instead, a restricted gift of an endowment fund. Cf. George W. Vallery Mem'l Fund, Inc. v. St. Luke's Cmty. Found., Inc. (In re Estate of Vallery), 883 P.2d 24 (Colo. Ct. App. 1993) (income-only bequest to hospital for specific purpose was restricted gift, not trust); Nat'l Found. v. Palmer First Nat'l Bank & Trust Co. (In re Estate of Thourez), 166 So. 2d 476 (Fla. Dist. Ct. App. 1964) (bequest of funds to charitable organizations for specified charitable purposes did not create trust but was gift with conditions as to use); Bradley v. Hill, 42 P.2d 580 (Kan. 1935) (devise of property to fraternal organization to provide income for assistance of needy members did not establish a trust); Moore v. Neely, 370 S.W.2d 537 (Tenn. 1963) (will established trust for care of decedent's brother and daughter, who were confined to hospital, during their lives, but gift over to hospital upon their deaths did not create trust).

The 2004 letter amendment was in direct response to Plaintiff's letter of April 2004, supra pp. 9-10, and the changes that were agreed to tracked directly the demands made at the end of Plaintiff's letter, cf. supra pp. 10, 11. It is those demands relating to investment policies and full account segregation that the

Foundation and the law school dean referred to in the letter when they expressed to Plaintiff a commitment "to administering the Lee and Leon Karelitz Fund . . . as you intend." Supra p. 11. Plaintiff's contention that his April 2004 letter "declared" that the Karelitz contributions "had been delivered as a public charitable trust" and that the 2004 letter amendment "in essence" acknowledged the same (Br. in Chief at 30, 31) vastly overstates the import of both documents.

Plaintiff's April 2004 letter is worth noting, however, in another respect. It provides a first-hand account of the considerations that led Plaintiff and his wife to enter into the 1994 agreement to establish the Karelitz chair in the first place. There is scarcely a mention of trusts, except briefly as historical background. (S.R.P. 107, 113.) Plaintiff's focus, instead, is on the concept of an endowment fund for an educational institution, as embodied in the 1991 statute, NMSA 1978, § 21-1-38, which Plaintiff explains was the impetus for his wife and him to begin their campaign of annual giving to the Foundation. Supra pp. 9-10.

Endowment funds, under the statute, are not trusts. They are funds "acquired by gift by an educational institution with respect to which the donors . . . have stipulated as a condition of the gift . . . that the principal is to be maintained and invested for the purpose of producing current and future income that may either be added to the principal or expended." Id. § 21-1-38(A)(1) (2011).

Plaintiff describes his gift of a bond portfolio in 2003 as "a paradigm for an endowment." Supra p. 10.

It is not difficult to piece things together. The 2003 transfer of bonds and cash, pursuant to the 2002 amendment, accelerated the funding of the Karelitz chair by making available immediately an endowment fund. That fund was given to bring about more quickly what Plaintiff sought to achieve by the 1994 agreement – a gift to the University, on condition that the assets given be used in perpetuity to support an endowed teaching chair at the law school. Only one conclusion follows from the circumstances surrounding the 1994 agreement, from the references to "donors," absolute ownership, and an endowment and the absence of trust language in that agreement, and from Plaintiff's own explanation of his motivation and purpose: in establishing the Karelitz fund in 1994, Plaintiff intended to and did create in the Foundation an endowment fund, not a trust.

Nothing occurring after that defining moment altered the nature of the fund. Though the manner of funding, the segregation of the fund from other Foundation assets, and the governing investment policy were changed from time to time by amendment or supplement, the fund remained what it was created to be in 1994. The district court was correct to conclude that no genuine issue of material fact exists and to grant summary judgment in favor of the UNM Defendants on

Plaintiff's claims grounded in trust law.

B. Plaintiff's Arguments Do Not Create a Genuine Issue of Material Fact.

Plaintiff's 1996 letter discussing the Karelitz chair not long after the agreement regarding its creation contains the seeds of this subsequent dispute. Already evident is Plaintiff's desire to exert greater control over the management of the Kareltiz fund and the operation of the Karelitz chair than the 1994 agreement allowed. And already Plaintiff makes reference to trust concepts as a means of asserting that control over the teaching plan. But – consistent with the 1994 agreement and inconsistent with the concept of trust duties – the letter abjures any claim that Plaintiff's own ideas for the chair could be enforced judicially. Supra p. 4.

Plaintiff argues that the numerous other letters and the affidavit he placed in the record give rise to a fact question regarding whether he intended to create a trust or, even, that they conclusively establish a trust relationship. (Br. in Chief at 12, 16, 27.) He cannot rely on these documents, however, because the parol evidence rule bars him from doing so. See Bixby v. Reynolds Mining Corp., 113 N.M. 372, 374, 826 P.2d 968, 970 (1992) (party opposing summary judgment must demonstrate existence of genuine issue through facts "admissible into

evidence ").

Plaintiff offers the letters and affidavit as evidence of an intent to create a trust. As previously discussed, however, there is no ambiguity in the 1994 agreement or the amendments or supplements that are undisputed and controlling on the UNM Defendants' motion for summary judgment. They manifest no discernable intent to create a trust and therefore do not create one. Supra Point A.

Parol evidence is not admissible to contradict the terms of unambiguous instruments. Featherstone v. Walker, 43 N.M. 181, 189, 88 P.2d 271, 276 (1939); see C.R. Anthony Co. v. Loretto Mall Partners, 112 N.M. 504, 511, 817 P.2d 238, 245 (1991) (extrinsic evidence did not show ambiguity in contract and therefore could not be used to add term that would contradict existing contract terms). Accepting Plaintiffs' argument would require the court to add trust terms to agreements that do not contain them. See Heimann v. Kinder-Morgan CO2 Co., L.P., 2006-NMCA-127, ¶ 10, 140 N.M. 552, 144 P.3d 111 ("We will not read language into a contract that is not there."). Doing so would place fiduciary obligations on the UNM Defendants that they did not accept under the undisputed, controlling contractual documents.

Plaintiff argues (Br. in Chief at 22) that the material documents do not

comprise an integrated agreement, so that recourse to parol evidence is permissible. Plaintiff's brief does not indicate where he made this specific argument below. Consequently, it need not be considered. Muse v. Muse, 2009-NMCA-003, ¶ 50, 145 N.M. 451, 200 P.3d 104 (filed 2008).

The argument fails in any event. It is not the presence or absence of an integration clause that determines whether a contract is integrated. See 6 Peter Linzer, Corbin on Contracts § 25.7, at 60 (Rev. ed. 2010) ("[I]t is possible and proper to find a contract fully integrated in the absence of a merger clause."). Instead, "the question of integration [is] one of the parties' intent." Id. at 57. An agreement that "on its face reasonably appears to be a complete agreement" is integrated unless there is evidence establishing the contrary. Clark v. Sideris, 99 N.M. 209, 214, 656 P.2d 872, 877 (1982) (citing Restatement (Second) of Contracts § 209(3) (1979)), overruled in part on other grounds by Clark v. Sideris, 102 N.M. 436, 697 P.2d 119 (1985), and C.R. Anthony Co. v. Loretto Mall Partners, 112 N.M. 504, 817 P.2d 238 (1991). Factors to be considered include "[t]he length of the agreement and the detail with which its provisions are set out . . . [and] the formality or informality of the setting. Some writings, such as elaborately drafted agreements signed by both parties, suggest complete integration; others, such as informal memoranda, do not." 2 E. Allan

Farnsworth, Farnsworth on Contracts § 7.3, at 222 (2d ed. 1998) (footnote omitted).

By these standards, the 1994 agreement to establish the Karelitz chair is an integrated agreement. And even if there were doubt on that score, by the time the parties had executed the last of the controlling documents with the 2004 letter amendment, integration could no longer be questioned. Plaintiff had in three amendments or supplements to the original agreement incorporated his explicit and detailed requirements regarding the management of the Karelitz fund. He did not seek to add additional ones.

Even if they were to be considered, Plaintiff's letters make inconsistent use of trust terminology intermingled with gift and endowment terminology and generally invoke trust concepts primarily in discussing investment philosophy. See supra pp. 4-10. They do not demonstrate with the requisite clarity that Plaintiff intended to create a trust through the 1994 agreement to establish the Karelitz chair or its formal amendments or supplements. See supra p. 18. They do not convert the 1994 arrangement into a trust relationship. As the district court concluded, they reflect at best a post hoc effort to impose trust-type duties on the Foundation that were not part of the original agreement. Furthermore, to the extent Plaintiff's affidavit, which was drawn for this litigation in which

Plaintiff has based his claims on trust doctrines, alleges that it was Plaintiff's intent in 1994 to create a trust, Plaintiff himself has explained why it cannot suffice: a party's undisclosed intentions do not determine legal relationships. (Br. in Chief at 19.) See S. Union Exploration Co. v. Wynn Exploration Co., 95 N.M. 594, 597, 624 P.2d 536, 539 (Ct. App. 1981) ("The controlling intent of a party is his expressed assent and not his secret or undisclosed intent.").

Finally, Plaintiff argues that there is no showing of novation to replace the public charitable trust allegedly created by the documents relied on in Plaintiff's affidavit. (Br. in Chief at 26.) Again Plaintiff has not shown how this argument was preserved below. See Muse v. Muse. It presumes that those documents gave rise to a trust which, as has been demonstrated, is not the case. The only novation that occurred here took place when the 1991 letter agreement by Plaintiff and his wife for lifetime contributions that were to be poured into a testamentary trust was expressly superseded by the 1994 agreement to establish the Karelitz chair through the gift of an endowment fund. See supra pp. 19-20.

The district court did not err in concluding that Plaintiff failed to demonstrate the existence of a genuine issue of material fact and that summary judgment was warranted.

Conclusion

Because Plaintiff basis his claims for relief on an alleged trust that, on the undisputed material facts, never was created, the district court's grant of summary judgment to the UNM Defendants should be affirmed.

Statement Regarding Oral Argument

Appellees request oral argument in the event the Court believes that argument would assist in the presentation, clarification, or determination of the issues in this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that a copy of the foregoing pleading was served upon

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