

Lange v Kooper

2005 NY Slip Op 30396(U)

January 5, 2005

Supreme Court, New York County

Docket Number: 114029/2003

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ
Justice

PART 03

-----x
ELIZABETH S. LANGE, individually and as parent and natural guardian of GUS LANGE, an infant, and ALICE LANGE, an infant, and JANE A. WAGMAN, individually and as parent and natural guardian of ANNA WAGMAN and MABEL WAGMAN,

INDEX NO. 114029/2003

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 001

-against-

MOTION CAL. NO. _____

MICHAEL KOOPER,

Defendant.

-----x
The following papers, numbered 1 to _____ were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Decision and Order.

FILED
JAN 11 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 15, 2005



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART: 3

-----X
ELIZABETH S. LANGE, individually and as parent and
natural guardian of GUS LANGE, an infant, and ALICE
LANGE, an infant, and JANE A. WAGMAN,
individually and as parent and natural guardian of
ANNA WAGMAN and MABEL WAGMAN,

Index No. 114029/2003

Plaintiffs,

DECISION and ORDER

-against-

MICHAEL KOOPER,

Defendant.

-----X
KARLA MOSKOWITZ, J:

Defendant moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the action and for sanctions.

This is an action to recover damages against the trustee of a life insurance trust. On December 11, 1996, Robert M. Steinberg, the father of Elizabeth Lange and Jane Wagman, created a life insurance trust for the plaintiffs: his daughters and their children. The purpose of the trust, entitled the RMS Family Insurance Trust (the Trust), was to hold insurance on the life of Steinberg that would benefit Steinberg's daughters and their children on Steinberg's death. The Trust purchased a \$5 million life insurance policy, bearing policy number N100224770, on Steinberg's life that Nationwide Life Insurance Company underwrote (the Policy or the Nationwide Policy).

Steinberg was President and Chief Operating Officer of Reliance Group Holdings, Inc. (Reliance). Reliance agreed to advance premiums on the policy on a yearly basis, for as long as Steinberg remained an employee. Under a "Collateral Assignment Split Dollar Agreement" (the

Collateral Assignment), dated February 26, 1997, between Reliance and the Trust, the Trust assigned the Policy to Reliance as collateral security for its advance of premiums (Kooper Aff., Ex. 2). Under the Collateral Assignment, Reliance also retained the right to recover its premium payments, interest free, from the proceeds of the policy, whether the proceeds came from a death claim, maturity or surrender of the policy. The Collateral Assignment also provided that the agreement would terminate upon termination of Steinberg's employment, and that, in that event, the amount equal to the aggregate of Reliance's advances would become due and payable (*id.*, ¶ 6). Pursuant to the Collateral Assignment, Reliance advanced substantially all of the premiums for the Policy.

In July 2000, Reliance was experiencing serious financial difficulties and terminated Steinberg's employment. At that time, the parties entered into an Agreement and General Release (the Reliance/Steinberg Agreement), that resolved Steinberg's employment-related claims, including his claims under two employment agreements. Reliance agreed to pay Steinberg \$1.5 million and to assign to Steinberg all of Reliance's interest in three insurance policies, including the Nationwide Policy (Kooper Aff., Ex. 4). In June 2001, Reliance and its wholly owned subsidiary, Reliance Financial Services Corporation, filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code.

In the interim, on August 17 and 18, 2000, Steinberg, Lange and Wagman agreed to accept the resignation of Kenneth B. Newman, the original trustee, and defendant Michael Kooper agreed to act as successor trustee. Kooper was a long-time family friend and the broker who had helped the Trust obtain the Nationwide Policy. Soon thereafter, on August 25, 2000, Steinberg and Kooper made a "Request for Surrender" of the Nationwide Policy and directed

Nationwide to remit the surrender proceeds to Steinberg. Kooper contends that they made the Request for Surrender because Steinberg, as assignee of Reliance's rights under the Collateral Assignment, was entitled to the premiums on the Nationwide Policy that Reliance had previously advanced. These premiums totaled \$761,600. Shortly thereafter, Nationwide issued Steinberg a check for \$747,508.53, the net contract value of the Policy, and terminated the Policy.

On or about September 19, 2000, Steinberg paid \$100,000 to Kooper, representing partial repayment of \$500,000 that Kooper previously had loaned to Steinberg in April 2000.

On August 5, 2003, Lange and Wagman commenced this action by filing a complaint naming Steinberg as a defendant, as well as Kooper, Nationwide and Reliance. Plaintiffs later dismissed the lawsuit against Steinberg, Reliance and Nationwide. Plaintiffs served an amended complaint on December 24, 2003, alleging five causes of action against Kooper: breach of fiduciary duty (first cause of action), breach of the Trust Agreement (second cause of action), conversion (third cause of action), unjust enrichment (fourth cause of action) and an accounting (fifth cause of action).

Plaintiffs' claims for breach of fiduciary duty and breach of the Trust agreement rely upon the wording of section 2 of the Collateral Assignment that provides as follows:

2. EMPLOYER RIGHTS AND RESTRICTIONS

It is expressly agreed that the sole specific right reserved by the Employer is the right to collect from Nationwide Life Insurance Company the net proceeds of the Policy when it becomes a claim by death or maturity, or when it is surrendered for its cash value, to the extent necessary to reimburse itself for the interest-free advances made to the Owner for the payment of premiums pursuant to Paragraphs 1 and 4 of this Agreement

(Kooper Aff., Ex. 2).

Plaintiffs contend that, under this section, the Trust and Reliance agreed that the amounts that Reliance advanced as premiums “could also be satisfied from ‘the net proceeds of the policy when it becomes a claim by death.’” (Affidavit in opposition of Elizabeth Lange, ¶ 8.) Thus, plaintiffs contend that Kooper prematurely surrendered the policy and that he therefore breached his obligations as trustee. Plaintiffs contend that, if Kooper had indeed acted in his fiduciary capacity, he would have utilized the then existing cash value of the Policy to acquire a “paid-up” life insurance policy that would have been in effect when Steinberg eventually died from which “the premiums could be satisfied.” By failing to do so, Kooper did not act as a fiduciary for the benefit of the Trust, plaintiffs argue.

However, plaintiffs completely ignore paragraph 6 of that same agreement, that provides, in part, as follows:

In the event of [Termination of the employment of the Employee by the Employer], the amount equal to the aggregate of the advances made by the Employer pursuant to this Agreement shall become due and payable, in accordance with the arrangements agreed upon by the parties

(id.) (emphasis added).

Thus, pursuant to the Collateral Assignment, that the Trust signed before Kooper even assumed the position as trustee, the Trust was obligated to re-pay Reliance’s premium advances. As trustee, Kooper had a duty to carry out the obligations of the Trust. The standard by which the performance of a trustee is to be judicially measured is whether the trustee exercised “such diligence and such prudence in the care and management . . . as in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs” (Matter of Hahn, 62 NY2d 821, 824 quoting King v Talbot, 40 NY 76, 85-86). Here, it was reasonable for Kooper to

perform the Trust's contractual obligation. Plaintiffs acknowledge that Steinberg, to whom the advances were now owed, was in financial need. Steinberg received an assignment of those advances as part of his severance package and was entitled to them. Further, the Trust specifically provides that "in no event shall the Trustee be liable for any error of judgment or for anything done or omitted to be done pursuant to the powers given, except for his or her own willful misconduct" (Kooper Aff., Ex. A, at 21). Plaintiffs have not shown willful misconduct.

Plaintiffs' claims for conversion and unjust enrichment are based upon the assertion that, in surrendering the Policy, Kooper, in fact, converted the payment that Steinberg later made to him. Plaintiffs also assert that Kooper was also unjustly enriched in doing so. Although on a motion to dismiss, the court accepts as true the allegations in a complaint and makes every favorable inference, the court need not accept bare legal conclusions and factual claims that are either inherently incredible or that they flatly contradict documentary evidence (Herman v Greenberg, 221 AD2d 251). Here, plaintiffs present absolutely no evidence to contradict Kooper's documentary evidence that he did, in fact, wire the \$500,000 to Steinberg in April 2000; that Steinberg had acknowledged the debt in writing; and that Nationwide transmitted to Steinberg the entire proceeds of the surrender of the Policy. That Steinberg made a partial payment on a pre-existing debt after receiving the proceeds of the surrender of the Policy, is insufficient grounds upon which to base a claim for either conversion or unjust enrichment against Kooper.

As to plaintiffs' cause of action for an accounting, Kooper has presented sufficient documentation on this motion to satisfy plaintiffs' right to an accounting.

The Motion for Sanctions

Although I have dismissed this action, Kooper has not demonstrated that plaintiffs' conduct, in bringing this action, was undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure the defendant (see, 22 NYCRR § 130 - 1.1 [c] [2]). The court thus denies that part of defendant's motion for sanctions.

Accordingly, based upon the foregoing, it is

ORDERED that the motion by defendant Michael Kooper is granted to the extent that the complaint is dismissed with prejudice, with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Copies sent to attorneys for parties before filing.

Dated: January 05, 2005

ENTER:



J.S.C.

FILED
JAN 11 2005
NEW YORK
COUNTY CLERK'S OFFICE