

Lipshie v Lipshie

2005 NY Slip Op 30489(U)

April 19, 2005

Sup Ct, NY County

Docket Number: 604288/02

Judge: Martin Schoenfeld

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

PRESENT: Schoenfeld
Justice

PART 28

Lipshie, Norman
- v -
Lipshie, Tamara

INDEX NO. 60#288/0c
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4,5</u>
Replying Affidavits _____	<u>6</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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Dated: 4/19/05

[Signature]

J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

-----X
Norman W. Lipshie,
Plaintiff,

-against-

Index No. 604288/02

DECISION AND ORDER

Tamara Lipshie, Cara Lipshic, and
Greg Danilow,
Defendants.

-----X
Martin Schoenfeld, J.:

Plaintiff *pro se* Norman Lipshie ("Plaintiff") commenced an action against defendants, Tamara Lipshie, Cara Lipshic and Greg Danilow for breach of an oral contract, mental anguish, fraud, and breach of trust. Defendants now move, pursuant to CPLR 3211 (a)(7) and CPLR 3211 (a)(5), for an order dismissing the complaint with prejudice for failure to state a cause of action and because one or more of the causes of action are void under New York's Statute of Frauds. Defendants' motion to dismiss is in all respects granted, as the complaint fails to satisfy the requirements of the Statute of Frauds, and fails to state any actionable claims as to the remaining allegations.

Background

Plaintiff married Geraldine Lipshie in 1982 and is the natural father of defendants, Tamara and Cara Lipshic. The other defendant, Greg Danilow, is the son of Geraldine Lipshic from a previous marriage. He was raised by plaintiff and by Geraldine until adulthood. In 1990,

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Geraldine Lipshie was diagnosed with Parkinson's disease. After a long period of decline, she died in January of 2000.

In 1998, while Geraldine was still alive, her mother, Sydell Ballon, was found to be an incapacitated person pursuant to section 81.02(b) of the Mental Hygiene Law. Cara Lipshie, granddaughter of Sydell Ballon, and one of defendants herein, and Lois Ballon, Sydell Ballon's stepdaughter were judicially appointed co-guardians of her person and property. (Sydell Ballon is sometimes referred to herein as the "IP").

The co-guardians subsequently sought, and received, court approval in 1998 to initiate a gift-giving program primarily to the children and grandchildren of the IP. This was done pursuant to Mental Hygiene Law §81.21 in order to minimize future estate tax obligations. It was proposed that monetary gifts be distributed in a manner somewhat consistent with the testamentary provisions of the IP's will. According to the will, Sydell Ballon's estate is to be distributed in equal shares to her daughter and stepdaughter, but should either fail to survive, then the bequest would be paid to that deceased child's issue. The court approved gift plan includes a distribution to the IP's stepdaughter, Lois Ballon, and to her grandchildren, defendants herein. Interestingly, it also provides for a distribution to plaintiff, the IP's son-in-law. Furthermore, the applications to maintain this program have been granted annually.

Plaintiff's complaint alleges an oral contract between himself and his three children concerning that portion of the money received by defendants under the gift-giving program. Specifically, the complaint alleges that there was a verbal understanding that plaintiff would receive from his children "whatever monies I wanted and that would be at least \$250,000 per year." See, Complaint, page 2, item 9. Plaintiff contends that he always provided for his children,

and alleges that any monies received by them through the guardianship's gifting program were understood to actually belong to him and to his now deceased wife. He maintains that his wife Geraldine would have been a beneficiary under the will had she survived her mother. Plaintiff next contends that by virtue of his marriage to Geraldine, he is solely entitled to enjoy the benefits of her potential inheritance. Thus, plaintiff alleges a breach of an oral contract, and breach of fiduciary duty by his children's refusal to pay over to him that portion of the money received by them through the court approved gifting program. This refusal, together with his not being allowed by defendants to see his grandchildren, is the basis for plaintiff's additional allegations of mental anguish and claim for punitive damages. Further, despite being involved, as the family accountant, with the tax planning, and his receiving a direct distribution, plaintiff claims to have been fraudulently induced into agreeing to the court approved gift-giving program.

Discussion

On a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and are accorded every favorable inference. Sanders v. Winship, 57 NY2d 391 (1982). However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration. Sud v. Sud, 211 A.D.2d 423, 424 (1st Dept, 1995). Further, pursuant to New York General Obligations Law, section 5-701, every agreement, promise or undertaking, which by its terms, is not to be performed within one year from the making thereof, "is void, unless it or some note or memorandum thereof is in writing."

Here, plaintiff alleges that his children orally agreed to turn over to him whatever funds

they would receive under the court approved gift-giving program. As noted, the program is designed to minimize ultimate estate tax consequences. It has been ongoing since 1998, and in each and every subsequent year, applications are made to obtain court approval for the distributions. Thus, by its very nature, the program is constructed for an extensive time period and cannot be fully performed within one year. *See, Lowinger v. Lowinger*, 287 A.D.2d 39 (1st Dept, 2001) (oral promises to provide financial support, employment and an inheritance to plaintiff and her children are not promises that can be fully performed within one year of the making thereof). Therefore, the alleged contract is in violation of the Statute of Frauds and the first cause of action must be dismissed.

Further, in his complaint, plaintiff fails to specify the alleged contract terms such as method of payment, duration or consideration thereof. Essential terms of a contract must be alleged in nonconclusory language, including the specific provisions upon which liability is predicated, (*Sud v. Sud, supra*), the amount of financial support defendants are required to provide (*See Cobble Hill Nursing Home v. Henry Warren Corp.*, 74 N.Y.2d 475 [1989]), and the duration of the contract (*See Dombrowski v. Somers*, 51 A.D.2d 636 (3rd Dept 1977). Thus, the first cause of action must be dismissed for the additional reason that the oral contract is vague and indefinite.

The second claim for mental anguish and punitive damages is duplicative of the first cause of action and should be dismissed. Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action. *Wolkstein v. Morgenstern*, 275 A.D.2d 635, 637 (1st Dept 2000). Here, the only additional factor is plaintiff's allegation that defendants deny him the opportunity to visit with his grandchildren.

Further, plaintiff's allegations of emotional distress fail to satisfy the high threshold requirements of such a pleading. A plaintiff must allege conduct that is so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Howell v. New York Post Co., 81 N.Y.2d 115, 122 (1993). It is a matter for the courts to determine whether the conduct as alleged meets this standard. Wolkstein v. Morgenstern, *supra*. Here, the allegations fail to meet the high standard required to support such a cause of action.

The claim for punitive damages, incorporated into plaintiff's second cause of action, cannot be maintained. It has been held as a matter of law that there is no independent cause of action for punitive damages. Mayes v. UVI Holdings, Inc., 280 A.D.2d 153, 161 (1st Dept 2001). (*Also see*, New York University v. Continental Ins. Co., 87 N.Y. 2d 308 (1995), setting forth the pleading elements required to seek punitive damages where the claim arises from a breach of contract.)

The third cause of action, to recover damages for fraud, must be dismissed as insufficient on its face. The essential elements of a fraud claim are representation of a material existing fact, falsity, scienter, deception and injury. Channel Master Corp. v. Aluminum Ltd. Sales Corp., 4 N.Y.2d 403, 407 (1958). Here, plaintiff alleges that defendants induced him into agreeing to the gifting plan, without ever intending to give him any of their share of the distributed funds. General allegations that a defendant entered into a contract while lacking the intent to perform it are insufficient to support a cause of action for fraud. New York University v. Continental Insurance Co., *supra* at 318. Further, plaintiff's fraud claim is "inherently incredible" (*See Sud v. Sud*, *supra*) as it is the court, not plaintiff, that must approve of any proposal with respect to a

distribution of guardianship assets. Plaintiff's approbation of the court order is therefore irrelevant.

As a fourth and final cause of action, plaintiff alleges breach of trust arising from defendants failure to pay over their share of the distributed funds. Plaintiff avers that defendants became fiduciaries when "they agreed to hold the monies for me". See, Complaint, page 4, item 28. Once again, this claim lacks merit as being duplicative of the first cause of action. As noted in William Kaufman Organization, Ltd. v. Graham & James LLP, 269 A.D.2d 171, 173 (1st Dept 2000): "A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." See also, Kaminsky v. FSP Inc., 5A.D.3d 251 (1st Dept 2004). Here, the claimed fiduciary relationship forming the basis of the "breach of trust" is neither separate nor distinct from any duty arising from obligations allegedly imposed by the oral contract.

Conclusion

Thus, for the reasons set forth above, defendants' motion to dismiss is in all respects granted. Further, as the papers "conclusively establish that no cause of action exists," the dismissal shall be with prejudice. See, Ming v. Hoi, 163 A.D.2d 268, 269 (1st Dept 1990).

This opinion constitutes the decision and order of the Court.

Dated: April 19, 2005

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