

<b>Katz v Katz</b>
2006 NY Slip Op 30767(U)
January 27, 2006
Supreme Court, New York County
Docket Number: 106740/05
Judge: Leland G. Degrasse
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SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 25

-----X  
DR. DAVID KATZ, :  
 :  
 Plaintiff, :  
 :  
 -against- :  
 :  
 BREND A R. KATZ, :  
 :  
 Defendant. :  
-----X

Index No.: 106740/05  
Cal. No.: 51 of 9/28/05

**DeGRASSE, J.:**

In this action arising from an alleged stock transfer, defendant Brenda R. Katz moves for an order dismissing the complaint based on the grounds that the action is time-barred (CPLR 3211 [a] [5], and the complaint fails to state a cause of action (CPLR 3211 [a] [7]). Plaintiff Dr. David M. Katz cross-moves for leave to amend the complaint to include a cause of action for conversion (CPLR 3025 [b]).

**FACTS**

On a motion to dismiss the complaint, the facts alleged therein must be accepted by the court as true (*Morone v Morone*, 50 NY2d 48 [1980]). In 1977, plaintiff, the brother of defendant, was the owner of 7,643 shares of Con Edison common stock held in the names of plaintiff and the parties' father, Sam Katz, as joint owners with rights of survivorship. The estimated value of the shares is in excess of \$367,628. Although plaintiff knew that his father owned shares of Con Edison stock, he did not know that his father had made him joint owner of the shares. On October 15, 1997, defendant presented a stock power to Con Edison containing the purported signatures of plaintiff and

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their father which resulted in the issuance of a new stock certificate transferring the shares to the father's sole ownership. Shortly thereafter, defendant executed another stock power transferring the shares to the joint ownership of the father and defendant. At the time of the stock transfers, the father's mental and physical health was on the decline. The alleged fraud was not discovered by plaintiff until August 2004. Plaintiff claims that prior to that time, defendant's deceptive actions had prevented him from learning about the stock transfer. On May 13, 2005, plaintiff commenced the underlying action alleging causes of action sounding in fraud, breach of fiduciary duty, and constructive trust. Plaintiff seeks relief in the nature of restitution of the converted stock or the imposition of a constructive trust upon their traceable proceeds. Defendant now moves to dismiss the complaint on the grounds that the complaint fails to state a cause of action, and that all of plaintiff's claims are, in any event, time-barred by the applicable statutes of limitations.

## DISCUSSION

### *Standard of Review*

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the pleadings must be liberally construed. The sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1997]). Although the facts pleaded are presumed to be true and accorded every favorable inference, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to such consideration (*Doria v Masucci*, 230 AD2d 764, 765 [1996], *lv denied* 89 NY2d 811 [1997]). (*Kliebert v McKoan*, 228 AD2d 232 [1996], *lv denied* 89 NY2d 802 [1996]). Affidavits and other

evidence may be used freely to preserve inartfully pleaded but potentially meritorious claims, and the court's attention should be focused on whether the plaintiff has a cause of action rather than on whether he or she has properly stated one (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 - 636 [1976]; *Guggenheimer v Ginzburg*, 43 NY2d at 275). However, bare legal conclusions as well as factual claims that are flatly contradicted by the record are not presumed to be true on a motion to dismiss for failure to state a cause of action, and are not entitled to any such consideration (*Mayer v Sanders*, 264 AD2d 827 [1999]; *Meyer v Guinta*, 262 AD2d 463 [1999]). Moreover, where the plaintiff's submissions conclusively establish that there is no cause of action, the cause of action should be dismissed (*Rovello*, 40 NY2d at 636).

#### ***Defendant's Motion to Dismiss the Complaint***

The first cause of action alleges that by forging plaintiff's name on a stock power, defendant deceived and induced Con Edison to improperly transfer the stock out of the joint account held in the names of plaintiff and his father, thereby depriving plaintiff of the benefit of his interest in the stock. In order to plead a cause of action for fraud, a plaintiff must establish: (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance by the other party on the misrepresentation or material omission; and (5) injury (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). "Essential to a fraud cause of action is the existence of a material misrepresentation made with the intention of inducing the plaintiff's reliance thereon" (*M.S. Partnership v Wal-Mart Stores, Inc.*, 2 AD3d 1482, 1484 [2003]). Defendant argues that the first cause of action should be dismissed because plaintiff has not pled each of the elements of a fraud

claim with the particularity required by CPLR 3016 (b). The court agrees. While defendant's false representation may have induced Con Edison into transferring plaintiff's interest, the complaint fails to state how plaintiff relied to his detriment upon defendant's false representations (*cf. Klembczyk v DiNardo*, 265 A.D.2d 934, 935 [1999]). As such, plaintiff's allegations fail to establish a prima facie case for fraud.

In opposition, plaintiff cites *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Chipetine* (221 AD2d 284 [1995]) for the proposition that a cause of action for fraud arises where the parties are in a fiduciary or confidential relationship and the defendant fails to disclose material facts which he or she is in good faith bound to disclose. Plaintiff appears to be alleging a claim for constructive fraud. In order to recover damages for constructive fraud, a plaintiff must establish that (1) a representation was made, (2) the representation dealt with a material fact, (3) the representation was false, (4) the representation was made with the intent to make the other party rely upon it, (5) the other party did, in fact, rely on the representation without knowledge of its falsity, (6) injury resulted and (7) the parties are in a fiduciary or confidential relationship (*see Brown v Lockwood*, 76 AD2d 721, 730 [1980]). Unlike actual fraud, in order to establish a constructive fraud claim, the plaintiff need not prove the element of scienter, or actual awareness on the defendant's part that false representations were made (*Brown*, 76 AD2d at 731; *Del Vecchio v Nassau County*, 118 AD2d 615, 617-618 [ ]). However, a fiduciary duty is an essential element to a constructive fraud claim (*Callahan v Callahan*, 127 AD2d 298 [1987]).

Defendant argues that she did not have a close relationship with plaintiff that created a fiduciary duty on her part. Plaintiff argues that "[a]lthough they did not have a close relationship, a confidential and/or fiduciary relationship did arise between them by virtue of their reliance upon

one another in making decisions regarding the care of their elderly and mentally incapacitated father.” The mere fact that the parties to this disagreement are siblings cannot of itself create a fiduciary relationship (*see Meltzer v Koenigsberg*, 99 NYS2d 143 [1950], *affd* 277 AD 1050 [1950], *lv denied* 278 AD 570 [1951], *affd* 302 NY 523 [1951]). “A fiduciary relationship, whether formal or informal, ‘is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another ....’” (*Apple Records v Capitol Records*, 137 AD2d 50, 57 [1988]), citing *Cody v Gallows*, 28 Misc2d 373, 214 NYS2d 127 [1961]).

Here, the complaint alleges that in October 2004, without plaintiff’s knowledge or consent, defendant convinced the parties’ father, whose mental and physical health was declining, to execute a new power of attorney making defendant the legal representative for the father’s Citibank accounts. The complaint further alleges that in November 2004, without notifying plaintiff, defendant removed the father from his Pennsylvania nursing home and placed him in an assisted living facility in New Jersey. As a result, plaintiff was unable to locate his father for several months because he did not know his father’s new address. Under the circumstances, plaintiff has failed to establish, as a matter of law, that the relationship between him and defendant was of such closeness so as to be of a confidential or fiduciary nature (*see Bontecou v Goldman*, 103 AD2d 732, 733 [1984]). Therefore, plaintiff’s cause of action for constructive fraud must be dismissed. Even assuming that the first cause of action states a valid claim for fraud, it would be barred by the applicable six-year statute of limitations which begins to run from the date of the commission of the purported fraud (*see CPLR* 213 [8]; *Lapis Enterprises v Intl. Blimpie Corp.*, 84 AD2d 286, 291 [1981]).

With regard to the second cause of action alleging breach of fiduciary duty, the record clearly shows that no fiduciary duty existed (*see Bd. of Mgrs. of Fairways at N. Hills Condominium*, 193 AD2d 322 [1993]). Therefore, the second cause of action must be dismissed. Similarly, in the absence of a valid breach of fiduciary duty claim, the third cause of action for a constructive trust cannot stand (*see Ellner v Pope*, 285 AD2d 624 [2001]; *Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). In light of the foregoing, it is not necessary to resolve the question of whether the applicable statutes of limitations bar plaintiff's second and third causes of action.

### ***Plaintiff's Cross Motion to Amend the Complaint***

Plaintiff cross-moves to amend the complaint to add a cause of action for conversion. An action for conversion is established by proving that (1) plaintiff had legal ownership or an immediate superior right of possession to specific identifiable personal property, and (2) defendant exercised unauthorized dominion over the property to the exclusion of the plaintiff's rights (*Aetna Cas. & Sur. Co. v Glass*, 75 AD2d 786 [1980]). In opposition, defendant argues that the cross motion should be denied because plaintiff has failed to include the proposed amended complaint and an affidavit of merit concerning the proposed causes of action in support of the cross motion. Defendant further argues that the proposed cause of action is time-barred by the three-year statute of limitations applicable to a conversion claim.

"In general, leave to amend a complaint rests within the court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit" (*Berger v Water Commrs. of Town of Waterford*, 296 AD2d 649 [2002]; *see* CPLR 3025 [b]). Although leave to amend is liberally given,

the motion"must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment," (*Non-Linear Trading Co. v Braddis Assocs., Inc.*, 243 AD2d 107, 116 [1998], quoting *Nab-Tern Constructors v City of New York*, 123 AD2d 571, 572 [1986]). Here, defendant's latter objection has been mooted by plaintiff's reply affirmation submitted in support of the cross motion. Plaintiff asserts that the proposed amendment will not cause prejudice or surprise to defendant because in her affidavit in support of the motion to dismiss, defendant admitted that she forged plaintiff's name on a stock power in order to transfer the shares of stock out of the joint account plaintiff held with his father.

Normally, a motion to amend a pleading should be accompanied by a copy of the proposed pleading (*Goldner Trucking Corp. v Stoll Packing Corp.*, 12 AD2d 639 [1960]). However, where, as here, plaintiff's alternative theory of recovery is based upon the same set of facts as originally pleaded, the court concludes that plaintiff should be permitted to amend the complaint to assert the proposed cause of action (*see* CPLR 3025 [b]; *England v Sanford*, 167 AD2d 147 [1990], *aff'd* 78 NY2d 928 [1991]; *Goldstein v Brogan Cadillac Oldsmobile Corp.*, 90 AD2d 512, 513 [1982]). Defendant has not demonstrated that she would suffer undue prejudice to have to defend against the proposed claim (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). Rather, in her supporting affidavit defendant argues that plaintiff's first cause of action for fraud is mislabeled and actually sets forth a claim for conversion.

The next issue before this court is whether the proposed cause of action is barred by the applicable three-year statute of limitations (CPLR 214 [3]) which generally runs from the date the conversion takes place (*Al-Roc Prods. Corp. v Union Dime Sav. Bank*, 74 AD2d 834 [1980], *lv dismissed* 50 NY2d 928 [1980]). Plaintiff argues that defendant should be estopped from asserting

a statute of limitations defense because he was unaware of defendant's misconduct until 2004, in large part due to defendant's concealment of her fraudulent conversion. In opposition, defendant argues that the assertion of the statute of limitations is not, as plaintiff contends, precluded by equitable estoppel since plaintiff knew of the stock transfers, at the very latest, by April 29, 2000. It is defendant's contention that any concealment of the alleged wrongful conduct was made known to plaintiff long before the expiration of the applicable statute of limitations. In support of her contention, defendant submits a letter, dated April 29, 2000, from their father's attorney, Kathy N. Rosenthal, Esq., which is addressed to defendant's former attorney, Steve Harfenist, Esq., and copied to plaintiff. The letter requests that defendant execute the necessary instruments to transfer the shares of stock registered in the names of defendant and the father, as joint owners, back to the joint ownership of plaintiff and the father. Defendant also submits an affidavit from Harfenist which states that during the course of his representation of defendant, he spoke to plaintiff regarding the stock transfers.

In his supporting affidavit, plaintiff avers that he never received a copy of the April 29<sup>th</sup> letter that defendant claims was sent to him, nor was he in communication with Rosenthal concerning the transferred stock until late July or early August 2004, when he contacted Rosenthal and asked her about the transferred stock. Plaintiff further asserts that in 1998, at a time when defendant held power of attorney over all of their father's affairs, she sent him a copy of their father's will. Annexed to defendant's moving papers is a copy of the will, dated November 26, 1997, wherein the father stated: "I specifically make no provision in this, my Will, for my son DAVID M. KATZ, M.D., because I have provided for him elsewhere." Plaintiff claims that along with the will, defendant enclosed a handwritten note which falsely stated that their father had made no provision

to leave plaintiff any property or money. Annexed to plaintiff's moving papers is a copy of the note wherein defendant stated:

"I don't believe Dad has as much as he says he does. He mentioned numerous acc[oun]ts, but nothing is specified in the Will. I was hoping to work something out with you after he died. You were never supposed to see this Will. I know [it is] upsetting! This is just his way of getting his final zing in. We will have to see what happens in the future. I was hoping to give you more cash than stock. ... Don't get your hopes up I really don't believe he has that much of anything."

Plaintiff claims that shortly thereafter, he received a telephone call from defendant wherein she informed plaintiff that their father was not providing anything for plaintiff in his will because he had paid for plaintiff's medical school education. According to plaintiff, after these communications, he "simply had no reason to make any inquiries about any of [his] father's property." In his reply affidavit, plaintiff further avers that he never spoke to Harfenist regarding the stock transfers. Plaintiff claims to have learned of plaintiff's fraudulent conversion in August 2004, while gathering some of his father's personal belongings to facilitate his father's move to a nursing home in Wilkes-Barre, Pennsylvania. At that time, plaintiff came across an undated handwritten letter that defendant had written to their father. The letter, annexed to defendant's moving papers, indicated that defendant had forged plaintiff's name on a stock certificate and states in pertinent part:

You told Lanny that I signed David[']s name on the stock certificate. If David ever finds out not only will he take me to court[,] but he will take the money away from you just like he did before. Nice going [D]ad! I know nothing[,] you know everything [and] are always right, so how about using your brain a little.

Plaintiff claims that shortly thereafter, he asked his cousin Lance [Lanny] Zipper about the forged stock power. According to plaintiff, Zipper, who held the power of attorney over the father's Citibank accounts, informed plaintiff that the stock, which had been held in a joint account in the

names of plaintiff and his father, had been transferred out of the joint account. Zipper also informed plaintiff that his father had retained an attorney to retrieve the stock from defendant.

In order to invoke the doctrine of equitable estoppel, a plaintiff must show that he or she was "induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 449 [1978]; see *Barrett*, 6 AD3d 1164, 1166). The doctrine requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing a timely action (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 122 [1985], *aff'd* 67 NY2d 981 [1985]; *Jordan v Ford Motor Co.*, 73 AD2d 422, 424 [1980]). Further, to rely on the equitable estoppel doctrine, a plaintiff must demonstrate that due diligence was used in bringing the action (*Simcuski*, 44 NY2d at 450).

Here, plaintiff has submitted evidence that defendant misled him about the fact that their father had "placed 7,643 shares of Con Edison stock into a joint account with [plaintiff]," and thus, plaintiff's father had provided for plaintiff after his death. Assuming that is true, it can reasonably be inferred that defendant misled plaintiff to keep him from suing her. Moreover, plaintiff commenced this lawsuit within a reasonable time after he allegedly first learned about the stock transfers. Although defendant denies that she misled plaintiff, and submits other evidence suggesting that plaintiff knew or should have known about the transferred stock in "late 1999 or early 2000," the issue of the statute of limitations is not resolvable at this time.

## CONCLUSION

For the foregoing reasons, defendant's motion is granted to the extent that the first, second and third causes of action by which plaintiff alleges fraud, breach of fiduciary duty and a constructive trust are dismissed pursuant to CPLR 3211 (a) (7). Plaintiff's cross motion for leave to amend the complaint so as to add a cause of action sounding in conversion is granted to the extent that this matter is referred to the IAS Judicial Support Office for assignment to a special referee to hear and report with recommendations on the issues of when plaintiff learned that defendant had caused the transfer of the shares of Con Edison stock out of the joint account plaintiff held with his father. The reference is necessary because leave to amend cannot be granted if a proposed new cause of action is time-barred (*see Doe v Holy See (State of Vatican City)*, 6 AD3d 1228 [2004]). Pending receipt of the special referee's report and a CPLR 4403 motion final determination of the cross motion shall be held in abeyance. The cross motion will be deemed denied unless plaintiff files a copy of this order with the IAS Judicial Support Office within 20 days after entry. The parties shall appear for a preliminary conference on March 13, 2006 at 2:00 p.m.

This constitutes the decision and order of the court.

DATED:

JAN 27 2006

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JAN 31 2006  
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J.S.C.

HON. JUDGE J. J. LASSER