

**Janien v Janien**

2006 NY Slip Op 30768(U)

January 11, 2006

Supreme Court, New York County

Docket Number: 603745/2002

Judge: Karla Moskowitz

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

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CEDRIC JANIEN,

Index No. 603745/2002

Plaintiff,

-against-

C. CHRISTOPHER JANIEN, AEGIS RESEARCH AND  
MANAGEMENT, INC., AND PERSHING INVESTMENT  
MANAGER SERVICES, A DIVISION OF PERSHING LLC,

**DECISION AND ORDER**

Defendants.

**FILED**

JAN 13 2006

NEW YORK  
COUNTY CLERK'S OFFICE

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**KARLA MOSKOWITZ, J:**

This is a dispute between father and son. Plaintiff Cedric Janien is the father of defendant C. Christopher Janien. Christopher Janien is the sole shareholder and officer of defendant Aegis Research and Management, Inc. ("Aegis"). Plaintiff Cedric Janien alleges that in September 2000, he transferred \$500,000 to defendant Christopher Janien "with the specific instructions that these funds were to be invested solely for the benefit of the Plaintiff with investments suitable to the Plaintiff for preservation of capital and a steady income stream." (Complaint ¶ 11). The Complaint states that Christopher Janien was supposed to act as an investment advisor and manage the investment account on behalf of his father. (Id. at 14).

Before the money transfer, on December 29, 1999, defendant Christopher Janien had established a brokerage account with DLJ Management Services, Inc. ("DLJ") on behalf of himself and plaintiff as joint tenants with right of survivorship. (See Affidavit of C. Christopher Janien "Janien Aff." sworn to July 14, 2005, Ex B). Plaintiff's signature appears on the "Account Application and Agreement." (Id.). Nowhere in the complaint or in his affidavit, does plaintiff deny that this is his signature. However, in a letter to defendant Pershing Investment Management Services ("Pershing"), dated February 24, 2005, plaintiff wrote "I never signed this

document as currently portrayed.” (See Affidavit of Cedric Janien “Cedric Janien Aff.” sworn to September 8, 2005, Ex. 5). He continued that “I never would have signed any document giving my son any rights of ownership in this account.” (Id.)

It was to this account that plaintiff wired the \$500,000. Plaintiff accuses defendant of concealing that he had placed the funds into a joint account by requiring DLJ to send the account statements to an address in Florida where plaintiff no longer resided. (Cedric Janien Aff. ¶ 5). Also, defendant allegedly invested the money contrary to plaintiff’s instructions resulting in a loss of principal.

Plaintiff asserts 11 causes of action: breach of fiduciary duty, restitution, conversion, declaratory judgment that plaintiff is the sole owner of the brokerage account and that defendants are liable to plaintiff, specific performance to return the funds, accounting, fraud, fraudulent inducement, interpleader (against defendant Pershing, the entity currently holding the money in the account), constructive trust and declaratory judgment concerning certain property. Plaintiff has withdrawn this last cause of action.

Defendants Christopher Janien and Aegis (collectively “defendants”) have moved to dismiss. Christopher Janien claims that the \$500,000 from plaintiff was a gift. He has placed before the court a letter, dated September 30, 2000, from himself to his father in which Christopher thanks his father for “[y]our gift of the \$500,000.00” (See Affidavit of Christopher Janien, sworn to July 14, 2005, “Christopher Janien Aff.” Ex D). However, Exhibit C to the same affidavit is a brokerage account statement from DLJ Investment Manager Services (“DLJ”) that lists Christopher Janien as “Your Investment Advisor.” In addition, defendants do not contest that neither Christopher Janien nor his father filed gift tax returns for this amount.

Plaintiff also cross-moved for summary judgement despite the pre-answer, pre discovery state of the case. The court denied this motion on the record at oral argument on this motion on October 12, 2005. The court took defendants' motion to dismiss on submission.

I. Breach of Fiduciary Duty: First Cause of Action

In order to maintain a cause of action for breach of fiduciary duty, the plaintiff must allege: (1) a fiduciary relationship (2) a breach of fiduciary obligations (3) defendant's knowing participation in that breach and (4) damages. (See Kaufmann v Cohen, 307 AD2d 113 [1st Dept 2003]). Defendants claim that: (1) there was no fiduciary relationship between the parties and (2) there is no evidence that Christopher Janien knowingly participated in that breach.

The complaint and plaintiff's affidavits on this motion allege that the plaintiff father, who is now 89 years old, transferred \$500,000 to Chase Manhattan Bank in order to have his son invest money for him. The defendant son claims that this transfer was supposed to be a gift and the plaintiff did countersign a letter acknowledging receipt of the cash "gift." However, defendant does not dispute that plaintiff never filed a gift tax return for this amount. In addition, the statement from DLJ lists Christopher Janien as the investment advisor. Although plaintiff's signature appears to be on the documents establishing a joint account at DLJ, plaintiff has questioned his signature and claims that his son set up this joint account without his knowledge. Plaintiff also claims that he is "informed that the account was established in joint names for convenience purposes only for my sole benefit." (Cedric Janien Aff. ¶ 4). The plaintiff also claims that his son had the account statements sent to an address in Boca Raton, Florida and plaintiff consequently had no idea of the losses that the account sustained because he lived in New York.

Under the circumstances, given the father-son relationship, the advanced age of the father, the listing of Christopher Janien as the “investment advisor” and that defendant directed the statements to an address where plaintiff did not live, the court has serious questions as to whether or not a fiduciary relationship existed between the parties and what Christopher Janien’s intentions were. The court therefore will not dismiss the claim for breach of fiduciary duty at this juncture. (Bestolife Corp. v American Amicable Life, 5 AD3d 211, 216 [1st Dept 2004], Laurenzano v. Laurenzano, 156 AD2d 430 [2d Dept 1989]).

Defendants also cite the general statute of frauds provision that General Obligations Law § 5-701 contains. They claim that “as there is no writing signed by defendant Christopher agreeing to manage the disputed funds for the sole benefit of his father, the causes of action sounding in contract must be dismissed.” (Def. Mem at 3). Although plaintiff has not asserted a cause of action for breach of contract, at essence this case involves the breach of an oral agreement. However, the breach of fiduciary duty claim does not “sound in contract” and therefore the statute of frauds is irrelevant to this cause of action. Defendants make such of plaintiff’s failure to address their statute of frauds argument in their opposition papers, but defendants’ notice of motion does not mention that they are moving to dismiss based upon the statute of frauds. Consequently, the court need not consider defendants’ arguments based on the statute of frauds.

## II. Restitution/Unjust Enrichment: Second Cause of Action

For similar reasons, the court will not dismiss plaintiff’s restitution claim. A cause of action for unjust enrichment is proper where plaintiff pleads it bestowed a benefit upon the defendant and that defendant will obtain such benefit without adequately compensating the

plaintiff for it. (Sergeants Benevolent Association Annuity Fund v Renck, 19 AD2d 107, 111 [1st Dept 2005]). In addition, “where defendants have reaped such benefit, equity and good conscience require they make restitution.” (Korff v Corbett, 18 AD2d 248, 250 [1st Dept 2005]). Although plaintiff never explains what benefit Christopher Janien received, defendant does not challenge the restitution claim on this basis. Rather, defendant argues that this cause of action must fail because plaintiff has not pled “wrongful conduct” and because a contract existed between the parties.

Because it is unclear at this juncture whether defendant received a legitimate gift or whether, as plaintiff contends, he appropriated plaintiff’s money and made improper investments, plaintiff has certainly pled a “wrongful act.” “The existence of a valid and enforceable written contract precludes recovery on a theory of unjust enrichment.” (Cornhusker Farms v Hunts Point Coop. Mkt., 2 AD3d 201, 206 [1st Dept 2003]). But, at this juncture, without knowing more about the parameters of the agreement between father and son, the court is reluctant to dismiss the claim for unjust enrichment/restitution, particularly considering our liberal pleading standard and plaintiff’s prerogative to plead in the alternative.

### III. Conversion: Third Cause of Action

Plaintiff has failed to address defendants’ argument that the statute of limitations bars plaintiff’s cause of action for conversion. Therefore, he concedes the argument and the court dismisses the third cause of action. In addition, it would appear that the alleged conversion took place in September 2000. The statute of limitations for conversion is three years. (See Collymore v Secretary of Housing and Urban Development, 22 AD3d 703 [2d Dept 2005]). Thus, the cause of action for conversion is clearly outside the applicable statute of limitations.

IV. Declaratory Judgment: Fourth Cause of Action

In his fourth cause of action, plaintiff seeks a declaration that he is the exclusive owner of the account. He also seeks a declaration that defendants are “liable to the Plaintiff in the full amount of an loss of the investment and bound to pay and all attorney’s fees, costs of investigation and disbursements” plaintiff incurred. (Complaint ¶ 35). The court dismisses that part of plaintiff’s claim seeking a declaration that defendants are liable to him because that cause of action duplicates the other causes of action in the complaint seeking money damages. (See Arthur Young Co., v Fleischman, 85 AD2d 571 [1st Dept 1981]). In addition, the part of this cause of action seeking to declare that plaintiff is the sole owner of the account duplicates the cause of action for a constructive trust. Therefore, the entire fourth cause of action is duplicative and warrants dismissal.

V. Specific Performance: Fifth Cause of Action

To sustain a cause of action for specific performance, plaintiff must plead: (1) that a contract exists; (2) that the plaintiff substantially performed its contractual obligations and (3) that defendant was able to convey the property and (4) that there is no adequate remedy at law. (EMF Gen Contracting Corp. v Bisbee, 6 AD3d 45, 51 [1st Dept 2004]). Plaintiff has failed to plead a written agreement between the parties. Plaintiff has also failed to plead that he has no adequate remedy at law. Therefore, the court dismisses the cause of action for specific performance.

VI. Accounting: Sixth Cause of Action

The court will not dismiss the cause of action for an accounting. The brokerage statement lists plaintiff as a joint tenant on the account. Plaintiff has alleged that defendant Christopher

Janien prevented him from viewing the account statements because he had DLJ send them to Florida. Plaintiff has also alleged that defendant still retains the money that plaintiff sent to him for investment purposes. Accordingly, plaintiff is entitled to an accounting.

VII. Fraud and Deceit and Fraudulent Inducement: Seventh and Eighth Causes of Action

To the extent that plaintiff alleges that Christopher Janien induced him to wire \$500,000 because defendant Janien had allegedly tricked him into believing that the account was in plaintiff's name only, plaintiff has stated a claim for fraudulent inducement. (Shisgal v Brown, 21 AD3d 845 [1st Dept 2005]). Because plaintiff has alleged a fiduciary relationship, to the extent that plaintiff alleges that defendant Christopher Janien concealed the nature of the investments he made and the losses on the account, he has stated a claim for fraudulent misrepresentation. (P.T. Bank Central Asia v ABN AMRO Bank N.V., 301 AD2d 373 [1st Dept 2003]). Therefore, the court sustains the causes of action sounding in fraud. Defendants complain that plaintiff has not pled fraud with particularity, but the complaint combined with the affidavits plaintiff has submitted on this motion as well as the documents both parties have submitted are more than sufficient to place defendants on notice as to parameters of the claims plaintiff has asserted against them and to enable defendants to answer the complaint.

X. Constructive Trust: Tenth Cause of Action

In his cause of action for a constructive trust, plaintiff requests a judgment stating "that all right, title and interest to all of the contents and money in Account Number 3PU-001098 held by Pershing Investment Manager Services together with all other assets secreted by the Defendants are the property of the Plaintiff and to which Plaintiff has a right to immediate use and title." (Complaint ¶ 73).

Defendants claim that, because plaintiff has failed to plead a confidential or fiduciary relationship and because plaintiff has failed to plead unjust enrichment, the court must dismiss the claim for a constructive trust. However, as plaintiff has properly pled a confidential or fiduciary relationship and has pled unjust enrichment, defendants' bases to dismiss the cause of action for a constructive trust are without merit and the court denies the motion as to this cause of action.

Accordingly, it is

ORDERED THAT the court grants the motion of defendants C. Christopher Janien and Aegis Research and Management, Inc. to dismiss the complaint only to the extent of dismissing the fourth and fifth causes of action and otherwise denies the motion; and it is further

ORDERED THAT the court directs defendants C. Christopher Janien and Aegis Research and Management, Inc. to answer the complaint within ten days from the date of service of this decision and order with notice of entry; and it is further

ORDERED THAT the parties are directed to attend mediation and should contact the court at (646) 386-3220 to speak to my court attorney who will make the necessary arrangements and set up a preliminary conference.

Dated: January 11, 2006

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