

Schild v Posner

2007 NY Slip Op 31508(U)

May 2, 2007

Supreme Court, New York County

Docket Number: 0117220/2006

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Index Number : 117220/2006

SCHILD, JULIE

INDEX NO. _____

vs
POSNER, ESTHER

MOTION DATE 4/30/07

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS DEFENSE

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 08 2007
NEW YORK
COUNTY CLERK'S OFFICE

Motions sequence 001 and 002 are consolidate for joint disposition as follows:

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Esther Posner to dismiss the complaint is granted on the ground of lack of personal jurisdiction; and it is further

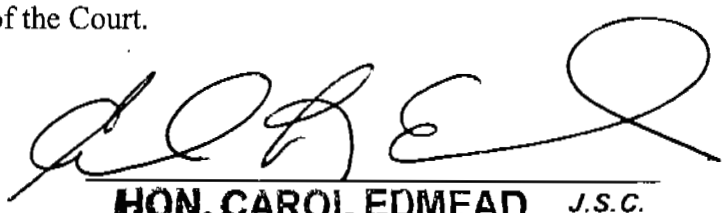
ORDERED that the motion by defendants Allmerica Financial and Hanover Insurance Group to dismiss the action as asserted against it is granted; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 4/30/07


HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
JULIE SCHILD,

Plaintiff,

-against-

ESTHER POSNER, ALLMERICA FINANCIAL
and HANOVER INSURANCE GROUP,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 117220-2006

Motion Seq. 001 and 002
DECISION/ORDER

FILED
MAY 08 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION¹

Plaintiff Julie Schild (“Plaintiff”), a New York resident, commenced this action against her niece, Esther Posner (“Posner”), and defendants Allmerica Financial and Hanover Insurance Group (Allmerica and Hanover hereinafter referred to as “Defendants”) in connection with her investment of approximately \$400,000.00 in an Allmerica Annuity #PN 00267779 (the “Annuity Contract”). In response to Defendants’ claim that Plaintiff assigned her ownership interest in the Annuity Contract to Posner (the “Assignment”), Plaintiff alleges in her Complaint that she (1) has no recollection of signing any agreement to transfer ownership of the Annuity Contract to Posner, (2) has no recollection of signing any such agreement before Posner’s son, as stated in the Assignment, (3) never intended to make a gift or transfer of her ownership interest in the Annuity Contract, and (4) that the Assignment was procured by fraud. Plaintiff seeks to void the transfer of the Annuity Contract, the imposition of a trust in her favor, the return of monies had and received by Posner, and legal fees.

¹ Motions sequence 001 and 002 are consolidate for joint disposition.

Posner now moves pursuant to CPLR 3211(a)(5) and 3211 (a)(8) for an order dismissing the action on grounds of lack of jurisdiction and statute of limitations. Posner, who resides in Michigan, contends that New York has no jurisdiction over her. Posner asserts that she did not visit New York in connection with Plaintiff's transfer of ownership and was not served with process in New York State. Further, Posner did not consent to jurisdiction in this action or conduct business in New York. Posner further argues that the statute of limitations for claims to recover "injury to property" and for breach of fiduciary duty are three years. Since these causes of action accrued over ten years ago when the Annuity Contract was transferred on January 14, 1996, Plaintiff's claims are time-barred.

Defendants also move to dismiss the action as untimely, adding that Plaintiff's equitable claims for the imposition of a constructive trust and for rescission are governed under the six-year statute of limitations and her breach of contract action is governed by a three-year statute of limitations. Allmerica also adds that the Complaint lacks the requisite particularity and fails to state the elements of a cause of action for the imposition of a constructive trust, breach of fiduciary duty, rescission, and for attorneys' fees. Furthermore, the causes of action for fraud, misrepresentation, or breach of fiduciary duty fail to state in detail the "circumstances constituting the wrong" as required under CPLR 3016(b).

In opposition, Plaintiff contends that Posner had substantial contacts with New York State. Plaintiff asserts that Posner was the registered representative of Allmerica, and was designated as Plaintiff's general power of attorney in 1985. Plaintiff contends that Posner was also the financial representative of Posner's mother, another New York customer of Allmerica. Posner was also co-trustee with Plaintiff for a Trust under Plaintiff's late husband's will.

Furthermore, Posner made payments to Plaintiff in New York, presumably in connection with Plaintiff's investments and interest on Plaintiff's Annuity Contract.

Plaintiff also contends that the action is timely. This action was commenced within six years from the date the two checks (dated January and February 2001) were issued. Thereafter, during 2006, Plaintiff received checks from Allmerica in May and April 2006. Plaintiff argues that such checks from Allmerica provide a new commencement for the running of the statute of limitations. When Plaintiff inquired as to when additional payments would be made, plaintiff learned, in 2006, that Posner had effectuated a transfer of the Annuity. Further, an action based on fraud accrues two years from the time Plaintiff discovered the fraud, which in this matter, was in 2006. Additionally, the 2001 checks issued by Posner constituted partial payment, and thus, may be held to have revived the statute of limitations. Posner also states that with respect to the Assignment at issue, the alleged witness Daniel Posner, was never in Plaintiff's house, she did not go to Michigan during January of 1996, and if she signed any document transferring the account to Posner, she must have done so in her New York apartment in Posner's presence.

Plaintiff further argues that Allmerica's motion is unsupported with any affidavits from a person with knowledge of the circumstances.

In reply, Posner argues that Plaintiff failed to identify any connection Posner has to New York that would render her subject to this Court's jurisdiction. Posner states that she was not present on January 14, 1996 when Plaintiff signed the Assignment in the presence of Posner's son. Further, Posner argues, her role as representative on the Annuity Contract is of no moment, in that Posner did not visit New York in connection with opening that Contract. In fact, Posner states, the Annuity Contract is a Michigan contract, and Plaintiff executed the Contract in

Michigan. Nor is Posner's role as "representative" on the Annuity Contract bear any relation to the cause of action arising from the Assignment Agreement. Further, Posner's appointment as co-Trustee of a "Trust" is unrelated to Plaintiff's claim. Posner also contends that her payment of \$10,000.00 to Plaintiff in 2001 was a gift paid from Posner's personal checking account, motivated by her affection for Plaintiff, and was not a payment under the Annuity Contract. Finally, Posner's two personal checks do not toll the statute of limitations since they were not made and accepted as a payment of a portion of an admitted "debt," accompanied by an "acknowledgment" of more being due from which a promise to make further payments may be inferred.

Defendants also reply that Plaintiff does not deny that she made the Assignment, but alleges only that she does not recall executing the Assignment. Plaintiff also acknowledges that the signature on the Assignment appears to be her own.

Analysis

Posner's Motion to Dismiss

The burden of proving jurisdiction is upon the party asserting it, and when challenged on jurisdiction, such party must sustain that burden by preponderating proof (*Saratoga Harness Racing Assn. v Moss*, 20 NY2d 733, 283 NYS2d 55 [1967]; *Jacobs v Zurich Ins. Co.*, 53 AD2d 524, 384 NYS2d 452 [1st Dept 1976]).

The extent to which a court may exercise personal jurisdiction over a nondomiciliary without violating the Due Process Clause of the Constitution was defined in the Supreme Court's opinion in *International Shoe Co. v Washington* (326 US 310 [1945]). In order to subject a defendant to a judgment *in personam*, "if he be not present within the territory of the forum, he

[must] have certain minimum contacts” with the forum state such that the “maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (*International Shoe Co. v State of Wash.*, *supra* at 615; *World-Wide Volkswagen Corp. v Woodson*, 444 US 286 [1980]; *see also Indosuez International Finance B.V. v National Resrve Bank*, 98 NY2d 238, 746 NYS2d 631 [2002]). However, the minimum contacts test of *International Shoe* merely sets the outer limits of personal jurisdiction that may be exercised under the Constitution (*see Siegel*, Practice Commentaries, McKinneys Cons. Laws of N.Y., Book 7B, CPLR C301:1; *Talbot v Johnson Newspaper Corp.*, 71 NY2d 827, 527 NYS2d 729 [1988]; *Future Ways, Inc. v Odiorne*, 697 F.Supp. 1339 [SDNY 1988]; *Reger v National Ass'n of Bedding Mfrs. Group Ins.*, 83 Misc.2d 527, 372 NYS2d 97 [NY Sup 1975] citing Weinstein-Korn-Miller, N.Y. Civil Prac., 302.10a). The starting point for due process analysis must be whether state law authorizes the assertion of jurisdiction under the circumstances (*see Siegel*, Practice Commentaries, McKinneys Cons. Laws of N.Y., Book 7B, CPLR C301:1).

New York recognizes five potential bases for jurisdiction, of which only two, “general jurisdiction,” on the basis of “doing business” (CPLR 301) and “long arm jurisdiction,” (CPLR 302 (a)(1)) are relevant to the inquiry posed by the parties herein.

Pursuant to CPLR § 301, this Court may exercise jurisdiction over a party if it is “doing business” in New York State. A defendant is “doing business” in New York if it has engaged in such continuous and systematic course of activities in New York such that it can be deemed present in New York (*O'Brien v Hackensack University Med. Ctr.*, 305 AD2d 199, 760 NYS2d 425 [1st Dept 2003] *citing Frummer v Hilton Hotels Int'l, Inc.*, 19 NY2d 533, 536, 281 NYS2d 41, [1967]). The test for “doing business ‘is a simple [and] pragmatic one,’ which varies in its

application depending on the particular facts of each case (*Id.*).

Based upon the record before the Court, Posner's contacts with New York fail to rise to the level of "doing business," to establish "presence" in New York. There is no indication in the record that Posner has a New York office, a New York mailing address, a New York bank account to support a finding that she has sufficient New York presence so as to justify jurisdiction. Notably, Posner's role as the representative on the Annuity militates against a finding of presence within New York, given that the Annuity and Allmerica's statements to Plaintiff and the other customer in Brooklyn list Posner's address as a location in Southfield, Michigan. Thus, as there is no indication that Posner engaged in continuous and systematic conduct in New York, so as to establish a New York presence, Plaintiff failed to demonstrate that this Court has general jurisdiction over Posner (*see O'Brien v Hackensack University Med. Ctr.*, 305 AD2d 199, *supra*).

Nor does the record support a finding of jurisdiction under CPLR 302 (a)(1). CPLR 302 (a)(1) provides that a court may exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, "transacts any business" within the State, provided that the cause of action arises out of the transaction of business (*Lebel v Tello*, 272 AD2d 103, 707 NYS2d 426 [1st Dept 2000]).² A single transaction will suffice, as long as there is a substantial relationship between that transaction and the alleged injury (*Reiner & Co. v Schwartz*, 41 NY2d 648 [1977]; *Bunkoff v State Auto. Mut. Ins. Co.*, 296 AD2d 699 [2002]). Here, Plaintiff's claim arises out of

² CPLR 302(a)(1) states, in pertinent part : "[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, ... who in person or through an agent: transacts any business within the state...."

the Assignment. However, Plaintiff failed to allege, and the record fails to disclose any facts demonstrating Posner's role in the Assignment. Plaintiff's speculation that in the event she signed the Assignment, it was signed in the presence of Posner in New York, is wholly insufficient.

Therefore, Posner's motion to dismiss the action for lack of personal jurisdiction is granted. In light of the above, the Court does not reach the merits of Posner's assertions that the complaint against her is barred by the statute of limitations.

Motion to Dismiss by Allmerica and Hanover

In her first cause of action, Plaintiff seeks to impose a trust upon the Annuity contract and all of the income derived therefrom from time to time of the purported Assignment on the grounds that:

The [Assignment] was obtained wrongfully, erroneously and upon information and belief, fraudulently by defendant Posner without plaintiff having desired to effectuate same.

An action to impose a constructive trust is governed by the six-year statute of limitations provided by CPLR 213(1), which commences to run upon occurrence of the wrongful act giving rise to a duty of restitution, and not from the time when the facts constituting the fraud are discovered (*Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003] citing *Mazzone v Mazzone*, 269 AD2d 574, 574-575, 703 NYS2d 282; *Breslau v Sakow*, 219 AD2d 479, 482, 631 NYS2d 637). As the submissions indicate, the alleged wrongful assignment of the Annuity occurred in January 14, 1996, more than six years before their complaint was filed. Thus, the first cause of action is dismissed (*see Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003] citing *Mazzone v Mazzone*, 269 AD2d at 575, 703 NYS2d 282).

In any event, Plaintiff failed to allege sufficient facts to support a constructive trust claim. To assert a claim for constructive trust, Plaintiff must allege “a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise, and unjust enrichment” (*see Insurance Co. of State of Pennsylvania v HSBC Bank USA*, 37 AD3d 251, 829 NYS2d 511 [1st Dept 2007] *citing Lipton v Donnenfeld*, 5 AD3d 356, 357, 773 NYS2d 82 *lv. denied* 2 NY3d 707, 781 NYS2d 288 [2004]). Plaintiff’s complaint and the submissions are devoid of any allegations or evidence that Allmerica made a promise to Plaintiff, that a transfer was made in reliance of any such promise, or that Allmerica was unjustly enriched. Therefore, Plaintiff failed to state a cause of action for an order imposing a constructive trust.

Plaintiff’s third cause of action alleges:

Ownership of the annuity was improperly and erroneously transferred from plaintiff to defendant Posner by defendant Allmerica Financial and/or Defendant Hanover Insurance Group. . . . Defendants Allmerica Financial and Hanover Insurance Group should void any transfer previously recorded involving the aforesaid annuity contract based upon the purported assignment and should record same solely in the name of plaintiff and should pay to plaintiff all of the interest earned on the aforesaid annuity since the date of the purported assignment.

Allmerica presented *prima facie* proof establishing that the six-year statute of limitations applicable to causes of action for rescission set forth in CPLR 213 had expired in 2002, more than four years before the commencement of this action. Allmerica sent a letter dated January 26, 1996 to Plaintiff, advising Plaintiff that the Assignment was effectuated. Specifically, the January 26, 1996 letter states, in pertinent part, that

Thank you for furnishing the properly completed transfer of ownership from dated January 14, 1996, and change of beneficiary form dated January 16, 1996, which have now been accepted.

We have marked our records to show the owner of the above policy to be Esther M. Posner

and the beneficiary to be Erwin H. Posner, Trustee of the Esther M. Posner Living Trust, dated January 15, 1996.

The letter is signed by a staff member of "Annuity Operations."

It is uncontested that Plaintiff received this letter and there is no indication in the record that Plaintiff was unable to discover any alleged fraud so as to toll the statute of limitations (*Meyer v Shearson Lehman Bros., Inc.*, 211 AD2d 541, 621 NYS2d 346 [1st Dept 1995], *citing Watts v Exxon Corp.*, 188 AD2d 74, 594 NYS2d 443). Therefore, Plaintiff's third cause of action for an order imposing a constructive trust is barred by the six-year statute of limitations.

Plaintiff's fourth cause of action seeks attorneys' fees on the grounds that:

The defendants had a fiduciary relationship with plaintiff who, as indicated, is not native born, and for whom English is not her native language and who at the time of the purported assignment, . . . recently widowed, residing alone and relying upon the defendants for advice.

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint, liberally construed, states a cause of action (*see*, CPLR §3026; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]).

Notwithstanding the fact that no other cause of action survives, the complaint fails to allege, and the record fails to demonstrate, that an agreement between the parties, statutory authorization, or court rule prescribing attorneys' fees in Plaintiff's favor. Thus, the fourth cause

of action for attorneys' fees is dismissed (*see Crispino v Greenpoint Mortg. Corp.*, 769 NYS2d 553 [2d Dept 2003] *citing Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-92, 549 NYS2d 365, 548 NE2d 903; *Glatter v Chase Manhattan Bank*, 239 AD2d 68, 669 NYS2d 651).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Posner to dismiss the complaint is granted on the ground of lack of personal jurisdiction; and it is further

ORDERED that the motion by defendants Allmerica Financial and Hanover Insurance Group to dismiss the action as asserted against it is granted; and it is further

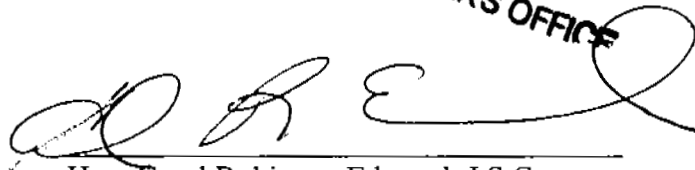
ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 2, 2007

FILED
 MAY 08 2007
 NEW YORK
 COUNTY CLERK'S OFFICE



Hon. Carol Robinson Edmead, J.S.C.
CAROL EDMED
 J.S.C.