

Rizer v Breen

2007 NY Slip Op 32325(U)

July 25, 2007

Supreme Court, New York County

Docket Number: 0601676/2005

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN Justice

PART 49

Rizer McGowan Plaintiff
- v -
Breen, John, R. Defendant

INDEX NO. 601676105
MOTION DATE 5/18/07
MOTION SEQ. NO. 015
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 ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM. DECISION IN MOTION SEQUENCE FILED

JUL 30 2007
NEW YORK COUNTY CLERK'S OFFICE

July 25, 2007 Herman Cahn J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X
MARGARET-MARY MCGOWAN RIZER,

Plaintiff

-against-

Index No. 601676/05

JOHN R. BREEN, JR., HSBC BANK USA,
SALOMON SMITH BARNEY, KEGELER'S, INC.,
TODD L. LAVERE, NORTH COUNTRY TAVERN
CORP., JEFFREY E. GRAHAM, GREATER
BENEFICIAL UNION OF PITTSBURGH, RBC DAIN
RAUSCHER OF NEW YORK INC., THE HARTFORD
FINANCIAL SERVICES GROUP, INC., MICHAEL J.
ALTERI, and UNITY FINANCIAL LIFE INSURANCE
COMPANY,

Defendants.

-----X
CAHN, J.

Plaintiff Margaret-Mary McGowan Rizer, a well known supermodel, brings this action to recover substantial sums from several financial institutions and two taverns where her stepfather, defendant John R. Breen, Jr. (Breen), misappropriated and/or misspent funds entrusted to him by her under a power of attorney.

Defendants RBC Dain Rauscher, Inc. (RBC) and Michael J. Alteri (Alteri) now move for summary judgment dismissing the amended complaint as to them.

For the reasons set forth below, the motion is granted.

In May of 1999, Rizer gave Breen power of attorney over a checking account that she opened with defendant HSBC Bank USA (HSBC). She subsequently deposited her savings and earnings into that account. Am Compl, ¶¶ 17, 18.

RBC is a securities brokerage firm, and is the successor to Tucker Anthony, Inc.

(Tucker Anthony). *Id.*, ¶ 14. Alteri is a registered representative (stockbroker) formerly employed by Tucker Anthony. *Id.*, ¶ 15. On May 17, 1999, Breen opened a money market account at the Watertown office of Tucker Anthony through Alteri, pursuant to a Cash Account Client Agreement (the Client Agreement). *Id.*, ¶ 50. The Client Agreement contains an arbitration clause. Rizer has disclaimed knowledge of this brokerage account relationship. *Id.*

Rizer's claims against RBC and Alteri focus primarily on ten checks issued by Tucker Anthony (eight checks) and RBC (two checks) payable to Rizer between September 27, 2000 and May 31, 2002, in the total amount of \$527,822.00. *Id.*, ¶ 51; Exh I. Rizer alleges that Breen forged her signature on the checks, and then deposited eight of them in Rizer's HSBC bank account (as to which he had a power of attorney), and two of them in his personal account at Community Bank. *Id.*, ¶ 52. Rizer further alleges that Breen then converted the money to his own use. *Id.*

The relevant information with respect to the ten checks at issue is as follows:

<u>Date of Check</u>	<u>Amount</u>	<u>Where Deposited</u>	<u>Date Deposited</u>
9/27/00	\$200,000	Rizer HSBC account	9/27/00
11/29/00	\$150,000	Rizer HSBC account	11/30/00
4/30/01	\$ 15,000	Community Bank	4/30/01
5/7/01	\$ 13,000	Community Bank	5/7/01
7/27/01	\$ 33,000	Rizer HSBC account	7/27/01
1/7/02	\$ 14,822	Rizer HSBC account	1/8/02
1/7/02	\$ 15,000	Rizer HSBC account	1/8/02
3/6/02	\$ 50,000	Rizer HSBC account	3/11/02

5/14/02	\$25,000	Rizer HSBC account	5/29/02
5/31/02	\$ 12,000	Rizer HSBC account	6/3/02

Id., Exh I.

Eight of the checks, comprising over 90% of the amount claimed, were issued and negotiated prior to May 10, 2002, i.e., more than three years prior to the commencement of the within action. The remaining two checks – 1) Check No. 32581449, dated May 14, 2002, for \$25,000; and 2) Check No. 35281593, dated May 31, 2002, for \$12,000 – were deposited back into Rizer’s HSBC account. *See id.*

This action was commenced on May 10, 2005. On October 20, 2005, Rizer filed an amended complaint.

Subsequently, the moving defendants filed a motion to compel arbitration pursuant to 9 USC § 4 and CPLR 7503 (a). By decision dated November 23, 2005, this court referred the issue of whether a valid agreement to arbitrate was made, to a Special Referee to hear and report. In her decision dated March 27, 2006, the Referee, Hon. Beverly S. Cohen, recommended that the motion to compel arbitration be denied on the ground that defendants had not met their burden of establishing that Rizer had agreed to arbitrate.

The remaining defendants filed motions to dismiss and for summary judgment. By decision and order dated January 29, 2007 (the Decision), this court dismissed virtually all of Rizer’s claims, against the defendants other than the movants herein. The moving defendants then brought the within motion for summary judgment. As discussed below, the substantive issues raised in the summary judgment motion have already been addressed and resolved in the Decision. As such, defendants’ motion for summary judgment is granted.

The claims in the amended complaint against the moving defendants are aiding and abetting fraud (first cause of action), aiding and abetting breach of fiduciary duty (second cause of action), unjust enrichment (third cause of action), and aiding and abetting conversion (twenty-first cause of action).

Rizer's claims for aiding and abetting fraud, breach of duty and conversion relating to the eight checks issued and negotiated prior to May 10, 2002 are barred by the statute of limitations. As this court has already determined in the Decision, "[a] claim for aiding and abetting conversion is governed by the three-year statute of limitations for the tort of conversion." Decision, at 38 (citing *Heffernan v Marine Midland Bank*, 283 AD2d 337, 338 (1st Dept 2001)). The court further determined that:

[T]he three-year statute of limitations for conversion is also applicable to [Rizer's] causes of action for aiding and abetting fraud and breach of fiduciary duty. *Gold Sun Shipping Ltd. v Ionian Transport, Inc.*, 245 AD2d 420, 421 (2d Dept 1997); accord *Mohan v Hollander*, 303 AD2d 473, 474 (2d Dept 2003). In addition, where a party seeks monetary damages for an alleged breach of fiduciary duty, the statute of limitations is three years. See *Svenska Finans Intl. BV v Scolaro, Schulman, Cohen, Lawler & Burstein, P.C.*, 37 F Supp 2d 178, 183-184 (ND NY 1999). Hence, Rizer's causes of action . . . for aiding and abetting breach of fiduciary duty are also independently barred by the statute of limitations.

Id.

Rizer opposes the statute of limitations defense, arguing that the statute does not begin to run until the plaintiff has knowledge that enables her to bring suit. However, as this court previously determined, the "discovery" rule does not apply with respect to third parties allegedly responsible for "aiding and abetting" the primary wrongdoer. Decision, at 40 (citing *Kaufman v Cohen*, 307 AD2d 113, 126-127 (1st Dept 2003)). Rizer fails to cite any case in

which the discovery rule has been applied against a third party, rather than the primary wrongdoer.

Accordingly, the claims for aiding and abetting fraud, breach of fiduciary and conversion are barred by the three-year statute of limitations with respect to the eight checks issued or negotiated prior to May 10, 2002, and are dismissed.

Although the third cause of action for unjust enrichment is not barred by the statute of limitations, as a six-year statute of limitations applies to this claim (*see* CPLR 213 [1]), it must nevertheless be dismissed against the moving defendants as well. As this court previously determined:

‘The theory of unjust enrichment lies as a quasi-contract claim’ and ‘is an obligation the law creates in the absence of any agreement.’ *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 (2005) (citing *State of New York v Barclays Bank of NY*, 76 NY2d 533 (1990)). Where, as here, ‘the matter is controlled by a contract,’ no cause of action lies for unjust enrichment. *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 572 (citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987)). Here, the subject matter of Rizer’s claim lies squarely within the terms of the deposit contracts between herself and HSBC, as well as the POA. As such, no valid claim can exist for unjust enrichment.

Decision, at 14-15. Likewise, here, the relationship between Rizer and the moving defendants stems from the Client Agreement, and, as such, the relationship is contractual in nature. Since there is clearly a controlling contractual agreement between Rizer and the moving defendants, her claim against them for unjust enrichment is dismissed.

The claims for aiding and abetting fraud, breach of fiduciary duty and conversion with respect to the remaining two checks – Check No. 32581449, dated May 14, 2002 and Check No. 35281593, dated May 31, 2002 – are not barred by the statute of limitations, as these checks

were issued and negotiated after May 10, 2002, the date this action was commenced. However, these claims must also be dismissed, as Rizer's allegations fail to raise any triable issues of fact.

As this court has already determined:

In order to state such claims [for aiding and abetting] . . . Rizer 'must allege (1) the existence of wrongful conduct by the primary wrongdoer. . .; (2) knowledge of the wrongful conduct on the part of [the defendant]; and (3) substantial assistance of [the defendant] in achieving the wrongdoing.' *Liberian v Worden*, 1998 Misc LEXIS 717, at * 9 (Sup Ct, NY County July 23, 1998), *aff'd* 268 AD2d 337 (1st Dept 2000).

* * *

Liability for aiding and abetting requires 'actual knowledge' of the underlying tort. Allegations of constructive knowledge, or that defendant was on notice as to the tortious behavior of the wrongdoer, are not legally sufficient to sustain a cause of action. *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dept 2003); *Kolbeck v LIT America, Inc.*, 939 F Supp 240, 246 (SD NY 1996).

* * *

'Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.' *Kaufman v Cohen*, 307 AD2d at 126.

Decision, at 12-13.

The claims against the moving defendants for aiding and abetting fraud and aiding and abetting breach of fiduciary duty are dismissed, as Rizer fails to allege either actual knowledge by the moving defendants of Breen's defalcation of her assets, or any facts that would support the theory that the moving defendants "substantially assisted" Breen in his defalcation. Rather, Rizer merely makes the conclusory allegation that the moving defendants were "on notice that conversion was afoot." Am Compl, ¶ 148. This allegation is insufficient to raise a triable issue of fact.

Rizer's only argument in opposition to the within summary judgment motion is that "Justice Cohen's rejection of Alteri's sworn testimony, at the very least, raises a clear inference that he actually knew about and actively participated in Breen's scheme to steal money." Pl Br, at 7. However, Alteri's testimony during the hearing before the Referee was directed only at the account opening process and the documentation containing an arbitration clause. *See* Referee's Report (Hayes Aff, Exh A). Moreover, the Referee made no findings or recommendations with respect to the withdrawals at issue. Rather, the key issue before her was whether Rizer had signed an enforceable agreement to arbitrate. *See id.* Thus, the Referee's findings with respect to how the account was opened does not support an inference that Alteri knowingly allowed Breen to loot it.

Accordingly, the claims for aiding and abetting fraud and breach of fiduciary duty with respect to the two remaining checks are dismissed.

As to the cause of action for aiding and abetting conversion with respect to these two checks, this court has already determined that:

Where, as here, a wrongdoer transfers a victim's assets from one account owned by the victim to another account owned by the victim, and then converts them from the second account, the proximate cause of any injury to the victim is the conversion from the second account, rather than the transfer from the first account. *Davis v Aircraft Products Co., Inc. v Bankers Trust Co.*, 36 AD2d 705, 705 (1st Dept 1971) (since 'plaintiff initially received the proceeds of the checks which defendant paid, it suffered no loss which is recoverable from defendant'). *See also Geotel, Inc. v Wallace*, 162 AD2d 166, 168 (1st Dept 1990) ('Any loss was the result of the manipulation of those accounts by [another] over which defendant [in this action] exercised no control'); *Liberman v Worden*, 1998 NY Misc LEXIS 717 at *13 ('when a check is deposited in a party's account over a forged or unauthorized endorsement and subsequently the proceeds of the checks are converted by the individual responsible for the deposit, such diversion is the proximate cause of the loss').

Decision, at 30-31.

Thus, Rizer's injury occurred not when Breen transferred funds from her Tucker Anthony account to her HSBC account, but when he withdrew the funds from the HSBC account and converted them to his own use. Since Tucker Anthony made the checks payable to Rizer, and those checks were deposited into her HSBC account, she cannot now recover from the moving defendants.

Rizer's sole opposition is that "the law regarding liability where a check is ultimately deposited into the victim's account is meant to protect the *innocent* party that unwilling supplies a check to a fraudster who steals the money from the victim's account." PI Br., at 9 (emphasis in original). The argument lacks merit. This principle of law does not turn on the alleged "innocence" of the transferring institution, or of the depositor, but rather, on the fact that the recipient institution's account constitutes the customer's property. *See* Decision, at 30-31. The cause of action for aiding and abetting conversion must also be dismissed against the moving defendants.

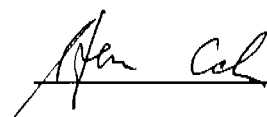
Accordingly, it is

ORDERED that the motion for summary judgment is granted, and the first, second, third, and twenty-first causes of action are severed and dismissed against defendants RBC Dain Rauscher, Inc. and Michael J. Alteri, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 25, 2007

ENTER:



J.S.C.

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