

Banyai v Banyai

2007 NY Slip Op 33179(U)

September 17, 2007

Supreme Court, New York County

Docket Number: 0101123/2006

Judge: Judith J. Gische

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JUDITH J. GISCHÉ

PART 10

Index Number : 101123/2006

BANYAI, DOLORES

vs

BANYAI, FRANCES V.

Sequence Number : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
OCT 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Sept 17, 2007

J. Gisché
HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x

Dolores Banyai,

Plaintiff

-against-

Frances Banyai,

Defendant.

-----x

DECISION/ORDER

Index No.: 101123/06
Seq. No.: 002

Present:
Hon. Judith J. Gische
J.S.C

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

FILED
OCT 05 2007
NEW YORK
COUNTY CLERK'S OFFICE
Numbered

Papers

- Def n/m §3211 w/MHK affirm, exhs 1
- Pltff opp w/SHM affirm, DB affid 2
- Def reply w/KMMcD affirm, exhs 3

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is plaintiff's action against defendant Frances Banyai (her mother) based upon claims that her mother defraud her and converted two checks that were intended as payments to the plaintiff. Before the court is defendant's motion to dismiss this action on the basis that it is time barred (CPLR §§ 213, 214), therefore plaintiff does not have a cause of action against her.

As per this court's decision/order of March 1, 2007, defendant's pre-answer motion for summary judgment was denied and defendant was ordered to serve her

answer which she has now done. The preliminary conference was held on April 26, 2007. At that time the parties agreed and the court ordered that any dispositive motions be made no later than May 15, 2007. The parties also agreed and the court ordered that depositions be completed on or before May 31, 2007.

Plaintiff opposes defendant's motion on the basis that it is untimely because it was served May 22, 2007, one week after their agreed to deadline. Additionally, plaintiff contends that defendant has not complied with any other of the court's directives in the preliminary conference order, like taking plaintiff's deposition or providing defendant's witness list. Thus, at the outset the court must decide whether to consider this motion though untimely.

Although the parties restricted themselves to a abbreviated time period in which to make dispositive motions, and defendant's motion was made late, it will nonetheless be considered. First, and most important, this motion is not untimely under any applicable statute, such as CPLR § 3212. Plaintiff has also failed to identify any prejudice she will suffer as a result of the court considering the motion on its merits. Since defendant properly raised the defense of statute of limitations in her answer, this will ultimately be decided by the court, and if meritorious, would bar this action altogether. Finally, the court always reserves the right to modify its own orders (including the preliminary conference order), if necessary, and appropriate. Under the circumstances presented, the court accepts this motion as timely notwithstanding the directive in the preliminary conference order, and will decide it on the merits.

Defendant claims that the complaint should be dismissed because it is time

[* 4]

barred. Because discovery has not yet been completed, the court will consider whether plaintiff's claims are time barred by accepting all of her facts as true. See: Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976); Guggenheimer v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997).

The court's decision follows:

Facts alleged in the complaint and arguments raised

Plaintiff was born June 10, 1978 and was 16 years old when her father died on March 19, 1995. Defendant (plaintiff's mother and the decedent's wife) brought a wrongful death claim which was settled for \$55,000. Surrogate Preminger granted defendant's petition to settle the estate's claim. The surrogate's decree and order of May 26, 1999 provides for distributions to the decedent's children, including the plaintiff. In relevant part the decree states that "\$5,000 to Dolores P. Banyai, child and beneficiary of said decedent as and for her share, pursuant to EPTL 5-4.4 . . ." A check in that amount was sent to defendant in August 1999, payable to "Dolores Banyai, child & beneficiary." Plaintiff alleges (and defendant does not expressly deny) that defendant negotiated the check by signing plaintiff's name and depositing it into her bank account. Before this, on February 23, 1998, another check in the amount of \$30,534.79, payable to Dolores P. Banyai was sent to the defendant with a notation on it that it pertained to wrongful death action. Defendant also signed this check and deposited it into her account.

Plaintiff states that in 1998 she met with the lawyer who her mother had hired in

connection with the wrongful death action and that he explained to her that the money she would be receiving as part of the settlement, and that it would be disbursed to her once she turned 21. Plaintiff contends that she kept asking her mother about this money and when she would get it but her mother deceived plaintiff into believing that she would receive nothing. Plaintiff contends that her mother convinced her, even though the lawyer had advised her differently, and even though plaintiff's relationship with her family was admittedly strained. Plaintiff contends she was suspicious all along and contacted several banks to see if her mother had set up an account in her name. She claims she did not discover the fraud until "sometime" in 2004 when she was talking to her sister.

Based upon these facts, plaintiff alleges that her mother committed a fraud (1st and 2nd causes of action), by converting two checks that were her property, (3rd and 4th causes of action), thereby breaching her fiduciary duty to plaintiff in defendant's capacity as the executor of the estate (5th cause of action), and that her mother was unjustly enriched by such fraud (6th cause of action).

This action was commenced on January 26, 2006. The first check (\$30,534.79) was made out to plaintiff on February 23, 1998, and allegedly deposited by defendant on March 16, 1998. The second check (\$5,000) made out to plaintiff on August 30, 1999 and allegedly deposited by defendant on January 5, 2000. Under CPLR § 213 (8), an action for fraud must be commenced within six years after the fraudulent act. A three year statute of limitations period applies to conversion actions (CPLR 214[3]) running from the date the conversion takes place. D'Amico v. First Union Nat. Bank,

285 A.D.2d 166 (1st Dept 2001).

While acknowledging that she commenced the within action more than six (6) years after either of these checks were forged, deposited, etc., plaintiff nonetheless contends this action is not time barred. She urges the court to apply the longer, more lenient, date of discovery rule which provides that an action for fraud is timely if commenced two years from time that the plaintiff "discovered the fraud, or could with reasonable diligence have discovered it." CPLR §§ 213 (8); 203 (g). Plaintiff contends that the defendant hid the facts necessary for her to discover her mother's fraud, and that defendant's misstatements were intentionally made to deceive plaintiff into believing that she was not entitled to any settlement money, or disbursements from her deceased father's estate. Although plaintiff does not directly oppose defendant's motion to dismiss her conversion claims which are subject to a three (3) year statute of limitations [CPLR § 214], she nonetheless states that the doctrine of equitable estoppel should be applied under the particular circumstances of this case to prevent an injustice and preserve her claims against the defendant for trial.

Defendant argues that plaintiff was already an adult when her father's case was settled and the checks disbursed. Defendant contends that plaintiff received a copy of the decree. Thus, it is defendant's contention that the date of discovery rule is inapplicable to preserve plaintiff's fraud claims and that even under that more lenient standard, plaintiff chose to sit on her rights and not pursue any legal action until now when it is too late, therefore this case must be dismissed.

Discussion

An action accrues, for purposes of the statute of limitations, when all the facts necessary to sustain a cause of action have occurred, so that the party can obtain relief in court. Vigilant Ins. Co. of America v. Housing Authority of City of El Paso, Tex., 87 N.Y.2d 36 (1995). Statutes of limitations strike a balance between protecting individuals from stale claims on the one hand, and not imposing an undue hardship on a litigant with a meritorious claim on the other. Zumpano v. Quinn, 6 NY3d 666, 673 (2006).

Plaintiff's facts, even when accepted as true, present time barred causes of action against the defendant. Plaintiff admits she expected to receive payments following her father's death because this is what her mother's lawyer told her and what she read in the surrogate's court decree. Plaintiff was not a child, but already 20 years old when this occurred. She was not living at home at the time and her relationship with her family was, by her own account, strained. Though plaintiff harbored suspicions, she did not, with due diligence inquire any further. Plaintiff does not allege, for example, that she contacted the lawyer she originally met with, or that she obtained the surrogate's court file. There is no reason to give plaintiff the benefit of the more lenient date of discovery rule because she admitted she long suspected her mother was lying to her. Plaintiff's conversation with her sister in 2004 does not defeat plaintiff's motion, given the totality of this record, and because the facts necessary for plaintiff to prosecute this action were available to her long before then.

The conversion actions are also time barred because the statute of limitations on a conversion action is three (3) years. Under plaintiff's facts, one check was cashed in

[* 8]
1998; the other in 2000, more than three years ago.

The unjust enrichment action plaintiff has asserted is subject to a six year statute of limitations. CPLR § 213; Natimir Restaurant Supply Ltd. v. London 62 Co. 140 A.D.2d 261 (1st Dept. 1988). The unjust enrichment claims are virtually indistinguishable from the conversion causes of action and are based on the same facts and claims alleged in the fraud action. Like the fraud cause of action, plaintiff's unjust enrichment causes of action are time barred because they were not brought within six years of the date when all the facts necessary to sustain the claim occurred and plaintiff could have obtained relief in court. Motor Vehicle Acc. Indemnification Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 214 (1996).

Plaintiff also alleges that defendant's actions were a breach of her fiduciary duty to her as the executor of the deceased's estate. Whether it is subject to a six (6) year statute of limitation (e.g. seeking equitable relief), or a three (3) year statute of limitation (e.g. seeking relief at law, such as a judgment), such a claim is time barred under the facts of this case. Kaufman v. Cohen, 307 A.D.2d 113 (1st Dept 2003).

Since defendant has proved that plaintiff does not have a cause of action because it is time barred, defendant's motion is granted and the complaint is dismissed in its entirety. The Clerk shall enter judgment in favor of defendant Frances Banyai, against plaintiff Dolores Banyai.

Conclusion

It is hereby

Ordered that defendant's motion is granted and the complaint is dismissed in its


[*9]
entirety; The Clerk shall enter judgment in favor of defendant Frances Banyai, against plaintiff Dolores Banyai; and it is further

Ordered that any relief requested not expressly addressed herein has nonetheless been considered and is hereby denied; and it is further

Ordered that this shall constitute the decision and order of the court.

Dated: New York, New York
September 17, 2007

So Ordered:



Hon. Judith J. Gische, JSC

FILED
OCT 05 2007
NEW YORK
COUNTY CLERKS OFFICE