

Island Fed. Credit Union v Smith

2007 NY Slip Op 33716(U)

November 1, 2007

Supreme Court, Suffolk County

Docket Number: 0012945/2006

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7/17/07
ADJ. DATE 8/17/07
Mot. Seq. # 001 - MotD
002 - XMD

-----X		
ISLAND FEDERAL CREDIT UNION,	:	PUGATCH & NIKOLIS
	:	Attorneys for Plaintiff
Plaintiff,	:	1205 Franklin Avenue
	:	Garden City, New York 11530
- against -	:	
	:	WOLINSKY PARNELL & MONTGOMERY
GERALD J. SMITH, individually and as Executor	:	Attorneys for Defendant
of THE ESTATE OF GERALD K. SMITH,	:	329 Hawkins Avenue
	:	Lake Ronkonkoma, New York 11779
Defendant.	:	
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Upon the following papers numbered 1 to 32 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 22; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 23 - 30; Other 31-32 (stipulations of adjournment); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant, Gerald J. Smith (GJS), executor of the estate of his father, Gerald K. Smith, for summary judgment dismissing the plaintiff's complaint for the recovery of funds which plaintiff distributed to movant, is granted on prima facie proof. The monies were paid pursuant to a joint account with rights of survivorship established on or about August 20, 1997 by decedent Gerald K. Smith (GKS) prior to death. The pleading also fails to state a cause of action. The plaintiff's lack of standing and documentary evidence on this record support dismissal (CPLR 3211[a][1], [3],[7]; CPLR 3212[b]; Banking Law §§675, 676, 677, 678, EPTL 4-1.6, 6-2.2; *Winegrad v NYU Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]); and it is

ORDERED that the cross motion by plaintiff, Island Federal Credit Union (IFCU), to dismiss defendant's counterclaims that allege abuse of process and the intentional infliction of emotional distress, is denied.(CPLR 3212[b]; *James v Saltsman*, 99 AD2d 797, 472 NYS2d 129 [1984]; *Nigro v Pickett*, 39 AD3d 720, 833 NYS2d 655 [2007]). Questions of fact are raised, and the credibility of the parties is for determination at trial (CPLR 3212, 3211; *Zuckerman v City of New York* 49 NY2d 557, 427 NYS2d 595 (1980); *S.J. Capelin Associates v Globe Mfg.* 34 NY2d 338, 357 NYS2d 478 (1978)).

Plaintiff is a credit union which commenced this action to recover funds distributed to GJS on September 7, 2002. GJS is the alleged estate representative and one of two heirs of the surviving tenant GKS, now deceased, who was a joint tenant on the subject account with rights of survivorship. The account was opened by GKS on or about August 20, 1997 in the names of the Estate of Bernard Mallon and Gerald K. Smith. GKS was the nominated executor under the Mallon will and had temporary letters issued by the Surrogate on July 25, 1997. The source of the funds deposited in the account appears to have been derived from joint and individual accounts previously held by the joint tenants during their lifetimes. GKS was Mallon's son-in-law and caretaker. The joint tenants resided together at the GKS residence located at 27 Ruth Place, North Babylon, NY, for many years. There is no evidence that either tenant was cognitively impaired. The first tenant to die was Bernard J. Mallon, who passed away on November 7, 1996. The funds then passed to the survivor, GKS, by operation of law.

Gerald K. Smith petitioned Surrogate's Court for probate and letters testamentary with respect to Mr. Mallon's estate on December 2, 1996. It appears that preliminary letters were issued on or about July 25, 1997. Objections were later filed by Mallon's grandson, Keith Kostinowski, and Keith's mother, Christine Kostinowski, on August 26 and 27, 1997. A letter from counsel for objectants, Vincent G. Berger, Jr., Esq., alleged that the letters issued to GKS were in error and that objectants intended to apply for vacatur at the next court appearance, then scheduled for August 19, 1997. Upon disposition of the contested litigation in Surrogate's Court, the objections of Christine Kostinowski were dismissed for lack of standing, and those filed by Keith Kostinowski were dismissed on the proof at trial. Final permanent letters testamentary were issued by the Surrogate to Gerald K. Smith on June 30, 1999. Shortly thereafter, GKS died on October 31, 1999. Defendant GJS was allegedly appointed executor of his father's estate.

In the interim between Mallon's death in 1996 and the issue of the Surrogate's decree which granted probate and final letters for his estate on June 30, 1999, GKS opened the joint account on August 20, 1997. At the time GKS created the account, he executed an affidavit pursuant to Banking Law §677, which agreed to indemnify the bank (IFCU) as the Mallon estate representative for any claims which might arise in an amount less than \$30,000.00. After the preliminary appointment of GKS in July 1997 as executor of the Mallon estate and the permanent appointment filed on June 30, 1999, GKS died on October 31, 1999. Defendant GJS was allegedly appointed the executor of his father's estate. However, there has been no further petition to appoint a successor fiduciary for the pending estate of Gerard J. Mallon. There has been no petition for successor to represent the Mallon estate. There is no petition pending, and the estate has not been closed by formal or informal account in Surrogate's Court.

Meanwhile the joint account, which passed to GKS by operation of law, remained dormant. It appears that defendant, estate executor GJS, had no notice the account existed. Residuary beneficiary Keith, his mother Christine Kostinowski, Mr. Berger, counsel for objectants in the probate proceeding, nor anyone with interest made reference to the account until shortly before distribution by plaintiff to GJS on or about September 7, 2002. During 2002 multiple inquiries were received by plaintiff from the Kostinowskis regarding the joint account. However, since no legal proceeding was commenced, the plaintiff credit union contacted GJS, the executor of the GKS estate. GJS is also one of two distributees entitled to intestate distribution of the GKS estate, which includes the funds on deposit to the last-surviving joint tenant (Banking Law §§675, 677, 678). The union persuaded GJS that he was entitled to

the funds which had vested in his father as the surviving joint account tenant. Defendant accepted the distribution of \$78,743.03 from plaintiff. The funds were used by GJS to pay various expenses.

On December 29, 2005, a letter appeared from Kostinowskis' attorney, Vincent G. Berger, Jr. The letter was addressed to plaintiff IFCU which advised that the grandson of Bernard Mallon was the residuary beneficiary of the real and personal property in the Mallon estate and that no distribution had been made to the beneficiary by GKS since the death of Bernard Mallon or during the four months between issue of letters (June 30, 1999) and the death of GKS (October 31, 1999). Counsel inquired of the proceeds in the joint account. Counsel Berger also admitted that no legally-interested person had applied for the appointment of a successor but no action was taken.

In response, plaintiff's letter, dated January 24, 2006, advised Berger that Account #33092 was closed and that distribution had been made to GJS. In addition, Mr. Berger was advised that the account was reopened. A deposit was made by plaintiff in the sum of \$2,996.30 to savings and \$77,096.20 to checking. These amounts appear to reflect the funds distributed to GJS with interest. Plaintiff agreed to hold the sums on deposit in the account pending further proceedings in Surrogate's Court. There is no evidence that further proceedings were commenced in any court.

A letter from Leonard J. Pugatch, Esq., counsel for IFCU, dated January 24, 2006, was delivered to defendant GJS by Federal Express. This mailing enclosed copies of the letters between IFCU and Mr. Berger which advised that the funds which were distributed on November 7, 2002 to GJS, allegedly in error, had been redeposited. IFCU also demanded that GJS refund \$80,092.50 with interest and counsel fees. Plaintiff threatened and did commence the within legal action on May 11, 2006, which seeks to recover the value of the deposit, based on plaintiff's conclusory mistake and indemnification.

The action is based on the alleged mistake in the distribution to GJS, as executor and one of two distributees of the GKS estate. The claim that plaintiff is entitled to recover pursuant to mistake or indemnity is without merit. The court cannot discern a "mistake" or that the indemnity clause is actionable prior to the commencement of an action and determination of liability based on a valid claim. No claim exists to the funds deposited by GKS in the joint account wherein the depositor, who was the surviving tenant, acquired the account by operation of law and then died.

The joint account was opened by GKS on or about August 20, 1997 pursuant to letters testamentary issued on July 25, 1997 subject to objections and final decree dated June 30, 1999. The decree of probate dismissed the objections and issued testamentary letters to GKS. The objectants' attempt to remove or replace GKS as fiduciary was unsuccessful. The joint account opened by GKS was held with survivorship rights to GKS. The application does not state that GKS opened the account as executor. The account was subject to closure and distribution when the GKS or Mallon estate settled. In this case the GKS estate appears to be settled, but the Mallon estate was not formally settled. Surviving joint tenant GKS died October 31, 1999. No one has petitioned for a successor representative of the Mallon estate during the contested probate prior to decree or after the death of GKS as executor. The account was properly distributed to GJS on November 7, 2002 pursuant to law (Banking Law §§675, 676, 677, 678).

There is no evidence of mistake on this record. Banking Law §675 permits the creation of such joint account absent fraud, undue influence or limitation shown, notwithstanding the source or percentage of funds deposited (Banking Law §675; *Mitchener v Bowery Savings Bank*, 31 AD2d 803, 297 NYS2d 682 [1969]). There were no unauthorized withdrawals. Joint tenant and nominated executor GKS was issued letters on July 25, 1997 and June 30, 1999 after trial. The bank is immune from liability when valid distribution is made (Banking Law §§675, 676; *American Lodge Assn., Inc. v East New York Savings Bank*, 100 AD2d 281, 474 NYS2d 332 [1984]). There is no proof of adverse claim, order, violation of terms of trust, or inconsistency with federal law, regulation or limitation (Banking Law §§675, 677, 678). In a joint tenancy, the property is passed by right of survivorship rather than by intestate distribution or testamentary instrument. Joint property is not an asset of the estate of the predeceased joint tenant (EPTL 6-2.1; *Gotte v Long Island Trust Co.*, 133 AD2d 212, 518 NYS2d 991 [1987]).

A cause of action for indemnity does not accrue until judgment on a claim is issued against plaintiff. There is no judgment or liability shown (CPLR 1404; 23 NYJur2d, *Contribution* §§94, *et seq.*, 96, 113). Thus, no cause of action for mistake or indemnity exists. In addition, a claim against the estate should have been presented to the executor within seven (7) months of the issue of letters or in this case by January 30, 1998 and no later than May 31, 2000. Of course, the executor GKS died on October 31, 1999, and no successor was appointed. The plaintiff Keith Kostinowski, any creditor or person interested in the estate or the Public Administrator was permitted to petition for appointment of a successor (SCPA §§1401, *et seq.*, 1415, 1802, 1902). Rather, the plaintiff failed to act for three years. Although inquiry was made by Vincent Berger, Esq. on behalf of the residuary beneficiary in 2005, no legal action was taken.

On the other hand, plaintiff's cross motion to dismiss the counterclaims, is denied in the absence of prima facie proof of entitlement and the existence of questions of fact, contingent on the credibility of witnesses for determination (*Zuckerman v New York*, 49 NYS2d 557, 427 NYS2d 595 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *S.J. Capelin Associates v Globe Mfg.*, 34 NY2d 338, 357 NYS2d 478 [1978]).

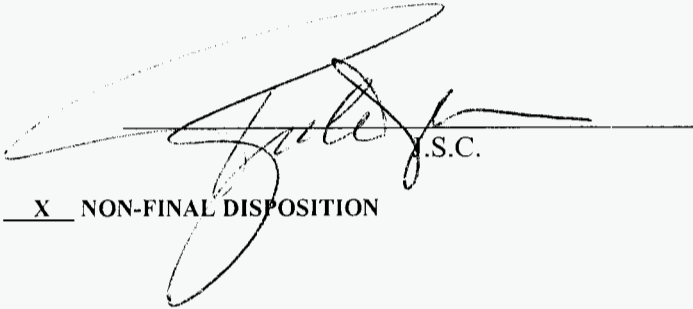
An abuse of process claim has three elements: (1) regularly-issued process to compel action or forbearance from a prescribed act; (2) the purpose of the process must show harm without economic or social excuse or justification; and (3) the person activating the process must seek a collateral advantage or detriment to the adversary outside the legitimate purpose of the process (*James v Saltsman*, 99 AD2d 797, 472 NYS2d 129 [1984]; *Berisic v Winckelman*, 40 AD3d 561, 835 NYS2d 561, 835 NYS2d 390 [2001]). Questions are raised with respect to intent of the parties including the plaintiff's unexplained actions and commencement of this action under the circumstances.

The intentional infliction of an emotional distress claim must show outrageous, extreme, virtually atrocious conduct intolerable to the community. As stated by counsel for defendant, Bruce F. Parnell, by letter dated February 8, 2006, the facts and circumstances are indeed unusual. The joint account existed since August 20, 1997. The surviving tenant died on October 31, 1999. The account was neither mentioned nor touched during the contested probate proceeding or for three years until November 7, 2002. Following plaintiff's investigation, distribution was made to the executor and heir of the

surviving tenant of the joint account. Defendant GJS had no prior notice of the existence of an account. Statements of account were inexplicably sent to Vancouver, Washington, rather than to 27 Ruth Place, North Babylon, New York, where both tenants resided or were mailed by plaintiff IFCU itself. The plaintiff claims inability to locate defendant GJS without effort to communicate at the North Babylon address, which appears on the application in the file which opened the account and where both Mr. Mallon and GKS resided for years. Ten years lapsed since the account had been opened. The beneficiary had notice of the estate's having been party to the Surrogate's Court proceedings. Except for letters from counsel Berger regarding the account on behalf of the Kostinowski beneficiary, no mention or claim to the account was raised. Testimony by plaintiff's representative, Anthony Adamo, denied that a mistake in distribution was made by plaintiff (EBT Adamo, March 17, 2007, Tr.210). Adamo also recalls a prior investigation wherein Adamo disclosed documents to a district attorney (EBT Adamo Tr.42-43). However, no claim to the funds in the joint account is shown.

Clearly questions are raised regarding the counterclaims addressed to the conduct of plaintiff, which are not subject to summary judgement (*Nigro v Pickett*, 39 AD3d 720, 833 NYS2d 655 [2007]; *James v Saltsman*, *supra*; *Zuckerman v City of NY*, *supra*; *S.J. Capelin v Globe Mfg. Assn*, *supra*). Therefore, judgment on the counterclaims must be denied.

Dated: NOV 01 2007

 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION