

Mulford v Fitzpatrick

2008 NY Slip Op 32666(U)

September 24, 2008

Supreme Court, New York County

Docket Number: 100746/08

Judge: Doris Ling-Cohan

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. Doris Ling-Cohan
Justice

PART 36

Index Number : 100746/2008
MULFORD, GENEVIEVE
VS.
FITZPATRICK, CELIA
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ in this motion to/for _____

PAPERS NUMBERED

1,2

3

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 *to dismiss by defendants*
is granted in accordance with the attached memorandum
decision.

FILED

SEP 26 2008

COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN

Dated: 9/24/08


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----x
GENEVIEVE MULFORD, Executrix of
the Estate of CHARLES McGUCKIN,
Deceased,

Motion Seq. No.:001

Plaintiff

-against-

Index No. 100746/08

CELIA FITZPATRICK and
JOHN FITZPATRICK

Defendants.

-----x
LING-COHAN, J.

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

BACKGROUND

Movant defendant Celia Fitzpatrick (Celia), is the stepdaughter of the plaintiff's decedent. Decedent met Celia's widowed mother in 1980, and married her in 1984. Celia states that her mother and stepfather often stayed at defendants' home in New Jersey, where special living quarters were constructed for them. At the time of his death, decedent was a resident of the State of New York.

In 2004, decedent fell and broke his hip while getting out of defendant John Fitzpatrick's car, and was taken to a hospital in New Jersey, where defendants live. John Fitzpatrick is Celia's husband. Decedent was subsequently moved to a rehabilitation facility, also in New Jersey.

While decedent was at the rehabilitation facility, Celia's mother suddenly passed away. Celia states that, because

of his physical condition, decedent was not immediately informed of his wife's passing.

On November 8, 2004, while at the rehabilitation facility, decedent executed a durable power of attorney, naming Celia as his agent. The power of attorney was witnessed and notarized in New Jersey by New Jersey residents who are unrelated to Celia or decedent.

Pursuant to this power of attorney, on November 13, 2004, Celia wrote out a check payable to cash from the joint account of decedent and her mother. The check was for \$50,000.00, which Celia deposited in her New Jersey bank account. Celia asserts that her intent was to use these funds for the care of her stepfather, and indicated certain expenses on his behalf for which she expended these funds.

Celia further states that, when she informed decedent of her mother's death, he told her to put the cost of the funeral and burial on his credit card, which she had the authority to do under the power of attorney. The amount that was so charged was \$10,000.00

Plaintiff is decedent's niece, executrix, and one of the primary beneficiaries under decedent's will. Celia states that her mother and plaintiff had not gotten along for many years prior to the incidents in question.

Celia alleges that when she informed plaintiff of decedent's

condition while he was in the rehabilitation facility, she and plaintiff agreed that decedent would be unable to return to his apartment in New York. Celia further alleges that plaintiff agreed that Celia could remove the furnishings in the apartment, which she did, transporting them to her home in New Jersey.

Celia asserts that she and plaintiff were not getting along, and alleges that plaintiff threatened her. On December 24, 2004, decedent's caregiver at the rehabilitation center advised Celia that decedent had been removed by plaintiff, who was decedent's health care proxy pursuant to a living will decedent executed in the 1990s. Celia states that the director of the rehabilitation center was told by plaintiff not to tell Celia where decedent was taken. Celia subsequently discovered that decedent was placed in another New Jersey facility, where he died the next day, December 25, 2004.

Plaintiff initially instituted suit against defendants in federal district court in New Jersey. Defendants were granted summary judgment, with prejudice, on the first count in that suit, which alleged that their negligence caused decedent's accident, and the remainder of the suit was dismissed for failing to meet the dollar amount for federal diversity jurisdiction.

On January 17, 2008, plaintiff instituted the present action against defendants, alleging that Celia converted decedent's property, fraudulently caused decedent to sign the power of

attorney, and breached her fiduciary duties. Defendants move, pursuant to CPLR 3211, to dismiss the action on three grounds: one, as being time barred; two, for lack of personal jurisdiction; and three, as being an inconvenient forum.

DISCUSSION

On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory [internal quotations and citation omitted].” *Nonnon v City of New York*, 9 NY3d 825, 827 (2007).

Under CPLR 213 (1), the statute of limitations for instituting an action based on fraud is six years. Therefore, the threshold question for the court to determine is whether the cause of action in the instant case is founded on fraud, or some other basis.

The complaint alleges that Celia “fraudulently held herself out to the staff at CareOne as Decedent’s daughter and, since he was unable to sign his name, convinced the staff to assist her in having him mark a power of attorney purporting to appoint her as his attorney-in-fact.” However, in plaintiff’s deposition, plaintiff admitted that she had no idea how Celia committed the alleged fraud, but just assumed that she did.

As stated by the court in *Friedman v Anderson* (23 AD3d 163,

166 [1st Dept 2005]), "a plaintiff seeking to recover for fraud and misrepresentation is required 'to set forth specific and detailed factual allegations that the defendant personally participated in ...'" [citation omitted]. Further, CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the alleged deception.

In the instant case, plaintiff has failed to assert a claim of fraud with sufficient particularity so as to defeat a motion to dismiss. Additionally, plaintiff fails to indicate any alleged wrongdoing on the part of defendant John Fitzpatrick.

Furthermore, even though plaintiff attempted to allege a cause of action for fraud, in essence, plaintiff is seeking the return of funds she asserts were misappropriated, which has a three-year statute of limitations pursuant to CPLR 214. As stated in *Powers Mercantile Corp. v Feinberg* (109 AD2d 117, 120 [1st Dept 1985], *affd* 67 NY2d 981 [1986]), "courts will not apply the Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims [citation omitted]."

Based on the foregoing, the cause of action for fraud is dismissed, and what remains are claims for breach of fiduciary duty and for conversion.

Under a breach of fiduciary claim, New York law does not

provide any single limitation period; rather, "the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought [citations omitted]." *Kaufman v Cohen*, 307 AD2d 113, 118 (1st Dept 2003). Where the relief sought is only money damages, courts have viewed the claim as being one for injury to property, with a three-year statute of limitations. *Id.*

In the instant action, plaintiff is only seeking monetary damages, and for this reason the court concludes that the appropriate statute of limitations is three years, which had elapsed prior to the institution of this suit (cause of action accrued: November 13, 2004; action commenced: January 17, 2008).

Lastly, under CPLR 214, the statute of limitations for the taking of property is three years. The allegations in the complaint, that defendants wrongfully took decedent's property, constitute a conversion claim (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283 [2007]), subject to this three-year statute of limitations period, which has elapsed.

Based on the foregoing, the case is dismissed pursuant to CPLR 3211 (a) (5) for being brought beyond the statutory period. This determination renders all of defendants' other arguments moot.

