

Independence Community Bank v Simonetti

2008 NY Slip Op 32918(U)

October 14, 2008

Supreme Court, Richmond County

Docket Number: 100441/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 100441/2006
Motion No.:005 & 006**

INDEPENDENCE COMMUNITY BANK,

Plaintiff

against

**JOANNE SIMONETTI, RALPH SIMONETTI a/k/a
RAFFAELE SIMONETTI, ANTOINETTE SIMONETTI,
MICHAEL SIMONETTI, JOHN DOE #1 through
JOHN DOE #20,**

DECISION & ORDER

HON. JOSEPH J. MALTESE

Defendants

The following items were considered in the review of this motion for summary judgment and partial summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 3
Answering Affidavits	4, 8
Replying Affidavits	7
Memorandum of Law	2, 5, 6
Exhibits	Attached to Papers

Defendants Ralph, Antoinette, and Michael Simonetti move this court for an order of summary judgment pursuant to *CPLR* § 3212. Plaintiff Independence Community Bank cross-moves this court for an order for partial summary judgment against defendants Ralph and Antoinette Simonetti. Both motions are denied in their entirety.

Facts

Moving defendants are the spouse and children of non-moving defendant, Joanne Simonetti (“Joanne”). Joanne pled guilty in the Eastern District Court of New York for making unauthorized monetary transfers and stealing approximately \$1,600,000 from the plaintiff. Joanne is now serving a prison sentence.

The plaintiff recovered \$1,110,785.02 of the approximate \$1,600,000 allegedly stolen from it. The plaintiff argues that the Simonetti family benefitted as a result of Joanne's crimes. In support of its argument, the plaintiff points out that defendants' bank accounts exceeded their total earnings. It further alleges that at least \$100,000 of the unauthorized transfers was used to purchase a house at 97 Churchill Avenue in Staten Island. In addition, the plaintiff claims that money from the diverted accounts was used to pay for the children's school tuition and that \$20,000 was used for an investment fund. Defendants confirm the latter occurrence, but maintain that the money was merely a loan that was returned.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."¹ Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issue of fact. "Moreover, the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion."² Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.³ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁴ On a motion for summary

¹ *CPLR* §3212[b].

² *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

³ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁴ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

judgment, the function of the court is issue finding, and not issue determination.⁵

Plaintiff raises the following causes of action against moving defendants: conversion; unjust enrichment; money had and received; civil conspiracy; concerted action; constructive trust of property located in 97 Avenue; and constructive trust. Defendants move for summary judgment on all causes of action. Plaintiff moves for partial summary judgment against Ralph and Antoinette Simonetti for unjust enrichment, money had and received, and constructive trust.

Conversion

Conversion occurs when a person has the unauthorized possession of property owned by another who has a right to possession of such property.⁶ Moving defendants argue that summary judgment should be granted because the plaintiff has failed to identify the allegedly converted assets. Plaintiff compares the facts in this case to *Republic of Haiti v. Duvalier*,⁷ where the court denied a motion for summary judgment to the defendant, the spouse of a former Haitian president accused of embezzling money from the state. The court held that when unexplained wealth is found on bank accounts or other fungible assets, the proof as to its origin can only be calculated by circumstantial evidence. Transactions where fraud or illegality are likely to be involved, “must be judged not with clinical detachment but with a common sense view to the realities of normal life.”⁸ Plaintiff asks this court to follow the *Duvalier* totality of circumstances analysis and to also view defendants’ transactions not with clinical detachment but with common sense. Plaintiff claims that like the *Duvalier*’s defendant, the moving defendants’ bank accounts, investments, and property purchases exceeded known sources of legitimate income. Since these

⁵ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁶ *Manufacturers v. Hanover Trust Co. v. Chemical Bank*, 160 A.D.2d 113 [1st Dept 1990].

⁷ *Republic of Haiti v. Duvalier*, 211 AD2d 379 [1995].

⁸ *Id.* at 385, quoting *Wilson v. Attaway*, 757 F2d 1227, 1235 [11th Cir 1985].

accounts may involve illegal transactions, the plaintiff urges this court to deny defendants' motion for summary judgment. Based on the plaintiff's opposition, the court finds that the determination of the source of funds exceeding the defendants' income is an issue of fact.

Unjust Enrichment

The elements of unjust enrichment are: (1) that defendant was unjustly enriched; (2) that defendant's enrichment occurred at the plaintiff's expense; and (3) "whether it is against equity and good conscience to permit defendant to retain what is sought to be recovered."⁹ Moving defendants allege that unjust enrichment is not a valid cause of action because there is a disconnect between plaintiff and moving defendants. They compare this case to *Sperry v. Crompton*, where the Court of Appeals rejected the plaintiff's unjust enrichment claim because the connection between the plaintiff, a tire purchaser, and the defendant, a manufacturer of rubber of processing chemicals, was "simply too attenuated."¹⁰ The defendants at the present case maintain that they were never the plaintiff's employees and that the relationship between opposing parties is also "too attenuated" to sustain a cause of action for unjust enrichment. On the other hand, plaintiff argues that there is a connection because moving defendants benefitted at the plaintiff's expense. Joanne Simonetti, according to the plaintiff, put money onto moving defendants' accounts, which were used to purchase a house and to invest in a business. Furthermore, plaintiff distinguishes the present case from *Sperry* by arguing that the moving defendants are the nuclear family of Joanne Simonetti, who admitted to embezzling money from plaintiff. Since these allegations raise an issue of fact, a summary judgment motion cannot be granted for either side.

Money Had And Received

⁹ *Citibank, N.A. v. Walker*, 12 AD3d 480, 787 NYS2d 48 [2d Dept 2004] quoting *Paramount Film Dist. Corp. v. State of New York*, 30 NY2d 415, 421 [1972].

¹⁰ *Sperry v. Crompton Corp.*, 8 NY3d 204, 216 [2007].

The action for money had and received requires that (1) defendant received money belonging to the plaintiff; (2) defendant benefitted from the receipt of the money; and (3) under principles of good conscience defendant should not be allowed to retain that money.¹¹ Moving defendants argue that the money did not belong to plaintiff and that the plaintiff fails to show that the diverted funds benefitted them. Furthermore, according to the moving defendants, plaintiff fails to prove that they obtained any money through “oppression, extortion, or deceit, or by the commission of a trespass” as it is often required in a cause of action for unjust enrichment.¹² Conversely, the plaintiff alleges that moving defendants benefitted by receiving the money stolen from plaintiff. Joanne shared an account with Ralph; therefore, according to the plaintiff, any deposit of stolen funds was placed in the possession and ownership of Ralph. Since the amount in the bank account exceeded Joanne and Ralph’s added salaries, plaintiff argues that Ralph had and received plaintiff’s money. Plaintiff also alleges that Joanne deposited \$100,000 into Antoinette’s account for the purchase of the house in 97 Churchill Avenue; consequently having and receiving the stolen money. Hence, a triable issue of facts has been raised by both parties and summary judgment is denied to both on the cause of action of money had and received.

Civil conspiracy

Civil conspiracy consists of: (1) an agreement to participate in an unlawful act; (2) an injury caused by an unlawful overt act performed by one of the parties to the agreement; and (3) that said act was done pursuant to and in furtherance of the common scheme.¹³ Moving defendants maintain that there is no evidence that they entered into an agreement with Joanne. Plaintiff questions why none of the moving defendants noticed a large infusion of money in their

¹¹ *Insurance Co. of State of Pa. v. HSBC Bank USA*, 37 AD3d 251, 255 [1st Dept 2007], *revd* on other grounds 10 NY3d 22 [2008].

¹² *Parsa v. State of New York*, 64 NY2d 143, 148 [1984].

¹³ *Halberstam v. Welch*, 705 F2d 472, 477 [D.C.Cir. 1983].

bank accounts. Their combined gross salaries for the years 1999 to 2005 was \$714, 499.00 while their bank accounts' amount for the same period was \$1,537,418.70.¹⁴ Plaintiff thus suggests that defendants' omission in failing to notice such disproportion constitutes a tacit agreement, satisfying the disputed element of a civil conspiracy. Hence, a triable issue of fact exists and the motion for summary judgment on conspiracy is denied.

Concerted Action

In addition to the elements of a civil conspiracy, concerted action requires that each party commits a tortious act.¹⁵ Defendants contend that there is no evidence that they each committed a tortious act.¹⁶ On the other hand, plaintiff argues that each defendant acted tortiously by converting and fraudulently obtaining unauthorized funds to purchase investments and real estate.¹⁷ Given that issues of fact need to be decided, defendants' motion for summary judgment is also denied on this claim.

Constructive Trust

A constructive trust is intended to restore the status quo when one has parted with property in reliance of an unkept promise. *Sharp v. Kosmalski* lists four elements to find such equitable remedy: (1) a confidential relationship; (2) an express or implied promise; (3) a transfer made in reliance upon such promise; and (4) resulting unjust enrichment.¹⁸ Moving defendants point out that there was never a confidential relationship between them and the plaintiff. The plaintiff directs this court to consider *Sidmonds v. Sidmonds*, which holds that "although the [*Sharp*] factors are useful in many cases constructive trust doctrine is not rigidly

¹⁴ Notice of Motion for Partial Summary Judgment ¶ 3.

¹⁵ *Cressar v. American Tobacco Co.*, 174 Misc.2d 1, *6.

¹⁶ Memorandum of Law in Support of the Motion for Summary Judgment in Favor of Ralph, Antoinette and Michael Simonetti, 20-21.

¹⁷ Plaintiff's Amended Complaint, 11.

¹⁸ *Sharp v. Kosmalski*, 40 NY2d 119, 121 [1976].

limited.”¹⁹ The plaintiff additionally maintains that defendants’ receipt of \$100,000 from the unauthorized transfers should lead to the granting of plaintiff’s summary judgment motion.

The court hence denies defendants’ motion for summary judgment and grants an extension of the notice of pendency on the house located in 97 Churchill Avenue. A notice of pendency relates to a judgment that affects the title to or the possession, use, or enjoyment of real property.²⁰ “An action seeking to impose a constructive trust over real property qualifies as one in which the filing of a notice of pendency is allowed.”²¹ Plaintiff seeks to impose a constructive trust over the property located in 91 Churchill Avenue, thus qualifying for the filing of a notice of pendency. In addition, plaintiff directed the Clerk of the County of Richmond to index a notice of pendency on this property on February 6, 2006. As a notice of pendency is effective for a period of three years from the date of filing, the court may grant an extension for a like additional period if good cause is shown.²² Since this case is pending and the plaintiff continues to have an interest in the real property at 91 Churchill Avenue, this court hereby grants an extension of the notice of pendency against defendants.

Conclusion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact.”²³ Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. In the

¹⁹ *Sidmonds v. Sidmonds*, 45 NY2d 233, 241 [1978].

²⁰ *CPLR* § 6501.

²¹ *Nastasi v. Nastasi*, 26 AD3d 32, 46 [2d Dept 2005].

²² *CPLR* § 6513.

²³ *CPLR* §3212[b].

present case, each cause of action raises a triable issue of fact. Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.²⁴

Based on the evidence and the questions raised by the parties' motions, it is the finding of the court that this action proceed to trial before a trier of fact. By an order issued on May 8, 2006, this court noted that there are specific and viable causes of action against defendants. This court reiterates such belief in this order. Similarly, defendants raise triable issues of fact in most causes of action, except in the cause of action for constructive trust.

Accordingly, it is hereby:

ORDERED, that defendants' motion for summary judgment is denied in its entirety; it is further

ORDERED, that plaintiff's cross motion for partial summary judgment is denied, except on the cause of action of constructive trust; it is further

ORDERED, that the notice of pendency on the property located in 91 Churchill Avenue has been extended; it is further

ORDERED, that the parties shall return to DCM Part 3 on November 19, 2008 at 9:30 A.M.

ENTER,

DATED: October 14, 2008

Joseph J. Maltese
Justice of the Supreme Court

²⁴ *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [App Div 1st Dept 1994].