

Yevoli v Yevoli

2009 NY Slip Op 30023(U)

January 2, 2009

Supreme Court, Nassau County

Docket Number: 015246/2008

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

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PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

JOSEPH A. YEVOLI, JR.,

Plaintiff,

INDEX NO.: 015246/2008
MOTION DATE: 12/15/2008
MOTION SEQUENCE: 004

-against-

JANICE M. YEVOLI, ALAN LOGIUDICE,
APPLE BANK FOR SAVINGS, JPMORGAN
CHASE BANK USA, N.A. and CAPITAL ONE
BANK (USA), N.A.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Memorandum of Law in Support of Defendant Janice M. Yevoli's Motion for Summary Judgment	2
Affidavit in Opposition of Joseph A. Yevoli, Jr. & Exhibits Annexed	3
Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment	4
Reply Affirmation of Gregg P. Garneau	5
Reply Memorandum of Law in Further Support of Defendant Janice M. Yevoli's Motion for Summary Judgment	6

This motion by defendant Janice M. Yevoli for an order pursuant to CPLR § 3212 granting summary judgment, or, in the alternative, pursuant to CPLR § 3211(a)(1), (5) and (7), dismissing the complaint is determined as follows.

This action has been the subject of three motions to dismiss, by the three named defendant Banks, and familiarity with the facts is presumed. Only facts relevant to the claims

asserted against plaintiff's step-mother, defendant Janice Yevoli, will be added.

The aforesaid Bank's dismissal motions were based on the running of the statute of limitations, failure to state a cause of action for breach of fiduciary duty and dismissal on the basis of documentary evidence. All three grounds were rejected; the motions were denied.

The first cause of action pleads money had and received by Janice Yevoli in the amount of \$177,155.75. The second cause of action is a claim of unjust enrichment against defendant Yevoli. The third cause of action alleges that defendant Yevoli aided and abetted the conversion of plaintiff's funds by his natural and legal guardian, defendant's deceased husband and plaintiff's deceased father. The fourth cause of action asserts fraud insofar as defendant Yevoli did not disclose to him the fact that plaintiff was entitled to funds held for his benefit in the three defendant banks upon his coming of age. The fifth cause of action asserts a breach of fiduciary duty by defendant Yevoli insofar as she took and received funds she knew to rightfully belong to plaintiff.

Defendant Yevoli's answer consists of a general denial and assertion of the following affirmative defenses: failure to state a cause of action; equitable estoppel; unclean hands; waiver; statute of limitations; justification; culpable conduct by persons over which answering defendant had no control; damages as a result of plaintiff's negligence and culpable conduct. Defendant Yevoli asserts a crossclaim for contribution over the remaining defendants pursuant to CPLR §§ 3019 and 1403.

A motion for summary judgment can be granted when the court is satisfied that there is no material question of fact necessary of determination by the trier of fact. In this case a pivotal fact is controverted by the plaintiff and moving defendant, that is whether plaintiff signed a Petition to Close Guardianship Account, dated July 13, 2001, or Release of Guardian dated July 13, 2001.

Both documents were notarized by defendant Alan LoGiudice. Plaintiff claims that not only did he not sign the aforesaid documents but also that he did not know of the subject accounts. Yet, counsel for defendant Yevoli states that "the Petition and Release were signed by plaintiff before defendant LoGiudice, a notary public commissioned by the Secretary of the State of New York." Affirmation in Support, at ¶ 17. Insofar as it is a statement by counsel who can have no knowledge of the fact asserted, it has no import. Rotino v Andry, 187 A.D.2d 1042 (4th

Dept. 1992). Defendant Yevoli states in a sworn affidavit that she did not see plaintiff sign the aforesaid documents and disassociated herself from the three bank accounts. The fact that defendant Yevoli claims not to have forged plaintiff's name is not dispositive.

Plaintiff's entire case turns on the assertion that he did not know of the damage awards received in his youth, did not know of his father's and the banks' guardianship accounts, did not know that such funds had been released by the banks to his father for his receipt, did not sign the petition to release the accounts upon his coming of age and did not sign the document acknowledging receipt of funds, did not know any of these things until he was told - after his father died. It is only if those assertions are true, that defendant Yevoli can have aided and abetted the conversion.

Accordingly, summary judgment is denied as the five causes of action alleged against defendant Yevoli, to the extent that they are otherwise meritorious, depend on the actual knowledge plaintiff had of those facts.

In reviewing defendants' motion to dismiss pursuant to CPLR 3211(a)(7) the "facts pleaded are presumed to be true, and the court must afford those allegations every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." Sitar v Sitar, 50 A.D.3d 667, 669 (2d Dept 2008).

The criterion for dismissal on a CPLR 3211(a)(7) motion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. Guggenheimer v Ginzberg, 43 N.Y.2d 268 (1977).

The elements of the first cause of action for money had and received are 1) the receipt of money belonging to plaintiff by defendant, 2) defendant's benefit of such money, 3) principles of equity and good conscience require that defendant not be permitted to keep the money. Matter of Witbeck, 245 A.D.2d 848 (3d Dept 1997). Plaintiff alleges that his father wrote checks on joint accounts holding plaintiff's property that were payable either for the benefit of defendant Yevoli or directly payable to her. Therefore, the elements of the first cause of action have been plead sufficiently to state a cause of action.

Further, the first cause of action is not time barred since the cause of action did not accrue until plaintiff discovered the delivery of his property to defendant Yevoli and made demand for its

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repayment which was denied. See Order dated December 24, 2008.

The second cause of action for unjust enrichment is adequately plead; plaintiff was deprived of the possession and use of his property allegedly through the breach of duty of his guardian after he reached the age of maturity. To the extent that defendant Yevoli was put in possession of such property she has been unjustly enriched at the expense of plaintiff. The claim is not time barred as the cause of action did not accrue until plaintiff learned of the defalcation and made demand for it's return.

The third cause of action for aiding and abetting the breach of a fiduciary duty is adequately plead. It is beyond question, assuming the pleadings to be true, that plaintiff's father abrogated his duty as his son's fiduciary and guardian. It remains to be determined whether the three defendant Banks are in breach of their duty as co-guardians of plaintiff's property. Defendant Yevoli avers that she was aware, but did not interfere. Therefore, the elements of breach of a fiduciary duty by another, a knowing inducement or participation in the breach and damages have been plead and the motion to dismiss is denied. Kaufman v Cohen, 307 A.D.2d 113, 125 (1st Dept 2003).

The fourth cause of action is a fraud based claim. "To recover damages for fraud the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission and injury. Lama Holding v Smith Barney, Inc., 88 N.Y.2d 413, 421 (1996). Two elements, which are intertwined, are missing from the complaint; duty to disclose and reliance.

Defendant Yevoli claims, with some reason, that she had no duty to disclose to plaintiff that his father was using his money in the bank. The contours of duty although often patent can also be indistinct and in such instances it is the duty of the court to the fix the orbit of duty. Strauss v Belle Realty Co., 65 NY2d 399 (1985). It is elementary that duty may arise out of a contract or by reason of the parties relationship under a given circumstance. It is not defined by foreseeability of injury, Id., but is rather " an expression of the sum total of those consideration of policy which lead the law to say that the plaintiff is entitled to protection." Id. at 406, dissenting opinion quoting to Angelis v Lutheran Med Center, 58 N.Y.2d 1053.

To the view of the court, the circumstances as recited in the record allow a step-mother to

remain separate from the financial relationship between a father and son. But it is a different matter to answer to the plaintiff on a theory of assisting the deception and benefitting from it, as in the third cause of action, than it is to inform a child that his parent is converting his property. There being no independent duty of movant to inform plaintiff of the true state of affairs, there can be no reliance on his part resulting from her failure to disclose. Therefore, the fourth cause of action is dismissed for failure to state a cause of action.

The fifth cause of action is based on breach of a fiduciary duty. "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope if the relations' (Restatement [Second] of Torts § 874, comment a). Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. ... Generally, where parties have entered into a contract, courts look to that agreement 'to discover ... the nexus of [the parties] relationship and the particular contractual expression establishing the parties' interdependency' (*see Id.* at 160)." EBCI v Goldman, Sachs & Co., 5 N.Y.2d 11, 19-20 (2005). The complaint does not provide any facts tending to support the kind of relationship between plaintiff and his step-mother that would lead her to relate to him with a higher degree trust, especially in matters involving his father. Accordingly the motion to dismiss the fifth cause of action is granted for failure to state a cause of action.

In summary, the motion for summary judgment is denied, the motion to dismiss on the basis of failure to state a cause of action is granted as to the fourth and fifth causes of action. The motion to dismiss for failure to state a cause of action and on the grounds of the statute of limitation is denied as to the first, second and third causes of action. The court has examined the application to dismiss on the basis of CPLR § 3211(a)(1) and finds it has no application to the claims against Janice Yevoli.

Dated: January 2, 2009


ENTERED J.S.C.

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