

Mermelstein v Singer
2010 NY Slip Op 32593(U)
September 15, 2010
Sup Ct, NY County
Docket Number: 111937/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PART 15

P

Index Number : 111937/2009

MERMELSTEIN, JOSEF
vs.
SINGER, RENEE

SEQUENCE NUMBER : 001
SUMMARY JUDGEMENT

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INDEX NO. 111937/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

is motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	
2, 3, 4	
5, 6, 7	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/15/10



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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 15

-----X

JOSEF MERMELSTEIN,

Plaintiff,

Index No.111937/09

- against -

Decision and Order
Mot. Seq. No. 001

RENEE SINGER,

Defendant

-----X

HON. EILEEN A. RAKOWER, J.S.C.

FILED
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Plaintiff, Josef Mermelstein ("Josef M.") brings this action for conversion of funds, in the amount of \$117,000.00, which defendant Renee Singer took possession of in March 2008. Ms. Singer brings counterclaims against Josef M., the first seeking an order decreeing that she is trustee of the funds at issue "and that any title that Plaintiff holds or ever held thereto is for the benefit of Renee Singer," and the second for an order directing an accounting of the subject funds. J. Mermelstein now moves for summary judgment on the complaint, and seeks to have Ms. Singer's counterclaims dismissed. Ms. Singer opposes and cross-moves to have the complaint dismissed¹ because it "fails to state a cause of action for constructive trust."

Ms. Singer's father, and Josef M.'s brother, Mendel Mermelstein ("Mendel M") passed away on April 2, 2008. According to Josef M., he and his brother were extremely close and he and Mendel M. lived together until the time of his death. Josef M. asserts that Mendel M. managed his accounts and investments, and that he "trusted him implicitly and no question ever arose regarding his handling of those accounts."

The instant dispute arose shortly after Mendel M.'s death when Ms. Singer claimed that the money in one of Josef M.'s accounts, an IRA held by Oppenheimer & Co., Inc., actually belonged to her father, and thus, she was entitled to the funds.

¹Ms. Singer characterizes her cross-motion as being one for summary judgment.

The Oppenheimer account was entitled "Josef Mermelstein IRA," and contained \$117,497.00. According to Josef M., he agreed to have Ms. Singer hold the money while he gathered proof that the monies deposited in the account were his and not Mendel M.'s.

Josef M., in support of his motion, submits: his sworn affidavit; the pleadings; several account statements; a copy of a check for the subject funds made out to Josef M. and endorsed by Josef M. to Ms. Singer; a 2008 IRS 1099 form; and a letter from Josef M.'s attorney to Ms. Singer, dated July 13, 2009. Josef M. claims that after he sent Ms. Singer documentation of his ownership on July 13, 2009, in the form of financial statements showing that he "rolled over" several accounts into the subject IRA, Ms. Singer refused to return the money. Josef M. claims that the documentary evidence establishes that all the money in the subject account belonged to him, and not to his brother Mendel M.

Ms. Singer, in opposition, submits the following, not duplicative of Josef M.'s submissions: a page with handwritten numbers that Ms. Singer claims is her father's asset tally; a copy of Mendel M.'s own separate statement from his Oppenheimer account; and a IRA Distribution Request Form. Ms. Singer claims that Josef M. gave her the funds as a recognition that the funds in the account belonged to her father. Specifically, Ms. Singer argues that there were a number of instances where Mendel M. treated the subject IRA account as his own, and that Josef M. also treated the account as if it were Mendel M.'s, both while he was still alive and after he died. Ms. Singer asserts that:

On numerous occasions during his life, Mendel discussed the IRA account with me. In addressing the ownership of the IRA account, Mendel, without exception, told me that the Account was his, and that when he died, the Account would belong to me. Many of the conversations took place in front of other persons, including my husband, Steven Singer, and Josef himself.

Ms. Singer also submits a bank statement showing that a deposit from the subject IRA was made into her father's account, in the amount of \$14,452.97. By way of reply, Josef M. concedes that he did transfer money into his brother's account, but that it was a gift, and it "made [him] happy to give [his brother] money.

In support of her cross-motion, Ms. Singer argues that Josef M. fails to state a cause of action for a “constructive trust,” because he fails to allege the elements of that cause of action.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

Conversion is “the unauthorized assumption of ownership over goods belonging to another to the exclusion of the owner’s rights . . . [t]he basis of an action for conversion is the denial or violation of the plaintiff’s dominion over , rights to, or possession of property.” (*Mirvish v. Mott*, 75 AD3d 269[1st Dept. 2010]). In order to establish an entitlement to judgment as a matter of law for conversion, plaintiff must first show “legal ownership or an immediate superior right to of possession to a specific identifiable thing . . .”(*Fiorenti v. Central Emergency Physicians, PLLC*, 305 AD2d 453,455[2nd Dept. 2003]).

There is no dispute that the subject IRA account is in Josef M.’s name. As for the source of the funds that make up the IRA account, Josef M. has submitted evidence establishing that the money contained in the IRA was transferred directly from his other accounts.

While Ms. Singer’s reference to conversations with her father about his alleged ownership of the subject IRA may be considered in opposition to Josef M.’s motion, such a claim, by itself, is insufficient to raise an issue of fact in light of Ms. Singer’s failure to submit other evidence in admissible form. (see *Candela v. City of New York*, 8 AD3d 45[1st Dept. 2004]). Although Ms. Singer claims that these conversations with her father took place in front of her husband, Ms. Singer does not submit an

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affidavit from her husband stating that he witnessed such exchanges. Further, the handwritten document Ms. Singer claims is a "tally" of her father's assets, is unidentifiable as belonging to her father. Nor is there any indication on the document that the notations allegedly made by Mendel M. are connected in any way to the subject IRA account. Finally, the bank statement showing a transfer of approximately \$14,000 from the subject IRA to Mendel's account, shows that the brothers exchanged money, but is not evidence of Mendel M.'s ownership interest in Josef M.'s IRA.

Ms. Singer's cross-motion to dismiss for failure to state a cause of action must be denied as the basis for Josef M.'s action sounds in conversion, for which he makes out a cause of action, and there are no allegations that a constructive trust was established.

Wherefore it is hereby

ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ORDERED that defendant Renee Singer's cross-motion is denied; and it is further

ORDERED that any and all of defendant Renee Singer's counterclaims are hereby dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Renee Singer, in the sum of \$117,497, plus interest at the rate of 9% per annum from August 10, 2009, until the date of the decision of this motion, and thereafter at the statutory rate until the date judgment is paid in full, together with costs and disbursements as taxed by the Clerk in the amount of \$ _____, for a total amount of \$ _____.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: September 15, 2010

FILED
SEP. 21 2010


EILEEN A. RAKOWER, J.S.C.

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COUNTY CLERK'S OFFICE