

Ferri v Riutta

2012 NY Slip Op 30299(U)

January 23, 2012

Supreme Court, Suffolk County

Docket Number: 10-7127

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 9-30-11 (#002)
MOTION DATE 10-6-11 (#003)
ADJ. DATE 10-20-11
Mot. Seq. # 002 - MotD
003 - XMotD

-----X
MARY L. FERRI, :
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 :
 Plaintiff, :
 :
 :
 :
 - against - :
 :
 THOMAS RIUTTA, DEBRA RIUTTA, and :
 OPEN WIDE DENTAL, PC, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 43 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6 ; Notice of Cross Motion and supporting papers 7 - 31 ; Answering Affidavits and supporting papers 32 - 38 ; Replying Affidavits and supporting papers 39 - 43 ; Other _____ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED the motion of the defendants for an order granting summary judgment dismissing the complaint against them or staying this action pending a determination of equitable distribution in a related matrimonial action is determined as follows; and, it is further

ORDERED that the cross motion of the plaintiff for an order granting summary judgment in her favor and against defendants on the third, fourth, fifth and sixth causes of action pursuant to CPLR 3212 is denied; imposing sanctions against defendants and granting legal fees on the motion is denied; and, denying defendants' motion is determined as follows.

This is an action to recover damages allegedly sustained by plaintiff as a result of three separate

transactions involving defendants. Plaintiff is the mother of defendant, Debra Riutta (“Debra”), and mother-in-law of defendant, Thomas Riutta (“Thomas”), who is a dentist and owner/proprietor of defendant, Open Wide Dental, PC (“Open Wide”). Defendant, Thomas, commenced a divorce action against his wife, Debra on or about July 16, 2009. Thereafter, in letters dated September 4, 2009 plaintiff demanded, by her attorneys, that defendants repay monies that she lent to them on or about June 2005 for improvement/renovation of their marital premises in the amount of one hundred twenty-five thousand and 00/100 (\$125,000.00) dollars; repayment of monies that she lent to them for the purchase of the marital premises in May 1998 in the sum of ten thousand seven hundred fifty (\$10,750.00) dollars; and, return certain cash funds in the sum of twelve thousand (\$12,000.00) dollars that she delivered to defendant, Thomas, to hold for safekeeping in July, 2007. When defendants failed to return or repay said monies demanded by plaintiff, on or about February 25, 2010, she commenced the within action based upon breach of contract, unjust enrichment, and intentional infliction of emotional distress. Her daughter, defendant Debra, failed to appear in the within action and a default judgment was obtained against her on June 27, 2011 in the sum of one hundred thirty-five thousand seven hundred fifty and 00/100 (\$135,750.00) dollars.

Defendants Thomas and Open Wide now seek an order granting summary judgment in their favor, dismissing plaintiff’s complaint against them or a stay of the within action, pending a determination of the equitable distribution claims of the parties in the divorce action between defendants Debra and Thomas. They allege that plaintiff’s claims are time barred, barred by the statute of frauds, and not supported by evidence. In support of their motion they include copies of the pleadings and of Thomas’ deposition testimony. Plaintiff cross moves and seeks an order denying the motion of defendants’ Thomas and Open Wide in its entirety, granting summary judgment in plaintiff’s favor on her third, fourth, fifth, and sixth causes of action, and imposing sanctions and directing moving defendants to pay legal fees, costs and expenses in connection with these motions. In support of her motion, plaintiff includes, *inter alia*, copies of the pleadings, the July 20, 2005 note and mortgage from plaintiff to North Country Mortgage Banking Corporation in the sum of one hundred twenty-five thousand (\$125,000.00) dollars, various cancelled checks drawn on the joint account of Thomas and Debra to the order of plaintiff or Chase Home Mortgage/Finance, and deposition transcripts of plaintiff and defendant Thomas.¹

Plaintiff alleges that in May 1998 she entered into an oral agreement with defendants Debra and Thomas, to lend them \$10,750.00 for the purchase of their home located at 17 Quaker Path, Stony Brook, New York (“the Quaker Path home”). Defendant Thomas does not dispute plaintiff’s contention that he and Debra lived at the said premises and that defendant Thomas opened his dental practice, Open Wide Dental, P.C., thereat. Nor does he dispute the allegation that he received monies from plaintiff to purchase the house in or about May 1998, however, he maintains that it was a gift for which no repayment was required or expected. Plaintiff claims that she borrowed against her own home and placed a mortgage upon it in the sum of one hundred twenty-five thousand (\$125,000.00) dollars in July,

¹Plaintiff maintains that defendants’ summary judgment motion is untimely and, therefore, should be denied. However, the court records indicate that the summary judgment motion was made in a timely fashion. Accordingly, that issue will not be addressed as it is moot.

2005 which she then delivered to defendants Debra and Thomas, as a loan. Although defendant Thomas disputes that the monies were delivered to him, he agrees that the funds were used to renovate and expand the Quaker Path home. He contends that the funds were all used for a portion of the addition placed on the home after July 2005 which did not include any work done on his home office which had been constructed in 1999 or 2000. Additionally, he admitted that monthly payments were made in connection with the loan and mortgage between September 2005 and July 2009 from a joint account he had with Debra. Finally, plaintiff insists that in or about July 2007, she requested defendant Thomas to hold the sum of twenty thousand (\$20,000.00) dollars cash for her in his safe-deposit box and that he agreed to do so. She states that pursuant to her request, sometime thereafter, he delivered and returned to her the sum of eight thousand (\$8,000.00) dollars and that Thomas has refused to return the balance of the funds to her, despite her demand that he do so. Defendant Thomas denies that he received these cash funds and that he is or was holding any monies for plaintiff.

Plaintiff's first cause of action alleges a breach of the May 1998 oral agreement and seeks damages in the sum of ten thousand seven hundred fifty (\$10,750.00) for same. Her second cause of action claims that defendants Debra and Thomas have been unjustly enriched as a result of their failure to repay the said sum. The third, fourth, fifth, and sixth causes of action each relate to the return of the one hundred twenty-five thousand (\$125,000.00) dollars for which plaintiff alleges she mortgaged her own residence in July 2005. The third cause of action alleges breach of an oral contract in connection therewith against Thomas and Debra; the fourth cause of action alleges that defendants Debra and Thomas have been unjustly enriched by the failure to repay the said sum; the fifth cause of action alleges that defendants Thomas and Open Wide have been unjustly enriched by the use of the said sum to renovate and improve that part of the Quaker Path home which is utilized by Open Wide's dental practice; and, the sixth cause of action alleges that defendant Thomas failed to make monthly payments on a Note and Mortgage and demands that he make said monthly payments pursuant to the terms of the Note and Mortgage. The seventh cause of action alleges a breach of a July 2007 agreement by defendant Thomas in failing to return the sum of twelve thousand (\$12,000.00) dollars to plaintiff; and, the eighth cause of action alleges that defendant Thomas has been unjustly enriched by his failure to repay the said sum. Finally, plaintiff's ninth cause of action alleges that defendants Thomas and Debra have caused her severe emotional distress and she seeks to recover the sum of one million (\$1,000,000.00) dollars for their intentional infliction of emotional harm upon her.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to

the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

CPLR 213 provides that an action for which no limitation is specifically prescribed by law and one based upon a contractual obligation or liability must be commenced within six (6) years. Both the first and second causes of action in plaintiff's complaint arise from a May 1998 transaction, one for unjust enrichment, for which there is no specific limitation (thus the six year statute of limitations controls), and the other for breach of an oral contract, for which there is a six year statute of limitations. Accordingly, defendants' request for summary judgment in their favor in connection with plaintiff's claims for repayment of ten thousand seven hundred fifty (\$10,750.00) dollars in connection with monies plaintiff loaned or gave to defendants Debra and Thomas in or about May 1998 is granted and the first and second causes of action are dismissed as time barred.

GOL 5-701, more commonly known as "the statute of frauds", requires that an agreement, promise, or undertaking that, by its terms, is not to be performed within one year from its making, must be in writing and subscribed by the party to be charged therewith. However, "an agreement which violates the statute of frauds may be enforceable where there has been part performance 'unequivocally referable' to the contract by the party seeking to enforce the agreement" (*Luft v Luft*, 52 AD3d 479, 481, 859 NYS2d 694 [2d Dept 2008]; *see also H.P.P. Ice Rink, Inc. v New York Islanders*, 251 AD2d 249, 674 NYS2d 667 [1st Dept 1998]). Here, although plaintiff and defendant Thomas are not in agreement as to the terms of the transaction by which plaintiff transferred one hundred twenty-five thousand (\$125,000.00) dollars to Debra and Thomas for their use in adding to or renovating their house, it is clear that the monies were transferred and used by them for that purpose. It is also apparent from the testimony of defendant Thomas and plaintiff that monthly mortgage payments were made by defendants Debra and Thomas in connection with the loan and mortgage taken by plaintiff for monies used by defendants Debra and Thomas. It is clear and unequivocal that there was part performance by defendants Debra and Thomas in connection with the oral contract of July 2005, the terms of which are still unclear. Accordingly, summary judgment dismissing the third, fourth, and sixth causes of action against defendant Thomas is denied. Additionally these causes of action are not time barred as they were commenced within the applicable six-year statute of limitation. However, plaintiff has failed to offer any evidence which would indicate that defendants Thomas and Open Wide were unjustly enriched by the use of any of the proceeds of the one hundred twenty-five thousand (\$125,000.00) dollar loan to renovate and improve that part of the Quaker Path home which is utilized by Open Wide's dental practice. Accordingly, summary judgment is granted to defendants Thomas and Open Wide as to plaintiff's fifth cause of action which is dismissed.

In connection with plaintiff's claim for the return of twelve thousand (\$12,000.00) dollars from defendant Thomas, the court finds questions of fact exist which preclude summary judgment in favor of either party. Plaintiff claims that she placed monies with defendant Thomas for safekeeping. Defendant Thomas denies such claim. Thus, neither party is able to show the absence of a material question of fact in regard to plaintiff's seventh and eighth causes of action and the motions for summary judgment in connection therewith are denied.

There are four elements of an action for intentional infliction of emotional distress, "(i)extreme

and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121, 596 NYS2d 350 [1993]). It is difficult to satisfy the requirements, particularly the first one, that of outrageous conduct, as often liability has only been found where the "conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Howell v New York Post Co.*, *id* at 122.) It is clear that New York State does not recognize a cause of action to recover damages for this tort between spouses (*Sareen v Sareen*, 51 AD3d 765, 858 NYS2d 285 [2d Dept 2008]; *see also Nacson v Semmel*, 292 AD2d 432, 738 NYS2d 888 [2d Dept 2002; *Eller v Eller*, 136 AD2d 678, 524 NYS2d 93 [2d Dept 1988]). Plaintiff has not provided any evidence which would show that the conduct of defendant Thomas amounts to that which is required to recover for intentional infliction of emotional distress. Nothing has been shown which indicates that his conduct was so outrageous or extreme as to go beyond all possible bounds of decency. Similarly, it would appear that an action by the parent of a divorcing party to recover damages for intentional infliction of emotional distress in connection with the actions by and between the divorcing child and child-in-law should not be recognized by this court. Accordingly, summary judgment is granted to defendant Thomas as to plaintiff's ninth cause of action for intentional infliction of emotional harm, which is dismissed.

In light of the forgoing, plaintiff's motion for summary judgment in her favor on her third, fourth, fifth and sixth causes of action is denied. Defendants having prevailed on portions of their motion, it is clear that same was not frivolous. Accordingly, plaintiff's request for sanctions, legal fees, costs and expenses is denied.

Dated: 1/23/12



A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION