

Davis v Davis
2012 NY Slip Op 32407(U)
September 18, 2012
Supreme Court, Suffolk County
Docket Number: 21975/2011
Judge: Paul J. Baisley
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SHORT FORM ORDER

INDEX NO. 21975/2011

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

 CATHERINE DAVIS,

Plaintiff,

-against-

JILL DAVIS,

Defendant.

ORIG. RETURN DATE: May 21, 2012

FINAL RETURN DATE: May 21, 2012

MOT. SEQ. #: 001 MD

002 Mot D

PLTF'S ATTORNEY:

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 475 NORTHERN BLVD, STE 24
 GREAT NECK, NY 11021

DEFT'S ATTORNEY:

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 377 OAK STREET, STE 101
 GARDEN CITY, NY 11530

Upon the following papers numbered 1 to 49 read on this motion for consolidation, etc.; cross motion for dismissal, etc.; Notice of Motion/Order to Show Cause and supporting papers 1 - 27; Notice of Cross Motion and supporting papers 28 - 39; Answering Affidavits and supporting papers 40 - 45; Replying Affidavits and supporting papers 46 - 49; Other _____; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that the motion by plaintiff for, inter alia, an order consolidating this action with an action entitled *Catherine Davis, plaintiff, against Bruce Davis, defendant*, assigned index number 21976/2011, and granting summary judgment in her favor is denied, without prejudice; and it is

ORDERED that the cross motion by defendant for, inter alia, an order dismissing the complaint is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that attorneys for the parties in this action shall appear on September 21, 2012 at 10:00 a.m. at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York for a preliminary conference.

In August 2009, plaintiff Catherine Davis commenced an action against her husband, Douglas Davis, for a judgment of divorce and ancillary relief. During the marriage, Douglas was employed by Davis Aircraft, Inc., a closely-held family corporation founded by his grandfather. His father, Bruce Davis, allegedly oversees the corporation and his sister, defendant Jill Davis,

allegedly controls its day-to-day operations. In addition to owning stock in Davis Aircraft, Douglas allegedly held ownership interests in various businesses with other family members during the marriage.

Prior to the commencement of the matrimonial action, Douglas was convicted in connection with a fatal motor vehicle accident that occurred on January 29, 2009, as he was driving while intoxicated. Significantly, just days after the fatal accident, Douglas executed durable powers of attorney appointing Bruce Davis and Jill Davis as his attorneys-in-fact, conferring on them full and unqualified authority to act in his place and stead. A pendente lite order issued by this Court (Blydenburgh, J.) on April 29, 2010 continued the temporary relief previously granted to plaintiff by an order to show cause dated August 26, 2009. Under such order, Douglas was directed to pay, among other things, temporary child support and maintenance, and to pay the carrying charges for the marital residence. Further, plaintiff, Douglas, “and their agents, servants and/or employees” were restrained from “removing, transferring, selling, encumbering . . . or otherwise acting with respect to any and all marital assets, whether real or personal or in his name or her name or in the name of a nominee, including but not limited to . . . bank accounts, investment security accounts . . . and any other asset held by the defendant” during the pendency of the matrimonial action without prior written consent of plaintiff or further order of the Court. On May 31, 2011, a second pendente lite order was issued by the Court (Quinn, J.) in the Davis matrimonial action. As relevant to the instant action, the order denied an application by Douglas for leave to pay counsel fees from a UBS account, and granted an application by plaintiff that defendant be directed to pay his court-ordered obligations from income, not marital assets. It is noted that Douglas was terminated from his employment with Davis Aircraft sometime after his conviction and sentencing on the criminal matter, and that he has been incarcerated since October 2009.

Subsequently, in July 2011, plaintiff commenced this action (Action No. 1) against Jill Davis apparently seeking damages for conversion, negligence and breach of fiduciary duty. The first cause of action in the complaint alleges, among other things, that plaintiff has an equitable ownership interest in the UBS account, and that Jill, under the authority granted her by the power of attorney, withdrew \$140,000 from the UBS account and converted such funds “for her own use and enjoyment and to pay her brother’s attorneys’ fees and the parties’ household expenses” in violation of the pendente lite orders issued in the matrimonial action. Although the complaint states the second cause of action is for negligence, the pages setting forth the allegations in support of the second and third causes of action were not included in the papers submitted on the motion.

Simultaneously with the commencement of this action, plaintiff filed a separate action (Action No. 2) against Bruce Davis, assigned index number 21976/2011, asserting causes of action for conversion, negligence and breach of fiduciary duty. As with the complaint in Action No. 1, the first cause of action alleged in the complaint for Action No. 2 asserts that Bruce

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converted \$140,000 from the UBS account. The second cause of action alleges that as attorney-in-fact for Douglas Davis, Bruce owed a duty to plaintiff, that he breached that duty “by failing to conform to the required standards of conduct,” and that plaintiff was harmed by his “carelessness and negligent management of the UBS account.” Similarly, the third cause of action alleges Bruce owed a fiduciary duty to plaintiff by virtue of the power of attorney granted to him by his son, that he breached such duty “by engaging in the unauthorized withdrawal” of \$140,000 from the UBS account, and that plaintiff “was deprived of her right to the proper equitable distribution award” as a result of such breach.

Plaintiff now moves for an order consolidating Action No. 1 and Action No. 2. She also seeks an order granting summary judgment in her favor as against both Jill Davis and Bruce Davis, compensatory damages in the sum of \$140,000, punitive damages in the sum of \$500,000, and sanctions in the sum of \$10,000. As to the branch of the motion seeking summary judgment, plaintiff argues that Jill and Bruce, acting as attorney-in-fact for Douglas Davis, withdrew sums totaling \$140,000 from a UBS account that, though titled in her husband’s name, “contains marital funds and is indisputably a marital asset.” She argues that the pendente lite orders issued in the matrimonial action restrained Douglas from using funds in the UBS account, that Jill and Bruce used their powers as attorneys-in-fact to violate such orders, and that, in doing so, they violated duties owed to her on behalf of her husband. She further argues that Douglas, Bruce and Jill colluded with each other to liquidate the UBS account as part of a scheme to reduce her equitable share of marital assets. Plaintiff’s submissions in support of the motion include an incomplete copy of the complaint, a copy of the answer, copies of the pleadings in Action No. 2, and copies of the pendente lite orders issued in the matrimonial action. In addition, plaintiff submits copies of statements for a UBS account in the name of Douglas Davis, excerpts of Douglas’s deposition testimony in the matrimonial action, and a billing statement prepared by plaintiff’s counsel for services and costs allegedly incurred by plaintiff in connection with Action No. 1 and Action No. 2.

Jill opposes the motion and cross-moves for an order dismissing the complaint or granting summary judgment in her favor. In an affidavit submitted with the cross-moving papers, Jill alleges that she did not withdraw funds from the UBS account, and that she did not know of the restraining orders issued in connection with the matrimonial action. She argues that as the issue of whether the UBS account is a marital asset is to be decided in the matrimonial action, which is scheduled to go to trial in October 2012, plaintiff’s claims for conversion, negligence and breach of fiduciary duty are premature. Further, Jill seeks an order, pursuant to CPLR 3211, dismissing the complaint against her for failure to state a cause of action, lack of capacity, and failure to name a necessary party. Alternatively, she requests summary judgment in her favor on the complaint.

The branches of the motion and the cross motion seeking summary judgment are denied, without prejudice. CPLR 3212 (b) requires that a motion for summary judgment be supported by

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copies of all of the pleadings filed in the action (*see Sendor v Chervin*, 51 AD3d 1003, 857 NYS2d 500 [2d Dept 2008]; *Matsyuk v Konkalipos*, 35 AD3d 675, 824 NYS2d 918 [2d Dept 2006]). Here, both plaintiff and defendant failed to include a complete copy of the complaint with their moving papers. For the same reason, the branch of plaintiff's motion for an order consolidating Action No. 1 and Action No. 2 is denied at this time, without prejudice. It is noted that while plaintiff's counsel alleges in a reply affirmation that Jill "has stipulated to consolidating this action" with Action No. 2, no written stipulation was annexed to the reply papers.

On a motion to dismiss, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *Basile v Wiggs*, 98 AD3d 640, 2012 NY Slip Op. 06007 [2d Dept 2012]; *Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928, 929-930, 895 NYS2d 203 [2d Dept 2010]). When a party moves under CPLR 3211(a)(7) for dismissal based on the failure to state a cause of action, the initial test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181, 904 NYS2d 153 [2d Dept 2010]). However, if documentary proof is submitted by the moving party, the test applied by the Court is whether plaintiff has a cause of action, not whether he or she has stated one in the complaint (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]; *McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660, 799 NYS2d 65 [2d Dept 2005], *lv denied* 7 NY3d 701, 818 NYS2d 191 [2006]). When a moving party presents evidentiary material, bare legal conclusions and factual allegations in the complaint which are flatly contradicted by such evidence will not be presumed true on a motion to dismiss, and dismissal will be granted under CPLR 3211 (a)(7) if such evidence disproves an essential allegation of the complaint (*see Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 846 NYS2d 368; *Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401 [2d Dept 2002]; *Doria v Masucci*, 230 AD2d 764, 646 NYS2d 363 [2d Dept 1996], *lv denied* 89 NY2d 811, 657 NYS2d 404 [1997]). Furthermore, when assessing a dismissal motion, a court may consider affidavits submitted to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]).

Dismissal of the cause of action for conversion for failure to state a cause of action is granted. To establish a claim for conversion, a plaintiff must show "legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights" (*Independence Discount Corp. v Bressner*, 47 AD2d 756, 757, 365 NYS2d

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44 [2d Dept 1975]; *see Cusack v American Defense Sys, Inc.*, 86 AD3d 586, 927 NYS2d 381 [2d Dept 2011]; *Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 905 NYS2d 209 [2d Dept 2010]). Tangible personal property or specific money must be involved for conversion to occur (*Independence Discount Corp. v Bressner*, 47 AD2d 756, 757, 365 NYS2d 44). The complaint in Action No. 1 does not allege that plaintiff owned, possessed or had control over the UBS account at issue, or that Jill was in possession of such account and improperly exercised control over it to plaintiff's exclusion (*see Castaldi v 39 Winfield Assocs.*, 30 AD3d 458, 820 NYS2d 279 [2d Dept 2006]; *Basile v Basile*, 9 AD3d 342, 778 NYS2d 913 [2d Dept 2004]).

However, dismissal of the cause of action for negligence and breach of fiduciary duty under CPLR 3211 (a)(7) is denied. Liability for negligence must be premised upon a finding of a legal duty owed by the defendant to the plaintiff (*Pulka v Edelman*, 40 NY2d 781, 782, 390 NYS2d 393 [1976]). "A tort obligation is a duty imposed by law to avoid causing injury to others" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316, 639 NYS2d 283 [1995]), and "[d]uty in negligence cases is defined neither by foreseeability of injury . . . nor by privity of contract" (*Landon v Kroll Lab. Specialists, Inc.*, 91 AD3d 79, 85, 934 NYS2d 183 [2d Dept 2011]). Defense counsel's conclusory assertion that the negligence cause of action must be dismissed, because "plaintiff cannot establish privity between defendant and herself" is insufficient to show that she does not have a cause of action for negligence. As to the third cause of action, "[a]nyone who knowingly participates with a fiduciary in breach of trust is liable for the full amount of the damage caused thereby to the cestuis que trust" (*Wechsler v Bowman*, 285 NY 284, 291, 34 NE2d 322 [1941]; *see Velazquez v Decaudin*, 49 AD3d 712, 854 NYS2d 163 [2d Dept 2008]). Here, the evidence presented by Jill did not conclusively establish her defense that she did not direct the transfer of funds from the UBS account in violation of the restraint placed on such funds by the pendente lite orders, particularly in light of the deposition testimony as to such transfers during her brother's incarceration (*see Minsky v Haber*, 74 AD3d 763, 903 NYS2d 441 [2d Dept 2010]).

As to the application for dismissal based on plaintiff's failure to name Douglas Davis as a defendant, a party may seek dismissal of a complaint on the ground that the court should not proceed in the absence of a person who should be a party (CPLR 3211 [a], [10]). CPLR 1001 (a) provides that parties are necessary and should be joined in the action "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." The failure to join a necessary party under CPLR 1001 is a ground for dismissal of an action without prejudice pursuant to CPLR 1003 (*see CPLR 1003*). However, when a person who should have been joined in an action was not made a party, but is subject to the jurisdiction of the court, dismissal is not the proper remedy; rather, the court "shall order him [or her] summoned" (CPLR 1001 [b]; *see Schwimmer v Welz*, 56 AD3d 541, 868 NYS2d 671 [2d Dept 2008]; *see generally Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 805 NYS2d 525 [2005]). Dismissal based on plaintiff's

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alleged failure to join a necessary party is denied, as Jill has not shown, or even alleged, that Douglas is not subject to the jurisdiction of this Court or that joinder is not possible (*see Schwimmer v Welz*, 56 AD3d 541, 868 NYS2d 671; *see also Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 793 NYS2d 494 [2d Dept 2005]).

The application for dismissal of the complaint for lack of standing also is denied. A plaintiff generally has standing to maintain a lawsuit if he or she has suffered an injury in fact as a result of the defendant's actions (*see Silver v Pataki*, 96 NY2d 532, 730 NYS2d 482 [2001]; *Maraia v Orange Regional Med. Ctr.*, 63 AD3d 1113, 882 NYS2d 287 [2d Dept 2009]). Here, the allegations in the complaint that plaintiff had a financial interest in the UBS account, and that Jill's actions allowed Douglas to deplete such asset, are sufficient to establish plaintiff's standing to sue for negligence and breach of fiduciary duty.

Accordingly, plaintiff's motion is denied, and the cross motion is granted only to the extent that the cause of action for conversion is dismissed.

Dated:

9/18/12

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.