

Perri v Perri
2012 NY Slip Op 32589(U)
October 3, 2012
Supreme Court, Putnam County
Docket Number: 652-2012
Judge: Lewis Jay Lubell
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Status Conference October 22, 2012

To commence the 30 day statutory
time period for appeals as of right
(CPLR 5513[a]), you are advised to
serve a copy of this order, with
notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X

EILEEN PERRI,

Plaintiff,

-against -

THE ESTATE OF FRANK PAUL PERRI, by
RACHEL PERRI, Administratrix, RACHEL
PERRI and NEW YORK STATE DIVISION OF
THE LOTTERY,

Defendants.

-----X

LUBELL, J.

DECISION & ORDER

Index No. 652-2012

Sequence No. 4

The following papers were considered in connection with this motion by Defendants, Rachel Perri and the Estate of Frank Paul Perri by Rachel Perri, for an Order dismissing each cause of action contained within Plaintiff's Verified Amended Complaint: (1) pursuant to CPLR 3211(a)(1) based upon documentary evidence; (2) pursuant to CPLR 3211(a)(5) based upon the Statute of Frauds, laches, and statute of limitations; (3) pursuant to CPLR 3211(a)(7) for failure to state a valid cause of action; (4) pursuant to CPLR 3211(a)(4) based upon another action pending in Westchester County Surrogate's Court; (5) and for an Order directing that any of Plaintiff's claims not dismissed pursuant to CPLR 3211 should be transferred to the Westchester County Surrogate's Court pursuant to CPLR 325(3); and (6) granting Defendants Rachel Perri and Rachel Perri as Administratrix of the Estate of Frank Paul Perri such other and further relief as this Court deems just and proper:

PAPERS

NUMBERED

Motion/Affirmation/Exhibits A-E
Letter dated July 27, 2012 of No Position
Affirmation in Opposition/Exhibits A-H
Defendant's Affirmation in Reply/Exhibit A

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Plaintiff, Eileen Perri, ("Plaintiff") the mother of decedent Frank Paul Perri ("Frank" or "Claimant"), brings this action against The Estate of Frank Paul Perri, by Rachel Perri, Administratrix, and Rachel Perri ("Rachel"), Frank's surviving wife, (collectively referred to as "Defendants", unless otherwise noted) for declaratory, monetary and injunctive relief in connection with the remaining future annuity payments of a \$12.5 Million Dollar New York State Lottery prize drawn on April 3, 1996 (the "Lottery Prize"). Among other things, Plaintiff seeks judgement declaring her the owner of the Lottery Prize that was claimed by her son, Frank, in 1996 so that she can collect the remaining annuity payments scheduled to expire in 2021, to the exclusion of Rachel, as Frank's surviving wife.

Plaintiff also advances causes of action for fraud, conversion, unjust enrichment, and intentional infliction of emotional distress against her former daughter-in-law, Rachel. A cause of action to posthumously annul the seven-month marriage between Rachel and Frank, who died on July 12, 2011, has since been withdrawn.

This Court will proceed to address the various aspects of Defendants' motion keeping in mind the well settled principle that

. . . the grant or denial of a request for a preliminary injunction, a provisional remedy designed for the narrow purpose of maintaining the status quo, is not an adjudication on the merits and will not be given res judicata effect (see Preston Corp. v Fabrication Enters. Inc., 68 N.Y.2d 397, 402, 509 N.Y.S.2d 520, 502 N.E.2d 197; Steck v Jorling, 182 A.D.2d 937, 939, 582 N.Y.S.2d 817, appeal dismissed 80 N.Y.2d 893, 587 N.Y.S.2d 909, 600 N.E.2d 636; Papa Gino's of America v Plaza at Latham Assocs., 135 A.D.2d 74, 77, 524 N.Y.S.2d 536).

(Coinmach Corp. v Fordham Hill Owners Corp., 3 AD3d 312, 314 [1st Dept 2004]).

Notwithstanding that, as earlier stated by the Court in connection with its Decision & Order of May 15, 2012, denying Plaintiff's motion for a preliminary injunction enjoying the New York State Lottery from distributing any further Lottery Prize winnings pending disposition of the action, although Plaintiff claims to have purchased the winning ticket, there is no dispute that Frank publically claimed the prize, declared the periodic

payments as income, and paid income taxes thereon. There is also no dispute that Plaintiff never filed a gift tax return if, indeed, Plaintiff ever gifted the whole or any part of the Lottery Prize to Frank in April 1996 or at any time thereafter.

There is also no disagreement that the annuity payments were directly deposited in the name of "Perri Frank P" to the credit of a joint bank account held in the names of Plaintiff and Frank, who resided together in a jointly held home even after Frank's December 12, 2010, marriage to Rachel. In fact, and what sets the stage if not the opportunity for some of the claims advanced herein by Plaintiff against Rachel, Rachel continued to reside with Plaintiff for several months after Frank's death on July 12, 2011.

DEFENDANTS' POINT I

First Cause of Action - Declaratory Relief Dismissal based on Documentary Evidence (CPLR §3211[a][1])

Whether couched in terms of a declaratory judgment seeking a determination as to rightful ownership of the Lottery Prize, or more circumscribed, as Plaintiff asserts, as seeking judgment declaring that there existed an "'oral agreement' . . . between Eileen and Frank, which was breached by Rachel, after Frank died", the Court does not find that the First Cause of Action is subject to dismissal based upon documentary evidence (CPLR §3211[a][1]). The Court is not satisfied "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law [citations omitted]" (Leon v Martinez, 84 NY2d 83, 88 [1994]).

Eighth Cause of Action - Annulment of Marriage Dismissal based on Documentary Evidence (CPLR §3211[a][1])

Defendants' CPLR §3211(a)(1) motion to dismiss Plaintiff's Eighth Cause of Action to posthumously annul the marriage of Frank and Rachel is denied as moot, said cause of action since having been withdrawn.

DEFENDANTS' POINT II

First Cause of Action - Statute of Frauds

Construing the Amended Complaint in the most liberal fashion, as the Court must on the motions currently before it, the Court finds that the First Cause of Action does state a claim against the Defendants for breach of an alleged "oral agreement" made by Plaintiff and Frank which allegedly "provided for Frank . . . to

claim the Lottery winning ticket, request annual installment payments and to deposit the money into a joint bank account" (Amended Complaint, par. 28). The contract between Frank and the New York State Lottery is not conclusive on the issue as to whether or not Plaintiff and Frank entered into the alleged oral agreement herein sought to be enforced. In fact, it is consistent with Plaintiff's contentions that Frank would claim the Lottery Prize in his name for her benefit. Whether the alleged oral agreement is barred by the Statute of Frauds (see, General Obligations Law §5-701) is another issue.

The Statute of Frauds is codified at section 5-701 of the General Obligations Law. It provides, in pertinent part:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime . . .

The Statute of Frauds is no stranger to lottery prize cases.

For example, upon reversing that portion of the lower court's decision concerning the enforceability of an alleged oral agreement between eleven co-workers to take turns purchasing lottery tickets, the winnings of which were to be shared equally, the court stated the following in Campbell v Campbell (213 AD2d 1027 [4th Dept 1995]):

An agreement to share the proceeds of a lottery is a valid and enforceable agreement (see, Johnson v Johnson, 191 AD2d 257; Yates v Tisdale, 3 Edw Ch 71; see generally, Annotation, Enforceability of Contract to Share Winnings from Legal Lottery Ticket, 90 ALR4th 784). An oral agreement to share proceeds that will be paid over a period of several years does not contravene the Statute of Frauds (see, Pando v Fernandez, 118 AD2d 474; 90 ALR4th, op. cit., at 797-798).

(Campbell v Campbell, supra). The rationale for such a

determination is articulated in Pando v Fernandez (127 Misc 2d 224 [Sup Ct 1984], affd for the reasons stated below 118 AD2d 474 [1st Dept 1986]) as follows:

. . . [T]he contract [here under consideration] could be performed well within one year. Defendant was to furnish the funds with which to purchase the ticket. Plaintiff had to purchase the ticket, select the numbers, return it to defendant, and pray. The winning numbers were scheduled to be drawn, and were drawn, within days, and at that time the obligations of the parties became fixed. The defendant would then have to have notified a third party, the state Lottery Division, that all future payments were to be divided equally between herself and the plaintiff, a task which she could perform within days. At that point the obligations of each side would have been performed. (North Shore Bottling Co., Inc. v Schmidt & Sons, Inc., 22 N.Y.2d 171, 292 N.Y.S.2d 86, 239 N.E.2d 189.) The fact that the payout would be extended over several years is of no moment, for the liability, if any, was fixed, the amounts known, and all that remained was the ministerial act of having the annual payouts divided. That is quite different from an agreement by a party to pay out a percentage of sales or earnings over a period of years, which may call for future services, and where the amounts cannot be established until well into the future.

(Pando v Fernandez, 127 Misc 2d at p. 226).

The *post-lottery drawing* oral agreement here under consideration is also quite different from the various *pre-lottery drawing* oral agreements that courts have considered.

In contrast to *pre-drawing* oral agreements to (1) pool money for the purchase of lottery tickets such as in (Campbell v Campbell, supra) or (2) which deal with agreements to divide the financial and services aspect of the purchase such as in Pando v Fernandez, supra, (physically buying the ticket, selecting the numbers, etc), in both instances with the intent to equally split winnings, the instant case concerns an alleged *post-drawing* agreement between the alleged lottery winner and another to have

the latter take official claim to the prize for the purpose of maximizing the payout (upon the mistaken belief that annuity payments cease upon the claimant's death).

The statute of frauds was intended to prevent "fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury" (D & N Boening, Inc. v Kirsch Beverages, Inc., 63 NY2d 449, 453 [1984]). Because memories fail over time, the statute requires a written contract for an agreement that is not to be performed within one year of its making. In order to remove an agreement from the application of the statute of frauds, both parties must be able to complete their performance of the contract within one year (see Cron v Hargro Fabrics, 91 NY2d 362, 367-368 [1998]; Meyers v Waverly Fabrics, 65 NY2d 75, 79 [1985]).

(Sheehy v Clifford Chance Rogers & Wells LLP, 3 NY3d 554, 560 [2004]).

The Court concludes that Frank's alleged obligation to deposit the annuity payments made payable only to him into a joint bank account beginning upon the first payment and yearly thereafter until plaintiff's death is a contract that, "by its terms", cannot be performed within one year (North Shore Bottling Co. v Schmidt & Sons, 22 N.Y.2d 171, 175-176, 292 N.Y.S.2d 86, 88-89, 239 N.E.2d 189, 190-91; Nat. Nal. Serv. Stas. v Wolf, 304 N.Y. 332, 335, 107 N.E.2d 473, 474). Any suggestion to the contrary is illusory. The Court does not equate Frank's alleged obligation to deposit annuity payments into a joint bank account with the ministerial act of the Division of the Lottery of making annual payments to a claimant or claimants, to which reference is made in the lower court decision of Pando v Fernandez, supra.

Based upon the foregoing, the Court finds that the First Cause of Action is based upon an agreement which comes within the Statute of Frauds (General Obligations Law, §5-701[a][a]) and, as such, is unenforceable.

First Cause of Action - Laches/Estoppel

Having ruled as it did on the Statute of Frauds issue, the Court need not rule on the doctrine of laches and estoppel issues

advanced by Defendants. Nonetheless, the Court notes that it finds no merit to Defendants' assertion that the First Cause of Action is subject to dismissal based upon the equitable doctrine of laches. At the very least, the Court does not find that "there has been an unreasonable and inexcusable delay" in seeking the enforcement of the contract asserted (Skrodelis v Norbergs, 272 AD2d 316 [2d Dept 2000]). It is only upon Frank's death that an issue has arisen, albeit already deemed violative of the Statute of Frauds (see supra).

Third Cause of Action for Conversion - Estoppel

The Court finds no merits to Defendants' argument that Plaintiff should be estopped from prosecuting the Third Cause of Action alleging conversion of the Wells Fargo and Astoria Federal bank accounts.

The Court is not satisfied that Defendants have met their burden of establishing that the interest of fairness dictates that Plaintiff needs to be estopped from enforcing "rights which would ultimately work fraud or injustice upon the person against whom enforcement is sought . . . [or that there exists a] failure to promptly assert a right [which] has given rise to circumstances rendering it inequitable to permit the exercise of the right after a lapse of time" with respect to these charges (Charles v Charles, 296 AD2d 547, 548-49 [2d Dept 2002] citing Matter of Ettore I. v Angela D., 127 AD2d 6, 120).

Nor is the Court persuaded that Plaintiff should be estopped from going forward with her allegations of conversion with respect to the Mercedes Benz and Hummer vehicles. Among other things, Defendants' position is principally based on assertions of material fact that are still in issue.

DEFENDANTS' POINT III

DISMISSAL FOR FAILURE TO STATE A CAUSE OF ACTION CPLR 3211 (A) (7)

The First Cause of Action - Declaratory Judgment

Lack of Justiciable Controversy/ Failure to Specify Rights/Legal Relations

In whatever terms couched, the Court has already construed the First Cause of Action as setting forth a valid cause of action for breach of contract and, as ruled upon in POINT I, supra, the Court has dismissed it as violative of the Statute of Frauds.

Accordingly, this aspect of Defendants' motion is denied as moot.

Failure to Exhaust Administrative Remedies

One does not meet his or her burden in this regard by conclusory and bald assertions that unspecified administrative remedies have not been exhausted. Movants have not even identified what administrative remedies have not been exhausted. Therefore, there is no merit to the failure-to-exhaust argument.

Claim Based Entirely on Hearsay

This aspect of Defendants' motion is denied as moot, the First Cause of Action already having been dismissed.

Second and Sixth Causes of Action - 3211(a)(7) (Fraud against Rachel Perri)

Third Cause of Action - 3211(a)(7) (Conversion against Rachel Perri)

"In reviewing a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action, the allegations of the complaint are deemed to be true. The pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give the pleader the benefit of all favorable inferences that may be drawn from the complaint ... (see Campaign for Fiscal Equity v State of New York, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565, 655 N.E.2d 661)" (Johnson v Kings County Dist. Attorney's Off., 308 A.D.2d 278, 284, 763 N.Y.S.2d 635; see also Leon v Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511).

(Dunn v Gelardi, 59 AD3d 385, 386 [2d Dept 2009]).

Upon application of this standard, the Court finds that the allegations of the Amended Complaint are sufficient to state a cause of action for fraud and conversion as against Rachel, and are sufficiently particularized within the meaning of CPLR §3016(b).

**PLAINTIFF'S FOURTH, FIFTH, SEVENTH AND NINTH CAUSES OF ACTION
CPLR 3211(a)(7)
(UNJUST ENRICHMENT)**

Upon application of the standard above referenced (see, Dunn v Gelardi, 59 AD3d 385, 386 [2d Dept 2009]), and except as to the Seventh Cause of Action wherein Plaintiff alleges "fraud on the Surrogate's Court [of Westchester County]", the Court finds that the Amended Complaint sets forth sufficient allegations of unjust enrichment to defeat this CPLR §3211(a)(7) motion. In this regard and not be way of limitation, the Court notes that movant improperly relies in great part on facts that are still in material dispute.

As to the Seventh Cause of Action directed at proceedings before the Surrogate Court, the Court notes that such proceedings are still on-going. In any event, this Court will not usurp the authority of the Surrogate of Westchester County to address allegations and redress any findings of fraud in matters that come before him.

**PLAINTIFF'S EIGHTH CAUSE OF ACTION
CPLR 3211(a)(7)
ANNULMENT & FORFEITURE**

This action is dismissed as withdrawn.

**PLAINTIFF'S TENTH CAUSE OF ACTION
CPLR 3211(a)(7)
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

Here, too, the Court is satisfied that, upon application of the standard enunciated in Dunn v Gelardi, supra, the Amended Complaint sufficiently states a cause of action for intentional infliction of emotional distress as to all elements as set forth in Graupner v Roth (293 AD2d 408, 410 [1st Dept 2002]).

**MOTION TO DISMISS FOR ANOTHER ACTION PENDING
CPLR §3211(a)(4)
CPLR §325(e)**

CPLR 325(e) provides that "[w]here an action pending in the supreme court affects the administration of a decedent's estate which is within the jurisdiction of the surrogate's court, the supreme court, upon motion, may remove the action to such surrogate's court

upon the prior order of the surrogate's court".

[W]hile the statute seems to require the prior consent of the Surrogate's Court to the removal, it is clear that this requirement is superseded by provisions of the State Constitution empowering the Supreme Court to transfer actions over which it has concurrent jurisdiction with the Surrogate's Court to the Surrogate's Court without Surrogate's Court's consent [citations omitted].

(Birnbaum v Central Trust Co., 156 A.D.2d 309-310).

Although there need not be "prior consent" of the Westchester County Surrogate, absent same, this Court is not persuaded that a transfer of this action in whole or in part to the Surrogate Court would be a prudent exercise of its discretion, especially given the numerous causes of action by Plaintiff against not only the defendant estate, but also against the individual defendant.

Therefore, the motion is denied without prejudice to whatever application Defendants may wish to make before the Westchester County Surrogate and, thereafter, to this Court.

There being no merit to any of the remaining aspects of Defendants' motions and/or arguments advanced in connection therewith, it is hereby

ORDERED, that, the motion is hereby disposed of as hereinabove indicated; and, it is further

ORDERED, that, the parties are directed to appear before the Court for a Status Conference at 9:30 a.m. on October 22, 2012.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
October 3, 2012

S/

HON. LEWIS J. LUBELL, J.S.C.

TO: Gary E. Bashian, Esq.

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