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| <b>Brestin v Estate of Maddy LaBianca Brestin</b>  |
| 2013 NY Slip Op 32371(U)   |
| October 3, 2013  |
| Sup Ct, Queens County  |
| Docket Number: 25246/2012  |
| Judge: David Elliot  |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IAS Part 14

LEWIS R. BRESTIN,  
Plaintiff,

Index  
No. 25246 2012

- against -

Motion  
Date August 28, 2013

THE ESTATE OF MADDY LABIANCA  
BRESTIN, etc., et al.,  
Defendants.

Motion  
Cal. No. 18

Motion  
Seq. No. 3

Oral Argument  
Date September 24, 2013

The following papers numbered 1 to 13 read on this motion by defendant Melissa Joy Friefeld (Friefeld) for an order dismissing the counterclaim and cross-claim of defendant the Estate of Maddy LaBianca a/k/a Maddy LaBianca Brestin a/k/a Madda M. Brestin, by her executor Mark LaBianca (collectively “the Estate”).

|  | <u>Papers<br/>Numbered</u> |
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| Notice of Motion - Affirmation - Exhibits..... | 1-5                        |
| Answering Affirmation - Exhibits.....          | 6-9                        |
| Reply.....                                     | 10-13                      |

Upon the foregoing papers it is ordered that the motion is determined as follows:

By order of Martin E. Ritholtz dated March 15, 2013, the actions under Index Nos. 18955/2011 and 25246/2012 were consolidated for all purposes under this index number. Further, the order provided, inter alia, that the third-party claims by Mark LaBianca and

Joseph LaBianca against Friefeld (which was asserted under Index No. 18955/2011) be deemed cross-claims and that Friefeld's answer to said third-party complaint be deemed an answer to said cross-claims. According to Friefeld and her counsel, post-consolidation, the Estate served an amended verified answer with cross-claims against Friefeld. Friefeld answered the Estate's amended verified answer and alleged the affirmative defense of lack of personal jurisdiction. Friefeld now moves for dismissal on that basis (CPLR 302, 3211 [a] [8]).

The allegations as set forth in the complaint originally filed under 18955/2011 were succinctly outlined by the Honorable Orin R. Kitzes in his June 8, 2012 order, and a recapitulation of those facts is warranted here for the purposes of this motion. It is alleged that, on or about March 26, 2002, plaintiff and his wife, the late Maddy LaBianca Brestin entered into a post-nuptial agreement whereby Maddy promised, inter alia, that she would establish for plaintiff's benefit a revocable trust and place her property known as 112-29 201<sup>st</sup> Street, Hollis, New York, therein for his benefit. Instead, it is alleged that Maddy conveyed it to herself and her son, Joseph LaBianca, as joint tenants with a right of survivorship, depriving plaintiff of the value of the estate.

Further, plaintiff is a 25% owner of 113-11 Partners, LLC, along with defendant Mark LaBianca, defendant trust, and defendant Maddy's estate, who also own 25% of the LLC, respectively. The LLC owns a building located at 113-11 Jamaica Avenue, Richmond Hill, New York. Plaintiff alleges that defendants Mark and Maddy – prior to the latter's death – collected rents from tenants at the property in excess of those reported on income tax returns, and deprived plaintiff of his share of the proceeds. Plaintiff makes similar allegations with respect to two other properties, located at 221-17 Jamaica Avenue, Jamaica, New York, and 206-01 Jamaica Avenue, Jamaica, New York.

The Estate has asserted counterclaims against plaintiff and cross-claims against, inter alia, Friefeld (who is plaintiff's daughter), asserting that these parties have wrongfully retained/misappropriated funds belonging to the Estate, including, but not limited to, rental income derived from the 221-17 and 206-01 Jamaica Avenue properties. The cross-claims asserted against Friefeld are for unjust enrichment and conversion. The Estate also makes a cross-claim against Friefeld for indemnity and contribution in the event plaintiff recovers from the Estate.

In support of her motion to dismiss on jurisdictional grounds, Friefeld alleges: that she does not reside in New York; that she is a resident of Florida; that she maintains no real property in New York; that she does not conduct business of any kind in New York; that she was not served with process in New York; and, notably, that she receives no funds from

plaintiff with regard to any rents claimed by the Estate in connection with the subject properties.

In opposition to the motion, Mark LaBianca submits his affidavit in which he reiterates the allegations set forth in his cross-claims against Friefeld. Defendant Mark also annexes banking statements for a joint account that plaintiff has with Friefeld and claims that “[i]t is believed that it is through that account and others that plaintiff is hiding money that plaintiff has stolen from us and from the Estate of Maddy LaBianca (and also that plaintiff owes the State for his Medicaid fraud),” that the statements “already show that plaintiff has used this account to transfer funds from his dental practice to Melissa Joy Friefeld in contravention of the State’s \$15,000,000.00 judgment,” concluding that “[i]t is not a stretch to believe that plaintiff is also using Melissa Joy Friefeld to hide money he owes to us.” Defendant Mark also makes reference to a company called Call Compliance in which Friefeld is a shareholder, and that she would not otherwise have been able to afford the stock purchase based upon her “modest income from her job.” Finally, defendant Mark points to the fact that it has been documented through photographs that Friefeld visits New York State.

Turning to CPLR 302, known as New York’s long-arm statute, subsection (a) (2), upon which the Estate relies so as to assert personal jurisdiction over Friefeld, provides that: “As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent commits a tortious act within the state.” The statute seeks to ensure due process is afforded to non-domiciliaries, requiring that “in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice” (*International Shoe Co. v Wash. Office of Unemployment Compensation and Placement*, 326 US 310, 320 [1945] [internal quotation marks omitted]). The seminal case in New York regarding the basis for jurisdiction under CPLR 302 (a) (2) is *Feathers v McLucas* (15 NY2d 443, 458 [1965]). As the Court of Appeals noted in *Feathers*, “[t]he mere occurrence of the injury in this State certainly cannot serve to transmute an out-or-state tortious act into one committed here within the sense of the statutory wording”; rather, the tortious act itself must be committed within the state (*id.* at 460; *see also Kramer v Vogl*, 17 NY2d 27, 31 [1966]).

Here, setting aside for the moment the fact that the allegations made by defendant Mark in support of his showing of *in personam* jurisdiction are largely vague and conclusory,<sup>1</sup> since the tortious acts committed by Friefeld, if at all, occurred in Florida, no

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1. For example, defendant Mark makes reference in his affidavit to the fact that plaintiff is allegedly utilizing the joint account to divert funds owed to the state. Defendant then essentially asks

basis exists for subjecting her to the jurisdiction of this court. The basis for the Estate's allegation arises from a particular bank account which allegedly contains funds belonging to the Estate.<sup>2</sup> If these funds constitute converted funds, and since Friefeld resides in Florida, then the place of her "tortious acts" could only be in Florida. The fact that the act may have caused injury to the Estate in New York – to wit: the loss of profits – same is insufficient to obtain jurisdiction over Friefeld (*see Tri-State Judicial Services, Inc. v Markowitz*, 624 F Supp 925 [EDNY 1985] [no jurisdiction established over Florida resident who was alleged to have diverted funds belonging to plaintiff]; *Associated Trade Development, Inc. v Condor Lines, Inc.*, 590 F Supp 525 [SDNY 1984] [no jurisdiction established in action for conversion since the monies collected were retained out of state, noting that "[i]ndirect economic injury in New York cannot, even if proven, sustain jurisdiction"]<sup>3</sup>; *see also Popper v Podhragy*, 48 F Supp2d 268 [SDNY 1998]). The fact that Friefeld visits New York on occasion is of no moment within the context of CPLR 302 (a) (2).

Further, though not addressed by the parties, it is noted that neither discovery nor an evidentiary hearing is necessary to determine whether jurisdiction over Friefeld exists, as the Estate has failed to meet the "sufficient start" requirement (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463 [1974]).

Turning now to another matter which appears to this court to be superimposed on this one, the court was advised on the oral argument date of this motion that the administration of the estate of Maddy LaBianca is pending in Surrogate's Court, Queens County. Namely, the Surrogate's Court is being asked to determine whether plaintiff herein is entitled to his elective share of his wife's estate or whether the post-nuptial agreement remains in effect. It is apparent that any such rulings with respect to the administration of the estate will necessarily affect the outcome of this case. For example, if it is determined that plaintiff is entitled to his right of election, then such a determination would appear to be dispositive with respect to any causes of action herein against the estate in connection with a post-nuptial agreement. Furthermore, since there are allegations (on both sides) regarding, inter alia, the

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the court to make the leap from this allegation to one which forms the basis for his jurisdiction argument; same is insufficient to demonstrate that jurisdiction over Friefeld exists. Moreover, any claims regarding the taking of "personal property" in the state are, similarly, simply too vague to support such a finding of jurisdiction.

2. It is noted that the statements are mailed to Friefeld at her residence in Florida.

3. Though these cases were discussed within the context of CPLR 302 (a) (3), the proposition remains the same: conversion or diversion of funds by a person who resides out of state does not establish jurisdiction over that person, since neither the tortious act nor the injury therefrom originates in New York.

respective shares of rental profits generated from the subject properties, any such disposition regarding the assets of the estate in that respect (i.e., the estate's share of jointly-owned properties which are in large part, the subject of the instant litigation), would also affect this action. That said, while transferring the entire action would not be appropriate since it may further obfuscate the issues presented in this lawsuit, it would appear to be, inter alia, in the interest of justice to stay the action pending a resolution in Surrogate's Court (CPLR 2201).

Accordingly, the motion by defendant Melissa Joy Friefeld for an order dismissing the counterclaim and cross-claim of the Estate is granted. Furthermore, it is hereby ordered that the action be marked "stayed." Upon disposition in Surrogate's Court of those matters relating to the estate which would necessarily affect the outcome of this action, the parties shall make the appropriate motion this court to lift the stay forthwith

Dated: October 3, 2013

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J.S.C.