

**Nasar v Trustees of Columbia Univ. in the City of
New York**

2013 NY Slip Op 32511(U)

October 15, 2013

Supreme Court, New York County

Docket Number: 150132/13

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

SYLVIA NASAR,

INDEX NO. 150132/13

Plaintiff(s),

MOTION DATE 10-2-2013

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY
OF NEW YORK,

Defendant(s).

The following papers, numbered 1 to 5 were read on this motion and cross-motion to/ for Dismiss:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____ cross motion _____	_____
Replying Affidavits _____	<u>4-5</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's Motion to Dismiss Plaintiff's Complaint is granted.

In 1998, the John S. and James L. Knight Foundation (the "Knight Foundation") made a gift to Defendant, Trustees of Columbia University in the City of New York, ("Columbia") in the form of a charitable endowment (the "Knight Endowment").

The terms of the Knight Endowment were memorialized in the John S. And James L. Knight Foundation Knight Chair in Journalism Endowment Grant Agreement, dated September 17, 1998 (the "Grant Agreement").

The Grant Agreement states that the purpose of the gift is "to endow a Knight Chair in Journalism in the Graduate School of Journalism" at Columbia.

The Grant Agreement required Columbia to select an individual to be the Knight Chair, an additional tenured position on Columbia's faculty.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The Grant Agreement stated that the individual selected for the Knight Chair “shall be appointed in accordance with the policies of [Columbia].”

The Grant Agreement required that the “base salary and benefits of the Knight Chairholder shall be provided by [Columbia] (from funds other than those earned from the [Knight Endowment]) and shall be comparable to that of a tenured full professor [at Columbia].”

On or about January 1, 2001, Plaintiff, Sylvia Nasar, (“Nasar”) was selected by Columbia to be the Knight Chair.

During a university-wide audit initiated in 2009, Columbia realized that it had been improperly using the income generated by the Knight Endowment to pay Nasar’s base salary and benefits. Columbia asserts that it had done so because this was how other endowments typically operated.

The Grant Agreement required that in the event that the purpose of the Knight Endowment should need to change or the expenses of the Knight Chair were significantly altered, Columbia was to consult with the Knight Foundation “with respect to the redirection of the use of such funds to an alternative purpose or purposes”. The Grant Agreement required that if the Knight Foundation concluded that Columbia could not use the Knight Endowment “for an alternative purpose satisfactory to the [Knight Foundation], [the Knight Foundation] may require [the Knight Endowment]...to revert to [the Knight Foundation.]

Based on the above requirements, Columbia alerted the Knight Foundation when the audit uncovered the improper use of the approximately \$923,000 of Knight Endowment income that had been paid to Nasar in the form of salary and benefits as the Knight Chair. Columbia sought the Knight Foundation’s counsel as to how to rectify the situation.

On or about March 28, 2011, Columbia and the Knight Foundation executed a Memorandum of Understanding (the “Resolution”) to resolve the issue of the improper use of Knight Endowment income that had been paid as salary to Nasar.

The Resolution required Columbia to devote \$92,300 of its own money per year for ten years to one of two purposes. At Columbia’s discretion, the money was to be allocated to either hiring adjunct faculty to the Knight Business Journalism program, or for scholarships for the Knight Business Journalism program.

The Resolution allocated the income from the Knight Endowment for fiscal year 2012 to various purposes, including \$20,000 to support Knight Chairholder Nasar’s research projects.

In years following fiscal year 2012, the Resolution required that Knight Endowment income be spent in accordance with the Grant Agreement and that Columbia pay the Knight Chairholder's salary and benefits from its own money, as required in the Grant Agreement.

Finally, the Resolution provided that it "in all respects resolve[d] all outstanding disagreements between [Columbia and the Knight Foundation] with respect to the [Grant Agreement] and the [Knight] Foundation [released] Columbia ...from all claims and/or liability with respect to past activities relating to the [Grant Agreement], the [Knight Chair] or the [Knight Endowment]."

Nasar commenced the instant proceedings alleging that Columbia illegally misappropriated and captured for its own purpose income generated by the Knight Endowment.

Nasar seeks damages from Columbia of \$923,000, alleging breach of fiduciary duty, breach of contract as a third-party beneficiary, unjust enrichment, conversion, and fraud.

Columbia filed the instant Motion seeking to dismiss Nasar's Complaint pursuant to CPLR Section 3211 (a)(1), (a)(3), (a)(5), and (a)(7).

A motion to dismiss under CPLR Section 3211 should be granted where the documentary evidence conclusively establishes a defense as a matter of law. See *Greenapple v. Capital One, N.A.*, 92 A.D. 3d 548, 939 N.Y.S.2d 351 (N.Y.A.D. 1st Dept. 2012). See also *Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511 (1994).

Columbia argues that Nasar has never had a personal entitlement to receive the Knight Endowment. Columbia argues that the Knight Endowment is Columbia's property held for the benefit of Columbia, its students, and the public at large. Columbia asserts that whatever benefit Nasar may receive as a consequence of the Knight Endowment, such benefit is entirely at the discretion of Columbia.

Columbia submits copies of the Grant Agreement and the Resolution as documentary proof that Columbia owes no duty to Nasar and that consequently, Nasar's Complaint should be dismissed.

Nasar argues that she is a third-party beneficiary of the Knight Endowment and that the Court should grant her standing as a 'private attorneys general' for the 'private enforcement of public policy'. Nasar does not explain what public policy would be enforced in having Columbia, from its own funds, pay Nasar ten years worth of salary that she has already been paid from Knight Endowment funds.

"The best evidence, however, of whether the contracting parties intended a benefit to accrue to a third party can be ascertained from the words of the contract

itself..." *Alicea v. City of New York*, 145 A.D.2d 315, 534 N.Y.S.2d 983 (N.Y.A.D. 1st Dept. 1988).

"[W]here the plaintiff seeks to base [her] right to maintain [her] action against a third party upon a contract made between that party and another, it must be one made or intended for [her] benefit. Such a beneficial intent must be clearly found in the agreement...before a third party can enforce a contract purportedly in [her] favor, it must clearly appear that the contract was made and intended for [her] benefit..." *Flemington Nat. Bank & Trust Co. v. Domler Leasing Corp.*, 65 A.D.2d 29, 410 N.Y.S.2d 75 (N.Y.A.D. 1st Dept. 1978) *aff'd sub nom. Flemington Nat'l Bank & Trust Co. v. Domler Leasing Corp.*, 48 N.Y.2d 678, 397 N.E.2d 393 (1979).

Beneficial intent must be "sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the third party] if the benefit is lost..." *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 451 N.E.2d 459 (1983); *State of California Pub. Employees' Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 741 N.E.2d 101 (2000).

The clause of the Grant Agreement which required Columbia to provide for the base salary and benefits of the Knight Chairholder from funds other than those earned by the Knight Endowment does not indicate an intent for the Knight Endowment to create an immediate benefit for or a duty to compensate the Knight Chairholder. The Knight Chairholder's benefit is incidental of the Knight Endowment.

Courts have also allowed third-party actions in situations such that "no one other than the third party can recover if the promisor breaches the contract...or that the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party..." *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 66 N.Y.2d 38, 485 N.E.2d 208 (1985); *Oursler v. Women's Interart Ctr., Inc.*, 170 A.D.2d 407, 566 N.Y.S.2d 295 (N.Y.A.D. 1st Dept. 1991).

The clause of the Grant Agreement which requires Columbia to consult the Knight Foundation if the conditions of the Knight Endowment changed and the Knight Foundation's right of reversion clearly indicate an authority granted to the Knight Foundation to recover should Columbia deviate from even the intent of the Knight Endowment.

Nowhere in the Grant Agreement do the parties indicate an intent to create a specific benefit for or duty to the Knight Chairholder. The Knight Foundation retains oversight of the Knight Endowment. The Knight Chairholder is a faculty position appointed in accordance with the policies of Columbia and compensated directly by Columbia. Disbursements from the Knight Endowment are determined

in accordance with the policies of Columbia.

On a motion to dismiss, non-moving parties are accorded the benefit of every possible favorable inference, and the court determines only whether the facts as alleged fit within any cognizable legal theory. See *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976).

However, even if the Court were to find some possible favorable inference (which it has not) to allow Nasar standing as a third-party beneficiary, Nasar's Complaint would still have to be dismissed. A third-party beneficiary's rights are derivative of the contracting party's and subject to the same defenses. See *Artwear, Inc. v. Hughes*, 202 A.D.2d 76, 615 N.Y.S.2d 689 (1994).

No possible favorable inference can change the plain language of the Resolution which "in all respects resolve[d] all outstanding disagreements between [Columbia and the Knight Foundation] with respect to the [Grant Agreement]" and released Columbia "from all claims and/or liabilities with respect activities relating to the [Grant Agreement], [the Knight Chair], or the [Knight Endowment]."

Accordingly, it is the decision and order of this Court that Columbia's Motion to Dismiss Nasar's Complaint is granted.

Accordingly, it is ORDERED that Columbia's Motion to Dismiss is granted and the Proceeding is dismissed, and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 15, 2013

ENTER :



MANUEL J. MENDEZ
J.S.C. MANUEL J. MENDEZ

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