

Forbes v Giacomo

2013 NY Slip Op 32685(U)

October 24, 2013

Sup Ct, New York County

Docket Number: 157640/2012

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 157640/2012
FORBES, RENEE
vs.
GIACOMO, JR., PAUL J
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 10/24/13

[Signature], J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

-----X

RENEE FORBES,

Plaintiff,

Index No. 157640/2012

-against-

PAUL J. GIACOMO, JR. individually,
THE LAW OFFICES OF PAUL GIACOMO,

Defendants.

-----X

HON. ANIL C. SINGH, J.:

In an action for fraud, breach of fiduciary duty, conversion and abuse of process, defendants Paul J. Giacomo, Jr. and the Law Offices of Paul Giacomo, move for dismissal of the complaint, pursuant to CPLR 3211 (a) (5), (7) and (8), on the grounds of the statute of limitations, the pleading fails to state a cause of action, and the court has not jurisdiction of the defendants. Defendants are also seeking sanctions pursuant to 22 NYCRR 130-1.1.

The following allegations are taken from the complaint. In 1999, plaintiff Renee Forbes and nonparty Louis Iocca were partners of Singularity Corporation (Singularity), a New York corporation engaged in the business of providing post-production services including video-editing, design, animation, graphics and interactive programming. Plaintiff, Christopher B. Forbes (plaintiff's father), Iocca and Barbara Iocca (Iocca's mother) comprised the Board of Directors. As partners, plaintiff and Iocca each owned 50% of the business and split the net profits of the business according to those percentages. In 2004, plaintiff's father, by and through Forbes Companies, purchased certain video production equipment known as Avid Media Composer Adrenaline (Avid) for the benefit of Singularity.

In 2005, plaintiff and Iocca began negotiations to end their business relationship. On July 31, 2005, the parties reached an agreement (Buyout Agreement) whereby Iocca agreed to pay Forbes \$35,000 by September 20, 2005, and split the open accounts receivable of approximately \$20,000 in exchange for Forbes's transfer of her 100 shares in Singularity. Under the Buyout Agreement, Iocca would become the sole owner, and he would remain responsible for the remaining payments of the Avid lease, which totaled approximately \$22,500. In addition, Iocca would acquire all other assets of the corporation, including post-production equipment valued in excess of \$100,000, the corporation's intellectual property, their clients and the website.

Following the negotiations, plaintiff took a one-week vacation and, upon her return, the locks at Singularity's office, located at 218 West 40th Street, New York, New York (the Premises) had been changed without her consent. On September 21, 2005, plaintiff sent an email to Iocca confirming the terms of the Buyout Agreement. In his response, Iocca directed plaintiff to contact his attorney, defendant Giacomo. Forbes thereafter contacted Giacomo who asserted that plaintiff "voluntarily" left the company and that "all bets were off" regarding her ownership in Singularity and the Buyout Agreement. Subsequent to that conversation, plaintiff learned that Giacomo, on behalf of Iocca, filed a certificate of incorporation to form a new corporation, Singularity Communications, Inc. (Singularity II) with the New York Department of State. Singularity's assets were then transferred to Singularity II. The assets included, but were not limited to, the corporation's bank accounts, receivables, proprietary information, customer lists, books, records and a leasehold interest.

Plaintiff alleges that Giacomo approved and facilitated Iocca's unlawful transfer of Singularity's assets to Singularity II without any consideration for plaintiff's interests. Despite

plaintiff's repeated demands for access to the Premises, her requests were denied. On November 29, 2005, Giacomo sent plaintiff a letter wherein he falsely asserted that plaintiff "attempted to abscond with a number of valuable items belonging to the Singularity Corporation" and that such actions were memorialized by a security camera on the Premises. On December 22, 2005, plaintiff's counsel sent a letter to Giacomo refuting the allegations. On January 10, 2006, Giacomo warned plaintiff's counsel that any attempt on their part to pursue any legal action concerning her separation from Singularity would result in "substantial counterclaims being made against Ms. Forbes, as well as an application for sanctions against both Ms. Forbes and your firm."

As a result, in 2006, plaintiff commenced an action against Iocca, Iocca's mother and Singularity Communications in the Supreme Court of the State of New York (index No. 601144/2006) (Iocca Litigation) asserting causes of action for fraud, conversion and breach of fiduciary duty. In June of 2012, the parties negotiated a settlement agreement.

On November 5, 2012, Forbes commenced this action against Giacomo asserting four causes of action for aiding and abetting breach of fiduciary duty, aiding and abetting fraud, aiding and abetting conversion and abuse of process.

Defendants argue that they are entitled to dismissal because: (1) plaintiff failed to obtain personal jurisdiction over defendants; (2) the claims are barred by the statute of limitations; and (3) the causes of action for aiding and abetting fraud, breach of fiduciary duty and conversion are not sufficiently pled.

Plaintiff argues that defendants are not entitled to dismissal because: (1) plaintiff's claims are sufficiently pled; (2) the claims are timely since they did not accrue until the resolution of

the Iocca Litigation; (3) the fraud claims are pled with specificity; and (4) this court has jurisdiction over defendants because they were personally served.

ANALYSIS

Defendants move, pursuant to CPLR 3211 (a) (8), to dismiss the complaint for lack of personal jurisdiction. “Under the Civil Practice Law and Rules, the preferred methods of personal service on an individual are by delivering the summons to the defendant” (*McSorley v Spear*, 50 AD3d 652, 653 [2d Dept 2008], *rearg denied* 11 NY3d 751 [2008]; CPLR 308 [1]).

Pursuant to CPLR 308 (2), personal service upon a natural person can also be made:

“by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney, or concerns an action against the person to be served, such delivery and mailing to be effected, within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service”

Here, there is a showing of proper service. The affidavit of service states that on December 5, 2012, at 7:58 p.m., the papers were delivered to and left with “Dasan” (the doorman), at 215

West 95th Street, New York, New York, said premises being Giacomo's "place of abode within the State of New York" (see exhibit B to affidavit of Susan J. Stromberg, dated January 29, 2013) (Stromberg Aff.). It appears that the process server was not given entry past the lobby of the building. The affidavit of service further states that Dasan telephoned Giacomo, who subsequently gave Dasan authorization to accept service at the front desk. It is well settled that where a process server is denied access to a specified apartment, a doorman is a person of suitable age and discretion within the contemplation of CPLR 308 (2) (see *Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept 2007], *rearg denied* 2007 NY Slip Op 71528 [U] [2007]).

Defendants argue that service was improper because defendants never received a mailing of the summons. The record demonstrates that on December 6, 2012, the summons and complaint was mailed by first class mail to Giacomo at 215 West 95th Street, Apt. 11M or 11L, New York, NY 10025 (exhibit B to Stromberg Aff.). The affidavit of service was filed on December 20, 2012. Defendants' assertions that they "never received a mailed copy of the summons and complaint" are insufficient to dispute the veracity and content of the process server's affidavit. "[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption" (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]). Accordingly, the process server's affidavit, which indicates that Giacomo was personally served in accordance with CPLR 308 (2), constitutes prima facie evidence of proper service, and defendants' assertions are insufficient to rebut this presumption.

"A defendant who seeks dismissal of a complaint pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired" (*Benjamin v Keyspan, Corp.*, 104 AD3d 891,

892 [2d Dept 2013] [internal citation omitted]). Here, plaintiff's first, second and third causes of action are time-barred. However, the fourth cause of action for abuse of process survives dismissal under CPLR 3211 (a) (5).

Plaintiff's first cause of action, for aiding and abetting breach of a fiduciary duty, is barred under CPLR 213 (8). "For breach of fiduciary duty claims, 'the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks'" (*Access Point Med., LLC v Mandell*, 106 AD3d 40, 43 [1st Dept 2013] [internal citation omitted]). Plaintiff seeks monetary damages stemming from defendant's alleged fraudulent actions in the transfer of Singularity's assets to Singularity II. Plaintiff specifically asserts that defendants aided Iocca in the breach of his fiduciary duties to plaintiff as an officer of their small corporation. She further asserts that the split occurred without her consent in September 2005, and despite her demands for the return of her property, all of Singularity's assets were transferred to Singularity II. Demand for the return of an investment in a business venture is a claim for monetary damages, to which the six-year statute of limitations would be applicable (*see Ingham v Thompson*, 88 AD3d 607, 608 [1st Dept 2011]). Therefore, plaintiff had until September 2011 to file her claims before the time limit under the statute of limitations expired. Plaintiff commenced this action on October 26, 2012, more than a year after the statute of limitations had run (CPLR 213 [8]).

Plaintiff's second cause of action, for aiding and abetting fraud, is barred under CPLR 213 (8). "[T]he statute of limitations period for fraud 'is the longer of six years from the wrongful conduct, or two years from when the party knew, or should have discovered, the fraud'" (*CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 153 [1st Dept 2009] [internal citation omitted]). As stated above, the complaint alleges that the wrongful conduct took place in September 2005, and,

thus, plaintiff should have commenced this action within six years of that date. Her commencement of this action in 2012 is, therefore, untimely.

Plaintiff's third cause of action, for aiding and abetting conversion, is barred under CPLR 214 (3). A three-year statute of limitations is applied to claims for conversion (CPLR 214 [3]). Accrual "runs from the earlier of the time when a defendant refuses to return the property after a demand, or the time when the defendant disposes of the property" (*see Malanga v Chamberlain*, 71 AD3d 644, 645-46 [2d Dept 2010]). Plaintiff asserts that the split with her business partner, Iocca, occurred without her consent in September 2005, and despite her demands for the remittance of her share of the assets in the corporation, all of Singularity's assets were transferred to Singularity II. Plaintiff had three years from September 2005 to commence a conversion claim against defendants. As stated above, this action was commenced in 2012, four years after the statute of limitations had run. Therefore, plaintiff's third cause of action, for aiding and abetting conversion, is time-barred.

Plaintiff's fourth cause of action, for abuse of process, survives dismissal under CPLR (a) (5). "Abuse of process is an intentional tort and, thus, is governed by a one-year statute of limitations" (*Benyo v Sikorjak*, 50 AD3d 1074, 1077 [2d Dept 2008]). Plaintiff alleges that, as Iocca's counsel, defendants filed an answer and counterclaims in the Iocca Litigation in addition to frivolous motions for: summary judgment, in limine, and leave to withdraw as counsel, with the purpose of delaying litigation and driving up plaintiff's litigation costs. The complaint states that the last of the legal action regarding the Iocca Litigation, with defendants as counsel, took place in the spring of 2012. It is undisputed that this complaint was filed in November 2012, and, thus, plaintiff's cause of action alleging abuse of process survives dismissal under CPLR

3211 (a) (5) (*see Honzawa v Honzawa*, 268 AD2d 327, 330 [1st Dept 2000]).

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction, and the court must accord the plaintiff ‘the benefit of every possible favorable inference,’ accept the facts alleged in the complaint as true, and ‘determine only whether the facts as alleged fit within any cognizable legal theory’”

(*High Tides, LLC v DeMichele*, 88 AD3d 954, 956 [2d Dept 2011] [internal citations omitted]).

The complaint does not state a cause of action for abuse of process. “‘Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective’” (*Greco v Christoffersen*, 70 AD3d 769, 770 [2d Dept 2010] [internal citations omitted]). “‘The gist of the action for abuse of process lies in the improper use of process after it is issued’” (*Williams v Williams*, 23 NY2d 592, 596 [1969] [internal citation omitted]). “‘Process is a ‘direction or demand that the person to whom it is directed shall perform or refrain from the doing of some prescribed act’” (*id.* [internal citation omitted]). Here, plaintiff alleges that defendants filed an answer and counterclaim in the Iocca Litigation with an intent to do harm. According to the complaint, defendants’ filings did not compel the performance or forbearance of any act by plaintiff (*see Palmieri v Biggiani*, 108 AD3d 604, 609-610 [2d Dept 2013]). Plaintiff further alleges that defendants’ order to show cause, as a mechanism to be relieved as counsel, was an abuse of process. “‘Contrary to the plaintiff’s contention that defendants’ use of an order to show cause as a mechanism by which to seek to be relieved as counsel did not constitute abuse of process’” (*id.*). “‘Where process is used for the purpose for

which it was intended, a cause of action . . . for abuse of process does not lie” (*id.* [internal citations omitted]). “CPLR 321 (b) (2) requires that a motion for leave to withdraw as counsel be made on ‘such notice to the client . . . as the court may direct,’ which necessarily entails the use of an order to show cause (*see* CPLR 2214 [d])” (*id.* [internal citation omitted]). The record demonstrates that Iocca no longer could afford the cost of his attorney, and, thus, Giacomo was forced to withdraw as his counsel. Although plaintiff alleges that defendants filed an answer, counterclaims and subsequent motions in the Iocca Litigation with “the collateral objective of inflicting economic harm,” “a malicious motive alone does not give rise to a cause of action to recover damages for abuse of process” (*Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 557 [2d Dept 2010] [internal citation omitted]). The complaint failed to sufficiently allege “an intent to do harm without excuse or justification” or “use of the process in a perverted manner to obtain a collateral objective” (*Greco v Christoffersen*, 70 AD3d at 770).

Regarding defendants’ request for sanctions in this matter, pursuant to 22 NYCRR 130-1.1 (b), sanctions may be imposed against a party or the party’s attorney for frivolous conduct.

“Conduct during litigation, including on an appeal, is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false’ ”

(*Muro-Light v. Farley*, 95 AD3d 846, 848 (2d Dept 2012) [internal citation omitted]). Under the facts of this case, there is insufficient evidence for a finding of frivolous conduct by plaintiff.

Accordingly, it is

ORDERED that the motion to dismiss is granted, and the complaint is dismissed with prejudice with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: Oct 24, 2013

ENTER:


J.S.C.

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**