

Lisanti v Zekus
2013 NY Slip Op 33767(U)
December 5, 2013
Sup Ct, Westchester County
Docket Number: 60473/2013
Judge: Orazio R. Bellantoni
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the 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.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

CHRISTEN LISANTI, individually and on behalf
of CHRISTOPHER BELLOISE and JOHN
BELLOISE,

Plaintiff(s),

- against -

LORIANN ZEKUS and NANCY BELLOISE,

Defendant(s).

SHORT FORM ORDER

Index No.: 60473/2013

Motion Date: 10/23/13

Plaintiff moves, by order to show cause, for a preliminary injunction, enjoining defendants from disposing of the proceeds of a certain life insurance policy pending the outcome of this action. Defendants cross move for an order, pursuant to CPLR 3211(a)(1), (3), and (7), dismissing the complaint.

The following papers were read:

Order to Show Cause, Affirmation, Affidavit, and Exs. A-E	1-8
Notice of Cross-Motion, Defendants' Affidavits, Affirmation, Exs. A-E	9-17
Memorandum of Law	18

On July 12, 2013, plaintiff commenced this action, claiming that defendants converted the proceeds of a certain life insurance policy. The following facts were gleaned from the complaint and the motion papers. In 1992, plaintiff Christen Lisanti was married to James Belloise, a non-party to this action, and two children (Christopher Belloise and John Belloise) were born while the two were married. In 2000, plaintiff Christen Lisanti and James Belloise finalized their divorce. Prior to the entry of the divorce judgment, the parties entered into a

stipulation of settlement (“Stipulation of Settlement”) wherein James Belloise agreed to provide a certain amount of child support and that during that time period, he also agreed to maintain one or more life insurance policies that would provide \$100,000 in death benefits. In or about July 2006, James Belloise obtained a life insurance policy in the amount of \$100,000, which named Christopher Belloise and John Belloise as the primary beneficiaries. In April 2013, James Belloise’s life insurance policy was changed so that defendant Loriann Zekus became the primary beneficiary and Christopher Belloise and John Belloise became successor beneficiaries. On June 6, 2013, James Belloise passed away and some time thereafter defendant Loriann Zekus received the \$100,000 as the primary beneficiary under the life insurance policy. This action ensued.

Plaintiff now seeks an injunction to prohibit defendants from dissipating the life insurance proceeds during the pendency of this action and defendants move to dismiss the action on various grounds. The Court addresses the motions in order.

A party seeking a preliminary injunction must demonstrate by clear and convincing evidence (1) a likelihood of success on the merits, (2) irreparable injury absent the injunction, and (3) that a balancing of equities favors the movant (*see Yedlin v. Lieberman*, 102 A.D.3d 769, 770 [2nd Dep’t 2013]). As it is dispositive, the Court addresses the irreparable injury element first. The Second Department has made it plain that “[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm (*see EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 [2nd Dep’t 2007]). In the instant action, plaintiff’s alleged harm is an economic loss, which is compensable by money damages. Plaintiff’s failure to demonstrate an irreparable injury absent the injunction is fatal to the motion and, accordingly, plaintiff’s motion for a preliminary injunction, pursuant to CPLR 6301, is denied.

Defendants make three arguments in support of their motion to dismiss. First, defendants argue that the Stipulation of Settlement only provided that James Belloise maintain a life insurance policy, but did not provide who the beneficiaries of the policy were to be. Consequently, there was nothing improper about changing the primary beneficiary to defendant Loriann Zekus. Second, defendants argue that Christopher Belloise was not a minor as of the filing of this action and, therefore, plaintiff Christen Lisanti lacks the capacity to sue on his behalf. Third, defendants argue that plaintiff has failed to state a cause of action for conversion, which also warrants dismissal.

In response to the first argument, plaintiff asserts that James Belloise was required to maintain life insurance while he was paying child support so that the proceeds therefrom would replace the child support upon his death. Plaintiff offers no response to the second argument. However, in the affidavit in support of plaintiff’s motion, plaintiff asserts, without explanation or substantiation, that Christopher Belloise resides with her, is incapable of

providing for himself, and is “unemancipated.” In response to the third argument, plaintiff argues that he has adequately plead all the elements of conversion.

Regarding defendants’ first argument, the Court of Appeals has explained that a motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*see Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 [N.Y. 2002]). The relevant language from the Stipulation of Settlement provides that “[t]he parties further agree that throughout the period of time that the husband is required to pay child support, the husband shall maintain one or more life insurance policies which shall provide at least \$100,000 in death benefits. The husband shall provide proof to the wife, within fifteen (15) days of receipt of the wife’s demand, that said policy or policies are in effect and that all premiums have been paid in full” (*see Affidavit in Support*; Ex. C, p. 10). While it is true that this provision does not explicitly provide that any life insurance policy designate Christopher Belloise and John Belloise as the primary beneficiaries, the Court cannot agree with defendants that the language of the Stipulation of Settlement utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law. Accordingly, defendants’ motion to dismiss, pursuant to CPLR 3211[a][1], is denied.

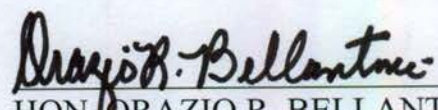
Regarding defendants’ second argument, plaintiff alleges in its complaint that Christopher Belloise was born on June 20, 1994, which makes him an adult in the eyes of the law. Plaintiff has offered nothing to substantiate her claim to bring this action on his behalf. Accordingly, defendants’ motion to dismiss the complaint to the extent that it was brought on behalf of Christopher Belloise, pursuant to CPLR 3211[a][3], is granted.

Regarding defendants’ third argument, the Court’s sole criterion on a motion to dismiss for a failure to state a claim is to determine whether the alleged facts fit within any cognizable legal theory (*see Esposito v. Noto*, 90 A.D.3d 825, 825 [2nd Dep’t 2011]). In making this assessment, the Court affords a liberal construction to plaintiff’s complaint, accepts the alleged facts as true, and accords plaintiff the benefit of every possible inference. As her sole cause of action is for conversion, it will be plaintiff’s burden to demonstrate that she had “an immediate superior right of possession to the identifiable fund and the exercise by defendants of unauthorized dominion over the money in question to the exclusion of plaintiff’s rights” (*see Fitzpatrick House III, LLC v. Neighborhood Youth & Family Servs.*, 55 A.D.3d 664, 664 [2nd Dep’t 2008] (quoting *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 385 [1st Dep’t 1992])). Plaintiff has alleged that James Belloise was legally obligated to maintain Christopher Belloise and John Belloise as the primary beneficiaries on his life insurance policy. Plaintiff has further alleged that, notwithstanding the foregoing, defendant Loriann Zekus has taken possession of the

proceeds of said life insurance policy. Assuming these allegations to be true for the purpose of this motion, plaintiff has adequately plead a cause of action for conversion. Accordingly, defendants' motion to dismiss, pursuant to CPLR 3211[a][7], is denied.

This matter is scheduled for a Preliminary Conference on January 13, 2014 at 9:30 a.m. in Courtroom 800 at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York. A copy of this decision and order is being forwarded to the Preliminary Conference Part. This order is being filed electronically.

Dated: December 5, 2013
White Plains, New York


HON. DRAZIO R. BELLANTONI
Justice of the Supreme Court

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