

Goldberg v HSBC Securities (USA), Inc.

2014 NY Slip Op 30481(U)

February 28, 2014

Sup Ct, New York County

Docket Number: 151411/13

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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HOWARD GOLDBERG, as Preliminary Executor
of the Estate of Herbert Lerner, Deceased,

Plaintiff,

- against-

Index No.: 151411/13
Submission Date: 9/25/13

DECISION AND ORDER

HSBC SECURITIES (USA), INC., HSBC
BANK USA, N.A., and ARNOLD ORLINSKY,

Defendants.

----- X

For Plaintiff:
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For Defendants HSBC Securities (USA), Inc. and HSBC
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Papers considered in review of this motion to dismiss (motion seq. 001):

- Notice of Motion 1
- Affs in Support 2
- Mem of Law in Support 3
- Aff in Opp 4
- Mem of Law in Opp 5
- Reply Aff 6

Papers considered in review of this motion to dismiss (motion seq. 002):

- Notice of Motion 1
- Mem of Law in Support 2
- Affs in Support 3
- Aff in Opp 4
- Mem of Law in Opp 5
- Reply Mem of Law 6

Papers considered in review of this cross motion for change of venue:

Notice of Motion 1
 Mem of Law in Support 2
 Mem of Law in Opp 3
 Reply Aff 4

HON. SALIANN SCARPULLA, J.:

This action is brought by Howard Goldberg (“Goldberg” or “plaintiff”), as Preliminary Executor of the Estate of Herbert Lerner (“Lerner”), alleging that defendants exerted undue influence on Lerner to name defendant Arnold Orlinsky (“Orlinsky”) as the beneficiary of an annuity, and also to name him on one of Lerner’s bank accounts. Goldberg also alleges that defendants wrongfully transferred money from Lerner’s bank account to an account held solely by Orlinsky.

Orlinsky moves pursuant to CPLR 3211(a)(4) to dismiss this action, or in the alternative for an order pursuant to CPLR 3211(f) extending Orlinsky’s time to answer or otherwise appear in this action (motion seq. 001). Defendants HSBC Securities (USA), Inc. (“HSBC Securities”), and HSBC Bank, N.A. (“HSBC Bank”) (collectively, “HSBC defendants”) move to dismiss the claims against them pursuant to CPLR 3211(a)(1) and (7), and 3016(b), and New York Estates, Powers & Trust Law (“EPTL”) §7-5.4 (motion seq. 002). Orlinsky cross moves, seeking an order pursuant to CPLR §510(1) and CPLR Rule 511, upon the granting of the HSBC defendants’ motion, that this matter be

transferred to Surrogate's Court, Kings County (motion seq. 003).¹ Motions sequence numbers 001, 002 and 003 are hereby consolidated for disposition.²

As alleged by plaintiff, Lerner died on April 11, 2011. At the time of his death, Lerner maintained a number of bank accounts with HSBC Bank and an investment account with HSBC Securities. Goldberg alleges on information and belief that Orlinsky also maintained one or more bank or investment accounts with HSBC Bank and/or HSBC Securities.

Goldberg alleges six causes of action in the amended complaint. In the first cause of action Goldberg asserts a claim of undue influence against Orlinsky in regard to an annuity. Goldberg claims that on April 2, 2009, Lerner received a personal injury award in the net amount of \$547,297.08. On October 2, 2009, Lerner purchased a First Sun Annuity (the "annuity") in the amount of \$252,999.07 through HSBC Securities. Robert Saffayeh ("Saffayeh") was Lerner's account representative and handled Lerner's purchase of the annuity. At the time of purchase, Lerner did not name a beneficiary.

¹ In the cross motion, Orlinsky also moves in the alternative for this matter to be moved to a non-commercial part, and for plaintiff to show that the Supreme Court, New York County, Commercial Part is the proper venue. However, by Administrative Order dated May 6, 2013, the HSBC defendants' request for this matter to be transferred to the Commercial Division was denied. Accordingly, Orlinsky's alternative grounds for relief are denied as moot.

² Orlinsky and the HSBC defendants moved to dismiss the complaint. In opposition, Goldberg filed an amended complaint, dated June 5, 2013. Unless otherwise indicated, the allegations at issue herein are those in the amended complaint.

On November 2, 2010, Lerner executed a Last Will and Testament naming Goldberg the executor of his estate, and also bequeathed his estate to Goldberg. Goldberg asserts that because Lerner did not initially name a beneficiary for the annuity, absent the undue influence on the party of Orlinsky, the annuity would have become a probate asset payable to Lerner's estate upon Lerner's death.

Goldberg further alleges, on information and belief, that Orlinsky was also an investment client of Saffayeh, that Orlinsky's relationship with Saffayeh pre-dated Lerner's relationship with Saffayeh, and that Orlinsky introduced Lerner to Saffayeh. Goldberg claims that Orlinsky befriended Lerner and repeatedly sought to have Lerner make Orlinsky the beneficiary of the annuity.

Thus, according to Goldberg, under Orlinsky's "supervision and influence," Lerner would tell Saffayeh that he wanted to add Orlinsky as a beneficiary to the annuity, but that after Lerner and Orlinsky left the HSBC branch, "Lerner would call Saffayeh and tell him to tear up the paperwork and/or not put through the designation of Orlinsky as beneficiary."

In February, 2011, Lerner was hospitalized. Goldberg alleges that, at that time, Lerner was heavily medicated and "confused, disoriented, weak and frail." On February 17, 2011, Orlinsky and Saffayeh went to Lerner's hospital room with papers to designate Orlinsky beneficiary of the annuity. Unlike on prior occasions, Goldberg alleges, this time Lerner did not call Saffayeh to instruct him to destroy the beneficiary designation.

Goldberg alleges that had Orlinsky, with the knowing assistance of Saffayeh, an HSBC Securities officer, not had Lerner execute the designation of beneficiary, the value of the annuity would have been paid to Lerner's estate and passed under his Will. In his first cause of action, Goldberg seeks return in the amount of \$252,763.34, what the annuity was worth at the time of Lerner's death, from Orlinsky.

In his second cause of action Goldberg asserts a claim against HSBC Securities, alleging that Saffayeh "knowingly rendered substantial assistance to Orlinsky's exercise of undue influence over Lerner." Further, Goldberg claims that, HSBC Securities, through Saffayeh, possessed actual knowledge of Orlinsky's undue influence, and that Saffayeh knew that Lerner lacked the mental, physical and emotional capacity to designate a beneficiary because of Lerner's "drugged, confused, disoriented, weak, and frail state."

In the third cause of action Goldberg asserts a claim against HSBC Bank for breach of contract. Goldberg asserts that Lerner entered into a contractual relationship with HSBC Bank "whereby Lerner covenanted to deposit funds with HSBC Bank and HSBC Bank covenanted to hold these funds and disperse them according to Lerner's order." It is alleged that through HSBC Bank officer Steven Shtivelman ("Shtivelman"), Lerner opened an account at HSBC titled "Herbert Lerner ITF Arnold Orlinsky" (the "ITF account"), but failed to inform Lerner of the meaning of "ITF," and that Shtivelman's transfer of \$119,929.40 from Lerner's account to an account solely in

Orlinsky's named breached HSBC Bank's contract with Lerner. Plaintiff further alleges that had Shtivelman told Lerner the meaning of "ITF," Lerner would not have added Orlinsky's name to the ITF account, HSBC Bank would not have transferred \$119,929.30 to Orlinsky, and those funds would have passed to Lerner's estate.

In the fourth cause of action Goldberg seeks equitable relief against Orlinsky. Goldberg alleges that HSBC Bank breached its contractual obligation to Lerner when it distributed \$199,929.30 to Orlinsky in violation of Lerner's intent and order, and that because HSBC Bank did not define "ITF" for Lerner, Lerner did not intent to make Orlinsky a beneficiary of the ITF account. Goldberg therefore concludes that "it is against good conscience and equity to allow Orlinsky to retain the \$119,929.30 obtained via manipulation of Lerner through HSBC Bank's breach of contract and Orlinsky's exercise of undue influence."

The fifth cause of action is for undue influence against Orlinsky in relation to the ITF account, and the sixth cause of action asserts a claim against HSBC bank for aiding and abetting Orlinsky's undue influence.

Orlinsky now moves to dismiss the action pursuant to CPLR 3211(a)(4) because there is another action pending between the same parties seeking the same relief. Orlinsky argues that Goldberg, as part of the Probate proceedings which were commenced in King's County Surrogate's Court (File No. 2011/1469) prior to this action, filed a discovery/turnover proceeding which has not been concluded, discovery has been

conducted, and the Court has ordered additional discovery. Orlinsky also maintains that this Court shares concurrent jurisdiction with the Surrogate's Court, and may direct, pursuant to CPLR 3211(a)(4) and Surrogate's Court Rule N.Y.C.R.R. §207.6 that "justice requires" plaintiff to file appropriate documents to consolidate this action with the Surrogate's Court proceeding.

The HSBC defendants move to dismiss the complaint as against them pursuant to CPLR 3211(a)(1) and (7) and 3016(b) for failure to state a cause of action. The HSBC defendants argue that plaintiff fails to set forth the elements of a claim of undue influence against the HSBC defendants, let alone with the particularity required by CPLR 3016(b). The HSBC defendants also assert that plaintiff cannot maintain its claims of negligence against the HSBC defendants, because they arise from the HSBC defendants' contractual relationship with Lerner. Orlinsky cross moved for an order directing that, if the Court grants the HSBC's motion to dismiss, this matter be transferred to Surrogate's Court, Kings County, where the Probate proceeding is pending.

Goldberg opposed both motions and the cross motion. In opposition, Goldberg filed an amended complaint in which, among other things, he asserts a breach of contract cause of action against HSBC Bank, and no longer asserts negligence as against the HSBC defendants.

In addition, Goldberg maintains that prior to beginning this action, he undertook two discovery proceedings pursuant SCPA §2013 in Surrogate's Court, Kings County.

Goldberg states that the HSBC defendants were respondents in one of the two discovery proceedings, and Orlinsky and other individuals were named as respondents in the other discovery proceeding. Goldberg argues that the discovery proceedings are not prior actions pending among the same parties seeking the same relief, and that Orlinsky was not a party as he did not appear.

In opposition to the HSBC defendants' motion to dismiss, Goldberg argues that the amended complaint is sufficient to state claims for aiding and abetting undue influence and breach of contract against the HSBC defendants. In reply, the HSBC defendants assert that the amended complaint fails to cure the defects in the original complaint, and that the pending motion to dismiss should be applied to the amended complaint.

Discussion

CPLR 3211 (a) states that: “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . (7) the pleading fails to state a cause of action” On such a motion, the test is not whether the opposing party “has artfully drafted the [pleading], but whether, deeming the [pleading] to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168, 176 (1st Dep’t 1998).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept as true all allegations in the pleading, “accord [the pleader] the benefit of every possible

favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Arnav Indus. v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 303 (2001).

Here, Goldberg fails to state a cause of action against the HSBC defendants for aiding and abetting undue influence. Orlinsky does not move to dismiss the undue influence claim against him. Thus, assuming for purposes of this decision only that the undue influence claim against Orlinsky is sufficiently plead, Goldberg nevertheless fails to state a cause of action for aiding and abetting undue influence against the HSBC defendants.

No authoritative New York case concludes that there exists in New York a cause of action for aiding and abetting undue influence. Plaintiff relies on *Medeiros v. John Alden Life Ins. Co.*, 1990 U.S. Dist. LEXIS 10393, 1990 WL 115606 (S.D.N.Y. 1990) for the proposition that one may be held liable for aiding and abetting another’s undue influence. On a motion for summary judgment, the court in *Medeiros* found that “[u]nder New York law, however, a person may be liable for aiding and abetting the tortious act of another where plaintiff demonstrates: (1) that the principal/third party violated the law or engaged in tortious conduct; (2) that the defendant knew or should have known that the violation or conduct was occurring; and (3) that defendant’s conduct gave substantial assistance or encouragement to the principal to engage in the violation or tortious conduct.”

The standard articulated by the court in *Medeiros* is essentially that for aiding and abetting fraud. See *Oster v. Kirschner*, 77 A.D.3d 51, 55-56 (1st Dep't 2010) (“[a] plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance”). Critical to a claim for aiding and abetting fraud is that the plaintiff plead “substantial assistance.” *AIG Fin. Prods. Corp. v. ICP Asset Mgt., LLC*, 108 A.D.3d 444, 447 (1st Dep’t 2013) (substantial assistance is necessary element of aiding and abetting claim). In addition, “[a]iding and abetting fraud must be pleaded with the specificity sufficient to satisfy CPLR 3016 (b).” *High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 960 (2d Dep’t 2011).

“Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.” *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep’t 2009) (internal quotations omitted); *Kaufman v. Cohen*, 307 A.D.2d 113, 126 (1st Dep’t 2003) (“Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur”).

Plaintiff fails to allege substantial assistance with sufficient specificity to satisfy CPLR 3016(b). Goldberg conclusorily alleges that the HSBC defendants failed to act by violating their own “Know Your Customer” rules, which require their personnel to

exercise reasonable diligence to obtain pertinent information on their clients necessary to evaluate and affect appropriate investment goals, and to adequately inform customers of the consequences of their financial decisions. Goldberg does not, however, allege with any particularity how this alleged failure aided and abetted Orlinsky's alleged undue influence over Lerner.

Goldberg's allegations that HSBC had actual knowledge of the undue influence consists of the fact that Orlinsky was present during financial meetings between Lerner and Saffayeh, and because Saffayeh's prepared paperwork to designate Orlinsky as beneficiary of the annuity while Lerner was in the hospital. Goldberg also alleges that Saffayeh failed to adequately inform Lerner of the consequences of naming Orlinsky beneficiary of the annuity in violation of HSBC Securities' Know Your Customer Rules, because it was impossible for Lerner to comprehend the financial consequences of his actions, and Saffayeh made no attempt to inform Lerner of the consequences of naming Orlinsky as a beneficiary. These facts, that HSBC essentially performed its banking functions in an arms length manner, do not support a claim of aiding and abetting undue influence.

Goldberg also claims that Shtivelman had actual knowledge of Orlinsky's undue influence based on Orlinsky's constant presence and pressure during Shtivelman's meeting with Lerner, that Shtivelman knew that Lerner lacked the capacity to designate a beneficiary, and that despite this knowledge Shtivelman completed the transaction by

which Lerner opened the ITF account. It is further alleged that absent Shtivelman's assistance, Lerner would not have opened the ITF account, and that Shtivelman knowingly gave substantial assistance to Orlinsky's exercise of undue influence.

Here again, these allegations fail to state a claim for substantial assistance of Orlinsky's alleged undue influence. That Saffayeh and Shtivelman observed Orlinsky's alleged exercise of undue influence over Lerner are insufficient and lack the required specificity to support a cause of action. The amended complaint is devoid of any alleged affirmatively assistance, concealing or failure to act when required to do so in furtherance of Orlinsky's alleged scheme.

The closest plaintiff comes are allegations that Saffayeh and Shtivelman violated the HSBC Know Your Customer rules. Even here, however, the allegations fall short. These allegations, made on information and belief, are conclusory, and offer no specificity as to what actions Saffayeh and /or Shtivelman took which constituted substantial assistance,

Essentially, Goldberg alleges that the HSBC defendants observed Orlinsky's alleged undue influence while performing their banking functions, and did nothing to stop it, thereby aiding and abetting it. Allegations of the HSBC defendants' inaction is insufficient to state a claim for aiding and abetting undue influence. *See National Westminster Bank USA v. Weksel*, 124 A.D.2d 144, 148 (1st Dep't 1987) ("We know of

no case where mere inaction by a defendant has been held sufficient to support aider and abettor liability for fraud”).

Goldberg also fails to state cause of action against the HSBC bank for breach of contract. The third cause of action of the amended complaint alleges that Lerner entered into a contractual relationship with HSBC Bank “whereby Lerner covenanted to deposit funds with HSBC Bank and HSBC Bank covenanted to hold those funds and disperse them according to Lerner’s order.” Goldberg alleges that HSBC Bank issues “Know Your Customer” rules, which are binding contractual duties of HSBC Banks and its employees, and which Shtivelman breached when he failed to discuss Lerner’s investment goals with Lerner, and failed to discuss with Lerner the meaning of “ITF” and to explain to Lerner that he was creating a Totten Trust for Orlinsky’s benefit.

These vague allegations fail to identify the specific contractual provision allegedly breached, and therefore cannot support a cause of action for breach of contract. *Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233, 234 (1st Dep’t 1994) (“The IAS court properly dismissed, without leave to replead, the plaintiff’s first cause of action, purporting to set forth a cause of action for breach of contract, as too indefinite, and therefore, unenforceable, for plaintiffs’ failure to allege, in nonconclusory language, as required, the essential terms of the parties’ purported personal services contract, including those specific provisions of the contract upon which liability is predicated”); *Valley Cadillac Corp. v. Dick*, 238 A.D.2d 894 (4th Dep’t 1997) (“A complaint for

breach of contract must allege the provisions of the contract upon which the claim is based”).

In accordance with the foregoing, the Court grants the HSBC defendants’ motion to dismiss the amended complaint against them.

Orlinsky’s cross-moves to change venue to Surrogate’s Court, King’s County. As Orlinsky notes, as the Court is granting the HSBC defendants’ motion to dismiss, there are no remaining parties residing in New York County, and there is no other basis for keeping this action venued here. CPLR 503. *See Christomanos v. Vick*, 95 A.D.3d 461 (1st Dep’t 2012). As there is a pending action in the Surrogate’s Court, Kings County, and both Goldberg and Orlinsky reside there, that is the proper venue. *See, e.g., Hoffman v. Sitkoff*, 297 A.D.2d 205 (1st Dep’t 2002) (while the Surrogate’s Court does not generally have jurisdiction over enforcement of a contract, where “the agreement in question is inextricably connected with a contested will so that the dispute will necessarily affect the administration of the estate, removal of the action to Surrogate’s Court is appropriate since the Surrogate’s Court has full general jurisdiction in law and in equity with respect to all matters relating to the estates and affairs of decedents); *Carmel v. Shor*, 250 A.D.2d 475, 476 (1st Dep’t 1998) (“CPLR 325 (e) expresses a preference for removal to Surrogate’s Court of all matters affecting the administration of a decedent’s estate. By statute (SCPA 209 [4]), the Surrogate’s Court is empowered to determine a

decedent's interest in any property claimed to constitute a part of his gross estate and to determine the rights of any persons claiming an interest therein, as against the decedent”).

Goldberg argues that such a transfer is not proper because Orlinsky failed to make a written demand for change of venue as required by CPLR 511(b).³ However, failing to comply with the written demand requirement only effects defendant's ability to change venue as a matter of right. *See Hughes v. Nigro*, 108 A.D.2d 722, 723 (2d Dep't 1985) (“In order to effect a change of venue *as a matter of right*, the defendant must serve a written demand upon the plaintiff that the action be tried in a county which the defendant specifies as proper (CPLR 511 [b])”) (emphasis added). The failure does not effect whether the court in its discretion can entertain such a motion. “While it is generally true that if a county defendant, as here, follows the special ‘demand’ procedure of CPLR 511(b) . . . such relief will be granted, it does not follow that such relief is judicially compelled *or the court is foreclosed from considering the discretionary* grounds for change or retention of venue set out in CPLR 510.” *Windhurst v. Thompson*, 78 A.D.2d 930, 931 (3rd Dep't 1980) (emphasis added). *See also Callanan Industries, Inc. v. Sovereign Constr. Co.*, 44 A.D.2d 292, 295 (3d Dep't 1974) (having failed to timely

³ CPLR 511(b) states in part:

The defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant.

comply with CPLR 511, “defendants were not entitled to a change of venue as a matter of right and their motion thus became one addressed to the court’s discretion”).

Accordingly, Orlinsky’s cross motion is granted, and this action shall be transferred to the Surrogate’s Court, Kings County.

In accordance with the foregoing, it is hereby

ORDERED that the motion by Defendants HSBC Securities (USA), Inc. and HSBC Bank, N.A. to dismiss the action (motion seq. 002) as against them is granted; and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties, the Clerk of this Court is directed to enter judgment dismissing the amended complaint in its entirety and any cross-claims as against Defendants HSBC Securities (USA), Inc. and HSBC Bank, N.A. only, together with cost and disbursements as taxed by the Clerk; and it is further

ORDERED that the cross motion by defendant Arnold Orlinsky to transfer this action to Surrogate’s Court, Kings County (motion seq. 003) is granted; and it is further

ORDERED that this action is transferred from this Court to the Surrogate’s Court, County of Kings, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Surrogate’s Court, County of Kings, upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

ORDERED that the motion by defendant Arnold Orlinsky to dismiss the complaint (motion seq. 001) is denied without prejudice to renewal in Surrogate's Court, Kings County.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
February 28, 2014

ENTER:

Saliann Scarpulla, J.S.C.
HON. SALIANN SCARPULLA