

Fixler v Reisman

2014 NY Slip Op 30591(U)

March 5, 2014

Supreme Court, New York County

Docket Number: 502886/13

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

**HELENE FIXLER, as beneficiary, and Trustee
of the Armin and Marilyn Reisman Family Trust,**

Plaintiff,

-against-

**STEVEN REISMAN, A/K/A RABBI STEVEN
REISMAN, A/K/A YISROEL REISMAN,
A/K/A RABBI YISROEL RESIMAN, A/K/A
SRULY REISMAN, A/K/A RABBI SRULY
REISMAN, as Trustee of the Armin and Marilyn
Reisman Family Trust, and YAKOV HOROWITZ
A/K/A RABBI YAKOV HOROWITZ, as Trustee of
the Armin and Marilyn Reisman Family Trust,**

Defendants.

DECISION/ORDER

Index No. 502886/13

**Submitted: 1/30/14
Mot. Seq. # 1**

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion to dismiss the complaint.

| Papers | Numbered |
|--|-----------------|
| Notice of Motion, Affidavits and Exhibits and Memorandum of Law..... | <u>1-5</u> |
| Affirmations in Opposition..... | <u>6-8</u> |
| Reply Memorandum of Law..... | <u>9</u> |

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Defendants move, pre-answer, to dismiss the plaintiff's complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(1) and (7). In support of the motion, there is an affirmation of counsel which merely states that a copy of the trust agreement is annexed to the complaint. There is a copy of the complaint annexed to

the Notice of Motion. There are two Memos of Law in support of the motion. There is a Second Affirmation from movants' counsel and an affidavit from two of plaintiff's adult children.

Background

At oral argument, counsel explained that plaintiff and defendant Reisman are siblings and co-trustees of an inter vivos irrevocable trust set up in 2001 by their parents. It was stated that after 10 years of serving as co-trustees, their mother, the co-grantor, added a third trustee, in 2011, co-defendant Yakov Horowitz. A copy of the Trust Agreement is annexed to the complaint, without Schedule A, the list of trust assets. The Trust Agreement provides that plaintiff Helene Fixler and defendant Steven Reisman are appointed co-trustees, and they, along with the grantors, executed the Agreement. It also provides that the trust assets must be divided into two separate trusts, one for plaintiff and her family and one for defendant and his family.

The Agreement provides that each trust share should be distributed, both principal and interest, as the trustees determine in their sole discretion to distribute, to the class of people which consists of the trustee, his or her spouse and children, and to any charities they want to contribute to. The grantors' two children and co-trustees, Helene Fixler and Steven Reisman, are given a power of appointment over his or her trust share, to enable distribution of the remainder of his or her share by will. Article Fifth permits the Grantors to appoint an additional trustee.

The Trust Agreement does not provide for mandatory accountings. It does provide that an intermediate or final account may be "settled by agreement with the adult beneficiaries interested in the account and any parent of any minor beneficiary and such settlement shall be binding on all persons interested therein." (Page 8) The

Trust Agreement also provides that (Page 9 Article Fifth "I"):

If any person eligible to receive any principal or income from any trust created hereunder shall act as a Trustee, such Trustee shall have no power whatsoever to make or participate in making decision affecting in any way the disposition of the income or the principal of such trust to himself.

and Page 9, Article Fifth "K":

All decisions regarding any trust shall be made by a majority of the Trustees not disqualified to act thereon. However, insofar as third persons dealing with the Trustees are concerned, instruments of any kind (including but not by way of limitation, any check, order, demand, assignment, transfer, contract, authorization, proxy, consent, notice or waiver) need be executed by only one Trustee, and when so executed shall be fully binding as if executed by all of them.

In the complaint, plaintiff has six causes of action; breach of trust; breach of implied covenant of good faith; breach of fiduciary duty; conversion; unjust enrichment and for an accounting. The plaintiff alleges in the complaint that the trust assets include real estate, stocks, bonds, bank accounts, shares in a closely held business and other assets.

Plaintiff further alleges that defendant Steven Reisman, her brother and co-trustee, never divided the trust assets into two equal trusts, one for his family and one for hers, didn't obtain her consent for withdrawals for his family's benefit, even though he was disqualified from making those decisions by Article Fifth paragraph I, that he has already distributed more than half of the trust assets to his children, and that once

the third trustee was appointed, they still failed to follow the terms of the Trust Agreement. Plaintiff also alleges that at least \$600,000 is unaccounted for. Plaintiff further alleges that she has never been formally notified of the third trustee's appointment.

The affidavit from two of plaintiff's children states that they have been receiving trust distributions, are happy with the administration of the trust by defendants, and they prefer that "the administration of the trust continue in the manner in which it currently operates, and that our mother not be given greater control of the Trust." Apparently they are unaware that she is disqualified from voting on distributions to them.

The Second affirmation from defendants' counsel is dated after plaintiff's opposition and is deemed a Reply. It merely says he is annexing a 2008 statement. The statement annexed is a bank statement for one month ending February 29, 2008, for an account at Astoria Federal Savings Bank. There is no explanation provided for the inclusion of this exhibit.

Turning to the memo of law in support of defendants' motion, counsel sets forth numerous averments which are not made with his personal knowledge, are not affirmed, and are thus not admissible as evidence. To be clear, the document titled memorandum of law is the only document with any discussion of the motion. There are also a handful of cases cited, but they are not on point. For example, it is stated that plaintiff may not assert a cause of action for an accounting, because "plaintiff has failed to allege a breach of a fiduciary duty." Plaintiff has clearly alleged a breach of fiduciary duty.

Discussion

Generally, "[o]n a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7)

for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2008]; see also *Manfro v McGivney*, 11 AD3d 662, 663 [2004]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, conclusory allegations in a pleading are not entitled to favorable inferences, and a complaint based on legal conclusions is insufficient and cannot survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009], citing *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1994]). Bare legal conclusions are not presumed true (see e.g. *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022 [2007]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]), and factual claims flatly contradicted by the record are not entitled to any beneficial inferences (*Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affd* 66 NY2d 946 [1985]; *Gershon v Goldberg*, 30 AD3d 372, 373 [2006]).

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court’s role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2nd Dept 2005]. See also *Leon v Martinez*, 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Dye v Catholic Med.*

Ctr. of Brooklyn & Queens, 273 AD2d 193 [2nd Dept 2000].

The standard of review on such a motion is not whether the 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.” *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC*, 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester*, 282 AD2d 561, 562. The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez*, 84 NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518. Applying this analysis to the motion, defendants’ motion fails to make out a prima facie case for dismissal under CPLR 3211 (a) (7).

Turning to the branch of the motion seeking dismissal pursuant to CPLR 3211 (a) (1), the court finds defendants’ motion also fails to make out a prima facie case for dismissal on this ground. A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) will be granted if the “documentary evidence resolves all factual issues as a matter

of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [2002] [internal quotation marks omitted]; see also *Fontanetta v John Doe 1*, 73 AD3d 78, 85 [2010]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). Documents where the contents are "essentially undeniable" include judicial records, mortgages, deeds, contracts and other written agreements (*Fontanetta*, 73 AD3d at 84-85). An insurance policy also suffices as "documentary evidence" for CPLR 3211 (a) (1) purposes (see e.g. *Sands Point Partners Private Client Group v Fidelity Natl. Tit. Ins. Co.*, 99 AD3d 982 [2012] [copy of policy conclusively established entitlement to 3211 (a) (1) dismissal of complaint]). Lastly, a complaint containing factual claims flatly contradicted by documentary evidence should be dismissed (*Well v Yeshiva Rambam*, 300 AD2d 580, 581 [2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 162 [1997], cert. denied 522 US 967 [1997]).

The court cannot determine what documentary evidence defendants are basing the motion on, a document they claim entitles them to have the complaint dismissed. Indeed, there are no documents whatsoever annexed to the motion.

The court finds that defendants have failed to make out a prima facie case for dismissal of the complaint, the relief requested in their motion. The motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: Brooklyn, New York
March 5, 2014

FILED
 KINGS COUNTY CLERK
 2014 MAR 10 AM 9:34



 Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
 Justice Supreme Court