

**Davis v Davis**

2014 NY Slip Op 31278(U)

May 8, 2014

Sup Ct, Suffolk County

Docket Number: 11-21975

Judge: Joseph Farneti

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whether real or personal or in his name or her name, or in the name of a nominee, including but not limited to . . . bank accounts, investment security accounts, profit sharing plans, 401K accounts, business investments and stock ownership, and any other assets held by defendant during the pendency of the action . . .” A pendente lite order issued by the Court (Blydenburgh, J.) in April 2010 continued the temporary injunctive relief granted by the order to show cause. Thereafter, an application by Douglas Davis to use assets held in an account maintained with UBS Financial Services to pay counsel fees was denied by an order of this Court (Quinn, J.) issued in May 2011. It is undisputed that Douglas Davis was the title holder of such UBS account.

Meanwhile, prior to the commencement of the divorce action, Douglas Davis was convicted in connection with a fatal hit-and-run accident that occurred in January 2009. As relevant to the instant motion, just days after the motor vehicle accident, Douglas, who was employed at the time by Davis Aircraft, Inc., a closely-held family corporation, executed a durable power of attorney appointing his father, defendant Bruce Davis, and his sister, Jill Davis, as his attorneys-in-fact.

Thereafter, as the matrimonial action was pending, plaintiff commenced the instant action against Jill Davis. The complaint, which sets forth three causes of action, alleges that the UBS account at issue contained marital funds and that defendant, in violation of the temporary restraining order and the pendente lite order issued in the matrimonial action, withdrew \$140,000 from such account during the period from September 2009 through January 2011. The first cause of action alleges plaintiff has “an equitable ownership interest in the UBS account which contains marital funds,” and that defendant, acting as an agent for her brother, “knowingly and intentionally converted the funds in such account for her own use and enjoyment and to pay her brother’s attorney’s fees and the household expenses.” The second cause of action alleges plaintiff has a beneficial ownership interest in the UBS account; that defendant, in her capacity as attorney-in-fact for Douglas Davis, owed plaintiff a duty of properly maintain the UBS account; and that defendant, by her “unauthorized and negligent management of the UBS account . . . caused pecuniary harm to plaintiff . . . by depleting significant marital funds and consequently denied [her] of her right to the proper equitable distribution award to which she is entitled.” The third cause of action alleges defendant, “[p]ursuant to her power of attorney,” owed plaintiff a fiduciary duty and that she breached such duty by “engaging in the unauthorized withdrawal” of funds from the UBS account, thereby depriving plaintiff “of her right to the proper equitable distribution” of marital assets. Plaintiff also brought an action against her father-in-law, Bruce Davis, under assigned index number 21976/2011, containing the same factual allegations and the same causes of action alleged against defendant in this action.

By order issued on September 18, 2012, this Court (Baisley, J.) denied, without prejudice, a motion by plaintiff for an order consolidating the actions against defendant and Bruce Davis and granting summary judgment in her favor. It also denied the branches of a cross motion by defendant for summary judgment in her favor and for dismissal of the second and third causes of action. The Court, however, granted the branch of defendant’s cross motion for dismissal of the first cause of action based on the failure to state a cause of action for conversion.

Then, on October 15, 2012, plaintiff and Douglas Davis entered into a comprehensive settlement agreement that addresses the issues of child support, maintenance and distribution of marital property. As relevant to the instant dispute, the settlement agreement states in Article XI that the parties “acknowledge that after the date of this Agreement, neither party has any right, claim or entitlement to any account held in the name of the other party and each party shall keep such accounts and stocks as are now in his or her name as separate property (i.e, the Husband shall keep UBS account [number] . . . in his sole name. The Wife hereby waives any and all right, title and interest in and to same. The Wife shall keep Morgan Stanley household account number . . . and Chase checking and savings account numbers . . . and the Husband hereby waives any and all right, title and interest in and to the same).” It further provides that, in consideration of plaintiff waiving her interest in a 401(k) plan and in a profit sharing plan provided to Douglas Davis by Davis Aircraft Products, “as well as in consideration of her waiver in [the] UBS account . . . and the Husband’s business interests, the Husband has agreed to transfer the Marital Residence to the Wife free and clear, which shall be her separate property.” Additionally, Article V of the settlement agreement states that, except as specifically set forth therein, “each party waives any and all rights which he or she may have to a distributive award or an award of equitable distribution with respect to any property acquired by the other or jointly acquired either before or during the marriage . . . and each agrees not to seek through judicial proceedings or otherwise a distributive award or an award of equitable distribution with respect to any property acquired by the other or jointly acquired either before or during the marriage.”

Subsequently, a written stipulation was executed in this action on April 18, 2013 and so-ordered by the undersigned. The stipulation states that this action “shall be consolidated for all purposes with the case Catherine Davis v Bruce Davis, index # 21976/11. Both matters shall next appear on this court’s calendar for a compliance conference on 6/20/13.” Thereafter, the actions continued to proceed under their respective index numbers. On September 11, 2013, an oral application for a joint trial with the action against Bruce Davis was granted by the undersigned. The Court notes that compliance conferences are scheduled for May 22, 2014 for both this action and the action against Bruce Davis.

Defendant now moves for an order granting summary judgment in her favor, arguing that plaintiff expressly waived any interest she may have had in the UBS account by executing the settlement agreement in the divorce action, and that plaintiff did not sustain any financial injury due to the alleged improper withdrawals from the UBS account during the pendency of the divorce action. Defendant’s submissions in support of the motion include copies of the pleadings served in this action and the related action against Bruce Davis; copies of moving and cross-moving papers allegedly filed in this action in 2012; and excerpts of the settlement agreement executed in plaintiff’s and Douglas Davis’ divorce action.

Plaintiff opposes the motion and cross-moves for an order granting summary judgment in her favor. Plaintiff argues, among other things, that she was a beneficial owner of the UBS account “as a result of her marriage to [Douglas] Davis,” and that she was “deprived of her right to equitable distribution of the \$140,000 that was wrongfully withdrawn from the account” by defendant. She also argues that she was a third-party beneficiary of the power-of-attorney authority conferred on defendant by Douglas Davis, and that defendant breached a duty of care owed to her by helping Douglas, who was

incarcerated, transfer funds from the UBS account to an account maintained with Bank of America so they could be used to pay pendente lite obligations, despite a court order restraining the use of marital assets. Plaintiff further asserts that the execution of the settlement agreement in the matrimonial action did not impact her right to pursue the claims in this action against defendant. In an affidavit annexed to the cross-moving papers, plaintiff avers that she executed the settlement agreement because she feared a wrongful death action brought against her husband might result in the loss of the marital residence, and that she “agreed to the terms of the matrimonial settlement, including a waiver of my interest in Davis Aircraft and the value of the UBS account as it existed at that time, in consideration of, among other things, the transfer of the home to [her], free and clear of the mortgage.” Plaintiff’s submissions in support of the cross motion include a copies of the pleadings, the settlement agreement, the written power of attorney executed by Douglas Davis in January 2009, an excerpt of defendant’s deposition testimony, of and excerpts of deposition testimony obtained in the matrimonial action.

As to the second cause of action, it is axiomatic that to prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that such breach was a proximate cause of the his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Miglino v Bally Total Fitness of Greater N.Y.*, 92 AD3d 148, 937 NYS2d 63 [2d Dept 2011]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (*Eiseman v State of New York*, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (*Church v Callanan Indus.*, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347, 728 NYS2d 731 [2001]).

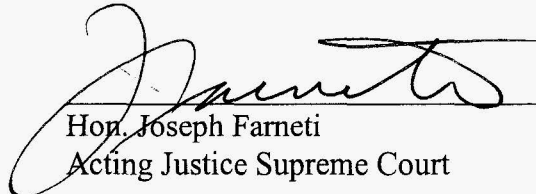
The evidence submitted in support of the motion establishes a prima facie case that plaintiff did not suffer any pecuniary injury due to the alleged improper withdrawals from the UBS account during the pendency of the divorce action. Significantly, under the terms of the settlement agreement entered into in the matrimonial action, the UBS account at issue constitutes Douglas Davis’s separate property, and any interest plaintiff may have had in such account is waived. Since plaintiff and Douglas Davis settled the question of their respective rights in property held jointly and separately, including the UBS account, by written agreement, equitable distribution was not at issue in their divorce action (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 872 NYS2d 426 [2008]; *Pellino v Pellino*, 308 AD2d 522, 764 NYS2d 478 [2d Dept 2003]). Thus, defendant’s submissions demonstrate that plaintiff is unable to establish her claim that the alleged depletion of such account denied her “the proper equitable distribution award to which she [was] entitled in the divorce action.” The conclusory assertion by plaintiff’s attorney that “defendant’s negligent conduct in withdrawing the sum of \$140,000 from the restrained UBS account in violation of several court orders was the cause of harm to plaintiff and the plaintiff was, in fact, harmed and damaged” is insufficient to raise a triable issue of fact. Accordingly, summary judgment dismissing the negligence claim against defendant is granted.

Defendant’s submission also are sufficient to established a prima facie case of entitlement to judgment in her favor on the third cause of action. “[A] fiduciary relation ‘exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within

the scope of the relation' ” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005], quoting Restatement [Second] of Torts § 874, comment a). A fiduciary owes a duty of “undivided and undiluted loyalty to those whose interest the fiduciary is to protect (citation omitted). This is a sensitive and ‘inflexible’ rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty” (*Birnbaum v Birnbaum*, 73 NY2d 461, 466, 541 NYS2d 746 [1989]). Moreover, to recover damages for a breach of fiduciary duty, a plaintiff must establish the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant’s misconduct (see *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 935 NYS2d 304 [2d Dept 2011]; *Robert I. Gluck, M.D., LLC v Kenneth M. Kamler, M.D., LLC*, 74 AD3d 1167, 904 NYS2d 151 [2d Dept 2010]; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 901 NYS2d 715 [2d Dept 2010]; see also *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]). Here, by submitting proof that plaintiff and Douglas Davis resolved the issue of ownership of the UBS account and other assets in a settlement agreement, defendant established prima facie that plaintiff did not suffer any harm to her rights in equitable distribution by the alleged breach of defendant’s fiduciary duty, as equitable distribution was not an issue in the divorce action (see *Staffenberg v Fairfield Pagma Assoc., L.P.*, 95 AD3d 873, 944 NYS2d 568 [2d Dept 2012]; *Country Club Partners, LLC v Goldman*, 79 AD3d 1389, 913 NYS2d 803 [3d Dept 2010]; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 901 NYS2d 715). The unsubstantiated, conclusory statement by plaintiff’s counsel that “significant marital funds were depleted” due to defendant’s “misconduct” in assisting Douglas Davis transfer funds from the UBS account to a bank account he allegedly used to pay court-ordered support obligations during the pendency of the divorce action, and that, as a consequence, plaintiff was “deprived of her right to the proper equitable distribution award,” is insufficient to raise a triable issue.

Accordingly, defendant’s motion for summary judgment dismissing the complaint is granted. Plaintiff’s cross motion for summary judgment is denied, as moot.

Dated: May 8, 2014



Hon. Joseph Farneti  
 Acting Justice Supreme Court

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION