

Estate of Kandov v Kogan

2014 NY Slip Op 31702(U)

June 30, 2014

Sup Ct, NY County

Docket Number: 653360/11

Judge: Anil C. Singh

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

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ESTATE OF ILYA KANDOV.,
 Plaintiff,

DECISION AND
 ORDER

-against-

Index No.
 653360/11

NATALIYA KOGAN AND NATALIYA DESIGN
 STUDIO, INC.

Defendants.

-----X

HON. ANIL C. SINGH, J.:

Defendants Nataliya Kogan (“Kogan”) and Nataliya Design Studio Inc. (collectively, “defendants”) move for summary judgment pursuant to CPLR 3212 with respect to plaintiff’s claims for breach of fiduciary duty and conversion. In a prior decision issued by this court on June 27, 2012, plaintiffs’ cause of action against Kogan for embezzlement was converted into one for conversion, and plaintiff Cititailor, Inc. (“Cititailor”) was dismissed from this action. Plaintiff opposes the summary judgment.

On March 10, 2013 while the motion was pending before this court, Kandov passed away, resulting in an automatic stay of this action on April 11, 2013. The Surrogate’s Court for Queens County appointed Kandov’s wife, Ninel Kandova as representative of Kandov’s estate on October 2, 2013. The stay was lifted and the motion for summary judgment was restored to the calendar. Oral argument was heard on April 16, 2014. The standards governing summary judgment are well known. As applied to this case, the defendants must establish that they are entitled to a judgment as a matter of law by the submission of admissible evidentiary proof (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 [1980], *citing Friends of Animals, Inc. v.*

Associated Fur Mfrs., Inc., 46 N.Y.2d 1065 [1979]). If the defendants are successful, plaintiff must demonstrate, by evidentiary proof in admissible form, the existence of at least one fact sufficient to require trial of an issue of fact (*Id.*). The court must grant the non-movant the benefit of every favorable inference and view the evidence in the light most favorable to him (*see Negri v. Stop and Shop, Inc.*, 65 N.Y.2d 625 [1985]).

The decedent Ilya Kandov (“Kandov”) had a 50 percent shareholder in Cititailor, a corporation that operates a tailoring and clothing alteration business; Kogan is the other 50 percent shareholder. Nataliya Design Studio Inc. is a corporation that also operates a tailoring business and, shares office space with Cititailor at 5 East 59th Street in Manhattan.

In August 2010, Kandov was diagnosed with stage IV colon cancer. He was hospitalized on November 22 and remained there for three weeks. Thereafter, Kandov underwent various chemotherapy treatments over the course of the first half of 2011; he did not return to work at Cititailor until March 2011.

While Kandov was hospitalized, and during his chemotherapy treatment, Kogan continued to operate and manage Cititailor. In December 2010, Kogan formed Nataliya Design Studio Inc., possibly as a result of previous oral negotiations between Kandov and Kogan regarding the dissolution of Cititailor Inc (defendants’ affidavit in support at ¶ 21). Kandov and Kogan dispute whether they agreed to close Cititailor and divide its assets (*compare* plaintiffs’ affirmation in opposition at Exhibit A *with* defendants’ affidavit in support of motion for summary judgment at ¶ 17). However, it is undisputed that Kandov and Kogan signed a Partnership Dissolution Agreement (the “agreement”) bifurcating Cititailor into two companies, Cititailor Inc. and Nataliya Design Studio Inc., although the parties disagree about the exact date

of execution, notwithstanding that the agreement recites that it was executed on May 15, 2011 (*see* defendants' motion for summary judgment at Exhibit 5; plaintiffs' affirmation in opposition at Exhibit A ¶ 25). The agreement was notarized. (defendants' motion for summary judgment at Exhibit 5).

The gravamen of the defendants' motion is based on the release clause in paragraph 7 of Partner Dissolution Agreement, which states:

The Partners hereby release and forever discharge one another from any and all claims, demands, actions, losses and damages whatsoever arising from or relating to the Partnership, with the exception of any claims, demands, actions, losses and damages arising from or resulting from the terms and conditions of this Agreement (defendants' motion for summary judgment at Exhibit 5).

The defendants contend that the plain meaning of this clause is unambiguous: Kandov's claims sounding in breach of fiduciary duty and conversion arise from or relate to the "partnership" – the corporation Cititailor – and predate the execution of the agreement and, thus, are barred (defendants' affidavit in support of motion for summary judgment at ¶ 4; defendants' memorandum of law in support of motion for summary judgment at p. 4-8).

With respect to plaintiff's breach of fiduciary duty claim against Nataliya Design Studio Inc., defendants submit that Nataliya Design Studio Inc. did not owe Kandov a fiduciary duty (defendants' notice of motion for summary judgment at ¶ 2; defendants' memorandum of law in support of motion for summary judgment at p. 8-9). Therefore, on the aforementioned grounds, the defendants contend that they are entitled to judgment as a matter of law.

Kogan has established that the agreement entitles her to judgment as a matter of law, whereas the Estate of Kandov ("the Estate") has failed to raise a triable issue of fact necessitating

a trial. Kogan proffered a written agreement, which was executed by both parties before a notary public, that contains the aforementioned release clause (defendants' motion for summary judgment at Exhibit 5). A "valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Minerals and Metals Corp. v. Holme*, 35 A.D.3d 93, 98 [1st Dept 2006]). Where the language of the release is clear and unambiguous, the signing of the release renders it binding on the parties (*see Booth v. 3669 Delaware, Inc.*, 92 N.Y.2d 934, 935 [1998]).

Kandov acknowledges that he signed the agreement (plaintiffs' affirmation in opposition at Exhibit A). However, he stated that he did not realize that the agreement was a dissolution agreement because he was under the influence of various cancer treatments and that he could not read the agreement or understand its contents (plaintiffs' affirmation in opposition to defendants' motion at Exhibit A). In short, the Estate contends that Kandor lacked the mental capacity to contract and, therefore, the release is invalid (plaintiffs' memorandum of law in opposition at p. 6).

The Estate has not offered any evidence in admissible form as to whether he lacked the capacity to enter into the agreement. Kandor's affidavit in which he asserts his lack of capacity is wholly self-serving (plaintiffs' affirmation in opposition at Exhibit A). The Estate also relies on appended medical records from his treating physician, Dr. Arthur I. Goldberg, but not once in the course of Dr. Goldberg's written notes spanning six months of Kandov's treatment, from December 2010 to the end of May 2011, is any reference made to Kandov's ability to read or comprehend the meaning of things he read, let alone the deterioration of either (plaintiffs' affirmation in opposition to defendant's motion at Exhibit B). According to the May 15, 2011

date listed on the executed and notarized Partnership Dissolution Agreement, Kandor executed the agreement while under Dr. Goldberg's treatment. In addition, there is no affidavit from Dr. Goldberg attesting that the treatment Kandor underwent affected his capacity to contract. Kandor returned to work at Cititailor in March 2011, which is circumstantial evidence of his possessing the mental faculties necessary to make business decisions and execute his responsibilities (plaintiffs' complaint at ¶ 14).

To raise an a factual issue with respect to his capacity to contract, the Estate must offer proof in admissible form that, at the time of entering into the agreement, Kandor was, "incapable of comprehending and understanding the nature of the transaction at issue, or ... due to his ... mental illness, was unable to control his ... conduct" (*400 West 59th Street Partners, LLC v. Edwards*, 28 Misc.3d 93, 95 [1st Dept 2010] citing *Ortelere v. Teachers' Retirement Bd. of City of NY*, 25 N.Y.2d 196 [1969]). The Estate is required to offer more than conclusory assertions to that effect (*see STA Travel (New York), Ltd. v. Raymond*, 197 A.D.2d 495 [1st Dept 1993] (holding that defendant's manic depressive condition and suicide attempts raised a triable issue of fact concerning his capacity to contract); *Sears v. First Pioneer Farm Credit, ACA*, 46 A.D.3d 1282 [3d Dept 2007] (affirming the Supreme Court's decision to dismiss plaintiff's cause of action seeking rescission of a loan agreement in part because no issue of fact was raised as to plaintiff's competency, notwithstanding that plaintiff suffered physical limitations due to having suffered a stroke)).

Here, the Estate has failed to meet its burden. The Estate's reliance on, *In re Estate of ACN*, 133 Misc.2d 1043 [NY Sur. Ct. 1986] is without merit. The case is distinguishable on its facts given that the grantor was determined to have been suffering from primary degenerative

dementia at the time he executed the trust. (*Id.*). Plaintiff has not shown that Kandor lacked the capacity to enter into the agreement with Kogan.

Furthermore, the law allows a principal to release his fiduciary from claims of breach of a fiduciary duty where, as here, “given the nature of the parties’ relationship at the time of the release, the principal is aware of information about the fiduciary that would make reliance on the fiduciary unreasonable” (*Pappas v. Tzolis*, 20 N.Y.3d 228 [2012]). Kandov’s allegations and sworn affidavit affirm that the business relationship between Kandov and Kogan had broken down and that Kandov knew that Kogan wanted to end their business relationship such that the relationship was no longer one of trust (*see* plaintiffs’ affirmation in opposition at Exhibit A; *Tzolis*, 20 N.Y.3d at 233). Therefore, the release clause in the agreement is sufficient to bar the Estate from suing Kogan for breach of fiduciary duty.

Kogan moves to dismiss plaintiff’s cause of action for breach of fiduciary duty against Nataliya Design Studio Inc. However, the Estate never asserted any such cause of action in their complaint (*see* plaintiff’s complaint at p. 7). Plaintiffs only accused Kogan of having breached a fiduciary duty to Kandov (*see* plaintiffs’ complaint at ¶¶ 26-9). At oral argument prior to this court’s earlier decision on defendants’ motion to dismiss plaintiffs’ causes of action, no fiduciary duty claim against Nataliya Design Studio Inc. was ever raised by the parties or discussed by the court (defendants’ motion for summary judgment at Exhibit 2). Therefore, defendants’ motion for summary judgment on this point is extraneous.

However, to the extent that the Estate asserts such a claim, a fiduciary relationship, “exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*EBC I, Inc. v. Goldman Sachs*

& Co., 5 N.Y.3d 11, 19 [2005] citing Restatement [Second] of Torts 874, comment a). Although a contract between the parties is not necessary to impose fiduciary duties on one to the other (Id., at 20), there was no relation between Kandov and Nataliya Design Studio Inc., and a party does not typically owe fiduciary duties to another party with whom it has no relation (see *Penato v. George*, 52 AD2d 939, 942 [2d Dept 1976]; see also Black's Law Dictionary [9th ed 2009], fiduciary). In light of the foregoing, summary judgment is granted on this claim insofar as it was ever asserted by the Estate.

Finally, the Estate's contention that Kogan breached the agreement and, therefore, may not enforce it (plaintiff's memorandum of law in opposition at p. 8) does not affect the disposition of defendants' motion because plaintiff has failed to offer evidentiary proof in admissible form of this fact. The Estate did not assert in the complaint that Kogan breached any part of the agreement (defendants' motion for summary judgment at Exhibit 1) and his attorney raises this issue belatedly in his memorandum of law without offering any evidence in support of the contention (see *Banco Popular N. Am. v. Victory Taxi Mgt.*, 1 N.Y.3d 381, 383 [2004] (“[A]verments merely stating conclusions, of fact or of law, are insufficient” to ‘defeat summary judgment’” quoting *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 290 [1973]); *Travis v. Allstate Ins. Co.*, 280 A.D.2d 394, 395 [1st Dept 2001] (reversing the IAS court's decision granting summary judgment to defendant because plaintiff submitted a memorandum of law without a supporting affidavit on the grounds that plaintiff's amended, verified complaint, “contained all of the factual allegations referred to in the memorandum ... and relied on to oppose defendant's motion”); *Caffee v. Arnold*, 104 A.D.2d 352 [2d Dept 1984] (noting that allegations in a memorandum of law are not, “presented in

evidentiary form”); *Lyndaker v. Sherwin Williams, Inc.*, 140 A.D.2d 979 [4th Dept 1988] (holding that an unsworn memorandum of law is “patently insufficient” to defeat a motion for summary judgment and noting that the plaintiff did not submit an affidavit or “any evidence in admissible form” to defeat the defendant’s motion for summary judgment)).

Plaintiff’s third cause of action for conversion is also dismissed for the reasons set forth above.

Therefore it is

ORDERED that defendants’ motion for summary judgment is granted in its entirety and the complaint is dismissed with prejudice.

Date: June 30, 2014

New York, New York

JUN 30 2014



Anil C. Singh

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