Seidenfeld v Zaltz
2014 NY Slip Op 33980(U)
June 2, 2014
Supreme Court, Kings County
Docket Number: 28790/10
Judge: Jack M. Battaglia
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 59

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SHEILA BERNIKER SEIDENFELD,

Motion Calendar Nos. 37, 38
May 5, 2014
Index No. 28790/10
Action No. 1

Plaintiff,

-against-

DECISION AND ORDER
Jack M. Battaglia
Justice, Supreme Court

HELENE ZALTZ, ISRAEL ZALTZ, and
ADELLE LAWRENCE,

Defendants.

BARBARA ROKEACH as Administrator of the Estate of
LEONARD ROKEACH, Deceased,

Index No. 31636/10
Action No. 2

Plaintiff,

-against-

HELENE ZALTZ, and ISRAEL ZALTZ,

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers submitted on the motion of Helene Zaltz and Israel Zaltz, defendants in both Action No. 1 and Action No. 2, for an order, pursuant to CPLR 3212, dismissing the Verified Second Amended Complaint in Action No. 1 and the Verified Complaint in Action No. 2 as against them; and the cross-motion of Adelle Lawrence, defendant in Action No. 1 only, for an order, pursuant to CPLR 3212, dismissing the Verified Second Amended Complaint as against her:

- Notice of Motion
  Affirmation in Support of Motion to Consolidate, to Dismiss and for Summary Judgment
  Exhibits A-P
- Notice of Cross-Motion
  Affirmation in Support
  Exhibits A-E
- Plaintiffs' Affirmation in Opposition to Defendants' Motion for Summary

Judgment
Exhibits A-B-1
- Plaintiffs' Affirmation in Opposition to Defendant Adelle Lawrence's Cross-Motion for Summary Judgment
- Reply Affirmation in Further Support of Motion to Dismiss and for Summary Judgment
Exhibits A-B
- Reply Affirmation

In Action No. 1, the Verified Second Amended Complaint of plaintiff Sheila Berniker Seidenfeld against defendants Helene Zaltz, Israel Zalts, and Adelle Lawrence purports to allege causes of action for breach of contract (First Cause of Action); breach of the implied covenant of good faith and fair dealing (Second Cause of Action); tortious interference with contract (Third Cause of Action); conversion (Fourth and Ninth Causes of Action); fraud (Fifth, Eighth, and Twelfth Causes of Action); constructive trust (Sixth and Tenth Causes of Action); and quasi-contract/unjust enrichment (Seventh and Eleventh Causes of Action.) In their Verified Answer, defendants Helene Zaltz and Israel Zaltz purport to allege 15 affirmative defenses, including statute of limitations (Verified Answer ¶ 4); statute of frauds (*id.*, ¶ 9); accord and satisfaction (*id.*, ¶ 10); and res judicata (*id.*, ¶ 11.)

In Action No 2, the Verified Complaint of plaintiff Barbara Rokeach as Administrator of the Estate of Leonard Rokeach, Deceased, against defendants Helene Zaltz and Israel Zaltz purports to allege causes of action for breach of contract (First Causes of Action); breach of implied covenant of good faith and fair dealing (Second Cause of Action; tortious interference with contract (Third Cause of Action); conversion (Fourth Cause of Action); constructive trust (Fifth Cause of Action); fraud (Sixth Cause of Action); and quasi-contract/unjust enrichment (Seventh Cause of Action.) In their Verified Answer, defendants Helene Zaltz and Israel Zaltz purport to allege 20 affirmative defenses, including statute of limitations (Verified Answer ¶ 7); statute of frauds (*id.*, ¶ 12); accord and satisfaction (*id.*, ¶ 13); and res judicata (*id.*,¶ 14.)

With a Joint Trial Order dated March 4, 2011, the late Hon. Herbert Kramer joined Action No. 1 and Action No. 2 for trial.

Defendants Helene Zaltz and Israel Zaltz (the "Zaltz Defendants") now move for an order, pursuant to CPLR 3212, dismissing the Verified Second Amended Complaint in Action No. 1 and the Verified Complaint in Action No. 2 as against them. Defendant Adelle Lawrence "cross-moves" for an order, pursuant to CPLR 3212, dismissing the Verified Second Amended Complaint in Action No. 1 as against her.

Neither the Zaltz Defendants nor defendant Lawrence submit a copy of defendant Lawrence's answer to the Verified Second Amended Complaint. Where a motion for summary judgment does not include a "complete set of the pleadings," denial of the motion is "required." (*See Zellner v Tarnell*, 54 AD3d 329, 329-30 [2d Dept 2008]; *see also Washington Realty Owners, LLC v 260*

Washington Street, LLC, 105 AD3d 675, 675 [1st Dept 2013]; *Mieles v Tarar*, 100 AD3d 719, 720 [2d Dept 2012]; *Thompson v Foreign Cars Center, Inc.*, 40 AD3d 965, 965-66 [2d Dept 2007]; *Wider v Heller*, 24 AD3d 433, 434 [2d Dept 2005].) The court may, however, permit renewal upon proper papers. (*See id.*)

To the extent, therefore, that the Zaltz Defendants move for summary dismissal of the Verified Second Amended Complaint as against them in Action No. 1, their motion must be denied; and the "cross-motion" of defendant Lawrence for summary dismissal of the Verified Second Amended Complaint as against her in Action No. 1must be denied; as to both, however, with leave to renew with a complete set of pleadings.

As to Action No. 2, the Zaltz Defendants assert two grounds for dismissal of the Verified Complaint in its entirely, *i.e.*, that "the complaint fails to state a claim upon which relief may be granted," "because Leonard's estate never had an interest in the Brooklyn home that is the subject" of the action; and "pursuant to CPLR 3211(a)(3) because Barbara lacks capacity to sue on behalf of Leonard's estate." (*See* Memorandum of Law in Support of Motion to Consolidate and for Summary Judgment ["Zaltz Defendants' Memorandum"] at 1.)

The Zaltz Defendants contend further that the alleged cause of action for breach of the implied covenant of good faith and fair dealing, and the alleged cause of action for tortious interference, must be dismissed "because both of those claims depend upon the existence of a valid contract, and the Second Department has held that the contract on which those claims are premised is invalid for lack of consideration." (*See id.*)

Among the 20 Affirmative Defenses they allege in their Verified Answer, the Zaltz Defendants fail to mention that Plaintiff lacks capacity to sue on behalf of the Estate of Leonard Rokeach. Having failed to raise that defense in their answer or a pre-answer motion to dismiss, the defense is waived. (*See Deutsche Bank Trust Co. Americas v Cox*, 110 AD3d 760 762 [2d Dept 2013].)

The Verified Answer of the Zaltz Defendants in Action No. 2 includes among the 20 alleged affirmative defenses that generally "[t]he complaint fails to state a cause of action" (Verified Answer ¶ 20), and specifically that "[t]he complaint fails to state a cause of action" for breach of the implied covenant of good faith and fair dealing (*id.*, ¶ 21), for tortious inference with contract (*id.*, ¶ 22), for conversion (*id.*, ¶ 23), and for fraud (¶ 24.) Although at one time the Second Department held that failure to state a cause of action could not be alleged as an affirmative defense, it is now clear that such a defense may be alleged, and that a motion to dismiss on that ground can be made at any time. (*See Butler v Catinella*, 58 AD3d 145, 150-51 [2d Dept 2008]; *see also Stolarski v Family Servs. of Westchester, Inc.*, 110 AD3d 980, 982 [2d Dept 2013].) Where, as here, a post-answer motion is made for failure to state a cause of action, questions can arise as to whether the motion is to be tested by the standards applicable to a motion to dismiss pursuant to CPLR 3211 or a motion for summary judgment pursuant to CPLR 3212. (*See generally Hendrickson v Philbon Motors, Inc.*, 102 AD3d 251 [2d Dept 2012].)

Here, the Notice of Motion seeks "summary judgment dismissing plaintiff's complaint . . . pursuant to CPLR 3212." (*See* Notice of Motion dated January 29, 2014.) Counsel's affirmation in support seeks "summary judgment dismissing the Verified Complaint . . . pursuant to CPLR 3211." (*See* Affirmation in Support of Motion to Consolidate, to Dismiss and for Summary Judgment ¶ 1.) The memorandum of law makes no reference to CPLR 3212, and makes several references to CPLR 3211(a)(7). (*See* Zaltz Defendants' Memorandum at 12, 13.) The Zaltz Defendants do not set forth the standards the court should apply on a motion pursuant to CPLR 3211(a)(7) or on a motion pursuant to CPLR 3212, and, therefore, do not show how application of any such standards would require a ruling in movants' favor on this motion.

Plaintiff's opposition does not help, citing neither CPLR 3211(a)(7) nor CPLR 3212, and at different points settings forth the standards applicable to one and the standards applicable to the other. (*See* Plaintiffs' Affirmation in Oppostion [*sic*] to Defendants Motion for Summary Judgment ["Plaintiffs' Opposition"] ¶¶ 39, 40, 71.) The Zaltz Defendants' reply adds nothing on the question, citing neither CPLR 3211(a)(7) nor CPLR 3212, and failing to set forth the standards under either.

The only certainty that can be gleaned from the submitted papers is that the Zaltz Defendants seek dismissal of the entire Verified Complaint in Action No. 2 "because Leonard's estate never had an interest in the Brooklyn home that is the subject" of the action (*see* Zaltz Defendants' Memorandum at 1.) Such a discrete issue is an appropriate subject for summary judgment. (*See* CPLR 3212[e],[g].)

In addition, as to the alleged causes of action for breach of the implied covenant of good faith and fair dealing (Second Cause of Action) and for tortious interference with contract (Third Cause of Action), the Zaltz Defendants contend that the claims must be dismissed because "the Second Department has held that the contract on which those claims are premised is invalid for lack of consideration" (*see* Zaltz Defendants' Memorandum at 1.) The Zaltz Defendants' Verified Answer included "affirmative defenses" of res judicata (Verified Answer ¶¶ 14, 15), and "[l]ack of consideration for the underlying alleged contract" (*id.*, ¶ 18.) "[T]he issue of the applicability of res judicata to [a] case presents a question of law, not fact" (*see Energycresent, Inc. v Creative Modules Enters.*, 183 AD2d 804 [2d Dept 1992]) that may be resolved either on a motion for summary judgment pursuant to CPLR 3212 (*see id.*; *see also Untied Servs. Auto. Assn. v Meier*, 112 AD2d 288 [2d Dept 1985]) or a motion to dismiss pursuant to CPLR 3211 (*see* CPLR 3211[a][5].)

Plaintiff Barbara Rokeach is the widow of Leonard Rokeach, one of the four surviving children of Max and Elsie Rokeach. The other three surviving children are Helene Zaltz, Defendant in Action No. 1 and 2; Sheila Berniker Seidenfeld, Plaintiff in Action No. 1; and Adelle Lawrence, Defendant in Action No. 1. Defendant Israel Zaltz is Helene's husband. Until their deaths, Max and Elsie Rokeach lived at 5001 11th Avenue, Brooklyn (the "Brooklyn Property".) Max died intestate in November 1982; Elsie died in August 2005.

In Action No. 2, the entire dispute concerns ownership of the Brooklyn Property upon the death of Elsie Rokeach. As alleged by Plaintiff, ownership of the Brooklyn Property was determined by an Agreement dated May 1986, stated to be between Israel and Helene Zaltz and Elsie "Rosenblatt," but is signed only by Sheila Berniker and Elsie "Rokeach"; and the Last Will and Testament of Elsie Rokeach dated March 31, 1992. Plaintiff contends that upon Elsie's death each of her surviving children were entitled to a one-fourth interest in the Brooklyn Property; or, at the least, Leonard Rokeach, Sheila Berniker Seidenfeld, and Adelle Lawrence would share one-half interest in the Brooklyn Property, with the Zaltz Defendants holding one-half interest.

Plaintiff further allege that, in July 2000, Helene and Israel Zaltz had Elsie transfer her ownership interest in the Brooklyn Property to Helene Zaltz, after which the Zaltz borrowed over $600,000 with mortgages on the Brooklyn Property; and that, in January or February 2005, the Zaltzs sold the Brooklyn Property for a sales price of at least $1,100,000. Based upon that sales price, Plaintiff seeks $275,000 from Defendants, *i.e.*, a one-fourth share of the total price, or $181,500, *i.e.*, a one-third share of half the sales price.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issues of fact." (*Guiffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Id.*) Failure of the moving party to make a *prima facie* showing of entitlement to judgment as a matter of law "requires denial of the motion, regardless of the sufficiency of the opposing papers." (*See Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

The Zaltz Defendants' contention that Plaintiff's decedent's estate "never had an interest in the Brooklyn home that is the subject" of this action (*see* Zaltz Defendants' Memorandum at 3) is elaborated in its entirety in the following paragraph:

> The claims in the Rokeach Action are premised on the assumption that Leonard's Estate had an interest in the Brooklyn home under Elsie's will. As explained at p. 3, *supra*, Elsie transferred her interest in the Brooklyn home long before her death. Even if that transfer were invalid—and it is not—Leonard's Estate would have no claim concerning the home because Elsie's will provides that, if any of her children predeceased her, the child's share of the Brooklyn home would go to the child's issue. Because Leonard predeceased Elsie, his estate never had an interest in the Brooklyn home. Accordingly, the claims in the Rokeach Action fail to state a claim upon which relief may be granted. (*Id.* at 10.)

Elsie Rokeach executed her will on March 31, 1992. Her son Leonard, Plaintiff's decedent, died in May 1997, leaving two sons, Gary and Michael. The transfer by deed of Elsie's interest in the Brooklyn Property to her daughter Helene took place on July 6, 2000. Elsie died on August 9, 2005.

The Court notes in the first instance that the contention of the Zaltz Defendants that the claims in Action No. 2 "are premised on the assumption that Leonard's Estate had an interest in the Brooklyn home under Elsie's will" is simply incorrect. It is clear from the Verified Complaint that Plaintiff claims the Estate's interest based upon the May 1986 Agreement. (*See* Verified Complaint ¶¶ 40, 41, 48, 49, 56, 57, 67, 75, 81, 92.) It is also clear from Plaintiffs' opposition to this motion. (*See* Plaintiffs' Opposition ¶ 55.)

The May 1986 Agreement states the parties as Israel and Helene Zaltz and "Elsie Rosenblatt," although it is signed "Elsie Rokeach." In it, Elsie "agrees to execute an appropriate testamentary instrument giving, devising and bequeathing her interest [in the Brooklyn Property], in equal shares to her children, Adelle Lawrence, Leonard Rokeach, and Sheila Berniker . . . , who by their signatures below satisfy and consent to this agreement and agree to be bound by the provisions hereof." Other than Elsie's, only Sheila Berniker's signature appears on the copy of Agreement submitted by the Zaltz Defendants.

The May 1986 Agreement was the subject of proceedings in Surrogate's Court, Queens County, which were reviewed by the Second Department. (*See Matter of Rokeach*, 101 AD3d 1022 [2d Dept 2012].) Unlike the copy of the Agreement found in the Zaltz Defendants' motion papers, the appellate court described the Agreement as having been "signed by the decedent [Elsie Rokeach], her children, including the petitioner [Sheila Berniker Seidenfeld] and . . . Helene Zaltz and Adelle Lawrence, and Israel Zaltz, Helene Zaltz's husband" (*see id.* at 1023.) The court held, among other things, that "to the extent the petition alleges that the 1986 agreement was breached by the transfer which occurred in 2000, any such cause of action is barred by the six-year statute of limitations applicable to actions alleging breach of contract" (*see id.* at 1024.)

Contrary to the assertion of the Zaltz Defendants that "the Second Department has held that the [May 1986] contract . . . is invalid for lack of consideration" (Zaltz Defendants' Memorandum at 1), the assertion is clearly incorrect. The Surrogate, however, in ruling on a motion for leave to serve an amended petition that included a cause of action for breach of contract, after holding that the cause of action was barred by the statute of limitations, stated:

> "The second amended petition also fails to state a cause of action for breach of contract in that it fails to allege an element of contract, to wit, consideration. In fact, the written 1986 'family agreement' contains no consideration for decedent's promise to make a bequest of the Brooklyn property." (Decision and Order dated August 26, 2010 of Hon. Robert L. Nahman [no page numbers].)

This statement is insufficient to warrant any preclusive effect in this action. (*See People v Evans*, 94 NY2d 499, 502-05 [2000] [distinguishing res judicata, collateral estopel, and law of the case].) Indeed, to the extent that the Zaltz Defendants make any showing as to preclusive effect, it is limited to a contention that res judicata bars the claims of Sheila Berniker Seindenfeld. (*See* Zaltz Defendants' Memorandum of Law at 11.)

Similarly, the contention of the Zaltz Defendants that the causes of action for breach of the covenant of good faith and fair dealing and for conversion must be dismissed, because the May 1986 Agreement is invalid for lack of consideration, is based upon the quoted statements from the Surrogate's Decision and Order. (*See* Zaltz Defendants' Memorandum at 12.) Again, the Zaltz Defendants make no independent showing that preclusive effect should be given to the statements as against Plaintiff.

Both the motion and cross-motion are denied, with leave to renew only as to Action No. 1.

June 2, 2014

Jack M. Battaglia
Justice, Supreme Court