

Kowal v Burack
2017 NY Slip Op 30463(U)
March 6, 2017
Supreme Court, New York County
Docket Number: 652811/2014
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : IAS PART 63

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Rachel Kowal, Aaron Burack, Joshua
 Burack, Froma Burack,

Plaintiffs,

-against-

Index Number:
 652811/2014

Nancy J. Burack, TIAA-CREF
 Investment Management, LLC,
 The Vanguard Group, Inc.,

Defendants.

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Ellen Coin, J.:

Plaintiffs move pursuant to CPLR 3212 for summary judgment on their first, fourth, seventh and eighth causes of action. Defendant Nancy J. Burack (Nancy) cross-moves pursuant to CPLR 3212 for summary judgment dismissing the complaint.

Underlying Allegations

Plaintiffs are the adult children of Bernard Burack (Bernard) (complaint, ¶ 3; Joshua affidavit, ¶ 2). Nancy J. Burack (Nancy) was Bernard's second wife and was married to him from 1997 until his death on September 30, 2012 (complaint, ¶ 4; Joshua affidavit, ¶ 4; Nancy affidavit dated May 15, 2016 [Nancy May affidavit], ¶¶ 1-2).

Plaintiffs state that in 1970, Bernard established an I.R.A. account (the Account) with TIAA-CREF Investment Management, LLC (TIAA-CREF), with plaintiffs as its beneficiaries (complaint, ¶

8; Joshua affidavit, ¶ 3). They further state that in January 2011, there was a change to the Account, making Nancy a 50% beneficiary and thereby reducing plaintiffs' interest to 50% (complaint, ¶ 9; Joshua affidavit, ¶ 5).

Plaintiffs and Nancy agree that Bernard became ill in late June 2012 and was hospitalized in the intensive care unit of Mt. Sinai Hospital, and that, while he was there, he executed a power of attorney dated June 29, 2012 (the Power of Attorney) (complaint, ¶ 10; Joshua affidavit, ¶ 6; Nancy May affidavit, ¶ 8).

Plaintiffs assert that on July 15, 2012, when Bernard's condition weakened, Nancy used Bernard's internet access and password for the Account to change the beneficiary designation (the Beneficiary Change), without any legitimate authority and beyond the power of attorney's scope, to make herself the sole beneficiary of the Account (complaint, ¶¶ 10-13; Joshua affidavit, ¶¶ 7-9). They state that the value of the Account at the date of Bernard's death on September 30, 2012 was \$843,231 (complaint, ¶ 14; Joshua affidavit, ¶ 10). They also state that the Account was subsequently rolled over into an account (the Successor Account) owned by Nancy and held at The Vanguard Group, Inc. (Vanguard) (complaint, ¶ 15; Joshua affidavit, ¶ 10).

Plaintiffs seek 50% of the value of the Account. Plaintiffs' complaint has eight causes of action: (1) a

declaration that the Beneficiary Change "was unauthorized . . . [and] invalid"; (2) injunctive relief against distributions from the Account or the Successor Account; (3) an accounting; (4) imposition of an constructive trust on the Successor Account; (5) negligence against TIAA-CREF; (6) breach of contract against TIAA-CREF; (7) conversion against Nancy; and (8) unjust enrichment against Nancy. Pursuant to CPLR 3217 (a) (1), on July 14, 2014, plaintiffs served a notice of discontinuance of their claims against TIAA-CREF.

Vanguard states that it is "a mere stakeholder" of the Successor Account, that it takes no position on the merits of the dispute between plaintiffs and Nancy and that it will not "distribute any funds of the [Successor Account] . . . until there is a judgment designating the proper beneficiaries [and the appropriate paperwork is completed]" (Michaels affirmation, ¶¶ 3-4).

Nancy contends that the Beneficiary Change was "in accordance with [Bernard's] specific instruction, consistent with his estate plan, and undertaken for his benefit" (Nancy May affidavit, ¶ 5). She states the Beneficiary Change was part of an overall financial arrangement, taken to pay various estate expenses, bequests and taxes (*id.*, ¶¶ 6-11). She further states that Bernard gave her his TIAA-CREF password and identification, that he instructed her to log into the Account and to make the

Beneficiary Change (*id.*, ¶¶ 12-13; Nancy affidavit dated June 10, 2016, ¶¶ 2-3). Further, she claims, Bernard instructed her to reduce her interest in the Vanguard account from 100% to 72% and to use the remaining 28% to create 7% interests in the Vanguard account for each of his children.

Summary Judgment Standard

A party seeking summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Conversion

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belong to someone else, interfering with that person's right of possession . . . [t]wo key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006] [internal citations omitted]; see also *Pappas v Tzolis*, 20 NY3d 228, 234 [2012]).

Unjust Enrichment

"[U]njust enrichment is not a catchall cause of action to be used when others fail [but] [i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]).

"Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled" (*id.*; see also *Markwica v Davis*, 64 NY2d 38, 41 [1984]).

Constructive Trust

"Generally, a constructive trust may be imposed '[w]hen

property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest'" (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976] [internal citation omitted]). The elements of a constructive trust are "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*id.*; see also *Kleinman v Kleinman*, 281 AD2d 459, 461 [2d Dept 2001]).

ERISA

"A claim for benefits under ERISA is the assertion of a contractual right. When interpreting an ERISA plan, this Court applies federal common law of contract, which is often embodied by the 'familiar rules of contract interpretation,' which are in turn 'informed by state [contract] law principles'" (*Knopick v Metropolitan Life Ins. Co.*, 457 Fed Appx 25, 28 [2d Cir 2012] [citations omitted] ; *Lifson v INA Life Ins. Co of N.Y.*, 333 F3d 349, 352-353 [2d Cir 2003]).

Discussion

Plaintiffs contend that Nancy effected the Beneficiary Change on her own, for her own benefit, without Bernard's authority or permission. Consequently, they argue, they have shown that the Beneficiary Change was invalid; that Nancy converted their 50% interest in the Account; that Nancy unjustly enriched herself at their expense; and that a constructive trust

should be imposed on the Successor Account, to the extent of the value of plaintiffs' interest.

Nancy contends that the Beneficiary Change was done with Bernard's authority and permission; that it was done to further his estate plan; that, therefore, there was no interference with plaintiffs' rights in the Account; that there was no equitable obligation running to plaintiffs; that plaintiffs' claims against her should be dismissed and the Beneficiary Change should be declared to be valid and authorized.

Initially, the court declines to dismiss plaintiffs' claims as barred by ERISA, since ERISA's underlying principles are "informed by state [contract] law principles" (*Lifson*, 333 F3d at 353).

The substantive dispute between plaintiffs and Nancy is dependent upon a determination as to whether the Beneficiary Change was executed with or without Bernard's authority and permission. Nancy and Joshua's affidavits are in direct conflict on this critical point.

However, on a motion for summary judgment, the court must accept the nonmoving party's version of disputed facts as true for the purpose of resolving the motion (*Branham*, 8 NY3d at 932). On plaintiffs' motion for summary judgment, the court must therefore accept Nancy's account that she was authorized and permitted by Bernard to execute the Beneficiary Change and,

accordingly, plaintiffs cannot establish as a matter of law that Nancy was unjustly enriched, converted funds in the Account or that a imposition of a constructive trust is warranted. Plaintiffs' motion for summary judgment must therefore be denied.

On Nancy's cross-motion for summary judgment, the court must credit plaintiffs' version of events since they are the nonmoving parties. Nancy cannot establish entitlement to summary judgment as a matter of law, since plaintiffs' version of events means accepting, for the purpose of deciding the cross-motion, that Nancy's use of Bernard's password and identification to effect the Beneficiary Change was not authorized by Bernard, but done by Nancy for her own benefit. Accordingly, Nancy's cross-motion for summary judgment must be denied.

Put another way, the resolution of the factual conflict between plaintiffs' and Nancy's versions of events is a matter of credibility determination, more proper for a finder of fact, rather than a court on a dispositive motion (see e.g. *Nyala C. v Miniventures Child Care Dev. Ctr., Inc.*, 133 AD3d 467 [1st Dept 2015]; *DeRosa v Valentino*, 14 AD3d 448 [1st Dept 2005])). Therefore, plaintiffs' motion for summary judgment and Nancy's cross-motion for summary judgment are both denied.

Order

It is, therefore,

ORDERED that plaintiffs' motion for summary judgement on

their first, fourth, seventh and eighth causes of action is denied; and it is further

ORDERED that defendant Nancy J. Burack's cross-motion for summary judgment dismissing plaintiffs' complaint is denied.

Dated: March 6, 2017

ENTER:

A handwritten signature in black ink, appearing to read "Ellen", is written over a horizontal line.

Ellen M. Coin A.J.S.C.