

First Am. Intl. v Koon Young Chong
2017 NY Slip Op 31447(U)
July 10, 2017
Supreme Court, New York County
Docket Number: 154577/2012
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

FIRST AMERICAN INTERNATIONAL,

Plaintiff,

Index No.: 154577/2012
DECISION/ORDER
Motion Seq. No. 001

-against-

KOON YOUNG CHONG,

Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for summary judgment.

Papers	Numbered
Plaintiff's Notice of Motion.....	1
Plaintiff's Memorandum of Law in Support.....	2
Plaintiff's Affirmation in Support.....	3
Defendant's Affirmation in Opposition.....	4
Plaintiff's Reply Affirmation.....	5

Joan Nerlino Caddell & Associates, PLLC, Staten Island (Ganine Gambale of counsel), for plaintiff.
Law Offices of Stephen K. Seung, New York City (Stephen H. Marcus of counsel), for defendant.
 Gerald Lebovits, J.

Plaintiff moves for summary judgment. Defendant opposes the motion and argues that the presence of disputed material issues of fact preclude summary judgment.

On July 8, 2012, plaintiff commenced this action seeking a money judgment against defendant arising from defendant's alleged misappropriation of deposited funds. Plaintiff seeks a judgment for \$109,600.60 plus interest at the statutory rate from February 3, 2012, until the judgment entry date. Plaintiff's complaint contains five causes of action: (1) breach of contract; (2) conversion; (3) unjust enrichment; (4) money had and received; and (5) prima facie tort.

On December 13, 2010, Surrogate's Court, New York County, issued a letter of guardianship to defendant. Defendant was appointed guardian of the property belonging to his son, Eugene Chong. On December 23, 2010, Surrogate's Court issued a Certificate of Appointment of Guardian to defendant. The certificate provides that all funds and property belonging to Eugene Chong, the ward, shall be deposited with plaintiff bank, in the name of the guardian and that no withdrawal or transfer could be made without an order from Surrogate's Court.

Defendant's late wife's insurer, New York Life Insurance Company, issued a check for life insurance benefits to Eugene Chong. According to plaintiff, when defendant deposited the life-insurance check in the amount of \$134,698.52, defendant also delivered a copy of the Certificate of Appointment of Guardian to a bank representative at plaintiff's Bowery branch. (Plaintiff's Notice of Motion, Affidavit of Jacqueline O'Bryant, Aug. 31, 2016, at ¶ 9, Exhibit C.) Plaintiff asserts that neither defendant nor defendant's attorney advised plaintiff of any restrictions on depositing the check or withdrawing the proceeds. (Plaintiff's Notice of Motion, Affidavit of Jacqueline O'Bryant, Aug. 31, 2016, at ¶ 10.) After defendant deposited the check, he withdrew money out of the bank account without first obtaining an order from Surrogate's Court; he transferred some of the money to another account he had with plaintiff bank. (Plaintiff's Notice of Motion, Exhibit E.) Plaintiff replenished the balance of funds that defendant withdrew. Plaintiff now wants the funds back. (Plaintiff's Notice of Motion, Affidavit of Jacqueline O'Bryant, Aug. 31, 2016, at ¶ 16.)

Summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court, as a matter of law, in directing judgment in favor of any party." (CPLR 3212 [b].) The movant on summary judgment must make a prima facie showing of entitlement to judgment as a matter of law and show sufficient evidence to demonstrate the absence of any material issue of fact. (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985].)

Plaintiff has proven its conversion claim. Conversion occurs "when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006].) One who deposits money with a bank relinquishes title, and the deposited funds become part of the bank's general funds. (*Kings Premium Serv. Corp. v Mfr. Hanover Trust Co.*, 115 AD2d 707, 709 [2d Dept 1985].) When defendant deposited the life-insurance check, title transferred to the plaintiff, and the funds became plaintiff's property. Defendant intentionally withdrew and transferred the funds without first obtaining a court order. (Defendant's Affirmation in Opposition, Affidavit of Koon Young Chong, at 4.) Plaintiff proved with admissible evidence that because defendant was not authorized to withdraw proceeds of the check without a court order, plaintiff had a superior right of interest on which it may recover defendant's wrongfully obtained funds. (Plaintiff's Notice of Motion, Exhibit C.)

In any event, plaintiff is entitled to summary judgment on its breach-of-contract claim. An action for breach of contract requires proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages. (*WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021, 1024 [Sup Ct, NY County 1999].) By defendant's use of the bank accounts, defendant assented to the terms and conditions of plaintiff's account agreement, a valid contract. When defendant withdrew or transferred money without a court order, defendant breached the account agreement. (Plaintiff's Notice of Motion, Exhibit C.) Plaintiff then replenished into a separate, special account, from its own funds, defendant's wrongfully withdrawn funds. (Plaintiff's Notice of Motion, Affidavit of Jacqueline O'Bryant, Aug. 31, 2016, ¶ 16.)

Defendant alleges that he asked various bank personnel whether a court order was needed to withdraw the funds, and the bank personnel said that an order was unnecessary. (Defendant's Affirmation in Opposition, Affidavit of Koon Young Chong, at 4.) But a bank has no duty to inform a customer or depositor of the monetary consequences of a transaction. (*Bennice v Lakeshore S&L Ass'n*, 254 AD2d 731, 732 [4th Dept 1998].)

Defendant states that he used the money to pay for rent, food, and pay back relatives. But these reasons do not create material issues of fact for trial.

Defendant's remaining arguments are likewise unavailing.

Defendant's defenses are dismissed. Defendant's answer raises the following affirmative defenses, numbered 1 through 10: (1) plaintiff's recovery would result in unjust enrichment to the plaintiff; (2) defendant withdrew money according to plaintiff's instructions, consent, and approval; (3) defendant, who is foreign born, and who neither speaks, reads nor understands English, relied on plaintiff's statements that the withdrawals were proper; (4) plaintiff's damage resulted solely from plaintiff's culpable conduct or negligent acts; (5) plaintiff's complaint fails to state a cause of action; (6) action against defendant is barred by plaintiff's laches; (7) action against defendant is barred by plaintiff's waiver; (8) plaintiff failed to take steps to mitigate its alleged damage; (9) the court has no personal jurisdiction over defendant; and (10) defendant did not understand the alleged agreements and plaintiff did not accurately explain to defendant the meaning of any documents he allegedly signed.

Defendant's first and fifth affirmative defenses are stricken. According to defendant, he withdrew money to pay for rent, food, and other necessities. (Defendant's Affirmation in Opposition, Affidavit of Koon Young Chong, at 4.) Also, he used some of the withdrawn funds to repay relatives who had helped defendant and his son, the ward, during a period of financial hardship. (*Id.*) Defendant states that his annual earnings for the years of 2007-2012 ranged from \$4272 to \$6944. (Defendant's Affirmation in Opposition, Affidavit of Koon Young Chong, at 2.) Defendant's defenses have no merit.

Defendant's second, fourth, sixth, and seventh affirmative defenses are stricken. Absent a special relationship of trust and confidence, a bank has no duty to inform a customer or depositor of the monetary consequences of a transaction. (*Bennice*, 254 AD2d at 732.)

In any event, plaintiff's evidence shows that as soon as it discovered defendant's unauthorized withdrawals and transfers, it sought the money back from defendant. (Plaintiff's Notice of Motion, Affidavit of Jacqueline O'Bryant, Aug. 31, 2016, ¶ 16.) When defendant refused, plaintiff replenished the funds into a special account, to be held pending further order of the Surrogate's Court. (*Id.*)

Defendant's third and tenth affirmative defenses are stricken. A bank is generally permitted to "assume that a person acting as a fiduciary will apply entrusted funds to the proper purposes and will adhere to the conditions of the appointment." (*Matter of Knox*, 64 NY2d 434, 438 [1985].) Although defendant states that he does not understand English, he was represented

by counsel throughout the guardianship proceedings; therefore, plaintiff was not obligated to inform or explain to defendant his fiduciary responsibilities.

Defendant's eighth affirmative defense is also stricken. In its opposition papers, defendant does not say how plaintiff failed to mitigate its damages.

Defendant's ninth affirmative defense is stricken as well. Defendant does not address this defense in his opposition papers.

Accordingly, it is

ORDERED that plaintiff's summary-judgment motion is granted, and plaintiff shall settle order; and it is further

ORDERED that plaintiff serve a copy of this decision and order on defendant.

Dated: July 10, 2017



J.S.C.
HON. GERALD LEBOVITS
J.S.C.