

<b>Iacobazzi v Cortese</b>
2017 NY Slip Op 33172(U)
September 22, 2017
Supreme Court, Westchester County
Docket Number: 53978/2017
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
FRANK IACOBAZZI,

Plaintiff,

-against-

ANDREW CORTESE, CORTESE CONSTRUCTION,  
INC. and ELIZABETH M. ENOCHS,

Defendants.  
-----X

DECISION AND ORDER

Sequence No. 1

Index No. 53978/2017

RUDERMAN, J.

The following papers were considered in connection with defendant Elizabeth M. Enochs' motion to dismiss the complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affidavit in Support and Exhibits A – D	1
Memorandum of Law in Support	2
Affirmation and Affidavit in Opposition	3 – 4
Reply Affirmation	5

Plaintiff Frank Iacobazzi commenced this action for breach of contract, unjust enrichment and conversion against defendants Andrew Cortese and Cortese Construction, and for negligence and breach of fiduciary duty against Elizabeth M. Enochs, Esq. The complaint alleges that plaintiff entered into a contract with Cortese for the construction of a home on property located at 13 English Lane in Dobbs Ferry, New York. In furtherance of that contract, Cortese directed plaintiff to transfer \$100,000 to Enochs' attorney trust checking account. Plaintiff alleges that, without his knowledge, Enochs' used those funds for the purchase of the Dobbs Ferry property.

In support of her motion, Enochs attests that Cortese and Cortese Construction retained her to close title on the purchase of 13 English Lane. On September 28, 2010, plaintiff and Cortese wired \$70,000 each to Enochs' attorney trust checking account, and, on September 29, 2010, plaintiff deposited an additional \$30,000 into the account. (See Enochs' Trust Checking Account Statement, Exhibit D.) On September 29, 2010, Enochs paid out the entire amount of \$170,000 for the purchase of the property. (See Contract of Sale and Closing Statement, Exhibits B and C.)

Enochs contends that she had no contact with plaintiff, did not represent him in the purchase of the property, and did not instruct him to deposit funds into her account.

Enochs argues that the complaint against her must be dismissed because plaintiff fails to allege that Enoch breached any duty to him. The lack of a relationship between Enoch and plaintiff, coupled with plaintiff's failure to allege the existence of an escrow agreement, is fatal to plaintiff's claims. Enoch further contends that plaintiff's causes of action against her are barred by the statute of limitations, pursuant to CPLR 214(4). Enoch asserts that plaintiff's claims accrued on September 29, 2010, when Enoch used plaintiff's funds for the purchase of the property. Accordingly, plaintiff's claims became time barred in September 2013, and this action was not commenced until March 2017.

In opposition, plaintiff first argues that the statute of limitations was tolled until his discovery of the disbursement of the funds, which was not until April 2016. Thus, the time within which to bring his claims against Enoch does not expire until April 2019. Plaintiff further contends that an escrow agreement need not be in writing, and the mere deposit of plaintiff's funds into Enoch's account constitutes an escrow, which thereby created a fiduciary relationship between him and Enoch. Additionally, plaintiff argues that whether an escrow was created depends upon the parties' intention. Since plaintiff believed his \$100,000 would not be disbursed without his authorization, an escrow was created, and Enoch became the fiduciary of all parties to the agreement, which includes plaintiff.

Lastly, plaintiff requests that, in the event the Court finds that the complaint fails to adequately plead the causes of action against Enoch, plaintiff be granted leave to amend the complaint.

#### Analysis

On a motion to dismiss a cause of action on the ground that it is barred by the statute of limitations, pursuant to CPLR 3211(a)(5), "a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." (*Is. ADC, Inc. v. Baldassano Architectural Group, P.C.*, 49 A.D.3d 815, 816 [2d Dept. 2008]; see *Sabadie v. Burke*, 47 A.D.3d 913 [2d Dept. 2008]; *Matter of Schwartz*, 44 A.D.3d 779 [2d Dept. 2007].) Once such a showing has been made, the burden shifts to the plaintiff to demonstrate that the statute of limitations has been tolled. (*Bullfrog, LLC v. Nolan*, 102 A.D.3d 719, 719 [2d Dept. 2013].)

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "the court must afford the pleading a liberal construction, accept the facts as alleged in

the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Sasidharan v Piverger*, 145 A.D.3d 814, 815 [2d Dept. 2016].) A motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence “utterly refutes” the plaintiff’s factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue. (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Rodeo Family Enters., LLC v. Matte*, 99 A.D.3d 781, 782 [2d Dept. 2012].)

#### I. Breach of Fiduciary Duty and Negligence Claims

To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty between the parties and a breach of that duty by defendant. (*See Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 [2d Dept. 2007]; *see Ozelkan v. Tyree Bros. Envtl. Servs., Inc.*, 29 A.D.3d 877, 879 [2006].) “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.” *Marmelstein v. Kehillat New Hempstead*, 11 N.Y.3d 15, 21 [2008] [internal quotations marks and citations omitted].)

An escrow agent has a contractual obligation to follow the escrow agreement and becomes a trustee of anyone with a beneficial interest in the trust with “a duty not to deliver the property held in escrow to anyone except upon strict compliance with the conditions imposed in the escrow agreement.” (*Sasidharan v Piverger*, 145 A.D.3d 814, 815 [2d Dept. 2016], quoting *Baquerizo v. Monasterio*, 90 A.D.3d 587 [2d Dept. 2011] [internal citations omitted].) “Thus, an escrow agent can be held liable for . . . breach of fiduciary duty as escrowee.” (*Cash v. Titan Fin. Services, Inc.*, 58 A.D.3d 785, 789 [2d Dept. 2009], quoting *Takayama v. Schaefer*, 240 A.D.2d 21, 25 [2d Dept. 1998].)

“Whether the holding of [an instrument] be under an escrow agreement depends on that agreement.” (*Farago v. Burke*, 262 N.Y. 229, 233 [1933]). While an escrow agreement does not have to be written, and there are no precise words necessary to constitute an escrow, merely calling an act an escrow does not make so. (*Farago*, 262 N.Y. at 233). “The question whether an instrument placed with a third person is to be escrow depends on the intention of the parties.” (55 NY Jur. 2d Escrow § 4.)

Here, plaintiff has failed to state a claim for breach of fiduciary duty. In order for an instrument to operate as an escrow, there has to be an agreement between the parties. The plaintiff does not allege that he had any agreement with Enochs, and in fact, acknowledges that he had no

contact with her. Thus, the mere delivery of the \$100,000 to Enochs' trust account does not constitute a transaction in escrow. (*See* 55 N.Y. Jur. 2d Escrow § 4; *see also Natl. Union Fire Ins. Co. Pittsburgh, Pa. v Proskauer Rose Goetz & Mendelsohn*, 165 Misc. 2d 539, 545 [NY County, Sup Ct 1994], citing *Farago*, 262 N.Y. 229 ["For an instrument or property to operate as an escrow there must be a valid contract and absent such a contract the mere delivery of the instrument or property to an escrowee does not constitute a transaction in escrow."].)

Moreover, plaintiff has not alleged that Enochs was only to release the funds upon the occurrence of any specific event or performance of a condition, other than for the closing of the subject property, pursuant to her agreement with Cortese. (*See* 55 N.Y. Jur. 2d Escrows § 2; *Falk v. Goodman*, 7 N.Y.2d 87 [1959]; *Matter of Burton*, 200 A.D.2d 324, 327 [1st Dept. 1994] [an escrow is defined as a written instrument, or money, that a grantor entrusts to a third party agent, who, in accordance with the escrow instructions, delivers the written instrument to the grantee upon the happening of a specific event or performance of a condition].) Plaintiff's claim that Enochs was to hold his funds indefinitely, to be released only upon his authorization, rather than upon the occurrence of a specific event or when certain conditions are met, defeats any claim of an escrow agreement.

Without an escrow agreement in place, Enochs had no duty to plaintiff, and therefore, plaintiff's claim of breach of fiduciary duty must be dismissed. This lack of duty also requires dismissal of plaintiff's claim of negligence against Enochs. (*See Irizarry v. Heller*, 95 A.D.3d 951 [2d Dept. 2012] [the complaint in an action for negligence must set forth facts showing a duty owing by the defendant to the plaintiff].)

## II. *Statute of Limitations*

Under New York law, the statute of limitations for an allegation of breach of fiduciary duty depends upon the substantive remedy sought. (*See Carbon Capital Mgt., LLC v. Am. Exp. Co.*, 88 A.D.3d 933, 939 [2d Dept. 2011].) Where a plaintiff only seeks money damages, the limitations period is three years. (CPLR 214[4].) Similarly, a cause of action alleging negligence is governed by a three-year statute of limitations. (*See* CPLR 214[4].)

Enochs has established, *prima facie*, that the time in which to sue for breach of fiduciary duty and negligence expired three years from September 29, 2010, when plaintiff's funds were disbursed. In opposition, plaintiff contends that the statute of limitations is tolled "until the fiduciary has openly repudiated his or her obligations or the relationship has otherwise been terminated." (Affirmation in Opposition, ¶ 6, citing *Westchester Religious Inst. v. Kamerman*, 262

A.D.2d 131 [1st Dept. 1991].) Plaintiff claims that “the termination of the fiduciary relationship was revealed to plaintiff” in April 2016 when he discovered that the funds were no longer in Enochs’ account. (Affirmation in Opposition, ¶ 10.) To the extent this is an assertion by plaintiff that the discovery accrual rule applies to his claims, such an argument is without merit. The discovery accrual rule does not apply in the absence of any allegations of fraud against the defendant. (*See Dignelli v. Berman*, 293 A.D.2d 565, 566 [2d Dept. 2002].) Accordingly, even if plaintiff had properly alleged his causes of action against Enochs, those claims would be time-barred.

III. *Leave to Amend the Complaint*

Lastly, while the Court has the discretion to consider plaintiff’s request to amend the complaint, (*see Smulczeski v. Smulczeski*, 128 A.D.3d 671, 672 [2d Dept. 2015] [the Supreme Court may consider a request for affirmative relief not presented in a proper cross-motion pursuant to CPLR 2215]), the Court declines to do so where, as here, plaintiff has failed to accompany his request with a proposed amended complaint clearly showing the changes or additions to be made to the pleading. (*See CPLR 3025[b]*; *see also Drice v. Queens County District Attorney*, 136 A.D.3d 665, 666 [2d Dept. 2016] [denial of plaintiff’s motion to amend complaint was warranted where plaintiff failed to provide copy of proposed amended complaint].)

Based upon the foregoing, it is hereby,

ORDERED that defendant Elizabeth M. Enochs’ motion to dismiss the complaint against her is granted; and it is further

ORDERED that the remaining parties appear in the Preliminary Conference Part on Monday, October 16, 2017, at 9:30 a.m., in the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
September 22, 2017

  
HON. TERRY JANE RUDERMAN, J.S.C.