

Halvatzis v Perrone
2017 NY Slip Op 33373(U)
March 27, 2017
Supreme Court, Queens County
Docket Number: Index No. 705905/16
Judge: Carmen R. Velasquez
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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ANITA HALVATZIS,
Plaintiff,

Index No. 705905/16

Motion

Date: August 11, 2016

-against-

m# 1

JOSEPH PERRONE AND JOAN PERRONE,

FILED
APR 13 2017
COUNTY CLERK
QUEENS COUNTY

Defendants.
-----x

The following papers numbered EF 3 - 38 read on this motion by defendants for an order dismissing the complaint and other relief.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits..... EF 3-16
Affidavit in Opposition - Exhibits EF 18-31
Replying Affirmation EF 32-38
Defendants' Memorandum of Law

Upon the foregoing papers it is ordered that this motion by defendants for an order dismissing the complaint is decided as follows:

Plaintiff commenced the instant action, alleging causes of action sounding in conversion, breach of contract, fraud and intentional infliction of emotional distress. Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(1), (3), (5) and (7).

On a motion to dismiss a pleading pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the nonmoving party the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Soodoo v LC, LLC*, 116 AD3d 1033, 1033 [2d Dept 2014]; *Alan B. Greenfield, M.D., P.C., v Long Beach Imaging Holdings, LLC*, 114 AD3d 888, 888

[2d Dept 2014].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus." (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010], quoting *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

In the first cause of action, plaintiff alleges that she and the late Edward C. Montell, the father of defendant Joan Perrone, were domestic partners who resided together in Queens County. According to the plaintiff, she and Edward shared a joint safe deposit box in Sovereign/Santander Bank, which contained \$150,000.00. The complaint states that they emptied the box and kept the \$150,000.00 cash at their home. The complaint further alleges that defendant Joseph Perrone, Joan's husband, committed a conversion when he came into plaintiff and Edward's home, took the \$150,000.00 and refused to return it.

Two key elements of a cause of action for 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, 50 [2006]; *Komolov v Segal*, 144 AD3d 487, 488 [1st Dept 2016].)

In the matter at hand, affording the first cause of action a liberal construction and accepting the facts as true, the first cause of action states a claim for conversion. The \$150,000.00 cash was part of a joint safe deposit box that the plaintiff shared with Mr. Montell, and the complaint alleges that the defendant Joseph Perrone refused to return the money after removing it from the plaintiff's home. These facts are sufficient to plead a cause of action for conversion.

The second cause of action alleges a claim for breach of contract. Specifically, plaintiff asserts that the decedent Edward C. Montell instructed the defendants to give the plaintiff a gift in the sum of \$250,000.00 from his funds then being held by the defendants. This cause of action further alleges that the defendants refused to deliver the money to the plaintiff.

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. (*143 Bergen St., LLC v Ruderman*, 144 AD3d 1002, 1003 [2d Dept 2016]; *Tudor Ins. Co. v Unithree Inv. Corp.*, 137 AD3d 1259, 1259 [2d Dept 2016].)

In the case at bar, the second cause of action fails to

allege the existence of any contract between the plaintiff and the defendants. Indeed, as noted above, the second cause of action asserts that Mr. Montell requested that the defendants transfer certain funds to the plaintiff. There is no allegation that the defendants ever agreed to such a transfer of funds to the plaintiff. Therefore, the second cause of action fails to state a valid cause of action for breach of contract.

The third cause of action also asserts a claim for breach of contract. Plaintiff alleges that she invested \$30,000.00 in permanent improvements to her home to build an office for Mr. Montell. She further alleges that she demanded re-payment of these monies from the defendants from the funds they are holding belonging to Mr. Montell. Plaintiff states that defendants have refused to make such payment.

Similar to the second cause of action, there is no allegation that a contract or agreement existed between the plaintiff and the defendants, or even the plaintiff and Mr. Montell, that would require that plaintiff be reimbursed for monies spent in making the improvements to the house. In the absence of an allegation of such an agreement, the third cause of action does not state a claim for breach of contract.

In the fourth cause of action, plaintiff similarly seeks to recover for breach of contract. In the fourth cause of action, plaintiff states that she spent much of her time between 2012 and 2015 caring for Mr. Montell by taking him to various doctors and emergency rooms. She alleges that because of her attention to the physical needs of Mr. Montell, plaintiff suffered lost income from her real estate business. Plaintiff states that she demanded that defendants repay these amounts from the funds they are holding from Mr. Montell's estate, but defendants have refused to make such payment.

As discussed above, there is no allegation in the fourth cause of action that either defendants or Mr. Montell ever agreed to repay the plaintiff for any lost income incurred in caring for the decedent. Thus, inasmuch as there is no allegation of any binding contract for such payments, the fourth cause of action fails to state a claim for breach of contract.

The fifth cause of action seeks to recover damages for fraud and conversion. According to the fifth cause of action, Mr. Montell maintained a life insurance policy with Phoenix Life Insurance Company naming the plaintiff as a beneficiary. Plaintiff alleges that the defendants wrongfully and fraudulently converted these funds and refused to return them to the

plaintiff.

It is well settled that the circumstances underlying a cause of action for fraud must be stated in detail. (CPLR 3016[b]; *Mariano v Fiorvante*, 118 AD3d 961 [2d Dept 2014]; *Genovese v State Farm Mut. Auto. Ins. Co.*, 106 AD3d 866, 867 [2d Dept 2013]; *Quinones v Schaap*, 91 AD3d 739, 741 [2d Dept 2012].) In the case at bar, the fifth cause of action does not provide any facts or details as to how the defendants fraudulently converted the insurance policy. As such, the fraud claims set forth in the fifth cause of action have not been properly pled, and are dismissed.

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. (*Botach Mgt. Group v Gurash*, 138 AD3d 771, 772 [2d Dept 2016]1; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012].)

The documentary evidence makes clear that the defendants did not convert the funds from the life insurance policy. Defendants have submitted copies of checks made out to Mr. Montell from Phoenix Life Insurance Company, with the notation "full surrender." Thus, no insurance policies from Phoenix Life Insurance Company existed at the time of Mr. Montell's death, and whatever rights plaintiff had as a beneficiary to the policy were extinguished. Therefore, there could be no conversion of the funds from the policy, and the fifth cause of action for conversion must be dismissed.

Finally, the sixth cause of action seeks to recover for intentional infliction of emotional distress. Plaintiff alleges that defendants intentionally deprived her of Mr. Montell's companionship during the last years of his life by removing him from the plaintiff's home and placing him in a nursing home. This cause of action also asserts that the defendants refused to allow the plaintiff to provide a better care and better diet for the decedent during the last years of his life. Plaintiff also alleges that the defendants refused to allow the plaintiff to visit the Mr. Montell at the nursing home and also refused to allow the plaintiff to attend Mr. Montell's wake following his death.

The Statute of Limitations for a cause of action sounding in intentional infliction of emotional distress is one year, which begins to run on the date of injury. (*Bellissimo v Mitchell*, 122 AD3d 560, 561 [2d Dept 2014]; *Wilson v Erra*, 94 AD3d 756, 756 [2d

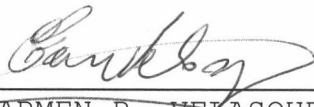
Dept 2012].) At bar, plaintiff's injuries alleged in the sixth cause of action accrued, at the latest, on March 23, 2015, the last date of Mr. Montell's wake, which plaintiff alleges she was barred from attending by the defendants. The instant action was commenced on May 19, 2016, more than one year later. Thus, the cause of action for intentional infliction of emotional distress is time-barred and must be dismissed.

Accordingly, the branch of this motion by defendants to dismiss the complaint pursuant to CPLR 3211(a) is granted solely to the extent that the second, third, fourth, fifth and sixth causes of action of the complaint are dismissed.

The first cause of action of the complaint shall remain.

The branch of the motion for sanctions is denied.

Date: March 27, 2017


CARMEN R. VELASQUEZ, J.S.C.

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