

Peters v UBS Trustees (Bahamas) Ltd.
2018 NY Slip Op 31644(U)
March 8, 2018
Supreme Court, New York County
Docket Number: 600456/2004
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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FRANCES PETERS,

Plaintiff,

INDEX NO. 600456/2004

MOTION SEQ. NO. 021

- v -

DECISION AND ORDER

UBS TRUSTEES (BAHAMAS) LTD., GEORGE PETERS, ANNA
PETERS, and UBS AG A/K/A UBS SA,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 497, 498, 499, 514, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528

were read on this application to/for DISMISSAL

HON. SALIANN SCARPULLA:

In this now fourteen-year-old intra-family saga, defendants George Christy Peters (“George”) and Anna Peters (“Anna”) (collectively, “defendants”) move for summary judgment dismissing the second amended complaint of plaintiff Frances C. Peters (“Frances”). Frances originally commenced this action in 2004 against her mother, Anna, and her brother, George, alleging that they have misappropriated millions of

dollars of assets held by off-shore trusts established for her benefit by her aunt, Athena Eliades ("Athena").¹

After much of Frances' original complaint was dismissed in 2005, Frances served an amended complaint and, in August 2010, a second amended complaint, repleading some of her dismissed claims and adding two defendants, UBS Bahamas Trustees (Bahamas) Ltd. ("UBS") and UBS AG. In the second amended complaint Frances alleged that UBS and UBS AG, as trustees of Athena's trusts, were part of Anna's/George's conspiracy to wrongfully distribute Athena's assets.

UBS and UBS AG were later dismissed from this action for lack of personal jurisdiction/*forum non conveniens*. Further, at oral argument on this motion, Frances' counsel stated that he did not oppose dismissal of Frances' common law fraud cause of action. Thus, Frances' remaining causes of action for purposes of my decision on this summary judgment motion are against only George and Anna, and allege conversion, unjust enrichment, and imposition of a constructive trust.

In support of their motion for summary judgment dismissing these remaining causes of action, George and Anna submit a copy of the Mimosa Trust Deed, a trust established by Athena. The Mimosa Trust Deed shows that on December 5, 2000, Athena settled the "Mimosa Trust" with UBS as Trustees for the benefit of herself, Anna, Frances, George, and Stelios Coutsodontis ("Coutsodontis").²

¹ Athena is Anna's sister and George's aunt.

² Non-party Coutsodontis is Athena's/Anna's brother and George's/Frances' uncle.

The Mimosa Trust Deed provides that UBS

shall exercise the discretions (each of which shall (subject to any provision to the contrary contained herein) be absolute) and powers vested in them as they shall think fit for the benefit of all or any of the Beneficiaries *and may exercise (or refrain from exercising) any discretion or power for the benefit of any of them without being obliged to consider the interests of the others. Every decision and action of the Trustees, whether actually made or taken in writing or implied from the acts of the Trustees, shall be conclusive and binding on all the Beneficiaries.* No power or discretion vested in the Trustees may be exercised at any time in a manner which would or might infringe any applicable rule governing the remoteness of vesting.

(Emphasis supplied).

Accompanying the Mimosa Trust Deed is an executed letter dated November 18, 2000 ("Letter of Wishes"), in which Athena expresses her "wish, [] without any intention to fetter [UBS's] discretion under the Trust or to impose any binding trust or legal obligation upon [UBS]", that distributions are made as follows: (1) "Account nr. 1" distributed equally between Anna and Coutsoodontis; and (2) "Account nr. 2" distributed between Coutsoodontis, George and Frances with Coutsoodontis receiving half and George and Frances each receiving a quarter.³

George and Anna state that UBS, as trustee of the Mimosa Trust, properly distributed the trust funds in accordance with the Letter of Wishes executed by Athena prior to her death. Specifically, defendants aver that "[Coutsoodontis] received approximately \$11,049,982.00" while "Anna received the other half of the Mimosa Trust

³ Defendants posit that Account nr.1 refers to the Mimosa account, and that Account nr. 2 refers to the Soya account, and together these accounts make up the assets of the Mimosa Trust.

[from Account nr. 1].”⁴ Anna then passed part of her distribution from the Mimosa Trust to George, and attempted to distribute part to Frances. Anna later revoked her distribution to Frances.⁵

Defendants argue that the Mimosa Trust Deed gave UBS the unfettered discretion to distribute the Mimosa Trust funds. Thus, as a matter of law, Frances does not have an enforceable right to any of the Mimosa Trust funds, and defendants could not have converted Frances’ property. Defendants also argue that the Mimosa Trust Deed and Letter of Wishes, and UBS’s distribution of funds thereunder show that they have not been unjustly enriched at Frances’ expense.

In opposing summary judgment, Frances asserts that the Mimosa Trust Deed and Letter of Wishes, as submitted by defendants, are inauthentic and inadmissible, and that Athena settled other, unnamed trusts for Frances’ benefit. Frances submits bank wire transfers demonstrating that Anna received (1) \$1,990,982.20 on July 21, 2003 and (2) \$3,050,000.00 on September 2, 2003, totaling approximately \$5,040,982.00 of Mimosa Trust funds. As for George, Frances submits a bank wire transfer of \$6,000,000.00 on October 8, 2003, which defendants assert was remitted as part of Anna’s distribution in

⁴ Defendants state that “Account No. 1 contained approximately \$22,099,964.00 and Account No. 2 contained approximately \$400,000.” Although defendants produce no evidence in support of this assertion, Frances produces a UBS statement of assets totaling \$19,114,258.00 for Account No. 1 as of May 27, 2003. *See* *Ewig Aff.*, Ex. J. Taking that statement into account with the \$3,000,000.00 distribution made to Coutsoodontis on April 2, 2003, the record supports defendants’ approximation of the funds in the Mimosa Trust.

⁵ In a letter to UBS revoking the distribution to Frances, Anna states that Frances “refused to cooperate in affecting the distribution to her.” *See* *Mogarbhya Aff.*, Ex. H.

Account nr. 1, and another bank write transfer of \$117,000.00 on June 23, 2003, which George asserts he received as part of his distribution from Account nr. 2. Frances argues that these distributions, along with defendants' conduct, raise an issue of fact as to whether defendants were *de facto* fiduciaries of the Mimosa Trust, thereby precluding summary judgment on the remaining causes of action against George and Frances.

Discussion

A party moving for summary judgment is required to make a *prima facie* showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Grob v Kings Realty Assoc.*, 4 A.D.3d 394, 395 (2d Dep't 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

The gravamen of Frances' conversion cause of action is that Anna and George have wrongfully received Mimosa Trust fund distributions that should have been made to Frances. "A conversion takes place 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. Two 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 N.Y.3d 43, 49-50 (2006).

On their summary judgment motion, defendants submit the Mimosa Trust Deed, in which Athena conveyed total discretion upon UBS as Trustee of the Mimosa Trust to distribute the Mimosa Trust funds. Defendants properly argue that, because UBS had complete discretion to distribute the Mimosa Trust funds, Frances has no “possessory right or interest” in the Mimosa Trust funds.

In opposition, Frances claims that the Mimosa Trust Deed and Letter of Wishes are fraudulent. However, after thirteen years of litigation, Frances has not uncovered any competent evidence to support this extraordinary claim. Indeed, after UBS was sued in this action in 2009, it brought an action in the Supreme Court of the Bahamas (“Bahamian Court”) seeking a declaration concerning the validity of the Mimosa Trust Deed and Letter of Wishes, and for construction of its terms (“Bahamian Action”). It is undisputed that Frances was served with a summons and notice of the Bahamian Action, but did not submit any evidence to the Bahamian Court to dispute the authenticity of the Mimosa Trust Deed presented in that action. In fact, Frances never even appeared in the Bahamian Action.

On February 4, 2010, the Bahamian Court issued an order on default (“Bahamian Order”), declaring that the “Trust Deed and Letter of Wishes exhibited at Exhibit AR-1 to the Affidavit Mr. Andreas Renschlet sworn here in 5th November, 2009 is the sole and proper Trust Deed and Letter of Wishes executed between [UBS] and [Athena] . . . on 5th December, 2000.” The Bahamian Order also declared that “pursuant to clause 2.2 . . . the Proper Law of the Trust is the law of The Bahamas” and that “pursuant to clause 5.1 . . .

the Trust is a fully discretionary trust with [UBS] having absolute discretion over the income and corpus of the Trust.”

The Bahamian Order was issued nearly eight years ago. Since that time Frances has not sought to vacate or modify it. Nor has she submitted any competent evidence in this action to show that the Mimosa Trust Deed relied upon by the Bahamian Court is a fraud. Instead, Frances relies solely on her own supposition to dispute the authenticity of the Mimosa Trust Deed, without any evidentiary support.⁶

Frances also objects to the admissibility of the Mimosa Trust Deed submitted by defendants based on CPLR § 4542. At oral argument on the motion I directed counsel for defendants to obtain a certified copy of the Bahamian Order and the Mimosa Trust Deed relied upon by the Bahamian Court. Defendants then submitted a copy of both documents from the Bahamian Court’s Registry, which the “Registrar” in the Bahamian Court “[c]ertified to be the true copy of [t]he original document.”

Generally, “[a] foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by . . . a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position [] of the attesting person” CPLR 4542(a). Frances argues that the certified copies of the Bahamian Order and the Mimosa Trust Deed are

⁶ On more than one occasion I have encouraged Frances to either travel to the Bahamas, or engage a representative to do so on her behalf, to ensure for herself that the documents submitted in the Bahamian Action are authentic. To my knowledge she has never done so. Nor has Frances ever engaged an expert to raise an issue of fact as to the authenticity of the Mimosa Trust Deed and Letter of Wishes.

procedurally defective because both lack final certification. According to Frances, this lack of final certification raises issues regarding the authenticity of the Registrar's signature and the authority of the Registrar.

Although foreign official records are not self-authenticating absent final certification, I “may, for good cause shown, admit an attested copy without final certification . . . [i]f reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents.” CPLR § 4542(b); *see also Estate of Birsten*, 104 Misc. 2d 345, 346 (Sur. Ct. 1980) (“[T]he court has the power to admit into evidence those documents which for some reason could not meet the usual authentication standards”); *In re Estate of Perez*, 40 Misc. 3d 1239(A) (Sur. Ct. 2013) (“The statutory scheme is designed to foster simplification and flexibility in the admission of foreign records and documents.”); *Garcia v Portuondo*, 459 F. Supp. 2d 267, 284 (S.D.N.Y. 2006) (“Section 4542's requirements are not mandatory”). Here, I find the Bahamian Order and the Mimosa Trust Deed relied upon by the Bahamian Court sufficiently authenticated and therefore, admissible.⁷

The Mimosa Trust Deed shows that UBS had the absolute discretion to grant or deny the beneficiaries distributions thereunder, including Frances. For this reason, Frances cannot show that she had an enforceable “possessory right or interest” to the

⁷ Contrary to Frances' argument, the lack of a specific name and identity of the Registrar does not preclude admission, because the Registrar's authority to certify copies of documents originally filed and issued in the Bahamian Action is clear. *See Black's Law Dictionary* (10th ed. 2014) (defining registrar as “[s]omeone who keeps official records”).

Mimosa Trust funds, and Anna and George cannot be held liable for conversion of the Mimosa Trust funds. The plain terms of Mimosa Trust Deed also preclude Frances from claiming that Anna and George were unjustly enriched at her expense when they received distributions from the Mimosa Trust.

To the extent that Frances argues that the trustee abused its discretion when making distributions to Anna and George but not Frances, that argument is improper as against Anna and George, who are only the beneficiaries of the Mimosa Trust.⁸ See discussion *infra* regarding Frances' failure to raise an issue of fact as to Anna and George acting as *de facto* fiduciaries to sustain an imposition of a constructive trust. For this reason,

Frances also argues that there are factual questions as to the existence of other trusts, which preclude summary judgment as to both unjust enrichment and conversion causes of action. In support of her claim that she is entitled to funds from other trusts, Frances submits unexecuted releases between UBS and Frances, which Anna purportedly transmitted to Frances in 2003. One unexecuted release refers to the "Carla" Trust, and one does not refer to any particular trust.⁹ However, Frances has submitted no documents or testimony evidencing any of the terms and/or beneficiaries of the "Carla" Trust or any other alleged UBS trust settled by Athena.

⁸ Moreover, Frances' argument, that the distributions failed to fulfill Athena's wishes because Anna allocated a portion of her distribution to George but not Frances, ignores the fact that Anna was free to dispose of her distribution from the Mimosa Trust as she wished.

⁹ Frances also submits a third, unexecuted release which refers to the Mimosa Trust.

Because the Bahamian Court declared in 2008 that the Mimosa Trust Deed is the sole trust Athena settled with UBS, and Frances has failed to come forward with sufficient evidence showing the terms/beneficiaries of any other existing UBS trust set up by Athena, Frances has failed to submit evidence sufficient to require a trial as to defendants' alleged conversion of other, unspecified trust funds.¹⁰

Further, Frances' unsubstantiated claim that Athena intended to hold shares in Sea Trade Maritime Corporation in trust for her benefit is also insufficient to deny summary judgment, because Frances submits no evidence demonstrating her right or interest in such shares, or the existence of such a trust.¹¹

Finally, Frances argues that I should deny summary judgment pursuant to CPLR § 3212(f). Discovery in this action has been ongoing since 2004, and has been the subject of several motions and many, many compliance conference orders. Frances has had ample time to conduct discovery in this action, but she has failed to uncover competent evidence to support any of her claims.

¹⁰ In any event, Frances claim' that Athena created other bank accounts with UBS, despite the submitted evidence showing that Anna and George received distributions only from the Mimosa Trust, may be litigated by Frances in another forum against UBS and UBS AG. *See Peters v Peters*, 101 A.D.3d 403 (1st Dep't 2012).

¹¹ Notably, a federal court's recent findings of fact as to the ownership of the Sea Trade Maritime Corporation shares contradicts Frances' claim in this action. *See Sea Trade Maritime Corporation et al. v. Stelios Coutsoodontis*, No. 09-cv-488 (S.D.N.Y. filed Aug. 23, 2016).

In sum, considering the terms of the Mimosa Trust Deed and the distributions made by UBS thereunder, defendants have shown their entitlement to summary judgment dismissing Frances' conversion and unjust enrichment causes of action, and Frances has failed to raise an issue of fact as to these claims. Accordingly, I dismiss Frances' causes of action for unjust enrichment and conversion against Anna and George. *See Pappas v Tzolis*, 20 N.Y.3d 228, 234 (2012) (affirming dismissal of plaintiff's unjust enrichment and conversion causes of action where a contract governing the subject matter existed and where there was no interference with plaintiff's property rights).

Regarding Frances' constructive trust cause of action, defendants argue that, because they do not have a fiduciary relationship with Frances, they are entitled to judgment as a matter of law dismissing this claim. Generally, to impose a constructive trust, "the plaintiff[] must plead and prove four essential elements: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment to impose a constructive trust" *Doxey v Glen Cove Community Dev. Agency*, 28 A.D.3d 511, 512 (2d Dep't 2006). A constructive trust is generally not imposed absent unjust enrichment.

Frances argues that Anna and George acted as *de facto* trustees with fiduciary duties and that by transferring to themselves Mimosa Trust funds, defendants preferred themselves over Frances. In support, Frances submits only a catalog of phone calls Anna made to UBS and communications Anna had with UBS regarding her own distributions. This evidence fails to raise an issue of fact as to whether defendants were *de facto* trustees. Anna was a distributee of the Mimosa Trust funds, and her communications

with UBS demonstrate nothing more than Anna's involvement in UBS's distribution of her trust funds. Further, Frances has failed to show that Anna and George were unjustly enriched at her expense. Accordingly, I also dismiss the constructive trust cause of action against George and Anna. *Farrell v Comstock Group, Inc.*, 211 A.D.2d 493, 493 (1st Dep't 1995) (finding imposition of a constructive trust unwarranted where only ordinary relationship exists and there was no showing of actual unjust enrichment).

Lastly, defendants seek attorneys' fees in defending this action because Frances refused to participate in the Bahamian Action and resolve her allegation that the Mimosa Trust Deed was fraudulent, and she continued to litigate this action despite the Bahamian Order finding that the Bahamian Trust Deed was authentic, and was the sole trust between Athena and UBS. Frances' causes of action against defendants were properly before me, and although Frances continued to prosecute this action despite the Bahamian Order and her inability to discover competent evidence in support of her claims, I do not find that Frances prosecuted the action in bad faith. Accordingly, I deny defendants request for attorneys' fees.

In accordance with the foregoing, it is ordered

ORDERED that defendants George Christy Peters and Anna Peters' motion for summary judgment is granted and the second amended complaint is dismissed with costs

and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

3/8/18

DATE

Saliann Scarpulla

SALIANN SCARPULLA, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

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FIDUCIARY APPOINTMENT

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REFERENCE