

Siegler v Lippe

2018 NY Slip Op 33946(U)

October 25, 2018

Supreme Court, Queens County

Docket Number: 703444/18

Judge: Timothy J. Dufficy

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
**SUZANNE SIEGLER, individually and as Successor
Trustee and beneficiary of the VERA LIPPE LIVING
TRUST,**

Plaintiff,

-against-

**Index No.: 703444/18
Motion Date: 7/17/18
Mot. Seq. 2**

**BARBARA KAYE NIXON TINKELMAN LIPPE,
Individually, as Trustee of the AMENDED AND
RESTATED BERNARD LIPPE LIVING TRUST
u/a/d 04/25/17, and as Executrix of the Estate of
Bernard Lippe, Deceased, BERNARD LIPPE
LIVING TRUST, and the ESTATE OF BERNARD
LIPPE,**

Defendant,

-----X

The following papers were read on this motion by defendant to dismiss the complaint pursuant to CPLR 3211 (a)(1), (a)(5) and (a)(7).

**PAPERS
NUMBERED**

Notice of Motion - Affidavits - Exhibits.....	EF24-EF27
Answering Affidavits - Exhibits.....	EF29-EF31
Reply Affidavits.....	EF32

Upon the foregoing papers it is ordered that the motion by defendant to dismiss the complaint is granted.

Plaintiff in this action for, *inter alia*, conversion, seeks the return of monies and properties which the plaintiff alleges belongs to plaintiff; as a beneficiary of a living trust. On December 15, 1997, plaintiff's mother, Vera Lippe, executed the Vera Lippe Living Trust. Pursuant to Article two of the Vera Lippe Trust, Vera Lippe specifically transferred certain property to her trust. Also, on December 15, 1997, Bernard Lippe, Vera Lippe's husband and plaintiff's father, executed the Bernard Lippe Living Trust, a reciprocal trust with the same terms as the Vera Lippe Trust. The Vera Lippe Living Trust

established that upon her death, the Trust would divide into two (2) separate and distinct shares, the Family Share and a Survivor's Share. The Family Share severely limited Bernard Lippe's ability to spend down the principal of the Family Share. It was intended to benefit the Lippes' only child, plaintiff, and was funded with specific designated assets. It granted Bernard Lippe the exclusive right to income from those assets during his lifetime, and expressly prohibited him from distributing more than \$5,000 or 5% of the trust's assets, whichever is greater, to himself in any calendar year. The purpose of the limitation was seemingly so that Bernard Lippe would benefit from the income produced by the Family Trust assets while he was alive, but the bulk of the assets themselves would remain in the Family Trust until his death to be distributed to the plaintiff. None of the assets from the Family Trust are the subject of the instant action.

The Survivors Trust was funded with all of Vera Lippe's assets not expressly distributed to the Family Trust, including the assets upon which the plaintiff's claims in this action are based. Whereas the Family Trust significantly limited Bernard Lippe's right to distributions from the Family Trust assets (so as to maximize the assets that would be distributed to plaintiff upon Bernard Lippe's death), the Survivors Trust contained no such limitation— Bernard Lippe could withdraw those assets at will. Since the Survivors Trust was primarily for the benefit of Bernard Lippe during his lifetime and the Family Trust assets were ultimately intended to pass to plaintiff, the Vera Lippe Trust Agreement expressly "recommended" that Bernard Lippe distribute assets from the Survivors Trust to himself before resorting to making distributions to himself from the Family Trust.

Plaintiff alleges in the complaint that, at various times following Vera Lippe's death, on July 21, 2000, Bernard Lippe improperly transferred monies from the Vera Lippe Survivors Trust to the Bernard Lippe Living Trust. Bernard Lippe died on August 26, 2017. Plaintiff alleges, in substance, that defendant Barbara Kaye Nixon Tinkelman Lippe, the second wife of plaintiff's father, improperly seized control of assets that were improperly distributed out of Vera Lippe's trust. Plaintiff commenced the instant action seeking the return of these assets.

Defendant seeks to dismiss the complaint, and parts thereof on various grounds, including that the causes of action are time-barred by the applicable Statute of

Limitations, that documentary evidence resolves factual issues raised by some causes of action, and that the remaining causes of action fail to state a claim. The motion is opposed by plaintiff.

Defendant moves to dismiss various causes of action on the ground that they are time-barred, pursuant to CPLR 3211 [a][5]. A cause of action alleging conversion of funds is governed by a three year statute of limitations (CPLR 214; *Cayuga P'ners LLC v Essex Captial P'ners, Ltd.*, 282 AD2d 493 [2d Dept 2001]). To establish the same, plaintiff must allege "legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant[s] exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights" (*Zendler Const. Co., Inc. v First Adj. Group, Inc.*, 59 AD3d 439, 440 [2d Dept 2009], quoting *Selinger Enters., Inc. v Cassuto*, 50 AD3d 766, 768 [2d Dept 2008]; *Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 592 [2d Dept 2007]; see generally *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-289 [2007]). Here, the plaintiff alleges, in substance, that Bernard Lippe failed to fund the Vera Lippe Trust with certain assets or otherwise unlawfully removed assets from the Vera Lippe Trust in violation of the terms of the Vera Lippe Trust Agreement, and to the plaintiff's benefit as a beneficiary of the Vera Lippe Trust. Plaintiff's second, third, fifth, sixth and seventh conversion causes of action are based on conduct that allegedly occurred more than three years ago. Specifically, plaintiff's second and fifth causes of action are based on Bernard Lippe's alleged conversion of a 50% interest in the Bernard Lippe Profit Sharing Plain, in July 2000. Plaintiff's third and seventh causes of action are based on Bernard Lippe's alleged conversion of a 50% interest in real property, located in Queens, New York, in May 2007. Plaintiff's sixth cause of action is based on Bernard Lippe's alleged conversion of a 50% interest in real property located in Boynton Beach, Florida in December 1998. A cause of action for conversion accrues when the conversion takes place (see *Sporn v MCA Records*, 58 NY2d 482, 487 [1983]). Inasmuch as these causes of action accrued more that three years before plaintiff commenced the instant action, the branches of the motion which seek to dismiss counts 2, 3, 5, 6 and 7 are granted.

The branch of the motion which is to dismiss count four of the complaint, based upon documentary evidence, is granted. Where, as here, the defendant moves, pursuant

to CPLR 3211(a)(1), to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence “ ‘must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim’ ” (*Fleming v Kamden Properties, LLC*, 41 AD3d 781, 781 [2d Dept 2007], quoting *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]; *Trade Source v Westchester Wood Works*, 290 AD2d 437 [2d Dept 2002]; see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]). Plaintiff’s conversion claims are premised on her contention that the trust assets allegedly converted by Bernard Lippe were instead to remain in the Vera Lippe Living Trust until Bernard Lippe’s death, and upon Bernard Lippe’s death those assets were to be distributed to the plaintiff. This contention is contradicted by the Vera Lippe Trust Agreement which granted wide discretion to Trustee (Bernard Lippe) to distribute principal and interest from the Vera Lippe Trust to Vera Lippe’s “Spouse” (then Bernard Lippe), while “spouse” was alive. Specifically, Article 8 of the Vera Lippe Trust Agreement unambiguously conferred Bernard Lippe (as Trustee) nearly unlimited discretion to pay or withdraw trust principal for his own benefit (as “Spouse”), and this unambiguous language must be enforced as written (see *Matter of Chase Manhattan Bank*, 6 NY3d 456, 460 [2006] (“The trust instrument is to be construed as written and the settlor’s intention determined solely from the unambiguous language of the instrument itself.”)). The cause of action for conversion based on such allegations are also legally insufficient, since the plaintiff had neither legal title to the funds, nor any possessory interest in them, at the time of the transfers, which occurred while Bernard Lippe was still alive and had no obligation to treat the funds in any particular manner (see *Thea v Thea*, 284 AD2d 245 [1st Dept 2001]; *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 385 [1st Dept 1992]; *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1st Dept 1990], *lv denied* 77 NY2d 803 [1991]).

Moreover, count four is subject to dismissal, pursuant to CPLR 3211[a][7], for failure to state a conversion claim. To establish the same, the plaintiff must establish (1) that she owns and has a right to possession of personal property at the time of the alleged conversion, and (2) that the property “is in the unauthorized possession of another

who has acted to exclude the rights of the owner” (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). With respect to the first element, the plaintiff alleges that she has a right to the alleged converted assets because they were to be distributed to her upon Bernard Lippe’s death. But the plaintiff concedes that her right to those assets were contingent on those assets remaining in the Vera Lippe Trust at the time of Bernard Lippe’s death. However, Bernard Lippe distributed those assets out of the Vera Lippe Trust during his lifetime, which he was entitled to do according to the terms of the Vera Lippe Trust. At the time of Bernard Lippe’s distribution of those assets during his lifetime, the plaintiff did not have any ownership rights or right of possession of any trust assets. At most, the plaintiff’s interest in these assets at the time of the alleged conversion was “a mere expectancy and not a vested right,” which is insufficient to support a conversion claim (*see Petty v Barnes*, 70 AD3d 661, 662 [2d Dept 2010]).

Similarly, the plaintiff cannot support her allegation that the assets were “in the unauthorized possession” of defendant. Once again, the Vera Lippe Trust Agreement expressly permitted Bernard Lippe (as Trustee) to distribute trust assets from the Vera Lippe Trust to himself (as “Spouse”), during his lifetime, and Bernard Lippe exercised this right. The complaint does not allege any facts from which it can be reasonably inferred that the defendant’s alleged current possession of these assets is unauthorized or otherwise subordinate to the plaintiff’s alleged right to them.

Count eight alleges that Bernard Lippe breached his fiduciary duties as Trustee of the Vera Lippe Trust by “diverting the assets of the Vera Lippe Living Trust to the Bernard Lippe Living Trust and/or the Estate of Bernard Lippe.” Where, as here, a claim for breach of fiduciary duty seeks only monetary damages, a three-year statute of limitations applies (*Scott v Fields*, 85 AD3d 756 [2d Dept 2011]). Here, the plaintiff’s breach of fiduciary duty claim is based on Bernard Lippe’s failure to transfer certain assets into the Vera Lippe Trust more than three years ago. Thus, it is barred by the statute of limitations. Moreover, the plaintiff’s claim is premised on Bernard Lippe’s distribution of assets out of the Vera Lippe Trust during his lifetime. Bernard Lippe was expressly authorized by the Vera Lippe Trust Agreement to make such distributions at his sole discretion, however.

The branch of the motion which is to dismiss plaintiff's ninth cause of action seeking an accounting is granted, as unopposed, and therefore abandoned (*see Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649 [2d Dept 2010]).

The branch of the motion which is to dismiss the tenth and eleventh causes of action which seek specific performance for the return of certain itemized personal property and real property in Queens, New York, is granted. In the absence of a contract between the parties, the plaintiff has no claim for specific performance (*see Cho v 401-403 57th Street Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]). Specific performance is an equitable remedy for a breach of contract, rather than a separate cause of action (*Id.*)

Plaintiff's claims for unjust enrichment (twelfth and thirteenth causes of action) are also dismissed as time barred. The three-year statute of limitations of CPLR 214 (3) governs here, since the plaintiff is seeking monetary, as opposed to equitable, relief (*see Ingrami v Rovner*, 45 AD3d 806, 808-09 [2d Dept 2007]; *Lambert v Sklar*, 30 AD3d 564 [2d Dept 2006]; *cf. Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 192 AD2d 501, 503 [2d Dept 1993]). The statute of limitations on an unjust enrichment claim begins to run upon the occurrence of the wrongful act (*id.*). Plaintiff's unjust enrichment claim is based on Bernard Lippe's alleged failure to transfer assets into the Vera Lippe Trust, upon Vera Lippe's death on July 21, 2000. Accordingly, the plaintiff's claims expired three years later, on July 21, 2003.

The statute of limitations applicable to a cause of action for money had and received is six years (*see CPLR 213[2]; County of Suffolk v Suburban Hous. Dev. & Research, Inc.*, 160 AD3d 607, 610 [2d Dept 2018]). Vera Lippe died on July 21, 2000. Plaintiff's claim for monies had and received based on Bernard Lippe's failure to fund the Vera Lippe Trust Fund with certain "identifiable cash assets" after Vera Lippe's death, expired six years later on July 21, 2006. The claim is thus time-barred.

Finally, in addition to substantive relief, the plaintiff's ad damnum clause seeks the recovery of plaintiff's "costs and disbursements in this action, including reasonable attorneys' fees. The general rule is that an attorney's fee is merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority (*214 Wall St. Assoc., LLC v Med. Arts-Huntington Realty*, 99 AD3d 988, 990 [2d Dept 2012]; *Gorman v Fowkes*, 97 AD3d 726, 727 [2d Dept 2012]; *Levine v Infidelity, Inc.*, 2 AD3d

691, 692 [2d Dept 2003]; *see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *Gorman v Fowkes*, 97 AD3d 726 [2d Dept 2012]; *Blair v O'Donnell*, 85 AD3d 954, 956 [2011]), although there are exceptions to this general rule (*see Matter of John T.*, 42 AD3d 459, 463 [2007]; *Harradine v Board of Supervisors of Orleans County*, 73 AD2d 118, 122 [1980]). Here, there is no contract which provides for an award of an attorney's fee, and plaintiff does not rely on any statutory provision in seeking such an award. Thus, the plaintiff's claim for attorneys' fees is dismissed.

Accordingly, based upon the foregoing, it is

ORDERED, the motion by defendant to dismiss the complaint is granted.

Dated: October 25, 2018



TIMOTHY J. DUFFICY, J.S.C.

FILED
NOV 26 2018
COUNTY CLERK
QUEENS COUNTY