

**Ferrara v Albus**

2019 NY Slip Op 30506(U)

February 27, 2019

Supreme Court, New York County

Docket Number: 651076/2018

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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CAROLYN A. FERRARA, AS TRUSTEE AND BENEFICIARY OF  
ALBUS IRREVOCABLE INVESTMENT TRUST

INDEX NO. 651076/2018

Plaintiff,

MOTION DATE 02/11/2019

- v -

MOTION SEQ. NO. 001

JOHN ALBUS,

Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21

were read on this motion to/for DISMISSAL

HON. BARRY R. OSTRAGER:

This case concerns a trust created to protect the assets of the parties’ parents, Dr. Jerry Albus and Ms. Alice Rogers. Plaintiff Carolyn Ferrara (“Ferrara”) is the daughter of Dr. Albus and Ms. Rogers. Defendant John Albus is Plaintiff’s brother. The parties and their two other siblings, non-parties Paul Albus and Laura Alee, are all beneficiaries of the Albus Irrevocable Investment Trust (the “Trust”). Plaintiff Ferrara purports to be the Trust’s co-trustee.

Defendant John Albus moves to dismiss Plaintiff’s complaint, pursuant to CPLR § 3211(a)(4) and CPLR § 1003, because of a prior pending action in California and failure to join a necessary party in this action. For the reasons stated herein, Defendant’s motion to dismiss is granted in part.

### Background

In July 2012, Dr. Albus and Ms. Rogers formed the Trust to allegedly protect Dr. Albus's assets from Ms. Rogers's profligate spending. The Trust corpus consisted of a few million dollars funded largely by the sale of Dr. Albus's dental practice and monies held in savings. Plaintiff and her non-party brother, Paul Albus, were to serve as the Trust's co-trustees. The siblings are all beneficiaries of the Trust.

Plaintiff alleges that Defendant John Albus, a beneficiary of the Trust, devised a scheme to wrest control of the Trust away from the trustees for his own pecuniary gain. Thus, Plaintiff alleges that Defendant sought to convince Dr. Albus, an eighty-year-old man suffering from advanced Alzheimer's Disease, and Ms. Rogers that they must dissolve the Trust and take control of its assets so they could make imprudent investments elsewhere.

In July 2016, Dr. Albus and Ms. Rogers, allegedly at Defendant's behest, commenced litigation in California to, *inter alia*, have the Trust dissolved and Plaintiff removed as a trustee. On December 5, 2017, Paul Albus resigned as a trustee of the Trust and Defendant John Albus purported to become a successor trustee. On December 8, 2017, Dr. Albus and Ms. Rogers, allegedly acting under Defendant's influence, purportedly signed a document (the "Notice of Removal") removing Plaintiff as a trustee and replacing her with Defendant's new wife, Maria Jose Ferreira de Oliviera.

Plaintiff also alleges that Defendant misappropriated Plaintiff's Charles Schwab Individual Retirement Account (the "Schwab IRA") which she inherited from her aunt in a transaction entirely unrelated to the Trust.

Plaintiff commenced this action alleging causes of action sounding in breach of fiduciary duty, conversion, unjust enrichment and seeking certain declaratory relief voiding the Notice of

Removal. Defendant moves to dismiss based on a prior pending action (the “California Action”) and Plaintiff’s purported failure to join Dr. Albus and Ms. Rogers as necessary parties in this action.

### Discussion

Under CPLR § 3211(a)(4), the Court has broad discretion to dismiss an action when it is shown that another action between the same parties on the same claims is pending elsewhere. “In order to reach this issue, it is necessary that there be sufficient identity as to both the parties and the causes of action asserted in the respective actions.” *White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 A.D.2d 90, 93 (1st Dep’t 1997). “With respect to the parties, the requirement is that there be substantial identity.” *Id.* at 93-94.

Here, the California Action, commenced in January 2017, is a proceeding brought by petitioners Dr. Albus and Ms. Rogers, under the California probate code, against respondents Paul Albus, Joseph Ferrara, and Carolyn Ferrara. The California Action seeks damages for alleged elder abuse and an order voiding the Trust.

The instant action, however, is hardly identical to the California Action. This action was commenced by Plaintiff Carolyn Ferrara against Defendant John Albus alleging claims sounding in breach of fiduciary duty, conversion, and unjust enrichment. Thus, the Defendant in this action is not even a party to the California Action. Further, the causes of action in this case, though related to the same Trust, are clearly not identical to the causes of action asserted in the California Action *against* Carolyn Ferrara.

In sum, because this action neither involves the same parties nor the same claims as those in the California Action, Defendant’s motion to dismiss because of a prior pending action is denied.

Defendant also moves to dismiss this action because of Plaintiff's purported failure to join Dr. Albus and Ms. Rogers as necessary parties.

"A court may always consider whether there has been a failure to join a necessary party." *City of New York v. Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 469, 475 (1979). "Necessary parties are defined as persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." *Id.* "An action is subject to dismissal if there has been a failure to join a necessary party."

Here, the participation of Dr. Albus and Ms. Rogers in this action is not necessary to accord full relief to Plaintiff and the rights of Dr. Albus and Ms. Rogers would not be adversely affected by most of the claims asserted herein. Adjudication of Plaintiff's claims for breach of fiduciary duty, conversion, and unjust enrichment would not adversely affect Dr. Albus and Ms. Rogers. Those claims relate entirely to Defendant's alleged misconduct and monetary damages Plaintiff has incurred as a result. Dr. Albus and Ms. Rogers need not participate in this action for those claims to be fairly adjudicated.

However, Plaintiff's third cause of action seeking a declaration that the Notice of Removal purportedly signed by Dr. Albus—removing Plaintiff as trustee—is null and void, cannot be fairly adjudicated without, at a minimum, joining Dr. Albus as a party. Such a declaration would clearly affect Dr. Albus with respect to his rights *vis-à-vis* the Trust.

Accordingly, it is hereby

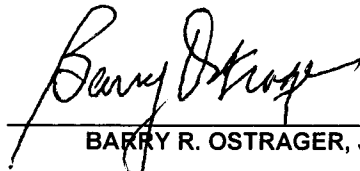
ORDERED that Defendant's motion to dismiss pursuant to CPLR § 3211(a)(4) is denied; and it is further

ORDERED that Defendant's motion to dismiss for failure to join a necessary party is granted, without prejudice, as to Plaintiff's third cause of action and denied in all other respects. The Clerk is directed to dismiss and sever Plaintiff third cause of action from the complaint; and it is further

ORDERED that Defendant file an answer Plaintiff's complaint within twenty days of this Decision & Order; and it is further

ORDERED that the parties appear for a preliminary conference on March 26, 2019 at 9:30 a.m.

2/27/2019  
DATE

  
BARRY R. OSTRAGER, J.S.C.  
**BARRY R. OSTRAGER**  
JSC

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|-----------------------|---|---------------------------------|---|------------------------------------|
| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED              | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER     |
| APPLICATION:          | <input type="checkbox"/> GRANTED                    |                                 | <input checked="" type="checkbox"/> GRANTED IN PART       |                                    |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER               |                                 | <input type="checkbox"/> SUBMIT ORDER                     |                                    |
|                       | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN |                                 | <input type="checkbox"/> FIDUCIARY APPOINTMENT            | <input type="checkbox"/> REFERENCE |