

Patricof v Patricof

2019 NY Slip Op 31229(U)

April 12, 2019

Supreme Court, New York County

Docket Number: 653920/2018

Judge: Francis A. Kahn III

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 14
Acting Justice

MARCIA PATRICOFF, individually and as the Personal Representative for the ESTATE OF JULES PATRICOFF, Plaintiff, INDEX NO. 653920/2018 MOTION DATE N/A MOTION SEQ. NO. 001

- v -

ALLAN J. PATRICOFF, Defendant. DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 were read on this motion to/for DISMISSAL

Upon the foregoing papers, Defendant's motion to dismiss Plaintiffs' complaint pursuant to CPLR §3211[a][5] is determined as follows:

Plaintiff Marcia Patricof is the mother of the Defendant Allan J. Patricof and the fiduciary of the estate of the Defendant's late father, Jules Patricof. This action has its origin in a loan of \$200,000.00 made by Plaintiffs to a non-party 125 South Cottage Street, LLC. The loan was secured by a mortgage on a parcel of real property located at 125 Cottage Street, Valley Stream, New York ("Cottage Street") on which Plaintiffs were the mortgagees. The transaction that primarily concerns this litigation derives from the closing of the sale of Cottage Street that allegedly occurred on August 3, 2012.

In the complaint, the Plaintiffs allege that they were to be paid \$251,100 in full satisfaction of the note they held. Plaintiffs further assert that Defendant, an attorney licensed to practice law in New York, while representing the Plaintiffs as attorney and "attorney-in-fact" at the closing, received \$251,000.00 on their behalf, but then failed to fully disburse these funds to Plaintiffs. Plaintiffs also accuse Defendant of deceiving them by affirmatively representing both before and after the closing that the mortgage could not be paid in full. Plaintiffs assert Defendant persuaded them to agree to accept \$87,500 in full satisfaction of their mortgage and that Defendant retained the proceeds allocated at the closing to satisfy the Plaintiff's mortgage. Defendant claims he neither funded the Cottage Street transaction nor represented his parents in the transaction as either an attorney or other fiduciary. Additionally, Defendant denies ever receiving the disputed mortgage satisfaction funds.

On August 7, 2018, Plaintiffs commenced this action by filing a complaint asserting five causes of action for fraud, conversion, breach of fiduciary duty, unjust enrichment and an accounting. By his motion, Defendant seeks to dismiss the complaint pursuant CPLR §3211[a][5] claiming all five causes of action are barred by the statute of limitations.

On a motion to dismiss a cause of action claiming it is barred by the statute of limitations, the movant bears the initial burden of making a *prima facie* showing that the time in which to sue has expired (*see* CPLR §3211[a][5]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). To meet its burden, “the defendant must establish, *inter alia*, when the plaintiff’s cause of action accrued” (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). In evaluating such a motion, “the Court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff” (*Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008]; *see also Leon v Martinez*, 84 NY2d 83, 87 [1994]) [“On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference...” [internal citation omitted]]. As well, a plaintiff’s opposition to a CPLR §3211 motion “must be given [its] most favorable intendment” (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). Where the movant demonstrates preliminarily that a claim is barred by the statute of limitations, the petitioner must establish that a toll or stay is applicable or that an issue of fact exists (*see Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]).

Concerning, Plaintiffs’ cause of action for fraud, Defendant is required on this motion to demonstrate that this proceeding was not commenced from six years from the date of the fraud (CPLR §213[8]) and that the Plaintiffs were “on inquiry notice of its fraud claims more than two years before it commenced the action” (*see Epiphany Community Nursery Sch. v Levey*, ___AD3d ___, 2019 NY Slip Op 00842 [1st Dept 2019]).

Here, based upon Plaintiffs’ allegations, there are multiple fraudulent acts alleged, by both misrepresentation and by omission. Plaintiffs claim fraud by affirmative act when Defendant allegedly misrepresented to Plaintiffs that only a portion of the funds were available to satisfy the mortgage, not the entire amount. Fraud by omission allegedly occurred when, based upon an alleged fiduciary relationship with Plaintiffs, Defendant failed to immediately disclose his receipt of the funds. In Plaintiff Marcia Patricof’s affidavit, she avers Defendant’s misrepresentation transpired “[i]n or around, July 2012” and “sometime after August 7, 2012”. While the earlier date is more than six years prior to commencement of this action, the latter may not be. As such, Defendant has failed to establish that all his alleged false representations are untimely. Moreover, the alleged omission presents an issue of fact as there is conflicting evidence when the disputed funds may have been received. Defendant claims it is the closing date which was on August 3, 2012 which is controlling. Plaintiffs, on the other hand, claim since the closing occurred by mail, Defendant likely received the funds on a later date.

Whether the Plaintiffs were on “inquiry notice” of Defendant’s alleged fraudulent acts presents a mixed question of law and fact and a motion to dismiss should be denied “where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred” (*Berman v Holland & Knight, LLP*, 156 AD3d 429, 430 [1st Dept 2017], *citing Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315, 315-316 [1st Dept 2006]). Here, based upon the close familial relationship between the parties, parents and child, and the alleged fiduciary relationships, Plaintiffs’ asserted reliance on the representations of Defendant adequately counterbalances Defendant’s claim that Plaintiffs should have known or inquired about the transaction based upon their business acumen in these matters (*see Epiphany*

Community Nursery Sch. v Levey, supra; Braddock v Braddock, 60 AD3d 84, 89 [1st Dept 2009]).

Regarding Plaintiffs' second cause of action, the limitations period of a conversion cause of action is three years (CPLR §214[3]; *D'Amico v. First Union Nat'l Bank*, 285 AD2d 166 [1st Dept 2001]) and the accrual date is the date that conversion of the property took place (*see Matter of Rausman*, 50 AD3d 909 [2d Dept 2008]). In general, a conversion occurs when there is "an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Employers' Fire Ins. Co. v Cotten*, 245 NY 102, 105 [1927]).

In the instant matter, Plaintiffs affirmatively plead in the complaint that Defendant received the disputed "Loan Payoff" "[i]n or before September 2012" and that "Defendant intentionally exercised unauthorized dominion of the Loan Payoff to the exclusion of the rights of [the Plaintiffs]." The complaint itself establishes the cause of action accrued on or before September 2012 and, therefore, the limitations period expired in September 2015, nearly three years before this action was commenced.

Plaintiffs' argument the statute of limitations did not begin to run until Plaintiffs' made demand for return of the money because Defendant's original receipt was lawful is misplaced. Here, even giving the Plaintiffs' complaint a liberal construction, their assertions that Defendant's instruction to the payor that the disputed proceeds be made to "Allan Patricof, as attorney" was without Plaintiffs' consent, that Defendant deposited the funds in his account in September 2012, and that Plaintiffs had an immediate and superior right to possession of the proceeds, constitute that Defendant's initial possession was unlawful and that the statute of limitations began to run immediately upon Defendant's receipt of the funds (*see In re Estate of King*, 305 AD2d 683 [2d Dept 2003]; *see also Collymore v Secretary of Hous. & Urban Dev.*, 22 AD3d 703 [2d Dept 2005]).

That Plaintiffs were unaware the funds had been converted is of no moment since it is immaterial in conversion that a claimant "may not have discovered the wrongs complained of until long after they were committed" (*see Varga v Credit-Suisse*, 5 AD2d 289 [1st Dept 1958]). Unlike a fraud based cause of action, no discovery exception applies to a conversion claim (*see Vigilant Ins. Co. of Am. v Hous. Auth.*, 87 NY2d 36, 44-45 [1995]).

As to Plaintiffs' cause of action alleging breach of fiduciary duty, Defendant asserts that a three-year statute of limitations is applicable since Plaintiffs allege an injury to property and seek only money damages (*see Yatter v William Morris Agency*, 256 AD2d 260 [1st Dept 1998]). Resultantly, Defendant argues this claim is barred as Plaintiffs allege the breach occurred in 2012. A six-year, not three-year, statute of limitations is applicable here as Plaintiffs' breach of fiduciary duty claim is predicated in alleged acts and omissions constituting fraudulent conduct which is essential to the cause of action (*see Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). Based upon the court's analysis of the fraud claim, *supra*, concerning when the alleged misrepresentations and omissions occurred and the accrual of the fraud claim, the court is unable, at this early juncture, to determine if the six years has transpired.

Similarly, the same factual ambiguity prohibits a finding that the six-year statute of limitations applicable to Plaintiffs' unjust enrichment claim has expired (see generally CPLR 213[1]; *Maya NY, LLC v Hagler*, 106 AD3d 583 [1st Dept 2013]).

An attorney-in-fact is a fiduciary and is required by statute to account (see GOL §5-1505[3]). Therefore, "[a] proceeding to compel an accounting by a fiduciary is governed by a six-year statute of limitations" (*In re Estate of Meyer*, 303 AD2d 682, 683 [2d Dept 2003]; see also CPLR §213[1]; *Matter of Barabash*, 31 NY2d 76 [1972]). Where a fiduciary relationship is ongoing, the six-year period does not commence running until there is an open or complete repudiation of the confidential relationship by the fiduciary or judicial settlement of the fiduciary's account (see *Matter of Barabash, supra*; *Incorporated Vil. of Muttontown v Ryba*, 121 AD3d 757, 759 [2d Dept 2014]). In addition, the statute may begin to run when the trust relationship comes to its end, to wit the fiduciary relationship has clearly been terminated and the fiduciary is without further duties to perform (see *Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195 [2008]; *Spallholz v Sheldon*, 216 NY 205 [1915]; *Westchester Religious Inst. v Kamerman*, 262 AD2d 131 [1st Dept 1999]).

Here, the court must accept for the purposes of this motion Defendant was Plaintiffs' attorney-in-fact. Defendant failed to establish *prima facie* when the fiduciary relationship ended between himself and Plaintiff since he denies its very existence. As to the commission of an act openly repudiating the relationship, the date Defendant allegedly received the funds does not qualify since this act was not open or complete. Plaintiffs allege, which the court again must accept as true at this point, Defendant took the funds without their knowledge and business relations continued between the parties (see *Matter of Ruth Bronner & Zwi Levy Family Sprinkling Trust*, 112 AD3d 429 [1st Dept 2013]; see also *212 Inv. Corp. v Kaplan*, 44 AD3d 332 [1st Dept 2017]; *Star Meth Corp. v Steiner*, 134 AD3d 555 [1st Dept 2015]).

Accordingly, Defendants' motion is granted only to the extent that Plaintiffs' second cause of action for conversion is dismissed. The motion is denied in all other respects.

Parties are reminded that they are to appear for a preliminary conference on **June 4, 2019, at 9:30 a.m.**, in Courtroom 1045, located at 111 Centre Street.

4/12/2019
DATE


FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input 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