

Carlson v Colangelo
2019 NY Slip Op 34301(U)
June 10, 2019
Supreme Court, Westchester County
Docket Number: Index No. 50095/2019
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
KRISTINE M. CARLSON,

Plaintiff,

-against-

**DECISION & ORDER
Index No. 50095/2019
Sequence No. 1**

**CRISSY COLANGELO, individually and as Trustee of
the DONALD P. DEMPSEY REVOCABLE TRUST and
DEMPSACO LLC,**

Defendants.

-----X
WOOD, J.

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 8-20, were read in connection with defendants’ pre-answer motion to dismiss plaintiff’s verified complaint pursuant to CPLR 3211(a)(1).

According to the verified complaint, plaintiff and Donald Dempsey, (“Decedent”) had a close business and personal relationship for well over a decade before he died in December 2015. In or about 2005, decedent advised plaintiff that he had a business opportunity that involved purchasing commercial real estate, including a gas station and garage located in Peekskill for an investment by plaintiff of \$100,000. Plaintiff agreed to the deal, and in exchange for her investment, decedent advised plaintiff that she would be a 50% owner of Dempsaco LLC (“Dempsaco”), which he was creating to own the real estate and business he acquired with her investment.

From 2007 until 2013, when Decedent had a relapse of his cancer, he made regular distributions to plaintiff as a 50% owner of Dempsaco.

Before Decedent's death, plaintiff also sold her house and moved to real property owned by Decedent, known as 122 Eton Downs in Cortlandt Manor ("the Premises"). Decedent promised plaintiff that when he died, he would transfer his interest to the Premises to Plaintiff, which he did. Decedent, as grantor, established the Trust, approximately one month before he died ("the Trust"). Defendant Colangelo was a Trustee of the Trust.

Plaintiff complains that approximately three and one-half years have passed since Dempsey died, and plaintiff has still received nothing. The Trustee has not yet transferred title to the Premises, nor has the Trustee distributed the \$350,000 stream of income to plaintiff that was promised in the Trust.

As a result, plaintiff seeks the transfer of the Premises pursuant to the terms of the Trust. Plaintiff also seeks a judgment declaring that she is a 50% member of Dempsaco, and directing Colangelo, the other member of Dempsaco, to render a full accounting of Dempsaco's operations from the date of Decedent's death, for recoupment from Dempsaco and Colangelo of all income payments wrongfully withheld from plaintiff, and the imposition of a constructive trust over all such income payments wrongfully withheld and compensatory and punitive damages for breach of fiduciary duty.

Upon the foregoing papers, the motion is decided as follows:

It is well-settled that under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d 83, 88 [1994]; 730 J&J LLC v Fillmore Agency, Inc., 303 AD2d 486 [2d Dept 2003]; Cives Corp. v George A. Fuller Co., Inc., 97 AD3d 713 [2d Dept 2012]). The documentary evidence offered must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable (Rabos v R&R Bagels & Bakery, Inc., 100 AD3d 849 [2d Dept 2012]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgage, deeds, contracts, and any other papers, the contents of which are

essentially undeniable, would qualify as documentary evidence in the proper case” (Cives Corp. v George A. Fuller Co., Inc., 97 AD3d 713 [2d Dept 2012]).

The Second Department has held that a trust agreement qualified as “documentary evidence” while affidavits are not (Fontanetta v Doe, 73 AD3d 78, 85 (2d Dept 2010))

Turning to defendants’ first argument that plaintiff forfeited her interest in the Trust because she allegedly violated the Trust’s NINTH paragraph the in terrorem clause. After the Court’s reading of the Trust, it is clear that the Trust contains an in terrorem clause that prohibited any beneficiary from contesting the Trust or any of its provisions. Specifically, the Trust provides, in pertinent part, that in the event that a beneficiary contests any aspect of the Trust, “the Grantor directs that such rights of such challenger shall be ascertained as they would have been determined had the challenger predeceased the execution of this instrument and the Grantor, without living issue” (*see Trust, Ex. B at Par. 9*). In addition, the challenger is charged with all costs, legal fees and expenses incurred with such challenge.

Defendants argue that plaintiff is clearly contesting an aspect of the Trust, insofar as their contention that the income stream of the Trust is mandatory, even though there is allegedly prefatory language (wish and desire). In divergence, plaintiff claims that she is not contesting the Trust, and that the directive to the Trustee to distribute the \$350,000 to plaintiff under the Trust is mandatory.

From these facts, it is not clear whether plaintiff clearly attacked the validity of the Trust in direct contravention of the Decedent’s apparent intention to prevent such actions by including an in terrorem clause, or merely moving to enforce the provisions of the Trust. While in terrorem clauses are enforceable, they are “not favored and [must be] strictly construed” (Tumminello v Bolten, 59 AD3d 727 [2d Dept 2009]). Since defendants made this

motion exclusively under CPLR 3211(a)(1), their submissions were insufficient as a matter of law to grant this branch of the motion. Such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (Goshen v Mut. Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]). The paramount determination as to whether the in terrorem clause has been triggered, involves an analysis of the construction of the Trust, Grantor's intent, and an evaluation of the conduct of plaintiff (Matter of Ellis, 252 AD2d 118 [2d Dept 1998]). In viewing these factors, at this juncture it cannot be determined as a matter of law that plaintiff violated the in terrorem clause of the Trust and, consequently, forfeited her legacies thereunder (In re Cagney, 293 AD2d 675, 676 [2002]). Thus, the documentary evidence submitted fails to conclusively establish a defense to asserted claims as a matter of law.

Next, defendants assert that Plaintiff's First Cause of Action for specific performance/mandatory injunction concerning the transfer of the Premises to plaintiff is moot, since Colangelo remains ready, willing and able to effectuate the transfer of the property to plaintiff upon plaintiff's execution of a Release. A plaintiff establishes its prima facie entitlement to specific performance by demonstrating that (1) it had substantially performed under the contract and was willing and able to perform any remaining obligations, (2) defendant was able to convey the property, and (3) there was no adequate remedy at law (Union Temple of Brooklyn v Seventeen Dev., LLC, 162 A.D.3d 710, 712 [2d Dept. 2018]).

Here, Plaintiff is ready, willing and able to accept transfer of the Premises, but refuses to execute the Release Agreement. Colangelo, by the Trustee's Letter attached a proposed Receipt, Release, Refunding and Indemnity Agreement (the "Release Agreement") and required plaintiff to sign it as a condition precedent to the distribution of the Trust's interest in the Premises to plaintiff. The Release Agreement provides that in the event that the Trustee shall at any time have insufficient funds to pay expenses, plaintiff will promptly refund to the

Trustee or her successors, such amounts not to exceed in the aggregate the aggregate fair market value on the date of distribution of all property of the Trust now or previously distributed to plaintiff. The Release Agreement also contained an indemnification clause. Plaintiff calls this a draconian agreement and refuses to sign it.

“It is legal duress for a trustee to refuse to turn over property to his beneficiary rightfully entitled thereto, except upon condition of signing a release” (In re Lasdon, No. 703/93, 2010 WL 9552756, at *7 (N.Y.Sur. June 09, 2010) cf. Matter of Tilly Baron, NYLJ, May 11, 1999, at 27, col 5 [Sur Ct NY County]). In a sense, it is akin to holding the trust assets hostage pending execution of the Release Agreement. Under these circumstances, the documentary evidence relied upon by defendants, does not “utterly refute the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law as required by CPLR 3211(a)(1).

As for defendants’ contentions that the Second Cause of Action for a judgment declaring that plaintiff is a 50% member of Dempsaco should be dismissed because pursuant to the Trust, Decedent bequeathed all of his interest in Dempsaco to Colangelo. The record shows that plaintiff was receiving payments from Dempsaco, and plaintiff pleaded that she is entitled to a judgment declaring that she is a 50% member of Dempsaco. Accordingly, there is a justiciable case or controversy for the Court to decide.

Also, the Second Cause of Action, refers to paragraph SIXTH of the Trust, which reads in pertinent part: “It is the Grantor’s sincere **wish and desire** that Crissy Colangelo provide a stream of income, not to exceed the sum of Three Hundred Fifty Thousand (\$350,000) in total to Kristine M. Carlson” (See Trust, Ex. B, page 6). The term “wish and desire,” has been held to be prefatory, and not binding on the executor (Matter of Sparacio's Estate, 61 AD2d 486,

488 (2d Dept1978), aff'd, 47 NY2d 771 (1979). However, it could be that since the specific amount and the recipient are clearly expressed in the Trust, this is an indication that the intention of Decedent was not to use prefatory words expressing desire or hope, but to give an express, binding direction, clothed in the language of civility (In re Martin's Estate, 32 AD2d 849, 300 NYS2d 751 (3rd Dep't. 1969). The fact that a bequest or devise is expressed in the form of a wish or desire does not necessarily defeat it (In re Alexejew, No. 251390, 1994 WL 16851433 (N.Y.Sur. May 1994)

Since there are disputed issues regarding the construction of the Trust relating to the distribution of the \$350,000, the Trust neither resolved all factual issues as a matter of law nor does it conclusively dispose of plaintiff's claim. Defendant's motion regarding plaintiff's Second Cause of Action is denied.

The Third Cause of Action alleges that Colangelo breached a fiduciary duty and demands an accounting all of expenses incurred and income received in connection with Dempsaco and demands the imposition of a constructive trust. According to defendants, decedent bequeathed all of his interest in Dempsaco to Colangelo. Defendants continue that since plaintiff is not a member of nor does she have any interest in Dempsaco, she does not have standing to bring such claims for breach of fiduciary duty or an accounting regarding Dempsaco. Plaintiff's claim for a constructive trust should also be dismissed, according to defendants, as plaintiff has not alleged the requisite factors or elements to establish a constructive trust, which must be proven by clear and convincing evidence. In addition, since plaintiff's only interest in the Trust is the Premises, which Colangelo is ready, willing and able to transfer to plaintiff, the claims for breach of fiduciary duty, an accounting and imposition of a constructive trust concerning the Trust are moot and should be denied.

However, the Court finds that plaintiff is not precluded by the Trust at this early stage of the proceedings from bringing this suit based upon these claims.

Plaintiff's Fourth Cause of action alleges that Colangelo and/or the Trust have been unjustly enriched at the expense of, and to the determined of plaintiff and Dempsaco. Defendants argue that the unjust enrichment claim is identical to the constructive trust claim and it should be dismissed as duplicative. To date, defendants have not transferred title to the Premises to plaintiff. The Trust neither conclusively establishes a defense to plaintiff's causes of action as a matter of law, nor does it resolve all factual issues and dispose of plaintiff's causes of action as a matter of law.

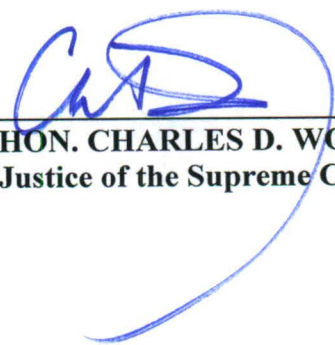
NOW, THEREFORE, for the stated reasons, it is hereby

ORDERED, that Defendants' pre-answer motion to dismiss is Denied; and it is further

ORDERED, that defendants, file and serve their answer to plaintiff's verified complaint, no later than 20 days after this Decision and Order is filed on NYSCEF.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: June 10, 2019
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF: