

Couzens v Treglia

2019 NY Slip Op 34754(U)

January 8, 2019

Supreme Court, Westchester County

Docket Number: Index No. 67499/2016

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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

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KAREN COUZENS, as Attorney-in-Fact for CORA
TANGNEY TANNER,

Plaintiff,

- against -

DECISION AND ORDER
Index No. 67499/2016
Sequence Nos. 1&2

RUTH TREGLIA and BETTY MURRAY,

Defendants.

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WOOD, J.

The following papers were read in connection with the summary judgement motions of plaintiff, Karen Couzens, as Attorney-in-Fact for Cora Tangney Tanner (Seq 1); and defendant Ruth Treglia ("Treglia") (Seq 2):

- Plaintiff's Notice of Motion, Plaintiff's Affidavit with exhibits, Counsel's Affirmation, Exhibits, Memorandum of Law, Rosen's Affidavit with exhibit.
- Defendant's Notice of Motion, Counsel's Affirmation with exhibit, Memorandum of Law, with exhibits, Counsel's Affirmation, Exhibits.
- Plaintiff's Counsel' Reply Affirmation.
- Plaintiff's Memorandum of Law in Opposition to Treglia's Motion.
- Treglia's Memorandum of Law in Opposition to Plaintiff's Motion.
- Treglias' Reply Memorandum.
- Plaintiff's Reply Memorandum.

This is an action arising from the alleged theft by Treglia of more than \$2 million from Tanner, an 85 year-old widow, between April 2013 and December 2015, while Treglia was employed

as Tanner's personal bookkeeper. Tanner is retired, has no children and supports herself with savings that she and her late husband accrued from work. In December 2012, she suffered a physical collapse as a result of an alcohol induced neuropathy rendering her unable to walk, bathe, dress, cook, and other tasks, or manage her financial affairs. She was subsequently diagnosed with dementia. The complaint accuses Treglia of taking advantage of Tanner's age and medical condition by transferring monies from Tanner's accounts to her own. Allegedly, Treglia falsely delineated some of these transfers as payments of legitimate expenses and labeled others as gifts to Tanner's family members. She then also paid herself tens of thousand of dollars each month as "wages" for her bookkeeping services, without authorization for those amounts from Tanner or any other person.

Plaintiff now moves for summary judgment on her causes of action seeking damages for breach of fiduciary duty, restitution under the faithless servant doctrine, conversion, fraud and unjust enrichment as well as for an accounting. Tanner's health aide, Mrs. Murray, settled the claims against her, and was dismissed from this action on February 9, 2018, leaving Treglia as the remaining defendant. Treglia now brings a motion for summary judgment seeking to dismiss the complaint as against her.

Based upon the foregoing, the motions are decided as follows:

Summary Judgment

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden,

the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (68 NY2d 320,324). Further, CPLR 3212(b), specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact".

Here, the record shows that in early 2013, plaintiff, who is Tanner's niece, became more involved in Tanner's affairs. Plaintiff's mother (Tanner's sister, Margaret D'Arcy ("D'Arcy")) moved in with Tanner so that D'Arcy's home health aide, Betty Murray ("Health Aide") could provide both sisters with medical assistance, and help with shopping, and other tasks. The Health Aide then introduced plaintiff to Treglia, and on or about April 20, 2013, plaintiff hired Treglia to perform

bookkeeping and bill paying services for Tanner. According to plaintiff, she hired Treglia with the understanding that Treglia would work approximately three to four hours each week at Tanner's home. Shockingly, neither plaintiff nor Tanner supposedly ever discussed any payments terms with Treglia.

At the time Treglia became the bookkeeper, Tanner's investment accounts were valued at more than \$4.24 million; her checking account was about \$25,000 and a certificate of deposit was valued at more than \$16,000. She also maintained five accounts to assist with her young relatives' educational expenses, which were collectively valued at more than \$40,000. From April 20, 2013, until she left Tanner's employ in early December 2015, Treglia caused Tanner's stock holdings to be liquidated in amounts ranging from \$70,000 to \$90,000 every month. Treglia allegedly was aware that those stock sale triggered tax liabilities for Tanner, but Treglia never kept track of those liabilities or set aside any funds to pay them. Rather, when Tanner's quarterly taxes came due, Treglia liquidated additional assets to pay them, which triggered even more tax liabilities. Plaintiff also contends that Treglia wrote thousands of checks to herself and to "Cash" and deposited them or kept the proceeds.

According to Treglia, all of these payments were for her wages and reimbursement of unspecified, undocumented expenses. Treglia paid herself \$2,150 per week, and then she nearly tripled her weekly pay to approximately \$6,000 per week by early 2015. Plaintiff proffers that in early May 2013, Treglia began issuing herself a second weekly check, often writing expenses or supplies in the memo line. These additional checks initially amounted to \$250 weekly, but then by June 2015, this second check amounted to an additional \$5,995 per week. There seems to be no explanation for these alleged expenses, insofar as she did not routinely advance expenses for Tanner whose groceries, medication and other supplies were procured and paid for by the Health Aide. Treglia allegedly wrote

herself an additional 88 checks each bearing the notation "Caroline, which references Mrs. Tanner' niece" for a total of \$220,000. Plaintiff sums up that the cumulative harm to Tanner totaled \$186,195 in 2013, \$624,662 in 2014, and \$763,186, in 2015. In less than three years, Treglia collected at least \$1.574 million.

Plaintiff also offers the affidavit of Gary B. Rosen, a Certified Public Accountant and financial professional with over 40 years of experience in public accounting. His review of the record indicates that throughout her employment as a bookkeeper, Treglia often made numerous disbursements to herself from Tanner's accounts in a single day. Rosen points out specific checks that Treglia wrote to herself, cashed and/or deposited the checks and kept the proceeds. The record contains numerous other examples in which three or more checks aggregating more than \$10,000, were written on the same day and cashed or deposited by Treglia. The accountant explains that in the Anti-Money Laundering field, the illegal act of splitting cash withdrawals or deposits into smaller amounts to stay under a currency reporting threshold is known as "Structuring". In his experience, individuals engaged in fraud often use Structuring to attempt to avoid suspicion and detection of their activities. It is his expert opinion that Treglia structured numerous payments to herself from Tanner's accounts to try to avoid drawing attention to the large amounts she was withdrawing each week. He attests that a properly trained and experienced bookkeeper working 50 hours per week and time and a half for overtime, could expect an annual salary of \$55,525 per year. A bookkeeper of Treglia's training and experience working in a position suited to her abilities and limitations, could expect a salary of \$52,455. In his expert opinion that Treglia's receipt of \$1,578,488.08 from Mrs Treglia in a period of less than three years vastly exceeded any legitimate wages she could have earned.

Treglia explains that the checks were salary payments for her work on behalf of Tanner,

D'Arcy and their family members. Further, during the same time period in which she alleges that Treglia took advantage of Tanner, Tanner gave Plaintiff \$1,500 per week and gave Plaintiff \$1,000 a week for plaintiff's daughter Charlotte, and gave plaintiff \$2,500 per month for plaintiff's daughter Caroline. Tanner also gave plaintiff \$1,500 per week in 2013, to support plaintiff as plaintiff was going through a divorce. Each payment made from Tanner to plaintiff for plaintiff, Charlotte and Caroline during 2013 was made via a check signed by Tanner and prepared by Treglia.

Treglia testified that she did not keep written records of her hours worked; she was paid an unspecified standard salary, and she worked between 50 to 70 hours per week; She testified that plaintiff was instructing that stock be sold, and that the proceeds be transferred to her checking account. On a monthly basis, she would only receive checks for her wages. Every check that she gave Tanner to sign was explained in full detail. She explains that Caroline (Tanner's niece) received a check once a month for \$2,500, she would also get paid for her work for plaintiff and her daughters and mother. She wrote checks for the daughter's college law school, but was never reimbursed to Tanner. For weekly work, Treglia wrote some checks from Tanner for expenses of her family. Many of the checks were given for plaintiff's family. When she wrote checks for Mrs. Tanner, she paid for utility bills, and did initial preparation for her tax returns. She explains that she wrote two separate checks so that they would be deposited in two separate bank accounts. She claims that she would also get alleged bonus checks in addition to her 50 to 70 hours per week that she worked. Treglia accuses plaintiff of wanting to deplete Tanner's accounts, and she was very uncomfortable. She also asserts that plaintiff wanted her aunt's will changed, and the will was changed so that upon Tanner's death, plaintiff would be the beneficiary of Tanner's condominium that was worth about \$700,000. Moreover, Treglia testified that she never signed Tanner's name to any of the numerous checks shown

at the deposition, and that Tanner that personally signed each of the checks.

“In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct” (Kurtzman v Bergstol, 40 AD3d 588, 590) . In order to establish a conversion claim, a plaintiff must show that he had “an immediate superior right of possession to the identifiable fund and the exercise by defendants of unauthorized dominion over the money in question to the exclusion of plaintiff's rights” (Fitzpatrick House III, LLC v Neighborhood Youth& Family Servs., 55 AD3d 664, 665 [2d Dept 2008]).

As a general rule, the question of whether a relationship is a fiduciary one is a question of fact for the jury (Langford v Roman Catholic Diocese, 271 AD2d 494, 503 [2d Dept 2000]). However, here, Treglia was in charge of Tanner's affairs and took care of her finances. Such a relationship “may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but an arms-length business relationship does not give rise to a fiduciary obligation” (Faith Assembly v Titledge of New York Abstract, LLC, 106 AD3d 47, 62 (2d Dept 2013)). Here, it is clear that Treglia was more than just a bookkeeper to Tanner, which gave rise to a confidential and fiduciary relationship. Treglia worked in the Tanner home for many more hours than she was initially hired.

As for the misconduct component for breach of fiduciary duty, allegedly Treglia took more than \$1.5 million from Mrs. Tanner' account in less than three years, without obtaining prior authorization. In opposition, Treglia argues that there was no evidence that her compensation was not authorized by Tanner, or that Treglia presented false invoices.

While alarm bells and sirens ring loudly of wrongdoing, stupidity, and neglect from all

directions, the court's job on this motion for summary judgment is to determine whether issues of fact exist, and it is not the court's function on a motion for summary judgment to assess credibility (Garcia v Stewart, 120 AD3d 1298, 1299 [2d Dept 2014]). Neither party made out a prima facie case for their respective motions. It is incomprehensible that the terms of Treglia's employment with Tanner have not been set forth on this record, and the deposition testimony of plaintiff and Treglia do not provide Treglia's employment conditions.

Treglia also argues that plaintiff cannot maintain her conversion cause of action because it is undisputed that Tanner executed each of the checks plaintiff alleges were improperly caused by the Heath Care Aide and Treglia. As such, Treglia argues that plaintiff cannot show that Treglia wrongfully exercises dominion over funds in derogation of Tanner's ownership because Tanner executed the checks. Thus, plaintiff fails to offer evidence of any misrepresentation made by Treglia to induce Tanner's reliance or any promise by Treglia to pay for certain expenses--inducing Tanner to pay purported invoices--and then failing to pay them.

Treglia further argues that plaintiff's claim that Tanner was fraudulently induced, or that she was unfit to execute her own checks, is undermined by plaintiff's own testimony that she writes checks for Tanner, that Tanner is capable of understanding the need to pay bills and why she is signing the check written by plaintiff. Moreover, Tanner verified the original complaint in this action dated November 21, 2016 so she must have been able to understand and properly execute checks from April 2013 through December 2015, which is the time in question in this case.

In her reply papers, plaintiff submits for the first time an Affidavit of Yves A. Lebrun, MD, board certified by the American Board of Psychiatry and Neurology. The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the

movant to introduce new arguments or new grounds for the requested relief (Allstate Ins. Co. v. Dawkins, 52 AD3d 826, 827 [2d Dept 2008]). The court, in its discretion considers this affidavit as it addresses the argument that had been raised in opposition papers as to Tanner's capacity. Dr LeBrun attests that Tanner has been under his care since May 2013, and continues to be under his care to present. He has been treating her for symptoms relating to her memory loss, hallucinations due to alcohol and dementia. It is his opinion that during the period from May 2013 through December 2015, Tanner suffered from dementia, major short term memory loss and hallucination and was not capable of managing her own affairs. Taking into consideration the parties' arguments, the court finds again that neither party made out a prima facie case, and this branch of their motions for summary judgment is denied.

As for the cause of action sounding in fraud, a plaintiff must allege that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and that the other party justifiably relied upon such misrepresentation or concealment to his or her own detriment (Schwatka v Super Millwork, Inc., 106 AD3d 897, 900 (2d Dept 2013), resulting in an injury (New York University v Continental Ins. Co., 87 NY2d 308 [1995]).

"Undue influence is seldom practiced openly, but it is, rather, the product of persistent and subtle suggestion imposed upon a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the victim's will to the point where it becomes the willing tool to be manipulated for the benefit of another" (Matter of Burke, 82 AD2d 260, 269 [2d Dept 1981]). As the court has found, existing triable issues of fact remain as to the terms of employment, and the understanding between plaintiff, Tanner and Treglia, and the final destination of all of Tanner's monies transferred by Treglia.

Under the Faithless Servant Doctrine-defendants who are engaged in repeated acts of disloyalty, risk complete and permanent forfeiture of compensation, deferred or otherwise (William Floyd Union Free Sch. Dist. v Wright, 61 AD3d 856, 859 [2d Dept 2009]). It is well-settled that one who owes a duty of fidelity to a principal and who is faithless in the performance of his or her services is generally not entitled to recover compensation, whether commissions or salary (Royal Carbo Corp. v Flameguard, Inc., 229 AD2d 430 [2d Dept 1996]). Notably, Treglia has attached multiple checks that were paid to the order of cash that plaintiff had deposited for allegedly for her own benefit or for the benefit of her daughters. The gravaman of plaintiff's claims is that Treglia deliberately concealed the true purpose of the checks she gave Tanner to sign, which was to enrich Treglia at Tanner's expense.

On this record, clearly there are triable issues of fact. What is evident is that there were numerous people who freely used and benefitted immensely from Mrs. Tanner's resources. The faithless servant doctrine is applicable upon a showing of a persistent pattern of disloyalty, which neither party showed a prima facie case (William Floyd UFSD v Wright, 61 AD3d 856 [2d Dept 2009]). However, affidavits and evidence of checks submitted by Treglia raise triable issues of fact as to whether the transactions at issue were authorized by Tanner, and whether Tanner had capacity to authorize those checks. This also holds true for the unjust enrichment cause of action if Treglia was greatly enriched at Tanner's expense.

Finally, the court finds that Treglia must provide an accounting of Tanner's assets, as plaintiff has amply shown a confidential relationship existed between Treglia and Tanner, who had access to all of Treglia's assets.

Accordingly, for the above stated reasons, it is hereby

ORDERED, that plaintiff's motion (Seq 1) is granted to the extent that an accounting of Tanner's assets is ordered so that on or before 30 days after entry of this Decision and Order on NYSCEF, Treglia shall provide plaintiff with a detailed informal accounting of all checks written during Treglia's tenure as an employee for Tanner, and the accounts into which the checks were deposited, and also the whereabouts of any monies from Tanner's accounts from which Treglia transferred monies, and, and Treglia is also directed to render such an accounting of all the monies Treglia received, obtained or controlled during her employment by Tanner, including specifically delineating any compensation and other beneficial interests Treglia obtained; and the motion is denied otherwise; and it is further

ORDERED, that Treglia's motion for summary judgment (Seq 2) is denied; and it is further

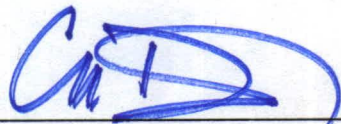
ORDERED, that the parties are directed to appear in the Settlement Conference Part at 9:15 am on January 22, 2019, in Courtroom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd, White Plains, New York 10601.

The Clerk shall mark his records accordingly.

All matters not specifically addressed are herewith denied.

This constitutes the decision and order of the court.

Dated: White Plains, New York
January 8, 2019



CHARLES D. WOOD, J.S.C.

To: All Parties by NYSCEF