

Royal Bank of Can. v Solny
2020 NY Slip Op 30551(U)
February 26, 2020
Supreme Court, New York County
Docket Number: 655436/2019
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

ROYAL BANK OF CANADA,
Plaintiff,
INDEX NO. 655436/2019
MOTION DATE
MOTION SEQ. NO. 003 004

- v -

MALKA ROSENBERG SOLNY aka MALKA ERIKA
ROSENBERG, SHANDELLE SOLNY and ROSE
SOLNY
Defendants.
DECISION + ORDER ON
MOTION

HON. MARCY S. FRIEDMAN

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44,
45, 46, 47, 48, 49, 50, 73, 74, 75, 76, 77, 78, 79, 80, 81, 95, 96, 97
were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 51, 52, 53,
54, 55, 56, 57, 58, 59, 64, 65, 66, 67, 68, 69, 70, 71, 72, 82, 83, 84, 86, 87, 88, 90, 91, 98, 99
were read on this motion to/for DISMISSAL

In this decision, plaintiff Royal Bank of Canada is generally referred to as Royal Bank.
Defendants are generally referred to by their first names, not out of disrespect but for purposes of
convenience as they all have the same last name.

In this action, plaintiff Royal Bank sues defendants Malka Rosenberg Solny a/k/a Malka
Erika Rosenberg and her daughters Shandelle Solny and Rose Solny for alleged transfer of funds
totaling \$845,478.34 from an account maintained in Royal Bank in the names of Shandelle and
Rose Solny. The transfer was made by wire transfer signed by Malka and Rose on September 9,
2019, to an account maintained at TD Bank, N.A. in the name of Malka Erica Rosenberg. The
transfer was allegedly made in violation of a seizure order (the Canadian seizure order), entered
by the Superior Court of Quebec on July 4, 2019, pursuant to which, on July 8, 2019 Royal Bank

seized — i.e., froze—the funds in Shandelle and Rose’s Royal Bank account pending litigation in Quebec of an estate dispute against Malka. (Complaint ¶¶ 9,19-22, 38.)

Royal Bank moves to punish defendants for contempt of this court’s order, dated December 23, 2019 (NYSCEF Doc. No. 101), which granted Royal Bank’s motion for a preliminary injunction and directed defendants to disclose the current location of the funds transferred from the Royal Bank account and to identify the account(s) in which such funds are held. Defendants move to quash a subpoena served by Royal Bank and to dismiss the complaint. Oral argument was held on the motions on February 24, 2020. The court has reserved decision on the contempt motion pending further briefing. Defendants’ motions are the subject of this decision.

Motion to Quash

On or about September 23, 2019, plaintiff served a subpoena on TD Bank, N.A. (TD Bank), located in New Jersey, seeking information on the September 9, 2019 wire transfer from Royal Bank to TD Bank and documents concerning account activity for any account held by Malka at TD Bank. (Subpoena, Agulnick Aff. In Supp., Exs. A, B.)

Defendants move to quash the subpoena on the grounds that the subpoena is overbroad, and that it is defective in that it lacks a proper attorney’s signature. (Agulnick Aff. In Supp., ¶¶ 9-12.) Defendants also move to quash on the ground that Malka was not properly served with the summons and complaint. (*Id.*, ¶¶ 6-8.) In opposition, plaintiff argues, as a threshold matter, that defendants lack standing to quash the subpoena. (Pl.’s Memo. In Opp. at 8-9.)

There is a substantial body of New York law that “a depositor has no ownership or other interest in a bank’s records of his accounts. Thus, he has no standing to object to a subpoena directed at them.” (E.g. AQ Asset Mgt. LLC v Levine, 111 AD3d 245, 260 [1st Dept 2013];

People v. Doe, 96 AD2d 1018, 1019 [1st Dept 1983].) While this rule has been subject to criticism (see Matter of Norkin [v. Hoey], 181 AD2d 248, 251-254 [1st Dept 1992]), it remains the law of New York. The court, however, retains discretion to entertain a party's request for a protective order pursuant to CPLR 3103 (a). (See Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3103:1 [citing Norkin and noting that CPLR 3103 was amended "to clarify that a nonparty whose information is contained in the records of another has standing to challenge a subpoena served to obtain those records"].)

In the motion, defendants request that the court quash the subpoena or, "in the alternative, limit[] it to what is actually discoverable based on the limited factual transaction alleged in Plaintiff's complaint." (Agulnick Aff. In Supp., ¶ 12.) Defendants do not dispute, however, that their attempts to resolve the issue were limited to a request that plaintiff withdraw the subpoena in its entirety. (Id., ¶ 3.) In a joint letter to the court, counsel for defendants informed the court that his clients "instructed their attorney that he does not have authority to waive any rights in having Defendants' formal motion to quash be heard." (Joint Letter, NYSCEF Doc. No. 61, at 3.) Defendants thus do not dispute plaintiff's assertion that they did not confer with plaintiff with a view to limiting the subpoena and did not make any suggestions as to how to tailor it to address defendants' overbreadth concerns. (See Pl.'s Memo. In Opp. at 6-7; Agulnick Aff. in Supp., at ¶¶ 3-4.) Significantly also, defendants Malka and Rose do not deny that they made the wire transfer to TD Bank, notwithstanding their knowledge of the existence of the seizure order.

Under these circumstances, the court declines to quash the subpoena or to grant a protective order except to the following extent: On the court's own motion, the subpoena shall be modified to provide that the information requested in the subpoena shall be provided for the time period beginning on September 9, 2019, the date of the wire transfer, not June 19, 2019, and

extending through and including the return date of the subpoena. (See Subpoena, Agulnick Aff. In Supp., Exs. A, B.)

The court further rejects defendants' contention that the subpoena was not properly signed. The court notes that TD Bank has raised no objection to the signature and has stated that it is willing to comply with the subpoena if it is not quashed. (TD Bank emails, Walsh Aff. In Opp., Exs. 2, 4.)

In addition, as the court holds below, it has personal jurisdiction over Malka. In any event, it is undisputed that Rose signed the wire transfer. (Wire Transfer Form, Walsh Aff. In Opp., Ex. B to Ex. 1 [showing Rose's signature].) As Royal Bank correctly notes in its complaint, it had an obligation as custodian of the funds to hold them pursuant to the Canadian seizure order. (Complaint, ¶¶ 25-27.) Under these circumstances, in which it is not disputed that the funds were transferred in violation of the seizure order, it is appropriate for Royal Bank to take all reasonable steps to locate and seek to recover the funds.

Motion to Dismiss

Defendants move to dismiss the complaint as against defendant Malka Rosenberg Solny, pursuant to CPLR 3211 (a) (8), on the ground that she was not properly served with process. All defendants move to dismiss the complaint on the grounds, among others, that the complaint fails to state a cause of action.

On the prior motion for a preliminary injunction, defendant Malka Rosenberg Solny also claimed that she had not been properly served and that the court had not obtained personal jurisdiction over her. This court's November 14, 2019 decision on the record of the motion for a preliminary injunction, to which the parties are referred, sets forth the legal authorities governing a determination as to whether service is adequately demonstrated by a process server's affidavit

of service or whether a named defendant is entitled to a traverse hearing on service. The November 14 decision held that the process server's affidavit of service was regular on its face, and that Malka's denial of service was insufficient to raise a triable issue of fact, as her affirmation was entirely conclusory and her denial was not supported by any details as to where she actually does live or work or any claim even that she does not know the person of suitable age and discretion on whom the process server attested service was made. (November 14 Transcript at 5-6.) As the finding was made at the preliminary injunction stage, however, the court authorized defendants to assert a continuing claim of lack of personal jurisdiction. (*Id.* at 11.)

The affidavit of the process server attests that on September 23, 2019, he made suitable age and discretion service upon Malka by serving a copy to "Rita Smith [Co-Worker]" at defendant's actual place of business, at 3813 13th Avenue, 3rd Floor, Brooklyn, New York, and by mailing a copy on September 23 to "c/o Solny Group." (Process Server's Affidavit, Malka Rosenberg Solny Aff. In Supp., Ex. A.)

In reasserting the claim of lack of personal jurisdiction on this motion to dismiss, Malka fails to correct the deficiencies in her prior affirmation in opposition to the preliminary injunction motion. She again states in wholly conclusory fashion: "I do not live at this [the 13th Avenue] address. Moreover, I do not work at this address. Further Rita Smith is not a 'co-worker' in any capacity." (Malka Rosenberg Solny Aff. In Supp., ¶ 5.) As on the prior motion, Malka does not state where she does live or work and does not state that she does not know Rita Smith. To the contrary, she states that "Rita Smith, herself, will say that she never 'accepted service of process' of any papers for me and that I do not work at the address where Plaintiff claims it tried to effectuate service of process." (*Id.*) On the reply, Malka submits an affirmation which repeats

her assertion that she does not work at the 13th Avenue address and that Rita Smith is not her co-worker. (Malka Rosenberg Solny Reply Aff., ¶¶ 2-3.) For the first time, she asserts that she is not a U.S. citizen and states that she does not have a U.S. green card and therefore cannot work in the U.S. (Id. ¶ 5.) She also states that she does not know of a business entity known as the “Solny Group.” (Id. ¶ 7.) Defendants also submit an affidavit from Rita Smith on the reply. This affidavit denies that she told the process server that she was authorized to accept service for Malka, and further denies that Malka is her “co-worker” or that there is business in her building with the name “Solny Group.”

Defendants fail to offer a persuasive explanation for the proffer of this new “information” for the first time on the reply. Even assuming that it is properly considered, it is insufficient to raise a triable issue of fact that warrants a traverse hearing. Ms. Smith’s affidavit is entirely conclusory. Malka continues to fail to provide any information as to where she does live and work or any clarification as to her relationship with Rita Smith. This omission is particularly glaring given that Malka’s daughters served responses to plaintiff’s CPLR 3118 demand, dated October 28, 2019, identifying 3813 13th Avenue, Brooklyn, as their address. (NYSCEF Doc. No. 99.) The branch of defendants’ motion to dismiss the complaint as against Malka Rosenberg Solny for lack of personal jurisdiction is accordingly denied.

The court turns to the branch of the motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. The complaint pleads four causes of action: conversion, common law fraud, unjust enrichment, and monies had and received, respectively. (Compl., ¶¶ 45-61.) Defendants seek to dismiss all of these claims.

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as

alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].)

The conversion cause of action is properly pleaded. “Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property and (2) defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights.” (Pappas v Tzolis, 20 NY3d 228, 234 [2012], quoting Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 50 [2006], rearg denied 20 NY3d 1075 [2013]; see Dobroschi v Bank of Am., N.A., 65 AD3d 882, 885 [1st Dept 2009], ly dismissed 14 NY3d 785 [2010].) Defendants submit no authority that a conversion claim is not maintainable under these circumstances in which Royal Bank seized, and was obligated to hold the funds in Shandelle and Rose’s account, pursuant to the Canadian seizure order, and in which Rose and Malka transferred the funds in violation of that order.

The fraud claim will, however, be dismissed without prejudice. “The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff[,] and damages.” (Carlson v American Intl. Group, Inc., 30 NY3d 288, 310 [2017], quoting Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]; accord Epiphany Community Nursery School v Levey, 171 AD3d 1, 8 [1st Dept 2019], appeal withdrawn 34 NY3d 927.) The complaint pleads a material misrepresentation or omission of fact based on Malka and Rose’s effectuation of the wire transfer without disclosing that the funds were seized. (Compl. ¶ 50.) The complaint, however, pleads that the transfer was made by Royal Bank as a result of the “erroneous

remov[al] of the restraint” by a Royal Bank employee (id. ¶ 35) and not as a result of reliance on Malka and Rose’s conduct. (See generally ACA Fin. Guar. Corp. v Goldman, Sachs & Co., 25 NY3d 1043, 1044 [2015] [discussing the justifiable reliance element].)

The unjust enrichment and monies had and received claims will be dismissed. While Royal Bank has a superior possessory interest to that of Shandelle and Rose in the Royal Bank account as a result of the Canadian seizure order, Royal Bank does not cite any authority that remotely supports application of these doctrines under circumstances in which a party has a temporary possessory, but not an ownership, interest in funds. (See generally County of Nassau v Expedia, Inc., 120 AD3d 1178, 1180 [2d Dept 2014] [discussing the doctrine of unjust enrichment].)

The court rejects defendants’ remaining bases for dismissal of the complaint. The court finds that the causes of action are adequately alleged against Shandelle and Rose, as well as against Malka; that damages are adequately alleged; and that the action is not moot based on seizure proceedings undertaken by Royal Bank in Canada. Finally, the court holds that, contrary to defendants’ contention, a foreign order is not subject to recognition only if it is a judgment domesticated pursuant to CPLR Article 53. (Defs.’ Amended Memo. In Supp. at 10-11.) For the reasons stated, and on the authority cited, in the November 14 decision on the motion for a preliminary injunction, comity is properly afforded to the Canadian seizure order. (November 14 Transcript at 6-7.)

The motion to dismiss is granted to the extent of dismissing the second cause of action for fraud, the third cause of action for unjust enrichment, and the fourth cause of action for monies had and received.

This constitutes the decision and order of the court.

2/26/2020

DATE



MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: