Choupak v Koroleva
2020 NY Slip Op 31443(U)
April 23, 2020
Supreme Court, New York County
Docket Number: 654557/2019
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

---X

DAVID CHOUPAK

Plaintiff,

- v -

ANASTASIA KOROLEVA,

Defendant.

---X

INDEX NO. 654557/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23

were read on this motion to/for DISMISS.

In this action by plaintiff David Michael Choupak sounding, inter alia, in conversion and unjust enrichment, defendant Anastasia Y. Koroleva moves, pursuant to CPLR 3211(a)(1), (a)(2), (a)(7) and (a)(8), as well as under the principles of comity, to dismiss the complaint. Plaintiff opposes the motion. After oral argument, as well as a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The parties were married in New York State in 2004 and lived in New York until 2010, at which time they moved with their children to London, England. Doc. 1. In 2010 and 2011, the parties filed joint federal tax returns in the United States. Doc. 1 at 42, 44. In 2012, defendant filed for divorce in Family Court in London. Doc. 1.

Due to certain unreported foreign bank accounts and wages of defendant, as well as other adjustments made in connection with entities they owned, the parties voluntarily enlisted into the Internal Revenue Service's ("IRS") Offshore Voluntary Disclosure Program ("OVDP") for the tax years 2005-2012. Doc. 1. The parties submitted all necessary information to the IRS and, in December 2015, they entered into a Closing Agreement with the IRS, approved in February 2016, pursuant to which the total tax, interest and penalties assessed against them was determined to be $481,804 before an offset due to certain 2012/2013 net operating loss ("NOL") carryback claims which the OVDP case agent agreed to process. Doc. 1. The 2012 and 2013 carryback claims were generated by married filing separate NOL and Alternative Minimum Tax loss carrybacks by both parties. Doc. 1. Amended returns on Form 1040X were prepared to carryback the separate NOL's to the 2010 and 2011 joint tax returns under the jurisdiction of the OVDP agent. Doc. 1.

On February 22, 2013, the parties entered into a separation agreement in England. Doc. 4. The separation agreement provided, inter alia, that its terms "are accepted in full and final satisfaction of . . . all other claims of any nature which one may have against the other howsoever arising either in England and Wales or in any other jurisdiction." Doc. 4 at 2, par. 7. The separation agreement further provided that:

> Each party agrees that he or she (a) received full and adequate disclosure of the other party's financial position in connection with the pending divorce proceedings, (b) has received competent legal advice from leading solicitors and barristers, (c) is not acting under pressure or duress, and (d) believes it is in their mutual interests to separate their assets and affairs on the basis set forth in this Separation Agreement to be upheld and respected by any applicable court if they do ultimately divorce.

Doc. 4 at 7, par. 10.

On March 4, 2015, the Family Court in England converted the separation agreement into a final financial remedy order (the "FRO"). Doc. 4. The FRO provided, inter alia, that its terms were "accepted in full and final satisfaction of . . . [a]ll other claims of any nature which one may have against the other howsoever arising either in England and Wales or any other jurisdiction." Doc. 4, FRO, at 3, par. 7. Additionally, the FRO provided that "the parties will split equally any remaining joint assets." Doc. 4, FRO, at 3, par. 7.

In May of 2016, the IRS determined that an overpayment in the amount of $790,124 had been made with respect to the parties' 2010 U.S. federal joint return ("the 2010 overpayment") and an overpayment of $988,744 had been made in connection with the parties' 2011 U.S. federal joint return ("the 2011 overpayment"). Thus, the parties were entitled to a total gross refund, before OVDP liability and interest, in the amount of $1,778,868. 51. Doc. 1. After accounting for interest on the 2010 and 2011 overpayments, offset with respect to OVDP liability, and IRS interest and penalty adjustments, the parties were jointly issued a net refund in the amount of $1,507,535 (including accrued interest of $174,818) in May 2016. Doc. 1. Each of the two refund checks were made payable to both parties. Doc.1.

Defendant refused to endorse the refund checks unless she received one-half of the total amount refunded, or $753,767.50. Doc. 1. Since the checks could not be cashed unless they were endorsed by both parties, plaintiff grudgingly acceded to defendant's demand that she receive one-half of the amount refunded. Doc. 1.

On August 12, 2019, plaintiff commenced the captioned action by filing a summons and complaint. Doc. 1. Plaintiff alleged causes of action for conversion and unjust enrichment and also sought a judgment declaring that "[u]pon further analysis and after applying applicable tax law, the [n]et [r]efund should have been allocated as follows: [p]laintiff, $1,262,359 and [d]efendant, $245,176.74" and that a justiciable controversy therefore existed regarding whether defendant was obligated to pay plaintiff $508,590.76, the difference between $753,767.50, the portion of the total refund she retained, and $245,176.74, the amount to which plaintiff claims defendant is entitled.

In lieu of answering, defendant now moves for dismissal pursuant to CPLR 3211(a)(1) (documentary evidence), (a)(2) (lack of subject matter jurisdiction), (a)(7) (failure to state a cause of action), and (a)(8) (lack of personal jurisdiction). Defendant also seeks dismissal based on the doctrine of comity. In support of the motion, defendant argues, inter alia, that the separation agreement and FRO warrant dismissal of the claim since they require that any remaining joint assets of the parties be divided equally.

In opposition to the motion, plaintiff argues, inter alia, that defendant is not entitled to one half of the refund because that money did not constitute "remaining joint assets" within the meaning of the separation agreement and FRO.

In reply, defendant asserts, among other things, that she is entitled to one-half of the tax refund.

LEGAL CONCLUSIONS:

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." *Robinson v Robinson*, 303 AD2d 234, 235 (1st Dept 2003). "When documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff stated a cause of action to whether it has one." *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014) (internal quotation marks and citation omitted). Ultimately, 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 at 88 (1994).

The essence of plaintiff's claim is that, since he paid far more in taxes than defendant, he should be entitled to the vast majority of the refund. Thus, he claims, plaintiff is wrongfully withholding from him the amount of $508,590.76, the difference between $753,767.50, or 50% of the total refund which she possesses, and $245,176.74, the amount to which plaintiff claims she is entitled.

However, plaintiff concedes that "[t]he 2012 and 2013 carryback claims were generated by married filing separate net operating and alternative minimum tax ("AMT") loss carrybacks by both [p]laintiff and [d]efendant." Doc. 1 at par. 48; Doc. 21 at 6. He further asserts that amended 2010 and 2011 returns were prepared on Form 1040X in order to carry back the separate net operating losses to the parties' jointly filed initial 2010 and 2011 returns. Doc. 1 at 49; Doc. 21 at 6-7. Since the refund arose from the amended 2010 and 2011 returns, and the refund checks were made payable to both parties, the refund was a joint asset subject to being divided equally pursuant to the separation agreement and the FRO.

The doctrine of comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 389 (2008) (internal quotation marks and citations omitted). Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v Guyot*, 159 US 113 (1895). Pursuant to the doctrine, New York courts will recognize a judgment obtained in a foreign jurisdiction so long as there was no fraud in procuring the judgment and that the recognition of the foreign judgment would not violate public policy. *see Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78, 82 (2006).

Additionally, comity is also a doctrine of "practice, convenience and expediency" (*Ehrlich-Bober & Co. v University of Houston*, 49 NY2d 574, 581 [1980], quoting *Mast, Foos & Co. v Stover Mfg. Co.*, 177 US 485, 488 [1900]) and the application of the doctrine is within the court's discretion. *Morgenthau*, 11 NY3d at 390.

This Court finds that the separation agreement and FRO submitted by defendant clearly warrant the dismissal of the complaint. As noted previously, the separation agreement provided that its terms "are accepted in full and final satisfaction of . . . all other claims of any nature which one may have against the other howsoever arising either in England and Wales or in any other jurisdiction." Doc. 4 at 2, par. 7. This language was then incorporated into the FRO. Doc. 4, FRO, at 3 par. 7. Although plaintiff claims that defendant's "sinister" reason for moving to England was to take advantage of that country's "liberal divorce and equitable distribution laws" (Doc. 21 at 4), he nevertheless signed the separation agreement, which was converted into the FRO. By agreeing to execute the separation agreement containing the broadly worded catchall provision quoted above, plaintiff effectively waived his right to commence any legal action against defendant in any court in any jurisdiction.

Additionally, the FRO clearly provides that "the parties will split equally any remaining joint assets." Doc. 4, FRO, at 3, par. 7. Since the checks were issued to plaintiff and defendant as a refund on their jointly filed 2010 and 2011 tax returns, they are each entitled to 50% of the total refund. Although plaintiff argues that he is entitled to a far greater percentage of the refund, the separation agreement and FRO, which refer to the apportionment of numerous specific assets, are silent regarding any tax refund.

In reaching this conclusion, this Court emphasizes, as noted above, that the separation agreement specifically provides that the parties agreed that they each "received full and adequate disclosure of the other party's financial position in connection with the pending divorce proceedings", that they received "competent legal advice from leading solicitors and barristers", were "not acting under pressure or duress", and that the separation agreement was to be "upheld and respected by any applicable court if they do ultimately divorce." Doc. 4 at 7, par. 10. Thus, the parties clearly had the opportunity to address a contingency such as a tax refund. Since a tax refund was not otherwise, specifically addressed by the parties, it fell within the catchall provision requiring remaining joint assets to be "split equally."

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Anastasia Y. Koroleva seeking to dismiss the complaint is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 20 days of entry of this order, defendant shall serve plaintiff with a copy of this order, with notice of entry; and it is further

ORDERED that this constitutes the decision and order of the court.

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4/23/2020	
DATE	KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE