

Vlahakis v Vlahakis
2020 NY Slip Op 33452(U)
October 20, 2020
Supreme Court, Kings County
Docket Number: 506913/2020
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

DONNA VLAHAKIS, et al,

Plaintiff,

-against-

DIMITRI VLAHAKIS,

Defendant.

DECISION/ORDER

Index No. 506913/2020

Motion Seq. No. 2

Date Submitted: 10/1/2020

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's pre-answer motion to dismiss

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>15-18</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>20-22</u>
Reply Affirmation.....	<u>24</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendant moves, pre-answer, to dismiss the first four causes of action in the amended complaint in this action, for failing to state a cause of action (CPLR 3211(a)(7) and founded on documentary evidence (CPLR 3211(a)(1).

The complaint sets forth five causes of action, but this motion is only addressed to the first four. They are: breach of contract; breach of fiduciary duty; fraud; and constructive trust. This action is a dispute between siblings over their deceased father's real estate. He passed away in 2014. Their mother is still alive and is suing both of them in a related action, *Zenovia Vlahakis v Donna Vlahakis, et al*, 523904/19.

The court finds that the motion must be denied as to the first two causes of action, breach of contract and breach of fiduciary duty. The contract is part of the

record, and it provides that defendant will manage the properties and states “all apartment building operating expenses must be paid on time. Full open and transparent income and expense reports, tax returns, passwords and bank accounts will be made available.”

To be clear, on a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff 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, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994].)

However, the third cause of action, for fraud, is hereby dismissed, as it fails to plead plaintiff's claims with the requisite specificity. "To make out a cause of action for fraud, . . . a party must allege representation of a material existing fact, falsity, scienter, deception and injury." *Megarix Furs v. Gimbel Bros.*, 172 AD2d 209, 209, 568 N.Y.S.2d 581 (1st Dep't 1991) (citation and internal quotation marks omitted). Moreover, "each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in the case of a cause of action based on fraud, that the circumstances constituting the wrong shall be stated in detail." *Id.* at 209-10. Here, plaintiff fails to state what false allegations were made by defendant to her. Or how she relied on them. Furthermore, the court notes that plaintiff is an attorney, so the deception would need to be one that would deceive a reasonable attorney. Nothing of the sort is pled here.

Similarly, the fourth cause of action “To Impress Constructive Trust upon other business and assets where company funds were used”, must be dismissed. The first

version of the complaint named several of defendant's businesses as additional defendants, but by stipulation, they were removed from the caption, and an amended complaint was filed which has plaintiff's brother as the sole defendant.

It is well-established law that "a constructive trust may be imposed [when] property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." (*Sharp v. Kosmalski*, 40 NY2d 119, 351 N.E.2d 721, 386 N.Y.S.2d 72 [1976] (internal citations omitted)). "However, these elements are simply guidelines and are not to be applied rigidly in pursuing the goal of preventing unjust enrichment." (*Hennessey v. Hunt*, 272 AD2d 756, 708 N.Y.S.2d 180 [3d Dept 2000]). Here, plaintiff claims that defendant, without authorization, used the rents and profits of the properties she contracted with him to manage to "invest in various business ventures, including but not limited to Izzy's Pizzeria, Karvouna Restaurant, Esperanto Restaurant, Motorino Broadway Inc., Motorino 3, Inc., Motorino East Village, Inc., Motorino Holdings, LLC., Motorino Restaurant Corp., and Motorino Williamsburg Inc." This claim is more akin to conversion than constructive trust, and in any event, none of the named entities are any longer parties defendant. A constructive trust can only be imposed upon a party's asset.

With regard to movant's claim that the four causes of action should be dismissed based upon "documentary evidence," the court finds that there is nothing that would be considered documentary evidence annexed to his motion papers. The only items

annexed to the notice of motion and affirmation in support are the complaint and a memo of law. A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) will be granted if the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [2002] [internal quotation marks omitted]; see also *Fontanetta v John Doe 1*, 73 AD3d 78, 85 [2010]; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). Documents where the contents are “essentially undeniable” include judicial records, mortgages, deeds, contracts and other written agreements (*Fontanetta*, 73 AD3d at 84-85).

Accordingly, it is **ORDERED** that defendant’s motion to dismiss the first four causes of action in the complaint is denied with regard to the first and the second causes of action, and is granted with regard to the third and the fourth causes of action.

IT IS FURTHER **ORDERED** that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 30 days.

IT IS FURTHER **ORDERED** that the matter Vlahakis v Vlahakis, Kings County Index 523904/19, is hereby transferred from Part 41 to the undersigned. As of this date, there are no pending motions in that action.

This constitutes the decision and order of the court.

Dated: October 20, 2020

ENTER:



Hon. Debra Silber, J.S.C.