

Aponte v Aponte

2020 NY Slip Op 34103(U)

November 5, 2020

Supreme Court, Kings County

Docket Number: 11825/2015

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 11825/2015

Seq# 003

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

RENE APONTE SNR.,

Plaintiff,

against

ESTATE OF RENE APONTE JNR., DANA E APONTE,
DANA E LOBO, DEKALB AND MYRTLE LLC,

Defendants.

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	
Other	

Upon the foregoing papers, defendants' motion for summary judgment (Mot. Seq. 003) is decided as follows:

Procedural Background

Plaintiff, Rene Aponte, Sr., commenced this action against the estate of his deceased son, Rene Aponte, Jr. ("Aponte Jr."), his son's wife, Danae Lobo, and Dekalb and Myrtle LLC, the company Aponte Jr. and Ms. Lobo jointly owned. Plaintiff alleges that he purchased a pawn shop business from his brother, Julio Hilario, and gave the pawn shop to Aponte Jr., in exchange for monthly payments of \$2,000. Plaintiff does not state when the monthly payments were supposed to end, but alleges that Aponte Jr. made such payments until Aponte Jr. became ill in November 2011. Plaintiff further alleges that he transferred money to Aponte Jr. and Ms. Lobo for the purpose of purchasing, in plaintiff's name, the property on which the pawn shop stood. Plaintiff claims that Aponte Jr. and Ms. Lobo purchased the property not in plaintiff's name, but in the name of Dekalb and Myrtle LLC. Plaintiff asserts claims for conversion, constructive trust, unjust enrichment, fraud, breach of contract and quasi-contract, and injunctive relief.

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KINGS COUNTY CLERK

Defendants previously moved to dismiss plaintiff's claims pursuant to CPLR 3211. The court (Graham J.) denied the motion because the plaintiff sufficiently pled his causes of action. On appeal, the Second Department modified the order. The appellate court granted defendants' motion to the extent of dismissing the causes of action against defendant Estate of Rene Aponte, Jr., seeking damages and the imposition of a constructive trust in connection the pawn shop's business. The appellate court further modified the trial court's court by dismissing plaintiff's request for a permanent injunction.

Factual Background

At his deposition, plaintiff testified that he and his brother, Julio Hilario, began discussing Julio's sale of the pawn shop and second hand dealer to plaintiff in or before December 2002. Plaintiff testified that he purchased the business in March 2003 for \$73,000, which was financed by a loan he took out for \$200,000. He testified that, not long after he purchased the shop, he entered into a verbal agreement with Aponte Jr. to manage the shop in return for receiving \$500 per week. Plaintiff testified that, as part of the agreement, Aponte Jr. paid plaintiff \$2,000 per month, which plaintiff used to repay the loan he took out. Plaintiff testified that the remaining profit from the shop was saved over time so that the shop could use that money to buy the property on which the shop was located. Plaintiff testified that the shop was not able to save enough money to purchase the property, so plaintiff sent Aponte Jr. \$50,000 towards the purchase of the property.

Plaintiff testified that he had an agreement with Julio Hilario that he (plaintiff) and the pawn shop would jointly purchase the property for \$750,000. However, as plaintiff testified, the closing did not occur because Julio Hilario passed away. Plaintiff testified that, thereafter, in 2011, he renegotiated the price of the property with Carlos Hilario, Julio's son, for \$550,000.

Plaintiff testified at his deposition that Aponte Jr. was handling the mechanics of purchasing the property in the names of plaintiff and the business. Plaintiff acknowledged at his deposition that he does not have any documents that memorialize his alleged agreement with Aponte Jr. regarding the purchase of the shop or the property.

Ms. Lobo states in her affidavit that, from 2004 to the time of his death on June 26, 2012, Aponte Jr. was the sole owner of the shop, called the Dekalb Second Hand Dealer, Inc. Ms. Lobo provides copies of tax returns for the shop for the years 2004 through 2012. The returns identify Aponte Jr. as president and sole shareholder. Ms. Lobo also provides a copy of the shop's tax return for 2003, which identifies plaintiff's brother Julio Hilario as the sole shareholder.

Ms. Lobo states in her affidavit that she has worked at the shop since July 2004. She claims that the first time she heard about plaintiff's ownership claims was in July 2012, after Aponte Jr. had passed away. Ms. Lobo also provides a copy of the written contract of sale for the property between plaintiff's brother Julio and Aponte Jr. As Ms. Lobo explains in her affidavit, Julio Hilario passed away after the contract was signed but just before the closing. Subsequently, Julio's son, Carlos Hilario was appointed the executor of Julio's estate. On August 18, 2009, Carlos, as executor of Julio's estate, and Aponte Jr. executed a new contract of sale for the property. Ms. Lobo provides a copy of this contract, as well as the modification of the contract, dated October 19, 2011, which states the purchase price is \$545,000. In addition, Ms. Lobo provides a copy of the deed, which shows that Carlos (as executor) transferred the property to Dekalb & Myrtle LLC, as well as a copy of the mortgage loan note issued by TD Bank, N.A. to Dekalb & Myrtle LLC, in the amount of \$431,200.

In addition, Ms. Lobo states in her affirmation that, in May 2013, plaintiff commenced a Surrogate's Court proceeding to appoint Ms. Lobo the representative of the Aponte Jr.'s estate. Ms. Lobo states that plaintiff raised his claims against her in the Surrogate Court proceeding and that the Surrogate Court ultimately made the requested appointment on March 11, 2014. Defendants provide a copy of the Letters of Limited Administration. Ms. Lobo states that, after she was appointed, plaintiff "took no further action to prosecute his claims." She states that she filed a final accounting for the estate, which plaintiff did not oppose. Defendants provide a copy of the final decree of judicial settlement, dated August 25, 2015.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Defendants argue that this court has no jurisdiction over the estate of Aponte Jr. because the Surrogate's Court issued a final decree and closed the estate. Defendants also argue that the final decree in Surrogate's Court has res judicata effect on plaintiff's claims in this case. Defendant raised these same arguments in support of their motion to dismiss. The trial court (Graham, J.) evaluated these arguments and issued its ruling, which was appealed. The Second Department modified certain aspects of the trial court's decision and order, as explained above. This ruling is not only the law of the case, but is an opinion of the appellate court, which is binding on this court. Accordingly, this court cannot, and will not, revisit these arguments.

Defendant next seeks dismissal, on summary judgment, of each of plaintiff's claims.

While plaintiff is correct that defendants previously sought dismissal of plaintiff's claims pursuant to CPLR 3211, defendants now seek dismissal on summary judgment, pursuant to CPLR 3212. To the extent that defendants' arguments are based on evidence, or the lack thereof, and whether there can be any dispute of fact based on such evidence, such arguments are not foreclosed by either the trial court's or the appellate court's decisions.

Conversion

Regarding his first cause of action for conversion, plaintiff alleges that defendants improperly converted the \$50,000 plaintiff claims he sent to them, and wrongly withheld the \$2,000 that he claims he had been receiving. Defendants argue that the claim should be dismissed because it violates the statute of limitations, which is three years (*Obstfeld v Thermo Niton Analyzers, LLC*, 168 AD3d 1080, 1083 [2d Dept 2019], citing CPLR 214[3]). While defendants raised this argument in their motion to dismiss, the Second Department held that "it cannot be determined as a matter of law at this stage of the proceedings that the plaintiff's cause of action alleging conversion is time-barred" (*Aponte v Estate of Aponte*, 172 AD3d 970, 974 [2d Dept 2019]). Consequently, defendants are not prohibited from reasserting this argument based on the evidence, such as plaintiff's deposition testimony, which was not available at the time of the motion to dismiss.

A conversion claim accrues when the conversion takes place and not when the alleged conversion is discovered (*Obstfeld*, 168 AD3d at 1083). Plaintiff testified that the payments of \$2,000 stopped in May 2012. Thus, plaintiff's claim as to these payments accrued at that time. Plaintiff testified that he paid the \$50,000 in 2005 (plaintiff's deposition transcript at 165). Defendants provide copies of their written contracts first with Julio Hilario in May 2006, and

then with Carlos Hilario in August 2009 and October 2011. Defendants also provide a copy of the deed, dated March 30, 2012, that transferred the property from Carlos Hilario to Dekalb & Myrtle LLC. Plaintiff's claim as to the use of the \$50,000 accrued, at the latest, on March 30, 2012. Plaintiff did not commence this action until September 25, 2015. Accordingly, plaintiff's claim for conversion is barred as to all defendants (*Obstfeld*, 168 AD3d at 1083).

Constructive Trust

Plaintiff seeks a constructive trust over: (a) the assets of the pawn shop, which he claims were transferred to a new company or otherwise converted by Aponte Jr. and Ms. Lobo; and (b) the subject property, which he claims Aponte Jr. and Ms. Lobo promised to purchase in his name. To prove his claim for a constructive trust, plaintiff must establish, by clear and convincing evidence: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on that promise; and (4) unjust enrichment flowing from the breach of that promise (*Seidenfeld v Zaltz*, 162 AD3d 929, 934 [2d Dept 2018]).

As an initial matter, the Second Department dismissed the portion of plaintiff's claim for constructive trust against the estate of Aponte Jr., as that claim relates to the pawn shop. Additionally, plaintiff also has not established that he had a confidential or fiduciary relationship with Ms. Lobo or with Dekalb & Myrtle LLC, Aponte Jr. and Ms. Lobo's corporation. Plaintiff also has not proven that Ms. Lobo or Dekalb & Myrtle LLC made any promise to him. In fact, plaintiff testified at his deposition that Ms. Lobo never promised to pay him \$2,000 per month or to use the \$50,000 he claims to have sent for the purchase of the property (plaintiff's deposition transcript at 201, 217-18). Finally, plaintiff has not sufficiently proven, by clear and convincing evidence, that he ever received the periodic payments of \$2,000 or sent the sum of \$50,000 (*Seidenfeld*, 162 AD3d at 934). Namely, plaintiff submits no documentary evidence to establish

these allegations, but relies only on his testimony. Accordingly, plaintiff's remaining claims for constructive trust are dismissed.

Fraud

Plaintiff's claim for fraud is against Ms. Lobo only. The elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 916 [2d Dept 2009]).

Plaintiff alleges in his complaint that, after Aponte Jr. was incapacitated, Ms. Lobo represented she would continue to send him \$2,000 per month and would use the \$50,000 to purchase the property in plaintiff's name. However, at his deposition, plaintiff admitted that Ms. Lobo never promised to pay him \$2,000 per month nor to use the \$50,000 he claims to have sent for the purchase of the property (plaintiff's deposition transcript at 201, 217-18). Accordingly, plaintiff's claim for fraud against Ms. Lobo is dismissed.

Breach of Contract

Plaintiff alleges in the complaint that he had an agreement with defendants that he would be paid \$2,000 per year, and that defendants would purchase the subject property in his name. To establish a cause of action for breach of contract, plaintiff must show: (1) the existence of a contract; (2) his performance pursuant to the contract; (3) defendants' breach of defendants' obligations; and (4) damages resulting from the breach (*Kiss Const., Inc. v Edison Elec. Contractors, Corp.*, 152 AD3d 575, 576 [2d Dept 2017]).

As an initial matter, the Second Department held that claims for damages against Aponte Jr. relating to the business are dismissed. Thus, plaintiff's claim for breach of any agreement for

Aponte Jr. to pay plaintiff \$2,000 is dismissed. Additionally, plaintiff admitted that Ms. Lobo did not promise to pay him \$2,000 per month nor to use the \$50,000 he claims he gave to defendants to purchase the subject property in his name (plaintiff's deposition transcript at 201, 217-18). Accordingly, plaintiff's claim for breach of contract against Ms. Lobo is dismissed.

As to the portion of the breach of contract claim for the payment of \$2,000 per month, plaintiff admitted at his deposition that the schedule of these payments had no end (plaintiff's deposition transcript at 135). Pursuant to the State of Frauds, General Obligations Law § 5-701[a][1], all agreements whose performance will not be complete within one year must be in writing (*Matter of Zelouf*, 183 AD3d 900 [2d Dept 2020]). Additionally, all agreements for the purchase of land must be in writing (*Fini v Marini*, 164 AD3d 1218, 1221 [2d Dept 2018], citing General Obligations Law § 5-703[2]). Plaintiff admitted at his deposition that his alleged agreements with Aponte Jr., both about the \$2,000 payment and regarding the purchase of the building, were oral, and were never memorialized in writing (plaintiff's deposition transcript at 198-200).

Plaintiff correctly argues that defendants argued for dismissal of this claim pursuant to the Statute of Frauds in their motion to dismiss. In its decision and order on defendants' motion, the trial court held generally that plaintiff had sufficiently alleged his claims. On appeal, the Second Department did not specifically address the Statute of Frauds, but also held that plaintiff sufficiently pled a claim for breach of contract.

On a motion to dismiss, the court rarely addresses the facts of the case, but rather determines whether plaintiff sufficiently alleged a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In contrast, on summary judgment, the court evaluates the evidence and determines if the evidence is undisputed and either proves or disproves plaintiff's claims, and

whether are any triable issues of fact (*Valentin Plaza, LLC v 228 Bushwick, LLC*, 186 AD3d 780 [2d Dept 2020]). Thus, the court is not bound by the trial court's or appellate court's determination that the claims were sufficiently pled, as such an inquiry is largely irrelevant on a motion for summary judgment.

Lastly, defendants argue that plaintiff's claim for breach of quasi-contract should be dismissed because it is duplicative of plaintiff's unjust enrichment claim (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). Certainly, these claims overlap, and the court will address plaintiff's claims for unjust enrichment and quasi-contract, below.

Unjust Enrichment

Plaintiff claims that defendants are unjustly enriched by "converting the assets and changing the name of the pawn shop belonging to the Plaintiff and applying the funds sent to them by the Plaintiff for the purpose of acquiring the property for the Plaintiff without the Plaintiff's consent and further acquiring the property in the name of the Corporate Defendant without refunding any funds back to the Plaintiff" (complaint at ¶ 26).

To prove his unjust enrichment claim, plaintiff must establish that: (1) defendants were enriched; (2) at his expense; and (3) that it is against equity and good conscience to permit the defendants to retain the enrichment (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 605 [2d Dept 2015]). Defendants' receipt of some benefit, standing alone, is not sufficient to support an unjust enrichment claim (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013]). A party may not assert an unjust enrichment claim to circumvent the Statute of Frauds (*Strauss v Fleet Mortgage Corp.*, 282 AD2d 736, 737 [2d Dept 2001]).

Plaintiff claims that he purchased the shop from his brother, Julio, in March 2003. However, the 2003 tax return for the shop shows that Julio was the sole owner. The tax return is

not dated or signed, but rather stamped with the name of the preparer, E. Cury & Associates. Ms. Lobo states in her affidavit that this return was filed at the end of 2003. Plaintiff has not provided this court with any contract or even any written correspondence which shows he purchased the business in March 2003 or at any other time. Plaintiff also does not provide any documentary proof of any transfer of money or payment to show he purchased the business, or that he took out a loan to purchase the business. In addition, the tax returns beginning in 2004 through 2012 show that Aponte Jr. was the sole owner of the shop. Neither Ms. Lobo nor Dekalb & Myrtle LLC are ever identified as the owners. Accordingly, the facts do not support his allegations.

The statute of limitations for an unjust enrichment claim is six years, and it begins to accrue “upon the occurrence of the alleged wrongful act giving rise to the duty of restitution” (*Mannino v Passalacqua*, 172 AD3d 1190, 1194 [2d Dept 2019] [citation omitted]). Therefore, plaintiff was required to bring this claim not later than 2010, six years after Aponte Jr. became the sole shareholder of the shop. Plaintiff did not commence this action until 2015, well after the statute of limitations expired.


The second part of plaintiff’s claim asserts that defendants were unjustly enriched by receiving \$50,000 without making plaintiff partial owner of the property. Plaintiff also provides no documentary proof of such a payment. In any event, this assertion is unproven and merely duplicative of plaintiff’s breach of contract claim. Plaintiff is not permitted to circumvent the Statute of Frauds by converting his contract claim into one for unjust enrichment (*Strauss*, 282 AD2d at 737).

Conclusion

For the reasons stated above, plaintiff's claims against defendants are dismissed. The action is disposed.

This constitutes the order of the court.

November 5, 2020
DATE


DEVIN P. COHEN
Justice of the Supreme Court

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