

Palmiter v Palmiter

2020 NY Slip Op 35163(U)

April 23, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 609066/2018

Judge: William G. Ford

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SHORT FORM ORDER

INDEX NO.: 609066/2018

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY**

PRESENT:

**HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT**

DANIEL J. PALMITER,**Plaintiff,****-against-****DANIEL M. PALMITER,****Defendant.**

**Motion Submit Date: 05/30/19
Mot Conf Held: 01/08/19; 04/21/20
Mot Seq 001 - MD
Mot Seq 002 - MG**

PLAINTIFF'S COUNSEL:

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DEFENDANT'S COUNSEL:

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Woodbury, New York 11797**

On plaintiff and defendant's respective motions for summary judgment in this electronically filed action, the Court considered: NYSCEF Docs. Nos. 8 – 47; and upon due deliberation and full consideration of the same; it is

ORDERED that defendant's motion for summary judgment is **denied** for the following reasons; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is **granted** as follows; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing upon defendant's counsel forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

Plaintiff commenced this action electronically filing summons and complaint on May 10, 2010. By the complaint, plaintiff asserts two causes of action alleging conversion against defendant, his son, emanating from withdrawals of approximately \$200,000.00 from a joint bank account. Plaintiff claims that defendant was previously his attorney-in-fact pursuant to a power

of attorney which has since been revoked and a new version executed naming defendant's sister, non-party Barbara Colon attorney-in-fact. Premised on the withdrawal which plaintiff claims was without his consent, he now sues for damages for those amounts.

Defendant joined issued filing his answer on June 7, 2018 asserting several affirmative defenses claiming that plaintiff lacked mental capacity to commence and prosecute this action having been diagnosed with dementia. The parties entered a Preliminary Conference Order commencing pretrial disclosure and discovery on September 18, 2018. Discovery remains ongoing. Despite that, both parties have now moved pursuant to CPLR 3212 for summary judgment in their favor. Defendant has moved to dismiss this action as a matter of law arguing plaintiff lacked capacity *ab inito* and thus could not properly maintain this lawsuit against him. In support of this contention, defendant annexes putative medical reports and records suggestive of plaintiff's receipt of diagnoses of dementia resulting in his loss of the privilege to operate a motor vehicle in New York and other prescriptions to treat a condition of dementia. Otherwise, by his answer defendant generally denied the operative allegations of plaintiff's complaint.

SUMMARY OF THE PARTIES' ARGUMENTS

Plaintiff for his part has opposed defendant's motion and cross-moved for summary judgment on his claims of conversion arguing that defendant cannot make out a *prima facie* case for entitlement to judgment as a matter of law on his claims of plaintiff's incapacity since the medical records and treatment reports are not in admissible form. Otherwise, plaintiff argues that defendant has failed to raise a triable issue of fact on plaintiff's claims of conversion, much less controvert or deny those claims with admissible evidence or proof.

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (*Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (*Gniewek v Consol. Edison Co.*, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see Goldstein v. Monroe County*, 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment 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, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]); *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however,

this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman, supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v Schefman*, 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]; *Benincasa v Garrubo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

DISCUSSION

Defendant's Motion

The Court begins its review with defendant's motion as he was the filing of original instance. By his papers as best as can be interpreted by this Court, he moves for an order declaring plaintiff incompetent, and either dismissing this action as against him at the most, or for a hearing to determine plaintiff's competency and presumably appointment of a guardian *ad litem* to safeguard plaintiff's interests. In support of this line of argument, defendant submits unauthenticated treatment reports and medical records of two of plaintiff's medical doctors positing that plaintiff previously has been diagnosed with dementia, and based on at least one of these reports, the New York State Department of Motor Vehicles revoked plaintiff's driver's license.

Plaintiff has opposed defendant's motion arguing in part that defendant is not entitled to the requested relief as it is not supported by admissible evidence. On this point, plaintiff observes that the putative medical records and diagnosis/treatment reports are unauthenticated or lack certification and thus should not be considered.

Generally as a matter of foundational evidentiary law, under CPLR 4518 governing the admissibility of business records as an exception to the hearsay exclusionary rule, medical "records are admissible if the proponent offers *either* foundational testimony under CPLR 4518(a) or certification under CPLR 4518(c)" (*Berkovits v Chaaya*, 138 AD3d 1050, 1051, 31 NYS3d 531, 533 [2d Dept 2016]). The foundation a proponent of medical records evidence must establish for admissibility has been described to require a showing that "that entries in the record were made in the regular course of business by members of the physician's staff "during observation, examination or treatment of the patient-plaintiff (*McClure by Young v Baier's Automotive Serv. Ctr., Inc.*, 126 AD2d 610, 511 NYS2d 50, 50 [2d Dept 1987]). Thus if records are not properly authenticated, they cannot be considered by a court as admissible evidence (*see e.g. Grechko v Maimonides Med. Ctr.*, 175 AD3d 1261, 1262, 109 NYS3d 418, 421 [2d Dept 2019])[standing for the proposition in part that even though entries in offered medical records were germane to diagnosis and treatment of a party, lack of foundation or certification under CPLR 4518(c) rendered the evidence inadmissible]; *see also Zito v City of New York*, 49 AD3d 872, 873, 857 NYS2d 575, 577 [2d Dept 2008][Inasmuch as the record does not establish whether the statement was germane to either diagnosis or treatment, it constituted hearsay and

should have been redacted from the record]).

Applying precedent here, plaintiff is correct. Because defendant's defense of lack of plaintiff's capacity rests solely upon unauthenticated medical records, they cannot be considered as evidence supportive of judgment as a matter of law on that theory. Accordingly, defendant has failed to support a *prima facie* case for summary judgment on that basis. Therefore, defendant's motion for summary judgment is denied.

Plaintiff's Motion

Turning now to plaintiff's cross-motion for summary judgment, plaintiff argues that he has made a *prima facie* showing defendant improperly converted funds held in common as a joint tenant on his bank account. In his moving papers, plaintiff explains that his bank account was originally opened and held jointly between himself and his now deceased wife, and that on her passing she became the fee owner of those funds exercising his right of survivorship. Further he maintains that his son, the defendant, was not authorized as his then attorney-in-fact to make the withdrawals indicated in the bank records and statements he has attached to his application. Largely, defendant makes no real substantive argument contesting the merits of plaintiff's position.

In order to succeed on a cause of action to recover damages for conversion, a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right (*Giardini v Settanni*, 159 AD3d 874, 875, 70 NYS3d 57, 58 [2d Dept 2018]; *Goldfine v Sichenzia*, 73 AD3d 854, 854, 902 NYS2d 117, 118 [2d Dept 2010])[to succeed on claim of conversion, plaintiff must allege that defendant received money belonging to the plaintiff in addition to alleging superior legal claim of right or ownership to the funds claims converted]; *Zell & Ettinger v Berglas*, 261 AD2d 613, 613-14, 690 NYS2d 721, 721-22 [2d Dept 1999])[to succeed on claim of conversion, plaintiff must that alleged converted funds are traceable to defendant]).

The law supports plaintiff's claims as precedent clearly holds that "the deposit of funds into a joint account 'in the name of such depositor ... and another person and in form to be paid or delivered to either, or the survivor of them' constitutes prima facie evidence of an intent to create a joint tenancy. Therefore, a decedent who deposited money in a joint bank account is "presumed to have conferred on the cotenant not only a mere expectancy, but rather a gift of a one-half interest in the deposited funds" (*Adams v Hickey*, 35 AD3d 328, 329-30, 828 NYS2d 105, 106-07 [2d Dept 2006])[construing Banking Law § 675[a][b]].

Plaintiff has sustained his burden of establishing the requisite elements of his claims of conversion via submission of *inter alia* various copies of bank records from his account Bethpage Federal Credit Union from April 2017 to February 2018. In opposition, defendant has failed to sustain his shifted burden of raising a triable issue of fact on whether the withdrawals depicted in these records evidenced converted monies and funds by defendant from the plaintiff. Innuendo and supposition by counsel, who by definition of his affirmation, lacks direct, firsthand or personal knowledge is insufficient to preclude entry of summary judgment. The Second Department has repeatedly cautioned counsel on this point (*Huerta v Longo*, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; *Collins v Laro Serv. Sys. of New York*,

Inc., 36 AD3d 746, 746-47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; *Cordova v Vinuesa*, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

To the extent that defendant raises new claims or seeks to introduce new unauthenticated evidence for the first time on reply, those contentions are rejected and denied as improper (*USAA Fed. Sav. Bank v Calvin*, 145 AD3d 704, 706, 43 NYS3d 404, 406 [2d Dept 2016][the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion]; *Lee v Law Offices of Kim & Bae, P.C.*, 161 AD3d 964, 965-66, 77 NYS3d 676, 678 [2d Dept 2018][determining that reply papers which included new arguments in support of the motion, new grounds and evidence for the motion, and expressly requested relief that was dramatically unlike the relief sought in the original moving papers were not properly before the Supreme Court]).

Accordingly, plaintiff's motion for summary judgment on his claims of conversion is granted.

Plaintiff is directed to settle judgment on notice on the claims of conversion in a manner consistent with the provisions of the within decision and order.

The foregoing constitutes the decision and order of this Court.

Dated: April 23, 2020
Riverhead, New York



WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION