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| Van Doren v Shifman |
| 2021 NY Slip Op 32055(U) |
| September 8, 2021 |
| Supreme Court, Nassau County |
| Docket Number: 613631/2020 |
| Judge: David P. Sullivan |
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SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. DAVID P. SULLIVAN,
Supreme Court Justice.

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ARIEL VAN DOREN and ALICIA VAN DOREN,

Plaintiffs,

-against-

SANFORD SHIFMAN, Individually and as Trustee
of Larry Shifman Revocable Trust, Created Under
an Agreement dated July 8, 1996, and Ruth Shifman
Revocable Trust, Created under an Agreement dated
July 8, 1996, and SANDORD SHIFMAN, ALAN
SHIFMAN CHARLES, and YVETTE VAN DOREN,
as Co-Trustees of the Ruth Shifman Revocable Trust,
Created Under an Agreement dated July 8, 1996,

Defendants.

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The following papers read on these motions:

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| Notice of Motion..... | 1 |
| Opposition..... | 2 |
| Reply..... | 3 |

Defendant Sanford moves for an order, pursuant to CPLR §3211(a)(1) and (a)(7), seeking dismissal of Plaintiffs' complaint in its entirety. Plaintiffs have opposed that application, and the court has received timely reply. Based upon the following, the motion is hereby granted to the following extent.

The matter before the Court appears to be a dispute amongst heirs to an estate and involves real property located in New Hyde Park, Nassau County, New York. Defendant

Sanford is one of three trustees of a trust that held title to the subject real property. The grantor of the trust created same on or about July 8, 1996, and apparently executed five (5) separate amendments to the trust document during her lifetime, modifying certain language of the document. It should be noted that neither side has presented a copy of the original trust document in the moving papers; rather, Plaintiff has only presented a document creating a trust for the grantor's spouse, whom he alleges used identical language as the grantor. Pertinent to the case at bar were her amendments to the conveyance and distribution of the real property located in New Hyde Park, in which she sought to convey the property to Defendant Sanford and direct the distribution of the proceeds from its eventual sale. The language in dispute, to which Defendant Sanford asserts make that portion of the trust clause inoperable, can be found in the Fourth Amendment to the Ruth Shifman Revocable Trust Agreement and Fifth Amendment to the Ruth Shifman Revocable Trust Agreement, respectively as follows:

“ I hereby give, devise and bequeath to my son, [Defendant Sanford], my entire interest in the property located at 149 Claudy Lane, New Hyde Park, NY, except that if the property is sold at any time by [Defendant Sanford] or his heirs, the net proceeds of the sale shall be divided as follows:

- A. One Hundred Thousand (\$100,000.00) Dollars to my granddaughter, [Plaintiff Alicia];
- B. One Hundred Thousand (\$100,000.00) Dollars to my granddaughter, [Plaintiff Ariel];
- ...
- E. The balance of the net proceeds of the sale to my son, [Defendant Sanford], or his heirs as the case may be.”

Plaintiffs' complaint alleges that following the death of the grantor, Defendant Sanford, presumably with the approval of either the Surrogate's Court of Nassau County or with his co-trustees, sold the subject property on or about February 27, 2020. Thereafter, he failed to provide the Plaintiff's with the sums they were entitled to under the aforementioned amendments

to the trust. Defendant Sanford argues in response that the above clause violates the rule against perpetuities under both the common law and EPTL §9-1.1; thus, Plaintiffs are not entitled to any such proceeds. There is not any indication in the moving papers that either the estate of the grantor of the trust, the subject trust itself, or the estate and/or trust of the husband of the grantor are the subject of a contested proceeding in Surrogate's Court, Nassau County, or elsewhere. Defendant now seeks dismissal against him as both a trustee and in his individual capacity.

A motion to dismiss a complaint based on CPLR §3211(a)(1) may be granted only in instances where the documentary evidence utterly refutes Plaintiff's factual allegations conclusively and establishes a defense as a matter of law. Ginsberg Development Co. v. Carbone, 85 AD3d 1110, 926 NYS2d 156 (2nd Dept., 2011). To be considered documentary under the statute, the evidence must be unambiguous, of undisputed authenticity, and its contents be essentially undeniable. Fontanetta v. Doe, 73 AD3d 78, 898 NYS2d 569 (2nd Dept., 2010). Affidavits, deposition testimony, and letters alone are not considered documentary evidence under CPLR §3211(a)(1). Attias v. Costiera, 120 AD3d 1281, 993 NYS2d 59 (2nd Dept., 2014).

Pursuant to CPLR §3211(a)(7), when reviewing such a motion, the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Reznick v. Bluegreen Resorts Mgmt., Inc., 154 AD3d 891, 62 NYS3d 460 (2nd Dept., 2017). A motion to dismiss made pursuant to CPLR §3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law. Clarke v. Laidlaw Transit, Inc., 125 AD3d 920, 5 NYS3d 138 (2nd Dept., 2015).

Defendant Sanford's moving papers do not adequately parse out his reasoning for dismissal based upon documentary evidence and failure to state a cause of action. Nevertheless, the Court finds that Plaintiff has properly pled a cause of action for conversion and unjust enrichment (*see* Petrone v. Davidoff Hatcher & Citron LLP, 150 AD3d 776, 54 NYS3d 25 [2nd Dept., 2017]; *see also* Travelsavers Enterprises, Inc. v. Analog Analytics, Inc., 149 AD3d 1003, 53 NYS3d 1003 [2nd Dept., 2017]). On the other hand, the Court agrees that the claim for breach of fiduciary duty is properly dismissed at this time, as the parties were never involved in a fiduciary relationship with regard to the subject property. *See generally* Gargano v. Morey, 165 AD3d 889, 86 NYS3d 595 (2nd Dept., 2018). Thus, Defendant Sanford's motion to dismiss is hereby granted to the extent that the third cause of action as stated in the amended complaint is dismissed against him both as a trustee and individually.

Defendant Sanford's moving papers sought dismissal of the complaint in its entirety based upon the language of the amendments to the trust that violate the rule against perpetuities. While the Court does agree that the salient language contained therein does appear to violate the rule (*see* Dimon v. Starr, 299 AD2d 313, 749 NYS2d 78 [2nd Dept., 2002]), without a true and correct copy of the initial trust document, it cannot be said what effect such a ruling would have on Plaintiffs' claims. Furthermore, although it appears to be a reasonable inference that a husband and wife would create identical trusts, since the Court has only been presented with a copy of a document creating a trust for the grantor's husband, and Defendant Sanford's affidavit in support of the motion fails to explain the absence of the document creating a trust for the grantor, this Court is unable to ascertain how title of the subject property passed to Defendant Sanford and what rights the parties have under these documents. Thus, until such time as discovery is completed and a summary judgment motion presented before this Court, the

foregoing should not be interpreted by the parties to be a determination on the merits of Plaintiffs' claims or Defendant Sanford's defenses.

Defendant Sanford shall file and serve a copy of the within order with notice of entry upon Plaintiffs within thirty (30) days from the date of this order. Thereafter, to the extent that Plaintiffs have not served the supplemental summons and amended complaint upon Defendant Alan and/or Defendant Yvette, Plaintiffs shall have forty-five (45) days from the date of this order to file and serve an answer to the amended complaint. Defendant Sanford shall have sixty (60) days from the date of this order to file and serve an answer to the amended complaint, whereas Defendants Alan and Yvette shall have seventy-five (75) days from the date of this order to file and serve an answer to the amended complaint.

The parties shall then complete a preliminary conference stipulation and order on or before January 20, 2022. Failure to complete same may result in an appearance before this Court.

All other requests for relief not specifically addressed in the foregoing shall be deemed denied.

This hereby constitutes the Decision and Order of this Court.

Dated: September 8, 2021
Mineola, New York

ENTER


HON. DAVID P. SULLIVAN, J. S. C.

ENTERED

Sep 10 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE