

<b>Salitsky v D'Attanasio</b>
2022 NY Slip Op 32846(U)
August 17, 2022
Supreme Court, New York County
Docket Number: Index No. 656458/2021
Judge: Suzanne Adams
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE ADAMS PART 39TR

Justice

-----X

PAUL SALITSKY,

Plaintiff,

- v -

KAREN D'ATTANASIO, MURIEL SIEBERT & CO., INC

Defendant.

-----X

INDEX NO. 656458/2021

MOTION DATE 01/03/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is ordered that the motion of defendant Karen Miller D'Attanasio ("Defendant") is granted. Plaintiff commenced this action in November 2021, alleging that his aunt, Maria Lotto ("Decedent"), named Defendant as the sole beneficiary of a transfer on death account (the "Account") being held by co-defendant Muriel Siebert & Co., Inc. ("Siebert"), as the result of fraudulent or other improper means. The Verified Complaint, dated December 13, 2021, sets forth the following facts, which are deemed true for purposes of this motion: plaintiff, Decedent's nephew, enjoyed a close relationship with Decedent and kept in touch with her by telephone, as he lives in California (¶ 9); on November 19, 2010, Decedent designated plaintiff as the sole beneficiary of the Account (¶ 8); Defendant had been Decedent's neighbor in their Manhattan apartment building for an unspecified period of time, and the two had a "neighborly" relationship (¶¶ 11, 12); Defendant began to pressure Decedent in or about 2017 regarding the latter's finances and estate planning (¶ 13); at around this same time, Decedent began to decrease her communications with plaintiff (¶ 14); Decedent named Defendant as the executor

of her estate on or about August 21, 2017, although plaintiff had been named the executor since at least 2011 (§ 13); and Defendant moved to Japan some time in 2018 (§ 11).

The pleading further sets forth that: in late 2019, Decedent fell and entered a rehabilitation facility, from which she was discharged in early December 2019 (§§ 15, 16); in December 2019, Defendant visited New York from Japan (§ 17); on or about December 23, 2019, Defendant was made the sole beneficiary of the Account, in place of plaintiff, either by Defendant's forging Decedent's signature on the beneficiary designation form, or by unduly influencing Decedent to sign the form (§ 16); on December 31, 2019, a check in the amount of \$15,000 payable to Defendant was written from Decedent's bank account (§ 20); in early January 2020, Decedent communicated to various third parties that she felt tricked into giving Defendant the \$15,000 check, which she tried unsuccessfully to place a stop on, and that she felt taken advantage of by Defendant, who was pressuring her to change her estate plan (§§ 24, 25); on February 25, 2020, Decedent executed a new will which removed Defendant as executor (§ 26); Decedent passed away on January 1, 2021 (§ 5); and Defendant thereafter executed a Renunciation and Disclaimer pursuant to EPTL § 2-1.11, in which she stated she was the sole beneficiary of the Account (§ 28).

The Verified Complaint alleges seven causes of action: the First, for a declaratory judgment that the form designating Defendant as the Account's beneficiary is invalid and void, and that an earlier form designating plaintiff as the beneficiary be held as controlling the Account's disposition; the Second, for injunctive relief preventing Seibert from distributing Account funds to Defendant; and the Third through Seventh, as to Defendant only, sounding in conversion, unjust enrichment, fraud upon Decedent, undue influence, and fraud upon plaintiff, respectively. Defendant now moves pursuant to CPLR 3211(a)(3) and (7) to dismiss the Verified Complaint for

lack of standing and for failure to state a claim upon which relief may be granted. Plaintiff opposes the motion.

It is well established that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs 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 N.Y.2d 83, 87-88 (1994). “However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration.” *Franklin v. Winard*, 199 A.D.2d 220 (1<sup>st</sup> Dep’t 1993). In addition, pursuant to CPLR 3016(b), “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” The court addresses each count of the Verified Complaint in the order set forth in the moving papers.

#### Sixth Cause of Action: Undue Influence

The Court of Appeals has set forth the criteria to determine the existence of undue influence, namely a showing that an individual exercised influence that amounted to a moral coercion over another, which prevented the other person from acting freely and independently, or by such persistence constrained the other person to act against their own free will, as they were unable to refuse or too weak to resist. *Matter of Walther*, 6 N.Y.2d 49, 53 (1959) (citations omitted). “It must not be the promptings of affection; the desire of gratifying the wishes of another; . . . or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent resistless power which the strong will often exercise over the weak and infirm, and which

could not be resisted, so that the motive was tantamount to force or fear . . .” *Walther*, 6 N.Y.2d at 53-54.

The facts set forth in the Verified Complaint fail to state a cause of action for undue influence. They also lack the specificity required by CPLR 3016(b). There are no details as to the nature of the relationship between Defendant and Decedent, beyond the fact that they were friendly neighbors. There are no details regarding the circumstances in which Defendant’s relationship to Decedent became, and continued to be, one in which Defendant so influenced and coerced Decedent, that Decedent felt compelled to name Defendant the Account’s beneficiary and the executor of her will. There are no allegations that Decedent was at any time mentally incapacitated. The Verified Complaint does not explain how Defendant exerted control over Decedent and isolated her from family and friends, including after Defendant moved to Japan in 2018. On the other hand, the Verified Complaint contains allegations that arguably demonstrate that Decedent was able to resist Defendant’s presumed influence. Plaintiff alleges that Decedent regretted giving Defendant the \$15,000 check shortly after doing so, and was able to communicate this to third parties, including her financial advisor, despite Defendant’s alleged efforts to isolate her from others. Then, less than two months later, Decedent changed her will to remove Defendant as executor, which arrangement remained in place for almost another year until her passing. There is no allegation that Decedent reinstated plaintiff as her executor. In short, the allegations as to Decedent’s habits, state of mind, and capabilities, and Defendant’s relationship with, and behavior toward, Decedent, are conclusory and speculative, warranting dismissal of the Sixth Cause of Action. *See, generally, Franklin v. Winard, supra.*

Fifth and Seventh Causes of Action: Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages [citations omitted]. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b).” *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). The Fifth Cause of Action alleges that Defendant became the beneficiary of the Account by deceiving Decedent, and as a result is liable to plaintiff. New York courts have held that “a fraud claim requires the plaintiff to have relied upon a misrepresentation by a defendant to his or her detriment. . . . [and] decline to extend the reliance element of fraud to include a claim based on the reliance of a third party, rather than the plaintiff.” *Pasternack v. Laboratory Corp. of Am. Holdings*, 27 N.Y.3d 817, 829 (2016). Therefore, the Fifth Cause of Action is dismissed.

The Seventh Cause of Action alleges in sum that Defendant misrepresented to plaintiff that she was the Account’s beneficiary and not him, that she made such representation to deceive him, and that plaintiff’s reliance on said misrepresentation caused him damages. These allegations fail to state a claim sounding in fraud, and are not pled with specificity. Plaintiff has assumed that the naming of Defendant as the Account beneficiary is untrue or improper, such that Defendant’s claim to that effect is “a material misrepresentation of a fact.” However, as discussed hereinabove, the Verified Complaint’s allegations as to how and why Defendant was named the Account beneficiary are speculative and conclusory. Furthermore, there are no allegations as to how plaintiff relied on the presumed misrepresentation and why such reliance was justifiable. As such, the Seventh Cause of Action must also be dismissed.

#### Fourth Cause of Action: Unjust Enrichment

“The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in ‘equity and good conscience’ should be paid to the plaintiff [citations omitted]. . . . [It] is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. . . . An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim [citations omitted].” *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012). The Fourth Cause of Action is based on the claim that Defendant’s interest in the Account is improper or fraudulent. As such, it is duplicative of the fraud claim, and likewise must be dismissed.

#### Third Cause of Action: Conversion

A claim for conversion must allege that the plaintiff has a possessory right to or interest in certain property, and that the defendant exercised dominion over or interfered with the property, in derogation of the plaintiff’s rights. *Dobroski v. Bank of America, N.A.*, 65 A.D.3d 882, 885 (1<sup>st</sup> Dep’t 2009). As with the causes of action discussed above, the Third Cause of Action turns on the speculative and conclusory claim that Defendant is not the legitimate Account beneficiary. By extension, the Verified Complaint does not properly plead a basis for plaintiff’s claim that he is the Account’s rightful beneficiary, *i.e.*, that he has a possessory right to or interest in the Account. Accordingly, neither element of a conversion claim is stated, necessitating dismissal of the Third Cause of Action.

Second Cause of Action: Injunctive Relief

To state a cause of action for a permanent injunction, a plaintiff must allege the violation, (or threatened or imminent violation) of a right, the lack of an adequate remedy at law, and the resultant serious and irreparable injury that will result absent the injunction. *Elow v. Svenningsen*, 58 A.D.3d 674, 675 (2d Dep't 2009). Again, the relief sought is premised upon plaintiff's speculative and conclusory claim that he is the true beneficiary of the Account, and thus he cannot state that he has a right to the Account. Moreover, even if this element had been satisfied, then an adequate remedy at law would have existed in contract or tort. Thus, the Second Cause of Action must be dismissed.

First Cause of Action: Declaratory Judgment

Finally, the First Cause of Action of the Verified Complaint seeks a declaratory judgment that the form designating Defendant as the Account beneficiary is invalid and void, and that the form naming plaintiff as the beneficiary should control the Account's disposition. "A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Apple Records v. Capitol Records*, 137 A.D.2d 50, 54 (1<sup>st</sup> Dep't 1988). The First Cause of Action must be dismissed because the supporting allegations are identical to those alleged in support of plaintiff's other claims, *e.g.*, those sounding in fraud and undue influence, and as such the cause of action is duplicative.

Accordingly, it is hereby

ORDERED that Defendant Karen Miller D'Attanasio's motion is granted in its entirety and the complaint is dismissed as against her, with prejudice; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that Defendant shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the court.

SA

<u>8/17/2022</u>			<u>SUZANNE ADAMS, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE