

Gioeli v Magro

2022 NY Slip Op 33111(U)

September 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 509990/21

Judge: Carolyn E. Wade

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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of September, 2022.

P R E S E N T:

HON. CAROLYN E. WADE,

Justice.

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LOUISE GIOELI, individually and as Grantor of THE LOUISE GIOELI LIVING TRUST,

Plaintiff,

Index No. 509990/21

- against -

MS #3

LINDA MAGRO, individually and as Trustee of THE LOUISE GIOELI LIVING TRUST,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc. No.:

Notice of Motion, Affidavits (Affirmations) and Annexed _____
Memorandum of Law in Opposition _____
Memorandum of Law in Reply _____

43, 46-50
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In this action based upon breach of fiduciary duty and fraud, defendant Linda Magro, individually and as Trustee of The Louise Gioeli Living Trust (defendant) moves, (in motion sequence [mot. seq.] three) for an order, pursuant to CPLR 3025 (b), granting her leave to amend her answer.

Background

On January 18, 1993, plaintiff Louise Gioeli, individually and as Grantor of The Louise Gioeli Living Trust (plaintiff) and her daughter Anne Mirasola (Mirasola) executed The Louise Gioeli Living Trust Agreement (Agreement), thereby creating The Louise Gioeli Living Trust (Trust). On July 31, 1993, plaintiff transferred her 50% interest in property located at 1954 84th Street, Brooklyn, New York (Property), which produces rental income and where plaintiff currently resides, to the Trust.¹ The Agreement named Mirasola as trustee and plaintiff's other daughter (defendant), as alternate trustee. Pursuant to Article Two of the Agreement, except if plaintiff became a patient in a health-related facility, the income derived from the Trust assets, minus management and maintenance expenses, was to be paid to, or applied for the benefit of, plaintiff during her lifetime. The Trust terms prohibited the trustee from "invading or consuming any of the principal of the trust for the benefit of [plaintiff] . . . for any purpose whatsoever" (*see* Article Two of the Agreement – NYSCEF Doc. No. 2).

On July 27, 2011, Mirasola transferred the 50% interest in the Property from "Anne Mirasola, as Trustee of the Louise Gioeli Living Trust Agreement" to "Anne Mirasola," individually, by bargain and sale deed. As a result, plaintiff commenced an action in Richmond County Surrogate's Court to void the deed and remove Mirasola as trustee. By settlement agreement and consent order, dated July 17, 2013, the deed was voided; the

¹ A UBS Financial Services account was later added to the Trust.

Property was returned to the Trust; Mirasola resigned as Trustee; and defendant agreed to be the successor trustee.

Plaintiff's Complaint

On April 28, 2021, plaintiff commenced this action by filing a summons and a verified complaint. The complaint alleges that, on or about June 4, 2014, defendant fraudulently induced plaintiff to execute an exercise of power of appointment (POA), by which plaintiff appointed "the entire principal of the Trust outright and absolutely" to defendant (*see* the POA – NYSCEF Doc. No. 3). The complaint further alleges that, on or about October 2, 2017, defendant, by the POA, fraudulently and in breach of her fiduciary duty, transferred the 50% interest in the Property to herself, individually, by bargain and sale deed.

Defendant's Answer with Counterclaims

On May 18, 2021, defendant filed a verified answer with two counterclaims, alleging fraudulent inducement and that the action is frivolous and interposed in bad faith solely to harass and delay.

Dismissal of Counterclaims

On June 7, 2021, plaintiff moved to dismiss defendant's counterclaims based upon documentary evidence, pursuant to CPLR 3211 (a) (1); for failure to state a cause of action pursuant to CPLR 3211 (a) (7); and for failure to particularize her fraud allegation pursuant to CPLR 3016 (b).

Defendant opposed the motion and cross-moved to dismiss plaintiff's complaint: (1) as barred by the Statute of Limitations and the Statute of Frauds pursuant to CPLR 3211

(a) (5); (2) as frivolous and interposed in bad faith solely to harass and delay pursuant to 22 NYCRR § 130-1.1 and CPLR 8303-a; (3) for failure to plead all necessary elements of her causes of action pursuant to RPAPL § 1515; (4) for failure to state a cause of action pursuant to CPLR 3211 (a) (7); and (5) based upon documentary evidence pursuant to CPLR 3211 (a) (1).

By order dated January 4, 2022, the court granted plaintiff's motion, finding that defendant failed to allege the requisite elements that constitute a fraud, and denied defendant's cross motion in its entirety. Defendant filed a notice of appeal on January 28, 2022.²

Defendant's Instant Motion

On February 3, 2022, defendant filed the instant motion seeking leave to amend her answer to re-assert her fraud counterclaim and to assert a new counterclaim based upon breach of contract and breach of the covenant of good faith and fair dealing.³ In support of her motion, defendant submits her own affidavit, her attorney's affirmation and her proposed verified amended answer.

In her affidavit and proposed verified answer, defendant avers, that at plaintiff's insistence, she accompanied plaintiff to her attorney's office in the Spring of 2014, where plaintiff informed defendant and her attorney that, due to Mirasola's breach of fiduciary

² Upon defendant's application, the appeal was deemed withdrawn by order of the Appellate Division, Second Department, dated August 5, 2022.

³ Although the parties state, in their motion papers, that defendant is seeking to assert separate counterclaims for breach of contract and breach of the covenant of good faith and fair dealing, defendant's proposed answer asserts these allegations as one counterclaim.

duty as former trustee, she wanted all Trust assets transferred to defendant immediately. After plaintiff's attorney informed them that the assets could only be transferred by POA, plaintiff expressed her desire to grant defendant a POA to be used at any time. Thereafter, the POA was prepared by plaintiff's attorney and signed by plaintiff. Defendant further alleges that, in June 2015, after confirming with her attorney that the POA could be used without contingencies at any time, plaintiff began encouraging defendant to use the POA to make transfers out of the Trust. To that end, on August 7, 2015, plaintiff consulted with her stockbroker at defendant's home, where plaintiff then resided, to initiate defendant's transfer of stock out of the Trust to herself. Defendant maintains that the stock was transferred to her "in reliance on my mother's representations and her encouraging the use of the Power of Appointment" (*see* ¶ 10 of defendant's affidavit and ¶ 44 of the proposed answer – NYSCEF Doc Nos. 48 and 47, respectively). According to defendant, plaintiff next urged her to transfer the Property interest from the Trust to herself, which she ultimately did in 2017.

Based upon these facts, defendant asserts that if the allegations in the complaint are true, that plaintiff only intended defendant to use the POA after her death, then plaintiff's statement to defendant that the POA should be used immediately was a fraudulent misrepresentation upon which defendant justifiably relied. As to damages, defendant alleges that "[t]he damages caused by this fraud are . . . (return of all assets transferred under the Trust as well as money I have paid into the Brooklyn property), as well as the fact that I am now suffering the costs of this litigation" (*see* ¶ 17 of defendant's affidavit and the proposed answer at 14 and 16 – NYSCEF Doc Nos. 48 and 47, respectively).

In her affirmation, defendant's attorney argues that the proposed amended answer better particularizes defendant's fraud claim; that, in any event, the court should liberally construe defendant's counterclaims to allow them to be decided on their merits, and that plaintiff would not be prejudiced by the amendment since discovery has not commenced.

Plaintiff's Opposition

In opposition, plaintiff argues that defendant's motion should be denied, as her counterclaims are palpably insufficient and patently devoid of merit. Moreover, plaintiff argues that defendant's fraud counterclaim should not be allowed since allegations in a pleading do not give rise to an independent cause of action.

Defendant's Reply

In reply, defendant argues that her motion should be granted in accordance with CPLR 3025 (b), since her counterclaims are sufficiently plead. Additionally, in furtherance of her breach of contract allegation, defendant argues that the POA, although unilaterally signed by plaintiff, is a clear and unambiguous contract, like an insurance policy, as it was delivered to, and accepted by, defendant and defendant performed thereunder when she transferred assets out of the Trust. Defendant asserts that plaintiff breached the contract by alleging in the complaint that the POA was not intended for immediate use. As to whether there was a meeting of the minds between the parties, defendant argues that this issue must be determined at trial.

Discussion

Leave to Amend Answer

Leave to amend pleadings should be freely granted, absent unfair prejudice or surprise to the opposing party directly resulting from delay in seeking such leave, unless the proposed amendment is palpably insufficient or totally devoid of merit (*see* CPLR 3025 [b]; *Jeffrey Gardens Apt. Corp. v LH Mgt., Inc.*, 157 AD3d 941 [2d Dept. 2018]). However, no evidentiary showing of merit is required by the movant. The court will not examine the legal sufficiency of a proposed amendment unless the insufficiency is “clear and free from doubt” (*Lucido v Mancuso*, 49 AD3d 220, 227, 229 [2d Dept. 2008], quoting *Sample v Levada*, 8 AD3d 465, 467-468 [2d Dept. 2004]). A determination whether to grant leave is within the court's broad discretion, “and the exercise of that discretion will not be lightly disturbed” (*Jeffrey Gardens Apt. Corp. v LH Mgt., Inc.*, 157AD3d at 942, quoting *Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept. 2007]).

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. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)” *Eurcyleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [citations omitted]).

Here, the court, in its discretion, grants defendant leave to interpose her fraud counterclaim, as it is sufficiently pled in accordance with CPLR 3016 (b), and is neither

palpably insufficient nor patently devoid of merit, and plaintiff does not allege unfair prejudice or surprise.

Plaintiff's argument that defendant cannot assert a fraud counterclaim since the alleged fraud arises from the pleadings is unavailing. The two cases on which plaintiff relies, *Taboola, Inc. v Aitken* (2016 NY Slip Op. 31340 [U] [Sup Ct, NY County 2016]) and *MidFirst Bank v Spencer* (2020-Ohio-106 [Ohio Ct App 2020]) are neither controlling nor persuasive authority and further, do not support plaintiff's argument. Notably, *Taboola* at *8, relies on a Second Department, Appellate Division case, *North Shore Env'tl. Solutions, Inc. v Glass*, and First Department, Appellate Division cases, *Yalkowsky v Century Apts. Assoc.* and *Yalkowsky v Shedler*, which, in a separate plenary action, involved collateral attacks on a settlement agreement, judgment, as well as charges of perjury; all distinguishable from this case. Though distinguished, the court in those cases held, analogous to the instant situation, that the challenges *must* be addressed in the underlying action where defendant seeks to assert her counterclaim to challenge plaintiff's cause of action.

Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing

To maintain a breach of contract claim, a plaintiff must establish the existence of a contract, plaintiff's performance, defendant's breach and resulting damages (*see JP Morgan Chase v J. H. Elec. Of N.Y. Inc.*, 69 AD3d 802 [2d Dept. 2010]). "Implicit in every contract is a covenant of good faith and fair dealing . . . The covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*Legend Autorama, Ltd v Audi*

of *Am., Inc.*, 100 AD3d 714, 716 [2d Dept. 2012], quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). “In determining whether a contract exists, “the inquiry centers upon the parties’ intent to be bound, i.e., whether there was a ‘meeting of the minds’ regarding the material terms of the transaction” (*Central Federal Sav., F.S.B. v. National Westminster Bank*, 176 AD2d 131, 132 [2d Dept. 1991]; see also *Schaffe v SimmsParris*, 82 AD3d 867 [2d Dept. 2011]). “It is well settled that a contract is unenforceable where there is no meeting of the minds between the parties thereto regarding a material element thereof” (*Brands v Urban*, 182 AD2d 287, 289 [2d Dept. 1992]).

Here, since defendant argues that plaintiff intended immediate use of the POA and plaintiff argues that she only intended the POA to be used after her death, there was no meeting of the minds as to a material term of the contract alleged by defendant. Defendant’s contention that this issue should be determined at trial is unavailing, since, to create a binding contract, there must be a meeting of the minds, and this “issue is generally one of law, properly determined on a motion for summary judgment” (*Central Federal Sav., F.S.B. v. National Westminster Bank*, 176 A.D.2d at 132; see also *Brands v Urban*, 182 AD2d at 289).

As a result, the court finds that the contract alleged by defendant is unenforceable, as a matter of law, and that, since there was no contract, there was no implied covenant of good faith and fair dealing. Therefore, the court denies defendant leave to interpose her breach of contract and breach of the covenant of good faith and fair dealing counterclaim, as the counterclaim is palpably insufficient and totally devoid of merit.

Conclusion


Accordingly, it is

ORDERED that defendant's motion (mot. seq. 3) is solely granted to the extent that defendant is granted leave to amend her answer to solely interpose her first counterclaim based upon fraud, in the form as annexed to her motion as Exhibit "A." The motion is otherwise denied; and it is further

ORDERED that defendant shall file and serve her amended verified answer, as directed herein, within 20 days of the filing of this decision and order with notice of entry.

The foregoing constitutes the Decision and Order of the court.

E N T E R,


L.S.C.

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